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JOHN JAY AS NEW YORK'S FIRST CHIEF JUSTICE

BY WALTER STAHR

In the late spring of 1777, after finishing their work on the state constitution, John Jay and the other delegates meeting in Kingston turned to the question of who would fill certain key positions in the new state government. The constitution provided a procedure for appointing justices and most other state officers: a council of appointment consisting of the governor and four senators. However, fearing that the war would delay the election of a governor and senators and anxious for the new courts to start work, the delegates named the judicial officers immediately, with the proviso that they



'John Jay, by B.B.E.', one of the earliest portraits of Jay, by an artist now known only by his initials.

would only continue to serve if confirmed by the council of appointment at its first session. The delegates in this May 7 resolution named John Jay as the first

Chief Justice of the New York State Supreme Court.¹

Why Jay? In what way was this young lawyer (not yet 32) qualified for this high position? He had no prior judicial experience. But then none of the New York revolutionaries had judicial experience. The judges in New York prior to the Revolution were men like Daniel Horsmanden: born in England, educated in London, part of the English establishment, loyal to the King. What Jay did have was extensive litigation experience; he had argued dozens of cases before every court in the colony of New York. And he had extensive political experience; he was a delegate from late 1774 through early 1776 in the continental congress in Philadelphia. More recently, he was a leader of the various New York conventions and committees in the revolutionary effort.

It is quite clear that Jay viewed himself, from the time of the May 7 resolution, as Chief Justice. Indeed, within a few days he was writing to a friend to offer him the position of clerk to the Supreme Court. He also viewed himself, however, as continuing to serve as a delegate to the convention; he was present as a delegate through

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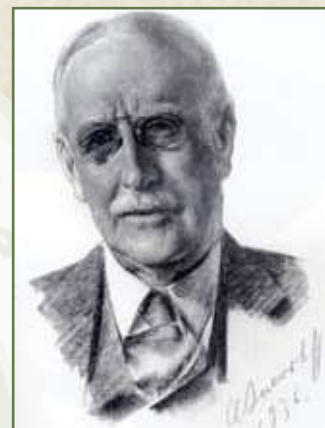
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TO BETTER THE BENCH:

The Labor of C. C. Burlingham

BY GEORGE MARTIN

WHAT, YOU MAY ASK, can a single lawyer, not holding public office, do to improve the quality of his state's judges? "Nothing" doubtless would have been the answer given by most lawyers who practiced in New York City in the early twentieth century. But Charles C. Burlingham, generally known



A 1936 drawing of C.C. Burlingham by Alexander Iacovleff

as CCB, certainly did try. Time and again, like Don Quixote, he mounted his horse and charged the political windmills, often failing, but sometimes succeeding. The urge was in him.

It surfaced first in the spring of 1906, when he was 47, an age then considered rather late in life, but CCB continued active until 1959, into his 101st year, and so had fifty years of crusading ahead of him. Of his labors to better the bench, here are four, typical in their success and failure.

In 1906, he was just another lawyer, the youngest

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FROM THE PRESIDENT

Dear Members

Although we published one issue of our historical journal in 2005, we have decided that it would be less duplicative and more sensible to combine the newsletter and historical journal by using an expanded newsletter format, with issues to appear twice yearly. This issue includes articles – and future issues will as well – of a high literary and historic order, continuing the growth of this publication, which will no longer be called a "Newsletter." It has earned a less ephemeral title, and we invite readers to give it an appropriate name (see box at right).

The pages to follow are filled with writings by distinguished historians and presenters, furnishing three articles of enduring value. The first, *John Jay As New York's First Chief Judge*, is written by Walter Stahr, one of Jay's prominent biographers. We are also fortunate to have an article by George Martin on C.C. Burlingham. Martin published a full length biography on Burlingham in 2005. Lastly, Margery Corbin Eddy, Lisa LeCours, Paul McGrath, and Frances Murray have combined to write a significant piece on Judge Harold Stevens, the first African-American to serve on the New York Court of Appeals. In all, three articles reflecting the expansion of this periodical into a publication of lasting historical value.

This issue represents a turn in the road in connection with the Society's written output. Readers will see that this publication has become a good deal more than a "Newsletter." It does, of course, contain news and information, but it has grown into a full-scale literary journal, with articles of historical substance and scholarship. Recent issues have included articles on the Roberson privacy litigation, the Lemmon (anti-) slavery case, the Barnes-Roosevelt Lawsuit, the Peggy Facto homicide, and many others.

The Trustees have liked what they have seen and we hope our readers have too.

Albert M. Rosenblatt

President, The Historical Society of the Courts of the State of New York

We are offering our readers the opportunity to submit a suggested "name" for our newsletter. Please e-mail your suggestions to us along with your contact information. The winning name will appear on our next issue and the contributor will be recognized.

TO THE EDITOR

To the Editor:

ON MAY 22, I attended the reargument of *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928). The proceedings were historically informative and thought provoking while at the same time most enjoyable. The Historical Society of the Courts of the State of New York received a well-deserved round of applause at the conclusion of the program.

I had thought that reargument was a "slam-dunk" and that the LIRR would prevail once again. After all, wasn't *Palsgraf* still the law in New York? How could the railroad be held liable for fireworks causing a scale at the end of a platform to fall on the plaintiff? The bizarre *Palsgraf* fact pattern was undeniably a law professor's delight and a



The "bench" that heard the May 22, 2006 *Palsgraf* reargument with the evening's hosts, Chief Judge Judith S. Kaye and Judge Albert M. Rosenblatt. The bench from left to right: Roy L. Reardon, Bettina Plevan, Hon. Howard A. Levine (CHIEF JUDGE), Judith A. Livingston and Caitlin J. Halligan.

defense lawyer's dream. Alas, I was mistaken. The five members of the prestigious bench unanimously voted to grant reargument and upon reargument reverse the prior decision of the Court of Appeals and affirm the Order of the Appellate Division. At long last, Helen

Letter to the Editor continued on page 11

A TRIBUTE TO

Judge Harold A. Stevens

JUDGE HAROLD A. STEVENS WAS THE FIRST AFRICAN-AMERICAN TO SERVE ON THE NEW YORK COURT OF APPEALS. But this milestone, achieved in 1974, was only one of many trail-blazing “firsts” in the extraordinary life of this exceptional lawyer and jurist. Judge Stevens was also the first African-American to graduate from Boston College Law School in 1936; the first elected to the Court of General Sessions in 1950; the first appointed and then elected to the New York State Supreme Court; the first to serve on the Appellate Division (appointed 1958) and the first African-American Presiding Justice of the Appellate Division (appointed 1969). Born and raised in the South during segregation, Judge Stevens settled in New York, a state he served as an advocate, a legislator and a judge. Today, we honor that service and pay tribute to Judge Stevens.

His Early Years

Harold Arnoldus Stevens was born on October 19, 1907 at Seven Oaks, a 839-acre farm situated on the Stono River, John’s Island, South Carolina. The farm was owned by Judge Stevens’ father, William F. Stevens, and his grandfather, Quash Stevens, a former slave.¹ His mother, Lilla Johnson Stevens, was a schoolteacher. Judge Stevens was the youngest of four boys. At the age of three, following the deaths of his grandfather and father,² his mother left Johns Island and took the family to Columbia, South Carolina to live with her parents, the Reverend and Mrs. C. H. Johnson. Ultimately, Judge Stevens’ mother married the Rev. John D. Whitaker.

Judge Stevens attended high school at Claffin College, South Carolina and graduated with an A. B. from Benedict College in Columbia, South Carolina. In 1926, while a student at Benedict College, an event occurred that had a profound impact on the course of his life — the Lowman lynchings. Clarence, Demon and Bertha Lowman, black siblings all under 25 years of age, were accused of killing Sheriff Henry H. Howard during a raid upon their home. At the trial, the jury found the Lowmans guilty of murder, but their convictions were reversed on appeal by the South Carolina Supreme Court and a new trial was ordered. When it became apparent during the second trial that the Lowmans would be exonerated, some members of the white community became enraged. They forcibly removed all three defendants from the jail, mutilated and shot them to death in an act of mob violence.

Stevens learned of this event from a fellow student, the son of the attorney who had represented the three victims. Horrified that “there was no voice of protest raised,” Harold Stevens “was inspired to study law — because it was our best bet to eliminate things like this.” Unable to attend law school in the then-segregated South,³ he moved to Boston where, in 1936, he became the first African-American and the first non-Catholic to graduate from Boston College School of Law, and was vice-president of his class. While attending law school, he supported himself by working as a porter in the Brandon Hall hotel in Brookline, Massachusetts. Shortly after graduation, he converted to Catholicism.

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by Margery Corbin Eddy,
Lisa LeCours,
Paul McGrath,
and Frances Murray

ABOVE At the
window of the
Appellate Division
(Photo by
Edward Lettau)

TOP RIGHT-
Graduation:
Benedict
College, 1926.

MIDDLE RIGHT-
‘Buffalo Soldier’ in
the U.S. Army 9th
and 10th Cavalry
Regiments, 1943.

RIGHT- Judge Stevens
in his chambers
at the Court of
General Sessions.

His Years as an Advocate

After graduating from law school, Judge Stevens was initially admitted to the bar in Massachusetts and New York and later to the bar in South Carolina, to the federal courts and to the United States Supreme Court. He began his career as a law clerk to Harlem Assemblyman William T. Andrews, serving as a partner in the firm of Andrews and Stevens from 1938-1942. From 1942-1948, he was a partner in the firm of Dyett & Stevens. During his years of private practice, Judge Stevens specialized in labor law, representing (among others) the Brotherhood of Sleeping Car Porters and the Brotherhood of Colored Locomotive Firemen, and advocating the power of unions to improve the quality of life for African-Americans.

Recalling this period of his life decades later in a newspaper interview, Judge Stevens spoke of returning to South Carolina on Christmas Day in 1938 "to marry Ella Myers, a childhood friend. He brought his bride to New York, for he had fallen in love with the city. He still remembers a long hectic trip South early in World War II to deal with the problems of Negro sleeping-car porters and the relief and joy he felt when, returning at night across the Jersey meadows, he saw the twinkling panorama of city lights."⁴ New York had become his home.

In 1943, at the height of World War II, Judge Stevens enlisted in the United States Army, serving at West Point as a Buffalo Soldier (9th and 10th Cavalry Regiments) in the then-segregated armed forces.⁵ After the war, he served as special counsel to President Roosevelt's Committee on Fair Employment Practices, and was credited with forcing hearings to challenge efforts by southern railroads and white engineers to oust black firefighters from their long-held jobs. When the hearings were postponed indefinitely, Judge Stevens resigned in protest⁶ stating in a strongly-worded letter of resignation that the order was "a blow to the Negro railroad workers who looked to your committee for some solution or adjustment of their problems for which courts refused to take jurisdiction and which other governmental agencies avoided." Judge Stevens objected that the action demonstrated a "flagrant disregard . . . of the problems and rights of minorities" and established a "dangerous precedent" suggesting principles were being sacrificed because of political pressure. Judge Stevens admonished: "The fight for democracy and justice, like charity, must begin at home."

In 1945, as a member of the voluntary legal panel of the Workers Defense League, he worked with Ernest Fleischman to file an amicus curiae brief in the United States Supreme Court case of *Morgan v Commonwealth of Virginia* (328 US 373 [1946]), challenging the constitutional validity of a Virginia segregation statute. Irene Morgan, a black passenger on a Greyhound bus traveling from Virginia to Maryland, was directed to move from her seat at the front of the bus to one in the rear pursuant to a statute intended to racially segregate passengers. The Supreme Court struck down the Virginia statute, holding that it imposed an

(THIS PAGE) Harold Stevens as a young advocate;
(PAGE 5, LEFT TO RIGHT) Judge Stevens' Oath of Office to the Court of General Sessions was administered by Secretary of State Carmine De Sapio. His wife, Ella and Governor Averell Harriman are at his right; Presiding Justice of the Appellate Division First Department, shown with associate Justices in 1969; Judge Stevens in his Chambers.



Although he had long contributed to the debate on public issues as an advocate, Harold Stevens formally began his career in public service in 1946 when he won a seat on the New York Assembly representing what was then the 13th Assembly District (covering the Washington Heights area in Manhattan). As a legislator, he introduced many civil rights bills, including one striking out the provision that required applicants for marriage licenses to provide race information. Other proposed civil rights legislation included expansion of the definition of libel to encompass malicious publication which exposes any group of persons of particular race, color, creed or national origin to hatred or ridicule or to injury in business, as well as a bill that sought to prohibit racial discrimination in the national guard, naval militia and New York guard.

His Early Judicial Career

After four years in the State Assembly, Harold Stevens was elected to the Court of General Sessions⁷ in November 1950 and inducted as a Judge on January 2, 1951. He was the first African-American to serve on that court. The speeches given on Judge Stevens' historic induction day emphasized his deep religious conviction and his work within the interfaith and civil rights movements to ensure that all individuals are treated as brothers and sisters in the human family. Judge Stevens' election to the Court of General Sessions was lauded by Congressman Adam Clayton Powell who praised New York City voters for their commitment to democracy. Congressman Powell stated:

"I come here today personally because I feel we have shown to the world that in Manhattan democracy is more than just a statement in the Bill of Rights or words in the Constitution. There are many places in our land where democracy is only lip service. But here in Manhattan, we have made democracy flesh and blood."

"...Today, we are striking a blow for world democracy that is as important as a military victory. And I am so happy and proud to stand here and note that Judge Stevens represents the free vote of a free people....Judge Stevens comes today not by benefit of any one person's wishes but by benefit of the desires freely expressed by thousands of Black and White, Jew and Gentile, Protestant and Catholic voters of this town."

During his four and one-half years on the Court of General Sessions, Judge Stevens presided over many criminal trials, including the celebrated larceny trial of Eveleen Cronin, the maid to famous actress Tallulah Bankhead.



In July 1955, Governor Averell Harriman appointed Judge Stevens to fill a vacancy on the Supreme Court of the State of New York and later that year Judge Stevens was elected to serve a full, 14-year term. Once again, Judge Stevens was the first African-American to be appointed and elected to that court. Less than three years into this term, Governor Harriman appointed Judge Stevens to the Appellate Division, First Department, making him the first African-American to sit on the Appellate Division. In 1969, in the last year of his first term as a Supreme Court Justice, Governor Rockefeller designated Judge Stevens as the Presiding Justice of the Appellate Division, First Department. Again, Judge Stevens broke new ground — he was the first African-American appointed Presiding Justice of any of the four Appellate Division Departments. Judge Stevens was reelected to the Supreme Court in 1969 and served his first stint as Presiding Justice from 1969 to 1974.

During this tenure, Judge Stevens implemented many court reforms. Most prominently, he introduced a panel to help adjudicate medical malpractice cases in the First Department, which inspired the Legislature to pass major medical malpractice reform legislation in 1974 (L 1974, ch 146). Judge Stevens was also instrumental in securing funding from the City of New York for the construction of new court buildings in Manhattan and the Bronx, and in obtaining a grant from the Ford Foundation to establish committees to study the operation of the New York City courts.

His Tenure on the Court of Appeals

Judge Stevens arrived on the Court of Appeals during a time of significant change for the Court. Court of Appeals judges were elected, although this method of selection had become controversial.

Between November 1972 and November 1974, there were no less than six Court of Appeals Judgeships to be decided by popular vote. In 1972 alone, three new members were elected to the Court (Domenick Gabrielli, Hugh Jones and Sol Wachtler). Judge Stevens joined the Court in the aftermath of a closely-contested election for the position of Chief Judge between then-Associate Judge Charles Breitler and private practitioner Jacob Fuchsberg in November 1973. Judge Breitler won the election but the hard-fought race caused many to call for change from an elective to an appointive system.⁸

The elevation of Judge Breitler to Chief Judge left an Associate Judge vacancy. A second vacancy occurred at the same time due to the resignation of Judge Adrian Burke.

In January 1974, pursuant to Article 6, § 2(b) of the New York Constitution, Governor Malcolm Wilson appointed then-Presiding Justice Stevens of the First Department and Presiding Justice Samuel Rabin of the Second Department to fill the two one-year vacancies. To serve a full term, however, Judge Stevens would have to run for election in November.⁹

Judge Stevens secured the support of each of the four major political parties and, as late as June 1974, he was believed to be well on his way to victory in the general election. It was not to be. In July 1974, Jacob Fuchsberg circulated nominating petitions seeking a spot in the Democratic Party primary for the Court of Appeals seat. Because two vacancies existed on the Court, each party nominated two individuals for the Judgeships. The Democratic Party nominated Judge Stevens and Justice Lawrence Cooke, then sitting on the Appellate Division, Third Department. Judge Stevens and Justice Cooke received substantial support from the New York State Bar Association and other bar groups. However, Judge Fuchsberg had an organized, well-funded campaign and name recognition based on the television and radio advertisements he had run the previous year in his unsuccessful race for the position of Chief Judge.

Jacob Fuchsberg and Justice Cooke won the Democratic primary with Judge Stevens finishing a close third. Thus, in the general election, Judge Stevens, a life-long Democrat, ran on the Republican, Liberal and Conservative party lines. In the general election, Justice Cooke garnered the most votes with Judge Fuchsberg narrowly defeating Judge Stevens for the second vacancy.

Deeply disappointed over Judge Stevens' defeat, bar leaders redoubled their efforts to change the selection process for Court of Appeals Judges, calling on Governor Carey to lead the effort. In 1976 and 1977, two successive Legislatures passed the necessary laws to present constitutional amendments to the voters that would authorize gubernatorial appointment of Court of Appeals Judges with the advice and consent of the Senate. The voters approved the proposed constitutional changes in the 1977 election.

Although he served on the New York Court of Appeals for only one year, Judge Stevens left a lasting impression on its jurisprudence, most notably authoring *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester County* (34 NY2d 222 [1974]). *Pell* — clarifying the scope of review in cases involving challenges to administrative determinations — is among the best-known decisions ever issued in the area of New York Administrative Law, having been cited more than 3000 times.¹⁰

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On January 1, 1975, Judge Stevens returned to the Appellate Division. Soon thereafter, newly-elected Governor Carey reappointed Judge Stevens to his position as Presiding Justice of the First Department, where he served until his retirement.

Judge Stevens with his wife, Ella



Judge Stevens died of a heart attack in 1990 at the age of 83. Chief Judge Wachtler, who served with Judge Stevens in 1974, delivered a Memoriam at the opening of the Court on November 13, 1990, in which he observed:

"Harold Stevens brought warmth and humor to this Court, and these are qualities that all of us who knew and respected him will always remember fondly. More importantly, however, Harold also possessed a deep understanding of the human condition, an understanding which found its way into his decisions. He knew from first-hand experience the cruelty of persecution and prejudice, and he brought this insight and this dimension to his role as Judge." ■

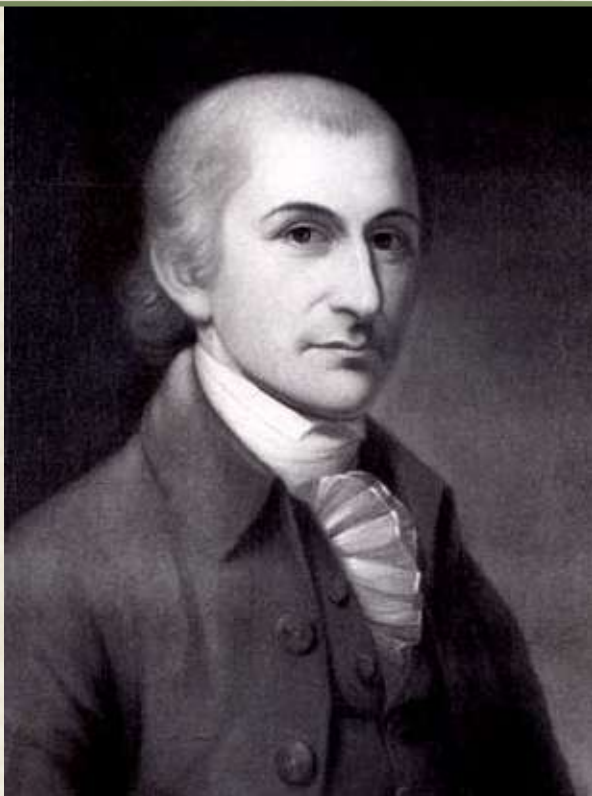
STEVENS ENDNOTES

- 1-A plate of the Seven Oaks plantation shows that it contained a number of dwellings, the main settlement, and even a country store. In 1903 Quash and his son sold the timber rights on the plantation to the Dorchester Land and Timber Company for \$1,000. Timber deeds such as this were fairly common, providing farmers with ready cash. The renunciation of dower attached to the deed tells us that Quash's wife was Julia W. Stevens and William's wife was Lilla L. Stevens. <http://www.sciway.net/hist/chicora/quash-1.html> Fascinating letters written by Quash Stevens are reproduced in: Your Servant, Quash: Letters of a South Carolina Freedman, <http://www.sciway.net/hist/chicora/quash-1.html>
- 2- In November 1909 Quash and William Stevens sold Seven Oaks for \$3,500. There is no indication in the deed why the plantation was sold, but Quash died on March 20, 1910, only four months later. His death certificate indicates that he died of heart failure and that he was buried at Centenary Cemetery. <http://www.sciway.net/hist/chicora/quash-1.html>
- 3- Judge Stevens was not the first member of his family to pursue college study. His maternal grandfather, Rev. C. H. Johnson, was expelled from the University of South Carolina in the 1890s when segregationist Governor Wade Hampton decided that no Negro would graduate from college in the State of South Carolina.
- 4- Oka, Stevens Hopes to Enlarge Court Innovation Begun by Botein, New York Times, October 20, 1968.
- 5- The end of segregation in the United States Army began July 26, 1948, when President Harry S. Truman issued Executive Order 9981 declaring that "there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion, or national origin." After eighty-five years, the story of the Buffalo Soldiers ended as the army took the lead in establishing an integrated society. But the memory continues of their valor, patriotism and dedication to duty, despite racism and adversity. A memorial monument to the Buffalo Soldiers stands at Fort Leavenworth, Kansas, facing west on a bluff overlooking the Missouri River. At the statue's dedication in 1993, then Chairman of the Joint Chiefs of Staff, General Colin Powell, said, "There he is, the Buffalo Soldier on horseback, in his coat of blue, eagles on his buttons, crossed sabers on his canteen, rifle in hand, pistol on hip, brave, iron-willed, every bit the soldier that his white brother was. African Americans had answered the country's every call from its infancy, yet the fame and fortune that were their just due never came. For their blood spent, lives lost, and battles won, they received nothing. They went back to slavery, real or economic, consigned there by hate, prejudice, bigotry, and intolerance. . . I am deeply mindful of the debt I owe to those who went before me. . . [I] don't forget their service and sacrifice." <http://www.nps.gov/>
- 6- He was not alone. Henry Epstein, former Solicitor General of New York and chief counsel for the committee in the railroad case, also resigned in protest.
- 7- The now abolished Court of General Sessions was a court of exclusively criminal jurisdiction with a venerable history, having predated the Constitution of the United States.
- 8- In February 1974, for example, members of the Joint Committee on Court Reorganization — consisting of Senators, Assembly members and sitting Judges — issued a report unanimously recommending the adoption of an amendment to Article 6 of the State Constitution providing for the appointment, rather than the election, of Judges to the Court of Appeals.
- 9- Had Judge Stevens been elected, his term would have expired December 31, 1977, the year in which he would turn 70 years of age.
- 10- The decision has withstood the test of time, having been recently reaffirmed by the Court of Appeals in *Matter of Kelly v Safir* (96 NY2d 32, 39 [2001]) ["Pell correctly articulates the applicable standard of law and should be followed"].

much of the summer in Kingston. And he was also, at least in conversations there, a candidate to become governor. Jay discouraged this talk, writing to a friend that since he was "persuaded that I can be more useful to the state in the office I now hold than in the one alluded to" he viewed it as his "duty to continue in it."²

The May 7 resolution dealt with many details, but it did not specify when and where the various courts should meet. The convention addressed this on June 5, specifying that the supreme court should meet at Kingston, following the same schedule that had been used by the colonial supreme court in 1774. But the initial meeting of the supreme court was postponed twice: once from July to August, and then again from August until early September. The cause of these postponements was not explained in the official minutes, but the second one was probably designed to give Jay a brief vacation. He had spent the last days of July and most of August 1777 riding horseback from Kingston to Philadelphia and back, seeking and obtaining additional troops, troops which would prove critical at the two battles of Saratoga in October.³

The first session of the new state supreme court was held in early September in Kingston. As was the custom at this time, Chief Justice Jay started the session with a lengthy address to the grand jury, which was printed and circulated in the newspapers. He started with a brief history of the revolution, "a revolution which, in the whole course of its rise and progress, is distinguished by so many marks of the divine favor and interposition, that no doubt can remain of its being finally accomplished." He praised the new state constitution, in particular the provisions regarding religious freedom, which meant that "no opinions are dictated, no rules of faith prescribed, no preference given to one sect to the prejudice of others." And he argued that the new constitution was, although an excellent framework, merely that, until "quickened" by the people. "Let virtue, honor, the love of liberty and science be, and remain, the soul of this constitution, and it will become the source of great and extensive happiness to this and future generations."⁴



John Jay, by Rembrandt Peale and Raphaele Peale. The Peale brothers apparently painted this in about 1795 from a now-lost portrait by their father, Charles Wilson Peale.

*Let virtue, honor, the love of liberty and science be,
and remain, the soul of this constitution,
and it will become the source of great and extensive
happiness to this and future generations.*

—John Jay on the new constitution

colonial courts as lawyers to appear in the new state courts until a new system of qualification had been put in place.

At some point in September of 1777, the council of appointment had its first session and for some reason failed to consider and approve the appointments of Jay and the other justices. A few days later, in early October, the justices received a petition for a writ of habeas corpus; they declined to rule on it. The Assembly summoned Jay and his two colleagues; they patiently explained that

“by reason of the failure of the Council of Appointment to approve their selection as judges, they had no authority to issue the writ.” The Assembly approved a resolution, drafted by Jay’s friend Gouverneur Morris, finding the justices’ reasons “satisfactory” and asking the council of appointment to approve forthwith the various appointments in the May 7 resolution.⁶

The council of appointment did not get around to this, however, for another two weeks for the very good reason that they had to flee. British warships and troops, attempting to distract the Americans from Saratoga, sailed up the Hudson in early October and approached Kingston determined to teach a lesson to that “nursery for every villain.” The delegates and residents fled for their lives. Morris was perhaps the only man to find humor in the situation, writing to Robert Livingston about how the children “squealed” and “bawled” and the wives wailed “like Hecuba at the taking of Troy.” The British burned Kingston to the ground, not leaving a house. This incident reminds us that the state over which Jay presided as chief justice was a war-

torn fragment of what we know today as the Empire State. The state government of which Jay was a part was in some senses more like a Latin American revolutionary regime, moving from place to place to avoid the opposing armies.⁷

We know that Jay presided over two sessions of the supreme court during 1778, and two special criminal courts, but we do not know much about the courts’ work because there were no reported decisions and few other papers have survived. Jay wrote to Morris from Albany in April that he was “engaged in the most disagreeable part of my duty: trying criminals. They multiply exceedingly. Robberies become frequent. The woods afford them shelter and the Tories food. Punishments must of course become certain and mercy dormant.” We know however that in appropriate circumstances Jay could be merciful. At the end of this April session, Jay and the other judges sentenced eleven men to death, but also recommended that the governor pardon three of the men. One of the men, convicted of robbery, had according to Jay been a “domestic inoffensive young man” and “had very little agency in the robbery.” Governor George Clinton accepted these recommendations, and noted in a letter to Morris that Jay “fills the bench with great dignity and pronounces the sentences of the court with becoming grace.”⁸

In addition to his duties on the court, Jay’s other role in the state government was to review legislation as part of the “council of revision.” Under the state constitution, legislation generally could not take effect until it was approved by the council of revision, composed of the governor, the chancellor and the members of the supreme court. The legislature could override the council’s veto, however, by a two-thirds vote in both houses. The decisions of the council have survived, and many of them touch on interesting legal issues.

In one of its first decisions, the

Over the next few days, the supreme court got to work. There were a number of cases on the docket, mainly criminal, including the trial of Jack, “a male Negro slave,” who was alleged to have assaulted and attempted to rape Catherine Helme, “a spinster.” There were four witnesses for the government, including Helme, and six witnesses for the defense, including Jack’s former owner, presumably as a character witness. Jack was convicted and sentenced to prison time.⁵

How was it that the first state supreme court could get to work immediately in this way? After all, the state’s legislature was itself meeting for the first time, so there were neither state statutes on the books nor rules for the supreme court. What law was the court applying? The short answer is English and colonial law. There was a basis for this in article 35 of the new state constitution, which provided that English common and statutory law and New York colonial statutory law, as they existed on April 19, 1775, would remain in effect unless and until modified by new state legislation. But there was also some interpretation involved; a silent decision, for example, to allow those who had appeared in the

council of revision considered a law which ratified and extended a grain embargo that had been imposed by the "council of safety" meeting in the fall of 1777. It is not completely clear, but it appears that the "council of safety" in question was not the council of safety appointed in the May 7 resolution (of which Jay was a member), but rather the council of safety appointed in October (which in that event governed until early 1778). The council of revision objected that once the legislature had gathered, as it did in early September, it could not then disregard the constitution by creating a council of safety to exercise legislative authority. The legislature was the only body that could legislate under the constitution; it had no right to "dispend with or suspend the government established by the constitution." The legislators, however, many of whom had been members of the council of safety, disagreed; they passed the bill into law over the objections of Jay and the other members of the council of revision.⁹

In another case, the legislature passed a special tax of five percent on the profits of "traders and manufacturers." Jay declared for the council of revision that the constitution's guarantee of an "equal right to life, liberty and property" meant that "no member of this state can with justice be constrained to contribute more to the support thereof, than in like proportion with other citizens." Moreover, it was "repugnant to the very idea of justice" to impose upon people merely because they were "traders" or "manufacturers" such "large penalties, not incurred on conviction of disobedience to any known law, and couched under the specious name of tax." The legislature disregarded Jay's objections, and passed the law over the veto.¹⁰

Apparently the tax system did not work well, however, for in the next session the legislature passed a second, similar tax bill. The legislature did not attempt to specify the tax, but rather authorized assessors to impose and collect whatever tax they "shall in their judgment think proper." Jay and the council again objected to the unfairness of the unequal taxation, but they also insisted that the legislature could not "delegate the right of determining, at discretion, how much shall be levied." Jay's argument here is an early, indeed perhaps the first, American statement of

the basic principle that there are limits on the authority of a legislature to delegate its lawmaking authority. In this case, the legislature listened to Jay; the veto was upheld.¹¹

For a modern lawyer, these decisions, particularly those which were reversed by the legislature, raise an interesting question: What was the relation of the council of revision to judicial review? If the council of revision determined that a statute was unconstitutional, and the legislature passed the statute into law over the council's objection and the executive sought to enforce the statute, could a state court decline to enforce it because it was unconstitutional? Or was the council of revision process supposed to be the end of the matter so that state courts could not take a different view of the constitutionality of state statutes after the council and legislature had acted?

Jay himself, as best one can tell, did not express any view on these questions while he was the leader of the state supreme court. He did express, in private, his frustrations with the legislature, which he said engaged mainly in foot-dragging and blunders. A few years later, as United States Chief Justice, Jay effectively ruled certain state statutes unconstitutional, and it seems likely that, if given the chance, he would have done the same as a state justice.

What we now know as Vermont was disputed ground during the Revolution. New York and Massachusetts each saw it as part of their state, but the Vermonters viewed themselves as a new, independent state of Vermont. The situation occasionally erupted into violent clashes, especially when different authorities attempted to collect taxes or enforce judgments. New York's governor, George Clinton, was an especially ardent opponent of the "rebels" in Vermont, and in October 1778 he suggested, and the legislature agreed, that John Jay should return to Philadelphia as a delegate to the Continental Congress to address the issue. Jay did not immediately resign as Chief Justice: he did not have to, because the state constitution allowed a justice to serve as delegate to the Continental Congress, and, he probably did not want to, because his service as delegate might be brief. In any event, within a few days of his arrival in December of 1778 in Philadelphia, he was elected President of the Continental

Congress. He did not resign his position as Chief Justice until August of 1779, when it was clear that national and international affairs would occupy him for the next few years.¹²

Effectively then, Jay worked as Chief Justice for only a year: from the fall of 1777 through the fall of 1778. We know relatively little about his service during this period because of the lack of reported cases and records. Yet we know enough, I think, to say that in spite of the difficult conditions, he was a successful Chief Justice: deciding cases fairly, reviewing legislation carefully and pronouncing judgment "with becoming grace." It is thus fitting that today John Jay's portrait looks down on the judges and others in the Courtroom of Court of Appeals Hall. ■

John Jay Endnotes

- The images and image captions used in this article are reprinted with the permission of Walter Stahr from his book *John Jay* (Hambledon & Continuum 2006), and are authorized to be used only in this publication.
- 1 Journals of the Provincial Congress, Provincial Convention, Committee of Safety and Council of Safety of the State of New York (Albany, 1842), vol. 1, pp. 916-18.
- 2 John Jay to Richard Morris, May 10, 1777, and to Abraham Yates, Jr., May 16, 1777.
- 3 Journals of the Provincial Congress, vol. 1, pp. 957, 994, 1046; Stahr, John Jay, pp. 81-82.
- 4 Charge of Chief Justice Jay to the Grand Inquest of the County of Ulster, September 9, 1777, Evans 15,376.
- 5 Supreme Court Minutes, September 1777, New York County Clerk's Office, Division of Old Records; copy at Columbia.
- 6 Charles Z. Lincoln, *The Constitutional History of the State of New York* (Rochester, NY: Lawyers Co-operative Publishing Co., 1906., vol. 1, pp. 577-78. I am grateful to Judge Albert Rosenblatt for pointing out this section of this source to me.
- 7 Gouverneur Morris to Robert Livingston, quoted in William H. Adams, *Gouverneur Morris: An Independent Life* (New Haven: Yale University Press, 2003); Lincoln, *Constitutional History*, p. 578 (noting appointment date as October 17); Stahr, John Jay, pp. 83-84.
- 8 John Jay to Gouverneur Morris, April 29, 1778, available at: www.columbia.edu/cu/lweb/digital/jay/ George Clinton to Gouverneur Morris, May 1778, in Hugh Hastings, ed., *Public Papers of George Clinton, First Governor of New York, 1777-1795, 1801-1804* (Albany: 1898-1914), vol. 3, p. 309.
- 9 Alfred B. Street, *The Council of Revision of the State of New York . . . Vetoes* (Albany: 1959), 203-08.
- 10 Id. at 208-13.
- 11 Id. at 214-19.
- 12 John Jay to George Clinton, August 18, 1779, available at: <http://www.columbia.edu/cu/lweb/digital/jay/>.

partner in the firm of Wing, Putnam and Burlingham, engaged mostly in admiralty practice. Yet he reportedly was the first to see in the November election a rare opportunity for improving the bench. He realized there would be ten Supreme Court judges to elect in the First Judicial District (Bronx and Manhattan)

— eight of them to new seats added by recent amendment.

“Chaos is Now Predicted.”



Nicholas Murray Butler and CCB, walking up Fifth Avenue after a morning service at St. George's Church, Easter Day, 1930

In addition, the patronage-rich post of New York county surrogate would be on the ballot. So, a witness recalled, “He went around from office to office, a most unwelcome caller after his message was known, and asked the influential lawyers of the city what they proposed to do about it.”

By mid-May his question had produced a group of thirty-five lawyers calling itself “Judiciary Nominators.” Joseph Hodges Choate, recently returned from six years as ambassador to Britain, was chairman and an effective speaker for the cause; the daily work of the group was done by its secretary,

CCB. Though the Nominators sought to reach agreements with either the Republican or Democratic parties on candidates, no joint nominations were achieved. *The Herald*, calling the situation “a jangle of factionalism,” headlined its story: “Chaos is Now Predicted.”

“In the end, the Nominators’ slate was weak, largely because no Republican lawyers of stature would run. Most believed they had no chance of election against a Democratic candidate backed by Tammany Hall, the political club controlling the party, and most certainly not if the race was three-way. Result: no Nominators’ candidate won. The *Times* judged the effort “a total failure ... A very considerable portion of the lawyers of the city and many of good standing and influence, failed to show any interest in the matter. The bar as a body clearly was not enlisted. We think the fact discreditable to the profession.”

In 1909, however, acting in the federal arena, CCB successfully led the campaign to have Learned Hand appointed as United States District Judge, Southern District of New York. As Hand’s biographer, Gerald Gunther, concluded, CCB “deserved, claimed, and received much of the credit,” and Hand served

on the District and Second Circuit courts until his death 52 years later, the model of a federal judge.

Then in 1913 came another opportunity to improve the Supreme Court in Manhattan and the Bronx. As part of a Fusion campaign (uniting Republicans, Independents and anti-Tammany Democrats) to elect a reform mayor for New York City, CCB was chairman of a subcommittee on judicial nominations. The chief fight came over the candidate for the Supreme Court, First District. CCB and his committee proposed Benjamin N. Cardozo. The district leader for the Progressive Party, Stanley M. Isaacs, recalled: “I found that Burlingham used him as a touchstone to test every other candidate that was mentioned. Nobody else thought of him except Burlingham, but Burlingham forced his nomination for the Supreme Court.”

Both major parties opposed Cardozo; the Republicans because he was a Democrat and the Democrats because he was not pro-Tammany. CCB presented his committee’s slate, led by Cardozo, to the Fusion executive committee, and for four hours defended its nominees, using Cardozo as the test to reject all others, stressing the man’s learning, ability, character and high standing at the bar. Ultimately, perhaps by exhausting his auditors, he prevailed; and later the Republicans came round so that on the ballot Cardozo’s name appeared on three party lines, Progressive, Independent, and Republican.

The campaign was odd and difficult. Cardozo, out of shyness, refused to campaign. Distressed by the sudden attention and publicity, he even forbade his supporters to publish in newspapers an endorsement of him by 130 leaders of the bar. The most he would allow was to circulate the endorsement among bar members. Come election day, he won by only 2,796 votes. Needless to add, as he quickly advanced to the Court of Appeals and then onto the U. S. Supreme Court, CCB continually was active in support, so that upon Cardozo’s seating on the latter, in 1932, Felix Frankfurter congratulated CCB: “For you it is, more than any single person, who gave him to the state and thereby to the nation.” Perhaps Frankfurter claims too much for CCB, but still, where others in 1913 had talked of the possibility of Cardozo’s nomination, CCB had taken action and stuck doggedly to the task. Henry J. Friendly, a judge of the Second Circuit and for several years its chief judge, wrote in 1962: “When the history of American law in the first half of this century comes to be written, four judges will tower above the rest – Holmes, Brandeis, Cardozo and Hand.” CCB provided the start for two of them.

Meanwhile, his standing as a leader of the New York City bar steadily strengthened. In 1910 he became the senior partner in his firm, Burlingham, Montgomery & Beecher, and in 1912, when the Titanic sank, he defended the White Star Line against

claims for loss of life and property. The case went up to the U. S. Supreme Court, and then in 1916 back to the Southern District Court, where, after argument and testimony, he felt he had won. But White Star was losing money and eager to be free of the Titanic, and so before judgment CCB opened negotiations for settlement. One was reached: White Star would pay \$664,000, less than four percent of the total damages claimed. The case, lasting four years and followed closely by the public, won him a national, even international, reputation as an admiralty lawyer.

In May 1929, when he was seventy, he was elected president of the Association of the Bar of the City of New York, but his new duties scarcely changed his daily routine, for he was already spending many hours a week on Bar Association affairs. He succeeded Charles Evans Hughes, and because both men had extraordinary energy, the Bar Association was unusually active in the years 1927-32. This was the period in which Samuel Seabury led the state's investigations of the city's government, uncovering in detail the depth and horror of Tammany's corruption of city officials and judges, and ultimately forcing Tammany's mayor, "Jimmy" Walker, to resign. CCB's effort to improve the quality of the judges at this time followed by a few months his leaving office as bar president, but it originated in the aftermath of the investigations and made unusual use of the Bar Association's facilities.

The episode started abruptly, following an announcement by the Democratic and Republican Parties of two candidates for election to seats on the Supreme Court, First District. To the public's amazement, both parties had named the same two men: Aaron Steuer, son of Tammany's lawyer Max Steuer, and Samuel H. Hofstadter, a Republican state senator and chairman of the legislature's committee investigating Mayor Walker. Plainly, the Democratic and Republican political leaders had struck a deal, and its crux, most persons assumed, was that Hofstadter who without Tammany's endorsement had no chance of being elected in the First District, Bronx and Manhattan, had agreed to suppress Seabury's final report on Walker. Worse still, many people feared the Republicans had agreed to drop from the election campaign any call to reform the city charter.

On October 3, 1929, 21 members of the Bar Association, led by CCB, called for a special meeting. Three days later, more than 600 members met and, by a vote of about 580 to 20, passed a resolution condemning the "parceling out of these judicial nominations for bi-partisan political purposes in defiant and contemptuous disregard of public and professional sentiment and of civic decency." They also declared Steuer and Hofstadter unfit to hold judicial office for having accepted the nominations under such circumstances; declared that independent nomination of qualified candidates ought to be made and supported; and invited the New York County

Lawyers' Association, the Bronx Bar Association, and other civic and commercial organizations in the city to join the campaign.

Because the Bar Association by its charter could not support a political ticket, CCB and his supporters founded the Independent Judges Party, with headquarters in the Bar Association's building. Its campaign committee included Nicholas Murray Butler, John W. Davis, Elihu Root and Seabury, as honorary chairmen. The next day, its candidates, both well-known lawyers, were announced: George W. Alger, a Republican, who had been appointed by Governor Al Smith to investigate the state's prisons and by Governor Franklin D. Roosevelt to the commission on paroles, and was then chairman of the Commission on the Cloak and Suit Industry; and Bernard S. Deutsch, a Democrat, president for three years of the Bronx Bar Association, secretary of the Appellate Division's Special Calendar Commission and a leader of the American Jewish Congress.

For their names to appear on the ballot, nominating petitions signed by at least 3,000 voters had to be filed, and there was

doubt whether these could be collected in time. Within three days, however (though one was a half-holiday, one a Sunday and one Yom Kippur), lawyers, members of the Citizens Union (a nonpartisan group monitoring city affairs), and law students of Columbia and New York Universities had secured 8,300. The professional politicians sneered and predicted the Independent candidates would tally only 50,000 votes.

The newspapers supported the campaign, however, and the *Herald-Tribune* noted: "The last time a race of this sort was made where the leaders of the bar nominated candidates in opposition to those of the major parties was in 1906 when the Judiciary Nominators put a ticket in the field." In late October, CCB spoke over the radio on the issue, and the night before the election the Independent Judges Party, its supporters and its candidates rallied in Town Hall, with CCB presiding and Seabury's speech broadcast over the airwaves.

The next day at the polls Alger and Deutsch lost. Yet to everyone's astonishment they had won nearly 300,000 of the 850,000 votes cast, running far ahead of the Republican candidates for any office, even of Hoover for President. In four assembly districts they had defeated Steuer and Hofstadter. The vote, CCB told reporters, would serve as "a warning to the bosses to keep hands off."

But nothing happened as expected. Hofstadter did not pocket Seabury's report in committee — though perhaps the adverse publicity of the election made that impossible — and both he and Steuer soon proved better than average judges. Nevertheless, to many of the public, something plainly was amiss in the system of nominations.

Privately, CCB was disappointed in the result. As he wrote to a friend, "Our vote for Alger and Deutsch amazed the poli-



CCB in his eighties



Charles Culp Burlingham, c. 1930

ticians ... We raised only \$16,000 and have no deficit. We got very little help from the bar. They voted at the meetings of the Association and gave a little money, but only a handful did any work. Our organization was pathetically amateurish, the best workers being four or five women ... We do not fool ourselves that we could do it again. So crude a deal won't be tried again for quite a while."

In that prediction he thus far has proved correct. Yet the question of what procedure is best for selecting judges for state and city courts, by appointment, election or some mixture of the two, continues to perplex American politics and law. CCB thought, as he once wrote in a letter, "My own opinion is that better judges would be secured if they were nominated by the Governor and confirmed by the Senate or a council."

Many may not agree, but few can speak with such authority, for few have wrestled so long or hard with the problem. ■

C.C. Burlingham Endnotes

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1. For a more detailed account of the life of CCB and for citations, see George Martin, *CCB The Life and Century of Charles C. Burlingham New York's First Citizen 1858-1959* (Hill and Wang, 2005).

LETTER TO THE EDITOR continued from page 2

Palsgraf had her \$6,000 verdict reinstated, albeit hypothetically and for one night only.

I left the evening intellectually distressed by the reargument verdict. The bench had reversed venerable and revered Benjamin N. Cardozo. This untoward result prompted me to read, and then read again, the opinion of Judge Cardozo. It is at the very least challenging and certainly not an easy read. To my surprise, I found that Judge Cardozo readily disavowed proximate cause as the basis for his decision, and thus rendered irrelevant the many proximate cause analogies presented in the dissent. He succinctly states "(t)he law of causation, remote or proximate, is thus foreign to the case before us" (*id.* at 346). Since proximate cause is not an issue insofar as Judge Cardozo was concerned, there was no need on reargument to analyze the case in terms of proximate cause, either for or against. What then was the basis for his decision? Without doubt, the key is his profound statement, learned by all of us in law school, that "(t)he risk reasonably to be perceived defines the duty to be obeyed..." (*id.* at 344). This is in fact the genesis for New York Pattern Jury Instruction 2:12 on foreseeability.

However, in *Palsgraf* the issue of foreseeability cannot be analyzed in terms of what can occur if fireworks explode. That is after the fact and therefore not the question. Foreseeability must be analyzed at the time of the alleged negligence. As regards the conduct of the LIRR vis-à-vis the man with the package, Judge Cardozo states "(i)f there was a wrong to him at all which may very well be doubted, it was a wrong to a property interest only, the safety of the package" (*id.* at 343). He continues "(o)ne who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground" (*id.* at 343). Assuming arguendo negligence on the part of the railroad, the foreseeable risk at the time of the negligence was not probable risk of injury to third person.

Query, what was the risk reasonably to be perceived from the conduct of the train men in attempting to pull/push the man onboard the moving train? It was at best a risk that the package being carried would be dropped and damaged. It was in this context that Judge Cardozo noted "(n)othing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed" (*id.* at 341). It is certain that the defendant could not have foreseen that the man who was being assisted onto the train was carrying a package of fireworks. Additionally, although not referenced by Judge Cardozo or by anyone on reargument, the fireworks were in apparent violation of the New York City Code of Ordinances, Chapter 10 - article 6, §93 (2) which prohibited "firecrackers longer than 15 inches or larger than the ¾ inch in diameter" and "bombs and shells."* No one could foresee that the package which might be dislodged, fall to the ground, break and possibly even fall under the wheels of the moving train, contained fireworks in apparent violation of a New York ordinance. Indeed, the law does not require that one foresee criminal conduct of another absent evidence of recurring criminal conduct.

The issue is not one of proximate cause as regards Helen *Palsgraf*. The issue is not whether the exact occurrence or injury has to be foreseeable, which it does not. The question to be resolved as a matter of law is whether it was foreseeable that the passenger was carrying fireworks concealed in an apparently innocuous newspaper package. The answer to this must be a resounding "No." The bench on reargument on May 22, 2006 was in error. The decision by the greatest New York jurist of the twentieth century, Benjamin N. Cardozo, should have been affirmed. *Palsgraf*, decided more than 75 years ago, remains good law today.

HAROLD LEE SCHWAB

Lester Schwab Katz & Dwyer, LLP, New York, NY

* See footnote 44 of the excellent article by William H. Manz, "Palsgraf: Cardozo's Urban Legend?" 107 Dick. L. Rev. 785, reprinted in The Historical Society of the Courts of The State of New York brochure for The Reargument of the Appeal.



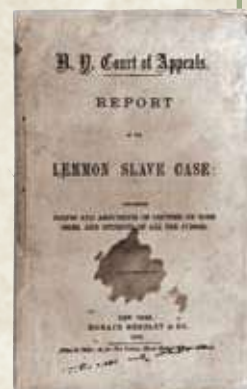
The families "squaring off"...Andrews v Cardozo.

HISTORICAL SOCIETY WEBSITE NEWS

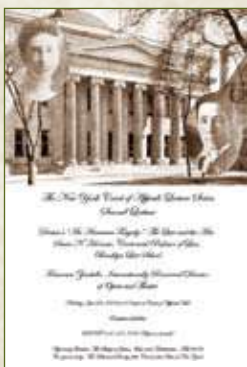
by Frances Murray

The Society's website, like all good websites, is a work in progress. Over the summer, we had the opportunity to add some really remarkable materials, and I thought that this might be the perfect opportunity to let you know what is now available and what is planned for the near future.

The first innovation was the addition of "virtual" copies of our newsletter — happily, the electronic version looks just as handsome as the paper original and we can now share with the world the wonderful articles and pictures we have enjoyed so much. John Gordan's recent newsletter article on the *Lemmon* slave case also serves as the keystone for a very special section of the website devoted to the abolition of slavery in New York. Cognizant of the Document Based Query section's Regents' High School examinations, we have made available the source documents relating to the *Lemmon* case, including the habeas petition decision, the certiorari review, and of course the Court of Appeals decision. The record and briefs submitted to the Court of Appeals are available in full text as is the statute law from the time of the First Constitution through New York's ratification of the Thirteenth Amendment to the United States Constitution. To this electronic archive, we will soon add a wonderful video — the lecture of Professor Paul Finkelman, McKinley Distinguished Professor of Law, Albany Law School, on the anti-slavery movement entitled: *Slavery, Freedom and the New York Courts*, delivered at the Society's recent program in Buffalo.



The decisions and arguments of counsel, as published by Horace Greeley and Co. (1860)



In June 2006, the Society co-sponsored the Court of Appeals Lecture entitled *Dreiser's An American Tragedy: The Law and the Arts*. As you may know, Dreiser based his novel on the New York murder case, *P. v Gillette*. The Society's website now contains the streamed video of the lecture in which Susan Herman and Francesca Zambello discuss the interrelation of law and literature. It is a treat not to be missed! Also in the Gillette segment of the website (reach it via the gold button on the main page labeled "Cases") are full-text materials relating to two cases that arose from the 1931 movie based on Dreiser's novel. The first relates to Dreiser's dispute with Paramount over the movie director's interpretation of his novel. It provides insights into the issues in the movie industry at the beginning of the "talkie" era. The second case was brought by the murder victim's mother who sought damages for defamation — she alleged that the movie depicted her family as "poor white trash."

We have added an audiocast of the May 22nd *Palsgraf* program to the website and plan to add a videocast of the encore *Palsgraf* program. These two programs are most interesting to view side-by-side since each bench's deliberations resulted in different decisions. We also plan in the near future to include a videocast of our October Buffalo program entitled: *Frontier Justice: Western New York Blazes a Trail on the Underground Railroad and Down the Erie Canal*. This program includes both the Finkelman lecture discussed above and a lecture by John Fabian Witt, Professor of Law, Columbia Law School entitled: *The Erie Canal & the Transformation of American Law*.



Ticket to East New York Station, scene of Palsgraf accident

The Court of Appeals Lecture Series (which the Society co-sponsors) provided us with two wonderful lectures (in addition to the program *An American Tragedy* described above). The first was delivered in Spring 2006 by the late Kermit Hall, President of the University at Albany. His subject was *New York Times v Sullivan*. The second lecture, entitled *The Shape of Justice: Law and Architecture*, was delivered in November 2006 by internationally renowned architects Henry Cobb and Paul Byard. If you did not attend these events, treat yourself to an evening with the videocasts — you won't regret it!



Our Executive Director would like you all to know that we have updated the Society's website technology. You can now use your credit card to become a new Society member; renew your existing membership; purchase a gift membership for a third party; and/or purchase one or more items of merchandise (for yourself or as a gift)...and you can do it all in one credit card transaction! We hope that there are many on your list who would appreciate our items offered for purchase, including books, calendar, note cards, N.Y. County Courthouse Rotunda scarf (left), and plate (right).



Dear Members—A Look Back

Following is a look back (with pride) at Historical Society events held in the past year. I hope you had occasion to attend at least one. We plan to display an audio or videocast of each of these programs on our website, and I hope you will visit us online and enjoy these programs again and again.

—Marilyn Marcus, Executive Director

ANNUAL LECTURE MAY 22, 2006

The New York City Bar,
New York, NY

The Scales of Justice: A Reargument of *Palsgraf* v *Long Island R.R. Co.*

A Moot Court dramatization of the New York Court of Appeals arguments and deliberations in this famous case.



Michael Cardozo with Edgar and Frederic Nathan at the *Palsgraf* reargument.

ADVOCATES:

Henry G. Miller, Esq., Clark, Gagliardi & Miller, for plaintiff. **Hon. Robert S. Smith,** Assoc. Judge New York State Court of Appeals, for *The Long Island R. R. Co.*

BENCH: **Hon. Howard A. Levine** (Chief Judge), Retired Assoc. Judge, NYS Court of Appeals; **Caitlin J. Halligan,** Solicitor General, Dept. Of Law; **Judith A. Livingston,** Dillof, Livingston & Moore; **Bettina Plevan,** Proskauer Rose; and **Roy L. Reardon,** Simpson Thacher & Bartlett. This year's Annual Lecture was a huge success, with attendance of over 400. The distinguished bench unanimously overturned the revered decision of the Cardozo Court.

NOVEMBER 9, 2006

The NYS Judicial Institute,
White Plains, NY

AN ENCORE PRESENTATION: The Scales of Justice: A Reargument of *Palsgraf* v *Long Island R.R. Co.*

ADVOCATES: **Hon. Lewis Lubell,** Supreme Court Justice, White Plains, NY, for plaintiff, **Hon. Robert S. Smith,** Associate Judge, New York State Court of Appeals, for defendant

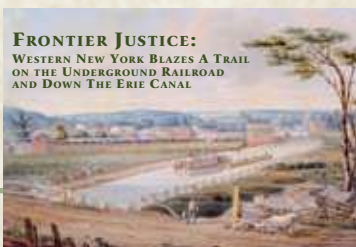
BENCH: **Hon. Sondra Miller,** Director, OCA Office of Family Services (Chief Judge); **Hon. Charles L. Brieant,** U.S. District Judge, Southern District; **Stephen J. Friedman,** Dean of Pace Law School; **Janet A. Johnson,** Professor of Law, Pace Law School; **Kevin J. Plunkett** Thacher Proffitt & Wood.

The Annual Lecture was such a huge success that the Historical Society took this program "on the road" to White Plains, with a new cast. The results.... 3-2 affirming Cardozo! Listen to *Palsgraf I* on our website and look for a videocast of *Palsgraf II* coming soon to our website.

OCTOBER 4, 2006

Buffalo N.Y. Frontier Justice: Western New York Blazes a Trail on the Underground Railroad and Down the Erie Canal.

**FRONTIER JUSTICE:
WESTERN NEW YORK BLAZES A TRAIL
ON THE UNDERGROUND RAILROAD
AND DOWN THE ERIE CANAL**



The grandson of Judge Andrews displays his shirt: "And you thought Mrs. Palsgraf had problems"

Slavery, Freedom and the New York Courts: Paul Finkelman, McKinley Distinguished Professor of Law, Albany Law School

The Erie Canal & The Transformation of American Law: John Fabian Witt, Professor of Law, Columbia University

This program, the work of a wonderful committee of our Western New York colleagues (**Hon. Eugene F. Pigott,** Associate Judge NY Court of Appeals; **Hon S. Sharon Townsend,** Administrative Judge, Supreme Court, 8th Judicial District; **Hon. Frank Clark,** District Attorney, Erie County; **Michael B. Powers,** Phillips Lytle) represented the beginning of our initiative to present programming throughout the State.

THE NEW YORK COURT OF APPEALS LECTURE SERIES:

The Historical Society proudly co-sponsored a series of three lectures created by Chief Judge Judith S. Kaye. The New York Court of Appeals opened the doors of its beautifully

refurbished and modernized courthouse and Court of Appeals Hall to the public for its precedent-setting inaugural series of lectures. The well-attended and much enjoyed lectures included the following:

NY Times v Sullivan and its Times: The Press and the Community. **Kermit Hall,** President of the State University at Albany

Dreiser's "An American Tragedy:" The Law and the Arts. **Susan N. Herman,** Centennial Professor of Law, Brooklyn Law School; and **Francesca Zambello,** internationally renowned director of opera and theater.

The Shape of Justice: Law and Architecture: featuring two internationally acclaimed architects **Henry N. Cobb,** Pei Cobb Freed & Partners; and **Paul S. Bayard,** Platt Bayard Dovell White.

RECENT EVENTS

Reviewed in more detail in our next issue.

MAY 10, 2007

Gala Dinner
Banking Hall, Chambers St.,
New York City

JUNE 26, 2007

**ON THE ROAD:
The Scales of Justice: A
Reargument of *Palsgraf*
v *Long Island R.R. Co.***

Nassau County Bar
Association, Mineola, NY

UPCOMING

SEPTEMBER 18, 2007

**The Stephen R. Kaye
Memorial Lecture**
The New York City Bar
New York, NY
Look for your invitation.

The Historical Society of the Courts of the State of New York



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