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## SOME FEATURES OF THE ORGANIZATION AND WORK OF THE COURT OF APPEALS

FRANK H. HISCOCK

As I become sufficiently separated from my membership in the New York Court of Appeals to look back at its organization and work in quite an impersonal and impartial way, I see certain features which, in my opinion, have especially contributed to its efficiency and reputation, some of which have been due to outside and even accidental causes.

At this distance we are not likely to appreciate how fortunate the state was in the character of the men who were selected as first members of the Court when its present organization became effective in 1870. While the organization of the Court prior to that time had in many respects been cumbersome, illogical and unsatisfactory, nevertheless it had brought into service judges who almost uniformly were of excellent ability and who sometimes were conspicuously learned and able. The names of Denio, Comstock, Selden, Paige and Bronson among others, who had sat in the former Court of Appeals, were still fresh in the minds of the Bar as those of great judges; and if the first judges selected for the reorganized Court had been men of mediocre ability or of anything less than high character, the new Court and its standards would have received a blow and a precedent have been set from which recovery would have been slow. As a matter of fact there was no basis for great optimism in respect of the character of the men who would be selected. The political party which was in the majority at that time was largely under the control of malign influences, and there was no reason to feel sure that these influences would not find some expression in the character of the men who were nominated for the new judgeships. Very fortunately, however, the result of the selections was far beyond what might have been reasonably anticipated. One has only to recall the names of the judges who were selected—Church, Allen, Peckham, Grover, Folger, Rapallo and Andrews—to appreciate that in average or aggregate ability of its members that membership of the Court has never been excelled. By this first composition, standards for membership in the Court were fixed from which it was difficult for political parties to escape. In fact, I can remember but one instance in which there has been nominated by one of the great parties for

a Court of Appeals judgeship a man whose character was assailed as unfitting him for the position; and it is fair to say that in this case the criticisms were based upon an act springing out of political strife rather than upon any personal or professional dereliction.

Of course, no one would assume that the substantial degree of immunity which the Court of Appeals has enjoyed from such widespread storms of criticism, vituperation and distrust as so frequently enveloped the Supreme Court of the United States in its earlier days has been due wholly to the fact that these first judges and their early successors tended by their high character and ability to create for the Court a firm and lasting popular confidence. These qualities were possessed also by Chief Justices Marshall, Taney and Chase, who were particular subjects of attack. The fact that our judges are selected by election rather than by appointment has undoubtedly strengthened them against the possibility of those popular attacks which so often threatened the reputation and usefulness of the Supreme Court in its early history. Then too the Court of Appeals has seldom been called on to decide cases involving questions of large political policy or consequence, such as often came to the Supreme Court in early days. But on the other hand, it has constantly been required to decide cases involving tremendous property interests and acute issues of an economic and social nature where, under favoring conditions, it would have been quite easy for the unreasonable, unthinking and demagogic assailant to stir up unfair criticism, abuse and distrust. No one can doubt that the membership of such men as Chief Judges Church, Folger, Andrews and Ruger and their associates in the early days was potent in establishing for the Court at the beginning a popular confidence which lasted and made such attacks unpromising.

In more recent years, the selection of judges of the Court in my opinion has been benefited by a constitutional provision which was designed for an entirely different purpose, and by the practice under which we have secured the advantages of both the appointive and elective systems of selecting judges. By an amendment of the constitution adopted in 1899 it was provided that:

“Whenever and as often as the Court of Appeals shall certify to the Governor that the court is unable, by reason of the accumulation of causes pending therein, to hear and dispose of the same with reasonable speed, the Governor shall designate such number of justices of the Supreme Court as may be so certified to be necessary, but not more than four, to serve as associate judges of the Court of Appeals.”

Of course, the purpose of this provision, as indicated on its face, was to enable the Court of Appeals to dispose of a gradually accumulating number of appeals. Other methods had been tried by which to accomplish this purpose, and still more proposed with fortunate rejections before trial. In the first days of the Court under its present organization, we had had a Commission of Appeals, and still later, commencing in the late 'eighties, we had had a second division of the Court. Both of these devices were aimed at keeping up with business when the Court with its regular membership was unable so to do; but both had proved more or less undesirable, sometimes resulting in absolutely conflicting decisions and frequently giving rise to more or less unfortunate maneuvering by counsel to get before one tribunal or the other as likely to be more sympathetic with the requirements of his case. Thus it was that the provision quoted above was adopted as a better means of accomplishing a desired result. I have no doubt that it was a much better method than a second division of the Court because, especially where the chief judge sat practically all of the time, it was possible to preserve a consistency and harmony in the decisions of the Court which had not been proved possible where there were separate organizations. In questions of mere practice, it often is not of any particular importance which way the question is decided, but it is important that there should be uniform decisions so that counsel may know what course to pursue.

But the interesting fact to which I wish to refer is that this provision not only worked fairly well in accomplishing the purpose for which it was designed, but it accomplished other things which were of great benefit to the Court. As I have said, it resulted indirectly in the application of both the appointive and elective systems in the selection of judges for the Court of Appeals. The original assignment of a Supreme Court justice to the Court was made by the governor, who was uniformly influenced by the advice of members of the Bar and by public opinion to select some justice who had done satisfactory work in the Supreme Court and who, therefore, might be expected with experience to become a useful member of the Court of Appeals. In this way the benefits of an appointive system were secured. Then, when a vacancy occurred in the regular membership of the Court, political parties, in making their nominations, were quite apt to consider the judges who had had the experience of sitting in the Court by assignment and to select them for permanent positions if their services had been acceptable, thus preserving the benefits and checks of the elective system. That this practice was quite universally followed is evident from the fact

that when Judge McLaughlin and I retired from the Court in December, 1926, all but two of the members of the Court had originally served as auxiliary judges by assignment, and the other two members, although coming into it by election as regular members instead of by original assignment, had been Supreme Court justices—so that there was the quite remarkable situation that all seven members of the Court had originally been Supreme Court justices and had done more or less trial work as well as, in most cases, appellate work in that court.

It undoubtedly is a matter of much advantage and benefit to an appellate judge that he should have had some service as a trial judge. If no other benefit resulted, and others certainly do result, it would be a helpful check on an appellate judge reviewing the work of a trial judge to be reminded by his own experience that the latter often has to decide perplexing questions on the minute without examination and frequently errors which he may commit do not exert the slightest influence on the result of a trial. It is easy for an appellate judge who has never had any experience in trial work, reviewing a case in the calm and unhurried deliberation of his chambers or of a consultation room, to become impatient with some fairly evident trial error and declare for reversal. Occasionally these errors are pretty bad and make one somewhat discouraged with the capacity of the judge who made them. But many can be excused and, in these days when the stress is so strong in favor of disregarding errors of a technical nature (a somewhat indefinite term), overlooked. There is no doubt that life in an appellate court does tend to separate a judge from contact with many if not most kinds of activity and, if he be not careful, to make of him something of a theorist and metaphysician. Appellate judges who are wise sufficiently resist this tendency so that they do not by any means cease to be "human," as is the frequent accusation. But certainly there is not doubt that one antidote to any such disposition in appellate work is furnished by experience with and observation of human nature and practical considerations in the administration of justice which a judge has in trial work. The popular belief that a certain amount of such work is needed to prevent an appellate judge from becoming a little theoretical and impractical in his work was abundantly evidenced by the long struggle with Congress which the Supreme Court of the United States, overburdened with appellate work, was obliged to carry on before it was able to secure relief for its members from the circuit work which Congress considered quite essential to the wisdom and proper attitude of the Court towards questions coming before it. It was urged as an objection by senators opposing this much needed relief

that exemption from this class of work would result in members of the Court "not mingling with the ordinary transactions of business, . . . not seeing the rules of evidence applied to the cases before them" and "becoming philosophical and speculative in their inquiries as to law."

Of all judges now dead with whom I sat during my twenty-one years of membership in the Court,\* Chief Judge Cullen was the outstanding figure. It was a great experience to sit under him for eight years. There is no need to dwell at any length on his splendid character as a man, citizen and soldier and his great learning and ability as a lawyer and judge. His opinions, spread through so many volumes of reports, are convincing evidence of the latter qualities. But they are not complete evidence of it. No one can fully appreciate the learning and ability and contributions to our jurisprudence of such a man as he was without having sat in consultation with him. A prevailing opinion is the deliberate and carefully considered expression of the views which have been adopted by the court, upon which the judge writing it spends thoughtful and sometimes prolonged labor, and in which he may display ability and learning. But, nevertheless, the views which are there expressed have been formulated in a consultation where there may have been sharp differences and much discussion resulting finally in a unanimous or divided decision; and it was in these consultations that Judge Cullen displayed a wonderful readiness and accuracy in analyzing questions under discussion and great ability and good judgment in bringing them to a conclusion. These qualities could not be fully reflected in a later opinion. He combined to a remarkable degree a memory of cases and an acquaintance with the fundamental principles of our jurisprudence—by no means a universal combination.

I have often debated with myself the interesting question whether, if he had remained in the Court, Judge Cullen would have been able or willing to adopt the more liberal interpretation of the constitution which has been followed during recent years by the Court to the end of upholding the validity of legislation adopted for the avowed purpose, especially, of bettering industrial and social conditions. No one can doubt that he was broad-minded, liberal and progressive in carrying out the spirit of remedial legislation where no constitutional obstacle arose. No better evidence of this could be found than the opinion written by him in the case of *Fitzwater v. Warren*,<sup>1</sup> in accordance with which the Court held that an employer would not be allowed to defeat the aim of legislation requiring safeguards on certain

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\*January 8, 1906 to December 31, 1926. [Ed.]

<sup>1</sup>206 N. Y. 355, 99 N. E. 1042 (1912).

dangerous machinery by invoking the defense of assumed risks against an employee who had been injured by the failure to provide protection, and by which decision the Court quite directly overruled prior ones. But the former Chief Judge had such convictions in respect of the interpretation of the constitution and was so sternly opposed to too great interference with personal rights for the avowed purpose of accomplishing community welfare that I doubt very much that he would have been willing to accept as constitutional some of the legislation which has been upheld in recent years. He not only concurred in the opinion written by Judge Werner condemning the first Workmen's Compensation Act as invalid but in addition wrote a vigorously concurring opinion, in both of which there was strenuous denial of the theory now so commonly accepted that injury to a workman in the course of his work may be regarded as an incident and burden of the industry in which he is engaged and that compensation may be enforced against the employer even though the latter has been guilty of no negligence. With the views there displayed, he probably would never have been willing to give to the constitution that liberal interpretation which has resulted in upholding the validity of many laws passed in the exercise of the police power and which were regarded as reaching their climax in the enactment of the so-called Rent Laws adopted a few years since. Undoubtedly very many lawyers and laymen would have sympathized with his opposition to some of these laws.

As everyone who was at all acquainted with him knows, Chief Judge Cullen was not only stalwart of body, until in later years physical infirmities overtook him, but he was stalwart and confident of mind and not afraid to take responsibilities. The result of these latter qualifications was that he would occasionally dispose of some question in connection with the organization or work of the Court without those consultations with his associates, which have become a uniform order under his successors, and give to the members of the Court a real surprise. But they were always so satisfied with his judgment and had so much affection for him that they never resented this. I recollect well two of these occasions.

In 1913 the Court was utilizing the services of auxiliary judges in an attempt to dispose of its work and catch up with its calendar. One of these positions had become vacant and, as was his duty, the Chief Judge had set out to find some man to fill the position. He settled upon Justice Nathan L. Miller, then a member of the First Appellate Division, and he was so sure of the correctness of his selection that he deemed it unnecessary to consult with his associates. The first we knew of what was going on was when he

announced that Judge Miller was to be one of our associates and we were asked to sign the proper papers effecting his designation. Of course, Judge Miller's personality, reputation, ability and qualifications for the position were so fine and unquestioned that no one in the Court of Appeals felt it was necessary that he should have been consulted in the selection. But I have been told that Judge Ingraham, who was then presiding Justice of the First Appellate Division and who was quite as ignorant until the very end of what was transpiring as were we, did insist that grand larceny could be committed in respect of other things than ordinary personal property.

The other occasion arose in connection with the Sulzer impeachment trial. It had been a subject of considerable debate whether the auxiliary judges, then sitting in the Court of Appeals, were such members of it as would be entitled to sit in the Impeachment Court under the constitution. Having this in mind I, then being one of those judges, traveled in a somewhat leisurely way from Syracuse to Albany on the day the Court was to open its session, supposing that this question would be submitted to the full Court of Impeachment before the auxiliary judges took their seats, if indeed the decision should be in favor of their so doing. But this was not what happened. The Chief Judge had concluded that these judges were members of the Court for all purposes and that no discussion was necessary. So when I reached Albany I found an attendant and a cab waiting to hurry me to the Capitol in order that I would be in time to take my seat when the Impeachment Court convened. When I reached the consultation room and found the judges assembled, I explained to the Chief Judge that I had not hurried for the reasons which I have stated; but his only reply was to tell me to put on my gown and proceed with the other judges to take my seat in the Court—and that was the end of debate or question on that subject. The manner in which the Impeachment Court accepted without question the opinion of the Chief Judge on this question was but symptomatic of the confidence and respect with which not only the Court but the intelligent public at all times regarded his rulings as presiding officer throughout this long and historic trial which involved so much personal and political bitterness.

Two features of the methods employed by the Court in taking appeals and receiving arguments are, I think, very fortunate. As is generally known, cases are taken by judges in that Court by rotation, and after a long experience I feel very strongly that this is a better method than that of assignment of cases by the chief judge, such as is practiced in many other courts, including the Supreme Court of the United States. No one

need think that a judge of an appellate court does not continue to be human enough so that he appreciates the difference between a case with a voluminous record, complicated facts and questions of no particular or general interest and a case on the other hand which does involve interesting questions of general importance. While he does his duty and takes whatever comes to him, he finds one case interesting and an intellectual pleasure and the other one a piece of drudgery. It is difficult for me to imagine a chief judge endowed with so much tact and wisdom that in the assignment of cases he would not occasionally make some associate judge feel disappointed that he received some unattractive case and did not receive some more interesting one. And in addition it seems to me that the process of assignment might easily result in the development of specialists, which is the last thing that is desirable in an appellate court, where a case ought to receive the independent consideration and judgment of every member. For instance, if a case came before the Court involving questions of irrigation, patent rights, taxation or land titles, it would seem quite natural for a chief judge to send it to some member of the Court who had had special experience in cases dealing with those particular questions and equally natural for other judges unconsciously to think they might safely rely on the judgment of one who had become a specialist in that class of cases, and thus fail to exercise that independent judgment which litigants are entitled to expect from every member of an appellate court.

In the consideration of appeals, the Court of Appeals during my time has always been sympathetic to oral arguments. The time which its rules have allowed for such arguments has been liberal, and there never has been any disposition to curtail these arguments so long as counsel kept within the limits of the case and discussed questions in a way which would be helpful to the Court. Undoubtedly it must be said that considerable time is wasted in these arguments, due sometimes to lack of preparation for them and at other times to failure of counsel to present their arguments in a manner which will enable the Court to comprehend them fully. This latter feature in my opinion is oftentimes due to the fact that a counsel who is thoroughly saturated with the facts of his case fails to appreciate that it is new to the Court, and that the Court therefore, is not able to understand the bearing of some things which are said. Nevertheless, I am thoroughly in favor of oral arguments which are helpful if they do no more than intelligently advise the Court what a case is about, what the questions are and what the claims of counsel are in respect of those questions, leaving details to be filled out on examination of the written brief. I can think

of nothing which would add more to the monotony of work in an appellate court than a general custom under which counsel walked into the court room, filed their briefs and then walked out. Life in such a court is not very exciting at best, and any such practice as I have suggested certainly would not relieve the situation.

In connection with oral arguments the question has often arisen and been debated by members of the Court as well as of the Bar whether the custom of frequent and argumentative questions from members of the Court during an argument is helpful. The practice in the Court of Appeals has been rather against such course and in that respect decidedly in contrast with the one prevailing in some other courts. Of course, a certain amount of questioning from the Bench is inevitable. The two Unanimous Affirmance rules in the past undoubtedly made practice in the Court of Appeals rather technical and complicated. It has often been difficult for counsel to understand the extent to which the Unanimous Affirmance rule forbidding the consideration of evidence carried the Court, and it has been frequently necessary for the chief judge to interrogate counsel for the purpose of ascertaining whether proposed questions were arguable. In addition, a well directed question often enables a judge to understand the force and application of what is being said by a counsel who has inadvertently omitted to explain some feature of his case. But as I say, the question has been considerably debated whether it is advisable to go further and by frequent questions engage in what is really a discussion with counsel of the merits of their case. Personally, I have never thought that much was gained by doing this, but rather that a large percentage of questions of that character addressed from the Bench are rather barren of results. If the case is being argued by an intelligent and well-prepared counsel, he will cover the questions in his case in a much more orderly way if left alone than if interrupted; and if counsel is diffident, inefficient or ill-prepared, such frequent questions are more apt to confuse than to help his argument.

In considering some of the principal causes which have made for efficiency and wisdom in the work of the Court, one would be seriously incomplete if he failed to mention the thoroughness of consultations and the spirit of harmony and friendly co-operation which have prevailed. I can imagine no more thorough consideration than a case receives from every point of view as it passes from judge to judge around the now historic consultation table of the Court. If one judge has so focused his attention on some particular feature of a case that he is missing others, he is pretty sure to have his mental vision broadened and made more nearly perfect by his associ-

ates; not infrequently I have seen a prospective decision concurred in by five or even six judges corrected and reversed by the argument of the final one of two judges. The minds of seven men directed to the consideration and analysis of a proposition can fairly be accepted as a substantial guaranty against error. We might well abolish opinions were it the necessary alternative to preserving consultations. Then one appreciates more than ever as he looks back at a term of long and pleasant service in the Court how friendly and considerate his associates have been and how much this attitude has contributed to whatever success he may have attained. I again acknowledge the human element in judicial character and freely admit that it would seem to me to be difficult for a judge in consultation to listen with a perfectly sympathetic and receptive mind to the views of another judge with whom he did not have speaking terms and toward whose general attitude in the Court he had conceived an active and personal hostility. The natural reaction to an atmosphere of personal animosities and, on the other hand, the necessity for thorough consultations and co-operative harmony in an appellate court are so obvious that it seems almost commonplace to dwell upon them as a source of strength which has been especially existent in the Court of Appeals. We have been told, however, that these features are not always so prevalent as to be commonplace.