BOOK REVIEWS

Jersey Justice. CARLA VIVIAN BELLO & ARTHUR T. VANDERBILT, III. New Jersey: Institute For Continuing Legal Education, 1978. Pp. 1, 221.

The last two decades have witnessed a great upsurge of interest on the part of legal writers and scholars in the history of American law and legal institutions.[1] This concern and interest are relatively new. As Professor White has pointed out:

> American legal history has been one of the most unfortunate stepchildren of the academic profession, disdained by historians and lawyers alike, struggling to establish itself in curricula and to disengage itself from antiquarianism, largely bereft of distinctive or distinguished scholarship.[2]

The volume under review[3] is a valuable, if modest, contribution to this literature.

It is an interesting collection of essays dealing with various aspects of the legal and judicial history of New Jersey from the late seventeenth century down to the present. By title, introduction and preface, it purports to be a history of the state's judiciary during this period. This it is not. But when the definitive history of the courts of New Jersey comes to be written, this volume will prove to be a mine of valuable information.[4] The book consists of a Prologue and Epilogue composed by the editors, together with eleven essays written by various authors between 1849 and 1962. These are, on the whole, well chosen.

The Prologue is a good but rather succinct review of the history of the courts of New Jersey during the three hundred year period

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[1] Examples of such work include G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT (1978); G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980); B. SCHWARTZ, LAW IN AMERICA (1974). Many of the most important publications of this kind are mentioned in the Foreword to G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT written by Professor Harold M. Hyman.

[2] G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 2 (1978).

[3] C. BELLO & A. VANDERBILT, III, JERSEY JUSTICE (1978).

[4] Thus, it is all the more regrettable that the book contains no index. It is to be hoped that this will be rectified upon the occasion of the next printing. The preparation of an index is a laborious and dull task, but the utility of this volume to scholars is seriously diminished by its absence.

with which the editors are concerned. The essays themselves present a varied if not totally comprehensive exposition of numerous judicial developments throughout the period. This brief review cannot discuss or even mention all of the events touched upon in the essays. Thus it may perhaps be appropriate to trace both the history of Chancery and the development of the doctrine of separation of powers. These subjects thread their way through successive essays, and although each is extremely important in the history of this state, I present the following observations with an easily verified personal interest in both of these areas.[5]

THE CHANCERY

A Court of Chancery seems to have been first mentioned in legislation passed by the East Jersey Assembly in 1675.[6] Although this statute did little more than mention the court, it was important in that the legislature opted, that early, in favor of the practice then existing in England of maintaining a separate court for the disposition of equitable matters.[7] This early Court of Chancery was presided over by the Governor.[8] In 1702, the proprietors of both East and West Jersey relinquished to Queen Anne all their claims to sovereignty, and there was henceforth the single Royal Colony of New Jersey. The famous Ordinance of Lord Cornbury for "Establishing Courts of Judicature in the Province of New Jersey" followed in 1704. Although this ordinance made no mention of the Court of Chancery, the omission was remedied in the following year by another ordinance designating the Governor and any three of his Council to act as the Chancery Court.[9] However, in 1714, upon the death of Anne, the Governor asserted the right to act as Chancellor without the Council, and in fact did so act for a very considerable period of time thereafter.[10] The Constitution of 1776 seems to have formalized this practice. It stated that "the governor, or, in his ab-

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[5] My interest in the Chancery court dates back to my many years of practice in addition to my years sitting as a Chancery Judge in this State. My views on the doctrine of separation of powers have been expressed in numerous legal opinions while an associate justice of the Supreme Court of New Jersey and are also the subject of a recent article written by me and published in this law review.

[6] C. BELLO & A. VANDERBILT, III, JERSEY JUSTICE 5 (1978).

[7] A separate Court of Chancery continued to exist in England until the Judicature Act of 1873 went into effect. 36 & 37 Vict. c.66.

[8] C. BELLO & A. VANDERBILT, III, JERSEY JUSTICE 5-6 (1978).

[9] This ordinance was issued by Lord Cornbury in March, 1705. It is reprinted in 1 KEASBEY, COURTS AND LAWYERS OF NEW JERSEY 206 (1912), and in 19 N.J. Eq. 578 (Appendix).

[10] 2 KEASBEY, COURTS AND LAWYERS OF NEW JERSEY 501-07 (1912).

sence, the vice president of the Council shall . . . be chancellor of the colony."[11] Probably at that time, the duties of Chancellor were not onerous, and could easily be performed by the chief executive in addition to his other duties. But by the middle years of the nineteenth century, things had changed. Thus, we find Governor Pennington, in 1840, recommending that the offices of Governor and Chancellor be separated, stating that "the increase of business in the Court of Chancery has been so great that it now requires the whole attention of the Chancellor and the nature of his duties call for permanency in office."[12] But not until the adoption of the New Jersey Constitution of 1844 was the Court of Chancery given constitutional status. The Chancellor then became a judicial officer appointed by the Governor, subject to confirmation by the Senate.[13]

In 1871, the Chancellor was first authorized to appoint a Vice-Chancellor to assist him in his duties.[14] By virtue of the Constitution of 1844 and the legislation passed in 1871, much, if not most, of the work of the Court of Chancery was performed by judges appointed to this office. At the time the Constitution of 1947 was adopted, there were ten Vice-Chancellors. Interestingly, the tradition of political bipartisanship always prevailed in the Court of Chancery with respect to the appointment of Vice-Chancellors.[15] Viewed in isolation, the Court of Chancery was an efficient and proud institution. But in its totality, the then-existing court system was the subject of some well-deserved criticism.

Writing in 1905, Charles H. Hartshorne said: "[o]ur system of courts at present is the most antiquated and intricate that exists in any considerable community of English-speaking people."[16] After describing the intricacies and complexities of our court system, Hartshorne placed much of the blame upon our dual arrangement of separate courts of law and equity. It is certainly true that upon occasion a litigant was shunted back and forth between courts of equity and law in an exasperating fashion and with much loss of time and money.

Many attempts to effect judicial reorganization had been made between 1844 and 1947, but none had met with success.[17] It

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[11] N.J. CONST. of 1776, § 8.

[12] Message to the Legislature, October 27, 1840, quoted in C. BELLO & A. VANDERBILT, III, JERSEY JUSTICE 19, 129 (1978).

[13] N.J. CONST. OF 1844, art. VII, § I, ¶ 1.

[14] L. 1871, c. 621, p.127.

[15] C. BELLO & A. VANDERBILT, III, JERSEY JUSTICE 152 (1978).

[16] *Id.* at 155-56.

[17] C. ERDMAN, THE MOVEMENT FOR JUDICIAL REORGANIZATION IN NEW JERSEY, 1875-1935, 167 87 (1936).

seemed as if any effort to merge the courts of law and equity was doomed to failure. But this result was finally achieved—rather belatedly—by the judicial article of the 1947 Constitution, which provides as follows:

> [s]ubject to rules of the Supreme Court, the Law Division and the Chancery Division shall each exercise the powers and functions of the other division when the ends of justice so require, and legal and equitable relief shall be granted in any cause so that all matters in controversy between the parties may be completely determined.[18]

The method of merging the two courts was really the same as that employed in England by the Judicature Act of 1873. There, a single court was created called the High Court of Justice; one of its parts is called the Chancery Division. In New Jersey, a single court was created called the Superior Court; one of its parts is called the chancery division. It is a little misleading to say, without more, that the two courts—law and equity—have merged. It is true that judges in both the law division and the chancery division have equitable powers and may afford equitable relief. But a trial today in the chancery division varies little from a final hearing in the former Court of Chancery before a Vice-Chancellor.

SEPARATION OF POWERS

The mingling of judicial, executive and legislative powers in the colonial government of the late seventeenth century surely was to be expected.[19] The doctrine of separation of powers formed no part of English political thought before the time of Anne.[20] But by 1776, the doctrine was well understood and generally supported. It was odd, therefore, that the New Jersey Constitution of that year gave no recognition to it. As the volume under review notes:

> [i]n light of the colonial experience with abuses of power by royal governors, a central thread running through many of the revolutionary constitutions of the other colonies was the emphasis on keeping the executive, legislative and judicial branches of government separate and distinct, and, more specifically, on keeping the courts and the legislature free from executive manipulation. But the three

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[18] N.J. CONST. OF 1947, art, 6, § 3, ¶ 4.

[19] C. BELLO & A. VANDERBILT, III, JERSEY JUSTICE 5 (1978).

[20] J. Landis, *Statutes and the Sources of Law*, 2 HARV. J. LEGIS. 7, 9 (1965). This article first appeared in HARVARD LEGAL ESSAYS 213 (1934).

> branches of the new government in New Jersey remained thoroughly intertwined.[21]

This early failure to recognize the importance of a triadic division of governmental powers among the judicial, executive and legislative departments seems clearly to have been one of the principal, if not the most important, motivating impulse leading to the constitutional convention in the spring of 1844 which drafted the new Constitution of that year. As background to what was done in 1844, it must be borne in mind that before that date, all judicial appointments were made by a joint session of the legislature, and the upper house of the legislature, as a Court of Appeals, reviewed decisions of the Supreme Court.[22] The quality of this review may be suggested by the fact that "[a]t no time in its entire history from 1776 to 1845 did the Court of Appeals ever write an opinion."[23]

The Constitution of 1844 clearly created three discrete departments of government.[24] Almost identical language was incorporated in the Constitution of 1947:

> [t]he powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.[25]

In spite of this constitutional provision it is perhaps inevitable that clashes between the various branches have arisen in the past and will continue to arise in the future. It is hoped that resolution of these inevitable disputes will be made within the letter as well as the spirit of this clear constitutional mandate.

EPILOGUE

In the Epilogue which concludes this study, the editors point to two areas where they see a need for further effort in order to maintain the high position which the New Jersey judicial system holds among the states. These are the abolition of the county courts and improvement in disposing of its workload by the appellate division.

Since the Epilogue, the New Jersey Constitution has been amended to abolish county courts.[26] The demise of this last vestige

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[21] C. BELLO & A. VANDERBILT, III, JERSEY JUSTICE 18 (1978).

[22] *Id.* at 17, 122.

[23] *Id.* at 147.

[24] N.J. CONST. OF 1844, art. III, ¶ 1.

[25] N.J. CONST. OF 1947, art. 3, ¶ 1.

[26] N.J. CONST. OF 1947, art. 6, ¶ 4 (as amended 1978).

of political parochialism has finally brought about the fully integrated court system for which many have so long striven.[27] Likewise, the recent reforms largely the result of recommendations made by the Committee on Appellate Practice chaired by Justice Handler have brought the appellate division closer to the goal of providing efficient justice to all litigants.

However, the editors fail to mention a problem which is now emerging and concerns the Supreme Court itself. The New Jersey Constitution allocates four important responsibilities to that court. It must, as a court of last resort, decide cases and write opinions. This is an exercise of the judicial power. It must also administer the entire court system, promulgate and revise rules of practice and procedure for all courts in the state, decide who shall be admitted to practice law and what shall constitute infractions of professional conduct including deciding what penalties shall ensue for infractions. All of the abovementioned traditionally "non-judicial areas" are directly related to the quality and integrity of our court system and are properly within the supervisory power of the court. The difficult task facing the court at this juncture, however, is that all of this important work has to be accomplished at a time when its duties as a court of last resort are ever expanding. It is suggested that this problem be studied before it reaches crisis proportions.

In conclusion, what is significant about this volume is that it illustrates and emphasizes the lesson of history: "'[t]o preserve, it is necessary to reform.'"[28] The editors are of the opinion that "for a court system to stand still is for it to fall behind."[29] Of course this is true. But in the end, if our court system is to be adapted to the continuing changing demands placed upon it, what must be remembered by those involved in proposing and enacting changes is that all reform must have as its goal the striking of that sensitive balance between the efficiency of the system and the individual attention and careful deliberation that must be given to each case that comes within it.

*Worrall F. Mountain**

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[27] Much credit must be given former Chief Justice Richard J. Hughes for his tireless and unremitting efforts to achieve this long overdue judicial reform.

[28] C. BELLO & A. VANDERBILT, III, JERSEY JUSTICE 215 (1978) (quoting from Thomas Babington Macaulay).

[29] *Id.* at 205.

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