The Supreme Court of Delaware, 1900-1952

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On May 14, 1951, the Delaware General Assembly, by amending the state's constitution, created a supreme court composed of justices who only sat in that court. Between 1897 and 1951 the Supreme Court of Delaware consisted of those state judges who had not heard the case below. Thus Delaware was said to use the "left-over judge" system in its final appellate jurisdiction. Since the above-mentioned amendment the supreme court is manned by three justices appointed by the governor and confirmed by the state senate. These judges are not permitted to serve in the inferior courts.

To establish a tribunal of final appeal with personnel unattached to the trial courts was not easy in Delaware. The opposition to this change was obdurate and continuous. It was based primarily on the fact that any change contemplated in governmental arrangements in the state is met with deep suspicion by many segments of the population.

The history of judicial organization in Delaware reflects the toughness of the left-over judge system. In the state constitution of 1792 it was provided that a high court of errors and appeals should consist of the chancellor and the judges of the Supreme Court (which court sat in first instance in criminal and civil matters) and of the Court of Common Pleas. If any of these judges had rendered judgment or passed a decree in any cause before its removal to the Court of Errors and Appeals, he was not to sit on the appeal. With slight modification this system was continued by the Constitution of 1831. Under the original provisions of the present constitution, adopted in 1897, the personnel of the state's judicial system (excluding the registers' courts and the justices of the peace) consisted of a chancellor, a chief justice, and four associate justices. Judges who sat in the case below were prohibited from serving on the appeal. Whenever the Superior Court or the Courts of Oyer and Terminer and General Sessions felt that a question of law ought to be heard by the five law judges, they had the power to...
to direct that it be so heard. The five law judges then constituted the *Court-en-Banc*. The *Court-en-Banc* actually exercised original and final jurisdiction as by custom no appeals could be taken from its decision.  

During the first half of the present century the state judicial system followed fairly closely the traditional court organization in Delaware. At the bottom of the structure were the justices of the peace. Registers' Courts were established with appeals lying directly to the Superior Court, which court had a wide variety of civil matters in original jurisdiction as well as an appellate authority over rulings of administrative agencies, justices' courts, and the Orphan's Court. The higher criminal tribunals sitting in first instance were the Courts of General Sessions and of Oyer and Terminer. There was a separate Court of Chancery, presided over by the Chancellor, who in 1939 was given the assistance of a vice-chancellor.  

The Superior Court, the Courts of General Sessions and Oyer and Terminer were manned by the five state law judges sitting singly, doubly, or (as in the case in Oyer and Terminer) by three. Thus the Constitution provided for six men (later seven) who served in first instance in matters of law and equity, and who collectively constituted the state's supreme court vested with complete final appellate authority.

In spite of the fact that the judges on the Supreme Court were kept busy with the handling of routine matters in the lower tribunals, they were called upon to determine the law of the state. The record of their accomplishments in appellate jurisdiction during the past fifty years stands as a monument to the capability, fortitude, and sense of duty which have marked the members of the judiciary in Delaware since the early days of statehood.

From the standpoint of numbers of cases heard before the Supreme Court during the period between 1900 and 1950 it cannot be said that the judges were overworked. Over three hundred reported cases were heard during this time—two hundred from the law side and one hundred and twenty-five from equity. The average case load was a little over six each year. The greatest number decided in any one year was thirteen. By far the greatest number of cases handled in appeal was in contract and in torts. 81% of the cases appealed from the law courts were in this category; the next largest division was in criminal law, with a little over 10%. Questions arising from the authority of the state administrative agencies to make rulings constituted the remainder of the issues before the Court from the law courts. Approximately one-third of all appeals taken to the Supreme Court were

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5 Constitution of Delaware (1897), Art. IV, sec. 15.
6 Cf. Ownbey v. Morgan's Executors, 30 Del. 317. Here the *Court-en-Banc* is considered by Chancellor Curtis to be in a sense an appellate tribunal to which questions of law are sent by the Superior Court. "It is not a court of final review, and its decisions do not bind the Supreme Court."
7 The Vice-Chancellor was made a constitutional officer in 1945.
8 Additional courts have been created by the legislature. These include Courts of Common Pleas in New Castle and Kent Counties, Juvenile Courts in Kent and Sussex, a Family Court in New Castle, and a Municipal Court in the City of Wilmington. State judges do not sit in these courts.
from the Chancery Court. Cases concerning the constitutionality of statutes were not frequently before the Court. Of the two hundred reported issues appealed from the law courts during the first half of the present century, only twelve involved the doctrine of judicial review. Six times since 1900 has the Court overthrown an act of the legislature.

Interpretation of statutes as distinguished from determining their constitutionality was frequently before the Court. With the increase in the enactment of legislation of a technical nature occasioned by the development of public control in the areas of employment, commerce, and public utilities, the judiciary was required to give increasing attention to the meaning of the legislation passed by the General Assembly. During the last two decades of its existence the Court was frequently called upon to interpret the statutes in these areas of public policy making. In carrying out this important function the judges refused to pass upon the wisdom of the legislative enactment. The Delaware judiciary when sitting as a court of final appeal was loath to employ the subtle doctrine of substantive due process. For a statute to be declared unconstitutional it had to appear on its face to contravene a fairly explicit provision of the state's constitution. Although the fundamental law of Delaware contains a provision stating that no man shall be deprived of his liberty or property except by the "law of the land," this clause was not used generally as a means of substituting predilections of the judiciary for the decisions of the representatives in the General Assembly. Delaware was somewhat unique in this, and to a considerable extent this uniqueness can be ascribed to the fact that the legislature has been traditionally the chief exerciser of governmental power. The history of the development of legislative power has its beginnings in the split of the "lower counties on Delaware" from Penn's proprietary fief to the north. Throughout the early years of statehood the General Assembly was practically the fount of public authority. Under the Constitution of 1776, the General Assembly appointed the chief executive (president), a privy council, and together with the president it named the state's judges. With the revisions in the constitution in 1792, 1831, and 1897, the power of the legislature relative to that of the executive and the judiciary did tend to diminish—not, however, to the point that either the governor or the court became co-equal in the process of policy formulation. Recently there is evidence that the executive branch is beginning to play a dominant role in political decision making, but Delaware courts have consistently remained aloof from the policy forming aspects of governing. Legis-

9 Biger v. U.C.C., 43 Del. 553 (1947).
10 Standard Oil Co. v. Superior Court, 44 Del. 538 (1948).
12 Cf. Becker v. State, 37 Del. 454 (1936), and Hoff v. State, 39 Del. 143 which were decided in Superior Court and not appealed to the Supreme Court. In both instances statutes were declared invalid. Substantive due process was recognized in a recent decision by the present Supreme Court. See State v. Hobson, decided Oct. 18, 1951.
13 CONSTITUTION OF DELAWARE (1897), Art. I, sec. 7.
14 CONSTITUTION OF THE DELAWARE STATE (1776), Arts. 7, 8, 12.
relative supremacy throughout the 19th Century served as a basis for the continued refusal of the judiciary to inject its own preconceptions of rightness and political wisdom into the law-making process. It is not to be inferred from the above that the courts had no influence upon the creation of law. Much of the thinking done by the legislative assemblies during the first half of the present century was conditioned largely by the traditional acceptance of the common law as the basis of public policy formulation. Delaware is one of the few commonwealths which still may be referred to as a common law state. It is, of course, extremely difficult to assess the effect of this fact upon legislation, but that it has been influential is attested by the relative absence of statutory interference with rules governing contracts and torts. Much of the body of the civil law in Delaware has been developed by the courts. With the controlling groups in the body politic prone to continue with the common law as a basis of social control, especially in the area of *ex contractu* and *ex delicto* relations, the legislature has been partially eclipsed in the formulation of law.

The importance of the role played by the Delaware judiciary in the law-making process raises interesting questions concerning the personnel of the appellate bench. This paper cannot attempt a detailed treatment of the backgrounds, philosophies, and attitudes toward law of the men who sat on the high court during the period under study. It is possible, however, in a brief survey to cite a few facts as to the number of men who served, the geographical distribution of the judicial appointments, and the length of service.

Between 1900 and 1950, twenty-five men sat at various times on the Delaware Supreme Court. Prior to 1945 there were six state judges (including the chancellor). In 19% of the decisions rendered in law during the fifty year period, the Court consisted of the maximum number who could have heard the case, namely, five. Most of the cases heard before a five-man court were in the last five years. 38% of the cases were tried before four judges; 43% before three judges. Thus only three men formed the highest court in the state in the greatest number of cases heard on appeal.

In respect to the geographical distribution of the appointments and its effect upon the role of the Court in the making of law, some statistics may be helpful. Of the twenty-five judges serving, fifteen came from New Castle County, five from Kent and five from Sussex. The judicial term was twelve years, and the right of re-appointment obtained. Inasmuch as there had to be by law one resident judge in each county one might expect that there would have been a more equitable distribution. One of the reasons for the disparity is that turnover among the New Castle appointees was far greater than in Kent or Sussex.

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15 State *ex rel McVey v. Burris*, 20 Del. 3 (1902).
16 Delaware has enacted statutes relating, *inter alia*, to uniform sales, negotiable instruments, warehouse receipts.
The average length of service for the state judges between 1910 and 1950 was seventeen years.\(^6\) One judge served for thirty-three years, two for twenty-eight years, and one for twenty-four years. The minimum time spent on the bench by any one judge was two years. Five of the twenty-five judges and chancellors were reappointed.

Kent and Sussex judges outnumbered the judges from New Castle in 59% of the cases tried on the law side. There was an even number of "down-staters" and New Castle judges in 16% of the cases. Thus the state's highest law was in final analysis determined to a considerable extent by judges coming from the lower counties. The fact that 85.6% of all law cases heard by the Court originated in New Castle County was to a considerable degree the cause of the majority of appellate decisions being rendered by down-state judges.

It must not be assumed, however, that the judges from the down-state counties, when sitting in appeals, tended to reverse their New Castle brethren. Such a contention would be far from the fact. Of the law cases appealed from New Castle, 29% were overruled, and one-third of these were heard by an appellate bench on which judges from that county were in the majority. The judges serving on the old Delaware supreme bench were in many instances men known throughout the state before receiving their appointments, and they generally had the respect of the great majority of the articulate citizenry. There is no evidence of local bias or sectional prejudice in the work of the high court.\(^7\) The real significance of the fact that there was a majority of down-state judges rendering the decisions in final appeals is that the Delaware judiciary was truly a state-wide group. This fact in turn provided the opportunity for the development of a jurisprudence based upon the legal opinion from all sections of the state. The position held by judges in the minds of the legal circles in the state afforded a respectability which in many ways made Delaware unique among its sister commonwealths.\(^8\)

Among the advantages accruing from the left-over judge system was that the close association of the state judges sitting as a court of appeals not only was a prime factor in promoting a well-knit concept of law among the judges themselves but it also had the result of developing an easy transition for the trial lawyer when arguing a case on appeal. He knew at first hand the personalities of the judges before whom he was taking an appeal. The judge conversely was well informed concerning the varying abilities and tactics of the trial lawyers, and, thus would have a rounded view of the trial situation in first instance. Further a judge who sat in original jurisdiction would be apt to know at first hand the

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16\(^a\) This average is computed by including only those judges appointed during the period under study and who had the opportunity to fill out their terms of appointment. Those judges appointed after 1938 are not counted. The judicial term is twelve years.

17\(^\) There was persistent rumor that personality clashes among the justices did occur from time to time.

18\(^\) See statement of Hon. George B. Pearson, Jr., president of the Delaware Bar Association reported in the WILMINGTON MORNING NEWS, September 7, 1951.
circumstances surrounding the trial, especially in respect to the way in which it was conducted. He would in most cases have a clear conception of what went on at the trial level, and his action in appeals would reflect this knowledge.

Another advantage derived from the left-over judge system was that the chancellor, a man trained in law as well as in equity, almost always sat in appeals from the law courts. He thus brought to the Court a wide experience in the adaptation of law to social needs. This experience often was in the field of business and corporate arrangements, and inasmuch as many of the appealed cases dealt with commercial law, he was able to apply much of this wisdom gained from the proceedings in equity, where the impact of new economic institutions upon the law was felt most often.\(^1\)

One of the prevailing arguments in favor of the retention of the left-over judge system was that it saved the expense of maintaining a separate appellate judiciary. In 1931, when the first concerted attempt was made to establish a separate supreme court, the most used argument against the move was the one of expense.\(^2\) As late as 1951, when the amendment creating the present Supreme Court was being debated, the cost item was constantly advanced, even though the additional outlay for a separate court was not to be over $75,000 \textit{per annum}.\(^3\)

In addition to the contentions cited above it should be noted that the Constitutional Convention of 1897 in providing for the left-over judge system did not intend that many cases should be appealed. The provision that two judges were to sit in Superior Court when hearing appeals from the Orphan's Court, three judges to hear cases in Oyer and Terminer, two permissive in the Orphan's Court. Two judges sat in the Court of General Sessions. In civil matters, which were heard usually in the Superior Court, often with two judges sitting, the associate justice-at-large was to be associated with the resident judge in the county. The Constitution specifically denied appeals in certain types of cases heard by the Orphan's Court. Appeal to the Supreme Court was provided for in convictions of election fraud.\(^4\)

It was felt that by having a plural number of judges sit in first instance fair procedure and an even justice would be guaranteed without setting up an elaborate system of appeals. If a fundamental question of law did arise in any of the law courts in first instance, the case could be given to the \textit{Court-en-Banc}.\(^5\)

\(^1\) Delaware was indeed fortunate in having a man of Chancellor Josiah Wolcott's ability on its highest court. He was known throughout the country as a leading authority in equity. He participated in 62 decisions on appeals on the law side.
\(^2\) \textit{Every-Evening}, March 31, 1931.
\(^3\) \textit{Morning News}, January 25, 1951, February 3, 1951.
\(^4\) In these cases Superior Court was the court of last resort. State v. Harrington and Terry, 42 Del. 14 (1942).
\(^5\) \textit{Constitution of Delaware} (1897), Art. V, secs. 7, 8.
\(^6\) \textit{Ibid.}, Art. IV, sec. 15.
While some of the older members of the bar accepted the left-over judge system, there was a growing demand, first noticeable in the early 1930's, for a separate supreme court. The fact that Delaware was the only state without a separate final appeals bench was a constant source of irritation to many of the younger lawyers and students of the law. It was an often repeated argument that the old court could not handle adequately the increasing corporate litigation; that a high bench concerned exclusively with the appellate function was vitally necessary if corporations were to continue to use the state as their official home.\textsuperscript{25} The telling arguments against the left-over judge system centered about two main points. The first was that by not having a separate supreme court Delaware was denied the advantage of a high court which could set the legal tone of the state. There was no "appellate climate" in which the high judges could meditate upon the jurisprudential aspects of a case.\textsuperscript{26} While the state judges sitting as a supreme court unquestionably rendered able decisions, they were constantly harassed by the pressure of their work in the lower courts. As a corollary of this argument it was held that the lack of an appellate climate placed the judge sitting in appeals in the position of being just "another judge" as far as the attorneys before him were concerned. The very intimacy of lawyer and judge, mentioned earlier, led to the establishment of perhaps too close a contact between bar and bench. This situation was felt by many to be inimical to the maintenance of that aloof dignity which is necessary to a court of last resort.

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In retrospect it may be said that the job done by the members of the Delaware Supreme Court between the years 1900-1950 was of great significance to the development of the state's jurisprudence. From the standpoint of the influence of personality upon the course of the law, the Delaware judiciary during this period consisted of many outstanding men. The length of service was a factor in the intensity of that influence. The role which the chancellors played in the development of the law from their presiding positions in the Court helped give the law a certain impetus in the direction of flexibility.

The chief areas of jurisprudence in which the old court labored were three. The first was in the application of the common law to the cases involving contract and tort. Here the Court was confronted from the start with the problem of fitting the rigid rules of the common law to the needs of an expanding society.\textsuperscript{27} During the first decade of the Court's existence little effort was made to change the old rules. Rather the Court tended to cite from early English author-

\begin{itemize}
\item \textsuperscript{25} Every-Evening, January 12, 1931, February 2, 1931.
\item \textsuperscript{26} Instead of a litigant having the opportunity of trial in one court and then having the case heard afresh, at least on matters of law, by a completely different group of judges, he was actually being tried in first instance by judges whose colleagues would be sitting on the appeal if one were taken.
\item \textsuperscript{27} Model Heating Co. v. Magarity, 25 Del. 477 (1911).
\end{itemize}
ities in upholding the old law. As an example of this, the Constitution of 1897 contains a provision for the payment of condemnation money in cases involving the placing of security whenever appeals from judgment are taken. The Court, however, availed itself of the common law rules, and it would seem that the effort on the part of the Constitutional Convention of 1897 to eliminate the ambiguity of the common law rule in respect to security placements was not recognized.

The hold of the common law on the judicial thinking was somewhat loosened after World War I. In an en-banc decision in 1920 the judges declared that common law marriage was invalid in Delaware because the state had not accepted the common law rule respecting marriage! Here the legislative acts regulating marriage were considered as having completely crowded out the common law. While it appears that it took the Court quite a time before making such a decision (considering the ubiquity of the subject matter), the judges did speak out sharply against the interference of common law practices with legislative regulations surrounding the marriage relationship. In spite of the argument earnestly advanced that such a ruling worked a hardship on the offspring of unions not entered into formally, the Court said "the question is whether the interest of innocent children is paramount to the good of society." The Court went on to say that if hardship did arise, the remedy was to apply to legislature to validate the marriage and legitimatize the children!

In general, however, when a statute was alleged to conflict with the common law, the Court was careful not to read a repeal into the wording of the act, but to sift carefully the meaning of the legislature. Repeal of the common law by implication was not readily accepted, and where a settled policy or prerogative of government was involved, repeal by implication was something to be questioned severely.

Perhaps one of the most outstanding cases before the former Supreme Court respecting the substitution of common law practice by a ruling considered more in keeping with demands of modern business and social policy was that of Wilmington Housing Authority v. Fidelity and Deposit Co. Here the Court was asked to reject a long-standing Delaware rule which held that recovery is denied to persons other than those who are parties to a contract. Although, as pointed out in a vigorous dissent, the rule had been incorporated apparently in Delaware law by the Constitution of 1792 and had been consistently applied since

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29 Ibid., n. 6.
30 Wilmington Trust Co. v. Hendrixson, 31 Del. 306 (1921).
31 Ibid., at 323-4.
32 State v. Foote, 35 Del. 515 (1933). This was a decision by the Court-en-Banc.
33 43 Del. 381 (1946).
34 Third party beneficiary rule.
then, the Court was of the opinion that it should be modified and that the prevailing American doctrine permitting recovery by third parties be adopted. The Court felt it was not necessary to await legislative action in this respect but rather that it was the duty of the courts to overrule existing law if "reason and justice demand (its) repudiation."  

The second area in which the old Court found itself confronted with vexing problems was that of adjusting the legislative process to the requirements of the new state constitution (of 1897). The constitutional revision of 1897 was motivated in part by a deeply felt desire on the part of many segments of the population to amend some of the governmental practices obtaining prior to that date. In the field of legislation, for example, the practice of enrollment of bills was similar to that employed by the British Parliament in colonial times. The Constitution of 1897 attempted to bring Delaware usage more in line with that then existing among the American states. The language of the Constitution did not, however, express clearly the wishes of the members of the convention. The Court therefore was called upon for clarification. In an elaborate exposition of the relationship of the legislative body to the fundamental law of the state, the Court spelled-out the intention of the framers in these respects.

As another example of the problems involved in determining the relationship of legislative action to the Constitution is a case concerning the interpretation of the constitutional requirement that a statute contain in its title reference to a single subject matter and that the title explain clearly the content of the act. The case involved the constitutionality of an act classifying real estate transactions in the city of Wilmington. The Court declared that an act dealing with such a complicated matter as this might very well not be able to contain in its title complete reference to its contents, but that in spite of such apparent inadequacy the law would stand if it was apparent that it attempted to deal with one general subject and that it referred to this subject in its title even though the reference itself was general. Similar instances relating to the interpretation of legislative powers were frequently before the Court during the period 1910-1920. By the beginning of the second quarter of the present century the basic requirements of the Constitution respecting the legislative process had been fairly well determined.

In addition to adjusting the legislative process to the constitutional requirements the Court was often compelled to define the powers of the several state courts under the Constitution. Here the old common law procedure had to be reviewed in light of the statements of the new fundamental law in respect to

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85 Constitution of Delaware (1792), Art. VIII, sec. 10.
86 43 Del. 381 at 385.
judicial practice. In a case involving trial upon information instead of indictment before the Court of General Sessions, the Supreme Court declared that the substitution of information for indictment did not affect the jurisdiction of General Sessions. It was still a court of general jurisdiction, and the new process of accusation did not disturb the authority gained from the common law.\textsuperscript{89} Here the Court was blending the new judicial forms with the old and not letting procedural changes interfere with the operation of the established judicial structure in the rendering of substantive justice.

In a case\textsuperscript{40} in which the Court was asked to issue a writ of mandamus directing the Superior Court of Kent County, sitting as a board of canvass, to recount the vote in the county during the election of 1940, it was decided that the writ would issue even though the Constitution,\textsuperscript{41} in stating to which courts the writ could be directed, was not clear as to whether the members of the Superior Court when sitting as a board of canvass were the Superior Court. In a rigorous dissent Judge Rodney opposed the use of mandamus.\textsuperscript{42}

Whether the Supreme Court had the power to bring cases before it where appeal was not specifically provided for, as in divorce proceedings, was a question posed under the new Constitution. The Court refused to follow older practice and stated that in all cases involving "substantial justice" there must be an appeal to the highest judicial authority in the state.\textsuperscript{43} In 	extit{Garboctowski v. State}\textsuperscript{44} the Court held that appeals could not lie to the Supreme Court on a mere refusal of the trial court to direct a verdict, that such refusal can only come up as an exception in appeal from final decision in the court below. Here the Supreme Court refused to interfere in what it considered the proceedings rightfully assigned a trial court by the Constitution.

It was in the reconciliation of the power of the courts derived from the common law with the juridical requirements of the revised constitution that the old Delaware Supreme Court made its lasting contribution to the jurisprudence of the state. That this reconciliation was accomplished with a minimum of disturbance to the judicial operations attests to the craftsmanship of the Delaware judiciary.

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In spite of the odd arrangement of the old Delaware judicial structure the Supreme Court between the years of 1900 and 1950 was able to meet the jurisprudential needs of the state with a dispatch that few would have conceded possible without knowing the facts. Even though there was strong opposition to the con-

\textsuperscript{89} Godwin v. State, 24 Del. 173 (1910).
\textsuperscript{40} State v. Harrington and Terry, 42 Del. 14, (1942).
\textsuperscript{41} Art. IV, sec. 12.
\textsuperscript{42} This decision was modified in one of the first cases to be decided by the new Supreme Court in 1951. See State ex rel v. Wolcott and Carey, reported September 25, 1951.
\textsuperscript{43} Thompson v. Thompson, 34 Del. 156 (1929).
\textsuperscript{44} 32 Del. 387 (1923).
tinuance of the old Court, one cannot help feeling that something unique was taken from the state when the old court died. The former Supreme Court of Delaware was like an old oak. The more one looks at the leaves of the current year's growth he sees again the seedling nourished in the soil of the past. As ever, changes mark the circuit of man's time, but with each change there is a tearing of the tender threads holding him to his earlier habit. Thus it is with recent reorganization of the high bench in Delaware. The new court will undoubtedly continue to deal wisely and well with the problems arising out of the needs of society. The jurisprudence of the state will continue to flourish as it gets geared to the new machinery of the law. Law has a way of being continual and eternal, of caring little for the trappings of structure. Law resides in the minds of men, and as long as men of outstanding ability sit on the court of last resort, it matters little what might be the formal organization in which the ultimate appellate function is performed.