



THE NEW YORK COURT OF APPEALS

Albert M. Rosenblatt

Judge Rosenblatt's introduction to the New York Court of Appeals is also a useful preface to Frances Murray's *Henry Rogers Selden* on page 443.

—*The Editors*

IT IS INTERESTING, AND CURIOUS, that in New York the Supreme Court is not supreme. Above it there are two courts, the Supreme Court's Appellate Division and the State's highest tribunal, the New York Court of Appeals. In naming the court, the New York legislature might have been thinking along the lines of Sherlock Holmes who in *The Sign of Four* referred to himself not as the "supreme" arbiter but as the "last and highest court of appeal."

The nomenclature of New York's Court of last resort has had a tangled history, going back to our Dutch and English origins. The idea of appealing to a temporal "higher authority" is an old one, and things were no different when we arrived in this part of the New

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World. Forming New Netherlands as a colony in 1623, the Dutch settlers derived their notions of jurisprudence from Holland. By 1653, they had established courts comprising the equivalent of sheriff, prosecutor, and mayor. No checks and balances or separation of powers as we know it. Judicial review would have seemed to them a strange and dangerous concept. *Marbury v. Madison* was 150 years away.

Although they had nothing resembling an appellate system, even Peter Stuyvesant recognized that as Director General he was answerable to Holland. As for the appellate process, he had this to say when sentencing two dissidents in 1647: "If any one during my administration shall appeal, I will make him a foot shorter, and send the pieces to Holland, and let him appeal that way." But appeal to Holland they did, and successfully.¹

In 1664, when the British took over from the Dutch, they established various trial courts with appeal to the Court of Assize, the colony's highest tribunal, and from there to the crown. Things changed in 1691, an eventful year. For starters, it marked the creation of the New York Supreme Court of Judicature. We gained a supreme court with an apt title, composed of five justices, with Joseph Dudley (1647-1720) as its first Chief. Before that, Dudley had been Chief Justice of Massachusetts (1687-1689), a state he seemed to have preferred, considering that after his two-year stint as New York's Chief Justice, he went back to serve as Governor of Massachusetts from 1702 to 1715.

Also in 1691, New York ceded Nantucket and Martha's Vineyard to Massachusetts. Whether Dudley liked the surf well enough to return to Massachusetts as a habitué of Nantucket and Martha's Vineyard is a question that falls far outside the scope of this piece.

I count about 29 men who served on the New York Supreme Court of Judicature, which existed from 1691 to 1777. Without listing them here, it is enough to say that they had prominent family names, now recognized as towns, streets, and subway stops (*e.g.*,

¹ Baynard Tuckerman, *Makers of American History*, New York, the University Society, 1904, p. 66.

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Chambers, DeLancey, Ludlow, VanCortlandt, Morris, Phillipse).

On July 10, 1776, the day after it ratified the Declaration of Independence, New York began to form its own government, free of England. Following an arduous nine-month gestation period, the State adopted its own constitution on April 20, 1777, and created its high court, the Court for the Trial of Impeachment and Correction of Errors. This Court of the Cumbersome Name was made up mostly of senators, and as such, resembled England's House of Lords. It heard appeals from New York State's Supreme Court and continued to do so after it evolved into the Court of Appeals. That accounts for the confusing designation by which the Court of Appeals is above the Supreme Court, which is now a trial court.

The Court for the Trial of Impeachment and Corrections of Errors, which lasted from 1777 to 1847, must have been an interesting place. It was composed mostly of legislators, with a sprinkling of Supreme Court Justices, who could have no voice in affirming or reversing their own judgments.² Anyone wishing to consult the decisions of the court may find them in named volumes such as *Johnson's Reports*, *Caines' Reports*, *Cowan's Reports*, and the favorite of many, *Lockwood's Reversed Cases*. Owing to the size of the tribunal, the votes read not like hockey scores (e.g., 5-2, 4-3, 6-1) but more like football scores (21-8, 12-6, 14-12).³

² The notion that judges sitting on higher courts should have no voice in reviewing judgments they made below is second nature to us. But it was not at all apparent to the judges who comprised the New York Court of Appeals created under the Constitution of 1846. With that court – which is, essentially today's court – the volume numbering began with 1 NY (about 420 volumes ago). The first case in the first volume is *Pierce v. Delameter*, 1 NY 17 (1847). The judges, some of whom had served in lower courts, saw no impropriety in reviewing their own judgments (i.e., Who knows this case better than I?). While *Pierce* gets some good belly laughs at after-dinner speeches, there was at least one instance in which the judge, on review, concluded that he had erred below. *Shindler v. Johnson*, 1 NY 261 (1848). Even so, we are not about to revert to that practice. Since the New York Constitution of 1869, judges may not sit in appellate review of their judgments. See *Wittleder v. Citizens' Electric Illuminating Co.*, 47 App. Div. 543 (1900).

³ It is difficult to account for these tallies; they do not add up to any consistent number. Did the members vote whenever it pleased them? Were there rules

For seven decades this court functioned, with judges whose names resonate in law and government: John Jay, James Kent; Brockholst Livingston, Smith Thompson, and Samuel Nelson (all three later United States Supreme Court Justices); Egbert Benson (New York's first Attorney General); Morgan Lewis, William Marcy, and Daniel D. Tompkins (all three later served as Governor).

The New York Constitution of 1846 changed the high court's character. No longer a large mix of senators and jurists, the Court, by political compromise, consisted of eight judges. Four were elected statewide and four (ex officio) appointed from among elected trial justices. Like many a political compromise, the arrangement brought short-term relief but long-term woes, in that four judges rotated in and out each year. In its first 23 years, the court had 19 regular members and 100 ex-officio. Because it lacked stability, its composition was changed, in 1869, to look more like today's Court: seven judges elected statewide for 14-year terms, with mandatory retirement at 70. Election lasted for about a century. In 1977, the Court went from popular election to gubernatorial appointment based on a list of candidates chosen by a constitutionally created Commission on Judicial Nomination.

N.Y. JURISTRIVIA

These nuggets of New York judicial history are drawn from *The Judges of the New York Court of Appeals, A Biographical History* (Fordham 2007):

The towns of Gardiner, New York, and Jewett, New York, are named after Judges Addison Gardiner (1797-1883) and Freeborn G. Jewett (1791-1858).

At Dartmouth College, Fritz Alexander (1926-2000) was one of four African-American students and the only African-American on the football team.

governing the process? Like Justice Dudley's possible affinity for Nantucket and Martha's Vineyard, these are issues that await the researches of some uncommonly enterprising young scholar.

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When charged with illegally voting in 1872 because she was a woman, Susan B. Anthony was represented by Henry R. Selden (1805-1885), who had served on the Court of Appeals, and John Van Voorhis, the grandfather of the court's John Van Voorhis (1897-1983). The trial judge was Ward Hunt (1810-1886), a Justice of the United States Supreme Court, on circuit. Hunt had also served on the Court of Appeals (1866-1870). See Frances Murray's *Henry Rogers Selden* on page 443.

"The Blue and the Gray," a poem by Francis Finch (1827-1907), is in American poetry anthologies. He wrote it in 1867 for *The Atlantic Monthly*, 14 years before he joined the Court of Appeals. He later became dean of Cornell Law School.

At 62, and while on the court, Emory Chase (1854-1921) responded to the outbreak of World War I by going to the armory of Company E, 10th Infantry, in his hometown of Catskill, and declaring his intention to join the depot unit there.

Rufus W. Peckham Sr. (1809-1873) and Jr. (1838-1909) were father and son, both having served on the Court of Appeals. When Senior was a trial judge, Junior appeared before him defending a criminal case. Senior showed no favoritism; in fact, the conviction was reversed owing to Senior's instructions to the jury. *Gordon v. People*, 33 NY 501 (1865).

And finally ...

The world is now prepared for the revelation that when Chief Judge Judith S. Kaye swore in Steven C. Krane as president of the New York State Bar Association, he proclaimed the oath by raising his right hand and placing his left hand on a copy of *Lockwood's Reversed Cases*, which the Chief had supplied for the occasion.

