

THE SUPREME COURT

AS

An American Institution.

SHALL IT BE SUBVERTED IN NEW JERSEY?

BY

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THE SUPREME COURT AS AN AMERICAN INSTITUTION:

Shall it be Subverted in New Jersey?

The State Bar Association has proposed amendments to the state constitution for the purpose of substituting in place of the present Court of Errors and Appeals, an "independent" court, of the same name, to consist of five judges who shall sit in no other court. These judges, it is proposed, shall review the decisions of the justices of the Supreme court, of the Chancellor and Vice Chancellors and of other judges of inferior judicial rank. The sentiment for abolishing the present clumsy appellate court is nearly unanimous, but very few seem to consider that the plan now proposed disguises the subversion in this state of an ancient American institution of capital value, which had a long and historic growth in nearly all of the old colonies, has taken root and developed in every state of the Union, and everywhere in this country, except in New York, has surrounded itself with traditions which place it in the foremost rank of American institutions. Everywhere, except in New York and New Jersey, the "Supreme Court" is supreme within the judicial system to which it belongs.¹ Wherever the state to which it belongs has a colonial history, except perhaps in the Carolinas and Georgia, the

¹New York and New Jersey are the only states in the Union having a court of appeals *above* a "Supreme Court." In Maryland and Kentucky there is no court bearing the title "Supreme Court." The supreme court in those states is called the "Court of Appeals." In all the other forty-one states the court of last resort is called "The Supreme Court." Of those forty-one states only the following have Courts of Appeal (so named), whose opinions are reported. They are all inferior to the "Supreme Courts" of their respective states:

Indiana. "The Appellate Court of Indiana," created by statute in 1893. Thornton's Rev. (1897) § 1346.

Colorado. The "Court of Appeals," created by statute in 1891. Mill's Statutes, vol. 3, p. 316.

Tennessee. "The Court of Chancery Appeals," created by statute in 1895. Shannon's Code (1896), § 6312.

Kansas. "Court of Appeals," created by statute (1895). General Statutes (1897), vol. 1, p. 61.

Texas. "Courts of Civil and Criminal Appeals," created by constitution of 1876. Rev. Stat. (1895), p. 2.

Supreme court derives an honorable descent from a common law court of supreme judicial rank in colonial times. And in New Jersey there is only a seeming exception to the rule of the supremacy of the Supreme court; for the Court of Errors and Appeals, till within a few years when lawyers took the place of laymen on that bench, has been the Supreme court sitting under another name with the Chancellor added. The six laymen, who sat in the appellate court, may be laid quite out of account; for the decisions of that tribunal, with the rarest exceptions, were made by justices of the Supreme court, the laymen following their lead or neutralizing each others votes by their own division, in event of a division among the justices.

The proposed constitutional amendment gives authority to the Supreme court to sit in divisions at different times and places. This hint will surely be acted on as the population of the larger cities and the business of the court increases. And after the division begins it will not cease. Why should the nine members of the court assemble when there is no business to call them together in one place? It does not require much penetration to see that a court sitting always in two or three divisions, in different parts of the state, whose decisions are reviewed by other trained lawyers sitting in a higher court, is essentially a local and inferior court, and that the respect and confidence which it will inspire in the bar and in the public will be measured accordingly. The fate that has overtaken the Supreme Court of New York would, in such event, surely overtake that of New Jersey. Its ancient and honorable estate would perish. Is there any need for this sacrifice? In the judicial system of the nation, and in that of each of forty-three states, there is a satisfactory appellate system with a Supreme Court (in most cases historic, if the state is historic) at the head of it. We may have such a system in New Jersey, if we will.

A Supreme court, considered as an American institution, has, among others, two distinguishing characteristics, namely, its judges have supreme judicial rank within the judicial system to which it belongs, and it either is the oldest common law court of general supervising jurisdiction, or it derives an historic descent from the oldest and highest court of that kind, within the judicial system. Had an appellate court been created above, instead of below, the United States Supreme court, a few years ago, neither the latter nor its appellate superior would have been the traditionary American Supreme court; for the new tribunal, though having supremacy in rank, would have neither history nor tradition to touch the imagina-

lish courts.⁵ The General court, in which the governor and his "assistants" (council) sat as members, exercised all the judicial powers of the colony till 1639, after which the governor, deputy governor and assistants were made the "Court of Assistants" or "Quarter court," with appellate powers only.⁶ After the annulment of the colony's charter, in 1684, the "Superior court" was established by the ordinance of Andros, the Royal Governor, in 1687, in place of the Quarter court. From its decisions appeals lay to the Governor and council, and thence, in certain cases, to the King in council.⁷ The charter granted by William and Mary, in 1691, authorized the legislature to establish courts, reserving appeals from their decisions to the King in council. Several acts of the General court were passed to establish a judicial system in place of that erected by the questioned authority of the former governor, but were disallowed by the English Government.⁸ In 1699, however, legislation effecting this end was adopted and allowed to stand.⁹ This legislation established the "Superior court," consisting of a chief justice and four associate justices. There was no review of its decisions within the colony, but an appeal lay directly from its judgments to the King in council.¹⁰ This court has ever since that time been the court of last resort within the state. Its title was changed to "the Supreme Judicial court," the name it now bears, not by legal enactment but by usage, the term "Judicial" being used to distinguish it from the General court.¹¹

As the other New England colonies were offshoots of Massachusetts, they naturally transplanted its institutions, though in Connecticut and Rhode Island the small size, the extreme democratic spirit, and the fact that they preserved their original charter rights and the institutions organized under them, gave a somewhat different history to the development of the Supreme court in these states.

In Connecticut the "Fundamental Orders," adopted by the colony in 1638, provided for the election and the duties of "Magistrates" or "Assistants" "besides the Governour, wch being chosen and sworne according to an oath recorded for that purpose,

⁵ 1 Poore, Charters and Constitutions, 941.

⁶ Washburn's Judicial History, Mass., 26, 29.

⁷ Id. 94, 98.

⁸ 3 Palfrey History, New England, 127, 156.

⁹ 4 Id. 172, 174.

¹⁰ 3 Id. 156; 1 Acts and Resolves, Mass., 372, 373.

¹¹ Gray, "The Supreme Judicial Court," 13 Med. and Leg. Journal (1895), p. 225.

established by the General court, and consisting of the same officers.¹⁷ In 1747 the court was made to consist of a chief justice and four associates chosen annually by the legislature, and it was made the court of last resort within the colony, appeals till then having been allowed to the legislature.¹⁸ This court was succeeded by the "Supreme Judicial court," created by statute. (Rev. Statutes 1798, p. 140). The state government was conducted under the colonial charter till 1842, when the first constitution framed for the state vested the judicial power "in one Supreme court and such inferior courts" as the legislature should establish.¹⁹

The highest law court in the colony of New Hampshire was, as in her sister colonies, the "Superior court," and the first constitution of the state (1784) refers to it as existing.²⁰ In 1792 that court was the court of last resort, and it then consisted of a chief justice and three associates.²¹ In 1876 it was abolished and its jurisdiction was vested in the present Supreme court, the highest court of the state.²² The change was essentially a change in name only.

The peculiar nomenclature given to the judiciary of Massachusetts and thence derived to the other New England colonies is not found elsewhere, for none of the colonies south of Connecticut was settled from New England. All of these, except Virginia, began their histories as proprietary colonies, and the difference between the democratic and the proprietary rule,²³ and the consequent spirit of their institutions, were not without influence upon the development of their judicial systems. The appeal from the judiciary to the executive, as such, was the exception in New England; it was the rule in the middle and southern colonies at some time in their histories. The royal, or the proprietary governor and his council were to the colonial courts what the King and his Privy Council, or his great council—the House of Lords—were to the courts of England. The appeal in both cases had an historical basis in the conception of supreme power, rather than in that of judicial rank or

¹⁷ Bates, Rhode Island, p. 20.

¹⁸ 2 Arnold, History Rhode Island, 157.

¹⁹ Article X., Sec. I.

²⁰ 2 Poore, Charters and Constitutions, 1290.

²¹ 3 Belknap, History N. H. (Ed. 1812), p. 206.

²² Laws 1876, p. 573.

²³ For the legal conception, prevalent in England in the 17th Century respecting proprietary government, see Osgood, "The Proprietary Provinces," Am. Hist. Rev., Vol. II., III.

upon no other authority for the rest of the colonial period, though the governor's power to establish courts without concurrence of Parliament or the Assembly was much questioned.³¹ The first constitution of the state (1777) recognized the Supreme court as existing, and created above it "a court for the trial of impeachments and the correction of errors." The latter consisted of the president of the senate, (who was the lieutenant governor) the senators, the chancellor and the judges of the Supreme court.³² This was the old Court of Errors and Appeals of New York. It was continued without change till 1846, when the constitution of that year substituted for the old Appellate court a Court of Appeals of eight members, increased the number of justices of the Supreme court to thirty-two and required the latter to sit in divisions. For a time one-half of the judges of the Court of Appeals were justices of the Supreme court who sat above, for short periods, in rotation. Mr. Fowler says that the constitution of 1846 and subsequent legislation "established a new court designated a 'Supreme court,' or, as Mr. O'Connor states in his Address on the One Hundredth Anniversary of the Constitution, eight essentially local courts, and vested it or them with all the powers of the Supreme court."³³ Under later constitutional changes the Court of Appeals consists of nine members, and the "Supreme court" of seventy-three members sitting separately in eight judicial districts. There are also four "Appellate Divisions," consisting each of five justices (except in New York county, where there are seven) of the Supreme court sitting as an intermediate appellate tribunal to review the decisions of single justices and inferior courts.

The American institution which we are considering no longer exists in New York. The tribunal there called the "Supreme court" is differentiated from that institution by these marks: (1) Its judges are not of supreme judicial rank, for their decisions are reviewed by a superior court, in which they have no seat. (2) Its judges number seventy-three and no Supreme court in the country has more than nine members. (3) They never sit together; they act always as separate courts. It is, in effect, a collective name for a great number of local inferior courts. Neither does the New York Court of Appeals answer to the American institution under consid-

³¹ Id. 309.

³² 2 Poore, C. & C., 1337.

³³ Fowler, Id. 20 A. L. J., 168, Note.

of the judges of the Supreme court, the "presidents" of the several Courts of common Pleas and three other persons "of known legal ability."⁴² The court was abolished by statute in 1806 and its powers vested in the Supreme court,⁴³ which has ever since been the court of last resort. When the latter became overwhelmed with business a new court was erected for its relief, not above but below it. This tribunal, called the "Superior court," has an intermediate appellate jurisdiction, part of which is final.⁴⁴

The history of New Jersey has, from the beginning, been so intimately associated with that of its great neighbors, New York and Pennsylvania, that, for adequate comprehension, they need to be read together.⁴⁵ The early settlements west of the Hudson and east of the Delaware were under the jurisdiction of the Dutch government at New Amsterdam, and appeals from their local courts lay to the governor and council at that town.⁴⁶ When the Duke of York, in 1664, carved out of the enormous territory granted to him by his royal brother the piece which he handed over to Berkley and Carteret, under the name of Nova Caesarea, his conveyance did not purport to confer powers of government.⁴⁷ Later (1674) letters patent from the King, designed to remedy this omission, commanded the inhabitants "to yield obedience to the laws and government" established by Carteret,⁴⁸ and the Duke's confirmatory grant, in 1682, to the twenty-four proprietors purported to confer upon them the same powers which he had received from the King.⁴⁹ The "Concessions" of Berkley and Carteret (1664) gave to the provincial assembly the power, the proprietors concurring, "to constitute all courts,"⁵⁰ a power confirmed as to "Courts of Sessions and Assizes" by Carteret's "Explanation" of the Concessions (1674). The latter also contained a provision wherein lay the embryo of our present Court of Errors and Appeals, "and that all appeals," says the Explanation, "shall be made from the Assizes to the governor

⁴² Id. Vol. 3, p. 92.

⁴³ Purdon Abridgement, p. 258.

⁴⁴ Brightley's Dig. Sup. (1895), p. 2682.

⁴⁵ The history of the Supreme Court of this State has been told quite fully by Mr. Whitehead, "The Supreme Court of N. J.," 3 Gr. Bag, 355, 401, and by Mr. Keasbey, "Courts of New Jersey," 17 N. J. L. J., 131, 210, 260.

⁴⁶ Lewis, Id. 355; Winfield, Hist. of Hudson Co., N. J., p. 74.

⁴⁷ Leam. & Spicer, 8, 46.

⁴⁸ Id. 49.

⁴⁹ Id. 149; Gordon, Hist. of N. J., 50.

⁵⁰ Leam. & Spicer, 16.

civil cases.⁶⁰ In the same session a Court of Oyer and Terminer was created to try capital crimes.⁶¹ The Court of Appeals was reorganized as to its personnel and its jurisdiction enlarged to embrace original cases, civil and criminal, in 1699. An appeal was given by the latter act to the assembly.⁶² Upon the surrender of the government by the proprietors of East and West Jersey it became necessary, of course, to provide one system of courts in place of those of the two provinces. This Cornbury proceeded to do under the powers conferred upon him by his commission. The latter empowered him and his council "to erect, constitute and establish such and so many courts" as they should think fit,⁶³ and his instructions had directed "that appeals be made, in cases of error, from the courts" * * * "unto you and your council there," and thence to the King in council.⁶⁴ Cornbury, now Governor of both New York and New Jersey, issued his ordinance (not dated, but printed in 1704) establishing in the latter state the same judicial system, in substance, which had been previously set up in New York. Among the courts ordained was "a Supreme Court of Judicature" with the jurisdiction of the Superior courts of Westminster.⁶⁵ The governor and council heard appeals or writs of error from the Supreme court till the constitution of 1844 substituted the present Court of Errors and Appeals, consisting of the justices of the Supreme court, the chancellor, and six judges "specially appointed" for terms of six years, who, by a custom grown out of the traditional exercise of supreme judicial power by laymen holding executive office, were, till recently, rarely lawyers. Within a very few years, however, our governors have tried the experiment of appointing such lawyers as could be induced to accept the underpaid employment.⁶⁶

No great change has been made in the jurisdiction or organiza-

⁶⁰ Id. 517.

⁶¹ Id. 520.

⁶² Id. 543.

⁶³ Id. 651.

⁶⁴ Id. 641; Gordon, Id. 56.

⁶⁵ Keasbey, "Courts of N. J.," 17 N. J. L. J., 211, where the ordinance is given in full.

⁶⁶ The six judges "specially appointed" are paid a per diem compensation. They may practice in other courts, but, of course, cannot appear as counsel in the Court of Errors and Appeals, nor sit in any case in that court in which they may, at any time previously have been retained. These circumstances preclude most lawyers of large practice from accepting the office. The court sits three times a year for two or three weeks at each session.

Supreme court, but as the new court had the same jurisdiction as the old the change appears to have been chiefly one of name. In 1897 a new constitution was adopted abolishing the Court of Errors and Appeals, and vesting the judicial power in "a Supreme court, a Superior court, a Court of Chancery" and other inferior courts. A chancellor, a chief justice and four associate justices hold all of these tribunals, but not more than three of them sit in any court except the Supreme court, in which all may sit (the chancellor included), save the judges whose decisions are under review. The Supreme court has original jurisdiction on writs of certiorari, prohibition and mandamus only.

The grant of Maryland to Lord Baltimore, in 1630, conferred all powers of government, expressly including the authority to establish courts,⁷⁰ and this power Baltimore delegated to his governor. The "Provincial court" apparently consisted of the governor and council till 1692, when the two bodies became distinct, though the same person was often a member of both.⁷¹ The first constitution (1776) changed the name of the Provincial court to that of the "General court," and established a "Court of Appeals," consisting of persons of "integrity and sound judgment in the law."⁷² All subsequent constitutions of the state have retained the Court of Appeals, and since 1805 appeals have been taken directly to it from the local courts, the appellate jurisdiction of the General court having been transferred to it then.⁷³ There has never been in Maryland a tribunal bearing the title "Supreme court;" none the less, the Court of Appeals is the true American Supreme court. It bears all the characteristic marks, including an historical descent from the supreme common law tribunal of colonial times. The General court has been abolished.

The governor and council, in Virginia, exercised supreme judicial power throughout the colonial period.⁷⁴ Their tribunal received the name of "The General court," in 1661-1662, and that title was retained till 1851, when the court was abolished. Its jurisdiction was original and appellate. By statute (1788) the General court was made to consist of five judges, and in 1779 the legislature

⁷⁰ I Poore, "Maryland."

⁷¹ Osgood, "The Proprietary Province," 3 Am. Hist. Rev. (1897), 45.

⁷² I Poore, 827.

⁷³ Id. 831.

⁷⁴ Doyle, "The Am. Colonies," Virginia, 110, 217, 267; Patterson, "The Supreme Court of Appeals," 5 Gr. Bag (1893), 310, 361.

except, I believe, Tennessee, which having been formed from a part of Georgia, adopted, at first, her old system of local courts without appeal. The state constitution of 1834, however, established the Supreme court, which is still the state court of last resort.^{77a}

Every state in the Union, except New York, has now the historic Supreme court. In Kentucky and Maryland its title is the "Court of Appeals," but it is the American institution of a Supreme court, for in each of these two states it is the court of last resort, as old as the state itself, and there is in the judicial system no older common law court having general supervising powers. In every state, other than the three last named and New Jersey, the court of last resort, is not only the characteristic American institution, but it bears the title "Supreme court," though in some cases explanatory words are added. In Virginia and West Virginia the words "of Appeals" are added; in Connecticut, "of Errors."

In no present judicial system of English-speaking people coming under my notice have I found so much that is both antiquated and intricate as in that of New Jersey. The change proposed by the Bar Association, far from being a step towards simplicity, adds to the list another altogether distinct court with five highly paid judges. Something may be learned by comparing judicial systems. New Jersey and Massachusetts have about the same area, 7,815 and 8,315 square miles, respectively. The former is divided into twenty-one counties, the latter into fourteen. New Jersey has a population of eighteen hundred thousand; Massachusetts of twenty-eight hundred thousand (census of 1900), and their wealth in 1890 was, for the former \$1,445,000,000, for the latter \$2,803,000,000. The following is a comparison of their judicial systems above the grade of municipal courts:

MASSACHUSETTS.			
<i>Name of Courts.</i>	<i>No. of Courts.</i>	<i>No. of Judges.</i>	<i>Compensation of Judges.</i>
Supreme -----	1	7	\$ 53,000
Superior -----	1	18	108,000
County Probate Court, } Held by same	14 }	16	44,980
County Insolvency Court. } Judge. -----	14 }		
	30	41	\$205,980

^{77a} The constitutions, including the first, of every state may be found in Poore's "Charters and Constitutions."

⁷⁸ The lists of courts and figures in the table for Massachusetts are taken from the Auditor's Report (1899), of that state, and from the "Manual for the General Court, 1900." The figures for New Jersey are taken from the State Comptroller's Report for 1899, except the salaries paid to judges of the county courts. The latter (except the circuit court judges) are paid by their respective counties, and I learned the amount of the salaries by writing to the judges themselves.

state, the judges sitting separately for trials, and together, in divisions of two or three, in different parts of the state, to hear arguments as some of the Supreme court justices did at general term under the late system in New York.

Under such a system the Circuit judges in most counties could, if required, do the work now done by the judges of the other county courts, and they would do it better, because higher abilities could be got for the Circuit bench than for the other county courts. Circuit court judges are paid more (except in two counties) and have a larger jurisdiction.

Such a plan would preserve the dignity and power of the Supreme court and would give us an "independent" court of appeals; for the appellate work would now, or very soon, leave its members no time for any other judicial duties. That has been the experience in Connecticut and it is fast tending so in Massachusetts. The plan would, indeed, make the Court of Chancery a subordinate tribunal, but so does the plan of the Bar Association. The latter proposes to make the five vice chancellors members of that court with judicial powers equal to those of the chancellor. What will become of the historic Court of Chancery, which always consisted of one supreme judicial officer, the chancellor, aided by assistants, when its powers are wielded by six chancellors, none of whom sits in the superior tribunal which reviews its decisions? Indeed, that ancient court seems everywhere to have fallen or to be fated to fall. In England it is now the "Chancery Division" of the "High Court of Justice," and is held, not by the chancellor, though he may, if he choose, sit in it, but by six lord justices of the "High Court of Justice." In only seven of the forty-five states of this Union does even the name survive.⁷⁹ And where the name still preserves its associations there is usually no chancellor, as in Vermont, or there are as in Tennessee, several. Only in New Jersey and in Delaware is the chancellor still a high state officer.

CHARLES H. HARTSHORNE.

Jersey City, N. J., December, 1900.

⁷⁹ The seven states in which there are courts called "Courts of Chancery" are, Vt., N. J., Mich., Del., Tenn., Ala., Miss.

Stimson, *Am. Statute Law*, Vol. I., § 555. The work was published in 1886. I have not looked to see whether any of the seven states have abolished the courts since.