

FOREWORD

"There shall be a Court of Appeals..."

by Chief Judge Judith S. Kaye

ON SEPTEMBER 7, 1847, WHEN THE COURT OF APPEALS JUDGES first took the Bench, the *Albany Evening Journal* reported that their "well known adaption to the duties which the people have imposed upon them furnishes a guarantee that whatever is brought before them will be despatched with proper facility, and with a single eye to justice and right." One hundred fifty years later, that guarantee endures.

Birthdays are happy occasions - and all the more so at the advanced age of 150. As this volume demonstrates, we have been enjoying this banner year celebration, examining the process, the places and the people that have distinguished the Court of Appeals throughout its life. Judges Titone, Bellacosa, Smith, Levine, Ciparick, Wesley and I feel privileged, and proud, to be part of this great Court at this historic moment in its life.

But anniversaries have their serious side too. As we celebrate we also learn.

PROCESS, PLACES, PEOPLE

The ensuing pages show, for instance, how much the past lives in and shapes our work today. Neither life nor law in 1997 bears much resemblance to 1847 - a docket once dominated by private property disputes has been overtaken by criminal and constitutional cases, and suits against the government. Indeed, our predecessors would hardly recognize some of the issues on today's calendars, as courts have increasingly become the battlefield of first resort in societal conflicts of a distinctly modern vintage: family crises, civil rights, scientific advances touching even the definition of human life, environmental protection, social services and educational entitlements.

Yet still in fundamental ways we build on, and endlessly continue, the excellent work of our predecessors. Nowhere is the continuity of the Court's process more visible than in the comprehensive survey of landmark decisions, prepared by Professor Stewart Sterk. To this day, these beacons of the past illuminate the pathways of the law.

Continuity is evident as well in our place - our magnificent courtroom - which replicates the Court's home of the last century. I am convinced that ours is the handsomest courtroom anywhere - the most dignified, inspiring setting a lawyer might hope to encounter for the presentation



of serious legal questions. That sense of the law is attributable, in part, to the portraits that line our courtroom walls, a silent progression from the age of steamships to the age of satellites.

As for the people - the Judges - connections abound there too. To give just one example, Judge Bellacosa and I recently visited with Judge Francis Bergan, now a youthful 95 and the Court's only historian (thus far). Judge Bergan took pleasure in recounting that the year I was born in Monticello, New York, he was a trial judge hearing cases there. As it happens, former Chief Judge Lawrence Cooke was in Monticello then too, on visits home from his studies at Albany Law School. How marvelous that former Chief Judge William B. Wright, a member of the 1847 Court, also practiced law in Monticello! But the members of the Court are bound by more than just coincidental crossings. Years of discussing, debating and deciding cases together forge strong collegial bonds that span the generations.

And on the subject of people, this anniversary has also afforded us an opportunity to compile a new document - the full list of every Judge appointed or elected to serve this great institution.

CONTINUITY AND CHANGE

We celebrate that much of our past is continued and carried forward, but we also cheer changes that show the Court is very much a part of today's world. One obvious example is the welcome arrival of diversity on our bench. While the faces on the courtroom portraits reflect a world of tradition, the faces on the bench now also reflect the wider world of opportunity.

Into this category of welcome change I place as well the Court's modern-day record of complete

currency in its work, a tribute to the genius of former Chief Judge Charles Breitel and the diligence of every Judge since. Indeed, litigants can expect to receive a decision within six weeks of oral argument, a record that is unrivaled by any busy high court in the country. Reading our history, as recounted in Judge Bergan's wonderful book as well as the pages of this publication, one is struck by how much backlogs have troubled the Court during much of its existence. The current "hot bench" and random case assignment system assure that the cases before us are resolved with efficiency as well as "a single eye to justice and right."

THE PRESENT AND THE FUTURE

This celebration actually began last November, with a memorandum from Stuart Cohen, Clerk of the Court, noting the anniversary. It has been nurtured throughout the year by all of the terrific people who work in Court of Appeals Hall. They are truly the heart and soul of the Court. While everyone has our gratitude for ferreting out the treasures of our past, one person deserves special recognition - our extraordinary Librarian, Frances Murray. Her tenacity, enthusiasm and skill in gathering up the remnants of the Court's history have informed and infected us all.

This banner year we celebrate our process, places and people to be sure, but above all else we celebrate the principles that the Court of Appeals has so jealously protected for the last 150 years. Justice, fairness and equal treatment under the law - these are the principles that have defined our work in the past. These are the principles that we daily strive to pass on as our legacy for the future.

SEPTEMBER 8, 1997

"There shall be a Court of Appeals..."

THE
THE
CONSTITUTION
OF THE
COURT
State of New-York,
THROUGH THE
ADOPTED NOVEMBER 3, 1846.
DECADES

WE THE PEOPLE of the State of New-York, grateful to Almighty God for its blessings, do



Section 1. The rights of the people of this State shall not be denied or disparaged. No person shall be disfranchised, or deprived of any rights or privileges secured to him by this Constitution, or of the use or enjoyment of the land, or the fruits thereof, on account of his race, color, or previous condition of servitude.

Section 2. The right of trial by jury shall remain inviolate forever. But a jury trial may be dispensed with by the parties in all civil cases, in the manner to be prescribed by law.

Section 3. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious faith, or on matters of religious faith, or on matters of religious faith.

1847-1997

"There shall be a Court of Appeals..."



Judge Freeborn G. Jewett
COURT OF APPEALS COLLECTION



Judge Greene C. Bronson
COURT OF APPEALS COLLECTION



Judge Charles H. Ruggles
COURT OF APPEALS COLLECTION

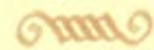


Judge Addison Gardiner
COURT OF APPEALS COLLECTION

were designated for terms of four, six and eight years, respectively. Judge-elect Jewett, having the shortest term to serve, was named Chief Judge.

The lottery was also used to determine the terms for Justices elected to each of the eight Judicial Districts of the Supreme Court. Thereafter, the four Justices with the shortest terms to serve in the First, Third, Fifth and Seventh Districts were designated by the Governor to serve as ex-officio Judges of the 1847 Court of Appeals. These Justices were Samuel Jones, William B. Wright, Thomas A. Johnson and Charles Gray. In January 1849, these Justices gave place to their

counterparts in the Second, Fourth, Sixth and Eighth Districts. The rotation continued in subsequent years, with the four Supreme Court Justices from the designated Districts whose terms were ending each serving one year on the Court of Appeals.



ON MONDAY JULY 5, 1847, the holiday commemorating the Fourth, the *Albany Argus* listed the Doings of the Day, which included a general procession to the North Dutch Church where an oration was to be delivered by the poet Alfred B. Street,



Judge Samuel Jones
COURT OF APPEALS COLLECTION



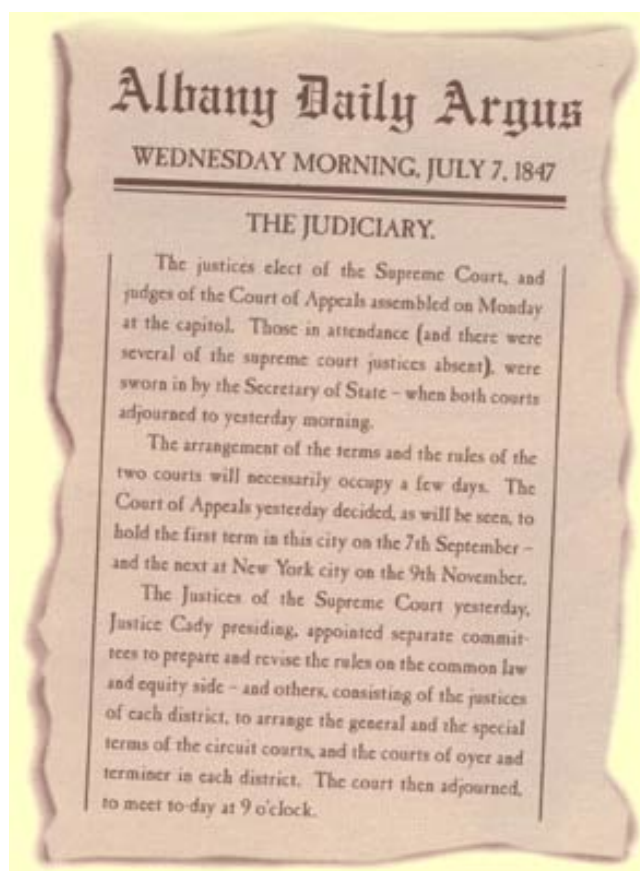
Judge William B. Wright
COURT OF APPEALS COLLECTION



Judge Thomas A. Johnson

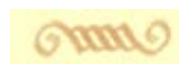


Judge Charles Gray
COURT OF APPEALS COLLECTION



These eight distinguished Jurists on the Bench together presented a formidable appearance. Their well known adaption to the duties which the people have imposed upon them furnishes a guarantee that whatever is brought before them will be despatched with proper facility, and with a single eye to justice and right.

Without the least formality, the Court entered upon the discharge of its duties, Several preliminary motions were disposed of when the calendar was taken up in its order.



ON SEPTEMBER 9, Chief Judge Jewett delivered the first decision of the Court, an opinion affirming the judgment of the Supreme Court in the case of *Pierce v Delamater* (1 NY 3) - astounding by today's standards - which upheld the propriety of a Court of Appeals Judge reviewing cases in which he took part in the court below. Over the course of three weeks, the Court continued to hear motions and arguments which were reported briefly in the daily newspapers.

Esq. The eight Judges scheduled to assemble Chamber at 11 o'clock, where Secretary of State Benton was to administer the constitutional oaths of office. of the Court of Appeals were in the old Capitol's Senate

Chief Judge Jewett convened the first Court of Appeals in the former Supreme Court Room - now renamed the Court of Appeals Room - in the old Capitol in Albany at 10:00 a.m on September 7, 1847. That evening, the *Albany Evening Journal* reported:

On September 27, 1847, the *Albany Evening Journal* stated:

The Court of Appeals, and terms of the Supreme and County Courts, have been in session here for the last three weeks. So far the system works well. Much has already been done to secure public confidence in the efficiency and fidelity of these new tribunals.

* * *

We but respond to the general sentiment in saying that the Judges of these three Tribunals are discharging their duties with great independence and impartiality, and with distinguished ability.



The Old Capitol

On September 28, the *Albany Daily Argus* reviewed the first term of the Court of Appeals and wrote:

The term closed yesterday. There were forty cases on the calendar. One judgment was affirmed by default. One writ of error was quashed, and two appeals were dismissed on motion. Nineteen other cases were argued, of which five were decided by affirming the judgments of the Supreme Court, and the remaining fourteen were retained for further consideration. The court went twice through the calendar and heard all the cases which were ready for argument.



The Court of Appeals holds its first sitting for the hearing of causes, at the Capitol in the city of Albany, in the room formerly occupied by the Supreme Court. Freeborn C. Jewett. Chief Judge: Greene C. Bronson. Charles H. Ruggles. Addison Gardiner. judges; Samuel Jones. William B. Wright. Charles Gray, Thomas S. Johnson. judges ex-officio, preside.

For the information of litigants and counsel, we transcribe from the calendar of the court the titles of the first twenty-five causes. noticed for hearing:- 1. George Call. Plaintiff in Error. vs. the People of the State of New York. defendants in error, E. P. Cowles. Atty for Pl'ff, Theo. Miller. Dis't At'y for def't.

2. Abel French. Jr.. Pl'ff in Error. vs. Robert D. Carhart, def't in error. S. D. Van Schaack. att'y for def't.

3. Erastus Corning. et al. Pl'ffs in error, vs. James McCollough. def't in error. D. Burwell for pl'ff. Jesse G. Smith for def't. 4. David Mead, Pl'ff, vs. Jas. Lawson, def't. Wheaton, Doolittle and Hadley. for pl'ff. J. S. Colt for def't.

5. James McKeon, pl'ff. vs. Richard Graves. et al. def'ts. J. H. Reynolds for pl'ff. Geo. W. Bulkley for def'ts.

6. The Mutual Insurance Co. of the city and county of Albany. pl'ff. vs. Nicholas Conover. ldeft C. H. Bramhall for pl'ff J.S. Colt for def't

7. Casparus C. Hoes and Mary his wife. et al. appel'ts vs. John M. Van Hoeson. respon't Hogeboom - Miller for appel'ts Edward Clark for respond't.

8. John Pierce. pl'ff. vs. James E. De Lamater. def't. R. E. Andrews for pl'ff. C. L. Monell for def't.

9. Robert Reynolds. pl'ff. vs. Henry H. Mynard, et al. Trustees. —c. def'ts. C. B. Dutcher for pl'ff. P. W. Bishop for def'ts.

10. Abraham I. Fort. appel't. vs. William Bard. et al. resp'ts. Orville Clark for appel't. Julius Rhoades, for respon'ts.

11. John G. Britson. et al. pl'ffs, vs. Issaac Frink. Sheriff —c., def't. A. K. Hadley for pl'ff. Ellis and Bullard for def't.

12. Mary Martin by her next friend. appel't. vs. Norris L. Martin. respond't. D.D. Field for appel't. H. B. Duryea for respond's. 13. Cornelius Van Giesen. pl'ff. vs. James C. Fuller. def't. Ceo. E. King for pl'ff. H. R. Selden for def't.

4. The Mohawk and Hudson Railroad Co. pl'ffs. vs. John Brown. def't. Pruyn — Martin for pl'ffs. P. Potter for def't.

IS. John Rowland. pl'ff. vs. Geo K. Fuller. def't. N. King, Jr. for pl'ff. John G. Stowcr for def't.

16. Elmon D. Jenks. pl'ff. vs. Israel Smith. def't. A. S. Slean for pl'ff. C. Carpenter for def't.

17. John Fraser. et al. appel'ts vs. Henry M. Western. et al. respon'ts. John Anthon for appel'ts. H. M. Western for respond'ts.

18. Abijah B. Curtis, pl'ff. vs. Justus B. Jones. def't. H. Humphrey for pl'ff. Samuel L. Selden for def't.

19. James T. Brady,appel't. vs. John A. McCosker, an infant, by his next friend. respond't John B. Stevens for appel't Benedict - Boardman for Respond't.

20. Everitt Judson. pl'ff vs. Jebiel Houghton, def't Roswell Judson. for pl'ff Ransom Balcom for def't

21. William G. Wood. ex'r. &c. of David Wood. dec'd. pl'ff. vs. George Weiant, et al. def'ts. H. S. Dodge for pl'ff. Wm. Nelson for def'ts.

22. Sylvanus H. Henry. et al. plff's vs. The President. Directors and Co. of the Bank of Salina, def'ts. Hough & Carpenter for pl'ffs. Noxon, Leavenworth & Comstock for def'ts.

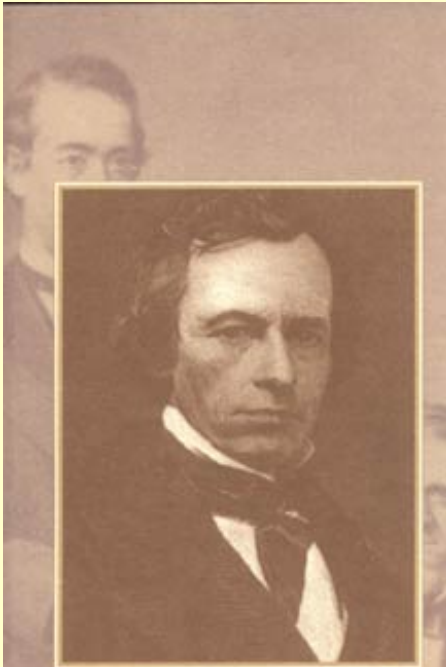
23. Harvey Loomis, pl'ff. vs. James Monroe, def't. T. T. Davis for pl'ff. Campbell, Boughton & Ward, for def't.

24. Melancthon W. Danks. pl'ff. vs. Jeremiah D. Quackenbush. def't. Isaac W. Brewster for pl'ff. Noxon Leavenworth & Comstock, for def't.

25. Frederick H. Stief, pl'ff vs. Monmouth B. Hart. def't. O'H. Platt for pl'ff. J.C. Hart for def't.

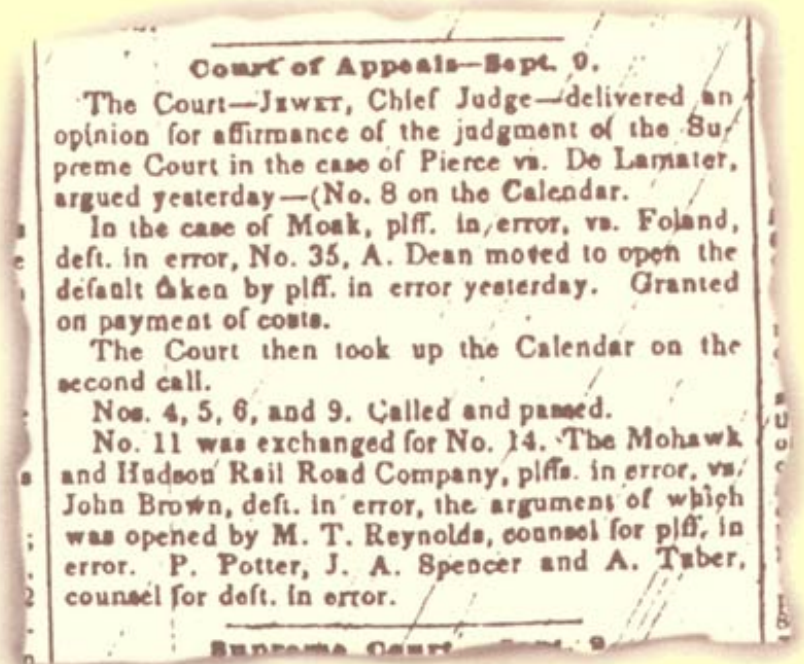
The following extracts from the rules of the court, prescribe the manner in which cases are to be printed for its use:- Rule 14. - All cases and points, and all other papers which may be delivered to the court in calendar causes, shall be printed on white writing paper. with a margin not less than one and a half inch wide. The printed page. exclusive of any marginal note or reference, shall be seven inches long, and three and a half inches wide. Part of Rule 16. - Copies of the calendat for the use of the judges, clerk and reporter, and to be kept with the records of the court and be deposited in the State Library, shall be printed in like manner as cases and points are directed to be printed. - Alb. Eve. Atlas.

"There shall be a Court of Appeals..."



Nicholas Hill

From 1847 until his death, he argued more cases in the Court of Appeals than any other lawyer.



THE SECOND TERM of the Court of Appeals was held at City Hall in New York City on November 9, 1847. In 1848, the first four terms of the Court of Appeals were held in Albany, New York City, Rochester and Syracuse, respectively, with the Court returning to Albany for the fifth term. The Court of Appeals constituted in 1846 functioned until 1870. The 1982 MacCrate Report discussed the development of appellate justice under the 1846 Constitution:

"The allocation of appellate functions between the Court of Appeals and the General Term reflected evolving concepts of the objectives of the appellate process. Underlying the establishment of the Court of Appeals was a desire to depoliticize appellate proceedings and to promote harmony in judicial decisions. Centralizing the ultimate appellate function in

the newly-created Court of Appeals was meant to serve the important values of predictability and consistency. At the same time the decentralized system of General Terms in each of the eight Supreme Court districts was intended to give litigants the opportunity for prompt appellate review in a nearby forum responsive to the people's concerns; the Court of Appeals could not have served this purpose as effectively as the eight regional tribunals."

In describing the strength of the early Court of Appeals, W. F. Cogswell, a Rochester attorney, wrote:

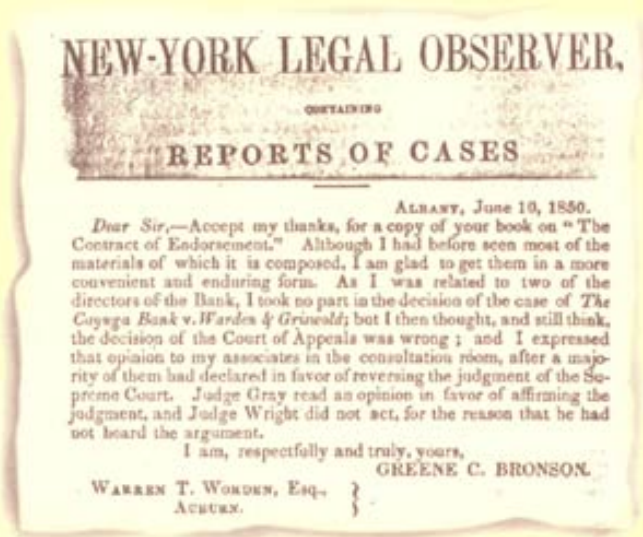
"It is a matter of common knowledge that the marked men of the court were Judges Bronson and Gardiner. They were diametrically the opposite of each other in many respects. Judge Bronson was by



W. F. Coggsell

*The old seal of the Court of
Appeals was in use until 1883.*

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8 New York Legal Observer 272 (1850)

nature an intense conservative. He had been a member for thirteen years of a court of solely appellate common-law jurisdiction. He was, by the very proprieties of his office, precluded from mingling much with men or affairs. He was thoroughly grounded in the common law, without much adaptedness for or acquaintance with equity jurisprudence. He was a great judge in a comparatively limited sphere. Judge Gardiner, on the contrary, was a radical, and had his mind liberalized by large acquaintance with men and affairs; for three years he had presided over the higher branch of the State Legislature; he had administered, for eight years, as Vice-Chancellor, equity law. It was no more than natural that these men, both men of great force and positiveness of character, with dissimilar natures and dissimilar experiences, should, as they often did, differ. There was nothing unseemly in their differences, but some of the best specimens of juridical discussion in the reports of this State will be found in their conflicting opinions, as the one or the other led the majority or the minority of the court."

Cogswell was describing the second great innovation under the 1846 Constitution, the merger of the courts of Common Law and Equity. The 1846 Constitution had delegated to the Legislature the

delineation of the jurisdiction of the new appellate courts. Raymond Cannon, for twenty-three years the Clerk of the Court of Appeals, described the significance of the constitutional changes thusly: *By the adoption of the Constitution of 1846, New York knowingly endorsed the principles of the separation of powers. But for the establishment of an independent and separate judicial power in the state by means of the political process, the price paid was the relinquishment by the courts of the control of practice and procedure by court rule and the transfer of that power to the Legislature for its formulation by statute. Equity pleading and practice to some degree, but the whole of the science of common-law pleading became in New York almost overnight a matter only of historical interest.*



The 1846 Constitution, article VI, section 24, required the Legislature, in the first Session following the adoption of the Constitution, to provide for the appointment of a Commission on Practice and Pleadings. The three Commissioners appointed were Arphaxed Loomis, David Graham, and David Dudley Field. As described by the Commissioners in their preface to the First Report of the Commission, presented to the Legislature on February 29, 1848:

"In the act which thereupon passed, creating the commission, the duties of the Commissioners are more explicitly

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defined; the eighth section declaring that they shall "provide for the abolition of the present forms of actions and pleadings in cases at common law; for a uniform course of proceeding in all cases, whether of legal or equitable cognizance, and for the abandonment of all Latin and other foreign tongues, so far as the same shall by them be deemed practicable, and any form or proceeding not necessary to ascertain or preserve the rights of the parties."

* * *

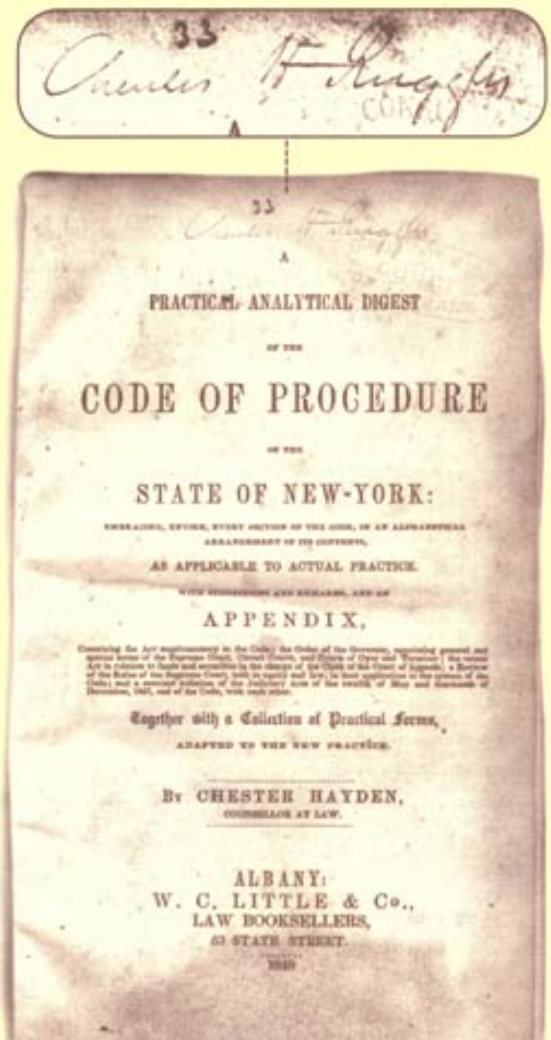
To say that the reforms thus enjoined upon them were such as their own judgment approved, is but to repeat what is already known to the Legislature. In accordance with their own convictions, and in the spirit of the law, they have prepared the portion of the system which is now submitted. Though compressed within a narrow compass, it reaches far, and sweeps away the needless distinctions, the scholastic subtleties, and the dead forms which have disfigured and encumbered our jurisprudence. If the performance be equal to the intention, they will have relieved justice from many of her shackles, and opened the way for a thorough reform of remedial law in all its departments.



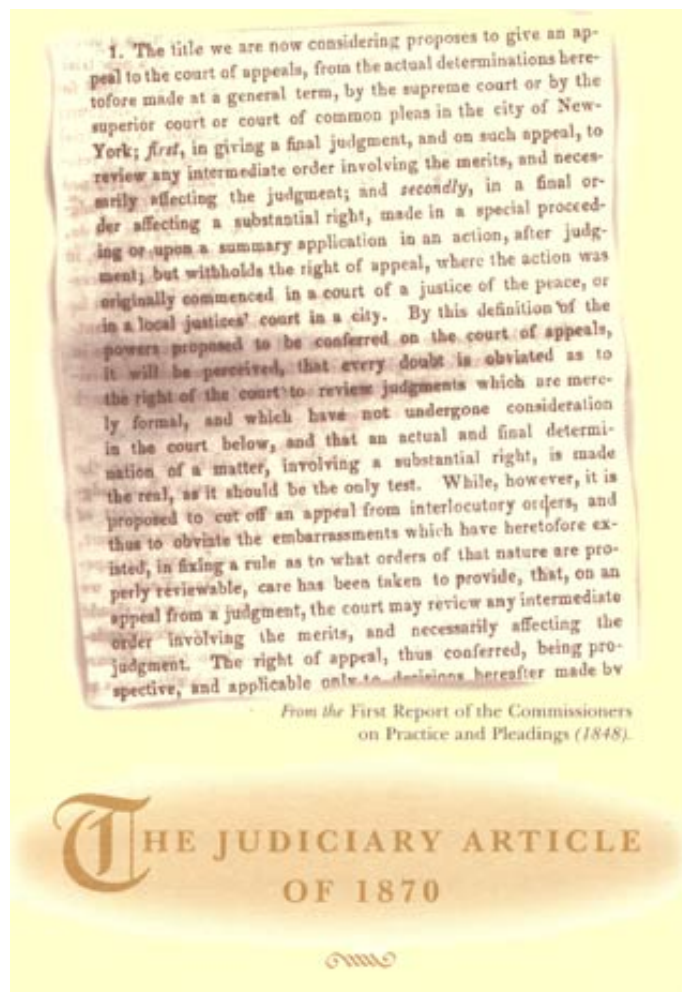
The Commission prepared the instrument known as the New York Code of Procedure, or the "Field Code," which was adopted in 1848. This pivotal document has influenced not only modern practice and procedure in New York but also that of many other states, and of England and the British Commonwealth. In 1849, Missouri adopted the Code, as did California in 1850. Subsequently, Washington, Nebraska, Kansas, Nevada, Dakota Territory, Idaho, Arizona, Montana, Wyoming, Colorado, Utah, Oklahoma and New Mexico adopted codes based on the Field Code/California Code. In his essay entitled *David Dudley Field. A Lawyer's Life*, Philip J. Bergan observed:

"Finally, coming full circle, the Field Code was to influence the English Judicature Act of 1873 and, through the English reforms, the whole English speaking world including some of the older States of the eastern United States."

Title II of the Code of Procedure governed the Court of Appeals and made provision for its jurisdiction, powers, terms and the quorum necessary for a judgment. Many of the concepts then established remain essentially intact and govern the Court's jurisdiction one hundred and fifty years later.

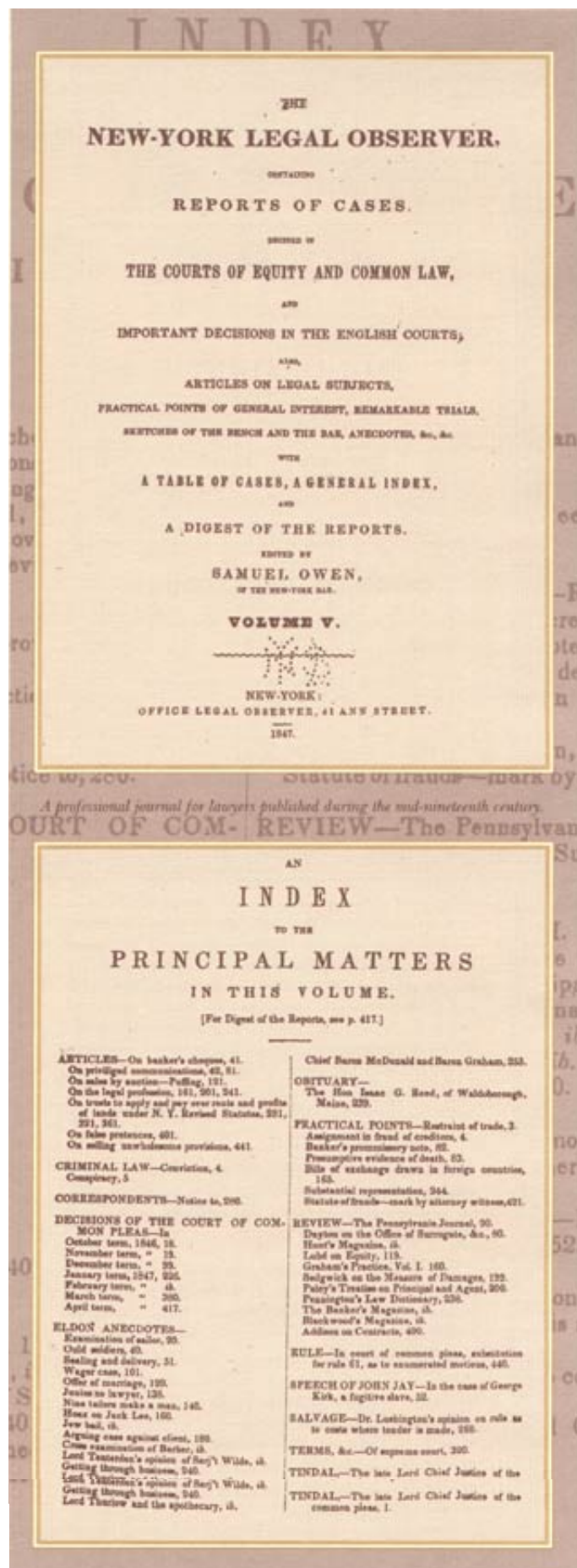


FROM THE COURT OF APPEALS COLLECTION

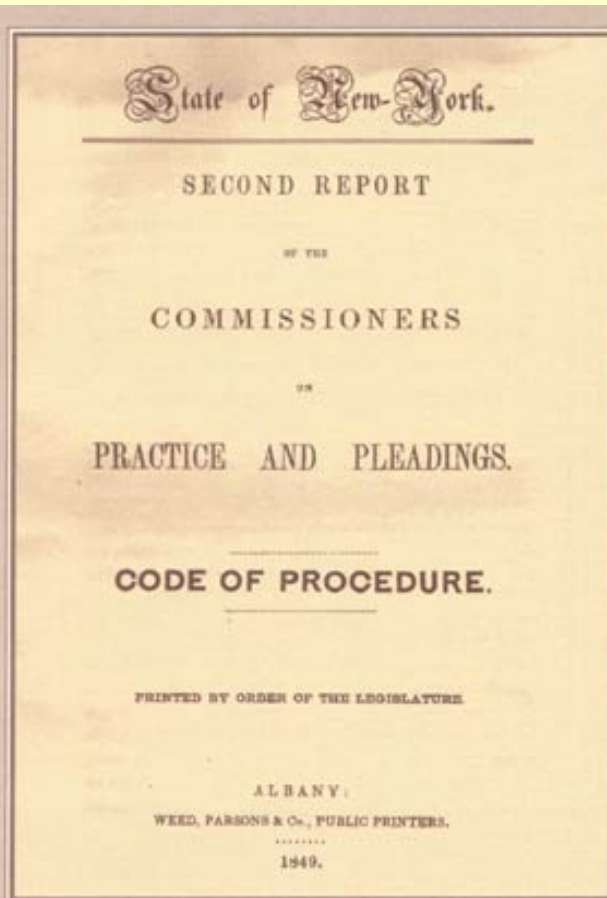


AFTER TWENTY YEARS OF OPERATION, THE JUDICIARY ARTICLE WAS REVIEWED at the 1867 Constitutional Convention. Many problems had become obvious. The Court annually lost half of its membership and acquired four different Justices from the Supreme Court. Every two years, the term of one of the Judges elected statewide would end, so that frequently more than half of the Court was replaced at the end of a year. In the first twenty- three years of the Court's existence, one hundred and twenty three Judges were members of the Bench. In his essay *The New York Court of Appeals: 1847-1977*, Francis Bergan noted that:

"Sometimes, as might be expected, Supreme Court justices came into the court with very strong ideas against the legal



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They could not but feel conscious that by this course, they of necessity placed themselves in an attitude adverse to the immediate interests, as well as to the trained habits and learning, of a large number of the profession to which they belong. The character of the profession is in its very nature eminently conservative in all its tendencies; the rules of jurisprudence are all drawn from the past; precedent is the lawyer's guide. The spirit of reform and innovation which characterizes the age, and to which the world is indebted for all the advances of the present century, are seen at a distance by those who administer the law; they may appreciate and enjoy them in their personal and public relations, but in their own profession they still pore over the musty volumes of antiquity in search for precedent.

The commissioners had not the presumption to expect, or the folly to hope, that they could originate and produce at a single effort a system so perfect, as not to contain many deficiencies, and to demand correction and construction for years.

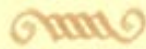
They could lay down principles, and adapt them to practical use, but to improve and perfect them, to settle their construction, is necessarily the work of time and experience. Neither the Commissioners, nor any sensible friend of reform, ever expected or pretended that in the details of any new system, so comprehensive in its scope, there would not occur both errors and omissions. Rarely, if ever, in the whole history of human progress, has a valuable improvement in any branch of science, philosophy, or the arts, come into existence in full perfection. Time and experience are necessary elements in human advancement; mind comes to the aid of mind, and one suggestion leads to another.

policy which the court had been following. These justices made their views felt in the decision process, so that in some areas of ongoing development of the law, the court seemed to take a staggered course."

Also, as Raymond Cannon pointed out, in keeping with the prevailing ideals of the day, the Legislature repeatedly broadened the jurisdiction of the Court. Meanwhile, the State and country were growing rapidly and life was becoming more complex. The eight General Terms, which were the intermediate appellate courts, issued decisions independent of and without reference to each other. The adoption of the new Code of Procedure introduced numerous concepts, many of which required judicial interpretation. Backlogs mounted in the Court of Appeals - the Court inherited some 1,500 cases which were pending before the Court for the Trial of Impeachments and the Correction of Errors in 1847 - and, by 1865, it took four years for the Court to reach an unpreferred cause.

The *Public Service of the State of New York*, 1880-1881-1882 considered unwise the arrangement by which judges sat in review of their own decisions - even if little positive injustice occurred, it subjected judges to severe criticism. The commentators believed the eight-year term was too short, rendering elections too frequent, often remitting a judge to private life just as he had become most useful to the State, and possibly interfering with the complete independence of the Judiciary. An age limitation was once again considered desirable, although the limit of sixty years imposed by the earlier constitutions was rejected.

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UNDER THE CONSTITUTION adopted in 1869 which went into effect on January 1, 1870, the Court of Appeals emerged with a Chief Judge and six Associate Judges, each chosen by election and holding office for a term of fourteen years, with the retirement age set at seventy. Five Judges formed a quorum and the concurrence of four was necessary for a decision. The Court had power to appoint and remove its clerk, reporter and attendants.

The Constitutional Convention held in the years 1867 and 1868 viewed as a major problem the disharmony that had arisen among the decisions issuing from the eight General Terms. The Constitution adopted in 1869 reduced the General Terms to four, and provided that no judge might sit in review of his own decisions. Rather than impose the existing backlog of cases on the newly created Court, a Commission of Appeals was created to deal with the old Court of Appeals backlog. The Commission consisted of five Commissioners - the four Judges elected statewide to the old Court, with a fifth Commissioner appointed by the Governor.



Secretary of State Nelson



The 1870 Court (as constituted under the 1869 constitutional amendment). From left: Judges Folger Allen, Andrews, Clerk of the Court Perrin, Chief Judge Church, Judges Rapallo, Grover and Peckham.

COURT OF APPEALS COLLECTION

Its tenure was limited to three years which, by a later constitutional amendment, was extended by two years. The Commission of Appeals commenced operation in July 1870.

To ensure representation of the minority party, the Republicans, the 1869 Constitution provided that two appointed Republican Judges would be members of the Court of Appeals. The five other vacancies, those of Chief Judge and four Associate Judges, were filled at a special election held in April 1870. The members of the 1870 Court were Sanford E. Church (Chief Judge), and William F. Allen, Rufus W. Peckham, Martin Grover, Charles A. Rapallo, Charles Andrews and Charles J. Folger (Associate Judges). The inaugural meeting of the new Court of Appeals took place on Monday, July 4, 1870 in the Senate Chamber of the old Capitol. Secretary of State Homer A. Nelson administered the oaths of office to the Judges-elect. The Albany Argus reported that the ceremony was solemn and impressive, and utmost silence reigned in the Chamber. As required by the Constitution, each Judge certified his age under oath and over his own signature. Chief Judge Church certified his age at 55, Judge Allen at 61, Judge Grover at 57, Judge Peckham at 61, Judge Rapallo at 46, Judge Folger at 52 and Judge Andrews at 43.

The Argus.

Established in 1813

WEDNESDAY MORNING, JULY 6.
1870

OPENING OF THE NEW COURT OF APPEALS.

THE ORGANIZATION

*Congratulatory Address by
Hon. Amasa J. Parker*

Response by Chief Justice Church.

The new Court of Appeals assembled in the Senate Chamber on Monday, July 1th. at 12 o'clock. The Chamber had been temporarily altered to suit the convenience of such an occasion. A platform had been arranged in front of the Lieutenant Governor's Chair, sufficiently capacious to accommodate the Court, The Judges met temporarily in the anteroom of the Chamber, and after a renewal of each others acquaintance, and a casual consultation, proceeded to the Senate Chamber proper, headed by Chief Justice Church. Upon taking their seats, Hon. Homer A. Nelson, Secretary of State, advanced and proceeded to administer so each the Constitutional oath of office. As the Secretary presented the Bible, Chief Justice Church arose, placed his hand upon the book, and took the oath in a clear voice as follows, speaking the words himself: "I do solemnly swear, that I will support the Constitution of the United States and the Constitution of the State of New York; and that I will faithfully discharge the duties of the office of Chief Judge of the Court of Appeals according to the best of my ability. So help me God."

Each of the Judges followed him

The administration of justice, whether considered with reference to its delicacy or its responsibility, justly belongs to the highest class of governmental power. It calls for godlike attributes. It demands the exercise of the best intellectual and moral gifts. It can be successful only so long as it commands the public confidence. We have been taught and we fully believe that an independent and honest judiciary is the bulwark of our liberties. From the commencement of our State government, the courts of final resort have always commanded the confidence of the People. They have been filled by men eminent for their learning and of unquestioned integrity, who have diligently applied their best faculties to the discharge of their duties. Their opinions have commanded the respect of the world, and they are cited as well at Westminster Hall as in all the States of the Union. Their failure, from time to time, to prevent an accumulation of causes on the calendar has been owing to no remissness of duty on their part, but to the increase of litigation necessarily consequent upon an increase of population, of property and of commerce. Our highest court has been characterized, during the last twenty years, as was the court which preceded it, by great industry and ability, and it retires from its field of labor with the good opinion and the thanks of the community.

Three times, in the history of our State, has its highest tribunal been reorganized with a view to adapt its capacity for business to the increased necessities for its service. At each time it was believed we could profit by the additional experience of the past.

It is confidently expected by those whom I represent on this occasion, that the tribunal I now have the honor to address, will prove as now

"There shall be a Court of Appeals..."

the United States Supreme Court, and deciding causes before writing opinions, will greatly lessen the labor of the Judges and soon relieve them from the accumulation I have mentioned.

In conclusion, allow me to say in behalf of those I represent, that it will at all times, give them great pleasure to do all in their power to render the duties of the court agreeable and lighten its labors. They will strive to uphold its dignity and to maintain it in the full confidence of the public, and they hope in return to deserve its good opinion and enjoy its esteem, confident as they are, that justice can only be well and advantageously administered, when pleasant reciprocal relations and mutual respect and confidence exist between the Bench and the Bar.

RESPONSE OF JUDGE CHURCH

When Judge Parker had concluded, Chief Justice Church arose in his place and responded as follows:

Judge Parker: For my associates and myself, I desire so return to you, and to the members of the Bar in whose behalf you have spoken, our profound thanks for the confidence you have expressed in the Court as now organized, and for the complimentary sentiments contained in your address towards its individual members.

It is to be regretted, as you have stated, that we are obliged so commence with an amount of business which at the outset threatens to overwhelm us. But by persistent labor, and a persevering determination to accomplish the work, we hope to be successful. I feel at liberty to say, that an earnest and conscientious effort will be made to satisfy the responsible expectations of the profession and the people of the

"There shall be a Court of Appeals..."

THE COURTS

COURT OF APPEALS--Monday, October 1. Present, HON. WILLIAM C. RUGER, Chief Judge; ANDREWS, RAPALLO, MILLER, EARL, DANFORTH and FINCH. Associate Judges. No. 786. The People etc. respondents vs. Anderson Gibbs, appellant. Argued by S. D. Halliday for appellant; Clarence L. Smith, district attorney, for respondent. 794. Harry E. Eldridge, respondent vs. Levi W. Flagg, appellant. Argued by R. W. Van Pelt for appellant; G. Zabenski for respondent. Appeal dismissed for want of jurisdiction. 795. The Concordia Savings & Aid Association, respondent vs. Elizabeth A.S. Read, appellant. Argued by O. O. Conkle for appellant; Adolbert Moss for respondent. 796. Sarah J. Gilbert, appellant vs. Marie A. Comstock and another, respondents. Submitted. 797. The Rescue etc. of Christ Church, respondent vs. John Mack and another, appellants. Argued by E. C. Boardman for appellant; Wheeler H. Peckham for respondents. 799. George Bessinghoff, respondent vs. The Agricultural Insurance company, appellant. Argued by A. H. Sawyer for appellant; Josiah T. Miller for respondent. Argument unfinished. Notice calendar for Tuesday Oct. 2. Nos. 738, 728, 722, 729, 732, 734, 733, 735, 730, 739, 717, 741, 742, 737, 743, 744, 745, 746, 749, 748. Day calendar, Nos. 200, 204, 203, 206, 207, 208, 210, 193.

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A THRONE ROOM OF JUSTICE.
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Of the important branches of the State government the Court of Appeals is the last to have assigned to it a permanent habitation under the roof of the Capitol. It has been going about from pillar to post for several years. Events have demonstrated the wisdom of the exercise of patience. The rooms which the Court took formal possession of this morning are in the opinion of most visitors the most magnificent in the building. The happiest thoughts of architectural arrangement and decoration seem to have entered into the task which in its present completion is an object of general admiration. It is fit and proper that a tribunal which has confided to it our most precious rights should be thus installed. The dignity of the bench is enhanced by the surroundings. There is in the room in which the Court sits an atmosphere of repose and serenity. The overpowering grandeur of the lofty halls occupied by the Legislature, the sombre aspect of the Executive Chamber, the plainness of the department offices all have their place in the plan. Nothing in closer consonance with a court of last resort could be imagined than the finished apartment in which it sits today. There is a perfect harmony of idea in every detail suggesting strength, unity and intelligence.

No special ceremony occurred to mark the sitting of the court under its new conditions. There were present a large number of prominent lawyers and spectators, among the latter being several ladies. Shortly after 10 o'clock the judges entered through the opening at the rear of the bench, their approach being announced by the veteran court crier, Amos Dodge. Mr. Dodge as he spoke the usual proclamation with which the court is opened, leaned on the gold headed ebony case presented by the court two years since. Among the gentlemen of the bar present were Judge Amasa J. Parker, Colonel Amasa J. Parker, Jr., Montgomery H. Throop, Judge I. H. Maynard, David A. Thompson, District Attorney John Vincent of New York, David Dudley Field, Assemblyman Van Allen, Deputy Attorney General Post.

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THE COURT OF APPEALS HELD ITS FIRST SESSION IN THE RICHARDSON-DESIGNED Courtroom on January 14, 1884. William C. Ruger was the Chief Judge at this time, and the Associate Judges were Charles Andrews, Charles A. Rapallo, Theodore Miller, Robert Earl, George F. Danforth and Francis M. Finch.



The Court 1883-1886, the first to wear gowns on the Bench. From left: Judges Miller, Rapallo, Danforth, Chief Judge Ruger, Judges Finch, Andrews and Earl.
COURT OF APPEALS COLLECTION

THE FIRST PART OF A NEW CODE OF CIVIL PROCEDURE became law six years later, in 1876, and the second part in 1880. This Code was to remain in effect until the enactment of the Civil Practice Act of 1920. Drafted by a Commission chaired by Montgomery H. Throop, the new code was, in Philip Bergan's words:

"highly detailed, crammed with minutiae and clearly intended to circumscribe judicial indiscretion. Indeed, it was everything that the spare, elegant Field Code had not been. Throop's Code contained 3,296 sections, compared with the Field Code's 473 as enacted."

For a brief period, the Field Code of Procedure and the Throop Code continued to co-exist, but in 1877 the Field Code was repealed. However, Field's Penal Code and a Code of Criminal Procedure were enacted in 1881. In the History of New York State, edited by James Sullivan, the transition was described:

"The new Court of Appeals found its task by no means easy; it was called upon to construct a new system of jurisprudence, based on the most radical changes. The Code of Procedure more than once came under judicial condemnation; and the Married Women's Acts of 1848, 1849, 1860 and 1866 brought many puzzling inquiries before the

"There shall be a Court of Appeals..."

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COURT OF APPEALS COLLECTION

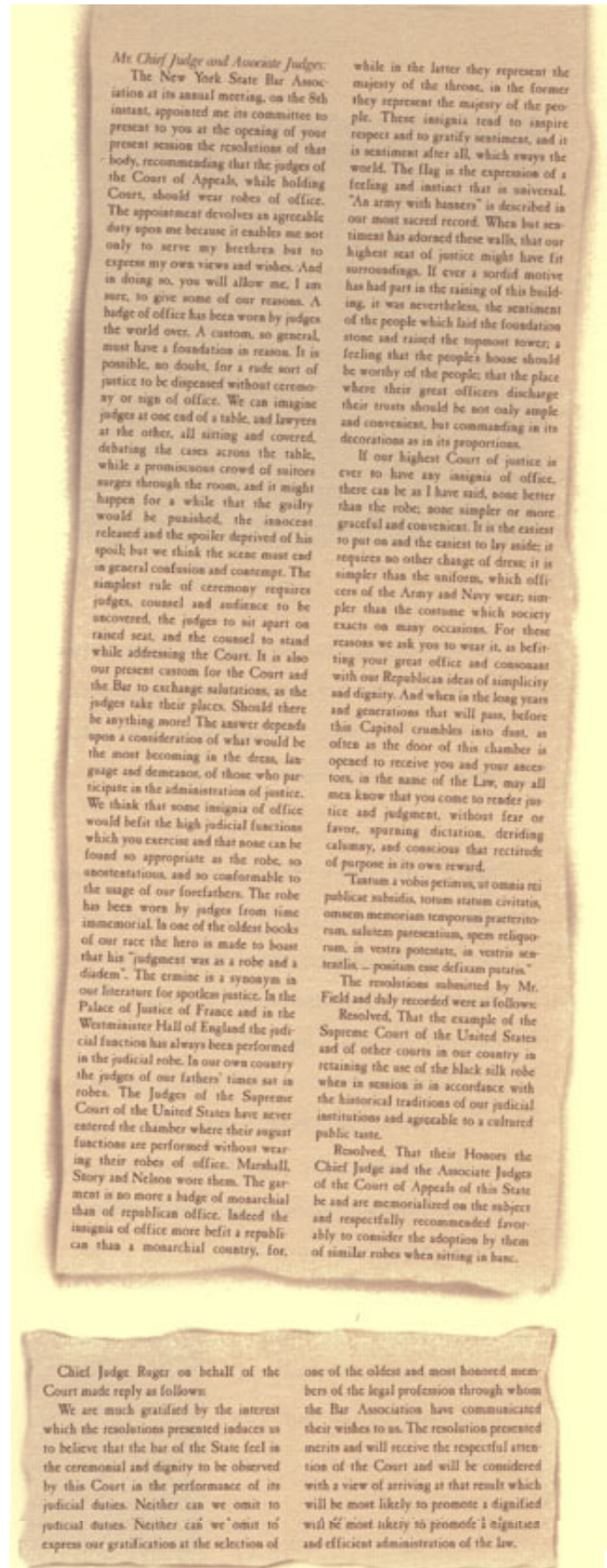


The Richardson-designed courtroom.
COURTESY OF THE NYS COMMISSION ON THE RESTORATION
OF THE CAPITOL.

David Dudley Field had the honor of being the first lawyer to address the Court in its new Courtroom. On behalf of the New York State Bar Association, he presented resolutions urging that the Judges wear official gowns. Chief Judge Ruger, in reply, thanked the Bar for the interest taken in the matter, and said the Court would take it under advisement. On February 25, 1884, the Court appeared on the Bench wearing gowns for the first time.

Initially, the application of the new codes slowed the work of the Court, and a backlog of cases again accrued. In 1874, appeals were limited to cases involving at least \$500, exclusive of costs, unless certified by the Supreme Court to involve important questions of law. In 1888, a constitutional amendment was adopted authorizing the Governor, upon certification by the Court that an overcrowded calendar existed, to designate seven Justices of the Supreme Court to sit as a separate body, known as the Second Division of the Court of Appeals, to aid the Court until it should certify that such aid was no longer needed. The Second Division, which was more highly regarded than the Commission on Appeals,

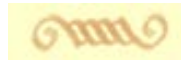
Sidebar: Resolution presented by Mr. David Dudley Field urging the fudges of the Court to wear official gowns. Both clippings are from the Albany Evening Journal (January 14, 1884).





1890 Court. From left: Judges Finch, Gray, Andrews, Chief Judge Ruger, Judges Earl, O'Brien, and Peckham.
COURT OF APPEALS COLLECTION

first sat in January 1889 and finished its assignment in the Fall of 1890. Another Second Division functioned from March 1891 to October 1892. Between 1889 and 1892, the Second Division disposed of 2,093 appeals.



IN THE FORTY YEARS that followed the inception of the Court of Appeals, it had become apparent that temporary auxiliary courts could not resolve the fundamental problem of the number of appeals which, over the years, repeatedly caused calendar backlog. In 1890, the Commission to Revise the Judiciary Article of the Constitution was appointed. It examined two options - permanent enlargement of the Court, or creation of an intermediate appellate court, with clearly defined jurisdiction, to take over part of the work of the Court of Appeals. In 1891, its report recommended a single Court of Appeals, unchanged in size but with much less business, and an Appellate Term of the Supreme Court, which would become the final appellate tribunal for most cases. This recommendation was not accepted by the Legislature.

A Constitutional Convention was convened in 1894. Its report on the Judiciary Article contained a recommendation

...to obviate the overcrowding of the Court of Appeals calendar by establishing more effective and satisfactory courts of intermediate appeal, and enlarging their powers and jurisdiction.

Limitation of the jurisdiction of the Court based on the monetary amount involved was rejected as undemocratic and unwise, because small cases might just as readily involve major issues of law as those where a larger amount was at stake. The recommendation divided the State into four judicial departments, establishing in each

a tribunal composed of five justices of the Supreme Court, who shall perform substantially no other duties, and shall be the court of last resort for that department upon all questions of fact and upon all interlocutory proceedings.... The Court of Appeals is limited to its proper function of declaring and settling the law. Believing that under the operation of the proposed appellate division of the Supreme Court and with the distribution of duties and jurisdiction above indicated strictly observed, the Court of Appeals will have no difficulty in meeting all demands upon it, we have done away with the makeshift of a Second Division and have prohibited the imposition of a money limit upon the right of appeal to the Court of Appeals.



Court of Appeals, Second Division, 1890. From left: Judges Vann, Parker, Potter, Chief Judge Follett, Judges Bardley, Brown and Haight.

THE JUDICIARY ARTICLE OF THE NEW CONSTITUTION.

By Walter S. Logan, First Judicial District.

The existing Constitution of the State of New York was adopted, substantially in its present form, in 1846. The convention which is to meet in 1894 will be likely to do its work so that the Constitution they formulate can be submitted to the people in 1895, and become operative in 1896.

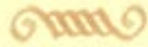
The present Constitution will, therefore, have existed for a period of almost, if not quite, exactly fifty years. These fifty years have been of the utmost moment and importance. The changes introduced during that time into our life, our domestic institutions and customs, and into the very nature of our civilization have been more revolutionary than any changes which have occurred in any former period of the world's history of twice its length. We cannot say that during that fifty years railroads were invented, for they were known and in use in this country before; but so far as its influence upon practical life is concerned, the railroad has almost entirely won its way and demonstrated its usefulness during that fifty years. Steamships had been invented, and a few had crossed the ocean, before 1846, but as a practical reality the steamship is the creature of the half century we are now considering. The telegraph had also been actually invented previously, but it is entirely during this period that it has come into general use; while as so the telephone, it is the invention of only recent years. The modern factory system has been developed during this half century from its newest and crudest beginnings into the wonderful agent for supplying the wants of human life that it now is. And the improvements in the loom, and in fact in all machinery, hat been so great that the product of labor has been more than doubled, and the cost of production cheapened proportionately. The newspaper, the magazine, and books of all kinds have been multiplied and cheapened during this period, so that the instruments of knowledge have become practically free, even in the humblest homes. The result of all this has been that localities have been practically abolished and distance annihilated from consideration;

people have gravitated from the country so the cities; the world has graduated from a system of small, independent towns into one vast, single community; knowledge has been diffused everywhere; education is almost universal; and all men are neighbors; Buffalo and New York are practically nearer together now than were Peekskill and Yonkers before the Hudson River Railroad was built; there are few lawyers in the State of New York that cannot eat their dinner at home and argue a case in the Court of Appeals in Albany the next morning; and the comforts which used to be the luxury of the few have now become a part of everyday life of the many.

Our new constitution-makers must take into consideration these momentous changes that have come over human life since the old Constitution was adopted. It is a different world that we live in, and it speaks volumes of tribute to the breadth of thought and far-seeing vision of the constitution-makers of 1846, that their work has lasted so long and through such crucial changes in the structure of society, and that it does, even now, so well. If the makers of the Constitution of 1896 can be as successful as their predecessors, they will have occasion to be very proud of what they have done.

The judiciary article is the most important part of the Constitution. The organization of our courts and the establishment of our judicial policy is what comes nearest to the everyday life of the people, and on which most depends their progress and their happiness. We shall have a Legislature and a Governor, and the various administrative departments of the State and municipal government, any way, and as they perform their functions better or worse, the State will profit more or less. But these matters, however important, are by no means so vital to the welfare of the people as the organization of that department of the government which is to administer justice to and between its people. The degree of perfection in the methods of the administration of justice as the supreme test of a nation's civilization.

From Proceedings of the New York State Bar Association (1894).



THE CONSTITUTION OF 1894, which came into force in January 1896, established fixed and limited jurisdiction for the Court of Appeals and prohibited the Legislature from enlarging it. Despite these significant changes, the backlog of cases continued and, in 1899, another constitutional amendment to address the backlog was adopted. It permitted the Governor, at the request of a majority of the Judges of the Court of Appeals, to designate up to four Justices of the Supreme Court to serve as Associate Judges of the Court of Appeals until the pending calendar of that Court was reduced to below two hundred cases. Still, not more than seven Judges were to sit in any one case. On January 2, 1900 the Governor designated

three Supreme Court Justices - Judson S. Landon, Edgar M. Cullen and William E. Werner - to act as Associate Judges, and the Court continued as a single court of seven Judges sitting *en banc*, but having nine or ten members under the elected Chief Judge.

Although the annual number of appeals heard and decided increased with the augmentation of the Court, by the time of the 1915 Constitutional Convention, over 600 cases had accumulated. The average time between the date of filing and argument was two years. The Appellate Division Departments were also overworked, due to the general increase in court business corresponding with the growth of the State. However, the 1915 Constitutional Convention brought about no change because the constitutional amendments it recommended were rejected by the People.



1898-1900 Court. From left: Judges Martin, Bartlett, Gray, Chief Judge Parker Judges O'Brien, Haight and Vann.
COURT OF APPEALS COLLECTION

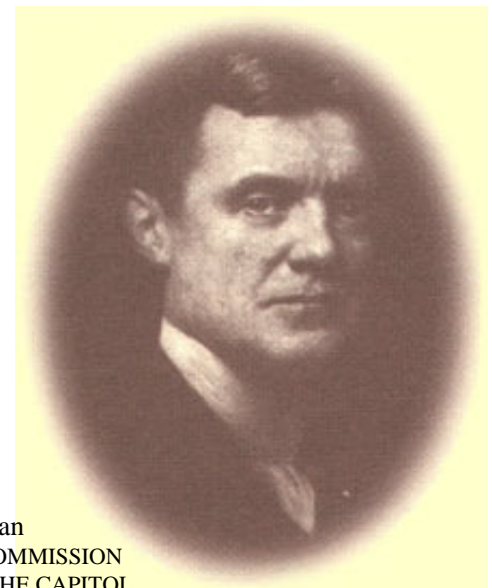
IN 1917, THE LEGISLATURE made major changes to the jurisdiction of the Court. Through legislation proposed by the New York State Bar Association and the Association of the Bar of the City of New York, in consultation with the Court of Appeals, appeals as of right were abolished unless a constitutional question was directly involved, or a disagreement in the courts below appeared through reversal, modification or dissent. An appeal from any other final order would require the permission of the Appellate Division or, upon that court's refusal, permission of the Court of Appeals granted in the "interest of substantial justice."

On January 8, 1917, dedication ceremonies marked the transfer of the newly-renovated building, formerly known as the old State Hall, to the Court of Appeals. Henceforth to be known as Court of Appeals Hall, the building contained a newly designed addition into which the Richardson Courtroom was relocated from the third floor of the Capitol. In turning over the building to the Court, Governor Whitman remarked:

We can wish no better things for the court that sits here today, that in the new quarters, so beautiful and so appropriate, the court may continue the great work which has characterized it in the past and for which it is known throughout our land.

Lewis E. Carr, representing the Albany County Bar Association, stated:

The powers of this court are regal in their character. Its final word is the law that regulates and controls the interest and rights of individuals and the departments of the government as well. Its judgments in matters within the scope of its jurisdiction are supreme, except where a federal question arises that may permit review by the Supreme Court of the United States, the greatest judicial tribunal we know. While it is true our government consists of three departments, executive, legislative, and judicial, it must in the last analysis be conceded the judicial is the most important of the three and the real and true stability of the government rests upon the wise and judicious exercise of the powers with which it is invested. This court, occupying the highest place in that department, not only may, but must, when its aid in that respect is invoked, inquire and determine if the work of other departments of the government are with or without the constitutional limits of their



Governor Whitman
COURTESY OF THE NYS COMMISSION
ON THE RESTORATION OF THE CAPITOL

"There shall be a Court of Appeals..."

powers, and, if it finds they are beyond such limits, by its judgments so declare. In our governmental scheme the monitory voice and restraining hand of the judiciary are safe-guards against encroachment or invasion by one department upon another which if unchecked, will wear away and render insecure the foundation on which the entire fabric was intended to, and, for its security, must at all times rest. The calm and deliberate judgment of our court of last resort is required to curb the efforts of mistaken zeal and correct the errors of those whose action is governed by seeming present interest rather than clear comprehension of the effect of what they do. Its wide domain is that of reason, where gusts of passion and waves of excited feeling have no place, and from which those elements that may tend to warp or unduly sway the judgment or to cloud or blind the eye of righteous understanding are banished. Its doors are open to all who within the limits of its jurisdiction may seek its aid, and the weakest and frailest equally with the strongest may enter with an abiding faith that they will have patient hearing and receive at its bar what is justly their due.



Lewis E. Carr

COURTESY OF ALBANY COUNTY BAR ASSOCIATION

ANOTHER JUDICIAL CONVENTION was convened in 1921, and its recommendations were adopted by the people in November 1925. The Convention retained the existing structure of the Court, and continued the Court solely as a court of law, except where the penalty imposed was death, or where the Appellate Division made new factual findings. The Judicial Convention recommended that the Court of Appeals might, itself, bring in Supreme Court Justices to sit in place of one or more of the members of the Court who were absent or temporarily unable to act, and the Convention also continued the power of the Governor to appoint, at the request of the Court, four Supreme Court Justices to aid in resolving any accumulated backlog.



1910-1912 Court. From left, standing: Judges Vann, Werner, Bartlett and Collins.
Seated: Judge Gray, Chief Judge Cullen and Judge Haight.
COURT OF APPEALS COLLECTION

"There shall be a Court of Appeals..."



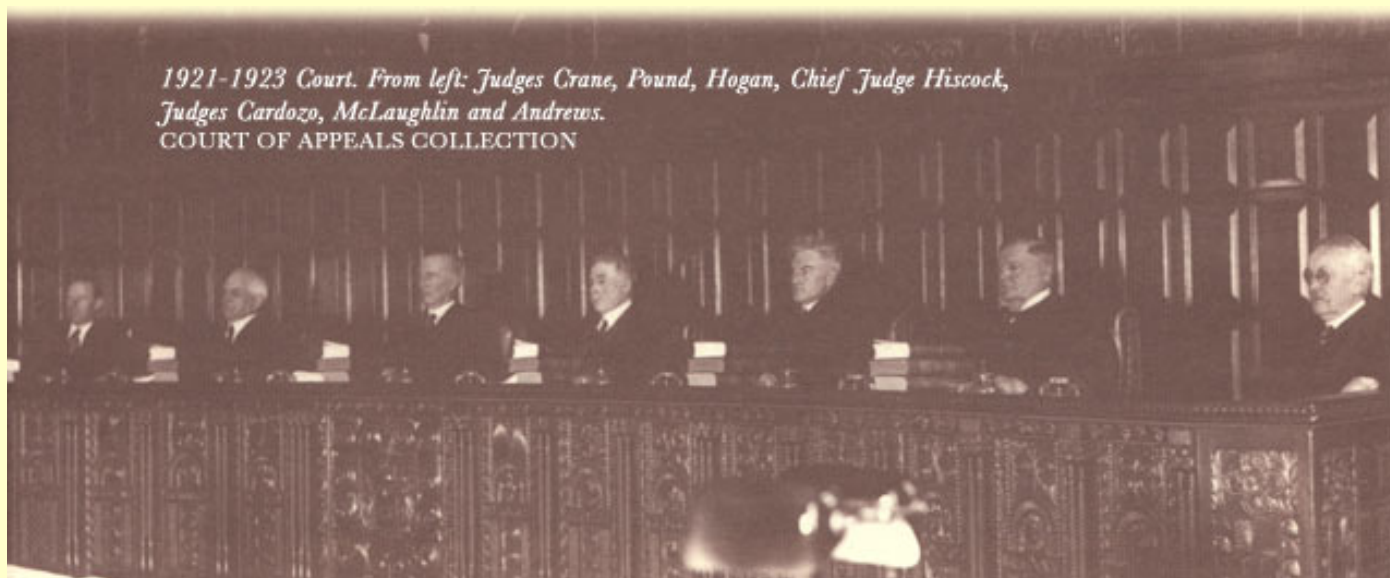
1922 Court. Center: Chief Judge Hiscock. Clockwise from upper right: Judges McLaughlin, Cardozo, Andrews, Crane, Hogan and Pound.
COURT OF APPEALS COLLECTION

been replaced. By June 1923, the Court's calendar had become current and, despite backlogs that accrued in later decades, no additional Justices were then or since designated by the Governor at the request of the Court. Proposals for the Judiciary made by the 1938 and 1967 Constitutional Conventions were rejected by the People. An amendment authorizing major court reorganization was adopted in 1961. The following year the Legislature enacted Chapter 308, the Civil Practice Law and Rules, replacing the Civil Practice Act, which had been in force since 1920.

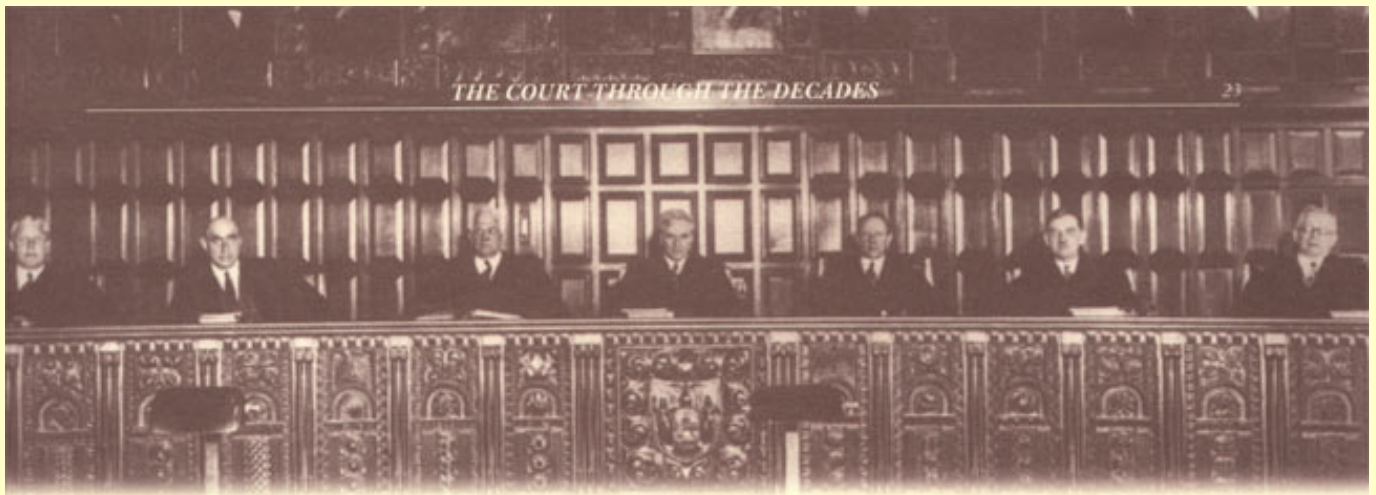
Internally, Chief Judge Charles Breitel implemented a radical change in Court of Appeals procedure in January 1974 when he replaced the "cold bench" system, under which a pre-assigned Judge prepared a written report on a case following argument. The Judge's report was submitted to other members of the Court for conferencing, sometimes weeks after the case was argued. The new "hot bench" system incorporated the procedural vibrancy and vitality which are now the hallmark of the modern Court. Judges individually prepare all cases before oral argument. Following argument, each case is assigned by lottery to one of the seven Judges. Each Judge who draws a case reports on it orally at the Court's Conference the following morning. Reports are oral rather than written to encourage dialogue at Conference.

However, by 1922, the Court had returned to its normal membership - a Chief Judge and six Associate Judges. As the Supreme Court Justices designated to sit as Associate Judges of the Court of Appeals retired or were elected to the Court, they had not

*1921-1923 Court. From left: Judges Crane, Pound, Hogan, Chief Judge Hiscock,
Judges Cardozo, McLaughlin and Andrews.*
COURT OF APPEALS COLLECTION



"There shall be a Court of Appeals..."



1931 Court. From left: Judges O'Brien, Lehman, Pound, Chief Judge Cardozo, Judges Crane, Kellogg and Hubbs.
COURT OF APPEALS COLLECTION

A 1975 CONSTITUTIONAL AMENDMENT

authorized the central administration of the State courts, now known as the Unified Court System. A major change took place in 1977 with the repeal of the 1846 constitutional provision requiring that the Judges of the Court of Appeals be elected. The amendment provided that, henceforth, the Judges of the Court of Appeals would be chosen by the Governor from a list of names recommended by the Commission on Judicial Nomination, and approved by the New York State Senate.

Another major change implemented by the adoption of the 1977 constitutional amendment provided that the Chief Judge of the Court of Appeals would be the Chief Judge of the State of New York and the Chief Judicial Officer of the Unified Court

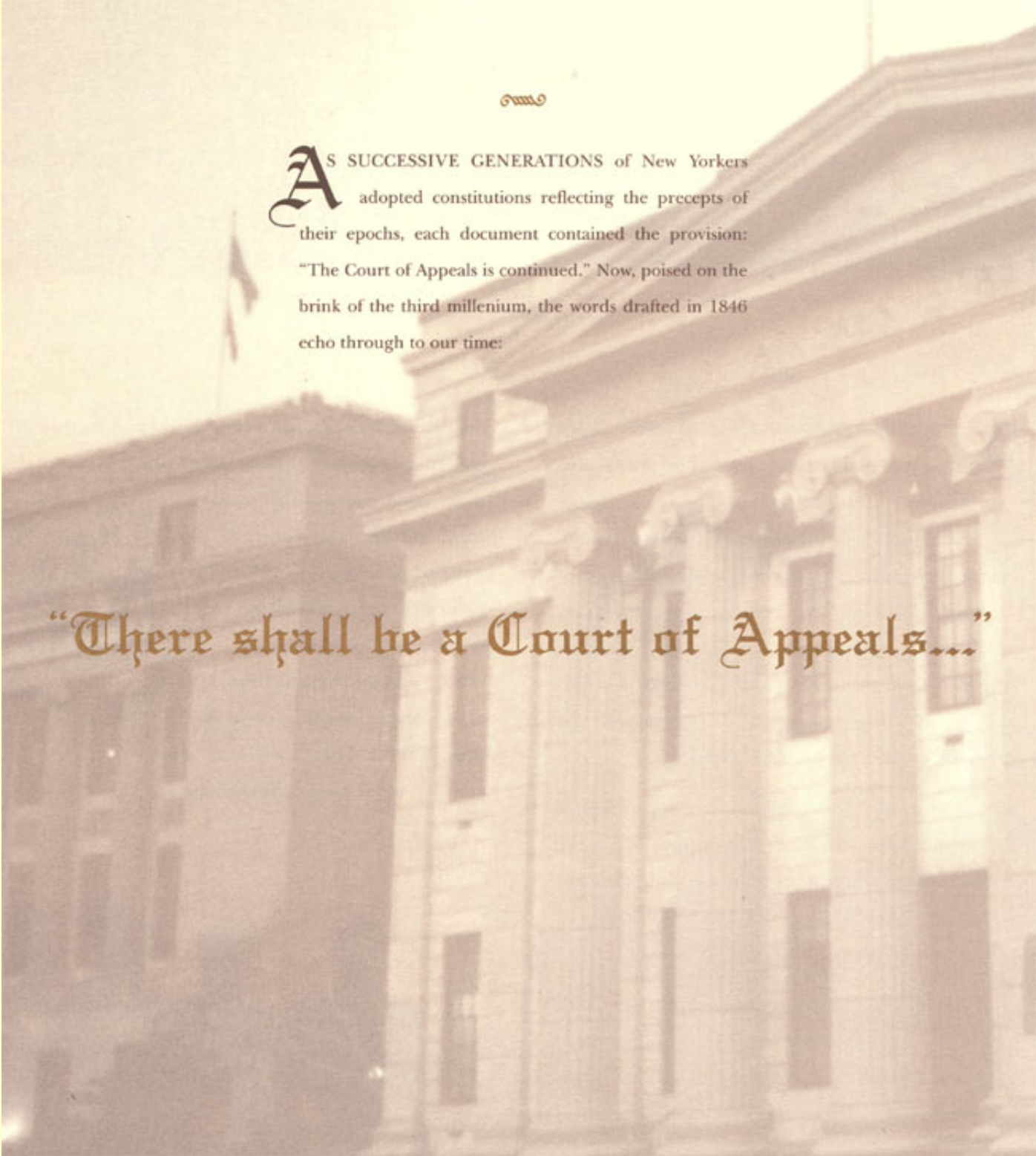
System.

Legislation enacted in 1985 granted the Court more control over its docket. Commonly known as Chapter 300 and affecting only civil appeals, the statute abolished appeals as of right from a reversal or modification by the Appellate Division, or upon a single dissent from the decision of an Appellate Division panel. The most recent constitutional amendment affecting the Court of Appeals was adopted in 1985, permitting the Court to answer questions of New York law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or an appellate court of last resort of another state.



Right: Breitel Court, 1975-1978. Standing, Judges Cooke, Wachtler, Jones, and Fuchsberg; seated, Judge Gabrielli, Chief Judge Breitel, and Judge Jasen.

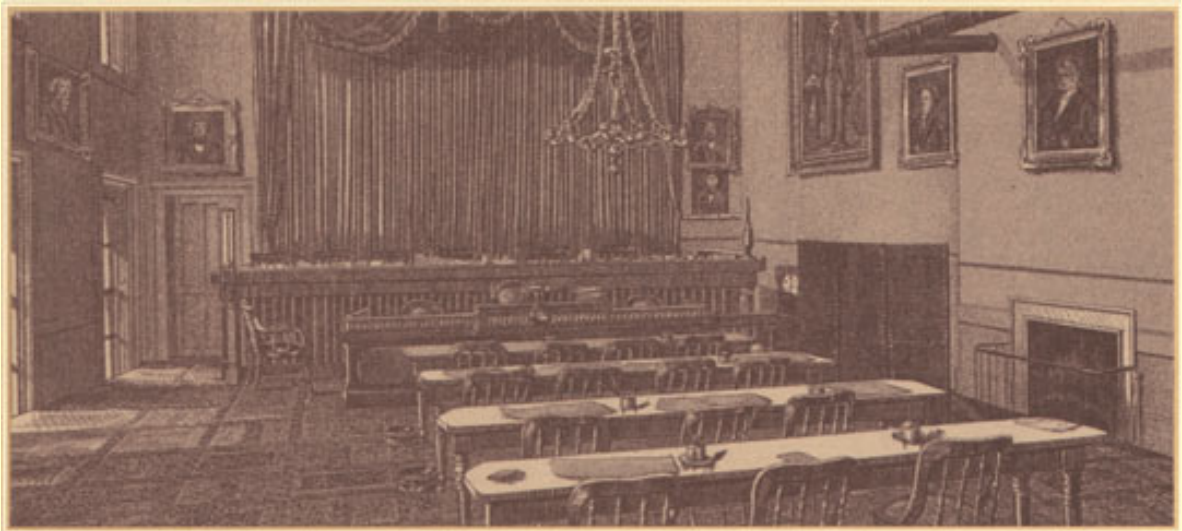
"There shall be a Court of Appeals..."



AS SUCCESSIVE GENERATIONS of New Yorkers adopted constitutions reflecting the precepts of their epochs, each document contained the provision: "The Court of Appeals is continued." Now, poised on the brink of the third millenium, the words drafted in 1846 echo through to our time:

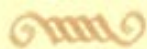
"There shall be a Court of Appeals..."

"There shall be a Court of Appeals..."



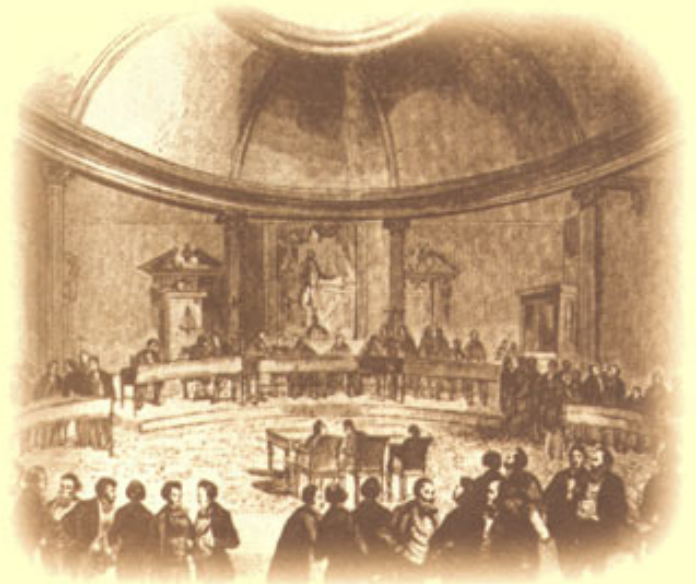
The Court of Appeals Room 1847-1879.

ON SEPTEMBER 7, 1847, THE COURT OF APPEALS HELD ITS FIRST SESSION IN Albany, in the courtroom once occupied by the Supreme Court in the old Capitol. Built between 1804 and 1806, and located immediately to the southeast of the present Capitol, the building was designed by the leading architect of the early nineteenth century, Phillip Hooker. It was constructed of Nyack freestone, with pilasters, window ornaments and an Ionic portico of Berkshire marble. Atop the building was a cupola crowned by a statue of Themis, the Greek goddess of law and justice.



Although the old Capitol is gone, we can imagine following the Court to its first courtroom through the west end of the Central Hall, up the staircase, taking the right-hand section that leads to the Supreme Court Room, now named for the Court of Appeals. Built in 1832 in what was then the Senate Gallery, the room was fifty feet long and twenty-eight feet wide, with the frieze, cornice and ceiling- piece richly ornamented in stucco.

Although the Court held sessions in regional locations - New York City, Rochester, Syracuse, Schenectady, Buffalo and Elmira, to name but a few - the Court of Appeals Room in Albany was its primary home for 32 years. In 1879, when the Senate and the Assembly moved to the new Capitol, the old Senate Chamber - which, prior to 1832, had been the Supreme Court Room - became the site of the State's highest court. The room was positioned



The Senate Chamber which became the Court of Appeals Room in 1879.

COURTESY OF NYS/OFFICE OF GENERAL SERVICES

"There shall be a Court of Appeals..."



Leopold Eidlitz

COURTESY OF THE NYS COMMISSION ON THE
RESTORATION OF THE CAPITOL

over the Central Hall, and was lighted by a dramatic circular-domed skylight constructed of 270 panes of glass. The skylight was created in 1817 at the insistence of the Justices of the old Supreme Court "in order to afford sufficient light," because the existing windows were shaded by the building's portico. A library for the Court of Appeals was established in the former Assembly Gallery. The Court continued to hold its sessions in the old Capitol until May 11, 1883. The June Term of that year was held in Saratoga Springs, after which the Court adjourned to meet in the new Capitol for the October Term. Between July and December 1883, the old Capitol was torn down.



The Eidlitz Courtroom was completed in 1879.
COURTESY OF THE NYS COMMISSION ON THE RESTORATION
OF THE CAPITOL



THE FIRST SESSION of the Court of Appeals in the new Capitol was held on October 1, 1883. The Second Floor of the Capitol was specifically designed to accommodate the Executive Chamber the Court of Appeals, important ceremonial spaces for the executive and judicial branches of government. The Courtroom was located on the second floor of the north side of the Capitol, adjoining the Golden Corridor leading from the Great Western Staircase, immediately beneath the Assembly Chamber. This Courtroom (Room 250), designed for the Court of Appeals by Leopold Eidlitz, was completed in 1879. It contained a unique carved oak ceiling, elaborately carved oak wall paneling, stone wainscot, a monumental carved stone fireplace and mantel, cast bronze "griffin" andirons and wrought iron and brass fenders. A line of columns and arches bisected the room, with the larger space devoted to the courtroom proper and the smaller one to spectators. Eidlitz also designed the two-toned



The old State Capitol, with the new Capitol visible in the background.
COURTESY THE NYS COMMISSION ON THE RESTORITION OF THE CAPITOL

"There shall be a Court of Appeals..."

crimson patterned carpet, drapes, six polished- brass Gothic three-light wall sconces and three twelve-light matching gas chandeliers, all with etched glass shades, and the polychromatic-paint wall decoration - a red-on-red stenciled pattern with a band of gold leaf at the ceiling. The Eidlitz Courtroom was used temporarily by the Senate between 1879, when the Legislature relocated from the old Capitol, and 1881, when the Senate Chamber was completed.

The Eidlitz Courtroom did not gain the Court's approval, however, perhaps for the reasons expressed by M. E. Sherwood that "the lighting is very bad, dazzling and confused, and the acoustic properties decidedly defective." In 1882, Governor Cornell told the Legislature:

The Judges of the Court of Appeals express dissatisfaction with the apartments designed for their use, and seem unwilling to occupy them at present. They desire to have rooms set apart for them in another quarter of the building, and have indicated a preference for a portion of the space originally intended for the State Library... This, however, involves such radical alteration in the plans of the building heretofore adopted, that legislative sanction would be necessary.

An appropriations bill, passed on June 6, 1882, directed the Capitol Commissioners to provide accommodations for the Court of Appeals in whatever part of the unfinished building the Judges chose, and to submit plans for the completion of the chambers to the Judges for approval on or before August 1, 1882.



H. H. Richardson
COURTESY OF THE NYS COMMISSION ON THE
RESTORATION OF THE CAPITOL

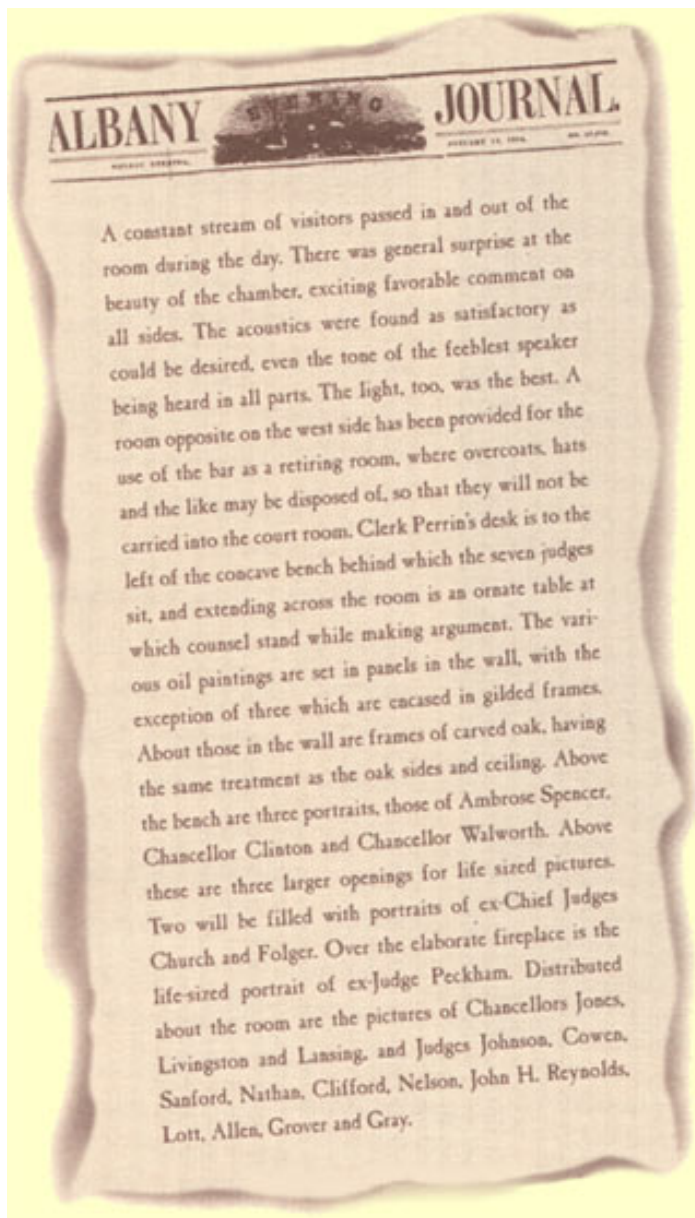
The plans, developed by H. H. Richardson and unanimously approved by the members of the Court that year, provided for a new Courtroom in the southeast corner of the Third Floor of the Capitol, directly above the Executive Chamber. The Court did, however, occupy the Eidlitz Courtroom for its October to December 1883 sessions.

THE COURT OF APPEALS held its first session in the Richardson Courtroom on January 14, 1884. No formal ceremonies took place, although the *Albany Evening Journal* reported that a large number of prominent lawyers and other spectators were present that day. The newspaper report described the suite as containing nine rooms in all, six on the third floor and three on the fourth, with an ornamental iron staircase connecting them. To the



The eastern facade of the Capitol.

The Richardson Courtroom was located in the southeast corner of the third floor.
COURTESY OF THE NYS COMMISSION ON THE RESTORATION OF THE CAPITOL



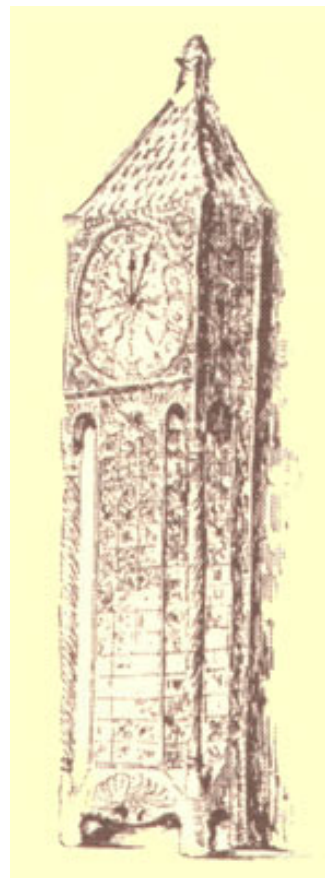
H. H. Richardson's sketch of the clock designed for the courtroom.

COURTESY OF NYS/OFFICE OF GENERAL SERVICES

north of the Courtroom was a retiring room for the Judges and, north of this, two rooms used as the Court's Library. Across the corridor was a room for the lawyers in attendance. The Clerk's Room contained "a very beautiful mantel of Lissoughter marble, of exquisite design and finish." In an 1890 article in *The Green Bag* (a magazine published in the 1890s intended to entertain, instruct and amuse the legal profession), Irving Browne described the suite:

The Court of Appeals has the finest quarters of any court in the world, so Lord Coleridge says. They are on the third floor of the Capitol, extending across the eastern front of the south wing and of the centre. The chamber for arguments is on the southeast corner, with three great windows on the east and two on the south, commanding an extensive view of the beautiful Hudson River valley. The chamber is of moderate

size, well proportioned and of good acoustic qualities. Its walls are paneled from floor to ceiling in oak, and the ceiling is heavily timbered with oak. The bench is elaborately carved along the front, showing grotesque heads, among other ornaments, which may be symbolical of the successful and unsuccessful suitors or counsel. On the walls are thirty-three portraits of deceased judges of the State, nearly all of this court, but embracing. Jay and Nelson. Over the bench hang portraits of Walworth, Kent, Spencer, Church, Jay and Folger, the three former to the lower row, and the three latter to the upper and arranged in the order named from left to right Over the fireplace hangs a superb portrait of the elder Peckham. The fireplace is a magnificent structure of the choicest Mexican onyx. Between the south windows stands a bronze statue, of heroic size, of Chancellor Livingston, the work of our distinguished Albany sculptor, Palmer, and a duplicate of one in the Capitol at Washington.



The hand-carved Richardson clock.
 COURT OF APPEALS
 COLLECTION



The only unpleasant object to lawyers) in the room is a tall clock in a carved oaken case. The judges look at it oftener than the lawyers. The judges' consultation-room, libraries, and toilette-rooms are north of the chamber, communicating with it by a door behind the bench. Through this door at ten o'clock the judges enter in their gowns while the bar rise and stand until the crier opens court and the judges take their seats. There is a daily calendar of eight causes, and the judges sit until two o'clock. Across the hall, on the south, is a large room for the bar, hung with portraits of great dead lawyers, pre-eminent among them Nicholas Hill, at full length, and in the hall hang full-length portraits of two of the greatest living lawyers, David Dudley Field and William M. Evarts.

"There shall be a Court of Appeals..."



The Richardson Courtroom in the Capitol.

COURTESY OF THE NYS COMMISSION ON THE RESTORATION OF THE CAPITOL

THE COURT REMAINED in the Richardson Courtroom until 1916, a period of over 30 years. During that time, the accommodations in the Capitol became inadequate and, in 1909, the Legislature authorized renovations to the State Hall to accommodate the Court of Appeals. Plans were made to house the Court temporarily in the new State Education Building, but there is no record that this relocation took place.

Intended to house State offices, the State Hall was designed by Henry Rector, who succeeded Philip Hooker as Albany's major architect. It was constructed over a ten-year period and completed in 1842.

According to architectural historian Talbot Hamlin, construction of the State Hall "proclaimed the complete victory of Greek Revival in the Albany region." Contemporary accounts describe five-foot-thick walls of marble, quarried and fashioned at Mount Pleasant (Sing Sing), New York, and transported by riverboat and oxen;

foundation stones that were the largest that could be procured; ceilings arched to supersede the use of timbers and make the building fireproof; marble flag floors and stairs; and a copper-sheathed roof and dome. In 1916, State Architect Lewis F. Pilcher designed a rear addition to accommodate the Court of Appeals Richardson Courtroom and a library. The Court held its first session in the old State Hall, renamed Court of Appeals Hall, on January 14, 1917.

A newspaper account of the dedication ceremonies on January 8, 1917 described the new Courtroom as an approximate replica of the Capitol courtroom:

It is somewhat larger than the old one, and the blinding light from the south windows which the judges always have faced has been eliminated. The carved woodwork of the old room was removed piece by piece and set up in the new wing of the state house, however. Oil paintings of former judges panel the four sides of the room, being held in by carved oak frames. Even the onyx and bronze fireplace from



The State Hall was completed in 1842.

"There shall be a Court of Appeals..."

the Capitol was transplanted so the "atmosphere" of the old hearing room would be maintained in the new quarters. A subdued lighting system arranged by the state architect gave the room a calm dignity which brought forth much comment from the judges themselves and many others present.



IN HIS PRESENTATION as part of *Making History Together: The New York State Court of Appeals in Albany's Tricentennial Year* (1986), John Mesick, noted Albany Architect and acknowledged expert on the work of H.H. Richardson, offered a unique perspective on the Courtroom:

And this is clearly the Capitol craftsmen, I believe, sculpting one another in parody. There are very humorous little things that peer out at you here. And unlike later architecture which became almost a machine-repetition of traditional motifs, you look nearly in vain for the same pattern twice in this room. There is always a feast for the eye, wherever you look. It is of the finest quality materials they could have of the day and, yet, a very quiet design that has survived well over time.

When in 1909 the judges had appropriation to build and renovate this building as the Court, they insisted their chambers go with them. And, so, this room was dismantled and brought over here. The ceiling was left behind and the window frames, which were arched in marble



The Richardson Courtroom was relocated to the State Hall in 1917.
COURT OF APPEALS COLLECTION

But most everything else that you lay your eyes upon was conceived by Richardson and built by a crew of craftsmen in the Capitol. The construction of the Capitol brought to Albany artisans in the building trades from all over the world. As the local newspapers noted, the architects didn't like to think that their wonderful, open-stone walls would be furnished by furniture out of a store or someone's catalog. So they established their own furniture shop in the basement of the Capitol; and, all the chairs that most of you are sitting in were manufactured in the basement of the Capitol by these artisans. And to truly appreciate this room, you have to approach the Bench on your hands and knees. The Chief Judge spoke about faces staring out, there are many more faces to be seen on your hands and knees if you look at the underside of this table or, indeed, even the front of the Bench.

on both the south and east facades, remained behind in what is today the Legislative Minority Conference Room of the Senate on the Third Floor And you can see what was left behind over there. But, when it was brought here, certain adjustments had been made given the size of this building and this rear wing was added to the building to include the court room. And scattered throughout the upper floors are other pieces of wonderfully crafted oak furniture that graced the various rooms of the Court in the old Capitol building. They were brought over and have been preserved to this day.

We all owe a great debt of gratitude to the foresight of succeeding generations of the Court that have kept this room intact and valued it for what it is.

"There shall be a Court of Appeals..."

BY THE 1950s, it became evident that the old State Hall, now Court of Appeals Hall, was deteriorating. The portico was in hazardous condition; the exterior column bases, as well as the column shafts and caps, were badly cracked. Life and property were endangered by pieces of column caps, window lintels and other stones spalling off and falling to the ground. The electrical and heating systems were outdated, and steel beams were required to strengthen the structure. Officials at the Department of Public Works considered the cost of renovation such that it would be better to tear down the old structure and start anew. They were overruled by Governor Harriman and the Judges of the Court who believed that the building had great historic

significance as a landmark and a monument as well as a courthouse.

Addressing a meeting of the New York State Bar Association in Saranac, Chief Judge Conway stated:

We have just come from Albany where we held our last session in the old Court of Appeals Hall, a building of ancient and honorable tradition which once presented to the public a facade of delicacy and beauty but which in recent years has begun to show the marks of its age and the ravages of the elements. Our Courthouse is in

In the midst of reconstruction, fire raged through the heart of the building.



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"There shall be a Court of Appeals..."

the process of being remodeled and when we return to it we expect that it will be like new ... As we left the Court on this last occasion we all felt a little sad to see our old rooms being torn up and the outside of the building being boarded and scaffolded. When we return to our building in October of next year we expect to find the outside of the Courthouse restored to its original design and appearance and as much of the inside similarly restored as modern methods and necessities will permit.

Under the direction of State Architect Carl Larson, the renovation took some sixteen months.

On October 22, 1958, in the midst of the reconstruction, a fire raged through the heart of the building, and collapsed the dome.

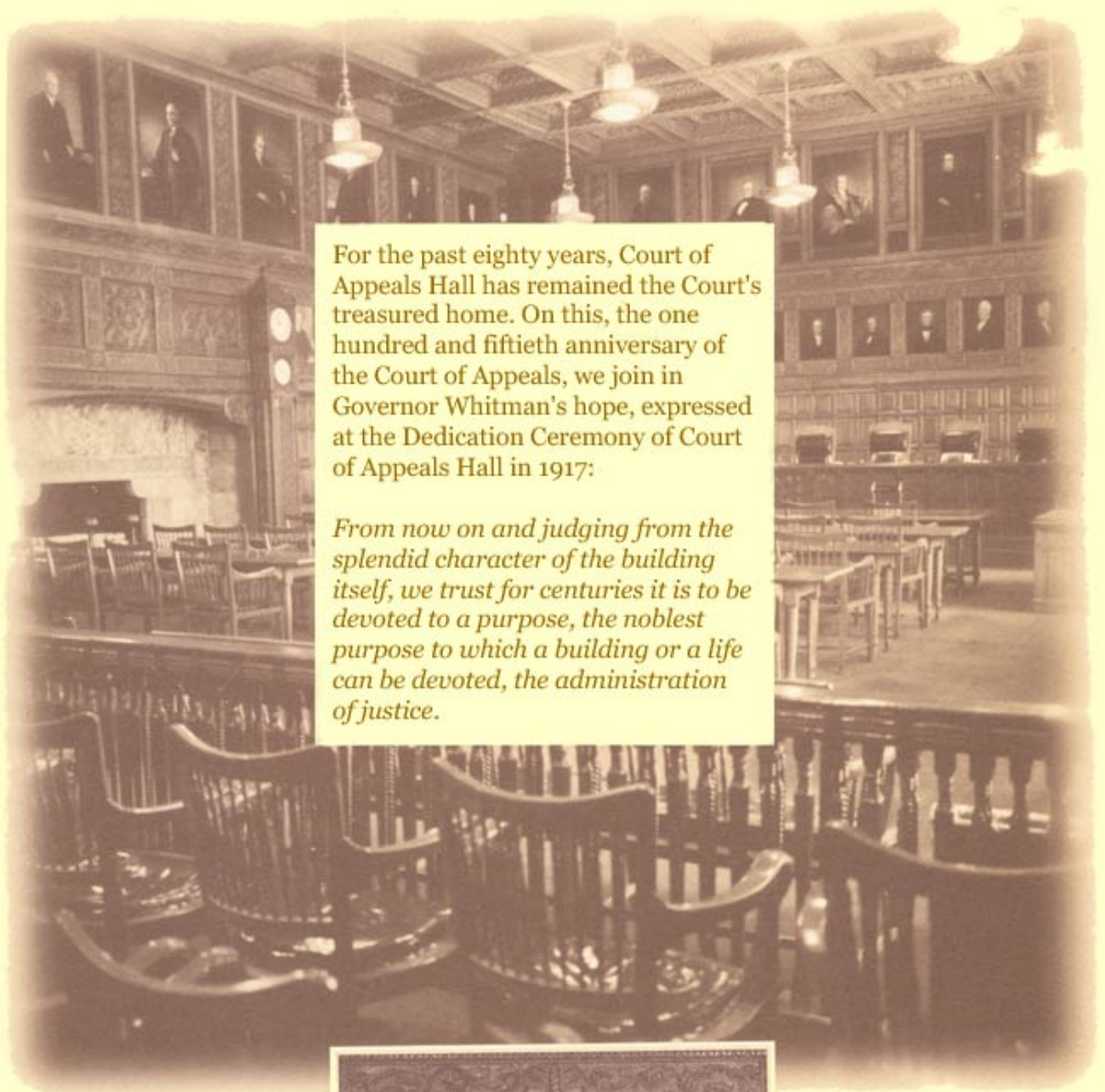
Fortunately, no serious damage was done. A contemporary newspaper story reported that the fire "kind of helped" by burning parts of the top of the building which would have been torn down anyway.

While the renovations were underway, the Court held session in the courtroom of the Appellate Division, Third Department, then located in the building next to Court of Appeals Hall.



SOME EIGHTY PERCENT of the exterior marble was refaced with Vermont marble, and six new Ionic columns replaced the decayed columns. The exterior front capitals and bases were copied from those of the Temple of Nike Apertosa on the Acropolis. A new cupola was added, in the dome of which artist Eugene F. Savage painted a mural depicting "the romance of the skies, emblematic of the three seasons when the court sits - autumn, winter and spring." Summer is also included in the dome painting, but it is separate from the other seasons. Besides silver stars and sky, the mural shows the moon, the sun (typified by Phoebus racing across the sky in his chariot) and Virgo, Leo and the Crab, from the Zodiac. At the request of State and Court officials, the seals of the State of New York and the Court of Appeals were also included.

"There shall be a Court of Appeals..."



For the past eighty years, Court of Appeals Hall has remained the Court's treasured home. On this, the one hundred and fiftieth anniversary of the Court of Appeals, we join in Governor Whitman's hope, expressed at the Dedication Ceremony of Court of Appeals Hall in 1917:

From now on and judging from the splendid character of the building itself, we trust for centuries it is to be devoted to a purpose, the noblest purpose to which a building or a life can be devoted, the administration of justice.



"There shall be a Court of Appeals..."

THE
1847
COURT

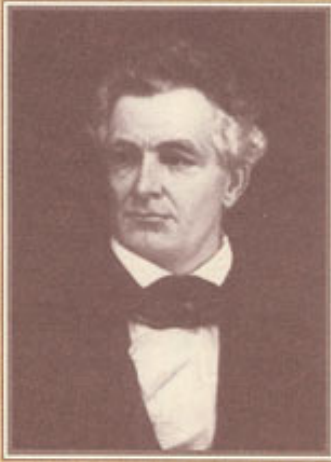
THE
CONSTITUTION
OF THE

State of New-York,

ADOPTED NOVEMBER 3, 1846.

WE THE PEOPLE of the State of New-York, grateful to
Almighty God for our Freedom, in order to secure its
blessings, DO ESTABLISH this Constitution.

CHIEF JUDGE FREEBORN G. JEWETT



Chief Judge Freeborn G. Jewett
COURT OF APPEALS COLLECTION

FREEBORN G. JEWETT was born in Sharon, Connecticut in 1791. He studied law with Henry Swift in Dutchess County, and completed his studies in the office of Colonel Young of Baliston, New York. He was admitted as an attorney in 1814, and as a counselor in 1817. He commenced the practice of law with the Hon. James Porter in Skaneateles, Onondaga County, New York.

Governor Tompkins appointed him a Master in Chancery in 1817. In 1822, Governor DeWitt Clinton appointed him an Examiner in Chancery, a position to which he was reappointed by Governors Yates and Throop. In February 1824, Governor Clinton appointed him Surrogate of Onondaga County. He was reappointed by Governor Yates in 1827 and held this office until 1831.

Chief Judge Jewett was a member of the Assembly from Onondaga County in 1826. He was a Presidential Elector and cast his vote for Andrew Jackson for President in 1828. In 1831, he was elected a Representative to the Twenty-Second Congress. Two years later, he declined renomination. In 1832, he was admitted as an attorney and counselor of the Supreme Court of the United States.

Governor Marcy appointed him a Supreme Court Commissioner for the County of Onondaga, to which office he was reappointed in 1838. In 1839 he was appointed District Attorney of Onondaga County, and filled that office for about six months. He was then appointed

Justice by Governor Wright on March 5, 1845.

When the Court of Appeals was created by the Constitution of 1846, he was elected a Judge of the Court and designated to serve for a two-year term. He was chosen by law as the first Chief Judge. He was re-elected as a Judge of the Court of Appeals in 1849 for an eight-year term. His opinions show him to have been a well-grounded lawyer, a patient investigator and a clear and discriminating writer, and decisions authored by him were often cited in other code states. Excellent examples of his writing can be seen in *French v Garhart* (1 NY 96), concerning a reservation in a deed, and *Van Lueven v Lyke* (1 NY 515), holding that where a domestic animal is in the close of another animal, and commits mischief there, the owner is liable.

His resignation from the Court in June 1853 was due to ill health, and he died in Skaneateles in January 1858. In a memorial, the Judges of the Court stated:

They are sensible of the great value of his judicial services to the People of this State. Deeply regretting his death, they remember the clearness of his intellect; the justness of his judgment; the purity and benevolence of his heart. They desire to preserve some public memorial of this event, which they deplore, and therefore order this entry to be made on the Records of the Court.

GREENE C. BRONSON

BORN IN ONEIDA COUNTY, New York in 1789, Greene C. Bronson was educated as a lawyer and practiced for many years in Utica, New York. In 1819 he was elected Surrogate of Oneida County. He was elected to the New York Assembly in 1822 and then appointed Attorney General in 1829, an office he held for seven years. On January 6, 1836 he was appointed a Puisne Judge and on March 5, 1845, he became Chief Justice of the Supreme Court.

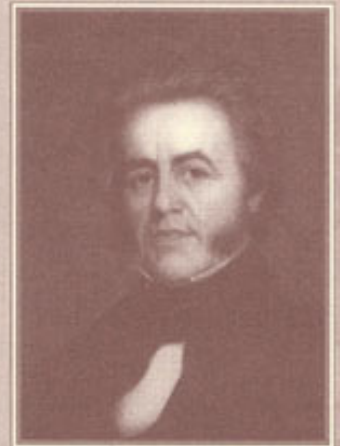
On June 7, 1847 he was elected a Judge of the Court of Appeals, and was designated for a four-year term. On January 1, 1850, he succeeded Freeborn G. Jewett as Chief Judge.

In *Shindier v Houston* (1 NY 261), he joined his colleagues in reversing his own Supreme Court judgment. The decisions in *Villas v Jones* (1 NY 274) on usury, and *Shorter v People* (2 NY 193) on self-defense, are excellent examples of his judicial expertise. W. F. Cogswell, a Rochester,

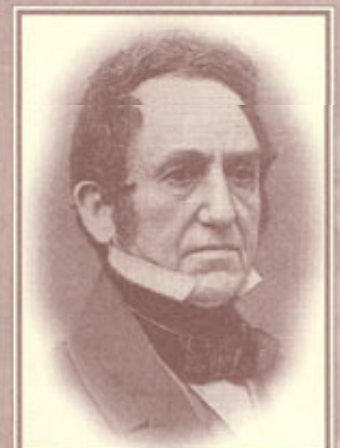
New York attorney, wrote of him:

Judge Bronson was by nature an intense conservative. He had been a member for thirteen years of a court of solely appellate Common Law jurisdiction. He was by the very properties of his office, precluded from mingling much with men or affairs. He was thoroughly grounded in for or acquaintance with equity jurisprudence. He was a great judge in a comparatively limited sphere.

He retired from the Bench in 1851, and settled in New York City, where he practiced law. In 1853, he was appointed Collector of the Port, and in 1860 he was appointed Counsel to New York City, a position he held until 1862. His politics resembled common law rather than equity - he was a "hard-shell" Democrat. He died on September 3, 1863 in Saratoga, New York.



Greene C. Bronson
COURT OF APPEALS COLLECTION

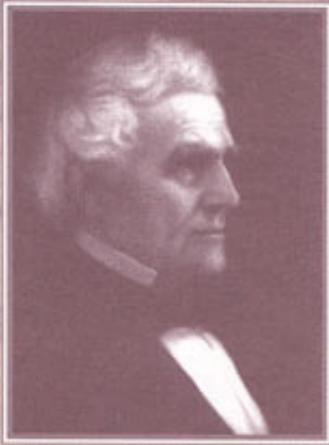


CHARLES H. RUGGLES

CHARLES HERMAN RUGGLES was born in Litchfield County, Connecticut on February 10, 1789. Upon completion of his professional studies, he practiced law in Kingston, New York. In 1820 he was elected to the New York State Assembly. He was a Congressional Representative from 1821 until 1823. His judicial offices included Vice Chancellor, Supreme Court Justice and Judge of the Second Circuit (Dutchess County), to which he was appointed in 1831.

In his History of Dutchess County, James H. Smith stated:

In his court respectful attention, patient investigation and impartial determination were sure of attainment. Judge Ruggles and his court were always peculiarly popular with the younger members of the Bar. He was dignified in person, kind in heart, clear in intellect and spotless in character.



Addison Gardiner
COURT OF APPEALS COLLECTION

Upon leaving the office of Second Circuit Judge, he served a second term in the Legislature. He was a member of the State Constitutional Convention of 1846 and Chair of the Committee appointed to design the new judicial system. He was elected to the Court of Appeals in 1847 for a term of six years.

In April 1851, he was appointed Chief Judge of the Court of Appeals, a position he held until January 1854. He was re-elected as an Associate Judge of the Court of Appeals on November 1853, and held that

ADDISON GARDINER was born in Rindge, New Hampshire on March 19, 1797. He was raised and educated in Manlius, New York and graduated from Union College in 1819. He studied law and was admitted to the Bar in 1822. He practiced law in Rochester, New York. There, he was chosen Justice of the Peace and, in 1825, was appointed District Attorney for Monroe County. He formed a partnership with Samuel L. Selden and his brother, Henry R. Selden, both of whom subsequently served as Judges of the Court of Appeals. In 1829, he was appointed a Circuit Judge for the Eighth Circuit. He resigned this office in 1838 and resumed his law practice in Rochester.

He was elected Lieutenant Governor in 1844 and in 1846, and was thus President of the Senate and the Court for the Trial of Impeachments and the Correction of Errors, an office he resigned when he was elected to the Court of Appeals in 1847 for a term of eight years. On January 1, 1854 he became Chief Judge of the Court of Appeals. He did not run again at the end of his term. Excellent examples of his writing may be found in his dissent in *Miller v Danks* (1 NY 129), discussing the constitutionality

of an exemption of personal property from execution for antecedent debts, and his opinions in *Leggett v Perkins* (2 NY 297), concerning a trust to receive and pay over rents and profits of land; *Chautauqua Co. Bank v White* (6 NY 236), determining the scope of a receiver's deed, and *Talmage v Pell* (7 NY 328) relating to an illegal purchase of State stocks by a bank. For the next 25 years he was a referee, hearing as many important causes as any Justice of the Supreme Court. W. F. Cogswell wrote concerning him:

He died in Poughkeepsie, New York on June 16, 1865.

of an exemption of personal property from execution for antecedent debts, and his opinions in *Leggett v Perkins* (2 NY 297), concerning a trust to receive and pay over rents and profits of land; *Chautauqua Co. Bank v White* (6 NY 236), determining the scope of a receiver's deed, and *Talmage v Pell* (7 NY 328) relating to an illegal purchase of State stocks by a bank. For the next 25 years he was a referee, hearing as many important causes as any Justice of the Supreme Court. W. F. Cogswell wrote concerning him:

There have been judges of greater learning, but in large comprehension and true judicial wisdom it is doubted whether he is surpassed by any. His opinions are simple, terse, business-like documents. He never wrote a line to display his learning or for rhetorical effect. The hesitating utterance of the truth by the timid was not lost upon his receptive ear; the subtle perversion of it by the disingenuous did not deceive or mislead him.

He died in Rochester, New York on June 5, 1883.

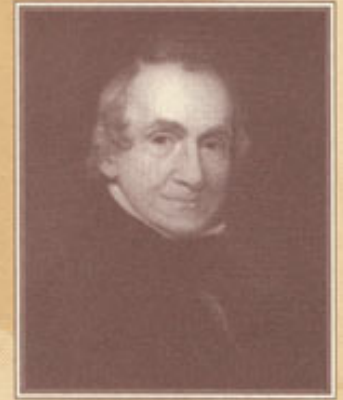
SAMUEL JONES

SAMUEL JONES was born in New York City on May 26, 1769. He graduated from Columbia University in 1790. He then studied law in his father's office and was admitted to the Bar. He was elected to the Assembly in 1812, and served until 1814. In 1823, he became Recorder of New York City. In 1826, he became Chancellor of the State. Between 1828 and 1847 he was the Chief Justice of the (old) Supreme Court of New York.

In 1847, he was elected a Justice of the Supreme Court in the First Judicial District, and he remained in that office until 1849. Representing the Supreme Court, First Judicial District, he was an ex-officio member of the first

Court of Appeals Bench. Excellent examples of his work may be found in *Corning v McCullough* (1 NY 47), involving a suit against a stockholder of a corporation, *Ruckman v Pitcher* (1 NY 392), an action to recover money deposited on an illegal wager, and *Brewster v Striker* (2 NY 19), concerning the legal interest that could pass by sale under judgment and execution.

Although then 80 years old, he returned to legal practice in 1849. The term "Father of the New York Bar," which first pertained to his father, also applied to Judge Samuel Jones. He died in Cold Spring Harbor, Long Island, New York on August 9, 1853.



Samuel Jones
COURT OF APPEALS COLLECTION

WILLIAM B. WRIGHT

WILLIAM B. WRIGHT was born in Newburgh, New York on April 16, 1806. He studied law with Ross and Knevals, then leading members of the Orange County Bar. In 1831, he moved to Goshen and practiced law in the office of Samuel J. Wilkin. He opened his own law office in Monticello, Sullivan County in 1835.

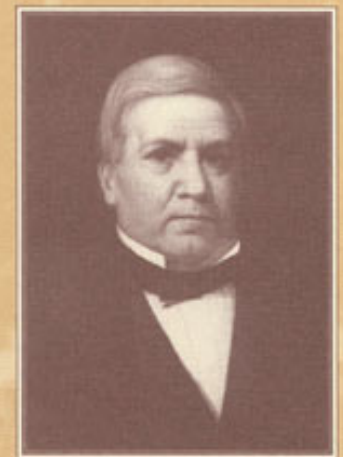
On February 20, 1840 he was elected Surrogate of Sullivan County, a position he held for four years. He was elected a delegate to the Constitutional Convention of 1846 from Sullivan County. He was also a member of the Assembly in 1846/47, resigning following his election as Justice of the Supreme Court from the Third Judicial District for a term of two years.

Representing the Supreme Court, Third Judicial District, he was an ex-officio member of the first Court of Appeals Bench. In 1849, he was re-elected to a full eight-year term on the Supreme Court, and subsequently was elected to fill an unexpired

term of four years arising upon the death of Malborne Watson. He again became an ex-officio Judge of the Court of Appeals in 1856 and in 1860. On November 5, 1861 he was elected a Judge of the Court of Appeals, and he became Chief Judge on January 1, 1868. He died during the January 1868 term of the Court. In a memorial address, poet Alfred B. Street said of him:

*His taste was cultured by much
and varied reading, and he
twined the fresh roses of
literature with the dry lichens of
the law. As a writer his style was
beautifully concise and clear, his
ideas showing through the
clearness like objects through
crystal water.*

Excellent examples of his writing may be seen in *Levy v Levy* (3 NY 97) discussing charitable trusts, and *Sparrow v Kingman* (1 NY 242) concerning estoppel in pais.



William B. Wright
COURT OF APPEALS COLLECTION

CHARLES GRAY



Charles Gray
COURT OF APPEALS COLLECTION

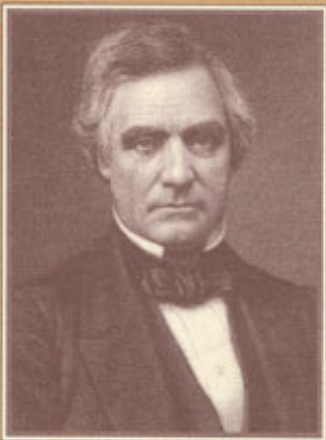
BORN ON SEPTEMBER 20, 1796 in the Town of Palatine, Montgomery County, New York, Charles Gray was educated at the Fairfield Academy, Fairfield, New York and then commenced his legal studies with Henry Markell. In 1819, he entered the Herkimer law firm of Simeon and Lauren Ford. He was admitted to the Bar in 1822, settled in Herkimer and practiced law with his partner, James McAuley. Two years later, he founded his own law firm, focusing on conveyancing, office counsel, and other unlitigated matters. He became Herkimer County Jail Building Commissioner in 1832 and was elected a Member of the Assembly in 1835.

Between 1838 and 1841 he was a Judge of the Court of Common Pleas.

For several years he held the office of Master in Chancery in Herkimer County. In 1847, he was elected a Justice of the Supreme Court, and was designated for a two-year term. Representing the Supreme Court, Fifth Judicial District, he was an ex-officio member of the first Bench of the Court of Appeals. Excellent examples of his writing can be seen in *Dodge v Manning* (1 NY 298), concerning payment of a testator's legacy to his granddaughter, and *Deraismes v The Merchants' Mutual Ins. Co.* (1 NY 371), discussing insurance premiums.

He had a strong interest in military affairs and held the office of Brigadier General, commissioned by Governor Marcy. He died on February 21, 1871 in Herkimer, New York.

THOMAS A. JOHNSON



Thomas A. Johnson

THOMAS A. JOHNSON was born in Blanford, Hamden County, Massachusetts on May 15, 1804 and grew up in Colesville, Broome County, New York. He was educated at the Common School and then studied law with Robert Monell in Greene, Chenango County, New York. Following admission to the Bar, he commenced practice in Centreville. Later, he moved to Knoxville and, in 1839, he became one of the first residents of the Village of Corning where he held many town offices. Until his elevation to the Bench, he was in the active and constant practice of his profession. He received the honorary degree of LL. D from Hobart College, Geneva, New York.

In 1841, he was appointed Land Commissioner for the Erie Railroad Company. In 1847 he was elected a Justice of the Supreme Court and drew a two-year term. Representing the Supreme Court, Seventh Judicial District, he was an ex-officio

member of the first Bench of the Court of Appeals.

At the end of his two-year term, he was re-elected to the Supreme Court for a term of eight years. He was subsequently re-elected for two further eight-year terms, thus holding the office of Supreme Court Justice for twenty-five years. He again served as an ex-officio Judge of the Court of Appeals in 1856 and 1864. At the time of his death, he was the senior Justice of the Supreme Court in New York State. In W. W. Clayton's History of Steuben County, Judge Johnson is described as:

Energetic and faithful in business, benevolent of heart, conscientious in principle and genial and courteous in manner, he had but to form an acquaintance to secure a friend.

He died on December 5, 1872 in Corning, New York.

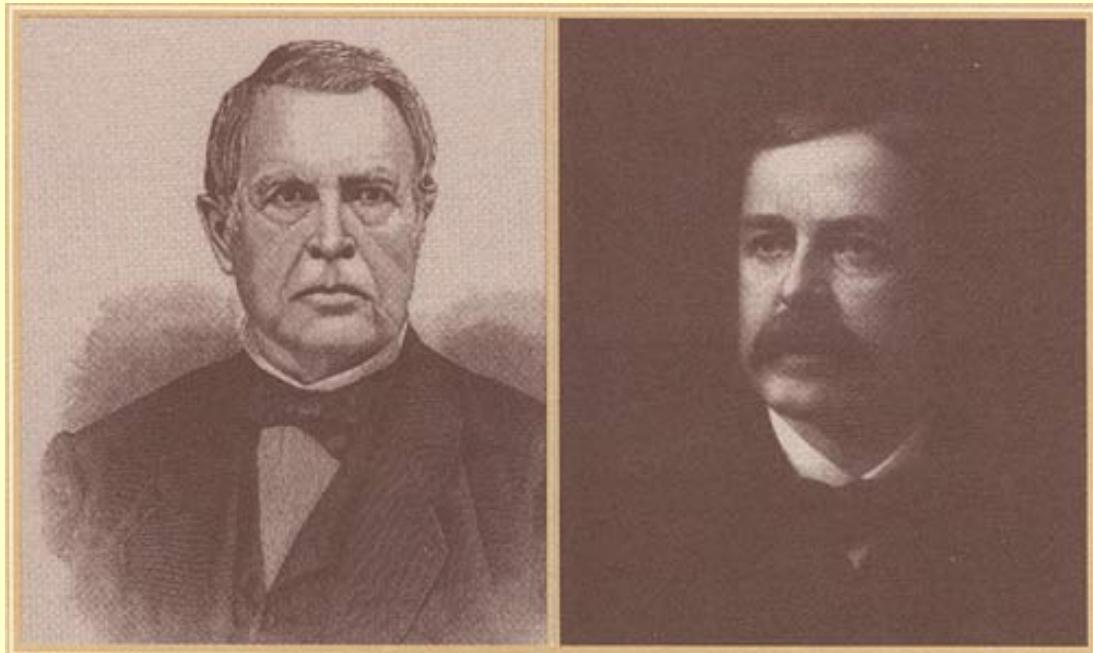
"There shall be a Court of Appeals..."

FATHERS, SONS AND BROTHERS



"There shall be a Court of Appeals..."

THE HANDS



Augustus C. Hand

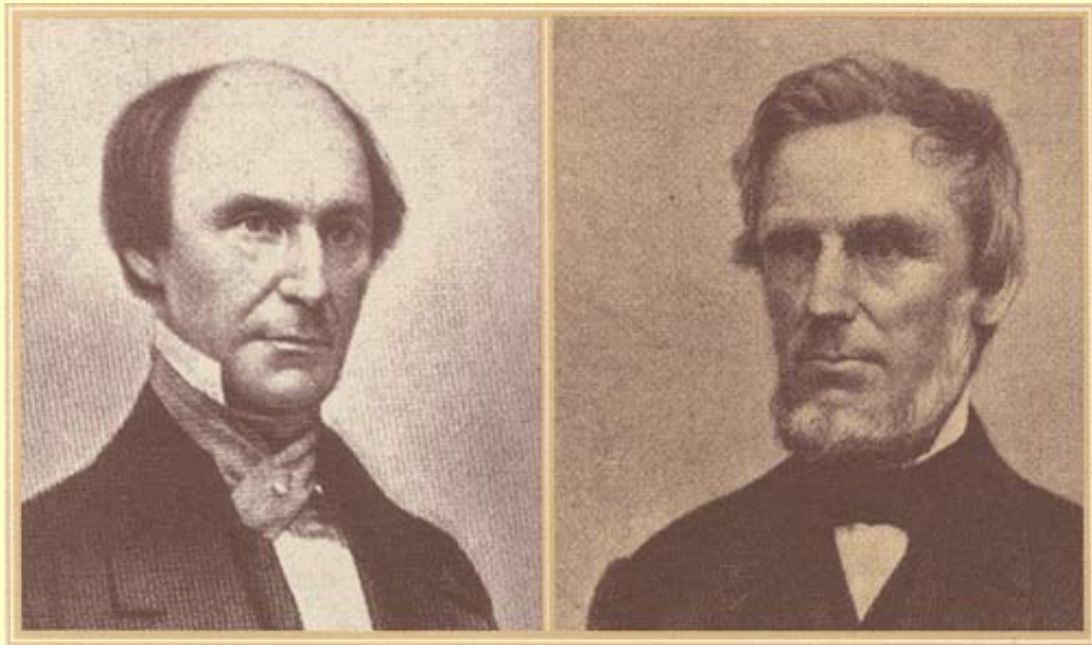
Samuel Hand

AUGUSTUS C. HAND was elected a Justice of the Supreme Court on June 7, 1847. Representing the Supreme Court, Fourth Judicial District, he was designated an ex-officio Judge of the Court of Appeals in 1855. His son, Samuel Hand, became an Associate Judge of the Court of Appeals on June 11, 1878. Appointed by Governor Tilden, he replaced William F. Allen, who had died on

June 3, 1878. His term of office expired on January 1, 1879.

Augustus C. Hand and Samuel Hand were the grandfather and father, respectively, of the famous Federal Circuit Judge, B. Learned Hand (1872-1961). Then United States Supreme Court Justice Benjamin N. Cardozo was not alone in considering Judge Hand the greatest living American jurist.

THE SELDEN BROTHERS



Samuel Lee Selden

Henry R. Selden

THE SELDEN BROTHERS and Addison Gardiner, a member of the 1847 Court and later Chief Judge of the Court of Appeals, were law partners. In 1854, Samuel Lee Selden, formerly a State Reporter and then a Justice of the Supreme Court, was designated ex-officio Judge of the Court of Appeals. The following year he was elected for a full term as Associate Judge of the Court. He became Chief Judge on January 1, 1862, and resigned from the Court on July 1, 1862.

His brother, Henry R. Selden, also a former State Reporter, was appointed Chief Judge in his place, but he took his seat as an Associate Judge, leaving the place of Chief Judge to be filled by Judge Hiram Denio, under the terms of the 1846 Constitution. He was elected for a full term in November 1863, and resigned from the Court in January 1865.

THE ANDREWS

IN THE MAY 1870 elections for the new Court of Appeals under the 1869 Constitution, Charles Andrews was elected an Associate Judge. Upon the resignation of Charles J. Folger from the office of Chief Judge in 1881, Judge Andrews was appointed to succeed him. At the end of his term as Chief Judge, he sought re-election, but lost. In 1893, he was again elected

an Associate Judge of the Court and, on January 1, 1895, he became Chief Judge for the second time, succeeding Judge Robert Earl.

His son, William S. Andrews, was a Justice of the Supreme Court for seventeen years before becoming an Associate Judge of the Court of Appeals in 1917. He retired from the Court on December 31, 1928.



Charles Andrews
COURT OF APPEALS COLLECTION



William S. Andrews
COURT OF APPEALS COLLECTION



Denis O'Brien
COURT OF APPEALS COLLECTION



John F. O'Brien
COURT OF APPEALS COLLECTION

THE O'BRIENS

HAVING HELD the office of Attorney-General from 1884 until 1885 and having served on the Commission to Revise the Excise Laws, Denis O'Brien was elected an Associate Judge of the Court of Appeals on November 5, 1889. He was re-elected in 1903, having been endorsed by both political parties, and served on the Court until December 31, 1907.

His son, John F. O'Brien, was appointed an Associate Judge of the Court of Appeals by Governor Alfred E. Smith to fill the vacancy caused by the election of Judge Benjamin N. Cardozo as Chief Judge in January 1927. The following November, with the endorsement of both parties, Judge O'Brien was elected to a full term on the Court.

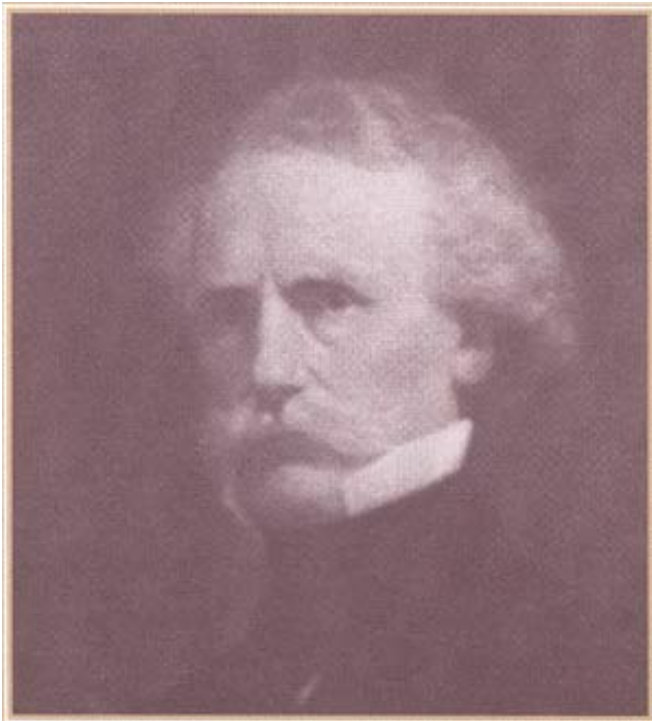
THE PECKHAMS

ON NOVEMBER 8, 1861, Rufus W. Peckham was elected a Justice of the Supreme Court for the Third Judicial District and, in 1866, was designated an ex-officio Judge of the Court of Appeals. In the May 1870 elections for the new Court of Appeals under the 1869 Constitution, he was elected an Associate Judge. He was lost at sea when the Ville du Havre was wrecked on November 22, 1873.

Thirteen years after his father's election to the Court, on November 6, 1883, Rufus W. Peckham, Jr. was elected Associate Judge of the Court of Appeals. He resigned from the Court on December 3, 1895, when President Cleveland nominated him as an Associate Justice of the Supreme Court of the United States.



Rufus W. Peckham, Jr.
COURT OF APPEALS COLLECTION



Rufus W. Peckham
COURT OF APPEALS COLLECTION

PREFACE.

On the morning of the 22d of November, 1873 the steamer Ville Du Havre came in collision with the ship Loche Earne, and sank in mid-ocean. Hon. Rufus W. Peckham, one of the judges of the Court of Appeals, worn out by the arduous and unremitting labors of his office, and hoping to find in change of scene and climate, and in a short respite from his duties; recuperated energies and renewed vigor, had taken passage in that unfortunate steamer; standing upon its deck, encouraging the affrighted ones around him, calmly and bravely he met his fate, and sank into an ocean grave.

Thus the first vacancy in the new Court of Appeals has been created, and it is deemed appropriate to make this, the first volume published after that sad calamity, in a measure, a memorial volume.

ALBANY, March 10th, 1874.

H. E. SICKELS,
State Reporter.

STEWART E. STERK

THE NEW YORK COURT OF APPEALS



150 YEARS

OF
LEADING DECISIONS

Above: Judge Frederick E. Crane
COURT OF APPEALS COLLECTION

THE NEW YORK COURT OF APPEALS: 150 YEARS OF LEADING DECISIONS

Stewart E. Sterk*

During its first 150 years, the New York Court of Appeals has had more impact on more areas of law than any other court in the United States. Other state courts - the California Supreme Court in the Traynor era, the New Jersey Supreme Court under Chief Justice Weintraub, to take two obvious examples - have had enormous impact, but no other state court has generated leading case after leading case in every decade for 150 years. Federal courts, including the United States Supreme Court, have had an enormous impact on American law, but that impact has been concentrated in public law; no Federal court has exerted influence comparable to that of the Court of Appeals over the wide range of problems that confront most Americans in their everyday lives: contracts, torts, property, trusts, wills, divorce law (to name a few).

Why has the Court of Appeals exercised such influence? In part, because of New York's importance as a center of commerce and finance. In large measure, however, the significance of the Court of Appeals' decisions is attributable to the wisdom (and the style) of the judges who have graced the court during its first century and a half. The leading law school casebooks - the sources that introduce law students into the profession - are filled with Court of Appeals opinions, most of them chosen because they serve as the best exposition of important legal principles.



Excerpt from the Minutes of the Court of Appeals (1847)

COURT OF APPEALS COLLECTION

In light of the rich and diverse body of Court of Appeals decisions, any attempt to label a group of them as "most significant" is certain to generate controversy - largely because of the important decisions that will be excluded from the group. What follows, then, is a sampling of those cases in which the Court of Appeals has left its mark on the jurisprudence of the state and the nation.

The sampling is "biased" in a number of ways. First, cases construing state statutes and the state constitution are underrepresented because decisions in those cases tend to have less impact on the national jurisprudence - even though the court's docket has increasingly been devoted to those cases, and even though the cases have significant importance for the people of New York State. In particular, the sampling of cases does not reflect the energies the court has devoted to criminal procedure issues over the last several decades. Second, it generally takes time for a court decision to be appreciated as "significant;" as a result,

there is an inevitable bias in the sampling against very recent decisions. Nevertheless, because past is prologue, it is certain that some of the court's recent decisions will have a profound effect on the jurisprudence, and I have included a number of recent cases which seem likely to become "landmarks of the law."

— CONTRACT LAW —

1. Third Party Beneficiaries

The Court of Appeals made its first significant mark on contract law before the Civil War when, in 1859, the court decided [Lawrence v. Fox](#), 20 N.Y. 268 (1859). To modern ears, the case was a simple one. Holly lent Fox \$300, telling Fox that Holly owed \$300 to Lawrence, and had agreed to repay Lawrence the next day. As Fox received the money, he promised Holly he would repay Lawrence the next day. Fox never repaid Lawrence, and Lawrence brought an action against Fox. After a jury verdict for Lawrence, the trial court entered judgment against Fox.

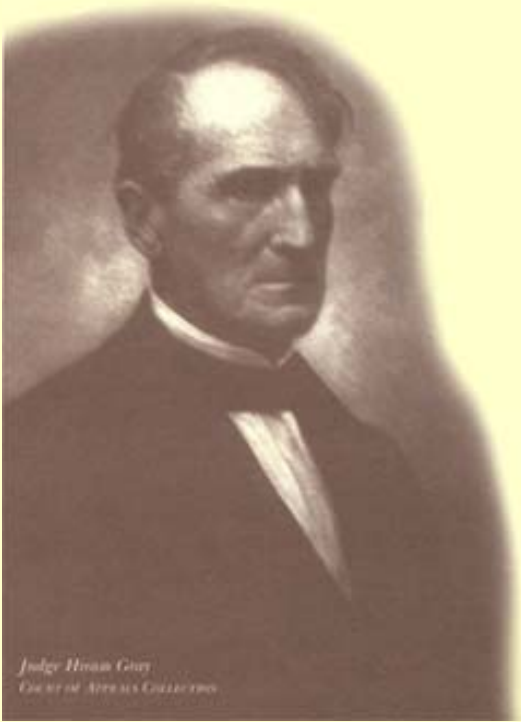
When the case reached the Court of Appeals, Fox made three arguments. The Court of Appeals, in an opinion by Judge Hiram Gray, quickly dispatched the first two - that oral testimony by a bystander was insufficient to establish the promise from Fox to Holly, and that the promise from Fox to Holly was not supported by consideration. The court then turned to Fox's third contention: Lawrence could not recover from Fox because Lawrence was not in privity of contract with Fox. Today, Fox's argument seems almost silly, but it seems silly largely because every American lawyer is familiar with the doctrine of *Lawrence v. Fox*: a third party may enforce a contract intended for his benefit.

When the case reached the Court of Appeals, Fox made three arguments. The Court of Appeals, in an opinion by Judge Hiram Gray, quickly dispatched the first two - that oral testimony by a bystander was insufficient to establish the promise from Fox to Holly, and that the promise from Fox to Holly was not supported by consideration. The court then turned to Fox's third contention: Lawrence could not recover from Fox because Lawrence was not in privity of contract with Fox. Today, Fox's argument seems almost silly, but it seems silly largely because every American lawyer is familiar with the doctrine of *Lawrence v. Fox*: a third party may enforce a contract intended for his benefit.

Before *Lawrence v. Fox*, a number of courts had held that when a trustee promises a trust settlor to hold trust funds for the benefit of designated beneficiaries, the beneficiaries may enforce those duties against the trustee, even if the beneficiary was not a party to the contract between settlor and trustee. Fox (and Judge George E Comstock, in his Court of Appeals dissent) argued that only in cases of a trust, where the trust settlor has given the trust beneficiary an equitable property interest in the trust property, may the beneficiary enforce an agreement to which the beneficiary was not a party. Judge Gray, in a model of common law analysis, rejected that argument. First, Judge Gray demonstrated that the underlying reasons for holding trustees liable to beneficiaries were equally applicable on the facts of *Lawrence v. Fox*:

"In this case the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay."

20 N.Y. at 274. Judge Gray then went on to argue that the principle previously applied to trustees was in fact merely an application of a broader principle of the common law:



Judge Henry Guy
COURT OF APPEALS COLLECTION

“The principle illustrated by the example so frequently quoted (which concisely states the case at hand) ‘that a promise made to one for the benefit

of another, he for whose benefit it is made may bring an action for its breach,' has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases."

Id. at 274 (quotations in original).

The Court of Appeals opinion in *Lawrence v. Fox* remains the foundation for modern third-party beneficiary law. Indeed, the court was well ahead of its time in *Lawrence v. Fox*, and it was not until the twentieth century that many courts accepted the broad propositions advanced in the court's opinion.

If the Court of Appeals is responsible for inventing third-party beneficiary theory in *Lawrence v. Fox*, the court is also responsible for defining its appropriate limits. In [*H. R. Moch Co., Inc. v. Rensselaer Water Co.*](#), 247 N.Y. 160 (1928), a water company contracted with the city to supply water for a variety of uses, including service at fire hydrants. During a fire, a blaze spread to a warehouse. The warehouse owner notified the water company, but the water company allegedly provided inadequate water pressure to put out the flames. As a result, the warehouse and its contents were destroyed. The warehouse owner brought an action against the water company, seeking damages for the company's breach of its contract with the city (a contract which allegedly required the company to furnish water pressure sufficient to prevent the spread of the fire). Special Term refused to dismiss the complaint, a divided Appellate Division reversed, and the warehouse owner appealed to the Court of Appeals, relying principally on *Lawrence v. Fox*.

In an opinion by Chief Judge Benjamin N. Cardozo, the Court of Appeals affirmed, holding that the warehouse owner was not entitled to enforce the contract between the city and the water company. The court read *Lawrence v. Fox* to permit a third party to enforce a contract only when the third party is an intended

beneficiary of the contract. Why impose such a limit? The court's opinion relies squarely on the intention of the parties to the contract:

"If the plaintiff is to prevail, one who negligently omits to supply sufficient pressure to extinguish a fire started by another, assumes an obligation to pay the ensuing damage, though the whole city is laid low. A promisor will not be deemed to have had in mind the assumption of a risk so overwhelming for any trivial reward."

247 N.Y. at 166. At the same time, however, the court's discussion of the promisor's "trivial reward" hints at another reason to limit liability to third parties: if third-party beneficiary theory were extended too far, many potentially beneficial contracts would not be made. In modern terminology, the prospect of free riders — third parties who do not pay for the privilege of enforcing contract obligations, but who nevertheless assert the



Chief Judge Benjamin N. Cardozo
COURT OF APPEALS COLLECTION

right to enforce those obligations - would interfere with the ability of the contract parties to enter into contracts for their mutual benefit.

It should not be surprising, then, that leading casebooks treat *Lawrence v. Fox* and *H.R. Moch Co., Inc.* as bookends, between them illustrating the existence, and the limits, of third-party beneficiary theory.

2. Reliance as a Basis for Contract Enforcement

Another pair of Court of Appeals decisions,

Hamer v. Sidway, 124 NY 538 (1891) and

De Cicco v. Schweizer, 221 NY 431 (1917),

serve as precursors of the more recent recognition that detrimental reliance on a promise often is, and should be, a sufficient basis for enforcement of the promise. Both cases involved contracts made not in a commercial context, but within the confines of the family. In both cases, the Court of Appeals enforced contracts, rejecting the argument that consideration was inadequate.

First, consider *Hamer v. Sidway*. On March 20, 1869, William E. Story promised his 15-year old nephew and namesake, William E. Story, 2d, that he would pay the nephew \$5,000 if the nephew would "refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age." Six years later, the uncle acknowledged that the nephew had performed, and wrote the nephew indicating that the uncle was holding the money for the nephew's benefit. The uncle later died, and his executor refused to pay the nephew's assignee, contending that the agreement was invalid for want of consideration.



Judge Alton B. Parker
COURT OF APPEALS COLLECTION

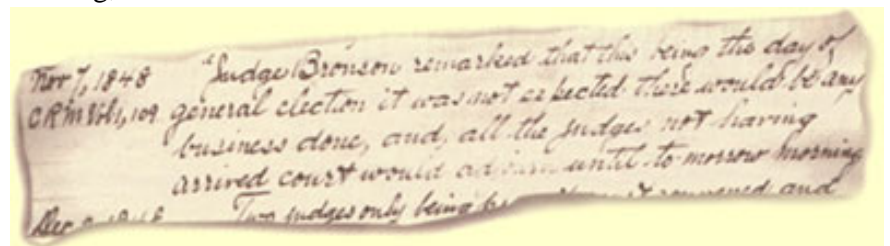
The executor's argument was this: the nephew's abstinence was of no particular benefit to the uncle, and, at the same time, was not a detriment to the nephew; indeed, the executor argued, the abstinence was beneficial to the nephew. Hence, the executor argued, the nephew's abstinence could not constitute consideration for enforcement of the contract.

In an opinion by Judge Alton B. Parker - the only Court of Appeals Judge to run for President of the United States - the court rejected the executor's argument, holding that courts should not evaluate whether the consideration furnished actually benefited or harmed the parties to the transaction:

"It is sufficient that [the nephew] restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense."

124 N.Y. at 546. Although the court decided the case by concluding that the agreement was supported by consideration, this critical sentence in the opinion could have been written 100 years later by a court invoking promissory estoppel as a basis for enforcing the uncle's agreement. Judge Parker's opinion makes his underlying premise clear: the nephew's detrimental reliance bound the uncle to perform on his promise.

Twenty-six years later, in *De Cicco v. Schweizer*, the Court of Appeals again highlighted the importance of reliance as a basis for contract enforcement. Blanche Schweizer was engaged to be married to Count Oberto Giacomo Giovanni Francesco Maria Gulinelli, whose name was apparently larger than his checkbook balance. Before the wedding, Blanche's father



promised, in writing, to pay Blanche \$2,500 per year for the duration of his life “in consideration of all that is herein set forth.” Blanche and the Count were married, and Blanche’s father made the annual payments for ten years. Blanche then assigned her right under the contract and, when her father refused to pay the assignee, the assignee brought an action on the contract. In Judge Cardozo’s words, the question was “whether there is any consideration of the promised annuity.”

The Court of Appeals held that the contract was supported by adequate consideration. But Judge Cardozo’s focus was on reliance, not consideration:

“The defendant knew that a man and a woman were assuming the responsibilities of wedlock in the belief that adequate provision had been made for the woman and for future offspring. He offered this inducement to both while they were free to retract or delay. That they neither retracted nor delayed is certain.... It is enough that the natural consequence of the defendant’s promise was to induce them to put the thought of rescission or delay aside.”

221 N.Y. at 437. In *De Cicco*, as in *Harner v. Sidway* before it, the Court of Appeals recognized - well before the legal community generally - the importance of detrimental reliance as a foundation for contract enforcement. It should be no surprise, then, that both cases are prominently featured in most introductory Contracts courses.

3. Interpreting Contract Language to Avoid Putting One Party at the Other’s Mercy

When parties enter into a contract, they rarely foresee every circumstance that might arise during the course of performance. How should a court deal with problems not expressly dealt with in the contract? In two of the most significant contract cases - *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88 (1917), and *Jacob & Youngs v. Kent*, 230 N.Y. 239 (1921) - the Court of Appeals looked beyond the language of the contract to reach results that appeared more in line with the parties’ intentions. In each case, the court’s opinion broke significant new ground.

Lucy, Lady Duff-Gordon, a fashion designer, gave Wood an exclusive right to market her designs and her endorsements of the designs of others. In return, Wood was to give her one-half of all profits and revenues derived from contracts he might make. Wood brought an action alleging that Lady Duff-Gordon breached the contract by endorsing dresses, fabrics, and millinery without his knowledge, and without sharing the profits. Wood alleged that this behavior violated the exclusive right provision in the contract. Lady Duff-Gordon sought judgment on the pleadings, contending that the contract was invalid for lack of consideration because Wood was not, in her view, obligated to do anything under the contract. Supreme Court denied her motion, but the Appellate Division reversed, and Wood appealed.

The Court of Appeals reversed, concluding that the circumstances surrounding the agreement justified the conclusion that Wood had bound himself to use reasonable efforts to market Lady Duff-Gordon’s designs. In Judge Cardozo’s famous words:

“The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking, and yet the whole writing may be ‘instinct with an obligation,’ imperfectly expressed. If that is so, there is a contract.”

222 N.Y. at 91 (citation omitted). Judge Cardozo went on to emphasize that the contract imposed on Wood a

The 1921-23 Court in conference. From left: Judges Pound, McLaughlin, Cardozo, Crane, Andrews, Chief Judge Hiscock and Judge Hogan.



duty to account monthly for all moneys received, and to take out all patents and copyrights and trademarks necessary to protect Lady Duff-Gordon's creations. Cardozo observed, that the agreement would not have had the business efficacy the parties obviously intended if the agreement were interpreted to impose no obligations on Wood. Hence, the court implied a promise on his part to

use reasonable efforts to bring profits and revenues into existence. As a result, the contract was supported by consideration, and Lady Duff-Gordon could not avoid her side of the bargain by contending that the agreement imposed no enforceable obligation on Wood.

Perhaps the most important principle of interpretation endorsed by Cardozo in *Wood v. Lucy, Lady Duff-Gordon* is his famous statement that "[w]e are not to suppose that one party was to be placed at the mercy of the other." *Id.* at 91. That principle, used to imply an obligation to make reasonable efforts in the *Wood* case, also underlies the court's treatment of the measure of damages in *Jacob & Youngs v. Kent*.

Kent hired Jacob & Youngs to build a country residence. The contract provided that all pipe should be "of the grade known as 'standard pipe' of Reading manufacture." 230 N.Y. at 240. After Jacob & Youngs had encased the plumbing in the walls, Kent learned that some of the pipe installed had been made at factories other than Reading. Kent's architect ordered Jacob & Youngs to demolish substantial parts of the completed structure to replace the pipe. Jacob & Youngs refused and, when final payment was refused, brought an



Judge Frederick F. Crane wrote the concurring opinion in *De Cicco v. Schweizer*.
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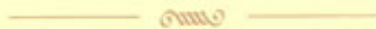
action for the contract balance. Supreme Court directed a verdict for Kent, excluding evidence that the pipe used was the same in quality as Reading pipe. The Appellate Division reversed and granted a new trial, and Kent appealed.

A divided Court of Appeals affirmed. Writing for the court's majority, Judge Cardozo emphasized that if Kent were permitted to insist on reconstruction of the house, "the significance of the default [would be] grievously out of proportion to the oppression of the forfeiture." *Id.* at 243-44. In holding that Kent was limited to the difference in value caused by the difference in pipe, Judge Cardozo articulated both the general rule, and the exception applicable to cases like *Jacob & Youngs*:

"The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value. Specifications call, let us say, for a foundation built of granite quarried in Vermont. On the completion of the building,

the owner learns that through the blunder of a subcontractor part of the foundation has been built of granite of the same quality quarried in New Hampshire. The measure of allowance is not the cost of reconstruction."

Id. at 244. But Judge Cardozo was not content to leave this rule as a rule of "justice"; he noted that an unjust result is one not likely to have been intended by the parties. Id. at 242. As in *Wood v. Lucy, Lady Duff-Gordon*, Cardozo's basic premise appears to have been that contract parties would not willingly put themselves in a position where they would be at the mercy of their contract partners. Permitting Kent to recover the cost of completion in the *Jacob & Youngs* case would put the contractor at the owner's mercy; the owner would be able to insist on payment up to the exorbitant cost of reconstruction even if the owner did not care a whit about the source of the pipe. That, in Cardozo's view, would not have been the parties' intention at the time they entered into the agreement.



4. Economic Duress

We have already confronted Judge Cardozo's principle that we should not construe contracts to put one party at the mercy of the other. Suppose, however, one party threatens not to perform, knowing that nonperformance will result in losses to

the other far beyond the ordinary damages recoverable in an action for breach of contract. Is the threatened party entitled to relief? In [*Austin Instrument, Inc. v. Loral Corporation*](#), 29 N.Y.2d 124 (1971), the Court of Appeals addressed that question, and articulated a doctrine of "economic duress."

Loral was awarded a \$6,000,000 contract to produce radar sets for the Navy, and then solicited bids for gear components. Austin bid on 40 of the gear components, and was awarded a subcontract to supply 23 of those components. The following year, Loral was awarded another Navy contract, and Loral again solicited bids. Again, Austin bid on all components, and Loral was again prepared to award Austin a subcontract on many of the components. Austin, however, insisted on an order for all 40 components, and threatened to stop delivering components under the first subcontract unless Loral placed an order for all 40 components, and increased the price paid to Austin on all parts. Austin stopped delivery, and Loral sought alternative suppliers. When Loral discovered that no other suppliers could provide the parts in time to meet its deadlines with the Navy, Loral contacted Austin, agreed to the price increases, and awarded Austin a subcontract for all 40 components on the second subcontract. When Loral did not pay the full amount due on the second subcontract, Austin sued for the balance. Loral then brought an action against Austin for increased prices it had paid for



*The 1969-72 Court. From left: seated, Judge Burke, Chief Judge Fuld and Judge Scileppi;
standing, Judges Jasen, Bergan, Breitel and Gibson.*
COURT OF APPEALS COLLECTION

goods delivered under the first subcontract, alleging economic duress. The cases were consolidated, and, after trial, Supreme Court awarded Austin judgment, and dismissed Loral's claim. The Appellate Division affirmed. The Court of Appeals, in an opinion by Chief Judge Stanley H. Fuld, reversed the Appellate Division's dismissal of Loral's claim. The court held that Austin's threat had deprived Loral of its free will, and that in order to perform Loral's contract with the Navy, Loral had no realistic alternative but to accede to Austin's demands. Hence, the court indicated that Austin's actions constituted economic duress, and made the second subcontract voidable. The court, however, was careful to define the contours of the duress defense: "[A] mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not in itself constitute economic duress. It must also appear that the threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate." 29 N.Y.2d at 130-31 (footnotes omitted). That is, only when the threatened party is truly at the mercy of the other will a court label the case one of "economic duress."

TORT LAW

1. Products Liability: The Demise of "Privity"

In New York, and elsewhere, liability for harm caused by defective products started as a form of contract liability - liability for breach of warranty. To recover for breach of warranty, however, the injured party had to demonstrate privity of contract with the manufacturer.



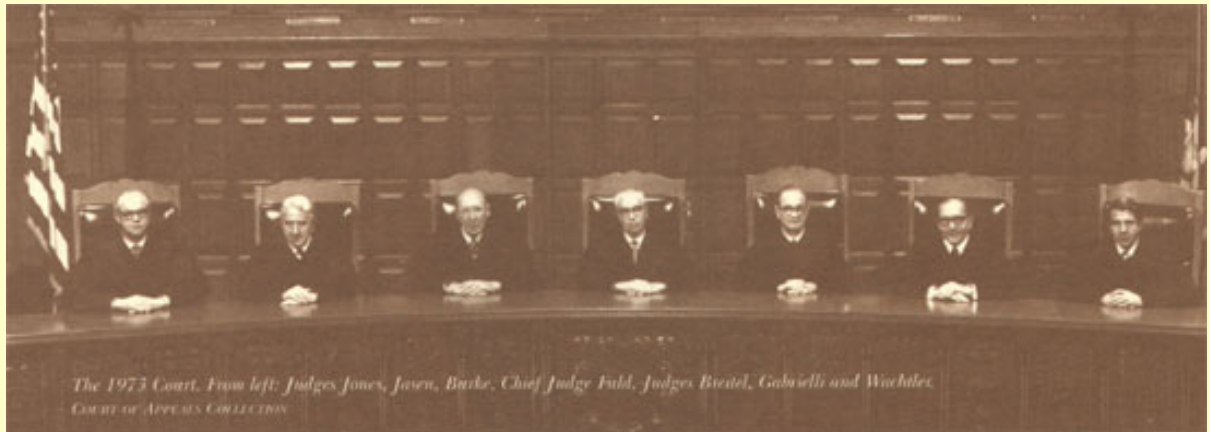
Chief Judge Stanley H. Fuld
COURT OF APPEALS COLLECTION

The Court of Appeals was a leader in breaking down the privity requirement. The process started before the Civil War. The case was *Thomas v. Winchester*, 6 N. Y. 397 (1852). Winchester, a manufacturer of vegetable extracts, mislabelled a bottle of "extract of belladonna" as "extract of dandelion". Belladonna was a poison, dandelion a harmless medicine. Winchester sold the mislabelled belladonna to a New York druggist, who resold it to an upstate druggist. When Mrs. Thomas' doctor prescribed dandelion for her illness, Mr. Thomas purchased the mislabelled bottle from the upstate druggist. When Mrs. Thomas ingested the poison, she became even sicker, and the Thomases brought an action against Winchester, alleging negligence in mislabeling the bottle.

Why should this case have posed a problem? Because courts had previously held that the seller's duty of care ran only to the immediate purchaser, not to remote purchasers with whom the seller had never dealt. In *Thomas v. Winchester*, however, the Court of Appeals departed from the prevailing rule, not by rejecting the rule altogether, but by careful use of the common law process of distinguishing cases. In an opinion by Chief Judge Charles H. Ruggles, the court focused on the particular item Winchester had sold - poison - noting that "[t]he death or great bodily harm of some person, was the natural, and almost inevitable, consequence of the sale of belladonna by means of the false label." 6 N.Y. at 408. Ultimately, the court made the common sense observation which, from a modern perspective, appears to make the case an easy one:

"In the present case, the sale of the poisonous article was made to a dealer in drugs, and not to a consumer; the injury, therefore, was not likely to fall on him, or on his vendee, who was also a dealer; but much more likely to be visited on a remote purchaser, as actually happened."

Id. at 409. That is, the court recognized that imposing a privity requirement in cases like *Thomas* would essentially



The 1973 Court. From left: Judges Jones, Jansen, Burke, Chief Judge Fuld, Judges Breitel, Gabarelli and Wachtler.
COURT OF APPEALS COLLECTION



Judge Bernard S. Meyer
COURT OF APPEALS COLLECTION

and that the injured party could not, by the exercise of reasonable care, have averted injury or damage. Judge Jones emphasized that holding the manufacturer liable would provide the appropriate incentive for manufacture of safe products:

“Pressures will converge on the manufacturer, however, who alone has the practical opportunity, as well as a considerable incentive, to turn out useful, attractive, but safe products. To impose this economic burden on the manufacturer should encourage safety in design and production, and the diffusion of this cost in the purchase price of individual units should be acceptable to the user if thereby he is given added assurance of his own protection.”

32 N.Y. 2d at 341. *Codling v. Paglia* completed the conversion of liability for defective products from contract to tort.

2. Product Liability: Statute of Limitations

The expansion of manufacturer liability for defective products created a new set of statute of limitations issues.

With more traditional torts, wrongdoing and injury were not generally separated in time. But with product liability, injury might occur years after commission of a wrong. From what point should the statute of limitations run to bar a claim? The Court of Appeals considered that issue in a number of careful opinions, most of which were summarized by Judge Bernard S. Meyer in *Martin v. Edwards Laboratories*, 60 N.Y.2d 417 (1983). In a case involving malfunction of a heart valve implanted into a patient, Judge Meyer, citing the court’s prior opinions, wrote that statute of limitations issues require a careful balancing

“reflecting the manufacturer’s interest in defending a claim before his ability to do so has deteriorated through passage of time, on the one hand, and, on the other, the injured person’s interest in not being deprived of his claim before he has had a reasonable chance to assert it.”

Balancing those two interests, the court concluded that the statute should run from the date of malfunction.

3. Mrs. Palsgraf and the Scope of Duty

Perhaps the most famous torts opinion written during the 20th century is Judge Cardozo’s opinion for the Court of Appeals in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (1928). A railroad guard helped an unsteady passenger into a railroad car. In the process, the guard caused the passenger to drop an innocuous- looking package. The package, however, contained dynamite, which exploded - causing scales to fall on Mrs. Palsgraf, who was buying a ticket at the other end of the platform. Mrs. Palsgraf sued the railroad, and the jury returned a verdict in her favor. The Appellate Division affirmed. The railroad appealed.

For Judge William S. Andrews and two other dissenters at the Court of Appeals, the question was one of



Judge William S. Andrews authored the dissenting
opinion in *Palsgraf v. Long Island Railroad Co.*
COURT OF APPEALS COLLECTION

proximate cause. What is proximate cause? Judge Andrews's statement is a classic:

“What we do mean by the word ‘proximate’ is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.”

248 N.Y. at 352. Given the jury verdict, and the Appellate Division's affirmance, Judge Andrews was unwilling to conclude, as a matter of law, that Mrs. Palsgraf's injuries were not the proximate result of the negligence. Judge Cardozo and the Court of Appeals majority, however, saw the case in a different light. For them, “[t]he law of causation, remote or proximate, is ... foreign to the case before us.” Id. at 346. For them, the problem was determining whether the railroad had a duty to safeguard Mrs. Palsgraf from the harm she suffered. Judge Cardozo emphasized that there was no reason for even “the most cautious mind” to believe that the innocuous package, wrapped in newspaper, was a threat to Mrs. Palsgraf's safety. Suppose, Judge Cardozo suggested, the railroad guard had intentionally thrown the package on the ground. In Cardozo's words,

“His conduct would not have involved, even then, an unreasonable probability of invasion of [Mrs. Palsgraf's] bodily security. Liability can be no greater where the act is inadvertent.”

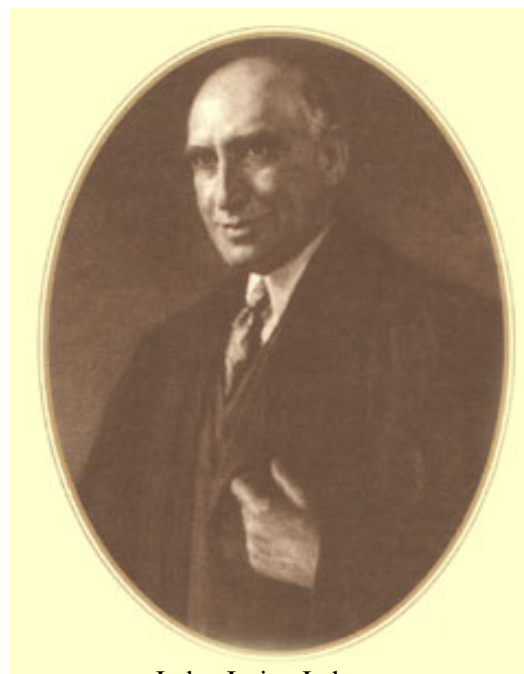
Id. at 345. Without reason to know that his actions would place Mrs. Palsgraf at peril, the guard simply had no duty to safeguard Mrs. Palsgraf from the unknown danger. And in the absence of duty, the railroad's conduct could not have been negligent. Hence, causation was, to the Court of Appeals, irrelevant.

Rarely have two opinions in the same case attracted as much admiration as the majority and the dissent in the *Palsgraf* case. Even as a dissent, Judge Andrews's opinion remains a significant exposition of proximate cause, while Judge Cardozo's majority opinion has become a pillar of modern tort law.

— PROPERTY LAW —

1. Residential Associations

In a state as populous as New York, residents have long lived in close proximity to each other.



Judge Irving Lehman
COURT OF APPEALS COLLECTION

Cooperation among neighbors assumes greater importance than in more rural areas. Homeowners have long entered into associations for their mutual benefit. To what extent, however, are those homeowners entitled to enter into agreements with neighbors which might bind successors in interest? In 1938, the Court of Appeals decided the leading case on that point: *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*, 278 N.Y. 248 (1938).

Neponsit Realty Company developed a residential tract. The deeds to each purchaser included a covenant binding the purchaser, and the purchaser's heirs, successors and assigns, to pay an annual charge for the maintenance of roads, paths, parks, beaches and other public purposes. The deed also provided that the realty company might assign to a “Property Owners’ Association” its right to receive the charge, and also provided that the charge would become a lien on the land. Neponsit Realty Company did, in fact, assign its rights to the Neponsit Property Owners’ Association, and the Emigrant Bank acquired title to one of the parcels burdened by the covenant. The Association sought to enforce the covenant, and the bank resisted, contending that enforcement was barred by the ancient doctrines of “touch or concern” or “privity,” and citing earlier cases in which the Court of Appeals had held that a covenant to perform an affirmative act is not enforceable against successors in interest to the original covenantor.

The Court of Appeals, in an opinion by Judge Irving Lehman, held the covenant enforceable. In doing so, the court did not abandon existing doctrine, but instead reconstrued the requirements in light of

P. 238
C.R.M. Vol. 1
Sept 26
1849
Buffalo.
Ordered that the Sheriff of Erie County cause the streets
in front of and adjoining to the Court House to be covered
sufficiently with tan bark to prevent a noise by the
passing of teams during the session of this court at this time

Excerpt from the Minutes (1849)
COURT OF APPEALS COLLECTION

modern conditions. Thus, in holding that the covenant touched or concerned the land, Judge Lehman wrote:

"In order that the burden of maintaining public improvements should rest upon the land benefited by the improvements, the grantor exacted from the grantee of the land with its appurtenant easement or right of enjoyment a covenant that the burden of paving the cost should be inseparably attached to the land which enjoys the benefit. It is plain that any distinction or definition which would exclude such a covenant from the classification of covenants which 'touch' or 'concern' the land would be based on form and not on substance."

278 N.Y. at 260. The court also rejected the argument that the Property Owners' Association could not enforce the covenant because it did not own any land in the subdivision, and hence was not in "privity" of estate with the homeowners. Judge Lehman emphasized that any reasons which might underlie the privity requirement were satisfied in this case:

"In substance if not in form the covenant is a restrictive covenant which touches and concerns the defendant's land, and in substance, if not in form, there is privity of estate between the plaintiff and the defendant."

Id., 262.

Neponsit is a landmark nationwide because it firmly established the legal basis for homeowner associations to enforce obligations against their members. Perhaps even more important, *Neponsit* laid the conceptual foundation for enforcement of obligations by condominium associations, a development which would become more important with passing decades.

As more and more homeowners have come to reside in units bound together by associations, another question grew in importance: to what extent will courts review decisions by those associations at the instance of disgruntled landowners. Again, the Court of Appeals proved a leader. The case was [*Levandusky v. One Fifth Avenue Apartment Corp.*](#), 75 N.Y.2d 530 (1990). Levandusky wanted to expand his kitchen. In order to complete his plans, he would have to move a steam riser in his apartment. The co-op board enacted a resolution reaffirming its policy of prohibiting relocation of risers. Levandusky nevertheless started work according to his plans and the board issued a stop work order. Levandusky then brought a proceeding to have the stop work order set aside. The case eventually reached the Court of Appeals.

In an opinion by Judge Judith S. Kaye, the court held that Levandusky was not entitled to relief. The court held that so long as the board is acting for the benefit of the cooperative collectively and acting in good faith, courts should not substitute their judgment for that of the board. Judge Kaye explained:

"A cooperative or condominium is by nature a myriad of often competing views regarding

CR.M Vol 2
page 161. On Jan 29, 1852, "The following order directed to be entered
as of Jan 6th inst. the first day of the present term"
"No proper and convenient room for the consultation of the
Judges of this court being provided at this term, in the place
where by law the customary Court may be held."
Jan 29 1852 "It is ordered pursuant to Sect 15 of the Code of Procedure
as amended by the act passed July 10, 1851 that the Sheriff of
the County of Albany do provide for the purpose of such con-
sultations at this term of the Court, the room at Congress Hall
in the City of Albany, in rear of the front port or "ladies sitting
room" with suitable light and fuel."

Excerpt from the Minutes (1852). Congress Hall was a hotel which, by long usage had become virtually an annex to the Capitol, the haunt of legislators and much used for their committee meetings in the absence of proper state-house facilities. The rambling hostelry stood between the Capitol and Washington Avenue.

COURT OF APPEALS COLLECTION



personal living space, and decisions taken to benefit the collective interest may be unpalatable to one resident or another, creating the prospect that board decisions will be subjected to undue court involvement and judicial second-guessing. Allowing an owner who is simply dissatisfied with particular board action a second opportunity to reopen the matter completely before a court threatens the stability of the common living arrangement."

75 N.Y.2d at 539-40. Although Levandusky did sanction judicial review in cases of bad faith, the Court of Appeals opinion - which immediately received national attention - made it substantially easier for co-operatives, condominiums and other residential associations to exercise governance functions.

2. Nuisance Law

Any list of the twenty most significant common law cases decided by any court over the course of the last thirty years would have to include the Court of Appeals decision in *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d. 219 (1970). Indeed, in law schools today, *Boomer* is, to my knowledge, the only case routinely taught to first-year students in three separate courses - Property, Torts, and Civil Procedure.

The Atlantic Cement Company operated a plant near Albany. A number of neighboring landowners brought actions to enjoin the factory's operation, alleging that the factory's operation constituted a nuisance, causing injury to their property from dirt, smoke, and vibration. Established New York law had held that a landowner harmed by a nuisance was entitled to an injunction even when the landowner's damages were slight. The trial court had found that the neighboring plaintiffs had suffered

permanent damages in the amount of \$ 185,000. By contrast, the cement company had invested more than \$45,000,000 in its plant, and employed more than 300 people at the site. The plant was using the best available technology.

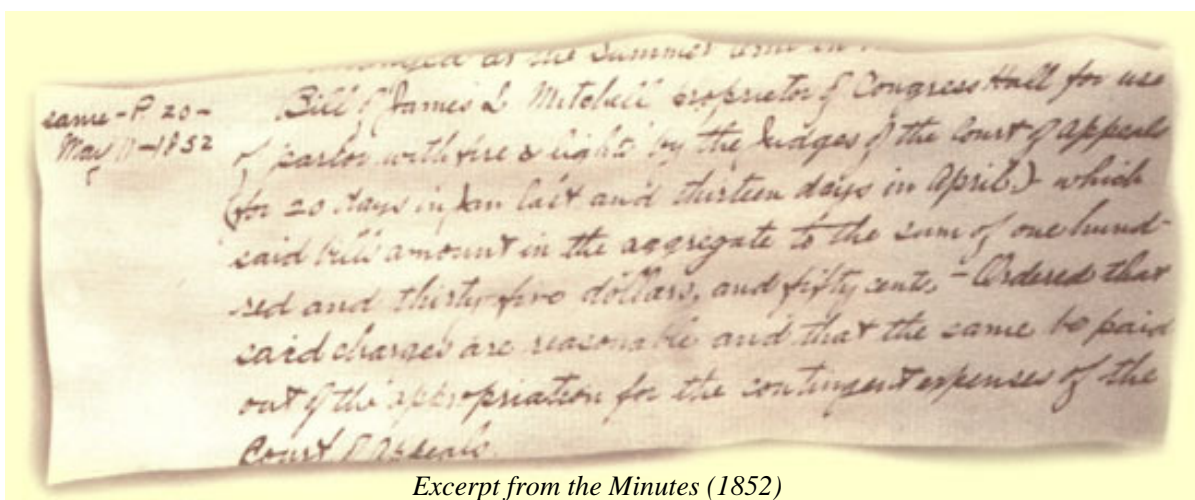
On these facts, the Court of Appeals, in an opinion by Judge Francis Bergan, held that the cement company should be enjoined, but should be entitled to vacate the injunction upon payment of damages to the plaintiffs, as determined by the court. In rejecting the notion that the cement plant should be enjoined, but the injunction postponed to permit the company to develop new technology, the court wrote:

"For obvious reasons the rate of the research is beyond control of defendant. If at the end of 18 months the whole industry has not found a technical solution a court would be hard put to close down this one cement plant if due regard be given to equitable principles."

26 N.Y.2d at 226.

Judge Francis Bergan
COURT OF APPEALS COLLECTION





Excerpt from the Minutes (1852)
COURT OF APPEALS COLLECTION

Boomer has been the subject of enormous attention. Academic symposia have focused on *Boomer* and its implications. The basic importance of the case is this: the Court of Appeals understood that the value of the cement plant, in all likelihood, was far greater than the harm the plant caused. Ordinarily, that balance had been irrelevant to the New York courts. Why? Because if a nuisance-causing landowner attaches great value to a nuisance-causing activity, the landowner, even if enjoined, can negotiate with its neighbor for the right to continue causing the harm. But in cases like *Boomer*, where the pollution spread over a wide area, the number of affected landowners would have been great. The prospect of holdouts - perhaps motivated by the hope that intransigence would bring a better offer - might make negotiations difficult, and force the factory to close. The approach the Court of Appeals took in *Boomer* recognized the existence of those transaction costs, and the remedy the court fashioned provided compensation to the harmed landowner without the need for negotiations among the parties.

— FIDUCIARY DUTIES —

1. The Prudent Investor Rule

When a settlor creates a trust, the trustee must naturally decide how to manage the trust proceeds. How should the trustee make that decision? In *King v. Talbot*, 40 N.Y.76 (1869), the Court of Appeals established standards which guided both the courts of New York, and the courts of many other jurisdictions, for generations.

Charles W. King's will left \$15,000 to each of his three minor children, with directions that the interest be applied for their maintenance and education until they reached the age of majority, at which time the children were to receive the principal. King's executors invested some of the money in railroad stocks and bank stocks. When the time for distribution came, the value of the stock had apparently declined, and the children rejected the stock investments, seeking to hold the executors liable for all moneys invested in the stocks.

Judge Lewis B. Woodruff started his opinion for the Court of Appeals by rejecting the English rule that a trustee must invest trust proceeds in the public debt. The court held instead that a trustee may "invest ... in such securities as would be acquired by prudent [persons] of discretion and intelligence." At the same time, however, the court rejected the notion that because prudent people often invest in speculative investments, trustees should be permitted to make the same sorts of investments:

"It ... does not follow, that, because prudent men may, and often do, conduct their own affairs with the hope of growing rich, and therein take the hazard of adventures which they deem hopeful, trustees may do the same; the preservation of the fund, and the procurement of a just income therefrom, are primary objects of the creation of the trust itself, and are to be primarily regarded."

Ordered that the following rules be adopted and that
some - P. 223 the clerk cause the same to be published pursuant to Sec 4
June 11-18-1852 Chap 4 to 7, Laws of 18-7
Rules, requiring, - 10 causes only to be called in one day -
exchange of causes on calendar one for another, - causes may
be stricken from the calendar by consent, - 14 copies of case
and points required

Excerpt from the Minutes (1852)
COURT OF APPEALS COLLECTION



Judge Howard A. Levine
COURT OF APPEALS COLLECTION

40 N.Y. at 86. The court went on to hold that stocks are an inappropriate investment for trustees because the trustees had relinquished management responsibilities by investing in a corporate enterprise.

The court in *King v. Talbot* also established another important principle: a trustee may not insulate himself from liability for one imprudent investment by forcing the beneficiary to accept or reject his investments as a whole:

"I perceive no reason for saying that where the trustee has divided the fund into parts and made separate investments, the cestui que trust is not at liberty, on equitable as well as legal grounds, to approve and adopt such as he thinks it for his interest to approve. The money invested is his money; and in respect to each and every dollar, it seems to me, he has an unqualified right to follow it..."

40 N.Y. at 90-91. That rule - that diversification does not absolve the trustee from liability for an imprudent investment - has remained an important principle of New York law.

On the other hand, a very recent Court of Appeals

sold for \$135 per share. The Bank retained the Kodak stock, although the price continued to drop - to \$63 per share by the end of 1974, and to \$40 per share by March of 1978. When, in 1981, the Bank sought a judicial settlement of its account, the beneficiaries of the trusts objected, contending that the bank had not complied with the prudent investor rule of *King v. Talbot*.

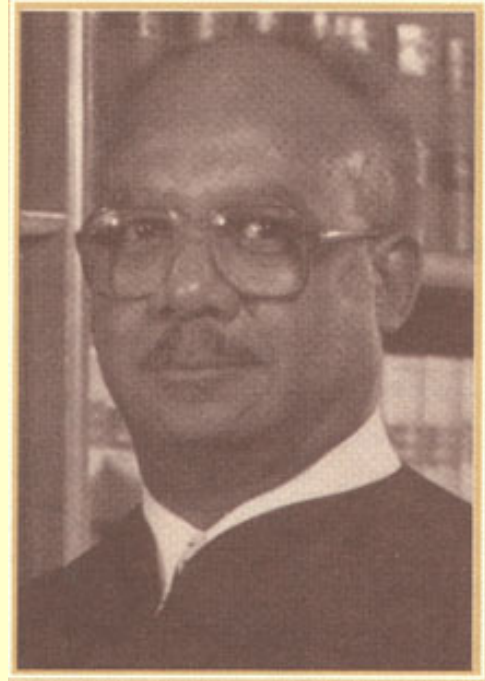
In an opinion by Judge Howard Levine, the Court of Appeals affirmed an Appellate Division order holding the trustee liable for breaching its fiduciary duty by retaining the large concentration of Kodak stock. The court declined to impose any absolute duty to diversify, but indicated nevertheless that a failure to diversify would be a significant factor in evaluating the fiduciary's conduct.

2. The Duty of Loyalty

The duties of a fiduciary vary with context. But a fiduciary almost always has a duty of undivided loyalty to any beneficiaries. [*Mercury Bay Boating Club Inc. v. San Diego Yacht Club*](#), 76 N.Y.2d 256 (1990) demonstrates the need for the qualification. In a dispute over the use of a catamaran boat to defend the America's Cup yachting trophy, Judge Fritz W. Alexander, II wrote:

"Unlike the trusts in which this strict rule of undivided loyalty was developed, the America's Cup trust promotes a sporting competition in which the donors clearly intended that the trustee compete on equal terms with the trust beneficiaries. Indeed, the trustee of the America's Cup is obligated to use its best efforts to defend its right

decision, [Matter of Janes \(Lincoln First Bank, NA.\)](#), 90 N.Y.2d 41, seems certain to become a leading case for the converse proposition: a trustee who fails to diversify investments takes a significant risk of liability for breach of fiduciary duty. Rodney B. Janes died on May 26, 1973, leaving an estate of \$3,500,000, more than half of which then consisted of shares of Eastman Kodak stock. Janes' will created several trusts, and Lincoln First Bank's predecessor had been named as trustee. At the time of Janes' death, the Kodak stock



Judge Fritz W. Alexander, II
COURT OF APPEALS COLLECTION

to hold the Cup and thus to defeat the beneficiaries in the contemplated competition. It is thus inappropriate and inconsistent with the competitive trust purpose to impose upon the trustee of a sporting trust such as this one the strict standard of behavior which governs the conduct of trustees who are obligated not to compete with the trust beneficiaries."

Yachting aside, the classic definition - and justification - for the high standard of loyalty appeared in Chief Judge Cardozo's opinion in [*Meinhard v. Salmon*](#), 249 N.Y. 458 (1928). Salmon, lessee of space, was a joint venturer with Meinhard. Because Salmon had management responsibilities, his name appeared on the lease; Meinhard's did not. Toward the end of the lease, the landlord approached Salmon about a new lease for more space, and ultimately, new buildings. Salmon executed the new lease on behalf of a corporation he owned and controlled. He told Meinhard nothing about the project or the new lease. When Meinhard sought to have the lease treated as an asset of the joint venture, Salmon refused. In holding that Salmon had breached his fiduciary duty to Meinhard, Judge Cardozo wrote:

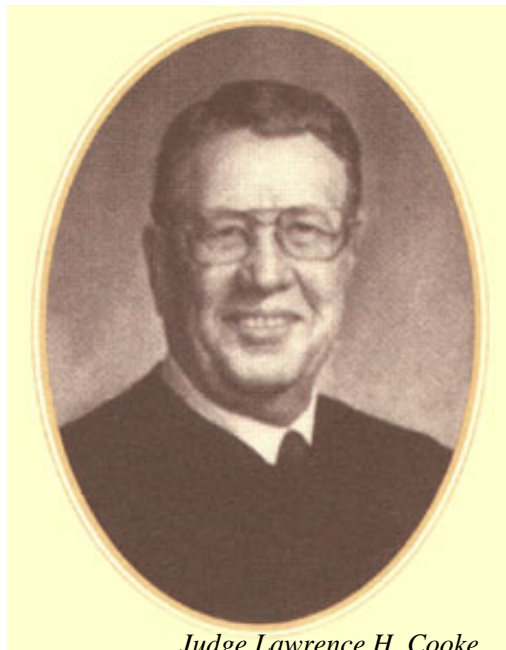
"Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior....

Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

249 N.Y. at 464 (citation omitted).

A fiduciary can be disloyal to a beneficiary without directly lining his own pockets. In [*Estate of Rothko*](#), 43 N.Y.2d 305 (1977), the Court of Appeals confronted one of the most famous breach of fiduciary duty cases - a case in which each of three fiduciaries violated his duty in a different way. Expressionist painter Mark Rothko left an estate whose principal assets were 798 paintings. His will left his residuary estate to a charitable foundation he created, and named three co-executors, Reis, Stamos, and Levine. The executors consigned about 700 of the paintings to Marlborough Gallery, mc, to be sold over time at a 50% commission. By contrast, during Rothko's lifetime, the same gallery had contracted with Rothko to sell Rothko's paintings at a 10% commission. At the time the executors consigned the paintings to the gallery, Reis was a director, secretary and treasurer of Marlborough Gallery, Stamos was an unknown artist with reason to curry favor with the gallery, and Levine was an anthropology professor who had essentially deferred to his co-executors on all decisions of importance. Rothko's daughter, claiming under New York's since-repealed mortmain statute, and the state Attorney General, challenged the executors' behavior.





Judge Lawrence H. Cooke
COURT OF APPEALS COLLECTION

The Court of Appeals, in an opinion by Judge Lawrence H. Cooke, held all three executors liable for breach of the duty of loyalty. Judge Cooke concluded that “the assertions that there were not conflicts of interest on the part of Reis or Stamos indulge in sheer fantasy.” 43 N.Y.2d at 319. At the same time, the court held that even though Levine had acted upon advice of counsel before acceding to the consignment agreement, he remained liable for a breach of his duty of care:

“Suffice it to say, an executor who knows that his coexecutor is committing breaches of trust and not only fails to exert efforts directed toward prevention but accedes to them is legally accountable even though he was acting on the advice of counsel. He could not close his eyes, remain passive or move with unconcern in the face of the obvious loss to be visited upon the estate by participation in those business arrangements and then shelter himself behind the claimed counsel of an attorney.”

Id. at 320 (citations omitted). *Rothko* is a leading case not merely for the court’s finding of a breach of fiduciary duty, but also for the measure of damages the court imposed. Because, in the court’s view, the executors had a duty to retain the paintings, the court imposed “appreciation damages,” assessing the executors not merely for the market value of the paintings at the time of the deal with Marlborough, but for the appreciation in

value after the conflict-of-interest transaction. As a result, the court affirmed a damage award against Reis, Stamos, and the gallery in an amount exceeding \$7,000,000!

REGULATION OF THE LEGAL PROFESSION

Among the most important fiduciary relationships is the relation between lawyer and client. In New York, the Appellate Division bears principal responsibility for disciplining lawyers who violate their fiduciary obligations. Nevertheless, in a number of cases, the Court of Appeals has taken a leading role in defining the nature of the attorney-client relationship.

To what extent is the relationship between lawyer and client founded on contract? That question reached the Court of Appeals in *Martin v. Camp*, 219 N.Y. 170 (1916). A law firm contracted to recover for a client an award in condemnation proceedings. The firm’s compensation was to be a proportion of the amount received. After the lawyer rendered services, the client discharged the firm. After the client recovered, the lawyer sought to recover for breach of contract. A divided Appellate Division held that the action for damages could proceed. The client appealed.

In an opinion by Judge Samuel Seabury, the Court of Appeals reversed and dismissed the complaint. The Court of Appeals held that the contractual relationship between a lawyer and a client is not a reciprocal one. Although the lawyer must fully perform to recover compensation from a client, the client is free to terminate a contract of employment at any time. In



Judge Samuel Seabury
COURT OF APPEALS COLLECTION

Judge Seabury's words:

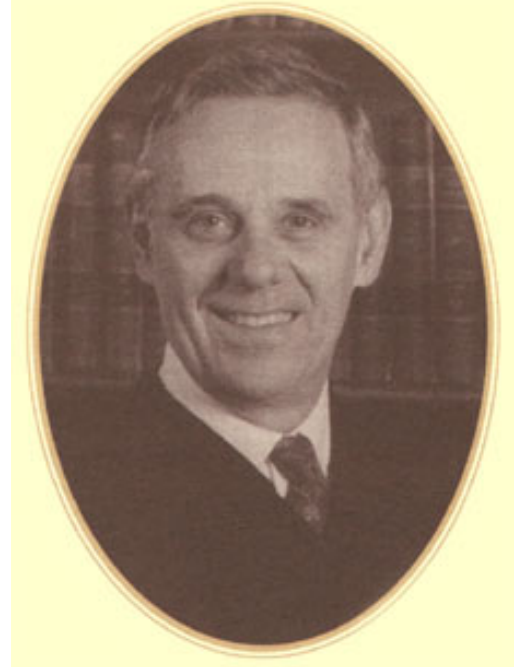
"That the client may at any time for any reason or without any reason discharge his attorney is a firmly-established rule which springs from the personal and confidential nature of the relation which such a contract of employment calls into existence."

219 N.Y. at 174. In order to give effect to the client's right to terminate the lawyer's employment whenever the client has lost confidence in the lawyer, the lawyer may not recover from the client for breach of contract. Instead, the lawyer is limited to recovery of the reasonable value of his services.

In *Martin v. Camp*, the Court of Appeals said expressly that its holding did not relate "to a case where an attorney is employed under a general retainer for a fixed period...." A number of lawyers seized upon this language to justify requiring so-called nonrefundable retainers. For instance, lawyer Edward Cooperman entered into a written agreement to represent a person charged with a crime. The agreement stated a minimum fee of \$15,000, and provided that "[t]his fee is not refundable for any reason whatsoever once I file a notice of appearance on your behalf." Within a month, the client discharged Cooperman, and sought a refund of the fee. Cooperman refused, relying on the agreement. This behavior by Cooperman was not an isolated incident; a number of clients had complained, after discharging Cooperman, about his practice of extracting nonrefundable retainers. In the course of formal disciplinary proceedings, the Appellate Division concluded that Cooperman's agreements were unethical. That court suspended him from the practice of law for two years. Cooperman appealed.

The Court of Appeals affirmed, holding that a nonrefundable retainer agreement "inappropriately compromises the right to sever the fiduciary services relationship with the lawyer." *Matter of Cooperman*, 83 N.Y.2d 465, 473 (1994). Judge Joseph W. Bellacosa's opinion emphasized that to permit nonrefundable retainers would chill the client's right to walk away from an unwanted lawyer. Responding to Cooperman's argument that, at the time he acted, no legal authority had explicitly prohibited nonrefundable retainers, Judge Bellacosa wrote:

"The conduct of attorneys is not measured by how close to the edge of thin ice they skate. The measure of



Joseph W. Bellacosa
COURT OF APPEALS COLLECTION

an attorney's conduct is not how much clarity can be squeezed out of the strict letter of the law, but how much honor can be poured into the generous spirit of lawyer-client relationships."

83 N.Y.2d at 475.

In recent years, as the bonds of law firm partnership have frayed, many lawyers have become concerned about the economic position of lawyers excluded from their former firms. In particular, to what extent is a removed partner entitled to a share of his former firm's "goodwill"? The issue reached the Court of Appeals in *Dawson v. White — Case*, 88 N.Y.2d 666 (1996). After *White — Case* attempted, unsuccessfully, to persuade Dawson to withdraw as a partner, *White — Case* dissolved as a firm and reformed the partnership without Dawson. Dawson sought an accounting. *White — Case* moved to dismiss, contending that Dawson was not entitled to any of the firm's goodwill, in part because the partnership agreement provided a mechanism for distribution of Dawson's interest. The Supreme Court and the Appellate Division held that the partnership possessed goodwill, and that Dawson was entitled to a distribution of that goodwill. *White — Case* appealed.

In an opinion by Judge Carmen Ciparick, the Court of Appeals modified, relying on the *White — Case* partnership agreement, which expressly deemed the partnership's goodwill to be of no value for purposes of computing credits and charges to departing partners. As a result, Dawson was not entitled to a distribution of *White — Case*'s goodwill. Perhaps more important than the court's holding, however, was the court's express rejection of the notion that a professional business can-

not have goodwill. Thus, in the absence of an agreement like the one at issue in *White — Case*, a departing lawyer would be entitled to a share of the firm's goodwill. In Judge Ciparick's words:

"[T]he ethical constraints against the sale of a law practice's goodwill by a practicing attorney no longer warrant a blanket prohibition against the valuation of law firm goodwill when those ethical concerns are absent."

— ESTATES LAW —

Should a murderer be entitled to inherit from his victim? Francis Palmer wrote a will giving legacies to his two daughters, and the remainder of his estate to his grandson, Elmer E. Palmer. Sixteen-year-old Elmer learned of the will provisions, and poisoned his grandfather, causing his death. Elmer, noting that the will was made in due form and had been admitted to probate, sought to take under the terms of his grandfather's will. His aunts resisted.

The Court of Appeals held that Elmer was not entitled to inherit. In *Riggs v. Palmer*, 115 N.Y. 506 (1889), the court was ahead of its time in suggesting that courts should focus on the intention of the statute of wills, not just its literal words. Judge Robert Earl wrote for the court:

"The purpose of those statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed; and in considering and giving effect to them this purpose must be kept in view. It was the intention of the law-makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it."

115 N.Y. at 509. The court went on to articulate a



Judge Carmen Beauchamp Ciparick
COURT OF APPEALS COLLECTION

principle, and for the narrower proposition that a murderer is not entitled to inherit from his victim.

In *Matter of Totten*, 179 N.Y. 112 (1904), the Court of Appeals resolved a more mundane issue, but one of great practical significance: what rights does a beneficiary have in a savings bank trust created by a depositor during the depositor's lifetime? Although the court had addressed the question in a few cases before *Matter of Totten*, the legal status of savings bank trusts had not been definitively resolved. In an opinion by Judge Irving G. Vann, the Court of Appeals recognized that these trusts are created principally "to avoid the trouble of making a will." 179 N.Y. at 127. In light of that fact, the court announced its conclusion:

"A deposit by one person of his own money, in his name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely' revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary."

more general principle often applied by the New York courts:

"No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."

Id. at 511. *Riggs v. Palmer* has become a classic, cited in many jurisdictions both for the general

Id. at 125-26. The court's statement clarified the legal status of savings bank trusts, and as a result these trusts are often known - both in New York and elsewhere - as "Totten Trusts."

In 1930, the State Legislature enacted a statute giving a right of election to the surviving spouse. The statute's purpose was to prevent the decedent from disinheritting a surviving spouse. Ferdinand Straus, however, was not pleased with the new statute. Straus, an 80-year-old widower, had married a woman in her thirties. The marriage was not a happy one. His wife had brought an action for separation, alleging that Ferdinand's perverted sexual habits had made him

impossible to live with. Ferdinand, not surprisingly, took offense at these allegations, and sought to disinherit his wife. Apparently acting on the advice of counsel, he executed trust agreements - three days before his death - and transferred all of his property to the trusts. By the terms of the trusts, Ferdinand reserved trust income to himself for life, reserved the right to revoke, and made the powers of the trustee subject to Ferdinand's own control during Ferdinand's lifetime. When Ferdinand died, the trust beneficiary sought to compel the trustee to carry out the trust's terms. Ferdinand's wife objected.

If Ferdinand's plan had worked, any testator would have been able to frustrate the elective share statute by creating revocable inter vivos trusts. In [*Newman v. Dore*](#), 275 N.Y. 371 (1937), however, the Court of Appeals held that the trusts were "illusory" with regard to Mrs. Straus, and therefore ineffective to cut off her elective share. Judge Irving Lehman wrote:

"Judged by the substance, not by the form, the testator's conveyance is illusory, intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed. We do not attempt now to formulate any general test of how far a settlor must divest himself of his interest in the trust property to render the conveyance more than illusory.... In this case, it is clear that the settlor never intended to divest himself of his property. He was unwilling to do so even when death was near."

275 N.Y. at 381

Newman v. Dore was a landmark for two reasons. First, the court's concerns ultimately led the New York Legislature to enact the current elective share statute, which explicitly treats many lifetime transfers as testamentary substitutes. Second, the court's analysis was adopted in a number of states across the nation, many of which



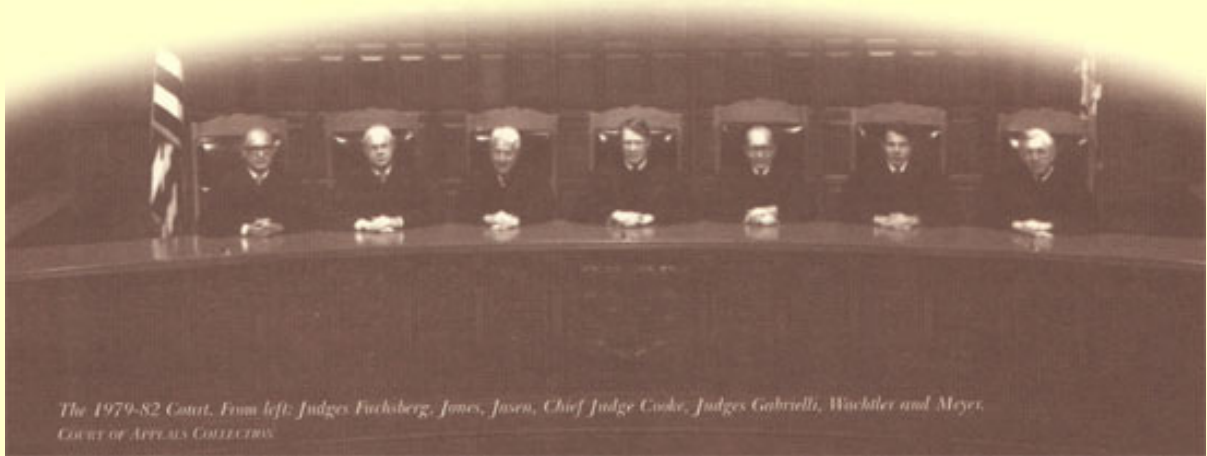
Judge Sol Wachtler
COURT OF APPEALS COLLECTION

have never enacted statutes comparable to the current New York statute.

As we have seen, in *Riggs v. Palmer*, the Court of Appeals had been willing to construe the statute of wills in light of its evident purpose - preventing a murderer from inheriting from his victim. Nearly 100 years later, in [*Matter of Snide*](#), 52 N.Y.2d 193 (1981) the Court of Appeals again construed the statute of wills in light of its purpose, this time relieving the parties from their lawyer's mistake at a will execution ceremony.

Harvey and Rose Snide each intended to execute mutual wills at a common execution ceremony. Each left all property to the other. Unfortunately, Harvey executed Rose's will, and Rose executed Harvey's. When Harvey died, a guardian for the couple's minor child opposed probate of the will - apparently because the child could benefit only by taking in intestacy. The Appellate Division held that Harvey's will should not be probated.

The Court of Appeals, in an opinion by Judge Sol Wachtler, reversed. The court noted that the only differences between the two wills were the name of the testator



Excerpt from the Minutes (1852)
COURT OF APPEALS COLLECTION

and the name of the beneficiary. The court then observed:

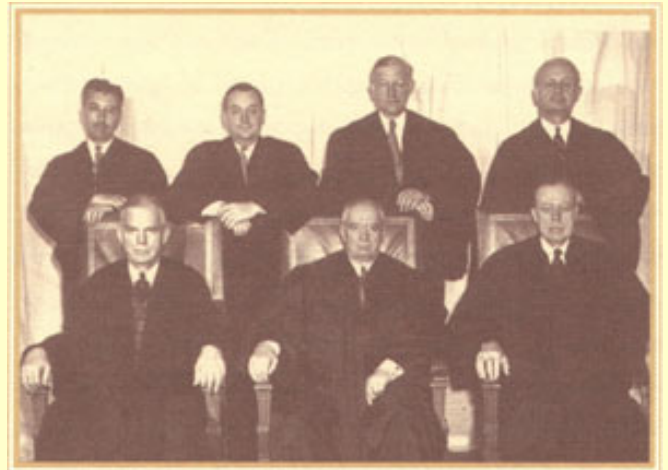
"Under such facts it would indeed be ironic - if not perverse - to state that because what has occurred is so obvious, and what was intended so clear, we must act to nullify rather than sustain this testamentary scheme."

52 N.Y.2d at 196. The court indicated that the case was an unusual one, and should not be read to change settled principles, but emphasized that on the facts of the case, "[t]here is absolutely no danger of fraud, and the refusal to read these wills together would serve merely to unnecessarily expand formalism, without any corresponding benefit." *Id.* at 197.

— REMEDIES —
PARTICULARLY CONSTRUCTIVE
TRUSTS

In the words of Judge Cardozo, the "constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386 (1919). In Judge Cardozo's elegant words, and in a number of critical decisions, the Court of Appeals has developed the constructive trust concept as a means for fighting injustice.

Latham v. Father Divine, 299 N.Y. 22 (1949), provides a prominent example. Mary Lyon had written a will leaving her estate to Father Divine, a religious leader. Before her death, she apparently had second thoughts, and had prepared a new will benefitting others.

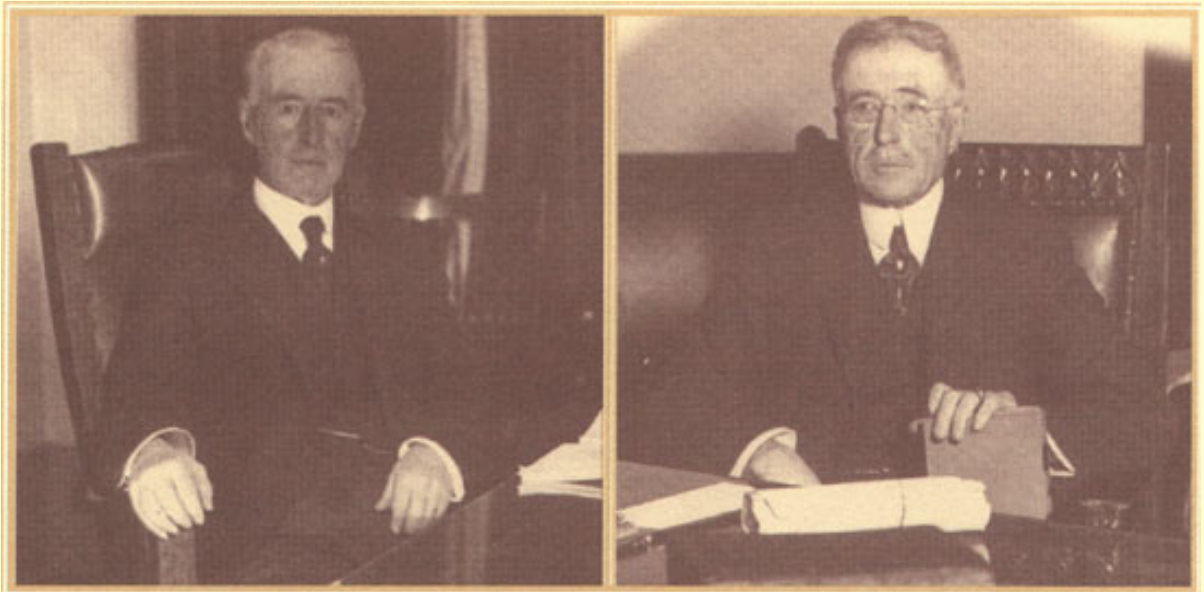


The 1949 Court. From left: seated, Judge Lewis, Chief Judge Loughran, Judge Conway; standing, Judges Fuld, Desmond, Dye and Froessel.
COURT OF APPEALS COLLECTION

At that point, according to the allegations of the complaint, the followers of Father Divine murdered her, preventing execution of the new will. When Mary Lyon's distributees contested the executed will - the one benefitting Father Divine - the religious leader entered into a compromise agreement with the distributees, under the terms of which the will would be probated, but the distributees would receive a substantial sum. At that point, the beneficiaries of the unexecuted will brought an action seeking to impress a constructive trust on the estate assets.

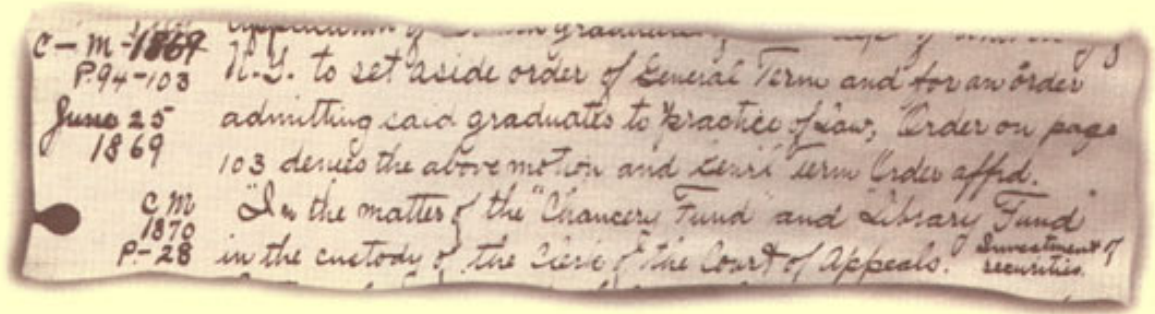
Taking the allegations to be true, the Court of Appeals held, in an opinion by Judge Charles S. Desmond, that the complaint adequately alleged a constructive trust. The court said of the constructive trust:

"Its applicability is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them."



*Left: Judge Hogan dissented from Judge Cardozo's opinion in Beatty v. Guggenheim Exploration Co. (1919).
Right: Chief Judge Hiscock concurred with Judge Cardozo's opinion in that case.*

COURT OF APPEALS COLLECTION



Excerpt from the Minutes (1869)
COURT OF APPEALS COLLECTION

299 N.Y. at 27. As a result, the compromise agreement was insufficient to permit Father Divine to inherit the Lyon estate; if the beneficiaries of the unexecuted will could prove their allegations, they would be entitled to the estate.

A constructive trust is often useful as a remedy when ordinary actions for breach of contract would be unavailing because of the promisor's insolvency. But to establish a constructive trust, a party must be able to trace the "trust" assets to the promisor's original promise. Sometimes, this obstacle appears insurmountable. In [Simonds v. Simonds](#), 45 N.Y.2d. 233 (1978), however, the Court of Appeals made it easier to trace proceeds when justice requires.

Decedent entered into a separation agreement with his first wife requiring decedent to maintain \$7,000 in existing life insurance policies with the wife as beneficiary, or, if the policies were to lapse, to replace them with policies of equal value. Decedent remarried and allowed the policies to lapse, but purchased other policies, in amounts totaling over \$55,000. The replacement policies named his second wife, or his daughter by his second wife, as beneficiaries. Decedent died, and his estate proved insolvent. His first wife then sought imposition of a constructive trust, to the extent of \$7,000, on the policies in effect at decedent's death. His second wife resisted.

In an opinion by Chief Judge Charles D. Breitel, the Court of Appeals imposed a constructive trust on the policy proceeds, rejecting the argument that the first wife's equitable interest could not be particular policies:

"[I]nability to trace plaintiff's equitable rights precisely should not require that they not be recognized.... The separation agreement provides nexus

45 N.Y.2d at 240 (citation omitted). Noting that the second wife would be unjustly enriched if she were permitted to keep the policies, the court emphasized that enrichment may be unjust even if the party enriched performs no wrongful act. Finally, in response to out-of-state cases imposing more stringent tracing requirements, the court wrote:

"Those cases, however, rely heavily on formalisms and too little on basic equitable principles, long established in Anglo-American law and in this State and especially relevant when family transactions are involved."

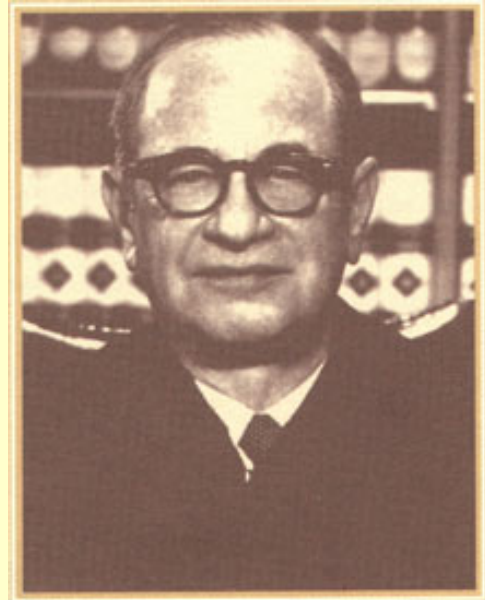
Id. at 243.

— CRIMINAL LAW —

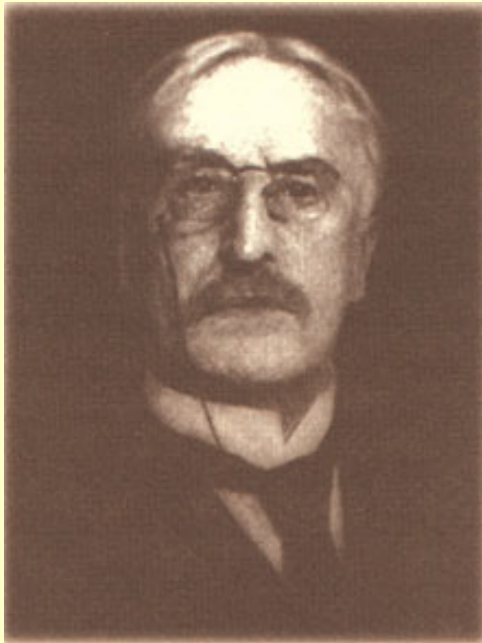
1. Impossibility as a Defense to the Charge of Attempt to Commit a Crime

Suppose a person acquires property he believes to be stolen, or shoots a person he believes to be alive, but his belief is mistaken. Is the person guilty of an attempt to commit a crime? Two of the leading cases addressing that question have been decided by the Court of Appeals.

between plaintiff's rights and the later acquired policies. The later policies were expressly contemplated by the parties, and it was agreed that plaintiff would have an interest in them. No reason in equity appears for denying plaintiff that interest, so long as no one who has given value for the policies or otherwise suffered a detriment is involved."



Chief Judge Charles D. Breitel
COURT OF APPEALS COLLECTION



Judge Willard Bartlett
COURT OF APPEALS COLLECTION

In 1902, Samuel Jaffe attempted to purchase twenty yards of cloth, believing the cloth to be stolen. In fact, however, the formerly stolen cloth had been restored to its owners at the time of Jaffe's attempt, and the cloth was offered to Jaffe by the authority of the true owner. Jaffe was nevertheless convicted of an attempt to receive stolen property. The Appellate Division affirmed, and Jaffe appealed to the Court of Appeals.

The Court of Appeals, in an opinion by Judge Willard Bartlett, reversed. The court wrote:

"The purchase ... Wit had been completely effected, could not constitute the crime of receiving stolen property, knowing it to be stolen, since there could be no such thing as knowledge on the part of the defendant of a non-existent fact, although there might be a belief on his part that the fact existed."

People v. Jaffe, 185 N.Y. 497, 500 (1906). The court distinguished earlier cases in which defendants had been convicted of attempted larceny when they tried to pick empty pockets, noting that in those cases, if it had been factually possible for defendant to commit the contemplated act, the completed act would have

The two friends, Bush and Geller, began to argue, and Bush shot Geller three times with a .38 caliber pistol. Dlugash then drew his own .25 caliber pistol and shot Geller, by now lying on the floor, five more times. At Dlugash's trial for murder, the court submitted two counts to the jury: murder, and attempted murder. The jury convicted Dlugash of murder. The Appellate Division reversed, holding that the People had not proven beyond a reasonable doubt that Geller was alive at the time Dlugash shot him. The Appellate Division dismissed the indictment, and the People appealed.

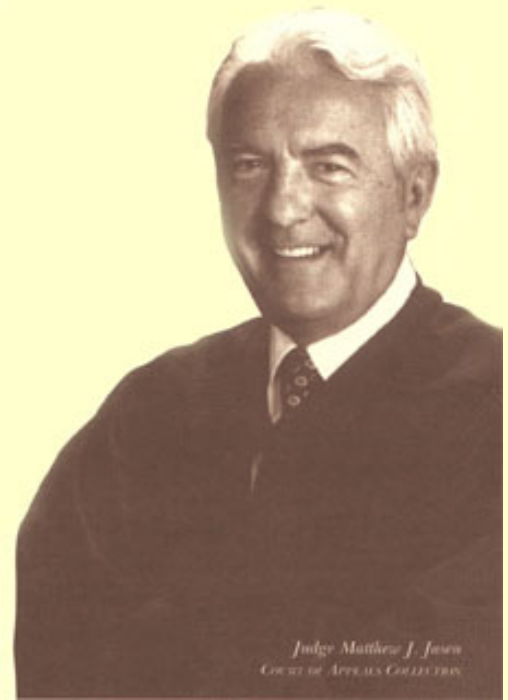
The Court of Appeals modified and remitted to the Appellate Division, holding that even if the People had not proven that Geller was still alive, the Appellate Division could have sustained a conviction of attempted murder. The court acknowledged the historical distinction - exemplified by the *Jaffe* case - between legal and factual impossibility. The court then noted that the drafters of the Model Penal Code had engaged in a fundamental rethinking of the impossibility defense, a shift ultimately reflected in the New York Penal Law. In the words of Judge Matthew J. Jasen, writing for the court:

"[T]he code suggested a fundamental change to shift the locus of analysis to the actor's mental frame of reference and away from undue dependence upon external considerations. The basic premise of the code provision is that what was in the actor's own mind should be the standard for determining his dangerousness to society and, hence, his liability for attempted criminal conduct."

41 N.Y.2d at 734.

been criminal. Jaffe, then, was long cited for the proposition that legal impossibility is a defense to the charge of attempt to commit a crime, while factual impossibility (as in the pickpocket cases) is not a defense.

Three-quarters of a century later, the Court of Appeals revisited the issue in [*People v. Dlugash*](#), 41 N. Y.2d 725 (1977). Melvin Dlugash was out drinking with two friends, and, in the wee hours of the morning, the threesome returned to the home of Geller, one of Dlugash's friends.



Judge Matthew J. Jasen
COURT OF APPEALS COLLECTION

Thus, in *Dlugash*, the court abandoned what the court termed the "nice" distinction between legal and factual impossibility.

2. Admissibility of Evidence of Other Crimes, Bad Acts, or Criminal Propensities

At the trial of a criminal defendant, to what extent may the prosecution introduce evidence of the defendant's other crimes or bad acts? The Court of Appeals was a leader in establishing that such evidence is generally inadmissible because of the substantial prejudice the evidence would generate in the minds of the jury.

The leading case, *People v. Molineux*, 168 N.Y. 264 (1901), was decided at the turn of the century. Molineux was accused of murder. At Christmas, Molineux had allegedly sent to an enemy of his, anonymously, a bottle labeled "bromo seltzer," but containing a mixture of bromo seltzer and cyanide of mercury, a deadly poison. The intended victim administered the mixture to a member of his household, who died the same day. At trial, the prosecution introduced evidence that Molineux had, several weeks earlier, sent a similar bottle of poison to a rival for a woman's affections, resulting in the rival's death. Molineux was convicted of murder, and his appeal reached the Court of Appeals.

The Court of Appeals reversed. An opinion by Judge William E. Werner held that the State may not generally "prove against a defendant any crime not alleged in the indictment." *Id.* at 293. Judge Werner then went on to catalogue the exceptions to the general rule, and to show why none of them was applicable in Molineux's case. Judge Denis O'Brien, in a concurring opinion, elaborated on the reason for the rule:

"It is so difficult for the human mind to discard false theories that assume the disguise of truth, and so easy



Judge William E. Werner
COURT OF APPEALS COLLECTION

to substitute suspicions and speculations for evidence of facts that proof of the general bad character of the accused, or of participation in other crimes, which is practically the same thing, would no doubt be of great aid to the People in procuring a conviction for the specific offense charged in the indictment. Such proof in a doubtful case might turn the scale against the accused, but the law, for obvious reasons, does not permit it..."

Id. at 338. Molineux's thorough examination of the rule and its exceptions has made it a much cited authority on the admissibility of prior crimes and bad acts.

Suppose a criminal defendant has never been convicted of a crime. Can the prosecution introduce evidence designed to show that defendant had criminal or murderous propensities? The Court of Appeals addressed that question in *People v. Zackowitz*, 254 N.Y. 192 (1930). Joseph Zackowitz and his 17-year-old wife were walking down a Brooklyn street when a group of men working on a car insulted



Zackowitz's wife. When the couple returned home, the wife informed Zackowitz that one of the men had offered her two dollars to sleep with him. Incensed, Zackowitz took a pistol from the home, and shot one of the insulters. At trial, the question was whether Zackowitz had shot with premeditation. The prosecution introduced evidence that Zackowitz kept three pistols and a tear-gas gun in his home. The evidence was admitted to show that Zackowitz was a person criminally inclined, and therefore more likely to have acted with premeditation. Zackowitz was convicted of first-degree murder, and his appeal reached the Court of Appeals.

In an opinion by Chief Judge Cardozo, the Court of Appeals reversed. The court held that evidence of murderous propensity is not admissible at a trial for murder. Judge Cardozo wrote:

"There may be cogency in the argument that a quarrelsome defendant is more likely to start a quarrel than one of milder type, a man of dangerous mode of life more likely than a shy recluse. The law is not blind to this, but equally it is not blind to the peril to the innocent if character is accepted as probative of crime."

254 N.Y. at 198. Zockowitz, like Molineux, has become a landmark of the criminal law.

3. Self-Defense: Reasonableness of the Actor's Belief

Until the O.J. Simpson murder trial captured the attention of the American public, the most controversial criminal case of the last quarter-century involved the trial of the so-called "subway gunman," Bernhard Goetz. Goetz could not match Simpson for celebrity status, but the legal issues in the Goetz case were more fundamental. The Court of Appeals was at center stage at a significant point in the case.

In 1984, four black youths boarded a southbound subway train in the Bronx. Goetz, carrying a concealed and unlicensed handgun, boarded the same train at 14th Street in Manhattan. Goetz had purchased the gun three years earlier after he had been the victim of a mugging. One of the four youths approached Goetz and said "Give me five dollars." Goetz then took out the handgun and shot the four youths, severing the spinal cord of one of them. The prosecutor presented the matter to a Grand Jury, seeking an indictment for attempted murder, assault, reckless endangerment, and criminal possession of a weapon. The Grand Jury indicted only on the weapons possession charges. Several weeks later, the prosecutor, citing newly available evidence, obtained court approval to resubmit the dismissed charges to a second Grand Jury. The second Grand Jury indicted for murder, assault, and reckless endangerment. Goetz, however, moved to dismiss, contending that the prosecutor had erred in instructing the Grand Jury to consider whether Goetz's conduct was that of a reasonable person in his situation. Goetz argued that in assessing his "justification" defense, the Grand Jury should have focused only on Goetz's own state of mind, not on what a reasonable person would have thought or done. Criminal Term dismissed the murder and assault indictments, and the Appellate Division affirmed. The People appealed to the Court of Appeals.

The Court of Appeals, in an opinion by Chief Judge Sol Wachtler, reversed and reinstated the indictment. The court rejected the argument that the legislature had adopted a purely subjective standard for measuring a criminal defendant's justification. In the court's words:

"We cannot lightly impute to the Legislature an intent to fundamentally alter the principles of justification to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable



The 1986 Court. From left: Judges Titone, Kaye, Meyer, Chief Judge Wachtler, Judges Simons, Alexander II, and Hancock.

COURT OF APPEALS COLLECTION

and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force."

People v. Goetz, 68 N.Y.2d 96, 111 (1986). Although Goetz was ultimately acquitted of the most serious charges against him, the Court of Appeals opinion remains a critical one in evaluating the justification defense.

CORPORATE LAW

I. Shareholder Agreements

To what extent may corporate directors (who are also corporate shareholders) limit, by contract, their managerial discretion? The Court of Appeals addressed that issue in two leading cases, *McQuade v. Stoneham*, 263 N.Y. 323 (1934), and *Clark v. Dodge*, 269 N.Y. 410 (1936). *McQuade v. Stoneham* involved the management of the New York Giants baseball club (since moved to San Francisco). Horace Stoneham owned 1,306 shares in the corporation that owned the baseball club. The team manager, John J. McGraw, owned 70 shares, as did McQuade, who was then a City Magistrate. The parties entered into a contract which provided that each of the parties would use best efforts to maintain Stoneham, McGraw, and McQuade as officers and directors of the company. Years later, Stoneham and McQuade had a falling out, and the directors (other than Stoneham and McGraw, who did not vote) replaced McQuade as officer and director. Stoneham and McGraw made no efforts to keep McQuade on. McQuade then brought an action for specific performance.

The Court of Appeals, in an opinion by Chief Judge Cuthbert W. Pound, held the agreement



From left: Chief Judge Pound, Governor Roosevelt and Judge Crouch

COURT OF APPEALS COLLECTION

unenforceable. The court emphasized the need to keep directors independent in their exercise of judgment:

"[T]he stockholders may not, by agreement among themselves, control the directors in the exercise of the judgment vested in them by virtue of their office to elect officers and fix salaries."

263 N.Y. at 328. The court went on to hold:

"that a contract is illegal and void so far as it precludes the board of directors, at the risk of incurring legal liability, from changing officers, salaries or policies or retaining individuals in office, except by consent of the contracting parties."

Id. at 330.

Less than two years later, in *Clark v. Dodge*, the court appeared to retreat from *McQuade v. Stoneham*. Clark owned 25% and Dodge 75% of the stock in two corporations. Clark managed the corporations, although Dodge was a director and controlled the other directors of the corporations. The corporations manufactured medical preparations, and Clark alone knew the formulas. Dodge and



Chief Judge Cuthbert W. Pound
COURT OF APPEALS COLLECTION

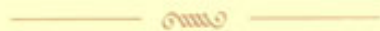
Clark agreed that Clark would divulge a specified formula to one of Dodge's sons, that Dodge would vote his stock to continue Clark as general manager, and that no unreasonable salaries would be paid to others in a way that would materially affect Clark's profits. Clark alleged that Dodge breached the agreement, and Dodge, citing *McQuade v. Stoneham*, contended that the agreement was unenforceable.

The Court of Appeals, in an opinion by Judge Leonard C. Crouch, held the agreement enforceable. In stark contrast to the language in *McQuade*, the court wrote:

"Where the directors are the sole stockholders, there seems to be no objection to enforcing an agreement among them to vote for certain people as officers."

269 N.Y. at 415. The court indicated that "[t]he broad statements in the *McQuade* opinion, applicable to the facts there, should be confined to those facts." *Id.* at 417.

The two cases remain mainstays of the corporate literature, and discerning the relevant distinctions between them has occupied generations of law students and lawyers.



2. The Scope of Limited Liability

Corporate law rests on the premise that limited liability is necessary to induce investors to participate in large ventures in which those investors will enjoy limited participation in management. How far does the privilege of limited liability extend? The Court of Appeals

opinion in [*Walkovsky v. Carlton*](#), 18 N.Y.2d 414 (1966), has become a leading case on that question.

Plaintiff was a pedestrian injured by a taxicab owned by a corporation whose only assets were two taxicabs, both mortgaged, registered in its name. The sole shareholder of the corporation, however, was the shareholder in 10 corporations, each of which had two cabs registered in its name. Since each corporation only carried the minimum liability insurance required by law, injured plaintiff sought to hold the corporation's individual stockholder liable for his injuries on the theory that the multiple corporate structure was an attempt to defraud members of the public who might be injured by cabs.

In an opinion by Judge Stanley H. Fuld, the Court of Appeals refused to "pierce the corporate veil." The court acknowledged that piercing the veil was appropriate when the corporate shareholders are actually doing business in their individual capacities, shuttling their personal funds in and out without regard to formality. In *Walkovsky*, however, plaintiff made no allegation that the shareholders were acting in their individual capacities; instead, plaintiff alleged only that the corporations were undercapitalized and that their assets were intermingled. This, without more particularized statements, was not enough to justify piercing the veil.

Moreover, Judge Fuld noted that the real problem in the case was the inadequacy of insurance coverage - an inadequacy caused by the Legislature's decision to set a low minimum for insurance coverage, and curable by the Legislature. Judge Fuld emphasized that plaintiff could just as easily have been injured by a taxicab owned by its individual driver, who might hold the cab in corporate form, and who might maintain only the minimum



The 1966 Court. From left: Judges Bergin, Burke, Fuld, Chief Judge Desmond, Judges Van Voorhis, Scileppi and Keating.
COURT OF APPEALS COLLECTION

insurance. In dismissing the claim against the individual shareholder, Judge Fuld wrote:

"If it is not fraudulent for the owner-operator of a single cab corporation to take out only the minimum required liability insurance, the enterprise does not become either illicit or fraudulent merely because it consists of many such corporations. The plaintiff's injuries are the same regardless of whether the cab which strikes him is owned by a single corporation or part of a fleet with ownership fragmented among many corporations."

15 N.Y.2d at 421. At best, in Judge Fuld's view, plaintiff might be entitled to recover against the larger corporate entity composed of many corporations, which might, under agency principles, be liable to each other's creditors.

Judge Kenneth B. Keating, in dissent, refused to accept the argument that the State Legislature had acquiesced in the arrangement by establishing low mandatory insurance requirements:

"[I]t is reasonable to assume that the Legislature believed that those individuals and corporations having substantial assets would take out insurance far in excess of the minimum in order to protect those assets from depletion."

Id. at 425-26. Judge Keating would have held:

"that a participating shareholder of a corporation vested with a public interest, organized with capital insufficient to meet liabilities which are certain to arise in the ordinary course of the corporation's business, may be held personally responsible for such liabilities."

Id. at 427.

3. Derivative Litigation

The New York courts have not been burdened with an overwhelming volume of shareholder derivative litigation. The Court of Appeals decision in [*Auerbach v. Bennett*](#), 47 N.Y.2d 619 (1979), deserves much of the credit for keeping shareholder derivative litigation under control.

At the direction of the Board of Directors of General Telephone — Electronics Corp, the board's audit committee investigated the corporation's worldwide activities to determine whether the corporation had paid any bribes or kickbacks to government officials around the world. The committee reported that payments totaling more than 11 million dollars had been made, and that some individual directors had

Constitution of 1869.

C.R.M. Vol. 101-2
Also in
D.M. 1870
P.O. 1
N. P. Clippings
July 5-1870
Allan
Grades.
July 9-1870
C.R.M. 101-1
same-1-2

The Court of Appeals as authorized by the constitution of 1869, was organized on ^{Monday} July 4th, 1870 in the Senate Chamber of the Old Capitol at Albany, N.Y.

The Judges were sworn in by Homer A. Nelson, Secretary of State, each judge certifying to his age as follows, Chief Judge Church, 55, Judge Allen 61, Judge Groves 57, Judge Rapaport 46, Judge Folger 52, Judge Andrews 43, C. A. Perring, Clerk, Samuel W. Andrus, reporter, Amos A. Dodge, Jr.

Addresses by J. V. L. Ryn and Henry B. Davis. Judge Church.

Excerpt from the Minutes (1870)
COURT OF APPEALS COLLECTION

*Clerk directed to "cause the chair of the deceased Judge Peckham
C.M.-1873-180 and the court room to be suitably draped etc. Dec 4, 1873*

*C.R.-1875 Presentation to Court of portrait of Judge Rufus W. Peckham
P.-132.1 by the Bar of the State of N.Y. (Clipping) June 12, 1875*

Excerpt from the Minutes (1873, 1875)
COURT OF APPEALS COLLECTION

been personally involved. A shareholder immediately brought a shareholder derivative action against the corporation's directors, its accountants, and the corporation itself. In response, the board created a special litigation committee, comprised of three disinterested directors who had joined the board after the challenged transactions. The board of directors vested in the special litigation committee all authority to determine the corporation's position with respect to the derivative claims. The special litigation committee determined that it would not be in the corporation's interest for the derivative action to proceed, taking into account litigation costs, possible damage to the corporation's reputation, and waste of management time. The corporation then moved to dismiss the derivative action. Special Term granted the motion to dismiss, but the Appellate Division reversed, and the corporation appealed to the Court of Appeals.

In an opinion by Judge Hugh R. Jones, the court reversed:

"While the substantive aspects of a decision to terminate a shareholders' derivative action against defendant corporate directors made by a committee of disinterested directors appointed by the corporation's board of directors are beyond judicial inquiry under the business judgment doctrine, the court may inquire as to the disinterested independence of the

members of that committee and as to the appropriateness and sufficiency of the investigative procedures chosen and pursued by the committee. In this instance, however, no basis is shown to warrant either inquiry by the court."

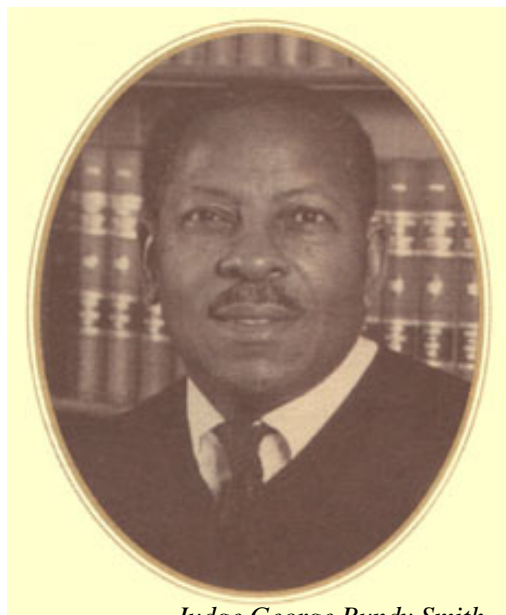
47 N.Y.2d at 623-24. The court's holding provided corporations with a mechanism for deterring derivative litigation; by appointing a special litigation committee, the corporation could effectively foreclose derivative suits so long as the committee, after appropriate investigation, concluded that the litigation was not in the best interest of the corporation.

More recently, in [Marx v. Akers](#), 88 N.Y.2d 189 (1996), the court dismissed a derivative action alleging that the directors had engaged in corporate waste by increasing the compensation of outside directors. An IBM shareholder brought the derivative action against IBM's board, complaining that the board, in a period of declining profitability, had increased the compensation of IBM's executives and outside directors. The shareholder never served on the IBM board a demand that the board institute an action for corporate waste. The board moved to dismiss for failure to serve a demand, and for failure to state a cause of action.

In dismissing the complaint, the Court of Appeals, construing the applicable statute, held that a demand

C. R. - 1875 At a meeting of the Bar held in the court room of the
Page 62 Court of Appeals, March 25, 1875. Resolved: That as a
Friday Mar 23 1874 mark of respect to the Chief Justice and Associate Justices
of the Court, and as indication of the veneration at
all times due to Justice, the Crier of this be requested
from this time forth to announce the entrance to
the court room of the Chief Justice and his Associates;
and that the members of the bar, present rise and
remain standing until the Judges are seated.
Geo F Comstock, Chairman. C O Penin Secy.

Excerpt from the Minutes (1875)
COURT OF APPEALS COLLECTION



Judge George Bundy Smith
COURT OF APPEALS COLLECTION

must be served unless the demand would be futile. With respect to the allegations that the board had authorized excessive executive compensation, the court held that the futility requirement had not been met because shareholder- plaintiff could not establish that the majority of the board had acted out of self-interest in authorizing excess compensation. By contrast, the court did recognize that a majority of the board was self-interested in the board's vote to increase the compensation of outside directors - who numbered 15 out of a total of 18 IBM directors. Hence, the futility requirement was met with regard to that claim. Nevertheless, the court dismissed the waste claim on the merits, reaffirming the principle that courts should intervene in corporate affairs only when "wrongdoing and oppression or possible abuse of a fiduciary position are shown." 88 N.Y.2d at 203. Judge George Bundy Smith wrote for the court:

"[A] complaint challenging the excessiveness of director compensation must - to survive a dismissal motion - allege compensation rates excessive on their face or other facts which call into question whether the compensation was fair to the corporation when approved, the good faith of the directors setting those rates, or that the decision to set the compensation could not have been a product of valid business judgment."

Id. at 203-204. Thus, the court again invoked the business judgment rule to protect the corporation (and its shareholders) from the burden of derivative litigation.

4. The Status of Minority Shareholders in Closely-Held Corporations

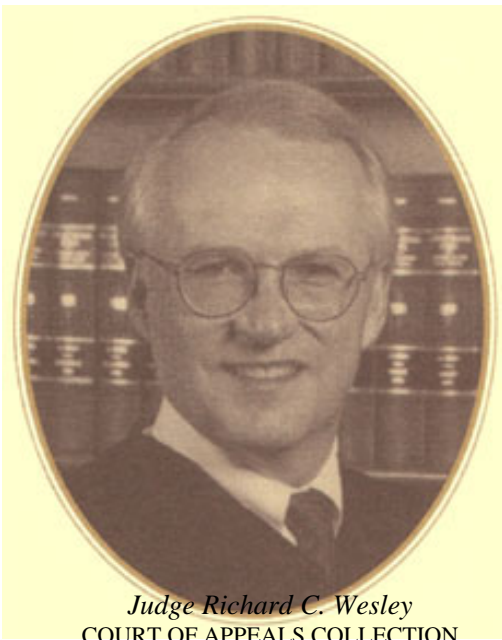
In a number of cases, state courts, particularly in Massachusetts, have protected minority shareholders in closely-held corporations from arbitrary dismissal by controlling shareholders. In the view of those courts, the shareholders understand that compensation of minority shareholders is to come from some combination of salary and return on shares, and that the majority may not simply terminate the employment of minority shareholders whenever termination seems convenient.

In *Ingle v. Glamore Motor Sales, Inc.*, 73 N.Y.2d 183 (1989), the Court of Appeals emphatically rejected this view of the employment relationship in closely-held corporations. Glamore, the corporation's sole shareholder, hired Ingle as a sales manager, and later gave Ingle the right to purchase shares in the corporation. A subsequent agreement among the shareholders - by then including Glamore's two sons, as well as Glamore and Ingle - provided that if any shareholder shall cease to be an employee of the corporation, Glamore would have the option to purchase all of the shares of that stockholder. A year later, the corporation's directors voted Ingle out of his corporate posts, and fired him as an employee. Glamore then exercised his option to repurchase Ingle's shares. Ingle brought an action for breach of a contractual duty of good faith and fair dealing, and for breach of fiduciary duty.

In an opinion by Judge Joseph W. Bellacosa, the court held that Ingle's causes of action were properly dismissed. In the court's view, the employment contract and the minority shareholder's rights as shareholder were entirely separate matters:

"A minority shareholder in a close corporation, by that status alone, who contractually agrees to the repurchase of his shares upon termination of his employment for any reason, acquires no right from the corporation or majority shareholders against at-will discharge.... It is necessary in this case to appreciate and keep distinct the duty a corporation owes to a minority shareholder *as a shareholder* from any duty it might owe him as an employee."

73 N.Y. 2d at 188 (italics in original). Despite an articulate dissent by Judge Stewart E Hancock, Jr. invoking equi-



Judge Richard C. Wesley
COURT OF APPEALS COLLECTION

table and fiduciary principles, the Court of Appeals opinion in *Ingle* has become a leading case for a contract-based view of the relationship between majority and minority shareholders in a closely-held corporation.

REGULATION OF
INTERNATIONAL FINANCE

Because New York is a center for international commerce, the Court of Appeals has, on a number of occasions, dealt with controversies over regulation of multinational financial entities. With the growing internationalization of finance, litigation of this sort is becoming more common. One of the most important of these cases is also the most recent - *Matter of New York Agency of the Bank of Credit and Commerce International (BCCI) v. CITIC Industrial Bank*, 90 N. Y.2d 410 (1997). BCCI, an international banking entity involved in money laundering on behalf of drug lords and international terrorists, had become the focus of investigations both in the United States and abroad. Despite BCCI's reputation as a "rogue" bank, CITIC Industrial Bank, motivated by the high interest rates BCCI was willing to pay, had been engaging in regular "dollar placements" with BCCI's Tokyo branch. During the early morning hours of July 5, 1991, CITIC, through a special Citibank terminal, ordered Citibank to transfer \$31 million, electronically, to BCCI's account at BankAmerica International (BAI) in New York. On the morning of July 5, New York's Superintendent of Banks ordered seizure of all of BCCI's property in New York on the ground that BCCI was in an unsound and unsafe condition. At 10:40 a.m., an assistant superintendent called BAI ordering that no moneys should be allowed out of any BCCI accounts at BAI. Not until later in the day, however, did Citibank actually send the CITIC funds to BAI. CITIC had never cancelled its transfer order. The Superintendent of Banks sought release by BAI of the \$31 million; CITIC objected, seeking return of the funds.

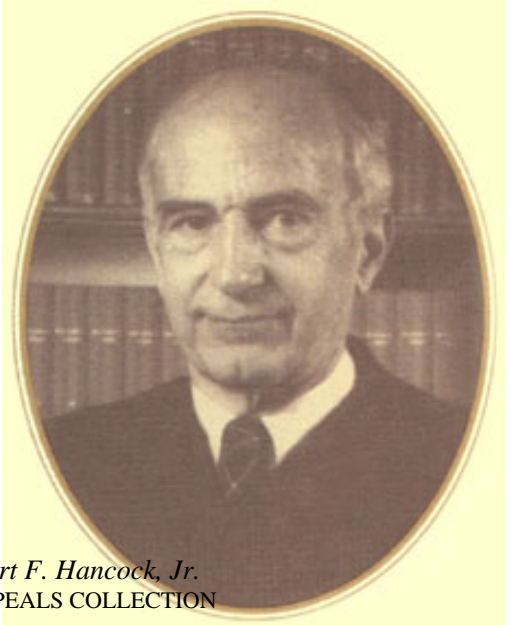
In an opinion by Judge Richard Wesley, the Court of Appeals held that the Superintendent was entitled to the money, rejecting CITIC's argument that once the Superintendent had seized BCCI's New York Agency, BCCI could no longer accept deposits. Judge Wesley's opinion for the court eschewed reliance on analogy to receiverships, turning instead to the realities of international banking in the 1990s:

"CITIC's argument ... ignores the organization of an international banking corporation. In essence, a branch/agency is nothing more than a stall in the money market bazaar of international banking in New York. A branch of a bank is not a separate entity. It has no separate capital, but rather has the entire worldwide capital of the foreign bank behind its transactions and its lending limits.... The New York Agency is the only part of BCCI that the Superintendent can control, license, or regulate. But that relationship does not require us to determine that CITIC's contract with another branch of BCCI in Tokyo ... was incapable of performance at the time the Superintendent took control of the New York agency."

The court's opinion preserved the power of the Superintendent of Banking to seize the assets of a foreign banking entity in order "to protect the integrity, stability and reliability of the New York financial market."

CONFLICT OF LAWS

The Court of Appeals has played a critical role in the development of choice-of-law theory during the twentieth century. At a time when most courts, including



Judge Stewart F. Hancock, Jr.
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the Court of Appeals, were generally committed to a wholly territorial theory of choice of law, many litigants invoked "public policy" as a basis to escape the unfavorable law of another jurisdiction. Quite early, however, the Court of Appeals held that it would not invoke New York public policy to strike a defense available under the law of the jurisdiction in which the parties acted.

The case was *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474 (1938), and the foreign law involved - the law of Nazi Germany - was undoubtedly repugnant to the moral sensibilities of the Court. Plaintiff, a German Jew, brought an action against a German corporation for breach of an employment contract. The contract provided that if the employee should die or become unable, without fault on his part, to perform the contract, the employer would pay him 120,000 marks. The first cause of action in the employee's complaint alleged that the employer discharged him solely because he was a Jew. The complaint sought damages. As a defense, the employer relied on German laws requiring discharge of persons of non-Aryan descent. Special Term struck the defense, and the Appellate Division affirmed.

The Court of Appeals modified to reinstate the defense. The court, in a Per Curiam opinion, wrote:

"Within its own territory every government is supreme and our courts are not competent to review its actions. We have so held, 'however objectionable' we may consider the conduct of a foreign government."

277 N.Y. at 479 (citations omitted). The court's point, in effect, was this: New York courts should not and will not invoke public policy to impose sanctions on a private party for taking actions in another country when those actions were mandated by the government of that country.

By contrast, the Court of Appeals invoked public policy to permit a New Yorker to escape from a Massachusetts wrongful death limitation in *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34 (1961). A New York passenger had bought, in New York, an airline ticket for a trip from New York to Nantucket. The plane crashed, killing the passenger, whose administrator then brought an action against the airline. The airline invoked a Massachusetts statute limiting recovery

for wrongful death to a maximum of \$15,000. The Court of Appeals, in affirming the Appellate Division's dismissal of the administrator's cause of action for breach of contract, indicated that the tort cause of action could proceed, and that the court below need not honor the Massachusetts limitation.

Chief Judge Charles S. Desmond wrote for the court, and his opinion was a harbinger of changes to come in New York's treatment of choice of law. In refusing, on public policy grounds, to enforce the damage limitation, Judge Desmond wrote:

"An air traveler from New York may in a flight of a few hours' duration pass through several ... commonwealths. His plane may meet with disaster in a State he never intended to cross... The place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of the lawsuits which result from these disasters."

9 N.Y. 2d at 39.

Two years later, the Court of Appeals decided the case that marked the turning point in American choice of law.



The 1937-39 Court
FROM THE NEW YORK RED BOOK, REPRINTED BY PERMISSION
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William Jackson and his wife, residents of Rochester, picked up their friend, Georgia Babcock, also a Rochester resident, for what was supposed to be a weekend trip to Ontario, Canada. While in Ontario, Jackson lost control of the car, which ran into a stone wall, leaving Babcock seriously injured. On her return to New York, Babcock sought damages for her injuries. Jackson (or his insurance carrier) invoked an Ontario statute prohibiting recovery by guests against owners or drivers of motor vehicles. Under then-prevailing choice-of-law principles, Ontario law would apply because the accident took place in Ontario.

In an opinion by Judge Stanley H. Fuld, the Court of Appeals considered the relative interests of New York and Ontario in the disposition of the case. The court emphasized that New York's interests in compensating the injured passenger were not diminished merely because the auto accident had occurred in Ontario. Conversely, the court indicated that "Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law."

[*Babcock v. Jackson*](#), 12 N.Y.2d 473 at 482 (1963).

The court noted that the primary justification for the Ontario statute - prevention of collusive and fraudulent claims against Ontario insurance companies - had no application in an action between New Yorkers insured by a New York insurance carrier.

Judge Fuld's opinion went on to abandon explicitly the traditional rule that the place of injury always governs in tort cases:

"[R]econsideration of the inflexible traditional rule persuades us, as already indicated, that, in failing to take into account essential policy considerations and objectives, its application may lead to unjust



Judge Richard D. Simons
COURT OF APPEALS COLLECTION

and anomalous results. This being so, the rule, formulated as it was by the courts, should be discarded."

Id. at 484. *Babcock v. Jackson*'s rejection of the traditional rule is often treated as the touchstone for the modern revolution in choice of law.

Since *Babcock*, the Court of Appeals has recognized that it is not fruitful to apply a single, talismanic, approach to choice of law. In [*Schultz v. Boy Scouts of America, Inc.*](#), 65 N.Y.2d 189 (1985), the court, in an opinion by Judge Richard D. Simons, distinguished between conduct-regulating and loss-allocating rules, holding that the traditional, place-of-the-wrong rule is more appropriate when conduct-regulating rules are involved, but less appropriate when loss-allocating rules are at stake.

In [*Cooney v. Osgood Machinery, Inc.*](#), 81 N.Y.2d 66 (1993), the court recognized that the distinction drawn in *Schultz*, while helpful as a starting point, is inadequate to





take into account the subtleties that underlie many choice-of-law problems. A Buffalo company bought a "bending roll" through Osgood Machinery, Inc. a New York sales agent which helped in the setup and initial operation of the machine. The Buffalo plant closed in 1961, and the bending roll ultimately made its way to a factory operated by Paul Mueller Co. in Missouri. Dennis Cooney, a Paul Mueller employee, was injured while cleaning the machine. Cooney obtained workers compensation benefits in Missouri, and then brought a products liability action, in New York, against Osgood Machinery. Osgood sought contribution from Paul Mueller Co. which had modified the bending roll by adding a foot switch. Mueller sought summary judgment, relying on Missouri's workers compensation statute which precluded all claims - including contribution claims - against an employer who provided workers' compensation benefits. New York, by contrast, permits contribution claims against employers who provide workers' compensation benefits. The question, then, was whether New York or Missouri law should apply.

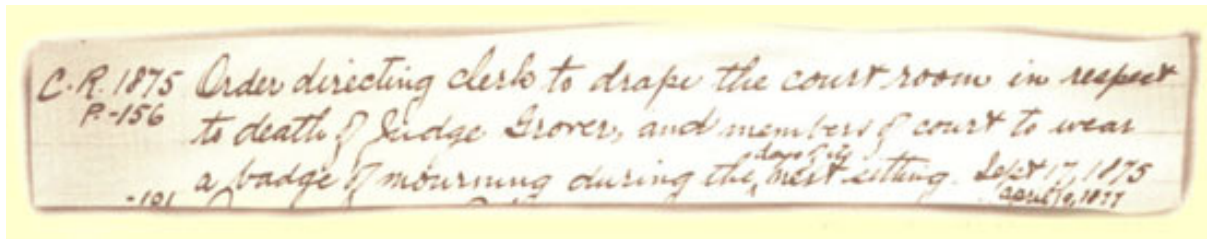
In an opinion by Chief judge Judith Kaye, the Court of Appeals held that Missouri law was applicable. After surveying the court's earlier choice-of-law opinions, Judge Kaye noted that the *Cooney* case presented a true conflict, "where the local law of each litigant's domicile favors that party." 81 N.Y.2d at 76. In such cases, Judge Kaye indicated, the place of injury - here Missouri - should govern. Judge Kaye noted that the court's approach "reflects a neutral factor that favors neither the forum's law nor its domiciliaries." Id. Finally, she emphasized party expectations as a reason to apply Missouri law:

"[O]ur decision to apply Missouri law rests as well on another factor that should, at times, play a role in choice of law: the protection of reasonable expectations. In view of the unambiguous statutory language barring third-party liability ..., Mueller could hardly have expected to be haled before a New York court to respond in damages for an accident to a Missouri employee at the Missouri plant."

81 N.Y.2d at 77. Moreover, underlying Judge Kaye's opinion - as emphasized in a footnote to the opinion - was the recognition that New York should not apply its "minority view" on contribution to upset the "carefully structured workers' compensation schemes of other States." Id. at 77, n.2. Put less diplomatically, New York contribution law made little sense, and the Court of Appeals was not about to apply that rule more broadly than necessary. *Cooney*, like *Babcock*, illustrates the capacity of the Court of Appeals, in choice-of-law matters, to capture what Karl Llewellyn called the "situation sense" of the cases that come before the court.

— DIVORCE AND FAMILY LAW —

For generations. New York's strict divorce law limited the number of divorce issues the Court of Appeals had to face. As social mores changed, and as travel to other jurisdictions with more liberal divorce laws became more feasible, some New Yorkers sought



Excerpt from the Minutes (1875)
COURT OF APPEALS COLLECTION

to avoid New York's one-ground divorce law by obtaining foreign divorces. Thousands of New Yorkers resorted to Mexican divorces. The validity of these divorces reached the Court of Appeals in *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64 (1965).

Rosenstiel sought an annulment of his marriage on the ground that his supposed wife remained validly married to her first husband. The first husband had appeared in Mexico to seek a divorce and, the next day, the wife appeared by an attorney authorized to act for her. A Mexican court granted the parties a divorce the same day. Rosenstiel argued that the divorce should not be recognized in New York, and that his marriage should therefore be annulled.

In an opinion by Judge Francis Bergan, the Court of Appeals rejected Rosenstiel's argument. Judge Bergan noted that New York courts were constitutionally required to give effect to Nevada divorces, which require six weeks residence in Nevada, and observed "Nevada gets no closer to the real public concern with the marriage than Chihuahua." 16 N.Y.2d at 73. Just a year after the *Rosenstiel* decision, the New York Legislature made it easier for parties to obtain a divorce. By providing a blueprint for obtaining a valid "quickie" divorce, the Court of Appeals opinion in *Rosenstiel* undoubtedly influenced the Legislature to liberalize New York's own divorce laws.

Once New York's divorce laws were liberalized, division of marital property upon divorce became a significant issue.

The Legislature enacted a statute mandating equitable distribution of marital property but an important question remained: do licenses and degrees acquired during the marriage qualify as marital property? In *O'Brien v. O'Brien*, 66 N.Y.2d 576 (1985), the Court of Appeals held that degrees and licenses obtained during the marriage are marital property subject to equitable distribution.

The O'Briens, then both teachers at a private school, were married in 1971. In 1973, the couple moved to Mexico where Mr. O'Brien entered medical school. His wife worked and contributed her earnings to the couple's joint expenses. The parties returned to New York in 1976 so that the husband could finish his medical training. The husband received his medical license in October 1980, and filed for divorce two months later. The wife sought a share of the value of her husband's medical license.

In an opinion by Judge Richard D. Sinions, the Court of Appeals held that treatment of a professional license as marital property is consistent with the partnership theory of marriage that underlies equitable distribution statutes:

"[F]ew undertakings during a marriage better qualify as the type of joint effort that the statute's economic partnership theory is intended to address than contributions toward one spouse's acquisition of a professional license.



Working spouses are often required to contribute substantial income as wage earners, sacrifice their own educational or career goals and opportunities for child rearing, perform the bulk of household duties and responsibilities and forego the acquisition of marital assets that could have been accumulated if the professional spouse had been employed rather than occupied with the study and training necessary to acquire a professional license."

66 N.Y.2d at 585. Although there remains disagreement among the states about the appropriate treatment of degrees and licenses, courts and scholars always cite O'Brien as the leading case for treating degrees and licenses as marital property.

In recent years, the court's opinions have, to some degree, focused less on the financial incidents of marriage, and more on the impact of divorce on the family. In particular, in an era marked by mobility, the court has had to consider the right of a custodial parent to move when the move would reduce the ability of the non-custodial spouse to visit with the child. *Tropea v. Tropea*, 87 N.Y.2d 727 (1996) is certain to become a leading case.

Under the terms of a separation agreement later incorporated into the divorce judgment, the mother was awarded custody of the children, and the father was granted visitation at least three days a week. Both parties were barred from relocating outside of Onondaga County. One year later the mother, now remarried and expecting another child, sought permission to relocate to Schenectady, two and a half hours away. The father objected, noting that the move would eliminate midweek visitation, and prevent him from continuing his involvement in the children's religious and academic education, and from continuing to coach their sports teams.

In an opinion by Judge Vito Titone, the Court of Appeals upheld the mother's right to move. Rejecting the notion that the custodial parent should be entitled to disrupt the non-custodial parent's visitation rights only upon a showing of "exceptional circumstances," the court held that the focus should be on whether "a proposed relocation would serve the child's best interests." 87 N.Y.2d at 741. Judge Titone wrote:



Judge Vito J. Titone
COURT OF APPEALS COLLECTION

"...[I]t serves neither the interests of the children nor the ends of justice to view relocation cases through the prisms of presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another."

Id. at 740.



Although much intellectual property law is federal, the Court of Appeals has rendered a number of intellectual property decisions with national significance. In *Tabor v. Hoffman*, 118 N.Y. 30 (1889), the court laid the foundation for a good deal of trade secret law. Plaintiff invented, patented and manufactured a pump. Over time, plaintiff improved the pump without seeking new patents for the improvements. Instead, he incorporated the improvements in his patterns for making new pumps, and kept the patterns in his exclusive possession. When plaintiff's patent expired, defendant hired one of plaintiff's employees, and induced him to copy plaintiff's patterns, from which defendant manufactured his own pumps. Plaintiff sought to enjoin defendant from using the patterns.

The Court of Appeals, in an opinion by Judge Irving G. Vann, granted the injunction. Defendant had argued that no protection was appropriate,

because defendant could have, by experimentation, duplicated the patterns. The Court of Appeals emphatically rejected the argument:

"If a valuable medicine, not protected by patent, is put upon the market, anyone may, if he can by chemical analysis and a series of experiments, or by any other use of the medicine itself aided by his own resources only, discover the ingredients and their proportions. If he thus finds out the secret of the proprietor, he may use it to any extent that he desires without danger of interference by the courts. But, because this discovery may be possible by fair means, it would not justify a discovery by unfair means, such as the bribery of a clerk, who in course of his employment ... had ... become familiar with the formula."

118 N.Y. at 36. Thus, the Court of Appeals established that an imitator may be free to duplicate a competitor's unpatented product by reverse engineering, but is not free to do so by stealing the competitor's secret processes. The Court of Appeals has also been in the forefront of unfair competition law. [*Fisher v. Star Company*](#), 231 N.Y. 414 (1921), is a leading case. The creator of the "Mutt" and "Jeff" cartoon characters sought to enjoin a publisher from drawing and publishing Mutt and Jeff cartoons so like the creator's own cartoons as to cause confusion in the public mind. The Court of Appeals, in an opinion by Judge Emory A. Chase, affirmed the grant of an injunction:

"If appellant's employees can so imitate the work of the respondent that the admirers of 'Mutt and Jeff' will purchase the papers containing the imitations of respondent's work, it may result in the public tiring of the 'Mutt and Jeff' cartoons by reason of inferior imitations or otherwise, and in any case in financial damage to the respondent and an unfair appropriation of his skill and the celebrity acquired by him in originating, producing and maintaining the characters and figures so as to continue the demand for further cartoons in which they appear."

231 N.Y. at 433. Thus, the court recognized that "[n]o person should be permitted to pass off as his own the thoughts and works of another." *Id.*

Until the 1976 Federal Copyright Act was enacted, no federal copyright attached to works until publication. Since the 1976 act, federal copyright attaches once a work has been "fixed in any tangible medium of expression." Does a person have any right to prevent publication of words uttered, but not published or "fixed"? The Court of Appeals addressed that question in [*Estate of Hemingway v. Random House, Inc.*](#), 23 N.Y.2d 341 (1968). During the last 13 years of his life, Ernest Hemingway had many conversations with A.E. Hotchner, a writer and frequent drinking companion. Hotchner frequently took notes of these conversations. After Hemingway's death, Hotchner wrote "Papa Hemingway," a biographical memoir built around quotations from Hemingway's conversations with Hotchner. Hemingway's widow and his estate sought an injunction and damages, asserting that Hemingway owned a common-law copyright in the quotations in the book, that publication would compete unfairly with Hemingway's other creations, and that Hotchner wrongfully used material that Hemingway had imparted to him in confidence.

In an opinion by Chief Judge Fuld, the Court of Appeals held that the courts below had properly dismissed the complaint. The court emphasized that during his lifetime, Hemingway had approved of Hotchner's practice of writing articles about Hemingway, and of liberally quoting from



Hemingway in those articles. As a result, the court concluded that Hemingway had impliedly authorized Hotchner to publish. Judge Fuld went on to suggest contours for any common-law copyright in spoken words:

"Assuming, without deciding, that in a proper case a common-law copyright in certain limited kinds of spoken dialogue might be recognized, it would, at the very least, be required that the speaker indicate that he intended to mark off the utterance in question from the ordinary stream of speech, that he meant to adopt it as a unique statement and that he wished to exercise control over its publication."

23 N.Y.2d at 349. The court went on to reject the estate's other claims as well.

— STATE FINANCE LAW —

Throughout the history of New York (and other states), state and local governments have sought to borrow to avoid taxing citizens to pay the cost of government. The State Constitution has long constrained borrowing power, and public officials have long sought to avoid the constraints. Ultimately, it has fallen to the Court of Appeals to enforce the constitutional limits - which the court has done since 1852 when, in *Newell v. People ex rel. Phelps*, 7 N.Y. 9 (1852), the court invalidated a statute which had authorized issuance of "canal revenue certificates", payable out of surplus revenues after the completion of an enlargement of the Erie Canal. The statute provided that the certificates "shall in no event or contingency be so construed as to create any debt or liability against the state..." within the meaning of the state constitutional debt limitation. That is, the state legislature sought to avoid the need for a public referendum on the canal expansion project.

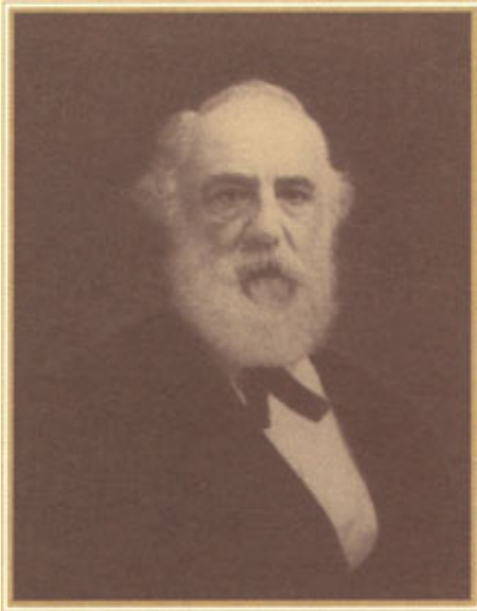
Responding to the argument that the certificates did not constitute state debt because the state only made available a single fund - canal revenues - for repayment of the debt, Judge Alexander S. Johnson wrote:

"If this can be done in regard to one source of revenue, we see no reason why the same thing may not be done in regard to every source of revenue of the state, including not only all revenue which may arise from property, but also all which may be realized by the exercise of the power of taxation.... If the constitutional provision against incurring debts permits such a scheme as this to be effectual, it is of small moment to inquire what it prohibits; for it provides no practical restraint whatever upon the power of the legislature."

7 N.Y. at 102-03. The litigation also generated two other opinions for the court, and a dissent.

More recently, the City of New York found itself in serious financial difficulty, in part because of excess borrowing. The city had issued short-term obligations - tax anticipation notes, revenue anticipation notes, and the like. When the city had difficulty meeting its financial obligations, the State Legislature enacted the New York City Emergency Moratorium Act, which imposed a three-year moratorium on actions to enforce the short-term obligations, unless the holders of those obligations "voluntarily" exchanged them for bonds issued by an intermediate finance agency - bonds which would not carry the "faith and credit" of either the state or the city. By contrast, when the city issued its short-term obligations, it had pledged its faith and credit. Bondholders responded to the moratorium by bringing an action to declare the moratorium unconstitutional. The Supreme Court and the Appellate Division rejected the bondholder's challenge, and sustained the moratorium.

In an opinion by Chief Judge Breitel, the Court of Appeals reversed, finding a violation of the state constitutional requirement that the city not contract indebtedness unless it has "pledged its faith and



Judge A. S. Johnson
COURT OF APPEALS COLLECTION

credit" for repayment of the debt. [*Flushing National Bank v. Municipal Assistance Corp.*](#), 40 N.Y.2d 731 (1976). The court rejected as "strange" the argument that the city had satisfied its obligation by "engraving a statement of the pledge in the text of the obligation." 40 N.Y.2d at 735-36. Acknowledging the city's enormous fiscal difficulties,

the court nevertheless rejected the legislature's solution:

"What has happened is those responsible have made an expedient selection of the temporary noteholders to bear an extraordinary burden. The invidious consequences may not be justified by fugitive recourse to the police power of the State or to any other constitutional power to displace inconvenient but intentionally protective constitutional limitations."

40 N.Y.2d at 736. Near the close of its opinion, the court emphasized the role of the courts in enforcing the constitution:

"Emergencies and the police power, although they may modify their applications, do not suspend

constitutional principles. It is not merely a matter of application to interpret the words the Constitution and obligations issued subject the Constitution to mean exactly the opposite what they say. The notes in suit provided city pledged its faith and credit to pay the notes and to pay them punctually when due. The clause and the constitutional mandate have no office except when their enforcement is inconvenient. A neutral court worthy of its status cannot do less than hold what is so evident."

40 N.Y.2d at 740-41. As it turned out, the court's decision did not cause nearly the financial upset some had feared. New York City recovered, and the court had established, once again, its willingness to police legislative behavior and safeguard constitutional principles.

CONCLUSION

This survey of leading decisions includes only a fraction of Court of Appeals decisions that have left their mark on our jurisprudence. Moreover, the court's role is not merely to make law for the ages, but to decide cases for the here and now. Much of the court's important work has focused on cases significant to the litigants, but not for posterity.

In addition, the court routinely decides many important cases that will have no significance for the national jurisprudence because the cases turn on peculiarly New York issues - New York procedural rules, New York administrative law, or unusual New York constitutional or statutory provisions. Indeed, in recent decades, these cases have generated an increasing share of the court's workload. As significant as these cases are

for the people of the State, they are less likely to be cited outside the State - or in the legal literature - than are cases like *Jacob — Youngs v. Kent* or *Riggs v. Palmer*. In addition, the Court of Appeals has also rendered many significant and thoughtful decisions on federal tutional law, but those decisions never receive the same attention as constitutional decisions made by the United States Supreme Court.

What is so remarkable is that, while functioning as the court of last resort for a single state, the Court of Appeals has, for 150 years, generated so many opinions impressed on the consciousness of lawyers throughout the country and beyond. In short, when the Court of Appeals speaks, lawyers (and educators) listen.