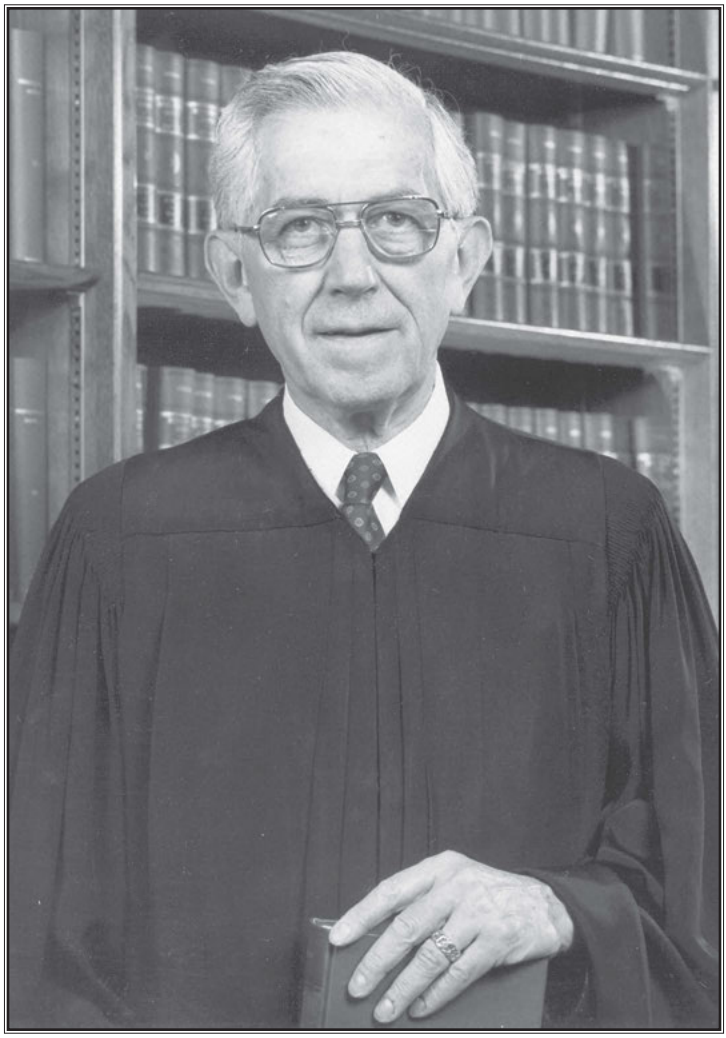
The History of the New York Court of Appeals, 1932–2003



In Memory of Associate Judge Bernard S. Meyer (1916–2005)

Judge Meyer was born in 1916. He was elected to the New York Supreme Court in 1958. In 1975, Judge Meyer was appointed Special Deputy Attorney General of the State of New York in charge of the investigation of the Attica Prison riots. He served as the first chair of the Committee on Pattern Jury Instructions - Civil of the Association of Justices of the Supreme Court which produced the compendium of jury instructions in use today. Judge Meyer was appointed Associate Judge of the Court of Appeals by Governor Hugh Carey in 1979 and served on the Court until retiring at the end of 1986, having reached the mandatory retirement age. He died in September of 2005.

The History of the New York Court of Appeals, 1932–2003

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To my wife, Horty, and to my partners at Meyer, Suzozzi, English & Klein, who have encouraged and supported my work on this book.
Bernard S. Meyer

To Dale, with love and with gratitude for her love, support, and encouragement during our fifty years of marriage.
Burton C. Agata

With love to Gail, my wife, and to Adam, my son, and in loving memory of my dear sister, Abby.
Seth H. Agata

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Preface

JUDGE FRANCIS BERGAN'S BOOK, *The History of the New York Court of Appeals 1847–1932*, was published in 1985 under the auspices of the William Nelson Cromwell Foundation. The period covered by that volume ended with the appointment of Chief Judge Benjamin Nathan Cardozo as an Associate Justice of the United States Supreme Court on March 7, 1932. Essentially, that volume was organized chronologically and focused in large measure on the development of the Court as an institution and to a lesser extent on some of its decisions developing the law.

In April 1997, the Honorable Harold Tyler, on behalf of the Cromwell Foundation, inquired of retired New York Court of Appeals Associate Judge Bernard S. Meyer whether he would be interested in preparing a history of the Court after 1932. Judge Meyer agreed to do so. Judge Meyer enlisted as co-authors Burton C. Agata, the Max Schmertz Distinguished Professor of Law (now emeritus) at the Hofstra University School of Law; Seth H. Agata, Associate Counsel (Codes Committee) Program and Counsel Staff, (now Senior Counsel to the Majority) New York State Assembly; and Professor Richard T. Farrell of Brooklyn Law School.[1] The authors, taking into account a suggestion by Chief Judge Judith S. Kaye, decided not to follow Judge Bergan's pattern, but instead to place greater emphasis on the Court's development of the law by focusing on the subject matter of decisions handed down after March 1932 and before October 31, 2003.[2] Of course, when appropriate to understanding the development, cases decided prior to 1932 also would be included. In view of the wide range of the

Court's work, this approach would be more useful to those interested in the Court and its development of the law.

Although its focus is on the Court's development of the law, the book also contains short biographies of members of the Court and describes major post-1932 institutional changes such as the change from election to gubernatorial appointment of members of the Court. Also included is consideration of major jurisdictional changes, including one by which the Court became a certiorari court with expanded power to determine which lower court decisions it would review and another that permitted Federal and other State appellate courts to certify to it questions concerning the law of New York.

The chapters concerning substantive legal rulings form the major part of this book and focus on those questions which were and in many instances continue to be subjects of general interest and even public dispute and reflect divergent views among members of the Court in their judicial and nonjudicial writings. Of course, the substantive law sections are not, nor are they intended to be, comprehensive statements of the substantive law discussed.

We are indebted to the Clerk of the Court, Stuart M. Cohen, to Gary Spencer, the Court's Public Information Officer, and to members of their staffs for their assistance. We are also indebted to Westlaw for providing such easy access to the New York reports and to the Hofstra University School of Law Library for providing access to much of the material discussed in the book.

Preparation of the text did not begin until January 1999, and our initial estimate was that the book would be completed in 2001. That turned out to be unrealistic. We hope, however, that the end product will be as satisfying to those interested in the history of the New York Court of Appeals and its development of New York law as has been our part in its preparation.

Bernard S. Meyer
Burton C. Agata
Seth H. Agata
Richard T. Farrell
May 2006

1.

A Brief Overview of the Court of Appeals

THIS CHAPTER IS not intended to be the definitive constitutional history of the Court of Appeals nor a comprehensive biography of those judges who have sat on the Court. Rather, its purpose is to give the reader an overview of the composition of the Court since 1932, as well as answer the question of how it came about that there are seven nonelected members of the Court rather than eight elected judges as was originally provided for in 1846.[1]

Evolution of the Court

The New York Constitution of 1846 abolished the Court for the Trial of Impeachments and Correction of Errors. It created the Court of Appeals, which took over the judicial functions of its predecessor, as well as its pending caseload of approximately 1,500 cases, and vested the impeachment function in the Legislature.[2] As originally established by Article VI, section 2 of that constitution, the Court consisted of eight judges, four of whom were elected to eight-year terms.[3] The Constitution empowered the Legislature to devise a process to ensure that one judge would be elected every two years, which the Legislature did through the Judiciary Act of 1847.

Of the original eight judges, four were chosen by lottery slips drawn by the secretary of state and each was randomly assigned a term of years for office to ensure that one vacancy would occur every two years. The elected judge with the shortest term to serve, a two-year term, was designated the Chief Judge.

The remaining four judges were chosen by the governor from the justices of the Supreme Court to serve one-year terms as *ex-officio* judges of the newly established court. There were eight judicial districts of the Supreme Court, and the governor designated the justices with the shortest terms from the First, Third, Fifth, and Seventh Districts to serve as the first group of *ex-officio* judges. At the conclusion of their terms, the justices serving the shortest remaining terms in the Second, Fourth, Sixth, and Eighth Districts took their places.

This rotating system of judges resulted, at times, in more than half of the court being replaced at the end of a single year. Moreover, a Supreme Court Justice could sit as an *ex-officio* judge on the Court of Appeals and thereby sit in review of his own decision. Thus, changes were warranted.[4]

In 1869, New York amended the judiciary article of the Constitution. The amendments reduced the number of judges from eight to seven with one judge designated as Chief Judge. Each judge was to be popularly elected to a fourteen-year term and could serve until the age of seventy rather than sixty as under the former Constitution. The amendment established a commission of appeals to cope with a backlog of cases pending in the court. The commission, which sat for five years, was composed of the four judges elected statewide under the 1846 Constitution and one judge appointed by the governor with the advice and consent of the New York State Senate. In addition, Article VI, section 8 specifically provided, in relevant part, that "[n]o judge or justice shall sit, at a General Term of any court, or in the Court of Appeals, in review of a decision made by him, or by any court of which he was at the time a sitting member."[5]

Because of a backlog of cases, the governor was permitted by a constitutional amendment adopted in 1899, at the request of a majority of the Court's judges, to designate up to four justices of the Supreme Court, each of whom would be excused from their duties as Supreme Court Justices, to serve as associate judges until the Court's caseload was reduced to fewer than two hundred cases. Five judges would constitute a quorum, but no more than seven judges could sit at a time on a single case. The term of office for each judge was left at fourteen years.[6]

Further constitutional changes were adopted in 1925.[7] At the Court's request, to aid it in deciding cases, the Constitution permitted it to request the governor to designate one or more justices of the Supreme Court to sit in place of one or more associate judges who were either absent or unable to sit. By 1923, the Court no longer included any Supreme Court Justices sitting by gubernatorial designation and none have since been appointed.

The most recent constitutional change affecting the composition of the Court occurred in 1977.[8] Popular election of judges to the Court of Appeals was replaced with a mechanism that provided that they would be chosen by the governor from a list of names recommended by the Commission on Judicial Nom-

ination ("the Commission") and approved by the New York State Senate. This reflected a trend away from the popular election of members of the judiciary and toward a process with the purported intention of facilitating selection based on merit.

Under the New York Constitution, the Commission is composed of twelve members, four of whom are chosen by the governor, no more than two of whom may be enrolled in the same political party, of which two must be members of the New York State Bar and two of whom need not be members. The same limitations are placed on the four members chosen by the Chief Judge of the Court of Appeals. Neither the governor nor the Chief Judge may appoint more than one former judge or justice of a New York court to the Commission.

The speaker of the Assembly, the temporary president of the Senate, and the minority leaders of each of the two houses of the Legislature are each authorized to appoint a member of the Commission. Members of the Commission are barred from holding any elected public office for compensation or any office in a political party. They are also ineligible for appointment to the bench during their tenure on the Commission and for a period of one year thereafter.

Biographies of the Judges[9]

Governor Thomas E. Dewey, in an issue of the *Columbia Law Review* dedicated to Chief Judge Stanley Fuld, remarked:

> Some lawyers become judges because they have worked hard enough and long enough in the political vineyard to persuade the dominant political party to nominate them. Some judges, like ambassadors, arrive at their destination by the route of heavy political contribution. Then there are some lawyers who become judges because they were born to be judges.[10]

The observations and biographies which follow are not attempts to either prove or disprove this hypothesis. The legacy of each member of the Court of Appeals is reflected in each judge's decisions and opinions, and by each judge's life's work.

General Observations About the Judges Who Have Sat on the Court

Without drawing any conclusions as to what it may take to become a judge on the Court of Appeals, some general observations may be made about the group of fifty judges who have been appointed and elected to the Court during the

period covered by this work (not including those judges who were on the bench as of 1932 but were appointed before that date).

First, there appears to be no pronounced bias in appointing or electing judges who were born in New York City; only eighteen of the judges who have served hail from the five boroughs.[11] However, being born in the State of New York is a decided advantage in that only seven of the judges who have been appointed or elected to the bench in the last seventy years were born outside the state, and of the three men of African-American descent, not one was born in New York. Four of the thirteen judges appointed since 1983 have been women.

Second, with respect to judicial experience before coming to the Court, approximately half of the judges surveyed served on the Appellate Division of the Supreme Court and another eleven judges served on the New York Supreme Court, while only three served on various other courts (both Judges Thacher and Rippey served on the Federal bench, although Judge Rippey also served on the New York Supreme Court, and Judges Dye and Read served on the Court of Claims). Judge Jasen served as Judge of the Third Military Government Judicial District of Occupied Germany at Heidelberg after World War II. Nine judges, including two of the chief judges (Judges Fuld and Kaye) had no prior judicial experience at all. Only Judges Bromley and Stevens were appointed by a governor to the Court but failed to be subsequently elected in their own right.[12]

Third, with respect to legal education, as distinguished from the pool of judges who served in the nineteenth century, all except two Court of Appeals judges graduated from law school. Of the remaining judges, only fifteen attended law schools outside of New York State. Harvard University (seven judges) and Columbia University (six judges) produced the most alumni on the Court. Of the nine appointments made by Governor Mario Cuomo, a graduate of St. John's Law School, three were graduates of his alma mater (Judges Titone, Bellacosa, and Ciparick).

The judges have brought a wealth of nonjudicial experience to the bench. The government experience that appears most often on the resumes of the judges is service as a prosecutor. Thirteen of the judges were assistant district attorneys or Federal prosecutors (including Judges Fuld and Breitel, who served under Thomas E. Dewey when he was conducting his rackets investigations) and five had been elected district attorneys of their respective counties (Judges Foster, Gibson, Gabrielli, Levine, and Rosenblatt).

Judges have held other elected offices at the local and town level (Judges Wachtler and Cooke served as town supervisors), as well as at the national level (Judge Keating served as United States Senator and Congressman). Judges

Stevens, Rabin, Wesley, and Finch were members of the New York Legislature, before sitting on the Court of Appeals. Three judges ran for nonjudicial office at various times and were defeated (Judges Conway, Medalie, and Hancock).

In addition, the members of the bench have held a variety of nonelected public offices, such as counsel to the governor (Judges Breitel and Read, who served as a deputy counsel), Superintendent of Insurance (Judge Conway), United States Solicitor General (Judge Thacher), and New York Solicitor General (Judge Graffeo). If one includes Judges Crane and Pound, six of the members of the Court have served as delegates to and in other leadership positions at state constitutional conventions (Judges Sears, Burke, Scileppi, and Bergan being the others).

A number of the judges have also taught. For example, Judge Bellacosa was a noted law professor before coming to the bench, and Judge Rippey was a professor of mathematics.

For those judges who have retired from the Court, there has been life after serving on the bench. Most have engaged in academic and professional activities, including writing books, articles, and treatises, some of which are set forth *infra*. Some have returned to the bench, such as Judge Sears, who served on the International Military Tribunal at Nuremberg, and Judges Gabrielli, Dye, and Rabin who, after retiring from the Court, sat on other courts in New York State. Two judges became United States ambassadors (Judges Keating and Finch) and Judge Alexander became Deputy Mayor of New York City. Judge Lewis became President of the New York State Bar Association (a position also held by Judge Jones before coming to the bench) while Judge Cooke served on the Judicial Screening Committee reviewing judicial nominations to New York courts.

They have also authored legal treatises (Judges Meyer and Bellacosa), high school texts (Judge Smith), and legal history (Judges Bergan and Meyer). Retired members of the bench have written novels (Judge Wachtler) and biographical works (Judges Wachtler and Burke), not to mention a stream of articles appearing in legal periodicals.

Chief Judges of the Court

FREEBORN G. JEWETT (1847–1849)

The first Chief Judge of the Court of Appeals was born in 1791 in Connecticut, but began practicing law in Skaneateles, New York. He served in a variety of elected and appointed positions including Master of Chancery (1817), Surrogate of Onondaga County (1824), Assemblyman from Onondaga County (1826), presidential elector for Andrew Jackson (1828), Congressman (1831),

Supreme Court Commissioner (1836), and District Attorney of Onondaga County (1838).

He was elected to a two-year term as Judge of the Court of Appeals and was designated Chief Judge. He was elected to a second eight-year term but retired from the bench in 1853 due to ill health. He died in 1858 and was remembered by his fellow judges for "the clearness of his intellect; the justness of his judgment; the purity and benevolence of his heart."[13]

GREENE C. BRONSON (1850–1851)

Judge Bronson was born in Oneida County, New York, in 1789. He was elected Surrogate of that county (1819), Assemblyman (1822), and New York Attorney General (1829–1836). In 1836, he was appointed a puisne judge (a junior judge as opposed to a chief judge) and subsequently became Chief Justice of the New York Supreme Court (1845).

He was elected to the first four-year term on the Court of Appeals in 1847 and retired in 1851. After leaving the bench, he was appointed Collector of the Port of New York (1853) and Corporation Counsel for New York City (1860). He died in Saratoga, New York, in 1863 being remembered by the Court for his opinions that served as "models of judicial excellence."[14]

CHARLES H. RUGGLES (1851–1853)

Charles Ruggles was born in Litchfield County, Connecticut (1789), but commenced practicing law in Kingston, New York, and became a prominent member of the Dutchess County, New York, bar.

He was elected to the New York State Assembly (1820) and to the United States Congress (1821). Upon leaving Congress at the end of his term in 1823, he resumed practicing law and served as Vice-Chancellor and Judge of the Second Circuit Court for Dutchess County (1831) from where he was elected again to the New York State Legislature.

He chaired the committee of the State Constitutional Convention of 1846 that drafted the judiciary article of the Constitution. He was subsequently elected to the first six-year term on the Court of Appeals and was reelected to a second term of eight years in 1853. He served on the bench until 1855 and died in Poughkeepsie, New York (1865).[15]

ADDISON GARDINER (1854–1855)

Although born in Rindge, New Hampshire (1797), Judge Gardiner was raised and educated in Manlius, New York, and began practicing law in Rochester, New York (1822). He held a variety of elected and appointed offices including District Attorney of Monroe County (1825), Circuit Judge for the Eighth Circuit (1838), and Lieutenant Governor of New York (1844 and 1846).

He resigned the office of Lieutenant Governor and was elected to an eight-year term as an original member of the Court of Appeals. He left the Court at the end of his first term, but remained involved in the judiciary by serving as a referee in cases from the New York Supreme Court. He died in 1883 in Rochester, New York.[16]

HIRAM DENIO (1856–1857, 1862–1865)

Judge Denio was born in Rome, New York, in 1799. He began practicing law there after studying law under Judge Hathaway of Rome, in 1821. He was appointed District Attorney in 1825 and remained in that position for nine years.

He was later appointed a Circuit Judge from the Fifth Circuit (1834) and Bank Commissioner (1838). In 1840, he returned to practicing law in Rome. Before being appointed to the Court of Appeals, he compiled several volumes of cases entitled *Denio's Reports of Cases Argued and Determined in the Supreme Court and in the Court for the Correction of Errors of the State of New York*, covering the final terms of that court beginning in 1845. He was appointed to the Court of Appeals replacing Judge Jewett in June 1853, and was reelected twice. He left the Court in 1866 and died in Utica in 1868. The Court noted, on his death, that "[h]istory, which rarely fails to do justice to show who passed away, will inscribe his name on the same page as Kent and Spencer and Bronson."[17]

ALEXANDER JOHNSON (1858–1859)

Alexander Johnson was born in Utica, New York, in 1817. He graduated from Yale College in 1839 and began practicing law in New York City where he remained until his appointment to the Court in 1851 at the age of thirty-four. He was designated Chief Judge in 1858, resigned from the Court in 1860, but was reappointed Associate Judge in 1873 to finish the term of Judge Rufus Peckham, who had been appointed to the United States Supreme Court. He subsequently lost the election to fill that vacancy and left the bench in 1874. After leaving the Court he was appointed a Commissioner to Revise the Statutes of the State (1875).

Judge Johnson was active in public service outside of New York. President Lincoln appointed him a Commissioner to settle the claims of the Hudson Bay and Puget Sound Companies (1864). He was also appointed a United States Circuit Court Judge for the Second Circuit (1875). He died in 1878.

GEORGE F. COMSTOCK (1860–1861)

Judge Comstock was born in Oswego County, New York, in 1811. Upon graduating from Union College in 1834, he entered a law office and was admitted to the bar in 1837. He began his career with the Court of Appeals by being

designated its first court reporter (1847) in which capacity he prepared the first four volumes of reported decisions of the Court.

President Millard Fillmore appointed Judge Comstock Solicitor of the Treasury in 1852. He was subsequently elected to a six-year term as Associate Judge of the Court (1855), the last two years of which he served as Chief Judge. He died in 1892.

SAMUEL L. SELDEN (JANUARY–JULY 1862)

Judge Selden was born in 1800 in Lyme, Connecticut. He relocated to New York and began practicing law in Rochester (1825). He was later Chancery Clerk, and he served as Judge of Common Pleas of Monroe County. In 1847 he was elected a Supreme Court Justice.

Judge Selden was elected to the Court of Appeals in 1856 and served a single term, the last six months of which he served as Chief Judge. Upon his resignation from the Court in 1862, his brother, Henry Rogers Selden, was appointed to take his place. Judge Samuel Selden died in 1876.

HENRY E. DAVIES (1866–1867)

Judge Davies was born in Black Lake, New York, in 1805. He studied law under Judge Alfred Conkling, was admitted to the bar in Utica (1826) but began practice in Buffalo. He relocated his practice to New York City and, at one time, was partners with Judge William Kent, son of Chancellor Kent.

He served as Corporation Counsel for New York City (1850–1853) and was later elected Justice of the Supreme Court for the First District (1855). He left that court in 1859 when he was elected to the Court of Appeals.

Upon leaving the Court in 1867, he resumed practicing law until he became a Justice of the New York Supreme Court (1873). Among other notable achievements following his career on the bench, he was appointed a member of the commission to determine whether it was advisable to construct a subway under Broadway in New York City. He died in 1881 in New York City.

WILLIAM B. WRIGHT (JANUARY 4–12, 1868)

William B. Wright was born in 1806 in Newburgh, New York. In 1840 he was elected Surrogate of Sullivan County and was later elected as a delegate to the 1846 Constitutional Convention from that county. He served as an Assemblyman from Sullivan County (1846) until he resigned the same year, having been elected a Justice of the Supreme Court. He was reelected to an eight-year term (1849) and then to another four-year term.

He served several terms as an *ex-officio* member of the Court of Appeals (July 1, 1847–January 1, 1848; January 1, 1856–January 1, 1857; January 1,

1860–December 31, 1860). He was elected to the Court in 1861 and briefly served as Chief Judge in 1868, the year he passed away.

WARD HUNT (MARCH 16, 1868–1869)

Judge Hunt was born in Utica in 1810. He studied law in Litchfield, Connecticut, and in the law offices of Judge Hiram Denio (*supra*) with whom he went into partnership in 1831 following his admission to the bar.

He was elected to the New York State Assembly from Oneida County (1839) and Mayor of Utica (1844). He was elected to the Court of Appeals in 1865, succeeding Judge Denio, and served as Chief Judge following the death of Judge Wright. After Judge Hunt left the bench, he served as a Commissioner of Appeals until January 1873, when he was appointed to the United States Supreme Court. In 1883, he resigned as Justice of the Supreme Court because of ill health. He died in Washington, D.C., in 1886.

ROBERT EARL (JANUARY–JULY 1870 AND JANUARY 19–DECEMBER 31, 1892)

Robert Earl was born in Herkimer, New York, in 1824. A graduate of Union College (1843), he was admitted to the bar in 1848 and practiced in Herkimer in partnership with his brother. In addition to practicing law, for several years, beginning in 1849, Judge Earl edited and published *The Herkimer Democrat*. He was later elected County Judge and Surrogate for Herkimer County in 1856.

In 1869, he was elected Associate Judge of the Court of Appeals. He subsequently served an extended term as Commissioner of Appeals through 1875. Governor Samuel Tilden appointed Judge Earl to the Court in 1875. He was elected to a full fourteen-year term in 1876 and was reelected in 1890, during which term he served as Chief Judge. He retired from the Court at the end of 1894 having reached the mandatory retirement age in that year. He died in 1902.[18]

SANFORD E. CHURCH (JULY 1870–MAY 1880)

Sanford E. Church was born in 1815 in Otsego County, New York. He settled in Albion, Orleans County, New York, where he was admitted to practice law. He later briefly moved to Rochester to practice law with Judge Henry Selden.

He was elected to the New York State Assembly from Orleans County (1842). Governor Wright appointed him District Attorney of that county in 1845, and he was later elected to that position. He was twice elected Lieutenant Governor of New York (1850 and 1852) and was later elected Comptroller (1857). In 1867 he was elected a delegate to the Constitutional Convention where he chaired its finance committee.

In 1870, he was elected Chief Judge of the Court of Appeals, a position in which he served until his death in May 1880. Upon his death, his colleagues recalled his "saving common sense . . . independence of character . . . and . . . strong sense of natural justice that caused him to shrink from what seemed to him to be a wrong . . ."[19]

CHARLES J. FOLGER (MAY 1880–NOVEMBER 1881)

Judge Folger was born in Massachusetts in 1818, but his family relocated to Geneva, New York, in 1830. He subsequently attended the school that is now known as Hobart College and, upon leaving, read for the law and was admitted to the bar in 1839.

He was appointed Judge of the Court of Common Pleas for Ontario County (1844) and Master and Examiner in Chancery. He was later elected County Judge of Ontario County (1851). Judge Folger was elected to the New York State Senate from that county (1862) and during his tenure served as president pro tem and chairman of the Judiciary Committee. He also chaired the judiciary committee of the Constitutional Convention of 1869. He served until 1869, at which time President Grant appointed him Assistant Treasurer of the United States.

In 1870, he was elected Associate Judge of the Court of Appeals and was later made Chief Judge. He resigned in 1881 upon being appointed Secretary of the Treasury by President Rutherford B. Hayes. Judge Folger ran for governor in 1882 against Grover Cleveland and lost. He died in 1884.[20]

CHARLES ANDREWS (DECEMBER 1881–1882 AND 1893–1897)

Charles Andrews was born in Oneida County, New York, in 1827. He read for the law and was admitted to practice in Syracuse in 1849. He served as District Attorney of Onondaga County from 1854 through 1857, and was twice elected Mayor of Syracuse (1861 and 1868). He also served as delegate-at-large to the Constitutional Convention of 1869. During this time of intense political activity, he became a leading activist in the newly formed Republican Party.

He was elected an Associate Judge of the Court of Appeals in 1870 and, in 1881, was appointed Chief Judge to succeed Judge Folger. He lost his election for a full term as Chief Judge the next year in a Democratic landslide victory, which swept state elections. In 1893, he was elected again to the Court and became, for a second time, Chief Judge in 1893. He retired at the end of 1897, having reached the mandatory age of retirement. He continued to serve as a Trustee of Syracuse University through 1917 (as he had from 1879) and died in 1918. He was the father of William S. Andrews, who served on the Court of Appeals as an Associate Judge from 1917 through 1928.

WILLIAM C. RUGER (1883–JANUARY 1892)

William C. Ruger was born in Oneida County in 1824 and moved to Syracuse in 1847. He graduated from Union College, studied law with his father, with whom he ultimately formed a partnership, and was admitted to the bar in 1845.

He practiced law in Syracuse until 1882 and was elected the first president of the Onondaga County Bar Association (1875). Before his election as Chief Judge of the Court of Appeals in 1882, Judge Ruger served as a United States Commissioner (1856) and was an unsuccessful candidate for Congress three times (1864, 1866, and 1880). He served as Chief Judge until his death in 1892.

ALTON B. PARKER (1898–AUGUST 1904)

Judge Parker was born in Cortland, New York, in 1852. He graduated from the Albany Law School and was admitted to the bar in 1873. Thereafter, he held a variety of judicial positions, both elected and appointed, including Surrogate of Ulster County (1877), New York Supreme Court Justice (1885), Judge of the Second Division of the Court of Appeals (from 1889 until its disbandment in 1892), and Justice of the Supreme Court and the Appellate Division, First Department (1892). He was also active in Democratic Party politics having successfully managed the campaign of Governor David Hill in 1885.

He was elected Chief Judge of the Court of Appeals and held that position until he resigned in 1904 to run as the Democratic Party candidate for President of the United States against Theodore Roosevelt. Following his defeat, he returned to practicing law in New York City and remained active until his death in 1926. Among the positions Judge Parker held was President of the American Bar Association, President of the New York State Bar Association, as well as President of the New York County Lawyers Association.[21]

EDGAR M. CULLEN (SEPTEMBER 1904–1913)

Edgar Cullen was born in Brooklyn, New York, in 1845. He graduated from Columbia College, and then enrolled in Rensselaer Polytechnic Institute in Troy, New York, to study engineering. Shortly after enrolling, however, he enlisted in the Union Army at the outbreak of the Civil War. He was commissioned an officer in 1862 and at the age of nineteen, because of his bravery and merit, became the youngest colonel in the Union Army.

He was admitted to the bar in 1867 and was nominated by the Democratic Party for Justice of the Supreme Court in the Second Circuit. He was subsequently renominated by both parties for reelection. He was designated to sit on the Appellate Division and, in 1900, Governor Theodore Roosevelt designated Judge Cullen as an auxiliary judge of the Court of Appeals. Having garnered both the Democratic and Republican nominations for Chief Judge, Judge Cullen was elected to that position in 1904 and served as Chief Judge until his retirement in

1913. During his tenure, he presided over the impeachment trial of Governor William Sulzer in 1913. He voted against it. Upon his death in 1922, his colleagues, while noting that he voted against impeachment, remarked admiringly that although he "expressed vigorous detestation of the unworthy acts of the Governor," he did not vote for impeachment because "it seemed to him that his misconduct was not attributable to his official character as Governor [having taken place before his election]."[22]

WILLARD BARTLETT (1914–1916)

Judge Bartlett was born in Massachusetts in 1846. He graduated from Columbia College and New York University Law School. Upon graduation, he became a partner of Elihu Root.

He was twice elected to the New York Supreme Court (1883 and 1897) and was among the first judges to be designated to sit on the Appellate Division of the Second Department (1896). Governor Frank Higgins assigned him to the Court of Appeals while he was a Supreme Court Justice in 1906, and he was elected in his own right to the Court in 1907. He served as Chief Judge until his retirement. When Judge Bartlett died in 1925, he was recalled by the Court as one who "was sensitive to the right thing to do."[23]

FRANK H. HISCOCK (1917–1926)

Frank H. Hiscock was born in Onondaga County, New York, in 1856. He graduated from Cornell University in 1875. He served as president of its Board of Trustees for twenty-two years and began practicing law two years later in Syracuse.

He was elected Supreme Court Justice in 1896 and was subsequently designated to sit on the Appellate Division in 1901. He was also assigned, as a Supreme Court Justice, to sit on the Court of Appeals in 1906 and was elected to a full term as an Associate Judge of the Court in 1913. In 1916, Judge Hiscock was elected Chief Judge and served in that capacity until he reached the mandatory retirement age at the end of 1926. After retirement, he continued to serve as an official referee. He died in 1946.[24]

BENJAMIN NATHAN CARDOZO (1928–MARCH 1932)

Benjamin Nathan Cardozo was born in New York City in 1870. He graduated from Columbia Law School and was admitted to the New York Bar in 1891.

He was elected to the New York Supreme Court in 1914. He was designated by Governor Martin H. Glynn to sit as a Supreme Court Judge on the Court of Appeals (1914), and the appointment became full-time in 1917, when he was elected for a full term as an Associate Judge of the Court of Appeals. He was

elected Chief Judge in 1927 and served until 1932, when he was appointed to the United States Supreme Court where he served until his death in 1938.

He was one of the great legal minds of the century, being an advocate, along with Justice Oliver Wendell Holmes, of judicial lawmaking in the common law. His opinion in *Palsgraf v. Long Island R.R.*, 248 N.Y. 339 (1928) helped define the modern law of torts. He authored such works as *Jurisdiction of New York Court of Appeals* (1909), *The Nature of the Judicial Process* (1921), *The Growth of the Law* (1924), and *The Paradoxes of Legal Science* (1928).[25]

CUTHBERT W. POUND (MARCH 1932–1934)

Cuthbert Winfred Pound was born in 1864 in Lockport, New York. He attended Cornell University and studied law in the offices of John E. Pound in Lockport before being admitted to the bar in 1886.

He served as City Attorney of Lockport (1889–1891), New York State Senator (1894), New York State Civil Service Commissioner (as a member from 1900 through 1902 and President of the Commission from 1902 through 1905), and counsel to Governor Higgins (1905). He also was a professor of law at Cornell University from 1895 through 1904.

He was first appointed to the bench in 1906 as a Justice of the Supreme Court and was elected to a full fourteen-year term in that year as the nominee of the Democratic, Republican, and Independence League parties. He was designated by Governor Charles Whitman as an Associate Judge on the Court of Appeals in 1915 and was elected to a full term in 1917. He was reelected with cross-party endorsement in 1930 and was appointed Chief Judge in 1932. Judge Pound served as chairman of the Convention to Revise the Judiciary Article of the New York State Constitution (1921) and was a member of the American Law Institute. He died in 1935 and was remembered by the Court he served "as an omnivorous reader of the law" whose experience in public office "gave a practical bent to his mind."[26]

FREDERICK E. CRANE (1935–1939)

Judge Frederick E. Crane was born in 1869 in Brooklyn, New York. He graduated from Columbia Law School in 1889 and was admitted to the bar the next year. He practiced law in Kings County until 1896, when he was appointed assistant district attorney.

Judge Crane was first elected judge in 1901 as County Judge for Kings County, and before his term expired he was elected Supreme Court Justice (1906). Governor Whitman designated Judge Crane as an Associate Judge of the Court of Appeals in 1917, and he was subsequently elected to a full term in 1920 with cross-party endorsements. He became Chief Judge in 1934 and retired in 1939.

He was elected as a Delegate-at-Large to the Constitutional Convention of 1938 and was chosen President of that body. He died in 1947.[27]

IRVING LEHMAN (1940–SEPTEMBER 1945)

Judge Lehman was born in New York City in 1876. He graduated from Columbia University (1896), Columbia Law School (1898), and after being admitted to the bar, practiced law in New York City until 1908. Among other positions, he served as Honorary President of the National Jewish Welfare Board.

He was first elected to the Supreme Court in 1908 and was subsequently reelected. He was elected Associate Judge of the Court of Appeals in 1923, was reelected in 1937, and was elected Chief Judge in 1939, in which position he served until his death in 1945. His colleagues characterized Judge Lehman, at his death, as one who "believed profoundly in the supremacy of the law . . . [and] believed fervently in the moral concept of law."[28]

JOHN T. LOUGHRAN (SEPTEMBER 1945–1953)

Judge Loughran was born in Kingston, New York, in 1889. He attended Fordham University Law School and was admitted to the bar in 1911. From 1912 until 1930 he was a member of the Fordham University Law School faculty. He practiced law in Kingston until he was elected to the Supreme Court in 1930. Governor Herbert Lehman appointed Judge Loughran to fill a vacancy on the Court of Appeals in 1934, and later that year he was elected to a full term.

In April 1946, Governor Dewey appointed Judge Loughran Chief Judge, and he was elected to that office in his own right in 1946. He served until his death in 1953. In acknowledging his service to the Court and to the law, the Court summarized his legal philosophy as comprising, among other things, a "recognition of the fact that while our law must not be static, nevertheless, it must be certain and that certainty cannot be had by repudiation of rules and principles and the rejection of the doctrine of *stare decisis*."[29]

EDMUND H. LEWIS (APRIL 1953–1954)

Edmund H. Lewis was born in Syracuse in 1884. He graduated from Yale University (1907) and received his law degree from Syracuse University College of Law (1909). In addition to engaging in private practice and serving as a major in the Judge Advocate General's Corps during World War I, he served as Deputy Attorney General of New York (1915–1918), Corporation Counsel for the City of Syracuse (1920–1922), and President of the Onondaga County Bar Association (1929) before his election to the Supreme Court (1929).

He served on the Appellate Division, Fourth Department from 1933 until his appointment as Associate Judge of the Court of Appeals in 1940. He was later elected to a full term as Associate Judge that year. In 1953, Governor Dewey

appointed him Chief Judge, and he served in that capacity until he reached the mandatory retirement age at the end of 1954. After leaving the bench, Judge Lewis became President of the New York State Bar Association. He died in 1972.[30]

ALBERT CONWAY (1955–1959)

Albert Conway was born in Brooklyn in 1889. He attended St John's College, graduated from Fordham Law School in 1911, and was admitted to practice shortly thereafter. He was appointed first deputy assistant district attorney for Kings County and later assistant district attorney, which offices he held from 1913 through 1920.

He unsuccessfully ran for New York State Attorney General in 1928 and Governor Franklin Roosevelt appointed him Superintendent of Insurance in 1929. In 1930, the Governor appointed him County Judge of Kings County, and he was elected to the bench in his own right later that year. Judge Conway was elected to the Supreme Court in 1931 and designated to sit on the Appellate Division in 1939.

Governor Lehman appointed him an Associate Judge on the Court of Appeals in 1940, and later that year, he was elected to the position with cross-party endorsements. It was during his tenure on the Court that the Judicial Conference was inaugurated. Judge Conway was elected Chief Judge in 1954 and held that office until he reached the mandatory retirement age and retired at the end of 1959. He died in 1969.

In addition to serving as President and Chairman of the Executive Board of the Brooklyn Council of the Boy Scouts of America, Judge Conway was a member of the American Law Institute, as well as various Brooklyn county organizations.[31]

CHARLES S. DESMOND (1960–1966)

Judge Desmond was born in Buffalo in 1896. He graduated from Canisius College and the University of Buffalo. During World War I, he served in the United States Marine Corps Flying Force. After being admitted to the bar in 1920, he remained in Buffalo where he practiced law until 1939.

He served on the New York State Board of Social Welfare (1935 through 1939) until Governor Lehman appointed him to the Supreme Court in January 1940. He was elected Associate Judge on the Court of Appeals later that same year. Judge Desmond was reelected to the Court in 1954 and elected Chief Judge in 1959. Pursuant to court reorganization, effective September 1, 1962, he became Chief Judge of the State of New York. He retired from the bench after reaching the mandatory retirement age at the end of 1966. Thereafter, he

returned to private practice and continued an "active interest in legal education." He died in 1987.[32]

STANLEY H. FULD (1967–1973)

Stanley H. Fuld was born in New York City in 1903. He attended the College of the City of New York and received his law degree from Columbia University. He practiced law in New York City from 1926 through 1935 and from mid-1944 through mid-1946. From 1935 through 1944, he was Assistant District Attorney for New York County and was Special Assistant Attorney General from May 1944 through December 1945 under Thomas E. Dewey.

Governor Dewey appointed Judge Fuld an Associate Judge on the Court of Appeals in 1946 after which he was elected to the bench. In 1966, he was elected Chief Judge upon being cross-endorsed by the political parties. He retired from the bench at the end of 1973, having reached the mandatory retirement age in that year. The New York State Bar Association established the Stanley Fuld Award, which is given every year to recognize outstanding contributions to commercial law and litigation. Judge Fuld died in 2003.

Judge Fuld is regarded as one of Judge Cardozo's heirs. His decisions on conflicts of law, freedom of speech, and torts have had national implications. Among his many other achievements and activities, Judge Fuld served as Chairman of the New York Fair Trial—Free Press Conference, Chairman of the Institute for Advanced Studies in the Humanities, and Chairman of the Board of Directors of the Jewish Theological Seminary. He was also a Fellow of the American Academy of Arts and Sciences.[33]

CHARLES D. BREITEL (1974–1978)

Judge Breitel, the last elected Chief Judge of the Court of Appeals, was born in 1908 in New York City. He graduated from the University of Michigan (1929) and received his law degree from Columbia University School of Law in 1932 before entering private practice in New York City.

He served on the staff of Thomas E. Dewey's Special Rackets Investigation (1934 through 1937). From 1938 through 1941, he served in the office of the District Attorney of New York County as Assistant Chief of the Indictment Bureau, Trial Assistant, and then Chief of the Indictment Bureau under District Attorney Dewey.

He continued his association with Dewey by following him into private practice in 1942 and later becoming counsel to Dewey from 1943 through 1950. Dewey appointed him to the State Supreme Court in 1950, but he lost his election that year for a full term. However, in 1951 he was elected to a full term and was designated in 1952 to sit on the Appellate Division and was later redesig-

nated by Governors W. Averell Harriman and Nelson Rockefeller. He was elected Associate Judge of the Court of Appeals in 1967, and was elected Chief Judge in 1973. He served until his retirement and died in 1991.

Among his many nonjudicial accomplishments, Judge Breitel served on the New York State Post-War Public Planning Commission and the Joint Legislative Committee on Interstate Cooperation while Counsel to the Governor. He was also a member of the President's Commission on Law Enforcement and the Administration of Justice (appointment by President Lyndon Johnson) and the Federal Commission on International Rules of Judicial Procedure (by appointments of Presidents Dwight Eisenhower and John Kennedy). He also served as Adjunct Professor of Law at Columbia University School of Law (1963–1969).

Judge Breitel was a leading advocate for eliminating the election of judges to the Court of Appeals following his own bitter contest for reelection. His activities resulted in the constitutional amendment establishing the appointment of judges to the Court. He was also responsible for requiring that the Court of Appeals sit as a "hot bench," which is to say, he required that each sitting judge be fully prepared before oral argument for each argument before the court.[34]

LAWRENCE H. COOKE (1979–1984)

Judge Cooke was born in Monticello, New York, in 1914. He graduated from Georgetown University and from Albany Law School, and he was admitted to the bar in 1939 and began practicing in his home county of Sullivan. He was elected Town Supervisor of Thompson and Chairman of the Sullivan County Board of Supervisors (1947).

He began his career on the bench in 1955 when he was elected County and Surrogate Court Judge of Sullivan County. He was subsequently reelected with bipartisan support (1959). With similar backing, he was elected to the Supreme Court in 1961 and was later appointed to the Appellate Division (1968 and 1971). He was elected to the Court of Appeals in 1974. In 1979, Governor Carey appointed Judge Cooke Chief Judge, a position he held until his retirement at the end of 1984.

Judge Cooke served on several State Judicial Conference committees, including the Committee to Study Grievance Procedures and the Committee to Recommend Improvements in the Jury System. He was chairman of the New York Fair Trial—Free Press Conference, and headed the National Conference of Chief Justices and the National Center for State Courts. In addition to being active in Sullivan County community activities and affairs, he was an active volunteer firefighter and published many articles concerning the law governing that job. After retiring from the bench, among other activities, Judge Cooke chaired the Judicial Screening Committee.

His official biography notes that he "took an active role in recommending legal reforms to secure more uniform sentencing of criminals, abolition of corroboration requirements in rape cases and the barring of irrelevant cross-examination as to the sexual history of rape victims." Judge Cooke died in 2000.[35]

SOL WACHTLER (MAY 1985–NOVEMBER 1992)

Sol Wachtler was born in Brooklyn, New York, in 1930. He attended Washington and Lee University and Law School and was admitted to the bar in 1956. Thereafter, he practiced law in Jamaica, New York, eventually opening his own law office in Mineola, New York.

While in the military, Judge Wachtler was an instructor in Military Law at the Provost Marshal General's School and served as Special Military Counsel. In the Town of North Hempstead, he was elected councilman and supervisor.

Judge Wachtler was appointed to the Supreme Court in 1968 and elected to a full term in 1970 with bipartisan support. In 1972, he was elected Associate Judge of the Court of Appeals. In 1992, Judge Wachtler resigned from the bench upon being charged with a crime unrelated to his judicial duties; he was later convicted. Since leaving the bench, he has authored an autobiography (*After the Madness*, [ereads.com, 2003]) and a novel with David Gould, *Blood Brothers* (New Millennium Press, 2003). He presently serves as a law professor at Touro College of Law.[36]

RICHARD D. SIMONS (ACTING CHIEF JUDGE NOVEMBER 1992–MARCH 1993)

Judge Simons served as Acting Chief Judge following Judge Wachtler's resignation. *See* biography under "Biographies of Associate Judges from March 1932 to the Present," for his complete biography.

JUDITH S. KAYE (MARCH 1993–PRESENT)

Judge Kaye, the first woman to serve on the Court of Appeals, was born in Monticello, New York, in 1938. She graduated from Barnard College, earned her law degree from New York University Law School in 1962, and was admitted to the bar the next year. For the next twenty-one years, she practiced as a trial lawyer in New York City. Governor Mario Cuomo appointed Judge Kaye to the Court of Appeals in 1983 and appointed her Chief Judge in 1993.

She is co-chair of the Permanent Judicial Commission on Justice for Children and was a Director of the Legal Aid Society and the American Judicature Society, as well as a Council Member of the American Law Institute. She has been a tireless advocate for mandatory continuing legal education for lawyers and for court reform. She has authored numerous publications on the judicial

process, women in the law, state constitutional law, and professional ethics, and has served on committees of both the New York State and American Bar Associations.

Biographies of Associate Judges Who Served from March 1932 to the Present

HENRY T. KELLOGG (1927–MAY 1934)

Judge Kellogg was born in Champlain, New York, in 1869, the son of a New York Supreme Court Justice. He received both his undergraduate (1889) and law (1892) degrees from Harvard University.

Upon admission to the bar, he began practicing law in Plattsburgh, New York, was elected County Court Judge for Clinton County in 1903, and was later appointed and then elected Justice of the Supreme Court that year. He was reelected to a second term in 1917, was designated to sit on the Appellate Division, Third Department in 1918, and served as its Presiding Justice from 1922 through 1923.

He was elected Associate Judge of the Court of Appeals in 1926 with bipartisan support but did not complete his term, being compelled to resign due to ill health in May 1934. He died in 1942.[37]

JOHN F. O'BRIEN (1927–1939)

John F. O'Brien, the son of Associate Judge of the Court of Appeals Denis O'Brien (1890–1907), was born in 1874 in Watertown, New York. He graduated from Georgetown University (1896) and New York Law School (1898), and upon admission to the bar in 1898 was appointed Assistant Corporation Counsel of the City of New York with authority over appeals for seven years, including appeals taken to the Court of Appeals, which later noted that, at the time of his appearances, the Court was "impressed with his learning."[38]

He was appointed by Governor Alfred E. Smith to fill Judge Cardozo's vacancy as Associate Judge in 1927. He was subsequently elected with cross-party endorsements in 1927 and served until his death in 1939.[39]

IRVING G. HUBBS (1929–1939)

Judge Hubbs was born in Oswego County, New York, in 1870. He graduated from Pulaski Academy in 1887, received his law degree from Cornell University, and was admitted to the bar in 1891. He practiced in Pulaski, New York, until he was elected Justice of the Supreme Court in 1912. Governor Charles Whitman designated him an Associate Justice on the Appellate Division, Fourth Department, in 1918, and he was designated Presiding Justice by Governor

Smith in 1923. He was reelected to the bench with cross-party endorsements (1924) and redesignated Presiding Justice.

In 1928, Judge Hubbs was elected Associate Judge and served in that capacity until his resignation in 1939. He died in 1952.[40]

LEONARD C. CROUCH (1932–1936)

Judge Leonard C. Crouch was born in 1866 in Kingston, New York. He graduated from Cornell University (1889) and received his law degree from Syracuse University. Upon admission to the bar in 1891, he began practicing law in Kingston, but shortly thereafter removed his practice to Syracuse.

His judicial career began with his appointment to the Supreme Court in 1913. He was elected to a full term later that year and reelected in 1928. In the interim, Governor Smith designated him to sit as an Associate Justice of the Appellate Division, Fourth Department (1923).

Governor Roosevelt appointed Judge Crouch to the Court of Appeals in 1932. He was elected in his own right in 1933 and served until his mandatory retirement in 1936, after which he served as an official referee. He died in 1953.[41]

EDWARD R. FINCH (1935–MAY 1943)

Judge Edward R. Finch was born in 1873 in New York City. He graduated from Yale University (1895) and Columbia University School of Law (1898). Judge Finch's first brush with public service was in 1901 when he began service as a member of the New York State Assembly, where he sat through 1903.[42]

Governor Whitman appointed Judge Finch to the Supreme Court in 1915. He was elected to a full term the next year and was subsequently reelected. Judge Finch was designated Associate Justice of the Appellate Division, First Department (1922, 1927, and 1930), and later served as its Presiding Justice. He was elected Associate Judge of the Court of Appeals (1935) and served until he retired at the end of 1943, having reached the mandatory retirement age. He died in 1965.[43]

Judge Finch served as one of the annotators of *Conflict of Laws* (American Law Institute) and founded the Child Welfare Commission. In addition to serving in the judiciary, he was appointed Envoy Extraordinary and Minister Plenipotentiary on Special Mission to Brazil. He also served on the American Bar Association's Adjunct Committee on Law Day. In 1968, Judge Finch's son, Edward R. Finch, Jr., established through the American Bar Association the Judge Edward R. Finch Law Day Speech Award to be awarded to the author of a speech which best expounds on the importance of law in society and furthers the public understanding of the law.

HARLAN WATSON RIPPEY (1937–1944)

Judge Rippey was born in 1874 in Wadsworth, New York. He graduated from the University of Rochester (1898), and upon graduation became a professor of mathematics at Wagner College (1898–1899). In 1901, he was admitted to the bar but apparently did not attend law school.

He was intimately involved with tax-related issues before coming to the bench, having served as Monroe County Inheritance Tax Appraiser (1912–1915) and Inheritance Tax Attorney (1922–1927). He also served as a member of the New York State Commission for the Revision of the Tax Laws (1930–1936).

Governor Smith appointed Judge Rippey to the Supreme Court 1927. President Franklin Delano Roosevelt appointed him a United States District Court Judge for the Western District of New York in 1934, in which capacity he served for two years until his election to the Court of Appeals.

He retired from the Court of Appeals at the end of 1944 having reached the mandatory retirement age. He died in 1946.[44]

CHARLES BROWN SEARS (1940)

Judge Sears was born in Brooklyn in 1870. He graduated from Yale University (1892) and received his law degree from Harvard University (1896). He also studied at the University of Berlin (1892–1893).

He served as a delegate to the New York Constitutional Convention of 1915 and chaired the Judiciary Committee of the New York Constitutional Convention of 1938.

Following his admission to the bar, Judge Sears practiced law in Buffalo for more than twenty years. He was appointed and subsequently elected to the New York Supreme Court in 1917 and later reelected to two more terms on that court. He was designated to sit on the Appellate Division, Fourth Department, from 1922 through 1931 and again through 1940, and he served as its Presiding Justice from 1929 through 1940 until his appointment by Governor Lehman to the Court of Appeals. He retired from the Court at the end of 1940, the year of his appointment, having reached the mandatory retirement age. After retirement, he sat as a judge on the International Military Tribunal in Nuremberg. Judge Sears died in 1952.[45]

THOMAS D. THACHER (MAY 1943–NOVEMBER 1948)

Judge Thomas D. Thacher was born in Tenafly, New Jersey, in 1881. He graduated from Yale University and Yale Law School (1904) and was admitted to practice in New York in 1906. He subsequently became a prominent member of the New York City Bar and gained a national reputation.

He served as Assistant United States Attorney in New York (1907–1910). During the latter part of World War I, he was a member of the American Red Cross Mission to Russia. He was first appointed to the bench in 1925 when President Coolidge named him United States District Court Judge for the Southern District of New York, where he served until his appointment by President Hoover as Solicitor General of the United States in 1930. While serving on the district court, among other notable accomplishments, he oversaw an investigation of corrupt bankruptcy practices (1930).

Before being appointed to the Court of Appeals, Judge Thacher served as President of the Association of the Bar of the City of New York (1933–1935), Chairman of the New York City Charter Revision Commission (1933–1935), and Corporation Counsel of the City of New York (1943). He was appointed to the Court by Governor Dewey in 1943 and was elected later that year to a full term as Associate Judge, in which capacity he served until his retirement in 1948.[46] He died in 1950.

MARVIN R. DYE (1945–1965)

Judge Marvin R. Dye was born in Forestville, New York, in 1895. After receiving his law degree from Cornell University School of Law (1917), he entered the military during World War I and was commissioned a first lieutenant. He returned to civilian life in 1920 and began practicing law in Rochester.

He served as County Attorney for Monroe County (1934–1935). Governor Dewey appointed Judge Dye to the Court of Claims (1940), where he served until his election to the Court of Appeals in 1944. He was reelected with cross-party endorsement (1958). He retired in 1965 having reached the mandatory retirement age, but returned to the bench as a trial judge serving as a Supreme Court Justice in the Seventh Judicial District.

While on the Court of Appeals, as noted by his colleagues at the time of his death in 1997, he was a powerful advocate for freedom of speech, religion, and the press.[47]

GEORGE Z. MEDALIE (SEPTEMBER 1945–MARCH 1946)

Judge Medalie was born in New York City in 1883 and graduated from Columbia University Law School in 1907. Upon admission to the bar, he began practicing law in New York City and became a prominent litigator. He served as Special Assistant Attorney General in charge of the prosecution of election frauds (1926–1928). President Hoover appointed him United States Attorney for the Southern District of New York in 1931. In this capacity, he oversaw and mentored a young prosecutor, Thomas E. Dewey.

Judge Medalie unsuccessfully ran as the Republican candidate for United States Senator from New York against Robert F. Wagner in 1932. Governor Dewey appointed him to the Court in 1945, but he died soon thereafter in 1946.[48]

BRUCE BROMLEY (1949)

Judge Bromley was born in Michigan in 1893. He graduated from the University of Michigan (1914) and then entered Harvard Law School; but he interrupted his legal studies to enlist in the United States Navy during World War I, where he served with distinction on board several ships.

After the war, he finished his studies and received his law degree from Harvard. He was admitted to the bar in 1920 and began practicing law in New York City as an assistant to Henry L. Stimson. Judge Bromley practiced with the New York City law firm of Cravath, Swaine & Moore until Governor Dewey appointed him to serve on the Court of Appeals in 1949. He was subsequently defeated by Judge Charles W. Froessel when he ran for the position that year. After leaving the Court he returned to Cravath, Swaine & Moore, where he served until his death. He was a litigator with a national reputation representing, among other noted clients, IBM in the antitrust action brought against it by the Federal Government. A chair was endowed in his name at his alma mater. He died in 1980.[49]

CHARLES W. FROESSEL (1950–1962)

Judge Froessel was born in Brooklyn in 1892. He received his law degree from New York Law School (LL.B. 1913, LL.M. 1914). During World War I, he served in the United States Navy with the rank of lieutenant. He was counsel to the Sheriff of Queens County (1916–1920), an assistant district attorney for Queens County (1924–1930), and a special assistant to the United States Attorney General in charge of slum clearance projects in New York City (1935–1937).

Judge Froessel was active in community and public affairs, having served in executive positions with the Boy Scouts of America and as Grand Master of the Grand Lodge of the Free and Accepted Masons of New York (1944–1946). He also was president of the Queens County Bar Association (1928) and chaired the Judicial Section of the New York State Bar Association (1945–1946).

He was first appointed to the bench as Justice of the City Court of the City of New York in 1937. In that year, he was elected Justice of the Supreme Court, having been endorsed by the Democratic and Fusion parties. He served as a justice until his election to the Court of Appeals (1949), and remained on the bench until he retired in 1962, having reached the mandatory retirement age.

While serving on the Court of Appeals, he supervised the reconstruction of the Court of Appeals courthouse. Judge Froessel died in 1982.[50]

JOHN VAN VOORHIS (APRIL 1953–1967)

Judge John Van Voorhis was born in 1897 in Irondequoit, Monroe County, New York. He graduated from Yale University in 1919, but did not attend law school. He was admitted to the bar in Monroe County (1922) and commenced practicing in Rochester.

He was elected a Justice of the Supreme Court for the term beginning in 1937 and was subsequently reelected. During his tenure on the Supreme Court, Governor Dewey designated him Associate Justice of the Appellate Division, Fourth Department (1947 and 1951). Governor Dewey initially appointed Judge Van Voorhis as a temporary associate judge of the Court of Appeals (1953) and then appointed him Associate Judge in 1954. That year, Judge Van Voorhis was elected with cross-party endorsements to a full term. He retired at the end of 1967 upon reaching the mandatory retirement age and returned to private practice and to teaching at New York Law School. He also served as a Special Master in the reorganization proceedings involving the New York, New Haven and Hartford Railroad Company. Judge Van Voorhis died in 1983.[51]

ADRIAN P. BURKE (1955–1974)

Judge Burke was born in New York City in 1904. He graduated from Holy Cross College in 1927 and from Fordham Law School in 1930 and, upon admission to the bar (1932), began practicing law in New York City.

Before his election to the Court of Appeals in 1954, Judge Burke served as Assistant Counsel to the Joint Legislative Committee Investigating Public Utilities (1936), delegate to the Constitutional Convention of 1938, and was the founder and president of the Youth Counsel Bureau in the District Attorney's Offices (1941–1953). He managed the mayoral campaign of Robert F. Wagner, Jr. in New York City in 1953 and was appointed Corporation Counsel for the City of New York (1954) shortly before he ran for and was elected to the Court of Appeals.

Judge Burke retired at the end of 1974, having reached the mandatory retirement age and then returned as New York City Corporation Counsel. Judge Burke died in 2000.[52] He composed his memoirs, which were subsequently arranged and edited by his son Frank in a volume entitled *Everything I Needed: Living and Working in New York* (New York: Golden String Press, 2004).

SYDNEY R. FOSTER (1960–1963)

Judge Foster was born in Cazenovia, New York, in 1893. He graduated from Syracuse University and its law school (1915), was admitted to the bar in 1917,

and in 1918 he began two years military service overseas in the Army Judge Advocate General's Department.

Following World War I, he practiced law until his election as District Attorney of Sullivan County in 1925. He was first elected a Justice of the Supreme Court in 1928 and was reelected three times thereafter, gaining the endorsement of both Democratic and Republican parties during his reelection bids. He was first designated to sit on the Appellate Division, Third Department, in 1939, and served there for twenty years, during which time he was designated Presiding Justice by both Governors Dewey and Harriman.

He first ran for the Court of Appeals in 1954 and was defeated by Judge Burke. He was subsequently appointed Associate Judge by Governor Rockefeller in 1960 and was elected that year to a full term. On the bench, he was noted by his colleagues for, among other attributes, his decisions in the field of workers' compensation and unemployment insurance law, which "exemplif[ied] his liberal bent in those fields." He also chaired the Judicial Section of the New York State Bar Association. Judge Foster retired at the end of 1963 upon reaching the mandatory retirement age and died in 1973.[53]

JOHN F. SCILEPPI (1963–1972)

Judge John F. Scileppi was born in New York City in 1902. He graduated from Fordham University Law School (1925) and was admitted to the bar shortly thereafter (1926).

He engaged in the general practice of law and served as Chief Deputy Clerk of Queens County (1938) until his election to the bench in 1939 as Justice of the Municipal Court, Queens County. He was reelected in 1949. Later, he was elected County Court Judge of Queens County (1951) and during his tenure served, by designation, as a Supreme Court Justice until 1962.

After being elected Associate Judge of the Court of Appeals, Judge Scileppi served as a delegate to the 1967 New York State Constitutional Convention. He was very active with the Benevolent Protective Order of Elks on a local and state level, along with a variety of Catholic and Italian-American related organizations. He retired from the bench at the end of 1972, having reached the mandatory retirement age for appellate judges, and returned to the Supreme Court as a trial justice for an additional four years. He died in 1987.[54]

FRANCIS BERGAN (1964–1972)

Judge Bergan was born in Albany, New York, in 1902. He received his law degree from Albany Law School in 1923 and was admitted to the bar the next year.

Judge Bergan's life on the bench began early in his legal career when he was elected to the Albany City Court in 1929. Four years later he was elected Albany Police Court Justice. He moved to the Supreme Court in 1935 and was reelected in 1949.

While on the Supreme Court, he was designated to sit on the Appellate Division, Third Department several times, as well as to the Appellate Division, First Department. In 1960, he was designated Presiding Justice, Appellate Division, Third Department. Judge Bergan was elected Associate Judge of the Court of Appeals in 1963 with endorsements of both major political parties. He remained on the bench until his retirement at the end of 1972 having reached the mandatory retirement age that year.

He served as a delegate to the 1938 and 1967 New York State Constitutional Conventions. In the latter year, he served as Chairman of the Committee on Education. In the area of constitutional reform, he was a member and vice-chairman of the Temporary State Commission on the Constitutional Convention (1956, also known as the "Peck Commission") and chaired the commission's Subcommittee on Local Government and Finance. He also chaired the Judicial Section of the New York State Bar Association and the Executive Committee of the New York State Association of Supreme Court Justices. As stated at note 1, *supra*, he authored *The History of the New York Court of Appeals, 1847–1932*. Judge Bergan died in 1998.[55]

KENNETH B. KEATING (1966–MAY 1969)

Kenneth B. Keating was born in 1900 in Lima, New York. After serving as an enlisted man in World War I, he received his law degree from Harvard University Law School (1923) and began practicing law in Rochester. During World War II, Judge Keating achieved the rank of colonel and was subsequently commissioned a brigadier general (1948), having been awarded the Legion of Merit with Oak Leaf Cluster and the Order of British Empire.

After World War II, Judge Keating was elected to Congress, where he served through 1958, at which time he was elected to the United States Senate. In 1965, he was elected to the Court of Appeals and remained until he resigned in 1969, upon his appointment by President Johnson as United States Ambassador to India. He later served as Ambassador to Israel. Judge Keating died in 1975.[56]

MATTHEW J. JASEN (1968–1985)

Judge Matthew J. Jasen was born in Buffalo in 1915. He graduated from Canisius College, Harvard Law School, and the Harvard University Civil Affairs School. He was admitted to practice in 1940.

During World War II, Judge Jasen served as a Military Government Officer in Europe. He remained in Germany after the war, serving as president of the Security Review Board for the State of Wurttemberg and as United States Judge for the Third Military Government Judicial District of Occupied Germany at Heidelberg (1946–1948).

Upon leaving the military, he took up the practice of law in Buffalo until Governor Harriman appointed him to the Supreme Court in 1957, and he was elected to a full term that year. In 1967, Judge Jasen was elected Associate Judge of the Court of Appeals with endorsements from all major political parties. He remained on the bench until the end of 1985, having reached the mandatory retirement age.

Following retirement from the bench, Judge Jasen has served as a judicial referee in matters involving judicial misconduct. He also chaired the New York State Bar Association Task Force on Administrative Adjudication, which issued a report in 1988 recommending, among other things, separating the adjudicative function of state regulatory agencies from their executive rulemaking and oversight obligations to better ensure the integrity and legitimacy of their decisions. Among other professional activities, he has also served on the Fourth Judicial Department Screening Committee and has been a member of the American Law Institute and the American Judicature Society.[57]

JAMES GIBSON (SEPTEMBER 1969–1972)

Judge Gibson was born in Salem, New York, in 1902. He graduated from Princeton University (1923). After law office study and a year attending the Albany Law School, he was admitted to the bar. Shortly thereafter, he practiced law in Hudson Falls, New York, and remained in the private practice of law until his election in 1935 as District Attorney of Washington County, a position his father held. During World War II, he served in Europe as a captain in the United States Army.

He was elected Supreme Court Justice in 1952 and reelected in 1966. Judge Gibson was designated an Associate Justice on the Appellate Division, Third Department (1956, 1957, and 1962), as well as Presiding Justice of that court (1964 and 1966).

Governor Rockefeller appointed him Associate Judge of the Court of Appeals to complete Judge Keating's term in 1969, and that year he was elected to the Court without opposition. On the bench, he chaired the Judicial Section of the New York State Bar Association.

Judge Gibson retired at the end of 1972, having reached the mandatory retirement age. He continued to sit on the Supreme Court as a trial judge until 1978, when he retired and returned to practice law in Glens Falls, New York. In

1976, the Court of Appeals appointed Judge Gibson to act as a special master in a case involving the unconstitutional moratorium declared on New York City bonds. He died in 1992.[58]

DOMINICK L. GABRIELLI (1972–1982)

Judge Dominick L. Gabrielli was born in Rochester in 1912. He graduated from St. Lawrence University and from Albany Law School in 1936 and was admitted to the bar a year later.

He was commissioned as an ensign in the United States Navy in 1942. During World War II, he served in North Africa, Italy, and Malta, participated in the landings in Salerno, Italy, and served as a liaison with the British Navy. He was subsequently very active in veterans' organizations.

During his legal career, he served as corporation counsel of Bath, New York, as well as counsel to other towns and villages (1939–1953). In 1953 he was first appointed and later elected Steuben County District Attorney. He served as Steuben County Court Judge and Children's Court Judge (1957–1961) until he was appointed to fill a vacancy as Supreme Court Justice. Judge Gabrielli was later elected to the Supreme Court in 1961 and served through 1972. While on the bench, he was designated Associate Justice of the Appellate Division, Fourth Department (1968).

Judge Gabrielli was elected Associate Judge of the Court of Appeals in 1972 with Republican and Conservative Party endorsements and served until he reached the mandatory retirement age in 1982. Upon leaving the bench, he returned to practicing law with the Rochester law firm of Nixon Hargrave Devans & Doyle. He was active in numerous bar association and bench-related committees and was a member of the American Judicature Society. At Albany Law School, he established the Dominick Gabrielli Appellate Advocacy Moot Court Competition. He died in 1994.[59]

HUGH R. JONES (1973–1984)

Judge Hugh R. Jones was born in New Hartford, New York, in 1914. He received his law degree from Harvard University School of Law in 1939.

During World War II, he served in the United States Navy, was awarded a Bronze Star with Combat "V," and retired with the rank of lieutenant commander (1954). He practiced law in Utica before entering the Navy and after leaving active military service until his election as Associate Judge of the Court of Appeals (1972), when he was endorsed by the Republican and Conservative parties.

Among his notable accomplishments, Judge Jones was President of the New York State Bar Association (1971–1972) as well as the chair of various sections and committees of the Association, including its Tax Section (1967) and the

Committee on Professional Ethics (1959–1963). He was also very active in religious affairs having been Chancellor of the Diocese of Central New York (Episcopal). He chaired the New York State Select Committee on Correctional Institutions and Programs (1971–1972) and was co-chair of the New York State Citizens Committee for Revenue Sharing during that time. He also chaired the New York State Board of Social Welfare (1964–1969), as well as a temporary state commission examining judicial salaries (1988), the Commission on Judicial Nomination (see *supra)* (having been appointed by Governor Cuomo), and the Governor's Advisory Commission on Liability Insurance. He authored the Cardozo Lecture (1979) entitled *Cogitations on Appellate Decision-Making*, which analyzed the role of appellate courts.

Judge Jones retired at the end of 1984, having reached the mandatory retirement age, and died in 2001.[60]

SAMUEL RABIN (1974)

Judge Samuel Rabin was born in 1905 in New York City. After he graduated from New York University School of Law in 1928, he was admitted to the bar and began practice in Queens County.

Judge Rabin was first elected to the New York State Assembly as a Republican in 1944 and served through 1954. He was Chairman of the Assembly Committee on Insurance and a member of the Assembly Judiciary Committee.

He was elected to the Supreme Court in 1954 and was reelected in 1968. Governor Rockefeller named Judge Rabin to the Appellate Division, Second Department (1962 and 1967) and designated him Presiding Justice of that Department in 1971. Governor Malcolm Wilson appointed Judge Rabin to fill a vacancy on the Court of Appeals, but he declined to run for a full term upon his failure to get cross-party endorsement for his nomination.

After Judge Rabin completed his one-year appointment on the Court, Governor Carey appointed him to two consecutive two-year terms on the Appellate Division, Second Department. He returned to practice law in New York City at the age of seventy-six and remained in practice until his death in 1993.

HAROLD A. STEVENS (1974)

Judge Harold A. Stevens was born in South Carolina in 1907. He graduated from Benedict College in Columbia, South Carolina, and Boston College Law School; he was admitted to the Massachusetts Bar and began practice in Boston in 1936. He said he had decided to become a lawyer in 1926 after witnessing the lynching of three black men in South Carolina who had been dragged from a local jail. In 1938, he moved to New York City.

He was elected to the New York State Assembly in 1946 and served for two terms. In 1955, he became a Judge of the Court of General Sessions of the City

of New York, and later that year was appointed a Justice of the Supreme Court and later elected to the same court. He was designated an Associate Justice of the Appellate Division, First Department (1958, 1962, and 1967), as well as Presiding Justice of the same court (1969 and 1970). Governor Wilson appointed Judge Stevens to complete Judge Breitel's term in January 1974, but he did not return to the Court when the term expired at the end of that year, having lost an election to Judge Jacob Fuchsberg.

He was very active in Catholic lay organizations, as well as being a member of the board of directors of the Catholic Interracial Council and the Law Center Foundation of New York University Law School. Judge Stevens died in 1990.[61]

JACOB D. FUCHSBERG (1975–MAY 1983)

Judge Fuchsberg was born in 1913. He graduated from New York University and New York University School of Law, was admitted to the bar in 1936, and immediately began practice as a trial lawyer in New York City.

He was elected president of the New York State Trial Lawyers Association in 1957 and was later elected president of the American Trial Lawyers Association (ATLA). He succeeded Dean Roscoe Pound as president of the research affiliate of ATLA, the Roscoe Pound—American Trial Lawyers Association Foundation, in 1965 and was reelected seven times to that position. He was also a founding director of the National Institute of Trial Advocacy. Judge Fuchsberg served on the National Advisory Committee of the Legal Services Program of the U.S. Office of Economic Opportunity from 1965 through 1973.

He first ran for the office of Chief Judge of the Court of Appeals against Judge Charles Breitel in 1973 and lost. In part, because of the stridency of that campaign, the New York State Constitution was amended to provide for the appointment rather than the election of judges to the Court of Appeals.

Judge Fuchsberg was subsequently elected to the Court of Appeals in 1975 and served until his retirement at the end of 1983. He returned to practice law in New York City. At the time of the creation of Touro College in the 1970s, he served on the college's Board of Trustees, and subsequently the Law Center at Touro College in Huntington, New York, was named after him.

While on the bench, he became the first judge in the history of the Court to be censured by its members for misconduct. He engaged in transactions involving his investments in New York Municipal Assistance Corporation Bonds when cases involving such bonds came before the bench in 1975 and 1976, and he consulted, *ex parte*, legal experts on issues before the bench.[62]

Judge Fuchsberg died in 1995.[63]

BERNARD S. MEYER (1979–1986)

Judge Meyer was born in 1916 in Baltimore. He graduated from Johns Hopkins University in 1936, received his law degree from the University of Maryland School of Law in 1938, and was admitted to the Maryland Bar soon thereafter.

He remained in private practice until 1941, when he joined the staff of the General Counsel of the United States Treasury. He served in the United States Navy in the Pacific theatre from 1943 through 1946. Upon returning to civilian life, he was admitted to the New York Bar and practiced in New York from 1947. Judge Meyer served as special counsel to the Moreland Commission to Study Workmen's Compensation Administration and Costs (1955–1958). He was elected to the New York Supreme Court in 1958.

While serving as a Supreme Court Justice, Judge Meyer chaired the National Conference of State Trial Judges (1970–1971), served as President of the Association of Justices of the Supreme Court of the State of New York (1970–1971), and was a founder of the Council of Judicial Associations.

In 1975, Judge Meyer was appointed Special Deputy Attorney General of the State of New York in Charge of the Special Attica Investigation tasked with investigating the Attica prison riot. He was also chair of the Advisory Panel to the Law Revision Commission on the New York Code of Evidence and chair of the Chief Judge's Task Force on Permanency Planning for Foster Children. He served as the first chair of the Committee on Pattern Jury Instructions—Civil of the Association of Justices of the Supreme Court, which produced the compendium of jury instructions in use today. He has published articles on a variety of legal topics including zoning, matrimonial law, and fair trial / free press issues and trial practice.

Judge Meyer was appointed Associate Judge of the Court of Appeals by Governor Carey in 1979 and served on the Court until retiring at the end of 1986, having reached the mandatory retirement age.[64]

RICHARD D. SIMONS (1983–1996)

Judge Richard D. Simons was born in 1927 in Niagara Falls, New York. He served in the United States Navy during World War II, graduated from Colgate University (1949), and received his law degree from the University of Michigan in 1952. After being admitted to the bar (1952), he began practicing in Rome, New York, where he served as Assistant Corporation Counsel (1955–1958) and Corporation Counsel for the City of Rome (1960–1963).

Judge Simons was first elected to the bench as Justice of the Supreme Court in 1963 and was subsequently reelected. While so serving, he was designated

Associate Justice of the Appellate Division, Third Department (1971–1972), and Associate Justice of the Appellate Division, Fourth Department (1973–1983). He chaired the Appellate Division Coordinating Committee to establish disciplinary rules for lawyer advertising (1977–1978), was a member of the Editorial Committee of New York Pattern Jury Instructions—Civil (1978–1983) and was a Fellow of the National Endowment for the Humanities, University of Virginia Law School (1979).

Governor Cuomo appointed Judge Simons Associate Judge of the Court of Appeals in 1983. He served as Acting Chief Judge from November 1992 through March 1993, following the resignation of Judge Wachtler and before the appointment of Judge Kaye.[65] He retired from the Court in 1996.

FRITZ W. ALEXANDER, II (1985–APRIL 1992)

Judge Fritz W. Alexander was born in 1926 in Florida. He served in the United States Naval Reserve during World War II and the Korean War. He graduated from Dartmouth College and graduated from New York University School of Law before being admitted to practice in New York in 1952. He practiced law in New York City through 1970, except for a leave of absence when he served as District Director of the Upper Manhattan District Office of the City Rent and Rehabilitation Administration (1962). He chaired the Lawyers Committee of the Housing Task Force of the New York Urban Coalition and was co-chair of the Steering Committee of the Task Force (1968–1970).

In 1970 he was appointed, on an interim basis, to the Civil Court of the City of New York and was later elected that year to a full term. He was periodically designated Acting Justice of the Supreme Court (1972–1975) and Family Court Judge (1974–1975). In 1977, he was appointed to an interim term and later elected to a full term on the Supreme Court. Governor Carey designated Judge Alexander as an Associate Justice of the Appellate Division, First Department in 1982.

Governor Cuomo appointed Judge Alexander Associate Judge of the New York Court of Appeals in 1985. He resigned in 1992 to become Deputy Mayor of New York City at the behest of his former law partner, Mayor David Dinkins of New York City. He died in 2000.[66]

VITO J. TITONE (1985–1999)

Judge Titone was born in 1929 in Brooklyn. He graduated from New York University (1951), served in the Korean War, and thereafter graduated from St. John's University School of Law in 1956. He was promoted to the rank of colonel in the New York State National Guard and served in that capacity while on the bench. From 1957 through 1968 he practiced law in Staten Island.

He was elected as a Justice of the Supreme Court in 1968 and was reelected in 1982. Judge Titone served as Administrative Judge of Richmond County (1969–1976). He also was designated an Associate Justice of the Appellate Division, Second Department (1975 and 1983). While sitting on the Appellate Division, he served on the Committee on Opinions of the Official State Reporter and chaired the New York Law Journal Committee. He was appointed to the Court of Appeals by Governor Cuomo in 1985 and retired at the end of his term in 1999, having reached the mandatory retirement age. He retuned to practice law with the firm of Mintz & Gold in New York City. He died in 2005.[67]

STEWART F. HANCOCK, JR. (1986–1993)

Judge Stewart F. Hancock, Jr. was born in 1923 in Syracuse. He served as a line officer in the United States Navy for two years following his graduation from the United States Naval Academy (1945). He remained in the Naval Reserve and served during the Korean War. He graduated from Cornell University Law School in 1950.

In 1952 he began practicing law in Syracuse and remained in private practice until 1971 except for a two-year interlude in which he served as Corporation Counsel for the City of Syracuse. Judge Hancock was active in Republican Party affairs, having served as chair of the Onondaga County Republican Party (1963 and 1964), a delegate to the National Republican Convention (1964) and an unsuccessful candidate for United States Congress (1966).

Governor Rockefeller appointed Judge Hancock to the Supreme Court in 1971, and later that year he was elected to a full term. He was appointed Administrative Judge, Fifth Judicial District (1977) and was designated Associate Justice of the Appellate Division, Fourth Department (1977, 1978, and 1983) before being reelected to another term as Supreme Court Justice. Judge Hancock served from 1983 through 1986 as a member of the Committee to Regularize Bar Admission Procedures.

Governor Cuomo appointed Judge Hancock to the Court of Appeals in 1986. He served as Associate Judge until 1993, when he reached the mandatory retirement age.[68]

JOSEPH J. BELLACOSA (1987–2000)

Judge Bellacosa was born in Brooklyn, New York, in 1937. He graduated from St. John's University School of Law (1961) and served as law secretary to Hon. Marcus G. Christ, Presiding Justice of the Appellate Division, Second Department (1963–1970).

In 1970, he returned to St. John's University as Assistant Dean of the School of Law and Professor of Law. He has authored numerous articles, as well as the

Practice Commentaries to McKinney's *Criminal Procedure Law of the State of New York*.

Judge Bellacosa's institutional attachment to the Court of Appeals began in 1975 when he was appointed Chief Clerk to the Court of Appeals and served in that capacity and as Counsel to the Court through 1983. He chaired the New York State Sentencing Guidelines Committee (1985–1987). He first came to the bench as a judge of the Court of Claims (1985) and served as Chief Administrative Judge of the New York Unified Court System (1985–1987). In 1987, Governor Cuomo appointed him an Associate Judge of the Court of Appeals.

While on the Court, he chaired the American Bar Association Section on Legal Education and Admissions to the Bar (1992–1996) and was responsible for implementing case screening and other internal procedures in the Court of Appeals. Judge Bellacosa served until 2000 when he retired from the bench to become Dean of the St. John's University School of Law.[69]

GEORGE BUNDY SMITH (1992–PRESENT)

Judge George Bundy Smith was born in 1937 in New Orleans, Louisiana. He graduated from Yale University and Yale Law School in 1962. He also earned a Ph.D. in government from New York University (1974).

Judge Smith was a staff attorney for the NAACP (1962–1964). He later served as law secretary to Hon. Jawn Sandifer, Civil Court (1964–1967), Hon. Edward Dudley, Justice, Supreme Court (1967–1971), and Hon. Harold Stevens, Presiding Justice, Appellate Division, First Department (1972–1974) (*see* biography, *supra*). He also served as Administrator of Model Cities, New York City from 1974 through 1975.

His career on the bench began with an interim appointment to the Civil Court of New York City in 1975. He was later elected to a full term on that bench. In 1979, he was elected Justice of the Supreme Court. He was designated an Associate Justice of the Appellate Division, First Department, where he served until 1992 when Governor Cuomo appointed him to the Court of Appeals.

He is the author of a number of publications including a text for high school students, *You Decide: Applying the Bill of Rights to Real Cases* (New York: Critical Thinking Books and Software, 1992). He is also a founding member of the Metropolitan Black Bar Association and former president of the Harlem Lawyers Association.[70]

HOWARD A. LEVINE (1993–2002)

Judge Levine was born in Troy, New York, in 1932. He graduated from Yale University and Yale Law School in 1956 and was admitted to the New York Bar that

year. He served as an assistant district attorney for Schenectady County (1961–1966) and was elected to a four-year term as its District Attorney in 1966.

He was first elected to the bench in 1970 as Schenectady County Family Court Judge. He remained on the Family Court until 1981 when he was elected to the New York Supreme Court. He was designated Associate Justice of the Appellate Division, Third Department, in 1982 and served there until Governor Cuomo appointed him to the Court of Appeals in 1993.

Judge Levine was particularly active in family court matters before being appointed to the Court of Appeals. Among other professional activities, he was president of the Association of Family Court Judges of the State of New York (1979–1980) and a member of both the New York State Temporary Commissions on Child Welfare (1974–1982) and on Recodification of the Family Court Act (1980–1984).[71] Judge Levine retired at the end of 2002, having reached the mandatory retirement age.

CARMEN BEAUCHAMP CIPARICK (1994–PRESENT)

Judge Carmen Beauchamp Ciparick, the first woman of Hispanic heritage to serve on the state judiciary, was born in New York City in 1942. She graduated from Hunter College in 1963 and St. John's University School of Law in 1967. She became a staff attorney with the Legal Aid Society of New York City. She later became assistant counsel for the Office of the Judicial Conference (1969), Chief Law Assistant of the New York City Criminal Court (1972) and counsel in the office of the New York City Administrative Judge (1974).

Her first experience on the bench came in 1978 when she was appointed Judge of the New York City Criminal Court. Judge Ciparick was first elected to office in 1982 as Justice of the Supreme Court. She held that position until appointed by Governor Cuomo to the Court of Appeals in 1994.

Judge Ciparick has served in a variety of leadership positions in the Puerto Rican Bar Association and as a member of the New York State Commission on Judicial Conduct (1985–1993).[72]

RICHARD C. WESLEY (1997–2003)

Judge Wesley was born in Canandaigua, New York, in 1949. A graduate of the State University of New York at Albany (1971) and the Cornell Law School (1974), he engaged in private practice for eleven years in Geneseo, New York, upon his admission to the bar in 1975.

He was active in the legislative process, serving as assistant counsel and chief legislative aide to Assembly Minority Leader James L. Emery of Geneseo (1979–1981). In 1982, he was elected to the first of two terms in the New York State Assembly, representing Livingston, Allegany, and Ontario counties.

In 1986, Judge Wesley was elected to the Supreme Court. While serving on the court, he was intimately involved with developing and implementing programs to provide alternatives to incarceration in Monroe and other counties. He was named Supervising Judge of the judicial district's criminal courts in 1991. He was appointed to the Court of Appeals by Governor Pataki in 1997. He retired in 2003 to accept an appointment to the United States Court of Appeals for the Second Circuit.[73]

ALBERT M. ROSENBLATT (1998–PRESENT)

Judge Rosenblatt was born in New York City in 1936. He graduated from Harvard Law School in 1960. He entered public service as an assistant district attorney for Dutchess County in 1964 and served until he was elected District Attorney in 1969. As District Attorney, he served as President of the New York State District Attorneys' Association (1974–1975).

He was reelected to that post before being elected Dutchess County Judge (1976–1981) and Supreme Court Justice (1982–1987). Judge Rosenblatt was the Chief Administrative Judge from 1989 through 1998, after which he was designated to sit on the Appellate Division, Second Department. He was appointed to the Court of Appeals by Governor Pataki in 1998.

Judge Rosenblatt has not only served on the *New York State Bar Journal* Board of Editors, but has also authored articles on a variety of topics including disability law, search warrants, court history, and due process. He is also the coauthor of a treatise on appellate practice and serves as the president of the Historical Society of the Courts of the State of New York.[74]

VICTORIA A. GRAFFEO (2000–PRESENT)

Judge Graffeo was born in 1952 in Rockville Centre, New York. After her graduation from Albany Law School (1977), she engaged in the general practice of law in Colonie, New York.

She served as assistant counsel to the New York State Division of Alcoholism and Substance Abuse (1982) and as counsel and then chief counsel to the New York State Assembly Minority Leader from 1984 through 1995. She was appointed Solicitor General of the State of New York by Attorney General Dennis Vacco in 1995 and served in that position until Governor Pataki appointed her to fill a vacancy on the Supreme Court in 1996. She was elected to a full term later that year and was later designated a Justice on the Appellate Division, Third Department (1998). She served as a Supreme Court Justice until the Governor appointed her to the Court of Appeals in 2000.

Judge Graffeo was a member of the Unified Court System's Committee to Promote Public Trust and Confidence in the Legal System and chaired the Third Judicial District Gender Fairness Committee.[75]

SUSAN PHILLIPS READ (2003–PRESENT)

Judge Read was born in 1947 in Ohio. She attended Ohio Wesleyan University and received her law degree from University of Chicago Law School in 1972.

She served with the United States Atomic Energy Commission in Maryland, as a staff attorney at the Central Administration of the State University of New York (1974–1977), and as in-house counsel with the General Electric Company (1977–1985), as well as engaging in private practice in Albany, New York. In 1995, she was appointed deputy counsel to Governor Pataki, who subsequently nominated her in 1998 to the Court of Claims, where she was designated by the Governor as its Presiding Judge. In early 2003, the Governor appointed her as an interim Associate Judge of the Court of Appeals, and later in January, she was nominated and confirmed for a full term.[76]

ROBERT S. SMITH (2004–PRESENT)

Robert S. Smith, Associate Judge of the Court of Appeals, was born in New York City in August 1944 and grew up in Massachusetts and Connecticut. He graduated from Stanford University (B.A. 1965, with great distinction) and Columbia Law School (LL.B. 1968, magna cum laude), where he was editor-in-chief of the Law Review. From 1968 to 2003 he practiced law in New York City with the firm of Paul, Weiss, Rifkind, Wharton & Garrison, taking a one-year leave of absence in 1980–81 to serve as Visiting Professor from Practice at Columbia Law School. He was a Lecturer in Law at Columbia Law School from 1981 until 1990.

One June 1, 2003, he became and individual practitioner and Special Counsel to the firm of Kornstein Veisz Wexler & Pollard. On November 4, 2003, he was appointed by Governor George E. Pataki to the Court of Appeals, and he was confirmed by the State Senate on January 12, 2004.[77]

2.

Jurisdiction of the Court of Appeals

THERE HAVE BEEN a number of changes in the jurisdiction of the Court since 1932. The 1943 amendments to Article VI of the New York State Constitution removed the provision that had authorized the Legislature to restrict the Court's jurisdiction, replacing it with a provision limiting the Legislature's authority to abolish appeal of right based on dissent, reversal, or modification and instead authorized appeal in such cases by permission of the Appellate Division or the Court of Appeals (Article VI § 3[b][6]) and authorized direct application to the Court in a proper case (Article VI § 3[a]). The 1943 amendments also extended the stipulation for judgment absolute, which had previously been limited to an Appellate Division order granting a new trial in an action, to such an Appellate Division order in a special proceeding (Article VI § 3[b][3]), and gave the Court of Appeals authority to review questions of fact in matters in which a final judgment or order is entered by the Appellate Division after it reversed or modified a final or interlocutory determination in an action or special proceeding and made new findings of fact (Article VI § 3[a]).

An amendment to the Judiciary Article approved in 1951 and now contained in Article VI § 3(b)(5) permitted the Court of Appeals to grant leave from nonfinal orders of the Appellate Division in special proceedings involving administrative agency determinations.

The Judiciary Article was revised in 1961. Article VI § 3(b)(7) excepted a case in which construction of the Constitution of New York or of the United States was directly involved from the general rule that appeal from an order of the Appellate Division in a case which originated in a lower court could be taken

only if the Appellate Division certified that in its opinion the question of law involved ought to be reviewed by the Court of Appeals.

In 1977 the voters approved an amendment now contained in Article VI § 22(d) which established the Commission on Judicial Conduct, and authorized the Court of Appeals to review that body's findings of fact and conclusions of law on direct appeal from the Commission (I.C, below), and in 1985 the voters approved an amendment permitting the Court to accept questions of law certified to it by the United States Supreme Court, a Federal Court of Appeals, or a court of last resort of another state (see subdivision I.D, below).

I. Appeals as of Right Directly to the Court of Appeals

A. Where the Only Question Is the Constitutional Validity of a Statute

Constitution Article VI § 3(b)(2) authorizes an appeal as of right from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where *the only question* involved on the appeal is the validity of a New York State or Federal statute under the New York State or United States Constitution and directs that on any such appeal only the constitutional question shall be considered and determined by the Court. CPLR § 5601(b)(2) mirrors the language of the Constitution in this respect, as did Civil Practice Act § 588(4).

Courts of record of original jurisdiction as defined in Constitution Article VI, § 1(b) include the supreme court, the court of claims, the county court, the surrogate's court, the family court, the courts of civil and criminal jurisdiction of the City of New York, and such other courts as the Legislature may determine shall be courts of record. Judiciary Law § 2 defines courts of record to include the above listed courts and each city court outside the City of New York (cf. Uniform City Court Act § 2) and the district court in each county or portion thereof in which such court shall be established (see also Uniform District Court Act, § 102). But it is not clear whether an appeal from a judgment entered by a court of original instance pursuant to an order of the Appellate Term is directly appealable: compare *Asheroff v. Board of Education*, 25 N.Y.2d 721 (1969) and 29 N.Y.2d 538 (1971) which reviewed such a judgment with *Martin v. Ivemey*, 34 N.Y.2d 593 (1979) which dismissed such an appeal.

The Court of Appeals has consistently applied the "only question" limitation, holding in *Lapchak v. Baker*, 298 N.Y. 89, 94 (1948) that it could not consider on direct appeal an issue other than the constitutionality of a statute which the

court of original jurisdiction had considered; accord: *Matter of Wallace v. New York State Insurance Department*, 6 N.Y. 2d 843 (1959); *Matter of Friedman v. Cuomo*, 39 N.Y. 2d 81,85 (1976); *People v. Cunningham*, 68 N.Y. 2d 714 (1986); *Fine v. Commissioner of Department of Consumer Affairs*, 75 N.Y. 2d 863 (1990). Thus direct appeal is not available when the facial validity of the statute is not the only question involved, as when there is also involved a question concerning interpretation of the statute, *Matter of Schneider v. Wyman*, 30 N.Y. 2d 956 (1972), and in such a case the appeal may be transferred pursuant to Constitution Article VI § 5(b) to the appropriate Appellate Division, *Stilley v. New York State Department of Social Services*, 90 N.Y. 2d 927 (1997); *First Federal Savings & Loan Association v. Niznik*, 89 N.Y. 2d 855 (1996); *Muka v. Greene*, 56 N.Y. 2d 855 (1982). A local law is a statute within the meaning of the governing constitutional and statutory provisions, *F. T. B. Realty Corp. v. Goodman*, 300 N.Y. 140, 145 (1949) but a rule of the Commissioner of Corrections governing consultations with inmates of a state hospital is not, *People v. McNeill*, 303 N.Y. 464 (1952).

B. In Death Penalty Cases

New York's death penalty for murder in the first degree was held unconstitutional in *People v. Smith*, 63 N.Y. 2d 41 (1984) and *People v. Davis*, 43 N.Y. 2d 17 (1977) and the strong convictions of Governors Hugh Carey and Mario Cuomo that the death penalty should never be imposed resulted in their vetoing fifteen times during their twenty years as Governor statutes passed by the Legislature to remedy the defects. Thus, it was not until George Pataki took office as Governor and approved Chapter 1 of the Laws of 1995 which enacted CPL § 400.27 and amended CPL § 470.30 that a death penalty again became a possibility.

Constitution Article VI § 3 (a) authorizes an appeal to the Court of Appeals in a criminal case where the judgment is one of death and excepts a death penalty judgment from its limitation of Court of Appeals jurisdiction to review of questions of law. Article VI § 3 (b) (1st unnumbered paragraph) provides that such an appeal may be taken "directly from a court of original jurisdiction." Those provisions are implemented by CPL § § 450.70, 450.80, and 470.30. Section 450.70 provides for direct appeal to the Court of Appeals as of right from a judgment including a sentence of death or from an order denying a motion to vacate such a judgment or to set aside such a death sentence. CPL § 450.80 authorizes such an appeal by the people from an order vacating or setting aside a sentence of death, and CPL § 470.30(2) explicitly provides that direct appeal

to the Court of Appeals of a judgment including a sentence of death may not be waived.

CPL § 400.27 established the procedure for determining sentence upon conviction for murder in the first degree. It provides for proof by the people of aggravating factors and proof by the defendant of mitigating factors as those terms are defined in the section, and precludes a death sentence unless the jury unanimously finds that the aggravating factors substantially outweigh the mitigating factors established. CPL § 470.30(1) directs that review by the Court of Appeals be on the record on the same basis as intermediate appellate courts review judgments and orders of criminal courts and includes reversal or modification on the law, on the facts, or as a matter of discretion in the interest of justice; and it may do so notwithstanding that the error was not protested at trial, if it deprived defendant of a fair trial (see *People v. Turriago*, 90 N.Y. 2d 77 [1977], *rearg. den.*, 90 N.Y. 2d 936 [1997]). Subdivisions (3) and (4) require the Court of Appeals to determine whether a sentence of death was based on any legally impermissible factor, whether the sentence is disproportionate to the penalty imposed in similar cases, the cases it took into consideration in determining proportionality, the aggravating and mitigating factors established in the record, and whether the decision to impose the death penalty was against the weight of the evidence. (See chapter 17, *infra*, for a more extensive discussion of the death penalty.)

C. From a Determination of the Commission on Judicial Conduct

1. CONSTITUTION ARTICLE VI, § 22, 23, 24 AND RELATED PROVISIONS

As amended in 1978, Article VI, Section 22(d) of the New York Constitution authorizes the Court of Appeals to review the findings of fact and conclusions of law of the Commission on Judicial Conduct on the basis of the record of proceedings before the Commission and to admonish, censure, remove, or retire a judge of the unified court system, to impose a less or a more severe sanction than the Commission had determined, or to impose no sanction. However, the procedure for discipline and removal of judges had undergone a number of changes prior to the present provision.

Prior to 1932 the Constitution provided, in Article VI, Section 11, that judges of the Court of Appeals and justices of the Supreme Court could be removed by concurrent resolution of both houses of the Legislature on a vote of two-thirds of all of the members elected to each house. All other judicial officers, except justices of the peace and judges or justices of inferior courts not of

record, could be removed by the affirmative vote of two-thirds of the members of the Senate on recommendation of the Governor, but such removal had to be preceded by a hearing and solemnized by the entry on the legislative journal of the votes of the senators, see *Matter of Silkman*, 88 A.D. 102, 104–105 (1903).

Effective January 1, 1948, former Sections 9-a and 11 were replaced by Article VI, Section 22, which created the Court on the Judiciary, consisting of the Chief Judge and the senior associate judge of the Court of Appeals and one justice of the Appellate Division in each judicial department designated by a majority of the justices of such Appellate Division. The section required the affirmative concurrence of not fewer than four members for removal, and provided that the Court could disqualify a judge or justice removed from office from holding any public office of the state and that removal proceedings or the removal of the judge would not prevent his or her indictment and punishment according to law. It also provided that the Chief Judge of the Court of Appeals could convene the Court on the Judiciary upon his or her own motion, required the Chief Judge to convene the Court upon written request by the Governor or by a presiding justice of the Appellate Division or by a majority vote of the executive committee of the New York State Bar Association, and it authorized the Court on the Judiciary, in its discretion, to suspend the judge or justice from exercising office pending determination of the proceeding. It required further that after the Court had preferred charges, the presiding officer of the Court, before a hearing on removal for cause was commenced, give written notice to the Governor, the Temporary President of the Senate, and the Speaker of the Assembly of the name of the judge or justice against whom charges had been preferred, the nature of the charges, and the date set for hearing, which could not be fewer than sixty days after the giving of such notice.

Moreover, if any member of the Legislature preferred the same charges against the judge or justice within thirty days after receipt of such notice, and if the charges were entertained by majority vote of the Assembly, the proceedings before the Court on the Judiciary would be stayed pending determination of the Legislature; such determination would be exclusive and final. Finally, the section provided that a judge of the courts for the City of New York established pursuant to Constitution Article VI, Section 15, of the district court, or of a town, village, or city court outside the City of New York could be removed in the manner provided by law after due notice and hearing by the Appellate Division of the Judicial Department of his or her residence.

Additional provisions for removal of justices and judges are contained in Sections 23 and 24 of Article VI adopted effective September 1, 1962, which are still in effect. Section 23 states that judges of the Court of Appeals and justices

of the Supreme Court can be removed by concurrent resolution of both houses of the Legislature if two-thirds of the members elected to each house concur, that judges of the Court of Claims, the County Court, the Surrogate's Court, the Family Court, the Courts for the City of New York established pursuant to Section 15 of Article VI, the District Court, and such other courts as the Legislature may determine, can be removed by the Senate on recommendation of the Governor, if two-thirds of all members elected to the Senate concur. However, any judge or justice can be removed under the section only for cause, and only after being served with a statement of the cause alleged and having had an opportunity to be heard. The cause of removal must be entered on the journals, together with the yeas and nays on removal.

Section 24 of Article VI gave the Assembly the power of impeachment by vote of a majority of its elected members, the court for trial of impeachment to be composed of the president of the Senate, a majority of the members of the Senate, and the judges of the Court of Appeals, or a majority of them, provided that no judicial officer shall exercise his or her office after articles of impeachment against him or her have been referred to the Senate, and that conviction requires the concurrence of two-thirds of the members present and can include disqualification to hold any public office under the state, but that the person impeached remains liable to indictment and punishment according to law. The section clearly contemplates impeachment of judges for it expressly states that "[n]o judicial officer shall exercise his office after articles of impeachment against him shall have been preferred to the senate, until he shall have been acquitted." In fact, prior to adoption of the section impeachment proceedings had been brought against a number of judges. See Lincoln, *The Constitutional History of New York*, 4: 579, 582, 585, 586, 605 and 607 and Cannon, "The New York Court on the Judiciary 1948 to 1963," 28 *Albany Law Review* 1,3 (1964), only one of which resulted in removal. As defined in *People ex rel Robin v. Hayes*, 82 Misc. 165 (1913), affd. 163 A.D. 725 (1914), *app. dismd*. 212 N.Y. 603 (1914), which involved impeachment of the then governor, the Court held that impeachment is a judicial power vested in the Assembly and that when the Assembly exercises that power, it is free of control by the executive or the courts; see also *People ex rel McDonald v. Keeler*, 99 N.Y. 463, 480–481 (1885).

Section 22 was amended, effective November 3, 1975. The 1975 revision continued the Court on the Judiciary but limited its composition to five justices of the Appellate Division designated by the Chief Judge of the Court of Appeals. The 1978 revision, as had the 1975 revision, provided for removal of "any judge or justice of the unified court system, in the manner provided by law," permitted admonishment, censure, or removal for cause, "including, but not limited

to, misconduct in office, persistent failure to perform his duties, habitual intemperance and conduct, on or off the bench, prejudicial to the administration of justice" or retirement "for mental or physical disability preventing the proper performance of his judicial duties." Section 22 was again amended, effective April 1, 1978 (see Section 36-a). As constituted by the 1978 revision, the Commission on Judicial Conduct consists of eleven members, four appointed by the Governor, one by the Temporary President of the Senate and one by the minority leader of the Senate, and one by the Speaker of the Assembly and one by the minority leader of the Assembly, and three by the Chief Judge of the Court of Appeals. Of the members appointed by the Governor, one must be a member of the New York Bar but not a judge or justice, one a judge or justice of the unified court system, and two to be neither members of the bar nor a justice or judge, active or retired. Non-lawyer members were included in order to build up public confidence in the discipline system and correct the suspicion that the system was designed primarily to protect judges against complaints. New York [State] Temporary Commission on the State Court System, *And Justice for All* (Albany: The Commission, 1973), Part II, p. 61. Of the members appointed by the Chief Judge, one must be a justice of the Appellate Division, two must be judges or justices of courts other than the Court of Appeals or Appellate Divisions, and none of the appointees of the legislative leaders can be a justice or judge, active or retired. The functions, powers, and duties of the Commission are governed by Article 2-A of the Judiciary Law.

Until the 1978 revision the Commission on Judicial Conduct had functioned solely as an investigatory body that tried its case before the Court on the Judiciary from whose decision there was no appeal. (Report of Joint Legislative Committee, Leg. Doc. [1973], no. 24, p. 15.) The 1978 revision eliminated the Court on the Judiciary, directed the Commission to receive, initiate, investigate, and hear complaints with respect to the conduct, qualifications, and fitness to perform or performance of the official duties of any judge or justice of the unified court system and gave it the power to determine whether the judge or justice should be removed or retired. The Court of Appeals was given the power of direct review of the determinations of fact and conclusions of law on the record of the proceedings before the Commission and to impose a lesser or more severe sanction than did the Commission or to impose no sanction. However, as to justices of town and village courts, subdivision (i) of Article VI, § 22 authorized the Legislature to provide for review of the Commission's determination by an Appellate Division. Apparently, the Legislature has not yet done so, for review of removal proceedings by the Court of Appeals of proceedings brought before the Court on the Judiciary involving justices of town or village courts are

reported in 45 N.Y.2d(a)–(ff), 47 N.Y.2d(a)–(iiii) and 49 N.Y.2d(a)–(cc) as are similar cases brought after 1978 by the State Commission on Judicial Conduct, e.g., *Matter of Lenney*, 71 N.Y.2d 456 (1988); *Matter of Vincent*, 70 N.Y.2d 208 (1987).

Also to be noted are Section 132 of the former Code of Criminal Procedure, which authorized the Appellate Division to remove a district court judge, and Penal Law Section 195.00, which defines the misdemeanor of "official misconduct" as knowingly committing an unauthorized act or refraining from performing a duty imposed by law. The opinion in *Matter of Sarisohn*, 21 N.Y.2d 36 (1967), reviewed the debates of the 1938 constitutional convention and the legislative history of related statutes adopted in 1938 and 1949, and held that Section 132 of the Code of Criminal Procedure authorized an appeal to the Court of Appeals, limited, however, to whether cause was established by evidence "roughly the equivalent to the substantial evidence rule in administrative law." *Sarisohn* again reached the Court of Appeals after remand, 22 N.Y.2d 808 (1969), remittitur amended 22 N.Y.2d 910 (1969), to state that the section did not violate the Fourteenth Amendment to the Federal Constitution, and the Supreme Court denied certiorari, 393 U.S. 1116 (1969). This section is no longer in effect. As to Penal Law § 195.00, the Court of Appeals, in *People v. La Carruba*, 46 N.Y.2d 658 (1979), dismissed the indictment, holding that the section did not authorize a removal proceeding based upon the Code of Judicial Conduct because discipline of judges for violation of standards not involving independently criminal conduct is reserved by Article VI, Section 22 of the Constitution to the Commission on Judicial Conduct.

2. DECISIONS OF THE COURT ON THE JUDICIARY AND THE COURT OF APPEALS

Of the cases decided by the Court of Appeals prior to 1932, three remain of interest: (1) *Matter of Droege*, 197 N.Y. 44 (1909), which held that it did not itself have jurisdiction to review the exercise of jurisdiction by the Appellate Division in removing a city magistrate from office pursuant to Constitution Article VI, § 17, Code of Criminal Procedure Section 132 (discussed above) and § 1401a of the Greater New York Charter; (2) *Matter of Levy*, 229 N.Y. 637 (1920), which simply affirmed the order of the Appellate Division, reported in 192 A.D. 550 that had reviewed in detail the provisions of prior constitutions and relevant statutes, and held in answer to the Appellate Division's certified question that the Court had jurisdiction to remove a justice of the Municipal Court of the City of New York; and (3) *People ex rel Swift v. Luce*, 204 N.Y. 478, 491 (1912), because of its possible *stare decisis* effect, which held that notwithstanding the then provisions

of Article VI, § 11 of the Constitution dealing with removal of judges "the Legislature can abolish a court and create a new court in place thereof, though the effect of the legislation is to remove judges from office."

The first cases to come before the Court on the Judiciary as constituted in 1948 were *Matter of Sobel* and *Matter of Leibowitz*, 8 N.Y.2d (a)–(j), in which the Court dismissed in the exercise of its discretion charges against two county court judges accused of making improper public statements, and *Matter of Friedman*, 12 N.Y.2d (a)–(e) (1963), app. dismd. for lack of a substantial Federal question 375 U.S.10 (1963); see also 24 N.Y.2d 528 (1969), app. dismd. 397 U.S. 317 (1970), in which the Court removed a Supreme Court Justice who had maintained in his judicial chambers financial records of his former law firm and former partnership and refused to surrender them to the investigatory body. The judge contended that the proceeding violated the Fourteenth Amendment of the United States Constitution. The Court on the Judiciary held that the proceeding had been conducted properly under the Rules of Procedure it had adopted pursuant to the Constitution.

Some eighty or ninety removal cases have been dealt with by the Court on the Judiciary or by the Court of Appeals' review of decisions of the State Commission on Judicial Conduct. In *Matter of Osterman*, 13 N.Y.2d (a)–(r) (1963), cert. denied 376 U.S. 914 (1964), the Court on the Judiciary held that "cause for removal was an inclusive not a narrowly limited term," that Article I, § 6 of the New York Constitution (considered below) did not excuse the judge's refusal to waive immunity and answer questions unrelated to his judicial service, and that his refusal constituted cause for removal pursuant to Article VI, § 22, since it demonstrated his unfitness for judicial office and unworthiness in refusing to cooperate in the official investigation. In *Matter of Pfingst*, 33 N.Y.2d (a)–(nn) (1973), the Court again held that the conduct for which removal is sought need not have occurred while the judge was holding office as a judge. In *Matter of Waltemade*, 37 N.Y.2d (a)–(ppp) (1975), the Court on the Judiciary held that it was authorized to provide by rule for trial before a referee whose decision was subject to its review. It noted further that its function was not punishment but the imposition of sanctions where necessary to safeguard the bench from unfit incumbents, 37 N.Y.2d at (lll); accord as to the Commission on Judicial Conduct, *Matter of Duckman*, 92 N.Y.2d 141, 152 (1998). Trial of *Matter of Vaccaro*, 42 N.Y.2d (a)–(n) (1977), was begun before the Court on the Judiciary as constituted prior to the 1975 revision, but, on motion of the judge, proceedings before that body were terminated and a new Court on the Judiciary was appointed. Of the cases thereafter decided by the Court on the Judiciary, only *Matter of Byrne*, 47 N.Y.2d (b) (1978), warrants comment. It held that while the

complaint filed by the State Commission on Judicial Conduct served as the basis for its investigation, it could not limit the charge brought against the judge by the Court (cf. *Matter of Gelfand*, 70 N.Y.2d 211 [1987]), which without mentioning the *Byrne* decision held that due process required that a judge could not be removed because of misdeeds that had not been charged in the Commission's complaint.

With the 1978 amendment of Article VI, § 22, the Court of Appeals again became the body to review decisions of the State Commission and as it noted in *Matter of Spector v. State Commission on Judicial Conduct*, 47 N.Y.2d 462 (1979), the scope of its "review is unusually broad, encompassing as it does authority not only to 'review the commission's findings of fact and conclusions of law,' but also to 'impose a less or more severe sanction' than the one determined by the commission, or [to] impose no sanction" (see also *Matter of Dixon v. State Commission on Judicial Conduct*, 47 N.Y.2d 523 [1979]). However, the Court of Appeals does not have jurisdiction to entertain an appeal of an order of the Commission on Judicial Conduct denying the judge's motion to dismiss the Commission's complaint, *Matter of K*, 92 N.Y.2d 1041 (1999); to review an order of the State Commission on Judicial Conduct denying a motion for reconsideration, *Matter of LaBelle*, 79 N.Y.2d 350 (1992); *Matter of Lenney*, 70 N.Y.2d 863 (1987); or to consider an objection not preserved during the proceeding before the Commission, *Matter of Schiff*, 83 N.Y.2d 689 (1994). To be noted also is the Court of Appeals' holding in *Matter of Mazzei*, 81 N.Y.2d 568 (1993), that the Commission is without jurisdiction to charge a violation of the lawyer's Code of Professional Responsibility as distinct from the Judicial Code of Conduct as set forth in 22 N.Y.C.R.R., Part 100.

Three *per curiam* opinions issued by the Court deal with judicial campaigns: *Matter of Watson*, 100 N.Y.2d 290 (2003), *Matter of Raab*, 100 N.Y.2d 305 (2003), and *Matter of Shanley*, 95 N.Y.2d 310 (2002). *Shanley* held that "simply using the phrase 'law and order' in judicial campaign literature does not amount to misconduct." *Watson* ruled that "[a] candidate's statements must be reviewed in their totality and in the context of the campaign as a whole to determine whether the candidate has unequivocally articulated a pledge or promise of future conduct or decisionmaking that compromises the faithful and impartial performance of judicial duties"; and both *Watson* and *Raab* stated that "the Due Process clause guarantees litigants a fair and impartial Magistrate and the State, as steward of the judicial system, has the obligation to create and maintain a system that ensures equal justice and due process" and that "[o]nce elected to the bench, a judge's role is significantly different from others who take part in the political process and, for this reason, conduct that

would be appropriate in other types of campaigns is inappropriate in judicial elections."

Matter of Cornelius, 48 N.Y.2d 1014 (1980), is notable in that on the basis of a Federal indictment of a Family Court judge, the Court of Appeals on its own motion considered whether the judge should be suspended pending determination of the charge. It concluded that he should not be suspended. In *Nicholson v. State Commission on Judicial Conduct*, 50 N.Y.2d 597 (1980), petitioner sought to quash a subpoena issued by the Commission. Prohibition was denied because the subpoena had been issued in furtherance of the Commission's investigation of the conduct of a judge and the information sought was reasonably related to a proper subject of inquiry. The Court of Appeals held, however, that it was improper to have sealed the record of the proceeding.

Matter of Steinberg, 51 N.Y.2d 74, 83–84 (1980), *Matter of Shilling*, 51 N.Y.2d 397, 402 (1980), and *Matter of Kuehnel*, 49 N.Y.2d 465, 469 (1980), all held that removal of a judge did not require overt illegality or extreme moral turpitude since any "conduct on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual judge to carry out his or her constitutionally mandated function." In *Matter of Steinberg*, *supra*, p. 83, the Court of Appeals agreed in principle "that the extreme sanction of removal should not be imposed absent truly egregious circumstances." It therefore accepted the Commission's recommendation of censure with respect to a judge who made racist remarks during court proceedings, *Matter of Agresta*, 64 N.Y.2d 327 (1985), and reduced the Commission's removal sanction in *Quinn v. State Commission on Judicial Conduct*, 54 N.Y.2d 386 (1981), and *Matter of Rogers*, 51 N.Y.2d 224: in *Quinn* to retirement for disability of a judge who had been previously admonished for alcoholism but who had submitted his resignation from office, and in *Rogers* of a town court judge who was a dairy farmer and was not a lawyer, who had neglected his administrative duties.

However, in *Matter of Greenfield*, 76 N.Y.2d 293 (1990), a four to two decision, it rejected the Commission's censure sanction of the judge's delay in resolving cases before him, in some cases for years because "[t]hese are failings but *without more*, not the kind of derelictions commonly associated with misconduct warranting formal penalties" (emphasis added). The additional factors that would justify sanctions would include defying administrative directives to subvert or attempting to subvert the system by falsifying records. In *Matter of Washington*, 100 N.Y.2d 873 (2003), a *per curiam* opinion, the Court applied *Greenfield*'s reasoning to sustain removal of a judge who "filed late, incomplete and false guaranty reports and maintained a persistent backlog, with some

delays of longer than two years. Petitioner's conduct demonstrated that she was either unwilling or unable to discharge her judicial duties and, as a result, the Commission's determined sanction of removal was warranted."

In several cases, however, the Court of Appeals has imposed removal as the proper sanction when the Commission has recommended a lesser sanction, *Matter of Sims*, 61 N.Y.2d 349 (1984), and *Matter of Shilling*, *supra*; in several others it has reduced the Commission's removal sanction to censure, *Matter of Skinner*, 91 N.Y.2d 142 (1997); *Matter of Kiley*, 74 N.Y.2d 364 (1989); *Matter of Cunningham*, 57 N.Y.2d 270 (1982); but in most cases it has confirmed a sanction of removal as recommended by the Commission. Illustrative of such confirmations, in addition to *Washington*, *supra*, are *Matter of Aldrich*, 58 N.Y.2d 279 (1983), confirming removal of a county court judge whose defense against charges that he used racist and vulgar language and threatened violence during court proceedings was based in part on his admission of alcoholism; *Matter of Steinberg*, *supra*, in which removal was confirmed with respect to a civil court judge who was found to have used the prestige of his office to persuade others to invest in private ventures and of misrepresenting his income on his Federal tax returns; *Matter of Esworthy*, 77 N.Y.2d 283 (1991) which confirmed removal of a family court judge who had addressed parties and their attorneys in intemperate and racial language and failed to inform litigants appearing before him of their rights, instead pressuring them to make admissions; and *Matter of Schiff*, *supra*, with respect to a judge of a village court who made racist remarks, failed to maintain adequate records or properly account for fines and surcharges, and who granted judgment to plaintiff in a civil case defended by a law firm one of whose partners was a town court justice who had dismissed traffic charges against the driver of a car who had been involved in an accident with the village court judge; see also *Matter of Mulroy*, 94 N.Y.2d 652 (2000); *Matter of Romano*, 93 N.Y.2d 161 (1999); *Matter of Duckman*, *supra*; *Matter of Mogil*, 88 N.Y.2d 749 (1996);*Matter of Mazzei*, *supra*; *Matter of Cohen*, 74 N.Y.2d 272 (1989); *Matter of Lenney*, *supra*; *Matter of Vincent*, *supra*; *Matter of Gelfand*, *supra*; *Matter of Reeves*, 63 N.Y.2d 105 (1984); and *Matter of Sardino*, 58 N.Y.2d 286 (1983).

The standard for review by the Court of Appeals is preponderance of the evidence rather than clear and convincing evidence, *Matter of Mogil*, *supra*; *Matter of Seiffert*, 65 N.Y.2d 278 (1985), due deference being given to the Commission's findings; *Matter of Collazo*, 91 N.Y.2d 251 (1998); *Matter of Sims*, *supra*. As to sanctions, the Court of Appeals has broad powers; the sanction need not be found shocking to one's sense of fairness, *Quinn v. State Commission on Judicial Conduct*, 54 N.Y.2d 386 (1981). Since it is required to review

the Commission's findings of fact, the Court of Appeals review is unusually broad, *Matter of Spector*, *supra*, at 465, although apparently not so broad as to permit additional evidence to be presented before it, see *Matter of Cunningham*, *supra*, at 274. The judge's failure to testify or to present any evidence may be considered on such review, *Matter of Reedy*, 64 N.Y.2d 299 (1985); *Matter of Myers*, 67 N.Y.2d 550 (1986); *Matter of Conti*, 70 N.Y.2d 416 (1987). The judge's refusal may also be taken into account, through the Commission's investigation and the proceeding before the referee to acknowledge the impropriety of his or her conduct, *Matter of Duckman*, *supra*, at 154. The fact that the judge has been elected to a different judicial office from the one he or she occupied when the improper conduct occurred does not proscribe removal from the newly elected office as a sanction, *Matter of Bailey*, 67 N.Y.2d 61 (1986).

However, expiration of the judge's term of office does not moot the proceeding, because a sanction of removal would render him or her ineligible for future judicial office (*Matter of Mazzei*, *supra*, at n.1). Therefore, the jurisdiction of the Court of Appeals and the Commission continue even after the judge resigns from office, if the Commission's determination that he or she should be removed has been transmitted to the Chief Judge of the Court of Appeals, or if the Commission's removal determination is transmitted to the Chief Judge within 120 days after receipt by the chief administrator of the Commission of the judge's resignation (Judiciary Law, Section 47).

3. CONSTITUTION ARTICLE I, § 6

Article I, § 6 of the New York Constitution provides for forfeiture of office at the suit of the Attorney General of "any public officer" who refuses to sign a waiver of immunity against subsequent criminal prosecution. As construed by the Appellate Division, Third Department, *People v. Doyle*, 286 A.D. 276 (1955) and affirmed without opinion by the Court of Appeals, 1 N.Y.2d 732 (1956), the section was held not applicable to Doyle, then sitting as Surrogate, for refusing to waive immunity as to his prior office of District Attorney. Effective November 3, 1959, the section was amended to authorize forfeiture of office for refusal to testify concerning "the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify or the performance of his official duties in any such present or prior office."

Several Court of Appeals cases other than *Doyle* have considered Article I, § 6. In *Matter of Cohen*, 7 N.Y.2d 488 (1960), *aff'd. sub nom Cohen v. Hurley*, 366 U.S.117 (1961), *reh.den*. 370 U.S. 857, 374 U.S. 870, the Court of Appeals held, six judges to one, that an attorney who relied on the section in refusing to answer questions in good faith reliance on his privilege against self-incrimination could

not be forced to waive immunity, but that as an attorney he was obligated to give full cooperation to the investigation and could not escape the consequences of his failure to do so. On appeal to the Supreme Court, Cohen's disbarment was affirmed by a vote of six to three. However, the *Cohen* decision was overruled in *Spevack v. Klein*, 385 U.S. 511 (1967), reversing the decision of the New York Court of Appeals, 16 N.Y.2d 1048 (1965), which had held that records required by law to be kept by an attorney were not within the Fifth Amendment privilege.

Matter of Gardner v. Broderick, 20 N.Y.2d 227 (1967) dealt with the section and the similarly worded provision of the New York City Charter and *State v. Perla*, 21 N.Y.2d 608 (1968), which considered the debates at the 1938 and 1949 constitutional conventions, held that the police officer in *Gardner* and the parking fee collector involved in *Perla* (both of whom refused to sign a waiver) could be removed from office for such refusal notwithstanding the Fifth Amendment to the Federal Constitution. Both were reversed by the United States Supreme Court, *Perla* in a one-line decision (392 U.S. 296 [1968]) citing its decision in *Gardner* (391 U.S. 273 [1968]), which held that discharge from office for failure to waive the Fifth Amendment privilege violated the Federal Constitution. See also *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 391 U.S. 280 (1968).

Lefkowitz v. Turley, 414 U.S. 70 (1973), considered statutes with wording substantially similar to Article I, § 6. It held that testimony could be adduced under compulsion of the loss of office or contract or of being held in contempt, but that such testimony resulted in whatever immunity is required to supplant the privilege and consequently may not be used as a basis for prosecution and is not admissible in evidence. On the basis of *Lefkowitz*, the Court of Appeals held in *People v. Avant*, 33 N.Y.2d 265 (1973), accord *People v. Leto*, 33 N.Y.2d 952 (1974), that although violation of the constitutional privilege of one who is a "target" of a grand jury investigation would require dismissal of its indictment, the target is *not* immune from future prosecution or from loss of office provided only that in all subsequent proceedings that person's constitutional rights are fully recognized.

D. On Questions Certified by a Federal or Out of State Court

Such certified question matters are not direct appeals in the same sense as cases considered in the preceding three subdivisions, because a record has been created in the Federal or out-of-state court. They are, however, direct in the sense that they involve no prior consideration of the matters by a New York State court.

The first efforts to establish a certified question procedure resulted from the Uniform Laws Annotated proposed law on the subject and took the form of a bill introduced in 1982 based on the ULA proposal. The bill was opposed by the Court of Appeals because the Legislature was without power to expand the jurisdiction of the Court, its jurisdiction being limited to Article VI, Section 3 to review as specified in that section (see Robbins, "The Uniform Certification of Questions of Law Act: A Proposal for Reform," 18 *Journal of Legislation* 127, 166 ff [1992]). At the request of the Court of Appeals and the Law Revision Commission, the proposed constitutional amendment, instead of itself spelling out procedure, authorized the Court to "adopt and from time to time amend a rule to permit the Court to answer questions of New York law certified to it"; increased the courts authorized to certify question to include not only the Supreme Court of the United States and a court of appeals of the United States but also "an appellate court of last resort of another state"; and changed the basis for certification from "no controlling precedent in the decisions of the Court of Appeals of New York" to "not controlled by precedent in the decision of the courts of New York." However, the amendment retained the requirement that the certified question "may be determinative of the cause then pending in the certifying court." Those changes resulted from letters from the Court's then clerk, Joseph Bellacosa, its then Associate Judge, Sol Wachtler, and the Law Revision Commission, *id.*, at 167–170. On November 4, 1985, the voters ratified the proposed amendment which added paragraph (9) to Constitution Article VI, § 3(b), and effective January 1, 1986, the Court of Appeals implemented it by adopting 22 N.Y.C.R.R. § 500.17.

The amendment did not contain the language used in the ULA proposal giving the court receiving a certified question authority to "answer, reject and modify" the question. Its language required no more than that the rule to be adopted "*permit* the court to answer questions" (emphasis supplied) and NYCRR § 500.17 subd.(d) authorized the Court of Appeals "on its own motion [to] examine the merits presented by the certified question, first to determine whether to accept the certification, and second, the review procedure to be followed in determining the merits." To be noted also is subd. (f), which requires the Clerk of the Court to notify the Attorney General in accordance with Executive Law § 17 if the certified question involves the constitutionality of an act of New York's Legislature affecting the public interest.

In the years since the certification procedure was adopted, more than twenty questions have been certified to the Court of Appeals, only one of which, *Matter of Southeast Banking Corp.*, 93 N.Y.2d 178 (1999), certified by the Eleventh Circuit Court of Appeals, came from other than the Second Circuit Court of

Appeals. Local Rule § 0.27 of the Second Circuit authorizes its certification "sua sponte or on motion of a party" of "an unsettled and significant question of state law that will control the outcome of a case pending before" that court.

In five cases the Court declined to accept the certified question, in each case in a *per curiam* opinion. *Rufino v. United States*, 69 N.Y.2d 310 (1987) did not accept the damages issues tendered for review because those issues were currently before the Appellate Division and to accept the certified question would necessarily affect the ordinary state procedure then in progress for resolution of those issues. The case referred to, *McDougald v. Garber*, 132 Misc.2d 457, was affirmed by the Appellate Division (135 A.D.2d 80), but modified by the Court of Appeals, 73 N.Y.2d 246 (1989), in an opinion which held that loss of enjoyment of life was not to be separately fixed by the jury. Rather it was a permissible factor to be considered by the jury in assessing pain and suffering. Meanwhile, however, as the Court of Appeals noted (73 N.Y.2d at 256), the Second Circuit had held in *Rufino v. United States*, 829 F.2d 354 (1987), applying its prediction of New York law, that a separate award for loss of enjoyment of life should be allowed.

Retail Software Services, Inc. v. Lashlee, 71 N.Y.2d 788 (1988), declined to answer the question whether New York's Business Law § 686 dealing with one who sells or offers to sell a franchise in New York provided a basis for personal jurisdiction because defendants in the Federal action had apparently engaged in no activities in New York. Consequently, an answer to the certified question would not be determinative in the Federal action as required by the Constitution. *Grabois v. Jones*, 88 N.Y.2d 254 (1966), refused to accept an issue concerning the right of decedent's second wife to ERISA payments where decedent's prior marriage had never been legally dissolved, citing the rarity of the occurrence, the fact that the first wife appeared *pro se* and had submitted no brief, that the estate fiduciaries were mere stakeholders with no interest in the result, and that the interplay between Federal and State law in construing the ERISA statute was more appropriately to be determined by the Federal courts. In *Yesil v. Reno*, 92 N.Y.2d 455 (1998), the certified questions asked what contacts with New York of an Immigration and Naturalization Director located outside New York would give New York courts jurisdiction over the Director. The Court of Appeals declined to answer because of uncertainty whether the questions would be determinative, there being alternative ways to obtain jurisdiction over the Director so the answer might not be dispositive, and because the issue was unlikely to arise in state courts and as presented was overly generalized or abstract. And in *Tunick v. Safir*, 94 N.Y.2d 709 (2000), the Court, while noting the great value of the certification procedure, declined to answer a certified

question raising the issue whether Penal Law § § 245.01 and 245.02, which proscribed photographs of nude bodies, was valid under New York's Constitution, because that issue had not been raised, briefed, or argued in the Federal courts and therefore could not be responsibly considered when first briefed and raised in the Court of Appeals. Of note also is *Goodlett v. Kaleshek*, F3d (2000) (NYLJ 8/4/00 p. 25), a two to one decision of the Second Circuit in which Judge Feinberg dissented because the majority declined to certify a question of New York tort law to the Court of Appeals.

Of the other cases responding to certified questions, only one—*Kidney v. Kalmar Laboratories*, 68 N.Y.2d 343 (1986)—the first case decided after the constitutional amendment—was dealt with in a *per curiam* decision; there was a concurring opinion in one—*Wildenstein & Co. v. Wallis*, 79 N.Y.2d 641 (1992); and a dissent in three—*Bocre Leasing Corp. v. General Motors Corp.*, 84 N.Y.2d 685 (1995); *Denny v. Ford Motor Company*, 87 N.Y.2d 248 (1995); and *Rooney v. Tyson*, 91 N.Y.2d 685 (1998).

Most of the answers to the certified questions by the Court of Appeals discussed only the New York law relating to the issue presented by the certified question, but some of the decisions also considered the certified question procedure. Thus, in *Longway v. Jefferson County Board of Representatives*, 83 N.Y.2d 17 (1993), which concerned how residence was to be determined for purposes of apportionment of districts under the Municipal Home Rule Law, the Court of Appeals noted that in view of the restricted nature of the question certified it need not address plaintiff's contention that the Board's apportionment plan was unconstitutional on its face. *Bocre Leasing*, *supra*, at page 691, held that a downstream purchaser could not recover in strict product liability and negligence against a manufacturer where the loss claimed flows from damage to the property itself. The Court noted that to allow such recovery where the product (here a helicopter) was unduly hazardous would in a sense contradict the certified question procedure which is designed and employed to provide certainty to and settlement of state law issues. *Engel v. CBS, Inc.*, 93 N.Y.2d 195 (1999) dealt with the question whether in an action for malicious prosecution of a civil lawsuit where the plaintiff attorney's representation of his client was actually undermined by the suit, the requirement of special injury could be satisfied where no provisional remedy is had against the defendant, the response of the Court of Appeals stated that on the facts given, it could not find the representation was in fact undermined and therefore answered the question in the negative. The Court noted, however, that the question of whether plaintiff could defeat a motion for summary judgment was not before it and would have to be decided by the Second Circuit based on the answer given.

Rooney v. Tyson, *supra*, presented the question whether an oral personal service contract between a boxer and a trainer to last "as long as the boxer fights professionally" was for a fixed duration or a hiring at will presumed terminable at any time by either party. The Court—while noting that its role is confined by the precise and narrow question certified, that the matter was not a case or controversy, as such, in the state court system, and that the guidance it gives to the Federal court should be dispositive of the precise law question transmitted to it—held that in view of the above quoted language, the contract was for a definite duration and enforceable though oral. The certified question in *Liriano v. Hobart Corporation*, 92 N.Y.2d 232 (1998), was whether the manufacturer of a grinder that included a safety guard could be liable under a failure to warn theory in a case in which the substantial modification defense (removal of the guard) would preclude liability under a design defect theory and if so whether liability of the manufacturer was barred as a matter of law on the facts of the case, viewed in the light most favorable to the plaintiff. Answering the first part of the question in the affirmative, the Court of Appeals declined to answer the second part, noting that failure to warn liability is intensely fact specific, and would be appropriately addressed by the Second Circuit in light of the substantive law resolved by the answer to the first part of the question.

The cases so far discussed concerned contract law (*Rooney v. Tyson*, *supra*), family and estate law (*Grabois v. Jones*, *supra*), damages (*Rufino v. United States*, *supra*), jurisdiction over out of state franchisors (*Retail Software Services v. Lashlee*, *supra*) and over an Immigration and Naturalization Services District Director whose office is located outside New York (*Yesil v. Reno*, *supra*), the definition of population for purposes of local legislative apportionment (*Longway v. Jefferson County Board of Supervisors*, *supra*) and tort law (*Bocre Leasing Corp. v. General Motors Corp.* and *Liriano v. Hobart Corp.*, *supra*), and constitutional law (*Tunick v. Safir*, *supra*).

The other questions answered by the Court of Appeals through April 1999 include:

- **Arbitration**: *Westinghouse v. New York Transit Authority*, 82 N.Y.2d 47 (1998), an arbitration clause that names as arbitrator an employee of a party but specifically provides that judicial review of the arbitrator's decision is not against public policy.
- **Banking law**: *Banque Worms v. Bank America International*, 77 N.Y.2d 362 (1991), with respect to an electronic fund transfer mistakenly applied to the wrong account, the recipient is under no duty to make restitution if it made no misrepresentation and did not have notice of the transferor's mistake.

- **Conflict of laws**: *Tanges v. Heidelberg North America, Inc.*, 93 N.Y.2d 48 (1999), which held that Connecticut's statute of repose barring an action for product liability not brought within ten years after the manufacturer parted with possession or control is substantive for the purpose of New York's choice of law analysis and therefore bars plaintiff's action brought in New York Federal court by a New York resident against the manufacturer and others for injury suffered in Connecticut.
- **Contract law** was the subject in *Messner, Vetere, Berge, McNamee, Schmetterer Euro RSCG, Inc. v. Aegis Group, PLC*, 93 N.Y.2d 229 (1999), which answered in the negative the question whether the part performance doctrine was adequately evoked by the claim that plaintiff took no action with respect to a preexisting written agreement because it was relying instead on defendant's oral promise, and also held that only part performance by the party seeking to enforce an oral agreement is relevant. Contract law was also involved in *West-Fair Electric Contractors v. Aetna Casualty and Surety Co.*, 87 N.Y.2d 148 (1995), which held a pay-when-paid provision in a contract between a general contractor and its subcontractor that transfers the risk of the owner's default from the general contractor to the subcontractor is in violation of public policy as declared in Lien Law § 34. The law with respect to corporations was involved in *Loengard v. Santa Fe Industries, Inc.*, 70 N.Y.2d 262 (1987), which held that there is no private cause of action under the Martin Act for fraud in relation to corporate merger.
- **Insurance law** was the subject of a number of cases: *Kidney v. Kolmar Laboratories, Inc.*, 68 N.Y.2d 343 (1986), money advanced by insurer on behalf of its insured to the injured party is not "payment of money" within the meaning of New York Social Services Law § 104-b, which makes the validity of the lien turn on written notice of the lien prior to payment to the injured party. Insurance law was also the subject of the question certified in *Home Insurance Company v. American Home Products Corp.*, 75 N.Y.2d 196 (1990), which answered in the negative the question whether New York would require an excess insurer to reimburse the insured for punitive damages awarded against the insured in a judgment of an out-of-state court because to do so would be contrary to New York's public policy. Insurance law was also involved in *Unigard Security Insurance Co. v. North River Insurance Co.*, 79 N.Y.2d 576 (1992), which held that in contrast to cases holding that a primary liability carrier can disclaim for breach of the prompt notice provision in the policy, breach of such a provision in a reinsurance policy furnishes no basis for disclaiming coverage unless the reinsurer can show that it was actually prejudiced by the delay. Based on that

answer by the Court of Appeals, the Second Circuit in 4 F.3d 1049 (1993) held on review of the facts that Unigard, the reinsurer, had not shown that it suffered prejudice from the late notice.

Whether Lloyd's insurance syndicate was doing business in New York when it issued insurance coverage to a New York insured or because it maintained a security fund as required by New York law was the issue involved in *Landoil Resources Corp. v. Alexander & Alexander Services*, 77 N.Y.2d 28 (1990). The question was answered in the negative by the Court of Appeals and on the basis of that answer the Second Circuit reversed the order of the district court, 925 F.2d 44 (1991), and directed that court to dismiss the action for lack of personal jurisdiction.

Wildenstein & Co. v. Wallis, *supra*, held that neither New York's Rule Against Perpetuities nor its common law rule against unreasonable restraints on alienation invalidated preemptive rights and future consignment interests in personal property (i.e., original paintings of renowned artists). It therefore answered the first two certified questions in the negative and held it unnecessary to answer the other questions certified.

Involved in *Hertz Corp. v. City of New York*, 80 N.Y.2d 565 (1992), was statutory construction: whether state legislation concerning car rental practices preempted the enactment of legislation on the subject by a municipality. The Court answered in the negative, holding that while the State statutes referred occasionally to rental vehicles, they did not regulate the amount that could be charged to residents of various areas within the State.

Three cases involved torts: *Gonzalez v. Armac Industries*, 81 N.Y.2d 1 (1993); *Madden v. Creative Services*, 84 N.Y.2d 738 (1995); and *Denny v. Ford Motor Co.*, 87 N.Y.2d 248 (1995). *Gonzalez* held that under General Obligations Law § 15–108(c) a pretrial agreement between an injured plaintiff and one of several tortfeasors in return for a limited payment by the latter was a release within the meaning of the section and relieved the settling tortfeasor from contribution liability to any other person, while forfeiting the latter's right to contribution from any other tortfeasor. In *Madden*, the Court of Appeals, which had accepted the certified question because it involved a state law issue of interest, held that the client had no cause of action, on the grounds of violation of the attorney-client privilege, against an intruder who had broken into the office of the client's lawyer in order to inspect the client's documents, and the Second Circuit then affirmed dismissal of the claim, 51 F.3d 11 (1995). *Denny* held that strict product liability and breach of implied warranty are not identical causes of action, and that it is hypothetically possible for there to be liability for breach of implied

warranty even though strict product liability is not established. However, the Second Circuit denied Ford's application for retrial of the action because it could have raised the issue in the earlier proceedings before the district court, 79 F.3d 12 (1996). Interestingly, although the Court of Appeals presumably had discretion under 22 NYCRR § 500.17 to refuse to accept the certified question, since the Federal district court had rejected Ford's motion for a new trial on the ground that the question it sought to raise had been waived (see 87 N.Y. 2d 250), its failure to do so clarified the law for both Federal and State courts!

Not until 1999, however, was a question certified by other than the Second Circuit. *Matter of Southeast Banking Corp. v. First Trust of New York*, 93 N.Y.2d 178, *supra*, dealt with a question certified by the Eleventh Circuit Court of Appeals which asked "what, if any, language does New York law require in a subordination agreement to alert a junior creditor to its assumption of the risk and burden of the senior creditors' post–petition interest?" The Court of Appeals noted that the question did not call for the customary affirmative or negative response nor had it been previously considered by New York courts: "within the procedural boundaries imposed by the problem, by adopting the general framework of the so-called 'Rule of Explicitness,' that New York law would require specific language in a subordination agreement to alert a junior creditor to its assumption of the risk and burden of allowing the payment of a senior creditors' post-petition interest demand."

What stands out from the foregoing analysis and from the number of cases in which the response of the Court of Appeals to a certified question has been cited by New York's trial and intermediate appellate courts (e.g. Shepard's citations to the *West-Fair* decision, *supra*) is that the procedure is beneficial not only to the Federal circuit courts but also to New York's courts in clarifying previously unclear issues. In only one case, *Rufino v. United*, *supra*, was the Federal holding contradicted by a later decided Court of Appeals case and that occurred only after the question presented by the case was declined by the Court of Appeals. Would it not be better in such situations, rather than declining, to expedite the pending State case so that the Court of Appeals could review both it and the federally certified question together? It is also somewhat surprising that in all the years since the 1985 constitutional amendment authorizing question certification not only by Federal courts but also by an appellate court of last resort of another state, no questions have been presented by the appellate courts of other states or by the United States Supreme Court. See *Lehman Brothers v. Schein*, 416 U.S. 386, 390 n.5 (1974). Query also whether there should not be a Federal statute authorizing certification by a state court of last resort to Federal circuit courts of questions arising in State court proceedings under Federal statutes

which are of less than general application, cf. *Modave v. Long Island Jewish Medical Center*, 501 F.2d 1065, 1074, n.12 (1974).

E. From a Final Judgment, Administrative Agency Determination, or Arbitration Award When the Appellate Division Made an Order on a Prior Appeal Which Necessarily Affects the Final Judgment, Determination, or Award

CPLR § 5601 authorizes direct appeal to the Court of Appeals as of right from a final judgment entered in a court of original instance, from a final determination of an administrative agency, or from a final arbitrator award or from an order of the Appellate Division that finally determines an appeal from such a judgment or determination, in a case where (1) the Appellate Division has made a nonfinal order on a prior appeal in the action and that nonfinal order necessarily affects the judgment, determination, or award, and (2) from which two justices have dissented or (3) that directly involves construction of the Constitution of the State or of the United States.[1]

The right of direct appeal from such a judgment, determination, or award stems not from explicit wording of a constitutional provision but from the anomaly of requiring a second appeal to the Appellate Division before the issues determined on the first appeal and which necessarily affect the final judgment could be reviewed by the Court of Appeals, *Gambold v. MacLean*, 254 N.Y. 357, 359 (1930); *Buffalo Electric Co. v. State of New York*, 14 N.Y.2d 453 (1964); see *First Westchester National Bank v. Olsen*, 19 N.Y.2d 342 (1967).

The inclusion of an arbitration award in the provision was a result of the Court of Appeals decisions in *Matter of Local 345 Retail Store Employers Union v. Heinrich Motors*, 61 N.Y.2d 900 (1984), and *Matter of Ford v. Civil Source Employers Assn.*, 62 N.Y.2d 799 (1984), that an arbitration award was not a final determination of an administrative agency and, therefore, the CPLR § 560 as it then read did not include a final arbitration award. A study by the Advisory Committee on Civil Practice followed,[2] and resulted in the enactment of chapter 316 of the Laws of 1986, effective January 1, 1987, amending CPLR § 5601(d) to include a final arbitration award.

When a nonfinal order "necessarily affects" the final determination is not entirely clear. The quoted words became part of CPLR § 5601(d) at the urging of the Advisory Committee on Practice and Procedure of the Temporary Commission on the Courts, Second Preliminary Report, N.Y. Legis Doc 1958, No. 13, p. 105, which noted that the Court of Appeals was familiar with those words, which had also been part of Civil Practice Act § 580. In *Matter of Aho*, 39

N.Y.2d 241, 248 (1976), the Court of Appeals held denial of a motion for change of venue necessarily affected the final judgment because reversal "would strike at the foundation" of the final judgment since the proceeding would have been submitted to a different court. *Buffalo Electric Co. v. State of New York*, *supra* at 461, found a sufficient nexus between an Appellate Division order eliminating a defense of release and the final judgment to treat them as a procedural entity because the earlier order "had a vital influence on the final judgment as entered" (see also *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, 158, n.5 [1982]). But an order dealing with in what state a deposition should be held did not necessarily affect the outcome of the trial there being "no reason to believe that the award would have been different if the place of hearing had been changed," *Matter of Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 304 (1929).

Cases involving the orders of an administrative agency can be complicated. The matter of whether or not a prior nonfinal order of the Appellate Division necessarily affects the agency's determination depends upon whether the orders of the agency in question (e.g. the Workers' Compensation Board) are subject to review by the Appellate Division or in an Article 78 proceeding. But in *Matter of Civil Service Employees Assn. v. Newman*, 61 N.Y.2d 641 and 1001 (1983) (see also 88 A.D.2d 685), the Court of Appeals held at p. 641 that "the only vehicle [for] review of the [prior] nonfinal order of the Appellate Division" is direct review of the prior order on appeal after entry of the administrative agency's final determination (see also *Matter of Berg v. Marsh*, 293 N.Y. 766 [1944], and *Matter of Albano v. Hammond*, 267 N.Y. 590 [1935]). Note, however, that if Article 78 review of the administrative agency's determination made after a prior Article 78 proceeding is sought the prior nonfinal order of the Appellate Division is not reviewable on direct appeal to the Court of Appeals, *Matter of Acres Storage Company v. Chu*, 73 N.Y.2d 914 (1989); *Matter of Concerned Citizens v. Town Board*, 54 N.Y.2d 957 (1981); *Parker v. Rogerson*, 35 N.Y.2d 751 (1974).

F. From an Order of the Appellate Division Granting a New Trial in an Action or a New Hearing in a Special Proceeding Where the Appellant Stipulates That, Upon Affirmance, Judgment Absolute or Final Order Shall Be Rendered Against Him

The above heading is a verbatim statement of Constitution Article VI, § 3(b)(3) after a constitutional amendment became effective January 1, 1944. Prior to the amendment, appeal as a right was authorized only on a stipulation as to a new trial order in an action, and not a stipulation as to an order of the Appellate divi-

sion in a special proceeding. CPLR § 5601(c) authorizes appeal as of right on such a stipulation only when the order was made in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims, or an administrative agency. For an action originating in a court other than those listed in the statute, appeal upon stipulation for judgment absolute may be taken only by permission of the Appellate Division, CPLR § 5602(b)(2)(iii), *Dukes v. Rotem*, 82 N.Y2d 886 (1993). see section III.B.(2).(b). However, when the Appellate Division affirms the lower court no further appeal to the Court of Appeals may be taken, *Tai On Luck v. Cirota*, 29 N.Y.2d 747 (1971). Note, however, that an Appellate Division order remitting for a collateral source hearing does not grant a new trial or hearing within the meaning of CPLR 5601(c), *Sternfeld v. Forciet*, 92 N.Y.2d 1045 (1999).

A stipulation for judgment absolute will require the Court of Appeals to affirm and render judgment absolute if its order was predicated on an issue of fact or the exercise of discretion by the Appellate Division, for (with exceptions irrelevant to the present discussion) the Court of Appeals is not empowered to consider either facts or the exercise of discretion even if the Appellate Division had also ruled erroneously on the law in the case, *Rabinowitz v. Indursky*, 11 N.Y.2d 724 (1962). However, since the enactment in 1942 of CPLR § 5615 (at the suggestion of the New York State Judicial Council, see, its 7th Annual Report [1941] pp. 559–562, and 8th Annual Report, p. 435 [1942]), affirmance and judgment absolute is not required if the Appellate Division order states "either that the questions of fact have not been considered or that the court has considered the questions of fact and has determined that it would not grant a new trial or hearing upon those questions." That provision has been construed to include matters of discretion as well, *Guasperi v. Gorsky*, 29 N.Y.2d 891 (1972).

The stipulation must be unconditional, *Kraus v. Ford Motor Co.*, 42 N.Y.2d 1093 (1977), but the court has allowed an appellant to apply to it for leave to withdraw the appeal as an alternative to affirming and rendering judgment absolute, *Claytor v. Wilmot & Cassidy Inc.*, 34 N.Y.2d 992 (1974), *McMurren v. Carter*, 38 N.Y.2d 742 (1975), cf., *Thrower v. Smith*, 46 N.Y.2d 835 (1978).

G. From a Judgment or Order of the Appellate Division Which Finally Determines the Action or Proceedings and Is One of Reversal or Modification

Constitution Article VI, § 3(b)(1) provides for an appeal as of right from a judgment or order which is one of reversal or modification. However, § 3(b)(8) permits the Legislature to abolish such an appeal of right if no question involving

the construction of the Constitution of the State or of the United States is directly involved, and the Legislature exercises that power, appeal in such cases shall be governed by § 3(b)(6) relating to appeals by permission.

Experience with the statutory provision that authorized appeals as of right from a final order of reveral or modification ultimately resulted in repeal of that provision. Under the original language of § 3(b)(1) modification in any respect authorized an appeal as of right, *Matter of Ruppert v. Egelhofer*, 3 N.Y.2d 576, 580 (1958) (amendment of the title of the proceeding). The resulting flood of appeals as of right so burdened the Court that the Legislature amended CPLR § 5601(a) to require that the modification be "in a substantial respect . . . within the power of the court of appeals to review . . . and [by which] the party taking the appeal [was] aggrieved," Laws of 1969, ch. 999. As originally enacted the amendment was of limited duration, but it was made permanent by the Laws of 1973, ch. 95. However, because the number of appeals based on reversal or modification remained high (the 1984 Annual Report of the Clerk of the Court states that 66 percent of the civil appeals decided by the Court in 1984 were filed under CPLR § 5061[a]), that section was amended by ch. 300 of Laws of 1985 to eliminate completely reversal and modification as bases for appeal as of right from an Appellate Division final order. Such appeals would thereafter be reviewable only upon permission granted by the Court of Appeals or the Appellate Division pursuant to CPLR § 5602.

II. Appeals as of Right from a Judgment or Order Entered Upon a Decision of the Appellate Division

A. When the Decision Directly Involves Construction of the State or Federal Constitution

Article VI § 3(b)(1) of the State Constitution authorizes such an appeal when the Appellate Division decision finally determines an action or proceeding which directly involves construction of the Constitution of the State or of the United States. As previously noted, subsection (8) of that subdivision expressly excludes such appeals from the power of the Legislature to abolish appeals as of right to the Court of Appeals. CPLR § 5601(b)(1) mirrors the language of § 3(b)(1) of the Constitution.

The constitutional issue may be directly involved even though construction of the statute is required in order to reach the constitutional issue. Thus, where the Supreme Court interpreted Civil Service Law § 71 as authorizing dismissal

of an employee absent by reason of disability for a cumulative rather than continuous period of one year and rejected the employee's claim that such an interpretation of the statute violated the equal protection and due process provisions of the Constitution, the Court of Appeals held the appeal authorized by CPLR § § 5601(b)(1) and affirmed the Appellate Division's affirmance of Supreme Court's holding, *Matter of Allen v. Howe*, 84 N.Y.2d 665, 671 (1999); accord: *Rent Stabilization Association v. Higgins*, 83 N.Y.2d 156, 168 (1993). Nevertheless, while the constitutionality issue was decided by the courts below, the Court of Appeals is not required to determine that issue. The issue is nonetheless directly involved even if the Court of Appeals bypasses that question and decides the case on the basis of its interpretation of the statute, *Matter of McBarnette v. Sobol*, 83 N.Y.2d 333, 336–337 (1994); *Matter of Campagna v. Shaffer*, 73 N.Y.2d 237, 240 (1989); but see *Matter of Twin Coast Newspapers v. State Tax Commission*, 64 N.Y.2d 874, 876 (1985).

B. From an Appellate Division Order as to Which Two Justices Dissented on a Question of Law

Article VI, § 3(b)(1) of the Constitution provides that appeals to the Court of Appeals may be taken as of right in civil cases and proceedings "where one or more of the justices of the appellate division dissents from the decision of the court," and CPLR § 5601 requires that the action in which such an appeal is taken have originated in the supreme court, a county court, a surrogate's court, the family court, the court of claims, or an administrative agency and be from an order of the appellate division that finally determines the action.

Prior to the amendment of CPLR § § 5601 by Chapter 300, section 1 of the Laws of 1985, dissent by a single justice authorized such an appeal. The 1985 law, effective January 1, 1986, required that the dissent be "by at least two justices." As the Governor stated in his memorandum approving the 1986 law, the revision was sought to enable the Court to better serve its function of deciding cases of statewide importance and was based on a study made by the American Judicature Society at the request of the Court of Appeals. McKinney 1985 Session Laws, 3292.

As the wording of the provision makes clear, the two-justice dissent does not provide a basis for appeal to the Court of Appeals when the ground of the dissent is not the dissenters' disagreement with the majority's result but with the basis on which that result is reached, or as the Court of Appeals put it in *Christovao v. Unisul-Uniao*, 41 N.Y.2d 338, 339 (1977) "when the minority has given appellant the benefit of its vote, as well as the benefit of its views."

Jurisdiction of the Court of Appeals is, however, limited, with exceptions not pertinent to this discussion, to review of questions of law. Const. Art. VI§ 3(a), CPLR § 5601(a), *Burr v. Eveready Insurance Co.*, 92 N.Y.2d 2041 (1999). Moreover, the question of law must have been raised by the appellant in the trial court, for, unlike the Appellate Division, which has jurisdiction to address unpreserved issues, the Court of Appeals may not do so. *Merrill v. Albany Medical Center Hospital*, 71 N.Y.2d 990 (1988); *Guasperi v. Gorsky*, 29 N.Y.2d 891 (1972). But all questions of law properly preserved may be reviewed on such a direct appeal even though a particular issue is not the basis for dissent, or the dissent is as to but one of several defendants, for the governing provisions concern "the right to appeal and not the scope of review, once an appeal is properly before the court." *Matter of Duchnowski*, 31 N.Y.2d 991 (1973); *Holtslander v. C.W. Whalen & Sons*, 69 N.Y.2d 1016 (1987), 70 N.Y.2d 962 (1988).

III. Appeals by Permission

A. In Criminal Cases Not Involving the Death Penalty

As noted, Constitution Article VI, § 3(b) (first unnumbered paragraph) permits direct appeal to the Court of Appeals from a court of original jurisdiction where the judgment is one of death, and in other criminal cases authorizes the Legislature to determine when an appeal "from an Appellate Division or otherwise" is permitted.

Under CPL § 460.20(2)(a) permission to appeal from the Appellate Division may be granted by either a judge of the Court of Appeals or a justice of the Appellate Division that entered the order. If the order dismissed the appeal, however, only a judge of the Court of Appeals may grant permission. CPL § 470.60(3), *People v. Santos*, 64 N.Y.2d 702, 704 (1984).

While CPL § 460.20(2)(a) does not limit the justice to whom application can be made, the Court of Appeals in *People v. Dorta*, 46 N.Y.2d 818, 821 (1978), has characterized it as the better practice to apply to a justice who was a member of the panel that decided the case and the rules of the Appellate Division Second and Fourth Departments so require. Moreover, once an application has been made to a justice of the Appellate Division, no further application can be made to a judge or justice of either court. *People v. Liner*, 70 N.Y.2d 945 (1988); *People v. Nelson*, 55 N.Y.2d 743 (1981), although as to an application denied by a judge of the Court of Appeals that judge may entertain a motion for reconsideration. *People v. Pepper*, 53 N.Y.2d 213, 218 n. 1 (1981), *cert. denied* 454 U.S. 967 and 454 U.S. 1162.

As to intermediate appellate courts other than the Appellate Division (i.e., the Appellate Terms of the First and Second Departments, the County Courts of the Third and Fourth Departments as to judgments or orders of local criminal courts in the particular county), CPL § 460.20(2)(b) provides that permission to appeal may only be granted by a judge of the Court of Appeals.

B. In Civil Cases

1. SOLELY BY THE COURT OF APPEALS

By voter approval effective January 1, 1952, of the constitutional amendment, proposed by concurrent resolution, Laws of New York 1951, p. 2090, of Article VI, § 7(5) (now § 3[b][5]), the Court of Appeals was authorized to grant leave to appeal from a nonfinal order of the Appellate Division in a proceeding instituted by or against one or more public officers or a board, commission, or other body of public officers or a court or tribunal, without regard to the availability of appeal by stipulation for final order absolute, which in its opinion involves a question of law which ought to be reviewed by it.

However, CPLR § 5602(a)(2) specifically excepts from the Appellate Division's authority an order granting, or affirming the granting, of a new trial or hearing. After 1944, when the stipulation for judgment absolute was extended to special proceedings, the Appellate Division was without authority to grant permission to the agency to appeal from an order reversing and remitting the agency's determination and could not, because not a party aggrieved, review its own order after final judgment. Therefore, the 1952 revision was enacted limiting authority to grant leave to appeal in such cases to the Court of Appeals. *Matter of Zeronda v. Town Board of the Town of Halfmoon*, 37 N.Y.2d 198, 200–201 (1975). Accord: *Gottlieb v. Laub & Co.*, 82 N.Y.2d 457, 461 (1993) which dismissed plaintiff's appeal from an Appellate Division order affirming a supreme court order granting a new trial in the event plaintiff did not stipulate to the court's setting aside the jury's finding as against the weight of the evidence and plaintiff did not so stipulate, because the Appellate Division was not empowered to grant leave to plaintiff (see also *Matter of Loewy v. Binghamton Housing Authority*, 4 N.Y.2d 1036 [1958]). The Court of Appeals has, however granted leave to appeal on its own motion instead of dismissing an appeal as of right taken from a nonfinal order, *e.g. Spears v. Berle*, 48 N.Y.2d 254 (1979).

2. SOLELY BY THE APPELLATE DIVISION

a. From a Nonfinal Order of That Court

Constitution Article VI, § 3(b)(4) permits appeal to the Court of Appeals from a nonfinal determination of an action or special proceeding where the Appellate

Division certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the Court of Appeals, but limits review in such cases to the question or questions so certified and requires the Court of Appeals to certify to the Appellate Division its determination of such question or questions. CPLR § 5602(b) implements that provision, but excludes from its scope an order in a proceeding by or against one or more public officers or a board, commission, or other body of public officers or a court or tribunal granting or affirming the granting of a new trial or hearing. Also excluded is such an order whether made in an action originating in the Supreme Court, a county court, a surrogate's court, the family court, the court of claims, or an administrative agency (CPLR § 5601[c]), or an action originating in a court other than the listed courts or administrative agency (CPLR § 5602[b][2]), or where appellant has stipulated that upon affirmance, judgment absolute shall be entered against him or her (CPLR § 5602[b][2][iii]). However, the Appellate Division is not authorized to grant leave on a certified question when it had reversed Supreme Court's grant of judgment dismissing plaintiff's complaint, awarded plaintiff judgment as to liability, and remanded the case to Supreme Court for a determination of damages, for though limited in scope the trial ordered constituted a new trial. *Maynard v. Greenberg*, 82 N.Y.2d 913 (1994).

With respect to the limitation of review by the Court of Appeals to the question or questions certified, the Court of Appeals has stated that its "review does not extend beyond the certified question as it reads or is reasonably interpretable," *Price v. Price*, 69 N.Y.2d 8, 13, n. 1 (1986), and that its practice has been "so to interpret a certified question as to present a problem of law, not a review of a purely discretionary decision." *Bata v. Bata*, 304 N.Y. 51, 55 (1952). Moreover, CPLR § 5713 requires that the Appellate Division "certify the questions of law decisive of the correctness of its determination or any separable portion of it," that is whether the appellant would be entitled to a reversal of the Appellate Division's order "in the event the question were to be answered in the appellant's favor." *Patrician Plastic Corp. v. Bernadel Realty Corp.*, 25 N.Y.2d 599, 604 (1970).

CPLR § 5612(b) requires that on an appeal on a certified question the Court of Appeals presume that questions of fact as to which no findings are made in the order granting permission to appeal or in the order appealed from or in the opinion of the Appellate Division were determined in favor of the party who is respondent in the Court of Appeals. That presumption was added by Chapter 297 of the Laws of 1942 to the CPA section which became CPLR § 5612(b). It was added on recommendation of the New York Judicial Council after a study by that body noted confusion as to when the Court of Appeals would disregard

the question and decide only issues within its jurisdiction, dismiss the appeal because it involved or might have involved questions of fact or discretion, or remit the matter to the Appellate Division for determination of issues of fact or discretion. Seventh Annual Report of the Judicial Council, pp. 507–514; Eighth Annual Report of the Judicial Counsel, pp. 53–54. The same 1942 statute added to the CPA section which became CPLR § 5613 the requirement that the Court of Appeals, upon reversing or modifying a determination of the Appellate Division, when it appears or must be presumed that questions of fact were not considered by the Appellate Division, must remit the case to that court for determination of questions of fact raised in the Appellate Division, for otherwise the Court of Appeals would be issuing an advisory opinion, which is beyond its function (cf., *Cuomo v. Long Island Lighting Co.*, 71 N.Y.2d 349, 354 [1988]). It also added to the CPA section that became CPLR § 5614 the requirement that the Court of Appeals not only answer the questions certified but also direct entry of the appropriate judgment or order.

b. In a Civil Case Originating in Inferior Trial Level Courts

Constitution Article VI, § 3(b)(7) provides that in a civil case, except in a case directly involving construction of the State or Federal constitutions, an appeal can be taken from an order of the Appellate Division, where appeal to that court was from a judgment or order entered in an appeal from another court, only if the Appellate Division certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals. That provision is implemented by CPLR § 5602(b)(2)(i) and, as the Court of Appeals held in *Dukes v. Rotem*, 82 N.Y.2d 886 (1993), CPLR § 5602(b)(2)(iii) requires that if the Appellate Division order grants or affirms the granting of a new trial or hearing the appellant stipulate that if the Court of Appeals affirms the Appellate Division judgment absolute shall be entered against the appellant, accord: *Present v. Avon Products*, 93 N.Y. 2d 1032 (1999).

3. BY EITHER THE APPELLATE DIVISION OR THE COURT OF APPEALS

Constitution Article VI, § 3 (b)(6) provides for appeal from a judgment or order entered upon the decision of an Appellate Division that finally determines an action or special proceeding but that is not appealable as of right where the Appellate Division or the Court of Appeals certifies that in its opinion a question of law is involved which ought to be reviewed by the Appellate Division, and that such an appeal shall be allowed when required in the interest of substantial justice and may be allowed upon application to the Appellate Division, and in case of refusal, to the Court of Appeals, or directly to the Court of Appeals. In a civil

case application is by motion addressed to the Court of Appeals, but in a criminal case is made to an individual judge of the court, CPL § 460.20(2)(a).

Prior to January 1, 1944, the effective date of the voters' approval of amendment of Constitution Article VI, § 7(5) (now § 3[b][6], as proposed by concurrent resolution, Laws of New York 1943, p. 2585), the Court of Appeals could grant permission to appeal from a final determination of the Appellate Division only after that court had denied leave to do so. The 1944 amendment gave an appellant from such a determination the option of applying directly to the Court of Appeals or of seeking leave from the Appellate Division and, if leave was denied, of then applying to the Court of Appeals.

CPLR § 5602(a),which implements Constitution Article VI, § 3(b)(6), also authorizes the Court of Appeals and the Appellate Division to establish rules, and expressly requires that the Court of Appeals rules shall grant leave upon the approval of two judges of that court. The section provides in its subdivision (l) that permission to appeal may be granted in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims, an administrative agency or an arbitration, from an order of the Appellate Division which finally determines the action and which is not appealable as of right, or from a final judgment of such court, final determination of such agency, or final arbitration award when the Appellate Division has made an order on a prior appeal in the action which necessarily affects the final judgment, determination, or award; and the final judgment, determination, or award is not appealable as of right on the basis of dissent by two or more judges of the Appellate Division.

Subdivision (2) of CPLR § 5602(a) authorizes the granting of permission by either court from an Appellate Division order that does not finally determine a proceeding instituted by or against one or more public officers or a board, commission, or other body of public officers or a court or tribunal, but excepts from the authority of an Appellate Division an order granting or affirming the granting of a new trial or hearing. Moreover, as the Court of Appeals observed in a footnote to the *Zeranda* opinion, *supra* at p. 301, and reiterated in *Matter of Power Authority v. Williams*, 60 N.Y.2d 315, 323 (1983), the subdivision "accords the benefits of the section to every party to the proceeding if any one party comes within its ambit." To be noted also is CPLR § 5515(1) which states "that where an order granting permission to appeal is made, the appeal is taken when such order is entered." That section had eliminated the confusion arising from the reference in CPA § 591 as the appealable paper to both the judgment in an action and the Appellate Division order in a special proceeding as such. Although the Constitution had not then been amended to remove the distinc-

tion, the Court of Appeals in *Purchasing Associates Inc. v. Weitz*, 13 N.Y.2d 267, 275 (1963), found, somewhat ingeniously," no material conflict between the Constitution and the statute since the CPLR may properly be read as treating the order of the Appellate Division in such circumstances as the equivalent of a judgment for purposes of appeal." Note, however, *Whitfield v. City of New York*, 90 N.Y.2d 777 (1977), in which the Court held, without mention of the *Purchasing Associates* decision, that where the Appellate Division order granted a new trial on the issue of damages unless plaintiff stipulated to its reduced damage figure "and to the entry of an amended judgment accordingly," and the reduced judgment is affirmed. The defendant's motion to the Court for leave to appeal made after execution of the stipulation but before an amended judgment had been entered must be dismissed as not from a final judgment.

4. LIMITATIONS ON COURT OF APPEALS REVIEW

a. Exercise of Discretion

Constitution Article VI § 3(a) provides that, with stated exceptions not here relevant, "[t]he jurisdiction of the Court of Appeals shall be limited to the review of questions of law" and CPLR § 5501(b) states that "[t]he Court of Appeals shall review questions of law only, except where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered."

Note, however, that whether a lower court has abused its discretion may be a question of law. Thus in *Matter of Von Bulow*, 63 NY 2d 221, 225 (1984), the Court's footnote referring to CPLR 5601(a)(iii), the predecessor to § 5501(b), stated:

> This statutory restriction on our jurisdiction gives particular importance to how the order and decision of the Appellate Division are formulated. When the Appellate Division decision rests on abuse of discretion by the lower court as a matter of law, and the order so recites, a question of law may be presented for our review. When, however, the Appellate Division concludes that there was an improvident exercise of discretion below and substitutes its own discretion, and the order recites that the modification is made as a matter of discretion, then the issues will be appealable only where this court determines that a substantial question of abuse has been presented or the result reached is so outrageous as to shock the conscience. Recitals in the orders of the Appellate Divisions and articulations in their opinions which fail to recognize and implement this distinction may lead to confusion as to appealability or scope of review in our court.

See also *Matter of Kelly v. Safir*, 96 N.Y.2d 32, 37 (2001), stating that whether there has been an abuse of discretion as a matter of law "involves consideration of whether the impact of the penalty on the individual is so severe that it is disproportionate to the misconduct, or to the harm to the agency, or the public in general."

Nor is it sufficient that the Appellate Division denominates its reversal as "on the law" in a decision in which it reviewed unpreserved error of the lower court, the Court of Appeals construing the Appellate Division's having done so as an exercise of discretion and beyond the Court of Appeals' power of review, *Brown v. City of New York*, 60 N.Y.2d 893, 894 (1983); *Feinberg v. Saks & Co.*, 56 N.Y.2d 206, 210–211 (1982). However, the constitutional duty to determine whether in a defamation action actual malice has been established with convincing clarity requires the exercise by the Court of Appeals of independent judgment notwithstanding the statutory constraints on its review power. *Freeman v. Johnston*, 84 N.Y.2d 52, 56 (1994); *Prozeralik v. Capital Cities Communications*, 82 N.Y. 2d 466, 474–475 (1993) (see *Mahoney v. Adirondack Publishing Co.*, 71 N.Y.2d 31, 39 [1987]).

When the Appellate Division has reviewed all of the relevant factors, however, its order permitting a class action to proceed in that form, *Weinberg v. Hertz Corporation*, 69 N.Y. 2d 979, 981 (1987), or denying class action status, *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43 (1999), is subject to review as to whether the Appellate Division abused its discretion as a matter of law in so doing. Mere conjecture, surmise, or speculation is not enough, *Cummins v. County of Onondaga*, 84 N.Y.2d 322, 325 (1994) (as to whether decedent was conscious following an accident as the basis for a claim for conscious pain and suffering). To raise any substantial question of abuse as a matter of law, either the results must be so outrageous as to shock the conscience or there must be extraordinary circumstances, factual or procedural, from which it might be concluded that there is a reasonable and substantial likelihood that on full consideration the Court will hold that there was an abuse of power or discretion, *Patron v. Patron*, 40 N.Y.2d 582, 585 (1976) (holding not reviewable orders denying counsel fees in a matrimonial action). But when mutual mistake is established by uncontradicted evidence the Court of Appeals has power of review, *Lazarus v. Bowery Savings Bank*, 16 N.Y.2d 793, 795 (1965), though not when the courts below permitted amendment of defendant's answer to include defenses of set off and apportionment, there being no showing that the defenses plainly lacked merit or that plaintiff was prejudiced by allowance of the amendment, *Herrick v. Second Cuthouse, Ltd.*, 64 N.Y.2d 692, 693 (1984).

In three cases decided in one opinion—*Leader v. Maroney, Ponzini & Spencer*, *Scarabaggio v. Olympia and York Estates Company*, and *Hafkin v.*

North Shore University Hospital, 97 N.Y.2d 95 (2001)—the Court determined the standards by which a lower court may exercise its discretion. The issues in each case involved CPLR 306-b which authorized a trial court to extend the time for service of a complaint "upon good cause shown or in the interest of justice." The opinion noted that

> the interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant.
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> . . .
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> The statute empowers a court faced with the dismissal of a viable claim to consider any factor relevant to the exercise of its discretion. No one factor is determinative—the calculus of the court's decision is dependent on the competing interests of the litigants and a clearly expressed desire by the Legislature that the interests of justice be served.

In each of the cases reviewed in the opinion the Appellate Division had divided three to two. In *Leader* the plaintiff's attorney was unaware of the change in CPLR 306-b that discontinued the prior version which would have given plaintiff an automatic new 120 days for service, plaintiff showed that his cause of action was meritorious, and defendant made no showing of prejudice. The Court affirmed the Appellate Division majority stating that "[w]e discern no abuse of discretion here." In *Scarabaggio*, the process service failed because defendant had apparently relocated but the server did not notify plaintiff who proceeded as if service had been made. When the error was discovered plaintiff moved for an extension of time, within two months after expiration of the statute of limitations and one month after the 120-day period. Defendant made no showing of prejudice, and there was some evidence in the record that it had actual notice of the action. The Court affirmed the Appellate Division majority stating that it had correctly affirmed the trial court's extension of time to serve. In *Hafkin* the Appellate Division majority concluded that an extension of time was not warranted. The Court affirmed noting that the Appellate Division had weighed all relevant factors, that though limitations had expired plaintiff offered

no explanation of their failure to serve defendant after commencement of its earlier action or any excuse for their eight months' delay in moving to extend their time for service after the 120-day service period expired, and did not assert that they were unaware of the amendment of CPLR 306-b, even though they had an opportunity to put relevant evidence on the record. Moreover, defendants had no notice of plaintiff's claims for nearly three years after their accrual, leading to an inference of substantial prejudice.

As pointed out in *Siegel's New York State Law Digest* No. 504:

> No single factor is decisive. It is the aggregate of the ingredients that must be looked to. For example, the fact that the statute of limitations has by now expired on the claim, which is among the things the Court lists for permissible consideration, can't by itself mandate an extension of the 120-day service period, or every case would be preserved on that showing alone. But a factor would be the length of time that has expired after the statute did. Not listed but apparently also relevant would be how close the plaintiff let the case come to the end of the statute of limitations before even purporting to commence the action.

With respect to review of a decision of an administrative board, the Court of Appeals can decide as a matter of law what inferences shall be drawn "only where the circumstances admit of only one inference," *Matter of Rumsey Manufacturing Corp.*, 296 N.Y. 113, 118 (1947); but where there is relevant evidence before the agency that a reasonable mind might accept as adequate to support its conclusion, its findings must be accepted; *Matter of Stork Restaurant v. Boland*, 282 N.Y.256, 274 (1940); that is to say whether the evidence "is so substantial that an inference of the existence of the fact found may be drawn reasonably" from it; *300 Gramatan Ave. Associates v. State Division of Human Rights*, 45 N.Y.2d 176, 181 (1978).

Similarly with respect to a matter tried before a jury it can be concluded as a matter of law that a jury verdict is not supported by sufficient evidence only if "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the trial evidence," *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499 (1978), but if the Appellate Division reached its conclusion without review of the facts, the Court of Appeals must, in view of the constitutional limitation on its review of the facts, remit to the Appellate Division for its review of the facts, at 500. "However, in view of the state constitutional guarantee of the right to trial by jury . . . the Appellate Division may not, in a case tried by jury as of right,

grant a final judgment based upon findings contrary to those of the jury." *Martin v. City of Albany*, 42 N.Y.2d 13, 19 (1977).

b. Mootness

Black's Law Dictionary (7th ed.) defines the mootness doctrine as "[t]he principle that American courts will not decide moot cases—that is cases in which there is no longer any actual controversy." It "is a doctrine related to subject matter jurisdiction and thus must be considered by the court *sua sponte*."*Matter of Grand Jury Subpoenas*, 72 N.Y.2d 307, 311 (1988), *cert. denied* 488 US 966, for the Court does "not decide mere abstract questions from the determination of which no practical result can follow." *People ex rel Geer v. Common Council*, 82 NY 575, 576 (1880).

Typically an action or proceeding has been held mooted when the voters rejected a plan of reapportionment which the proceeding sought to have declared invalid, *Town of Greenburgh v. Board of Supervisors*, 23 N.Y.2d 732 (1969), and when, after determination of the court below, the position of supervisor of education to which petitioners sought reinstatement was lawfully abolished due to budgetary considerations, *Sedita v. Board of Education*, 42 N.Y.2d 827 (1977), or when pending appeal from the Appellate Division's ruling in favor of the Westchester County Clerk in his proceeding to annul the transfer of authority under Vehicle and Traffic Law Section 205(1) from the County to the Department of Motor Vehicles the Legislature amended that subdivision to exempt Westchester County from its provisions, *Matter of Spano v. O'Rourke*, 59 N.Y.2d 946 (1983).

Though prior to the decision in *Matter of Hearst Corporation v. Clyne*, 50 N.Y.2d 707 (1980), the exception to the mootness doctrine was unclear, that decision stated the three common factors of the exception to be "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, *i.e.*, substantial and novel issues," *id.* at 714–715, accord *Matter or Rodriguez v. Wing*, 94 N.Y.2d 192, 196 (1999). In the *Clyne* case respondent Clyne, a judge of the Albany County Court, had closed his court during suppression hearings in a criminal case and refused a request by the news media for a transcript of defendant's plea proceeding, but had furnished the transcript to petitioners before the Article 78 proceeding was commenced. The Court held that "an appeal will be considered moot unless the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment." *Id.*, at 714. It held the appeal moot and not of a character which should be reserved

for review and, therefore, dismissed the appeal, solely on the ground of mootness, because two recent decisions of the Court had declared the underlying principles relating to when pretrial proceedings could be closed.

When a party will be directly affected by determination of the appeal is illustrated by the decisions in *Matter of Bickwid v. Deutsch*, 87 N.Y.2d 862 (1995); *Matter of Rochester Telephone Corp. v. Public Service Commission*, 87 N.Y.2d 17 (1995); *Matter of George L*, 85 N.Y.2d 295 (1995); *Matter of Williams v. Cornelius*, 76 N.Y.2d 542 (1990); and *Matter of Grand Jury Subpoenas, supra*; see also *Community Board 7 v. Schaffer*, 84 N.Y.2d 148, 154 (1994); *Matter of Codey*, 82 N.Y.2d 521, 527 (1993). *Bickwid* concerned an accountant who as a result of his testimony as an expert witness was held in civil contempt and had served forty-eight days in jail. The Court held that though the jail time had been served the case was not moot because the contempt adjudication could be used in future cases in which he testified to attack his credibility and thus jeopardize his reputation and his means of earning a living. A similar conclusion was reached in *Matter of Williams, supra*, involving criminal contempt, although petitioner had been released from jail prior to completion of the sentence imposed. *Matter of George L, supra*, held the appeal by petitioner, a mentally disturbed individual who was released from confinement after having been found to be no longer dangerous but was designated a "track 1" defendant, not moot because that designation affected his status in all future proceedings concerning his commitment, but *cf. Matter of Boggs v. New York City Health and Hospital Corp.*, 70 N.Y.2d 972 (1988), in which the mentally disturbed petitioner's release from confinement apparently involved nothing similar to *George's* track 1 designation and the Court dismissed her appeal as moot because the trial judge's finding that she was not shown to be a danger within the meaning of the governing statute more nearly comported with the weight of the evidence. *Rochester Telephone* ruled that though a joint stipulation resolved the immediate issue of the authority of the Public Service Commission to rule concerning a royalty imposed upon petitioner, a live controversy remained as to the authority of the Commission to impose a royalty on all regulated utilities, and in *Matter of Grand Jury Subpoenas, supra*, the Court refused to dismiss the appeal because the Union's membership lists remained under control of the Assistant District Attorney and continued to be used by him in the investigation. But in *Matter of Dreikausen v. Zoning Board of Appeals of the City of Long Beach*, 98 N.Y.2d 165 (2002), the Court dismissed as moot the appeal of litigants seeking to upset the Board's grant of a variance pursuant to which the property owner had demolished buildings and made improvements to the property. The opinion held the issue moot, there having been substantial completion of the project, because of the challengers' failure to seek preliminary injunctive relief or otherwise pre-

serve the status quo to prevent construction from commencing or continuing during the pendency of the litigation.

Finally to be noted is that although in most cases the Court simply dismisses the appeal, *Matter of Boggs*, *supra*, it has in a number of cases remitted the case to the Appellate Division with directions to dismiss the *appeal* as moot, *Matter of Hearst Corp.*, *supra*, a direction the effect of which it had earlier declared in *Matter of Park East Corp. v. Whelan*, 43 N.Y.2d 735 (1977), "is not only to vacate the determinations heretofore made, but 'to erase the whole case from the books'" or remitted the case to the trial court with direction to dismiss the *action*. *Matter of Spano v. O'Rourke*, *supra*, or with direction to vacate its *judgment*, *Town of Greenburgh v. Board of Supervisors*, *supra*. The Court of Appeals has not made clear what, if any, difference there is in the noted directions.

c. Appealability

CPLR 5511 describes a permissible appellant as "[a]n aggrieved party or a person substituted for him" and permits such a party to "appeal from any appealable judgment or order except one entered upon the default of the aggrieved party." Aggrievement is jurisdictional and may be raised by the Court even though not raised by the respondent, *Matter of Niagara Mohawk Power Corp. v. Green Island Power Authority*, 94 N.Y.2d 891 (2000). To be aggrieved a party must be directly affected by the judgment or order appealed from. Thus in *Scopelliti v. Town of New Castle*, 92 N.Y.2d 944 (1998), an appeal from an Appellate Division order imposing sanctions upon appellant's counsel was dismissed on the ground that appellant was not aggrieved by that order. Whether the result would be different if appellant had agreed with counsel that appellant would pay any sanction imposed on counsel is not clear for it may be held that such an agreement is contrary to the purpose of the rule governing sanctions (see CPLR 8303-a and Rules of the Chief Administrator of the Courts, 22 NYCRR Part 130) although neither the statute nor the rules contain a specific provision to that effect. So also *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478 n. 2 (1984), held that the action against her having been dismissed on *forum non conveniens* grounds, defendant's cross appeal on the ground that the Court did not have jurisdiction over her was dismissed since, in view of the dismissal of the action against her, she was not aggrieved, and *Whitfield v. City of New York*, 90 N.Y.2d 777, 778 n* (1992), and *Tongue v. Tongue*, 61 N.Y.2d 809, 810 (1984), both held that a party who had stipulated to entry of judgment was not aggrieved within the purview of CPLR 5511 and, therefore, that his appeal was properly dismissed by the Appellate Division.

But an appellant who assigned his judgment to a third party with recourse was held to be entitled to appeal because the possibility of recourse by the

assignee gave appellant aggrieved status, *Tri-City Roofers v. Northeastern Industrial Park*, 61 N.Y.2d 779, 781 n* (1984). Likewise in *People v. Dobbs Ferry Medical Pavilion*, 40 A.D.2d 324, affd 33 N.Y.2d 584 (1973), the Court decided an appeal by doctors who were not parties to the action, since the judgment enjoined not only the defendant but also "any other person with knowledge of this injunction from operating an abortion clinic until a license had been issued." As summarized by the Court in *Parochial Bus System v. Board of Education*, 60 N.Y.2d 539, 544–45 (1983), a successful party is not a person aggrieved unless the judgment or order did not grant him complete relief, or if it was less favorable than the appellant sought in some affirmative claim, or if a substantial right was denied. That he did not prevail on all issues or he disagrees with the rationale on which the court below based its decision in his favor, or modified the lower court's judgment or order in a substantial aspect, does not constitute him an aggrieved party unless he can demonstrate actual aggrievement by the modification made, see also *Matter of Delta Air Lines*, 90 N.Y.2d 882 (1997), or as phrased in *Matter of Wilson*, 309 NY 1011, 1012 (1956) if appellant "lost something of considerable value." In *Wilson*, a surrogate court discovery proceeding tried before a jury determined the issues favorably to appellants, but on appeal to the Appellate Division that court ordered the proceeding dismissed on the ground that the Surrogate's Court lacked jurisdiction in a discovery proceeding to determine the issues submitted. The Court of Appeals held appellants aggrieved because although successful in the Appellate Division they "lost something of considerable value by that court's reversal and dismissal of the proceeding in that they are now deprived of the lower court determination in their favor on the merits." It is not clear, however, whether a party who prevailed below may argue for affirmance on a ground other than that on which the lower court based its decision. Compare *Mitchell v. New York Hospital*, 61 N.Y.2d 208, 213–14, n2 (1984), with *Matter of Vogeler v. Smith*, 48 N.Y.2d 974 (1979).

As above noted, however, CPLR 5511 excepts "a judgment or order . . . entered upon the default of the aggrieved party." Thus in *Bank of Montreal v. Predovan*, 71 N.Y.2d 844 (1988), and *Matter of Dietz*, 29 N.Y.2d 915 (1972), the Court dismissed a motion for leave to appeal from an Appellate Division order affirming the order of Supreme Court against the party moving for leave on the ground that an appeal does not lie from a default judgment entered upon an uncontested inquest. But a defaulting defendant admits only liability, not damages, and therefore may offer proof in mitigation of damages "if it involves 'circumstances intrinsic to the transaction at issue' in the plaintiff's complaint," *Amusement Business Underwriters v. American International Group*, 66 N.Y.2d