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INFORMATION.

(Filed February 17, 1937.)

NEW JERSEY SUPREME COURT.

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THE STATE OF NEW JERSEY, DAVID T. WILENTZ, Attorney-General, *ex rel.*, JOSEPH L. RODGERS, *Relator*, v. THOMAS D. TAGGART, JR., *Respondent.*	On Quo Warranto. Information.

20

Joseph L. Rodgers, the relator, an inhabitant, citizen and taxpayer of Atlantic City, County of Atlantic and State of New Jersey, who sues in behalf of said State in the name of David T. Wilentz, Attorney-General, with leave of this Court, according to the statute in such case made and provided, comes in his own person into the Supreme Court of the State of New Jersey, before the Justices thereof, at the State House at Trenton, New Jersey, on the 30 sixteenth day of February, 1937, and gives the Court to understand and be informed of the following facts:

1. Thomas D. Taggart, Jr., of Atlantic City, County of Atlantic and State of New Jersey, for

the space of one month and upwards, has unlawfully occupied, enjoyed and executed, and still does unlawfully occupy, enjoy and execute the powers and duties of the office of Recorder of the City of Atlantic City, New Jersey, and the liberties, privileges and franchises of the said office.

10 2. On the twenty-sixth day of March, 1936, the said Thomas D. Taggart, Jr., was, by a resolution of the City Commissioners of the City of Atlantic City, New Jersey, appointed Recorder of the said City, which appointment, according to said resolution duly passed, was to be effective as of March 17, 1936.

3. Pursuant to said resolution, the said Thomas D. Taggart, Jr., entered into the performance of his duties as Recorder of said city, said office being 20 that of a Judge of a Court of Record, and still does continue to perform the duties of said office in the City of Atlantic City, which is a city of the fourth class.

4. At a general election held in November, 1936, said Thomas D. Taggart, Jr., was elected as one of the Assemblymen from Atlantic County, and on Tuesday, January 12, 1937, took the oath as Assemblyman and took his seat as such in the General 30 Assembly of New Jersey and is now holding and exercising the offices of Recorder of Atlantic City, and Assemblyman from Atlantic County, at the same time.

5. By reason of the above facts, the office of Recorder of the City of Atlantic City, being that of a

Judge of a Court of Record, became vacant pursuant to Article IV, Section V, paragraph 3 of the Constitution of New Jersey (1844), as amended, which reads as follows:

> "No justice of the supreme court, nor judge of any other court, sheriff, justice of the peace, nor any person or persons possessed of any office of profit under the government of this State shall be entitled to a seat either in the senate or in the general assembly; but on being elected and taking his seat his office shall be considered vacant; and no person holding any office of profit under the government of the United States shall be entitled to a seat in either house."

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6. Incident to the powers and duties of the office of Recorder of the City of Atlantic City, the said Thomas D. Taggart, Jr., exercises the powers and duties of a Justice of the Peace in criminal cases by virtue of Pamphlet Laws of 1933, page 331, so that the said Thomas D. Taggart, Jr., is at the same time exercising the powers and duties of a Judge of a Court of Record, a Justice of the Peace, in criminal cases, and of Assemblyman.

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7. By reason of the above facts, the said Thomas D. Taggart, Jr., for the period of time aforesaid, has usurped, intruded into and unlawfully held and exercised, and still does usurp, intrude into and unlawfully hold and exercise, the office of Recorder of the City of Atlantic City, New Jersey, in contempt of the State of New Jersey, and to its great dam-

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age and prejudice against its sovereignty and dignity.

Wherefore, the said Joseph L. Rodgers, relator, for the State of New Jersey, in the name of David T. Wilentz, Attorney-General, desiring to prosecute in this behalf, prays the advice of the Court herein
10 in the premises, and for due process of law against the said Thomas D. Taggart, Jr., to be made to answer to the said State by what warrant he claims to hold, occupy, use, exercise and enjoy the aforesaid office of Recorder of the City of Atlantic City, New Jersey, and the liberties, privileges and franchises thereof.

EDWARD I. BAKER,
Attorney of Relator.

20

[ENDORSED]

Allowed this 16th day of February, 1937.

CHARLES W. PARKER,
Justice.
30 For the Court.

PLEA.

(Filed March 10, 1937.)

NEW JERSEY SUPREME COURT.

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THE STATE OF NEW JERSEY, *ex rel.*, JOSEPH L. RODGERS, *Relator*, v. THOMAS D. TAGGART, JR., *Defendant*.	On Quo Warranto. On Petition. Plea.

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Now, as yet of the term of January, in the year 1937, comes the said Thomas D. Taggart, Jr., by Bourgeois & Coulomb, his attorneys, and having heard the information read, he complains and under color of the premises in said information contained, he is greatly vexed and disquieted, and that by no means justly, because protesting that the said information and the matters therein contained are by 30 no means sufficient in law, and that he need not, nor is he subject by law, to answer thereto, yet for plea thereto he says that he ought not to be impeached or impeded by reason of the premises in said information contained; and denies that he has usurped, in-

truded into and unlawfully held and exercised and still does hold, usurp, intrude into and unlawfully hold and exercise the office of Recorder of the City of Atlantic City, in contempt of the State of New Jersey, and to the great damage and prejudice against its sovereignty and dignity; and says that the City of Atlantic City was incorporated by an
10 Act of the Legislature entitled: "An Act to Incorporate Atlantic City," approved March 3, 1854, Pamphlet Laws, p. 278, Section 2 of which Act is in the following language:

> "And be it enacted that there shall be and forever hereafter shall be in and for said city, one mayor, one recorder, who besides his duties as recorder shall in case of death, absence or disability of the mayor, have, hold and execute said duties annexed to the mayoralty" &c.

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and Section 21 of said Act is in the following language:

> "That the mayor, recorder and aldermen of said city, and each of them, shall have jurisdiction in all matters of a criminal nature and in all matters of a civil nature that the justices of the peace, or any of them, of Atlantic County now have or hereafter may have, such jurisdiction to be limited within the bounds of Atlantic
> 30 City, with full power to issue process, and hear, try and determine all suits at law of a civil nature," &c.

and further says that the City of Atlantic City, a municipal corporation of the State of New Jersey,

is governed by an Act of the Legislature, duly adopted by the voters of Atlantic City, prior to the year 1920, entitled: "An Act relating to, regulating and providing for the government of cities," approved April 3, 1902, Pamphlet Laws, p. 284; and further says that he was duly elected by the qualified voters of Atlantic County, a member of the Assembly of the State of New Jersey at a General 10 Election held on the 3d day of November, 1936, and duly qualified as such Assemblyman on the 12th day of January, 1937, and entered upon the duties of said office; that the office of Recorder of Atlantic City is a municipal office under Sec. 110 of said Act, p. 337; that pursuant to a resolution of the Commissioners of Atlantic City, he was duly appointed and qualified as Recorder of said City; said City having previously been advised by its attorney, learned in the law, that the appointment of a Re- 20 corder of said City did not conflict with Article 4, Section 7, Paragraph 3, of the Constitution of the State of New Jersey, as amended; the salary of such Recorder being fixed and paid by the City of Atlantic City.

Further answering, this defendant says, that Honorable Joseph A. Corio, after being duly elected Assemblyman from Atlantic County, qualifying and entering upon his duties as such Assemblyman in January, 1922, was on the 28th day of November, 30 1922, by resolution of the Commissioners of the City of Atlantic City appointed Recorder of said City, to fill the unexpired term of Honorable Clarence Goldenburg, and, thereafter, fulfilled the duties thereof; and in November, 1923, Joseph A. Corio

was again elected Assemblyman from Atlantic County, and qualified as Assemblyman in January, 1924, and, thereafter, on March 16, 1924, Joseph A. Corio, while a member of the Assembly, was re-appointed for a three-year term as Recorder of the City of Atlantic City, he having, without question or objection as to lawful right, performed the du-
10 ties of Assemblyman of the County of Atlantic and Recorder of Atlantic City simultaneously and continuously from the 28th day of November, 1922, until the expiration of his term of office as Assemblyman on December 31, 1924, receiving his pay as such Assemblyman from the State of New Jersey and as such Recorder from the City of Atlantic City.

That succeeding the Honorable Joseph A. Corio, as Assemblyman, Joseph Altman was elected and took the oath of office as Assemblyman for the
20 County of Atlantic in January, 1925, and, thereafter, was annually elected as such Assemblyman from the County of Atlantic until he resigned on the 30th day of June, 1935, and on the 28th day of March, 1929, while a member of the Assembly, was appointed as Recorder of the City of Atlantic City, to fill the unexpired term of the Honorable Joseph A. Corio, and, thereafter, was elected to the 1930 Assembly, and while a member of the 1930 Assembly, was reappointed Recorder of the City of Atlantic City, for
30 a term of three years, and, thereafter, was elected, while Recorder of the City of Atlantic City, to the 1931, 1932, and 1933 Assembly, and while a member of the 1933 Assembly, was re-appointed on March 17, 1933, for a three-year term as Recorder of the City of Atlantic City, and while Recorder of the

City of Atlantic City, was re-elected to the 1934 and 1935 Assembly, and continued as a member of the Assembly and Recorder of the City of Atlantic City until June 30, 1935, when he resigned as a member of the Assembly and as Recorder of the City of Atlantic City; that during the entire period from the time of his first appointment as Recorder on March 28, 1929, until his resignation as Assemblyman and as Recorder on the 30th day of June, 1935, he performed the duties of said two offices simultaneously, without question or objection to his lawful right, receiving his pay as Assemblyman from the State of New Jersey and as Recorder from the City of Atlantic City.

That at the November election, of 1934, this defendant was duly elected Assemblyman from Atlantic County, and took the oath of office as such at the convening of the Legislature in January, 1935, and was re-elected as Assemblyman at the November election, of 1935, for the year 1936, and again in November, 1936, he was elected as Assemblyman for the year 1937. On the 1st day of July, 1935, he was appointed by the Commissioners of the City of Atlantic City as Recorder of said City, to fill the unexpired term of the Honorable Joseph Altman, and on the 26th day of March, 1936, this defendant was re-appointed as Recorder of the City of Atlantic City, to be effective as of March 17, 1936, for a term of three years, and from July 1, 1935, fulfilled the duties of said two offices of Assemblyman and Recorder simultaneously, without question or objection as to his lawful right, until the date hereof, he receiving his pay as such Assemblyman from the

State of New Jersey, and as such Recorder from the City of Atlantic City.

That George Grimm was duly elected and qualified a member of the New Jersey Assembly during the year 1931, and during the time he executed the office of Assemblyman he was Recorder and executed the office of such Recorder of East Orange, a munic-
10 ipal corporation of the State of New Jersey, and executed the two offices simultaneously, receiving his pay as such Assemblyman from the State of New Jersey and as Recorder from the municipality of East Orange.

That during the year 1935, John McNaughton was Assemblyman of the State of New Jersey from Passaic County, and at the same time was Recorder of Pompton Lakes, a municipal corporation of the State of New Jersey, fulfilling the duties of the two
20 offices simultaneously, receiving his pay as such Assemblyman from the State of New Jersey, and as such Recorder from Pompton Lakes.

That Joseph T. Karcher was duly elected Assemblyman from Middlesex County during the year 1931 and 1932, and at the same time was Recorder of Sayreville, and fulfilled the duties of said two offices simultaneously, receiving his pay as Assemblyman from the State of New Jersey, and as such Recorder from the municipality of Sayreville.
30 That Edwin A. Carpenter was duly elected Assemblyman from Mercer County during the year 1933, and at the same time was Recorder of Lawrence Township, and fulfilled the duties of said two offices simultaneously, receiving his pay as Assemblyman from the State of New Jersey, and as

such Recorder from the municipality of Lawrence Township.

That the Honorable J. Edward Knight was duly elected Assemblyman from Monmouth County during the year 1935, and at the same time was Recorder of Neptune Township, and fulfilled the duties of said two offices simultaneously, receiving his pay as Assemblyman from the State of New Jersey, and as such Recorder from the municipality of Neptune Township. 10

That Philip D. Elliott was duly elected Assemblyman from Essex County during the years 1920 and 1921, and at the same time was Recorder of Caldwell, and fulfilled the duties of said two offices simultaneously, receiving his pay as Assemblyman from the State of New Jersey, and as such Recorder from the municipality of Caldwell.

Further answering, this defendant says, that Roy Stewart, while a member of the State Senate from Camden County, in 1929, 1930 and 1931, was at the same time Mayor of the City of Camden, in Camden County, and as Mayor of said City was invested by law with the authority of a Justice of the Peace, and with authority to hear and determine charges against alleged violators of City Ordinances; and fulfilled the duties of both offices simultaneously, receiving his pay as such Senator from the State of New Jersey, and as such Mayor from the City of Camden. 20 30

That the Honorable John J. Rafferty, while a member of the New Jersey Assembly from Middlesex County, in 1933 and 1934, was at the same time Mayor of the Borough of Middlesex, in Middlesex

County, and as Mayor of said Borough was invested by law with the authority of a Justice of the Peace, and with authority to hear and determine charges against alleged violators of Borough Ordinances; and fulfilled the duties of both offices simultaneously, receiving his pay as such Assemblyman from the State of New Jersey, and as such
10 Mayor from the Borough of Middlesex.

That Frank Durand, while a member of the New Jersey Assembly from Monmouth County, in 1930, at the same time was Mayor of the Borough of Sea Girt, in Monmouth County, and as Mayor of said Borough was invested by law with the authority of a Justice of the Peace, and with authority to hear and determine charges against alleged violators of Borough Ordinances; and fulfilled the duties of both offices simultaneously, receiving his pay as such
20 Assemblyman from the State of New Jersey, and as such Mayor from the Borough of Sea Girt.

That Robert Todd, while a member of the New Jersey Assembly from Bergen County, in 1921, 1922, and 1923, at the same time was Mayor of Palisades Park, a Borough in Bergen County, and as Mayor of said Borough was invested by law with the authority of a Justice of the Peace, and with authority to hear and determine charges against alleged violators of Borough Ordinances; and fulfilled the duties of both
30 offices simultaneously, receiving his pay as such Assemblyman from the State of New Jersey, and as such Mayor from the Borough of Palisades Park.

That Thomas Flockhart, while a member of the New Jersey Assembly from Somerset County, in 1932, at the same time was Mayor of the Borough of

Somerville, in Somerset County, and as Mayor of said Borough was invested by law with the authority of a Justice of the Peace, and with authority to hear and determine charges against alleged violators of Borough Ordinances; and fulfilled the duties of both offices simultaneously, receiving his pay as such Assemblyman from the State of New Jersey, and as such Mayor from the Borough of Somerville. 10

That Henry G. Herschfield, while a member of the New Jersey Assembly from Passaic County, in 1920, at the same time was Mayor of the Borough of Pompton Lakes, in Passaic County, and as Mayor of said Borough was invested by law with the authority of a Justice of the Peace, and with authority to hear and determine charges against alleged violators of Borough Ordinances; and fulfilled the duties of both offices simultaneously, receiving his pay as such Assemblyman from the State of New Jersey, and 20 as such Mayor from the Borough of Pompton Lakes.

That Horace R. Bogle, while a member of the Assembly in 1936 and 1937, from Bergen County, was Mayor of the Town of Lyndhurst, in Bergen County, at the same time, and is invested by law with the authority to act as the Recorder of said Town; and fulfilled the duties of both offices simultaneously, receiving his pay as such Assemblyman from the State of New Jersey, and as such Mayor from the 30 Town of Lyndhurst.

Defendant further says, that by reason of a long course of conduct by members of the New Jersey Assembly while occupying such office, being elected to or holding the office of Mayor or Recorder of a

municipality invested with judicial power similar to a Justice of the Peace in criminal matters, and authority to hear and determine violations of Ordinances of such municipality, whose salary as such officer was paid by the municipality, some of which are hereinabove set forth; the legality of the holding of such office of Mayor and Recorder, while As-
10 semblyman has received an interpretation excluding the Mayor and Recorder of municipalities from being included within the purview of Article 4, Section 7, Paragraph 3 of the Constitution of the State of New Jersey, as amended; and further says that performance of the duties of Mayor or of Recorder of a municipality, and of this municipality, with the performance of the duties of Assemblyman, and of this Assemblyman, in no manner conflict with the performance of the duty of an Assembly, either in
20 the nature and kind of duties to be performed or the time when and in which the respective duties of each must be performed; and further says that he is not a Sheriff; nor a Justice of the Peace, nor any one of the other persons or class of persons receiving salary or profit from the State of New Jersey, mentioned in Article 4, Section 7, Paragraph 3 of the Constitution of the State of New Jersey, as amended; and denies that he has usurped, intruded into or unlawfully holds or exercises said office of
30 Recorder, in violation of Article 4, Section 7, Paragraph 3 of the Constitution of the State of New Jersey, as amended; which matters and things herein set forth this defendant is ready to verify and prove, as the Court shall award; whereof he prays judgment that the office, its liberties, privileges and

franchises by him claimed in manner aforesaid may be allowed and adjudged to him, and he may be discharged by the Court hereof from the premises above charged against him.

THOMAS D. TAGGART, JR.,
Defendant.

BOURGEOIS & COULOMB,
Attorneys for and of Counsel with Defendant. 10

State of New Jersey, } ss.
Atlantic County, }

THOMAS D. TAGGART, JR., the above named defendant, of full age, being duly sworn, on his oath says:

That the facts, matters and things set forth in 20 the foregoing plea in the above-entitled cause, so far as they relate to his own acts, are true, and so far as they relate to the acts of others, he believes them to be true; and this deponent further says that the plea by him above pleaded is not intended for the purpose of delay, but that he verily believes that he has a just and legal defense to said action and information on the merits of the case.

THOMAS D. TAGGART, JR.

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Sworn and subscribed before me this 10th day of March, 1937.

MADELINE M. NEWELL,
(Seal) *Notary Public of New Jersey.*

GENERAL DEMURRER.

(Filed March 16, 1937.)

NEW JERSEY SUPREME COURT.

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THE STATE OF NEW JERSEY, DAVID T. WILENTZ, Attorney-General, *ex rel.*, JOSEPH L. RODGERS, *Relator*, v. THOMAS D. TAGGART, JR., *Respondent*.	On Quo Warranto. General Demurrer.

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The relator, Joseph L. Rodgers, as to the plea filed by the respondent in the above entitled cause, says that said plea is frivolous and insufficient in law to bar or preclude the relator from having a judgment of ouster entered against the respondent, and the relator is not bound by law to reply
30 to said plea. The relator, Joseph L. Rodgers, demurs to said plea, which is neither in denial nor in confession and avoidance of the material facts alleged in the information. Admitting the truth of any facts in the plea which may be well pleaded, the relator says that such facts are insufficient to justify the respondent's holding of the office of Recorder of the City of Atlantic City, New Jersey.

Wherefore, by reason of the legal, substantive insufficiency of the said plea, the relator prays that judgment of ouster be entered against the respondent and that the relator be allowed his costs in this proceeding and that the Court make such further order as the Court shall deem lawful and just.

EDWARD I. BAKER
Attorney and Counsel of Relator.

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GROUNDS OF DEMURRER.
(Filed April 9, 1937.)

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, DAVID T. WILENTZ, Attorney General, *Ex Rel.* JOSEPH L. RODGERS, *Relator,*
v.
THOMAS D. TAGGART, JR., *Respondent.*

On Quo Warranto. Grounds of Demurrer.

20

The relator sets forth the following grounds of demurrer to the plea filed by the respondent in the above cause.

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1. The plea is frivolous and insufficient in law to bar or preclude the relator from having a judgment of ouster entered against the respondent because it alleges no facts either in denial, nor in confession and avoidance of the material facts al-

leged in the information. The fact that the respondent, the Recorder of the City of Atlantic City, New Jersey, is the judge of a municipal court and not the judge of a State Court does not exempt him from the application of Article IV, Section V, paragraph 3 of the Constitution of New Jersey (1844), as amended.

10

2. Admitting the truth of any facts in the plea which may be well pleaded, such facts are insufficient to justify the respondent's holding of the office of Recorder of the City of Atlantic City, New Jersey. The meaning of Article IV, Section V, paragraph 3 of the Constitution of New Jersey (1844), as amended, is clear and unambiguous and a resort to a practical construction of said Constitutional provision is both unnecessary and improper. There-
20 fore, all of the allegations in the plea relating to various persons who, from 1920 to date, while in the New Jersey Legislature, simultaneously were recorders or mayors, are irrelevant and immaterial.

Edward I. Baker,
Attorney and Counsel of Relator.

[Endorsed]

30 Service of a true copy of the within Grounds of Demurrer is hereby acknowledged this 8th day of April, 1937.

Bourgeois & Coulomb,
Attorneys and Counsel of Respondent.

OPINION.

NEW JERSEY SUPREME COURT.
No. 7, May Term, 1937.

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THE STATE OF NEW JERSEY, DAVID T. WILENTZ, Attorney-General, *ex rel.*, JOSEPH L. RODGERS, *Relator*,
v.
THOMAS D. TAGGART, JR., *Respondent.*

20

Argued May 5, 1937; decided September 18, 1937.
On *Quo Warranto.*

Before BROGAN, Chief Justice, and JUSTICES TRENCHARD and PARKER.

30

For the relator, EDWARD I. BAKER.
For the respondent, BOURGEOIS & COULOMB.

The opinion of the Court was delivered by BROGAN, Chief Justice:

This case comes to us upon a demurrer to a plea filed in an information in *quo warranto* proceedings. The information is filed in the name of the Attorney-General, by a citizen and taxpayer of Atlantic City, under Section 1 of the Statute (C. S., Vol. 3,
10 p. 4210). The question raised is whether the respondent, Thomas D. Taggart, Jr., who holds the office of Recorder of Atlantic City, has, by his election to the State Legislature and taking his seat as a member of the General Assembly, thereby caused a vacation of his office of Recorder. Mr. Taggart was appointed Recorder of Atlantic City on March 26, 1936. He was elected a member of the House of Assembly of New Jersey at the November election in 1936, and took his seat as such
20 member in the ensuing January.

The language of our Constitution, relied upon to oust the respondent, may be found in Article IV, Sec. 5, Par. 3 of the Constitution of the State of New Jersey, as amended (1844) and reads as follows:

> "No justice of the supreme court, nor judge of any other court, sheriff, justice of the peace, nor any person or persons possessed of any
> 30 office of profit under the government of this state shall be entitled to a seat either in the senate or in the general assembly; but on being elected and taking his seat his office shall be considered vacant; and no person holding any office of profit under the government of the

United States shall be entitled to a seat in either house."

The information filed February 17, 1937, alleges that the respondent unlawfully occupies the office of Recorder of Atlantic City because he also is a member of the House of Assembly of the State of New Jersey; alleges that as such Recorder he is 10 authorized to exercise the powers and duties of a Justice of the Peace in criminal cases (Chap. 160, P. L. 1933, Sec. 5), and that since Justices of the Peace, as such, expressly fall within the interdiction of the Constitution, the continuance of the respondent in the office of Recorder is in defiance of the Constitution and illegal.

The plea of the respondent denies that he unlawfully holds said office; asserts that the office of Recorder is a municipal office (Chap. 107, P. L. 20 1902, Sec. 110, p. 337), and, further, that certain other persons in the past have held the office of Recorder of Atlantic City although at the same time they were members of the Legislature, and that these several persons occupied and fulfilled the duties of both offices simultaneously without question or objection; that in the case of the respondent he was elected an Assemblyman from Atlantic County in 1934, was re-elected in 1935, and again in 1936; that in July, 1935, while an Assemblyman, 30 he was appointed Recorder to fill an unexpired term, and that in 1936, he was appointed Recorder for a term of three years.

The respondent, in his plea, points to eight instances in the last fifteen years where Recorders

of cities or towns, including Atlantic City, were, at the same time, members of the Legislature; to seven instances where members of the Legislature also occupied the office of Mayor of the several municipalities in which they resided and, as such Mayor, were invested with the power and authority of a justice of the peace under the statute and that
10 the holding of both such offices went unchallenged and that, therefore, the practical construction established by usage and custom should prevail in determining the meaning of this section of the Constitution.

The argument of the respondent is two-fold—first, that the constitutional inhibition applies only to a judge of a state court, which the respondent is not, and, second, that the relevant language of the Constitution is uncertain and therefore the inter-
20 pretation placed upon it by custom and usage should be construed as correct by this court.

Is the holder of the office of Recorder a "judge of any other court" as intended by the Constitution?

The respondent argues that the Recorder of Atlantic City is a municipal officer and not a judge or justice of the peace within the purview of the Constitution. It may well be conceded that a Re-
30 corder is a municipal officer. Perry v. Bianchi, 97 N. J. L. 113. But the respondent contends (a) that the constitutional inhibition applies only to a judge of the state court, and (b) that the words of the Constitution, "judge of any other court" should be held to apply only to judges *eo nomine* and that since the respondent was appointed as "Recorder"

and not as "judge," he is outside the letter and the meaning of the Constitution interdiction. This second or alternative argument seems to be without merit. We daresay that no one would seriously urge that the Chancellor of the state (prescinding from the provisions of Art. VII, Sec. 2, Par. 1 of the Constitution) or any of the Vice-Chancellors of the Court of Chancery might, while occupying their 10 high office, serve as a member of the legislative branch of government. We, therefore, perceive no merit in the contention that only judges appointed to office by the designation of "judge" were intended by the Constitution as the class disqualified from participation in the other branches of government.

The argument is also made that it could not have been the intention of the framers of the Constitution that all judges come within the constitutional interdict since at times those who make up the legis- 20 lative and executive branches partake of a jurisdiction judicial in character, and that such dual powers and duties would therefore be irreconcilable. For example, the Governor, while chief executive, also acts as a member of the Court of Pardons (Constitution, Art. V, Sec. 10) and the Senate, when the occasion arises, acts as a court for the trial of impeachments (Constitution, Article VI, Sec. 3). We see no real incompatibility. In the first place the judicial functions so exercised are annexations to 30 these respective offices. People v. Mann, 79 N. Y. 530, and, second, these incident duties are expressly made part of the jurisdiction of the office in question. These state officers do not hold the office of judge of a court according to the plain meaning

of that term but act as such on occasions and in accordance with the constitutional plan. Our Constitution (Art. III, Par. 1) reads as follows:

> "The powers of the government shall be divided into three distinct departments — the Legislative, Executive and Judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided."

The instances cited come within the exception expressly provided.

It seems clear that the plain intention of the framers of the Constitution was that no one who participated in the administration of one of these departments should be eligible to act in either of the others, but the exception, at the end of the section just quoted, is a complete answer to the argument that a Governor of the state, though at stated times he acts as a member or judge of the Court of Pardons, or a Senator, who, when occasion arises, acts as a member or judge of a court for the trial of impeachments, comes within the scope of the constitutional ban.

A consideration of the third article, just quoted, makes it plain that the intention of those who framed the Constitution was that legislators should not exercise any judicial power, generally. Indeed, the language of the Constitution of 1776 (Sec. XX), while not complimentary, none the less points the way to the intention of those who framed that Constitution:

> "That the legislative department of this colony may, as much as possible, be preserved from all suspicion of corruption, none of the judges of the supreme, or other courts, sheriffs, or any other person or persons possessed of any post of profit under the government, other than justices of the peace, shall be entitled to a seat in the Assembly; but that on his being elected and taking his seat, his post or office shall be considered as vacant." 10

A judge may be defined as "a public officer lawfully appointed to decide litigated questions according to law" (Bouvier's Law Dictionary, Rawles' 3rd Ed., p. 1711; Am. & Eng. Ency. Vol. 12, p. 716). The respondent, as Recorder, possesses all these attributes and cannot be excluded from the class.

A recorder's court is a court in the comprehensive 20 sense in which that word is used in the constitutional section under consideration and the Recorder is the judge of it. The fact that it is a municipal court does not remove it from the all-embracing term "court," and we, therefore, think that the respondent's first point fails.

As to the second point—that the court should adopt the practical construction placed over a period of years upon this constitutional language—we also think it is without substance. The language is 30 clear, definite, precise and unambiguous and no amount of "practical construction" over a period of years can overcome the meaning of words that contain no room for doubt. As an example of this, see State v. Wrightson, 56 N. J. L. 126, where, al-

though for years members of the House of Assembly had been elected by districts and the practice had been generally accepted, yet when the method was challenged and brought into this court, there was no hesitancy in declaring a statute providing for the election of members of the Assembly, from Assembly districts set up within the county, uncon-
10 stitutional.

A long list of cases cited by the respondent in favor of his argument for "practical construction," of which State v. Kelsey, 44 N. J. L. 1, and Assessors v. C. R. R., 46 Id. 146, are typical, would, of course, be controlling except for the fact that they are premised on the proposition that the statute or language in question in those cases was of uncertain meaning, which in this case before us is a supposition contrary to the fact.

20 We conclude therefore that there must be a judgment of ouster.

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JUDGMENT.

NEW JERSEY SUPREME COURT.
No. 7, May Term, 1937.

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THE STATE OF NEW JERSEY, DAVID T. WILENTZ, Attorney-General, *Ex. Rel.*, JOSEPH L. RODGERS, *Relator*, v. THOMAS D. TAGGART, JR., *Respondent*.	On Quo Warranto. Judgment of Ouster.

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And now, on the 22nd day of September, in the year of our Lord one thousand nine hundred and thirty-seven, before the Supreme Court of New Jersey, at Trenton, comes the said State, by its Attorney General, and the relator, Joseph L. Rodgers, by his attorney, and the defendant, Thomas D. Taggart Jr., by his attorney; whereupon all and singular, the premises being fully known and understood, 30 and deliberation had thereon by said Court, it appears to said Court that the said information in the nature of quo warranto, and the matters therein contained, are sufficient in law for the said State to have and maintain its information and action

thereon against Thomas D. Taggart, Jr.; wherefore, it is considered and adjudged by the said Court that the said Thomas D. Taggart, Jr., by virtue of Article IV, Section V, paragraph 3 of the Constitution of New Jersey (1844) as amended, vacated the office of recorder held by him when he was elected to the New Jersey Legislature and took his seat therein on
10 January 12, 1937.

And it is further considered and adjudged by this Court that Thomas D. Taggart, Jr., do not in any manner intermeddle with or concern himself in and about the office of Recorder of said City of Atlantic City, or about the liberties, privileges and franchises of said office; and that he be absolutely excluded from exercising or using the said office, or its liberties, etc.

And it is further considered and adjudged that
20 the respondent, Thomas D. Taggart, Jr., having failed to show any sufficient authority, right or title to the office of Recorder of the City of Atlantic City, be and he hereby is ousted from the said office.

For the Court

THOMAS J. BROGAN,

Justice.

Entered: September 24, 1937.

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NOTICE OF APPEAL.

(Filed Oct. 6, 1937.)

NEW JERSEY SUPREME COURT.

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State of New Jersey, David T. Wilentz, Attorney-General, *ex rel.*, Joseph L. Rodgers, *Relator,* v. Thomas D. Taggart, Jr., *Respondent.*	On Quo Warranto. Notice of Appeal.

To Edward Baker, Esq., Attorney for Relator:

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Take Notice, that the Respondent appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment of ouster entered in this cause.

Bourgeois & Coulomb,
Attorneys for Respondent.

Dated: October 5, 1937.

[Endorsed]

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Service of a copy of the within Notice of Appeal is acknowledged this 5th day of October, 1937.

Edward I. Baker,
Atty. for Relator.

GROUNDS OF APPEAL.

(Filed Nov. 4, 1937.)

NEW JERSEY COURT OF ERRORS
10 AND APPEALS.

STATE OF NEW JERSEY, DAVID T. WILENTZ, Attorney-General, *ex rel.*, JOSEPH L. RODGERS, *Relator-Appellee*, v. THOMAS D. TAGGART, JR., *Respondent-Appellant.*	On Quo Warranto. On Appeal from Supreme Court. Grounds of Appeal.

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THOMAS D. TAGGART, JR., the above-named respondent-appellant, sets down the following Grounds of Appeal from the judgment of ouster of the New Jersey Supreme Court, entered against him in the above-stated cause on September 24, 1937:

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1. Because the Supreme Court gave judgment of ouster in favor of the State of New Jersey by its Attorney-General, and the relator, Joseph L. Rodgers, against respondent-appellant, whereas it should have given judgment in favor of respondent-appellant.

2. Because the Supreme Court sustained the demurrer of relator-appellee to the plea of respondent-appellant, whereas it should have overruled said demurrer and entered judgment in favor of respondent-appellant.

3. Because the Supreme Court adjudged that respondent-appellant, by virtue of Article IV, Sec. 5, par. 3 of the Constitution of New Jersey (1844), as amended, vacated the office of Recorder held by him when he was elected to the New Jersey Legislature and took his seat therein on January 12, 1937. 10

4. Because the Supreme Court held that respondent-appellant, while Recorder of Atlantic City, was the Judge of a court within the intendment of Article IV, Sec. 5, par. 3 of the Constitution of New Jersey, as amended. 20

5. Because the Supreme Court should have adjudged that respondent-appellant, while Recorder of Atlantic City, occupied a municipal office and was, therefore, not a "Judge of any other court" within the meaning and intent of Article IV, Sec. 5, par. 3 of the Constitution of New Jersey, as amended.

6. Because the Supreme Court held that respondent-appellant, while Recorder of Atlantic City, was a "Judge" within the meaning and intent of Article IV, Sec. 5, par. 3 of the Constitution of New Jersey, as amended, whereas the Supreme Court should have adjudged that respondent-appellant, while occupying the office of Recorder of Atlantic City, was a Recorder and not a "Judge" within the 30

meaning and intent of Article IV, Sec. 5, par. 3 of the Constitution of New Jersey, as amended.

7. Because the Supreme Court should have adjudged that respondent-appellant, while occupying the office of Recorder of Atlantic City, was not possessed of an office of profit under the Government of
10 the State of New Jersey, and hence was not a "Judge of any other court," within the meaning and intent of Article IV, Sec. 5, par. 3 of the Constitution of New Jersey, as amended.

8. Because the Supreme Court held that the course of practical construction of said Article IV, Sec. 5, par. 3 of the Constitution of New Jersey, as amended, set forth in the plea of respondent-appellant, was without substance and hence unavailing to
20 respondent-appellant.

9. Because the Supreme Court, in giving judgment of ouster against respondent-appellant erred in divers other respects, and said judgment should be reversed, set aside and for nothing holden.

Bourgeois & Coulomb,
Attorneys for Respondent-Appellant.

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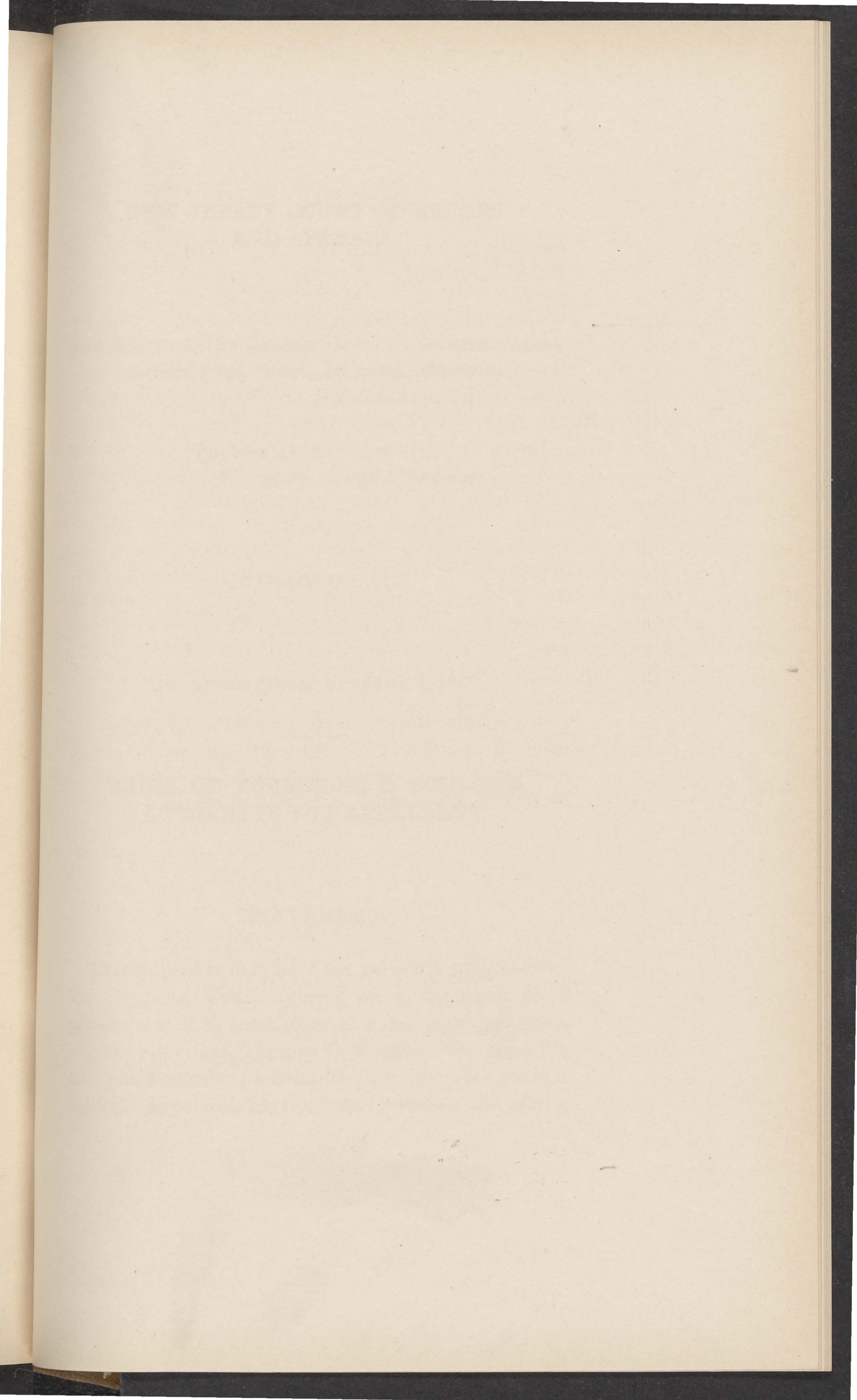
30 [Endorsed]

Service of a copy of the within Grounds of Appeal is acknowledged this 4th day of November, 1937.

Edward I. Baker,
Attorney for Relator-Appellee.



NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, DAVID T. WILENTZ, Attorney-General, *ex rel.*, JOSEPH L. RODGERS,
Relator-Appellee,
v.
THOMAS D. TAGGART, JR.,
Respondent-Appellant.

ON QUO WARRANTO.

ON APPEAL FROM SUPREME COURT.

BRIEF OF BOURGEOIS & COULOMB, ATTORNEYS FOR APPELLANT.

STATEMENT.

This appeal brings here for review a judgment of the Supreme Court entered on a demurrer to a plea to a writ in the nature of a *quo warranto* ousting the appellant, Thomas D. Taggart, Jr., from his office as Recorder of Atlantic City, upon the ground that the appellant, having been elected to and taking

his seat in the Assembly in January, 1937, his office as Recorder of Atlantic City was thereby vacated under the provisions of Article IV, Section V, Paragraph 3 of the Constitution of 1844.

Article IV, Section V, Paragraph 3 of the New Jersey Constitution (1844) reads as follows:

> "No justice of the supreme court, nor judge of any other court, sheriff, justice of the peace, nor any person or persons possessed of any office of profit under the government of this state shall be entitled to a seat either in the senate or in the general assembly; but on being elected and taking his seat his office shall be considered vacant; and no person holding any office of profit under the government of the United States shall be entitled to a seat in either house."

The Supreme Court in an opinion by the Chief Justice concluded that by a proper construction of the Constitution the words "judge of any other court" should be construed to include recorders and that, therefore, the appellant, having taken his seat in the Assembly in January, 1937, he thereby automatically became ousted from his office as Recorder of Atlantic City.

The sole issue on this appeal is whether the appellant as Recorder is a Judge within the meaning of the Constitution.

Relator, in his writ, contended:

1. That a recorder was a justice of the peace within the meaning of the Constitutional provision in question.

2. That a recorder was a Judge within the language "judge of any other court."

3. That the office of recorder and assemblyman were incompatible offices.

The Supreme Court disregarded the contention that the appellant was a Justice of the Peace (which contention was specifically abandoned by relator at the oral argument) and the Court likewise ignored the theory of incompatibility.

The opinion of the Supreme Court (Case, p. 19), as we read it, is based upon the broad proposition that by virtue of the Constitutional division of our State government into three branches, legislative, executive, and judicial, these branches are independent departments and that the inherent public policy as declared in the Constitution was to prevent a member of any one of these departments from occupying a position in any other of the departments. The opinion concluded therefrom that the framers of the Constitution intended to exclude every person exercising a judicial function, however subordinate, whatever its character, and whether strictly municipal or not, from occupying a position in either of the other departments. The Court then held that by reason of this underlying basic policy the words "judge of any other court" contained in Article IV, Section V, Paragraph 3, included recorders of municipal courts.

PLEADINGS.

On February 17, 1937, appellee, with the permission of the Supreme Court, filed an information in the nature of a writ of *quo warranto* challenging appellant's right to continue his occupancy of his office as Recorder of Atlantic City (Case, p. 1). To this information a plea was filed by appellant (Case, p. 5). To this plea a demurrer was filed (Case, p. 16). Judgment of ouster on the demurrer was awarded in favor of appellee (Case, p. 27). From this judgment appellant appeals.

FACTS.

The facts relating to the two offices as disclosed by the plea are as follows:

The appellant, Thomas D. Taggart, Jr., was appointed Recorder of Atlantic City on July 1, 1935, by the Commissioners of that city to fill the unexpired term of Joseph Altman, Esquire. On March 26, 1936, he was again appointed Recorder of Atlantic City to be effective as of March 17, 1936, for the term of three years beginning as of July 1, 1935. At the general election, November, 1934, appellant was elected an Assemblyman from Atlantic County, to which office he qualified in January, 1935. He was again elected Assemblyman in November, 1935, and took his seat in January, 1936. He was elected

to the Assembly for the third time in November, 1936, and qualified and took his seat in January, 1937. Other pertinent facts are referred to later in this brief.

ARGUMENT.

Article III of the Constitution of 1844 is inapplicable.

The opinion of the Supreme Court is based upon the tri-partite division of our State Government under three departments, legislative, executive, and judicial. The Chief Justice said (Case, p. 24):

> "It seems clear that the plain intention of the framers of the Constitution was that no one who participated in the administration of one of these departments should be eligible to act in either of the others, &c."

It is our contention that this statement is broader than either the Constitution or the cases construing it justify. In the case of *Ross v. Freeholders,* 69 N. J. L. 291, the question before the Court was the constitutionality of an Act which authorized the Justices of the Supreme Court to appoint park commissioners. The objection was that the Act conferred executive powers upon a member of the judiciary. In overruling this contention, Mr. Justice Dixon, in writing the opinion of the Court, said:

> "This article contains three clauses, a distributive clause—'The powers of the govern-

ment shall be divided into three distinct departments—the legislative, executive and judicial;' a prohibitive clause, 'and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others,' and an excepting clause, 'except as herein expressly provided.'

"The distributive clause cannot be read as the declaration of an abstract proposition, that the powers of government are naturally divided into legislative, executive and judicial departments; for the words indicate, not the powers of government generally, but 'the powers of the government,' that is, the government then being formed, and a division not already existing, but one about to be made, 'the powers of the government shall be divided.' Hence we must seek for the scope of the division primarily in the constitution itself."

Continuing at page 295, he said:

"The powers properly belonging to each of these departments and, therefore, forbidden to the others, are those assigned under the general terms, legislative power, executive power, and judicial power, and also those specifically delegated by the constitution to the senate and general assembly, or to the governor, or to the courts. But since in these specific delegations of power the appointment of local officers, as distinct from authority to provide for their appointment, is not mentioned, our consideration may be confined to the general terms employed."

We contend, therefore, that the determination of the question involved in this proceeding, viz., whether a recorder is a Judge within the meaning of Article IV, Section V, Paragraph 3 of the Constitution must depend upon the construction of that provision. It is manifest that the limitation referred to by Mr. Justice Dixon in the words "except as herein expressly provided" must be determined by other provisions of the Constitution. It is, therefore, necessary to determine whether a Recorder is a member of the judicial department of the State.

That this division of power does not extend to local or municipal government is made clear by the fact that in almost every Act creating or providing for the creation of government of cities and other subordinate municipalities the mayor is frequently a member of the executive, legislative, and judicial branches of the municipal government. The Walsh Act, adopted by Atlantic City, provides that all executive, administrative, judicial, and legislative powers and duties theretofore possessed by the mayor and city council and all other executive or legislative bodies in a municipality which had adopted that Act, are to be exercised by the Board of Commissioners. 2 Cum. Supp. to Comp. Stat. of N. J., Section **136-8, page 2461, and Supp. to Comp. Stat. of N. J., 1925-1930, Section **136-8, title "Municipalities Governed by Commissions," page 1270.

In almost every municipality the mayor is vested with certain powers as police justice. Furthermore, the prohibition of a member of one of the Constitutional departments to exercise as such the functions of one of the other departments has never been ex-

tended to municipal officers occupying seats in the legislature. Instances too numerous to mention disclose that municipal and county officers have frequently and indeed now do, occupy seats in the legislature without anyone ever doubting their right so to do (see *infra* this brief). It is plain, we think, that the Constitution was creating a State government and not municipal governments. It was providing for a fundamental law for the government of the State as such and Article III was intended only to apply to the administration of the several departments insofar as those departments were created by the Constitution itself and insofar as those departments were exercising their several functions as creatures of the Constitution in administering the affairs of the State as such.

McQuillin, in his work on Municipal Corporations in considering this point, said (Vol. 1, 2d Ed. Section 91, at page 255):

> "As considered in another part of this work most of the recent state constitutions contemplate that all municipal corporations, especially cities and towns, shall be self-governing. Accordingly these organic laws contain many provisions designed to prevent state assumption of local affairs or interference with just municipal freedom. But apart from these restrictions on legislative interference, from the historical examination of this subject, it becomes manifest that local self-government of the municipality does not spring from nor exist by virtue of, written constitutions; that it is not a mere privilege, conferred by the central authority, but that the people in each munici-

> pality exercise their franchises under the protection of the fundamental principles just indicated, which were not questioned or doubted when the state constitutions were adopted, and which, in the opinion of eminent American jurists, publicists, political scientists and statesmen, no power in the state, apart from the people themselves, can legally disregard. Judge Cooley argues that such conclusion is inevitable when it is considered, first that a system of local government thoroughly understood and reasonably uniform in character existed from the earliest settlement of the colonies, and never for a moment interrupted or abandoned, and second, that the liberties of the people have always arisen from and depended upon, that system, which system it is fair to presume, was taken into account, and that the principles thereof were incorporated by implication into the state constitutions.''

In addition to this, the prohibition of Article III is not completely carried out by the Constitution itself.

In substantiation of our contention upon this point, we refer to the minutes of the Constitutional Convention of 1844. It appears that on June 7, 1844, Mr. Dickerson, some time Justice of the Supreme Court, Governor and Recorder (see Elmer's Reminiscences of Bar and Bench), offered a resolution providing that mayors, aldermen, recorders, &c., of municipalities should be elected or appointed and continue in office as provided in their charters under which in most, if not all, instances they were elected or appointed by the legislature. (See Minutes of Convention, pages 70-72.) The resolution, after a

considerable discussion, was rejected (Idem, page 138). The report of these sessions as contained in the State Gazette for June 14, 1844, and the Newark Daily Advertiser of June 15, 1844, discloses that the members of the Convention were thoroughly acquainted with the duties of the several municipal officers and particularly with reference to their power to perform the several functions of justice of the peace.

While there may be some doubt as to whether a member of the legislature is excluded from holding a commissioned office in the National Guard under the provision of Article IV, Section V, Paragraph 3, "no person possessed of an office of profit under the government of this State, &c.," many members of the legislature have, and still do, occupy commissioned offices in the National Guard. The legislature has expressly recognized their right so to do in the Revision of 1937, P. L. 1937, page 147, Section 7, which is a re-enactment of the previous Act of the Legislature likewise recognizing such right. P. L. 1925, Section 4, page 154. Again Article IV, Section V, Paragraph 1 specifically prohibits a member of the legislature from being appointed to any civil office by the governor or the legislature *where the office was created or the emoluments increased during the term for which he was elected.*

In construing the effect of Article III, there is a still further consideration. It does not refer to appointments of the same person in different departments nor does it prohibit a member of one department from being appointed to another department of the government. The true intention and meaning

of the article was to prohibit the Courts established by the Constitution *as such* from exercising the functions of the legislative or executive departments; the legislature *as such* from exercising the functions of the executive or judicial departments; and the executive *as such* from exercising the functions of the judicial and legislative departments. In the case of *Maxwell v. Goetschius,* 40 N. J. L. p. 383, the question was whether the legislature by its own enactment could cure a fatal defect in a partition proceeding. The Supreme Court placed its decision, as we read it, squarely upon the proposition that the Constitution prohibited one department or a member thereof *as such* from invading or usurping the power of any other department of the government.

Whatever may be said on this phase of the case, it seems unquestionably clear that Article III is limited in its extent and application to the departments created by the Constitution with respect to the government of the State as such and was not intended and does not by its own force apply to analogous functions or powers granted to counties and municipalities as such.

In the case of *Paul v. Gloucester,* 50 N. J. L. 585, Mr. Justice Van Syckel, writing the opinion for the Court of Errors and Appeals, illustrated the application of Article III by stating that the Chancellor could not be authorized to exercise the office of governor in the event of the death of the governor, president of the senate, and speaker of the House, and further suggested that a senator could not be authorized to hold the Circuit Courts during the recess of the senate. The Constitution of 1844, as

suggested by Justice Dixon in *Ross v. Freeholders, supra,* was to create a new fundamental law for the government of the State. The departments of government referred to in Article III were departments of the State Government as provided for in the Constitution. It is the several governmental departments as therein enumerated which are protected from interference, usurpation or encroachment by other State departments within the field designated by the Constitution. Outside of the Constitutional limitations, powers, and privileges of these several departments, the field is free and as the case above cited indicates, permits the legislature to authorize the members of one department to exercise the functions of the other departments without infringing the Constitutional inhibition.

There are many instances too numerous to mention wherein our courts have upheld the designation of members of one department to exercise powers and privileges technically belonging to the other two departments. The citation of a few cases will be sufficient:

In *Hudspeth v. Swayze,* 85 Law 595, the right of the Chancellor to appoint a jury commissioner was upheld;

In *Ripley v. Prudential Insurance Co.,* 85 Law, 395, the right of the Chancellor to appoint appraisers to appraise capital stock of life insurance companies was upheld; and

In *In re Roebling,* 108 Atl. 359, the right of the ordinary to pass on the action of a state comptroller assessing an inheritance tax was upheld.

In the case of *Erie Railroad Co. v. Board of Public Utility Commissioners,* 87 N. J. L. 438, the Supreme Court held that the power of the Utility Commissioners to determine the extent and necessity of protection at railroad crossings was not judicial, but administrative, notwithstanding Vice-Chancellor Grey in the case of *Palmyra v. Pennsylvania R. R. Co.,* 62 Eq. 601, had concluded that the function was judicial and not legislative. He said, 62 Eq. at page 612:

> "If it attempted to hear and determine disputes between municipalities and railroad companies as to their respective rights and duties at each particular crossing, the parties must be noticed, a hearing must be had, evidence must be produced and its admissibility ruled upon, argument must be heard and considered, and a judgment must be pronounced."

It will be observed that the Constitution does not place any limitation upon the powers to be granted to municipal governments. Municipal governments are not mentioned as far as constitutional division of departments is concerned. We, therefore, contend that Article III has no application to municipal governments and that, therefore, a Recorder, being a municipal officer, is not a member of the judicial department of the State of New Jersey and is, therefore, not within the prohibition of Article III.

A recorder is not a member of the judicial department of the State of New Jersey.

The office of Recorder of Atlantic City is a municipal office, being created by an Act of the Legislature entitled: "An Act relating to, regulating and providing for the government of cities," P. L. 1902, p. 284.

The Plea discloses that the office of Recorder of Atlantic City was first created by the charter of that city "An Act to Incorporate Atlantic City," approved March 3, 1854, P. L. page 278, Section 2 of which provides:

> "And be it enacted that there shall be and forever hereafter shall be in and for said city, one mayor, one recorder, who besides his duties as recorder shall in case of death, absence or disability of the mayor, have, hold and execute said duties annexed to the mayoralty" &c.

and Section 21 of which further provides:

> "That the mayor, recorder and aldermen of said city, and each of them, shall have jurisdiction in all matters of a criminal nature and in all matters of a civil nature that the justices of the peace, or any of them, of Atlantic County now have or hereafter may have, such jurisdiction to be limited within the bounds of Atlantic City, with full power to issue process, and hear, try and determine all suits at law of a civil nature," &c.

Appellant was appointed Recorder by the City Commissioners of Atlantic City, was paid by the City, and administered certain laws pursuant to Statute or authorized municipal ordinances.

He is a Recorder and was appointed by the name of Recorder, and the laws he is authorized to administer are to be administered by him as Recorder, and nowhere in the several acts is he ever referred to as Judge.

In the case of *Perry v. Bianchi,* 97 N. J. L. 113, the Supreme Court held that the Police Justice of the City of Orange is not a State but a municipal office; and in 2 Dillon on Municipal Corporations, Vol. 2, (5th Ed. p. 740) the author states:

> "The office of Police Justice and Judge of the Police Court has always been regarded as a municipal office."

In the case of *Klair v. Bacharach,* 10 N. J. Misc. 448, it was held that the Mayor of Atlantic City was a municipal and not a State officer.

In the case of *Keffer v. Gaskill,* 88 N. J. L. 77, our Supreme Court, after determining that Atlantic City adopted the Walsh Act, which is not questioned in this suit, held that the organization of the City Commission thereunder did not abolish the charter office of Recorder previously existing.

Prior to the adoption of the Constitution of 1844, there were a number of charters of municipalities throughout the State providing for the office of mayor, recorder, and alderman. In each of these charters, these officers were vested with the powers of justices of the peace and other judicial powers

under certain limitations. Some of these charters are:

Burlington, December 21, 1784
Camden, February 13, 1828
Trenton, November 22, 1808
Princeton, November 27, 1822
Perth Amboy, 1787
Elizabethtown, November 28, 1789
Jersey City, February 22, 1838

Each of these charters may be found in Elmer's Digest published in 1838.

Notwithstanding the power of these officers to administer certain of the duties of justices of the peace, it was held in the case of *State v. Perkins,* 24 N. J. L. 409, that where the Statute required the oath of office to be administered by a justice of the peace of the County of Burlington, an oath of office administered by the Mayor of Beverly in that County was not properly administered although it clearly appeared that the powers of a justice of the peace had been conferred by law upon the Mayor of Beverly. The Court said, at page 410:

> "The first objection taken to the tax assessed in the case is that the members of the Common Council which ordered it to be raised, and the Assessor and Collector, were not duly sworn. The Charter (Acts of 1850, p. 186), requires them to be sworn or affirmed before a Justice of the Peace of the County of Burlington. In point of fact, they were sworn before the Mayor of the Borough, who, it is declared by the 7th section of the Charter, shall have all the powers and authority of a Justice of the Peace of the State of New Jer-

> sey. This section, it is contended, and I think rightly, although it gives the Mayor the general powers of a Justice of the Peace, probably not including therein the power to hold courts for the trial of small causes, does not make him a Justice of the Peace of the County of Burlington, and therefore did not authorize him to administer an oath in this particular case."

It seriously may be doubted whether courts held by justices of the peace are strictly a part of the judicial department of the State. It is true that Article VI, Section VII, Paragraphs 1 and 2 provide for the number of justices of the peace in their respective municipalities and the method of ascertaining the population in order that the number may be determined. The provisions in Section VII of Article VI differ widely from the other provisions of that Article. It will be observed that the other sections create courts, viz: Section 1, Enumeration of courts (justices of the peace not mentioned); Section 2, Court of Errors and Appeals; Section 3, Court for the Trial of Impeachments; Section 4, Court of Chancery and Prerogative Court; Section 5, Supreme and Circuit Courts; Section 6, Common Pleas Courts.

Article VII, Section II, Paragraph 8 provides for the election of justices of the peace by the voters in their respective municipalities.

It will thus be observed that while the number, tenure of office, appointment etc., of justices of the peace are provided for, no courts are provided for over which they were to preside. The courts, there-

fore, over which they presided were such, not as were created by the Constitution of 1844, but such as existed in the municipalities and counties of the State at the time of the adoption of that Constitution. It is clear, therefore, that a recorder of a municipality is not a member of the judicial department of the State as contemplated by Article III of the Constitution.

The Recorder is not a judge within the meaning of Article IV, Section V, Paragraph 3.

We submit we have successfully demonstrated that a recorder of a municipality is not a member of the judicial department of the State of New Jersey. The Supreme Court, in arriving at the conclusion that a recorder was a judge, within the meaning of Article IV, Section V, Paragraph 3, turned to the definition as contained in Bouvier's Law Dictionary in the following language:

> "A judge may be defined as 'a public officer lawfully appointed to decide litigated questions according to law.' "

The Court then found that the duties of a recorder brought him within the definition and that, therefore, a recorder was a judge.

We contend that it is not enough to bring the recorder within the prohibition that he should be a judge. The question is, was he such a judge as was contemplated by the framers of the Constitution of 1844? Under the Court's definition, a justice of

the peace is as much a judge as a recorder. Perhaps even more so, if the extent of his jurisdiction under our Statutes is a proper criterion. In our brief in the Supreme Court, we contended that if the word "judge" as used in the phrase "judge of any other court" was intended to include all persons within Bouvier's definition, it would not have been necessary to have specifically mentioned the name justice of the peace in the provision in question. By the very reasoning of the Supreme Court, a justice of the peace would have been included within the purport and meaning of the phrase "judge of any other court." The inquiry, therefore, is, why was he specifically mentioned? In considering this question, it may be useful to have in mind that Article VI, the judiciary article, provides for the creation of courts and for the number of justices of the peace. Article VII, Section II, Paragraph 1 provides for the appointment of justices of the Supreme Court, the Chancellor, judges of the Court of Errors and Appeals, and judges of the inferior Court of Common Pleas; and further provides that the justices of the Supreme Court and Chancellor shall hold no other office under the government of the State or of the United States. Article VII further provides for the election or appointment of certain other state and county officers including sheriffs, county clerks, coroners, and surrogates. Neither Article VI nor Article VII provides for the election or appointment of any municipal officer and as we have above shown, the provision for such appointment or election was expressly rejected by the Convention.

In the Constitution of 1776, there was a provision somewhat similar to Article IV, Section V, Paragraph 3. It is the 20th Section of the Constitution of 1776, and reads as follows:

> "That the legislative department of this colony may, as much as possible, be preserved from all suspicion of corruption, none of the judges of the supreme or other court, sheriffs, or any other person or persons possessed of any post of profit under the government, other than justices of the peace, shall be entitled to a seat in the assembly; but that, on his being elected and taking his seat, his office or post shall be considered as vacant."

It may be useful to point out here the method of appointment of justices of the peace under the Constitution of 1776. The provision is Section XII of the Constitution of 1776, and reads as follows:

> "That the judges of the supreme court shall continue in office for seven years, the judges of the inferior court of common pleas in the several counties, justices of the peace, clerks of the supreme court, clerks of the inferior courts of common pleas and quarter sessions, the attorney-general and provincial secretary shall continue in office for five years, and the provincial treasurer shall continue in office for one year; and that they shall be severally appointed by the council and assembly in manner aforesaid, and commissioned by the governor, or, in his absence, by the vice-president of the council; provided always, that the said officers severally shall be capable of being re-appointed at the end of the terms severally before limited; and that any of the said officers shall

be liable to be dismissed, when adjudged guilty of misbehavior by the council, on an impeachment of the assembly."

A survey of our judicial history from its earliest days clearly shows that justices of the peace were the most important judicial officers in the early days and continued to be such down to the time of the adoption of the Constitution of 1844. They performed the greater part of the litigated business of the colony, and even after the surrender of the government by the proprietors to the crown in 1702 continued to hold the county court and even sat on appeals in the county court. (Courts of New Jersey, *Clevenger and Keasby*, p. 95, also p. 81.) After the Constitution of 1776, they continued to form an integral part of our judicial machinery and many of them acted as judges of the court of common pleas down to the time of the adoption of the Constitution of 1844, and indeed many of the so-called lay judges of the court of common pleas under the Constitution of 1844 were justices of the peace.

Accepting for the purpose of argument the Court's definition, it must be at once apparent that a justice of the peace from the earliest colonial times down to and at the time of the adoption of the Constitution of 1844 was a judge within that definition. Now the prohibitory article reads as follows:

> "No justice of the supreme court, nor judge of any other court, sheriff, justice of the peace, nor any person or persons possessed of any office of profit under the government of this state shall be entitled to a seat either in the senate or in the general assembly."

The appellant is said to have lost his office as Recorder by virtue of that part of the provision reading as follows: "Nor judge of any other court."

As we have above pointed out, for many years prior to the adoption of the Constitution of 1844 there existed in many cities of this State mayors, recorders, and aldermen, each of whom had, in a varying degree, the same or similar jurisdiction to that possessed by the Recorder of Atlantic City. Such of their official titles and duties as were of a judicial nature were prescribed in the various charters of the several cities referred to. They were not referred to nor designated as judges although no doubt colloquially they may have been referred to as such in common speech. It is manifest, therefore, that at the time of the adoption of the Constitution of 1844 there were in addition to justices of the peace, officers of certain municipalities including mayors, recorders, and aldermen, who had many judicial functions similar to those of justices of the peace and substantially the same as those of the present-day recorders.

That the judicial functions and duties of recorders, mayors, aldermen, &c., were well known to the framers of the Constitution of 1844 is clearly demonstrated by the reports of the Convention hereinabove referred to. It is significant that Mr. Dickerson, who offered the resolution concerning the election of municipal officers, &c., had himself been governor, judge of the Supreme Court, and recorder, and consequently well knew the functions of the office of recorder. In view of the sharp debate concerning the justices of the peace and municipal

officers, it seems manifest that if the framers of the Constitution had intended to exclude recorders from seats in the legislature they would have said so, particularly in view of the fact that they did include justices of the peace.

Another pertinent inquiry is why did the framers of the Constitution of 1844 deem it necessary to specifically mention justices of the peace as among that class of officers who were prohibited from holding seats in the legislature if justices of the peace, being judges, were embraced within the category denominated "judges of any other court"? If this expression included all officers within the State who by exercising judicial functions were judges, why did it not likewise include justices of the peace without the necessity of any specific mention of them? It seems obvious under the doctrine of *expressio unius exclusio alterius* that when from all of the group of subordinate judicial officers, viz. justices of the peace, mayors, recorders, aldermen, and perhaps others, they specifically named only justices of the peace, it was because the other classes of subordinate judicial officers were not intended to be included. It will be noted in this connection that in the Constitution of 1776, while judges of the supreme or other courts were excluded from sitting in the assembly, justices of the peace were excepted from this prohibition and were thereby permitted to retain their seats in the legislature. Now, if but for this exception in the Constitution of 1776, justices of the peace would have been excluded because they were judges of another court

then by the simple expedient of removing the exception they, likewise, would have been excluded from sitting in the legislature under the Constitution of 1844 and it would not have been necessary to mention them specifically in order to obtain the result intended by the Constitution of 1844.

As we have above pointed out, justices of the peace were appointed by the assembly and council under the Constitution of 1776, and yet were permitted to retain their office as justice of the peace if elected to the assembly. In other words, they could be part and parcel of the same body that elected or appointed them. It would appear from such reports as we have of the proceedings of the Constitutional Convention of 1844, that it was feared the justices of the peace would create forcible opposition to the adoption of the Constitution as proposed if they were deprived of their right to sit in the legislature, but that notwithstanding this fear of opposition, the framers nevertheless decided that they should be excluded even though they were no longer nominated nor appointed by the legislature but were elected by the people.

Touching the discussion, as appears from the newspaper reports of the Constitution Convention, covering the reducing of the Justices of the Peace, Mr. Browning, on the 5th day of June, 1844, before the Convention, said:

> "The great objection urged was that it might provoke the jealousy of the Justices now in commission, and they would go against the Constitution. In addition to that, they would have the chance of being elected again and

> as each one would think he had the best chance, the gain at least would be in favor of the Constitution with this provision."

Mr. Ryerson was surprised that any friend of the Constitution would introduce such a provision.

The number of Justices now was legion, and to cut off their heads would set all against it and tend to defeat the Constitution.

Mr. Childs said:

> "It would create a party magistracy—the evils of which could readily be appreciated. Besides, it would array against the Constitution every magistrate now in office as it would bring against it this whole influential body of men and certainly defeat its adoption by the people."

Mr. Van Arsdale said:

> "The principle on which the committee had gone was that no one should be disturbed in office so that the Constitution should go before the people entirely unembarrassed by anything which would tend to array any class of citizen against it."

Mr. Zabriskie said:

> "The system here proposed could not be carried into effect unless all the justices were discharged at a particular time. As to the idea that it would array the justices against the constitution, I would ask would any justice dare to array himself against a provision which gives to the people the selection of their justices?"

In view of this concern over the attitude of justices of the peace toward the new Constitution, it is odd that they alone of all subordinate officers having judicial power were excluded from seats in the legislature. From the point of view of expediency, the framers might well have thought it wise to exclude mayors, aldermen, recorders, and others having similar powers to a justice of the peace and thus placate justices of the peace by placing them all on the same footing.

Justices of the peace under the Constitution of 1776, were state officers. This is made clear by the juxtaposition of the excepting clause, viz., "other than justices of the peace" to the words "other person or persons holding office, &c." It is further made manifest by the fact that they were elected by the Assembly and Council and commissioned by the Governor. Under the Constitution of 1844, they became county officers and in the same class with sheriffs. *Hankins v. Berrian,* 62 N. J. L. 180; *Gage v. Clark,* 51 N. J. L. 97. It is significant that with but two exceptions all of the officers mentioned in the Constitution as being excluded from seats in the legislature were state officers. The only two officers specifically named as being excluded from holding seats in the legislature were justices of the peace and sheriffs, both of whom were county officers. It is odd that the surrogates and coroners, each of whom have certain judicial functions to perform, were not specifically included in the prohibition, nor were county clerks nor other county or municipal officers. In this connection, it is an odd

fact that while Article VII, Section II of the Constitution provides for the appointment of certain officers in the following language:

> "Justices of the supreme court, chancellor, judges of the court of errors and appeals, and judges of the inferior court of common pleas, shall be nominated by the governor, and appointed by him, with the advice and consent of the senate."

only the justices of the supreme court and chancellor are prevented from holding any office of profit under the state. The language is as follows:

> "The justices of the supreme court and chancellor, shall hold their offices for the term of seven years; shall at stated times receive for their services a compensation which shall not be diminished during the term of their appointments; and they shall hold no other office under the government of this State or of the United States."

It is difficult to discover why, under the strict division of power, only the chancellor and justices of the supreme court should be excluded from holding any office under the State while the other judges enumerated in the first paragraph of the section are not so excluded.

Whatever the reason may be, it seems obvious that the whole frame of the Constitution has to do with the administration of the Government of the State as such and that the judges who lose their offices if they are elected to the legislature and take their seats therein are those judges exercising the

judicial power specifically conferred by the Constitution and not municipal judges, police justices, and those with like subordinate jurisdiction.

The Chief Justice, in his opinion in the Supreme Court, adverts to the preamble to Section 20 of the Constitution of 1776, which reads as follows:

> "That the legislative department of this colony may, as much as possible, be preserved from all suspicion of corruption."

He derives from this preamble some intention on the part of the framers of the Constitution of 1844, to prevent any judge from being in the legislature.

It is curious, if this be so, why the framers did not incorporate the preamble in Article IV, Section V, Paragraph 3. That it was not an inadvertent omission is evident from the fact that when presented to the Convention the Article included the preamble in question. (See Minutes of Convention, page 53.) Whatever may have been the reason for its exclusion, it is obvious that the framers of the Constitution of 1844, did not apprehend that there were to be difficulties in the administration of the Government of the State of New Jersey, by permitting subordinate municipal officers, whether judges or not, to sit in the legislature. A policy of exclusion would logically require the exclusion of not only judicial but of executive officers from the legislature. Plainly this is not the case. Article IV, Section V, Paragraph 3 of the Constitution distinctly limits the exclusion in the following language: "nor any person or persons possessed of

any office of profit under the government of this state." Contrast this provision with the somewhat similar provision in Section 20 in the Constitution of 1776, which reads: "or any other person or persons possessed of any post of profit under the government." Whether the inclusion of the word "state" in the Constitution of 1844, was designed or not, its effect is that the only officers excluded are those specifically mentioned in the paragraph and those holding offices of profit under the State. This corresponds to a similar exclusion of supreme court justices and chancellor in the second paragraph of Article VII, Section II.

Noscitur a Sociis.

It is appellant's contention that Article IV, Section V, Paragraph 3 of the Constitution in providing that the justices of the supreme court and judges of other courts may not sit in the legislature, &c., had reference only to the judges constituting the judicial department of the State, in short, to State judges and not to municipal officers performing limited judicial functions.

It is one of the first canons of the construction of a constitution as well as statutes that the whole of the instrument must be examined if there is any question as to the meaning of any provision therein. *State v. Murzda,* 116 N. J. L. 219.

There are several provisions in our Constitution which may be considered as prohibiting the holding of more than one office by those belonging to or who

constitute any one of the three departments of government. The first one is Article III, which provides, among other things:

> "And no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others."

The second one is Article IV, Section V, Paragraph 1, which prohibits a member of the legislature from being appointed to any civil office under the authority of the State where the appointment is by the governor or legislature, where such office was created or the emoluments thereof increased during the term for which he was elected. Article IV, Section V, Paragraph 2 provides for the vacation of the seat of any member of the legislature who is elected to represent the State in the Senate or House of Representatives of the United States or who accepts any office under the government of the United States. Article IV, Section V, Paragraph 3, prohibits the justices of the supreme court, judges of any other court, sheriffs, justices of the peace, and any person or persons possessed of any office of profit under the government of this State from holding a seat in the legislature and provides that upon taking such seat, the office is vacated. The second portion of this section provides that no person holding an office of profit under the United States shall be entitled to a seat in either house.

Article V, Section VIII, prohibits a member of Congress or person holding an office under the United States or this State from holding the office of

governor and further provides if the governor should accept any office under the United States or this State his office as governor is thereby vacated.

Article VIII, Section II, Paragraph 1, prohibits justices of the Supreme Court and the chancellor from holding any other office under the government of this State or of the United States. It does not specifically prohibit other officers whose appointments are provided for in Article VII from so doing.

An analysis of these several provisions discloses several odd facts. Article III does not specifically concern itself with appointments and while it prohibits officers constituting one department from exercising the powers of any other, it does not disqualify the officer who offends from holding office in the department to which he belongs.

Article IV, Section V, Paragraph 1, while it excludes a member of the legislature from accepting an appointment by the governor or the legislature to a civil office under the authority of the State, where the office was created or the emoluments increased during his term, does not prevent his appointment to such civil office excepting under those conditions. Nor does it provide for the vacation of his office as legislator if he should accept. Paragraph 2 of the same section does provide for the vacation of his office should he accept any office under the government of the United States, including senator or representative.

The provision relating to the governor does not limit the prescribed office to one of profit but extends the prohibition to any office of this State. The same is true as regards justices of the supreme

court and the chancellor as provided in Article VII, Section II, Paragraph 1.

It will thus be observed that the governor, chancellor and justices of the supreme court may not hold any other office, whether of profit or not, under this State or the United States; that other State judges are excluded only from holding seats in the legislature and are not excluded by the Constitution from holding other offices of profit or otherwise; that members of the legislature may not hold any office under the United States, including that of representative or senator; may not hold a civil office under the State that has been created or the emoluments increased during their respective terms; and may not at the same time be a supreme court justice or other judge, sheriff, justice of the peace, nor possessed of any other office of profit under the State government.

In all of these limitations and restrictions it nowhere appears that any one of the officers named is prohibited from holding any municipal or any county office excepting sheriff and justice of the peace. These are the only two offices not State offices which are specifically mentioned anywhere in the several provisions prohibiting the holding of more than one office.

Shortly after the adoption of the Constitution of 1844, the Election Act of 1847 was passed. Nixon's Digest 1709-1855, page 214. Section 21 of this Act, page 218, is as follows:

> "No person shall hold at the same time more than one of the following offices: elector of president and vice-president of the United

States, member of the House of Representatives of the United States, members of the Senate or of the General Assembly of this state, clerk or surrogate of a county, sheriff, or coroner; and if any person who shall have been elected or appointed to any such office shall, during the term for which he shall have been elected or appointed, be elected or appointed to another of such offices, and shall accept the same, such acceptance shall be deemed to make vacant the office to which he shall have been previously elected or appointed; and if any person shall, at any election, be elected to two or more of such offices, he shall accept but one of the same, and the other or others shall be deemed vacant."

This section is repeated almost verbatim in the present Election Law, P. L. 1930, Chapter 187, Article III, Paragraph 12, Section 5, page 675; Article III, Paragraph 32, Section 25, page 683.

It will be observed that the above-quoted incompatibility provision includes elector of president and vice-presidents, clerk, surrogate, and coroner of the county, which offices are not mentioned in the several incompatibility provisions of the Constitution. The present Election Act adds the office of United States Senator. The exclusion from the prohibition of the Election Act of other county or municipal officers such as freeholders, mayors, aldermen, recorders, city and county solicitors, &c., is significant, showing as it does that in the contemplation of the legislature the only additional officers to be excluded from holding seats in the legislature were the surrogates, county clerks, and coroners

and electors. This exposition of the Constitution coming within two or three years of its adoption and remaining on the statute books to the present time is a clear indication of the interpretation placed upon the Constitution by the legislature contemporaneously with its adoption. The offices of both surrogates and coroner are judicial in their nature and the persons holding either of these offices is a judge within Bouvier's definition and would have been included within the term "judge of any other court" if that term were intended to apply to judges other than State judges.

We have attempted to demonstrate that the only officers contemplated by the several provisions of the Constitution prohibiting the holding of more than one office are State and federal officers. This is particularly true of Article IV, Section V, Paragraph 3. The expression "nor any person or persons possessed of any office of profit under the government of this State" clearly limits the effect of the entire paragraph to State officers whether judicial or otherwise, with the exception of sheriff and justice of the peace, which are county officers.

In the case of *State v. Murzda,* 116 N. J. L., page 219, the Court of Errors and Appeals in considering Article IV, Section VII, Paragraph 2, concerning gambling and providing that the penalty, &c., provided for at the time of its adoption in 1897 be not diminished had to determine whether the possession of number or policy slips was within the purview of the Act. In concluding that policy slips were not within the purview of the Act, the Court resorted

to the familiar rule of construction *noscitur a sociis*, and said at page 224:

> "While the words of a constitutional limitation are, for obvious reasons, to be taken in their natural and ordinary sense, significance and import, and regard is to be had to their general and popular usage, unless terms of art are employed, which are to be given their technical sense, the intent, as we have stated, is not to be collected from any particular expression, but from a general view of the whole clause. It is an established canon of interpretation, in aid of the primary rule adverted to, and applicable alike to all written instruments, that the meaning of words may be indicated or controlled by those with which they are associated. *Noscitur a sociis.*"

Again in considering the same subject the Court said at page 222:

> "But, in the quest for the intention and meaning of a constitutional limitation, its essence and nature must ever be kept in mind. The primary design of a constitution is to put the fundamentals of government beyond the control of 'the varying moods of public opinion,' to borrow the language of Judge Cooley (Cooley's Constitutional Limitations (8th Ed.) 124); and it is therefore to be presumed that the words employed have been carefully measured and weighed to convey a certain and definite meaning, with as little as possible left to implication."

We further submit that the well-established maxim of Lord Bacon, viz., *Copulatio verborum indicat ac-*

ceptationem in eodem sensu, is peculiarly applicable in the present case in determining the precise meaning and interpretation to be given to the words "judge of any other court." The above-quoted maxim may be freely but accurately translated as follows: "The coupling of words together shows that they are to be understood in the same sense." See Broom's Legal Maxims, page 447.

This maxim was applied and explained in the case of *Fowler v. Danvers,* 8 Allen (Mass.) 80, at page 85, where the Court said: "The maxim of Lord Bacon, '*Copulatio verborum indicat acceptationem in eodem sensu*' is a safe and sound rule in the construction of doubtful phrases and sentences; and unless there is something to indicate a different intent it is fair to presume that the word in question and those which immediately follow it are designated to be *ejusdem generis* and referable to the same subject matter, or to be interpreted in a similar sense." This maxim was also considered in the New Jersey case of *State v. Gedicke,* 43 N. J. L. 86. The fundamental rationale of the maxim is crisply stated by the Wisconsin Court in the case of *Attorney-General v. Chicago Ry. Co.*, 35 Wis. 425, as follows: "We are to be guided in the application of the uncertain by its certain associates."

We submit that this maxim finds perfect application in the construction of the word "judge" in the mooted section of the Constitution in the present case. It will be observed that each of the offices named in said section is clearly and certainly named whereas the words "judge of any other court" are not certain in their application. Their certainty,

however, may clearly be determined by the association in the same section of the words "person possessed of any office of profit under the government of this State" as clearly limiting the word "judge" to a judge under the government of this State, *i. e.*, a State judge. Obviously appellant does not occupy such a status. *Perry v. Bianchi, supra.*

Now having in mind the two principles of constitutional construction above-referred to, how can it be said that either in the division of powers between the legislative, executive, and judicial, or in the construction of the words "judge of any other court" in Article IV, Section V, Paragraph 3, the Constitution was intended to or does extend to municipal officers when, as we have pointed out, municipal officers are not mentioned in the Constitution and the only county officers mentioned in the particular paragraph are the sheriff and justice of the peace?

Furthermore, in construing the word "judge" it is important to have in mind the practice and conditions prevailing with which the framers of the Constitution of 1844 were familiar at the time of its adoption. In the case of *In re Ridgefield Park,* 54 N. J. L., page 288, the question was whether a supreme court justice sitting as circuit court judge could determine the boundaries of a village in order to determine the extent of the jurisdiction thereof. In determining whether the power thus conferred was legislative or judicial, the Court had recourse to the conditions prevailing at the time of the adoption of the Constitution of 1844, and said at page 290:

> "But in the framing of American constitutions, that which chiefly suggested and controlled the selection of their language was the practice of the governments to which the framers had been accustomed, and consequently this practice furnishes one of the safest guides in the interpretation of their words."

As we have said, in almost every municipality of the State existing at the time of the adoption of the Constitution of 1844 and even at the present time, the mayor had both executive and legislative powers and in many instances judicial powers as police justice.

By Section 4 of the Walsh Act, P. L. 1911, page 462, all legislative, executive, and judicial functions theretofore possessed by the mayor and council of any city adopting the Act were vested in the Board of Commissioners and by them to be distributed to such of the commissioners as they deemed proper. Obviously, if none of these several powers was distributed, such power remained vested in the Board of Commissioners. This section was further extended or supplemented by Chapter 330 of the Laws of 1927, page 776.

In the case of *Klair v. Bacharach,* 10 N. J. Misc. 448, the Supreme Court held that the Mayor of Atlantic City was a municipal officer and not a State officer under the provisions of the Public Utility Act which prevented a member of the Utility Board from holding any office under the State. The mayor and recorder are obviously in the same category and if the mayor is a municipal a *fortiori* the

Recorder is likewise a municipal officer.

In the case of *State v. Churchman* (Del.), 51 Atl. 49, the Supreme Court of Delaware in an opinion by the Chancellor held that the municipal judge of the City of Wilmington under its charter was not a State judge under the Constitution requiring the consent of the senate to the appointment by the governor of such "officers" as he was authorized by law to appoint and did not require the appointment of said city judge, required by the said charter to be made by the governor, to be confirmed by the senate. The Court said at page 50:

> "It cannot be doubted, as a general proposition of law applying to the construction of statutory and constitutional provisions alike, that the words 'offices' or 'officers', taken by themselves, in a statutue of constitution, mean state or county 'offices' or 'officers' only, and cannot be construed to mean the offices or officers of municipal or other corporations, unless there be language expressly or by necessary implication extending their meaning to corporation officers."

Quoting from Judge Dillon, page 53, the Court continued:

> "A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people."

Again quoting from Judge Dillon at page 52:

> "In this country it is usual to provide in a charter or organic act of municipal corporation for a local or special tribunal, called by differ-

ent names, such as the mayor's court, recorder's court, city court, and the like, and which is invested with jurisdiction over complaints and prosecutions for the violation of the ordinances of the corporation, and often, for public convenience, with special civil, and limited criminal jurisdiction, under the laws of the state." And he adds: "It is competent for the legislature to provide for the establishment of those inferior courts, and to invest them with such measure of power and jurisdiction as may be deemed expedient, if no provision of the constitution of the particular state be infringed."

In the case of *Respublica v. Dallas,* 3 Yates (Penn.), page 300, the Supreme Court of Pennsylvania in a well-considered opinion held that the recorder of Philadelphia who possessed certain judicial powers could constitutionally hold at the same time the office of United States District Attorney for the Eastern District of Pennsylvania, although by the 8th Section of the Second Article of the then Constitution of Pennsylvania, it was provided:

> "No member of congress, from this state, nor any person holding or exercising any office of trust or profit under the United States, shall, at the same time, hold or exercise the office of *judge,* secretary, treasurer, prothonotary, register of wills, recorder of deeds, sheriff, or any office in this state, to which a salary is by law annexed, or any other office, which future legislatures shall declare incompatible with the offices or appointments under the United States." (*Ours*)

In the case of *Clifford v. Heller*, 63 N. J. L., page 105, Mr. Justice Van Syckel, speaking for the Supreme Court in determining the construction to be placed upon the provision of the Constitution providing for the president of the Senate, &c., administering the government in the absence, death, or resignation of the governor, said at page 110:

> "In construing this clause of the constitution it must be borne in mind that it was carefully drawn by learned jurists, who knew how to express with exactness and precision the purpose they had in view."

In the case of *State v. DeLorenzo*, 81 N. J. L. 613, the Court of Errors and Appeals had under consideration the question whether the legislature could constitutionally take from a sheriff certain powers that were inherent in his office at the time the Constitution was adopted. It was argued that if the legislature could so restrict the powers of the sheriff, it could in effect abolish the office. The Court, however, held that the Act under consideration was a valid enactment which the legislature was not prohibited from passing and said at page 621:

> "* * * the existence of a constitutional limitation upon the legislative power is to be established and defined by words that are found written in that instrument, and not by reference to some spirit that is supposed to pervade it or to underlie it or to overshadow the purposes and provisions expressed in its written language."

It would seem clear from the consideration of these two cases that when the framers of the Constitution used the words "justice of the supreme court or judge of any other court" in Article IV, Section V, Paragraph 3, they were using these words in the precise and technical sense and did not intend that this implication should be extended to minor judicial officers not specifically mentioned and that the courts they had in mind were those created by the Constitution itself and forming the judicial department of the State. This is particularly so when in the very article itself the words "or person possessed of an office of profit under the government of this state" were used and two county officers, viz., sheriff, and justice of the peace were specifically mentioned. The suggestion that a vice-chancellor would not come within the category of a judge is beside the point. A vice-chancellor is the *alter ego* of the chancellor (*In re Appointment of Vice-Chancellors,* 105 N. J. Eq., page 759) and would be excluded by virtue of the words "person possessed of office of profit under the government of the state."

In the case of *McCran, Attorney-General v. Gaul,* 95 N. J. L. 393, affirmed 96 N. J. L. 165, the Court had to consider whether the governor of the State in removing a member of the Public Utility Commission after hearing charged under Section 2 of the Public Utility Act, was exercising judicial power within the prohibition of Article III of the Constitution. Notwithstanding a sharply divided view in the Court of Errors and Appeals it was held that

the governor was not exercising judicial power, although the character of his act was analogous to, if not precisely the same as that of the court for the trial of impeachments.

Our adversary, in the Supreme Court, relied chiefly upon the following cases: *Commonwealth v. Hawkes,* 123 Mass. 525; *Woodside v. Wagg,* 71 Maine 207; *Murtha v. Lindsay,* 187 Mich. 79; and *State of Louisiana v. George H. Grandjean,* 51 La. 1099.

We believe that only three of these cases need discussion and distinguishment, viz. *Commonwealth v. Hawkes,* 123 Mass. 525, *Woodside v. Wagg,* 71 Maine 207, and *Murtha v. Lindsay,* 187 Mich. 79.

In *Commonwealth v. Hawkes,* it appeared that under the Constitution of that State "no judge of *any court of this Commonwealth* (except the Court of Sessions) shall at the same time hold the office * * * or have a seat in the Senate or House of Representatives of this Commonwealth." The Massachusetts court held that a justice of the police court was a judge of a court of the Commonwealth. This holding, of course, is in direct conflict with the decision of *Perry v. Bianchi, supra,* which was not overruled by the Supreme Court in the opinion below.

Additionally, the Constitution of Massachusetts provided that all judicial officers (which, of course, include the police justices) were subject to removal by the governor with the consent of the council upon the address of the legislature. It, therefore, appears that a police justice in Massachusetts, being

a member of the legislature, could by virtue of his position in the legislature, impede or perhaps even defeat proceedings initiated for his removal from office because, being a member of the legislature, he could vote against and use his influence against an address to the governor and council. This fact alone clearly distinguishes *Commonwealth v. Hawkes* from the case at bar.

In *Woodside v. Wagg,* Humphreys was Judge of the Municipal Court of the Town of Brunswick. Before he rendered a judgment against Woodside, he qualified as a member of the legislature. The case itself was not a *quo warranto* proceeding, but arose by way of an attack upon a judgment rendered by Humphreys after he took his seat in the legislature. It will be observed that the Maine Court relied upon *Commonwealth v. Hawkes,* which we have distinguished, *supra.* Additionally, it is to be observed that the provisions of the Maine Constitution were vastly dissimilar from the pertinent provisions of our Constitution. Under the Maine Constitution, judges of municipal police courts were specifically mentioned by name and it was provided that they should be appointed by the Governor in the same manner as other judicial officers were appointed. The other judicial officers were, under the Constitution, appointed by the Governor with the advice and consent of the Council. The Council itself was chosen by the joint ballot of the Senators and Representatives, so it is readily discernible that a member of the legislature could by virtue of his position exert his influence to obtain his own ap-

pointment as a judge of a municipal court and re-appointment thereafter. This circumstance alone clearly distinguishes *Woodside v. Wagg* from the case at bar. Furthermore under the Constitution of Maine a police judge could only be removed by the governor with the advice of council on the address of both houses of the legislature, therefore, it is at once obvious that a police judge in Maine, if he were at the same time a member of the House of Representatives, could impede or perhaps defeat his own removal from office. Of course, no such circumstance is present in the case at bar, and we, therefore, submit that in view of the fundamental dissimilarity between the Maine Constitution and the Constitution of New Jersey in the respects heretofore mentioned that *Woodside v. Wagg* is in no sense a reliable precedent to be followed by the Court in the instant case.

In *Murtha v. Lindsay,* Mandamus Proceedings were brought by James A. Murtha against the City Clerk of Detroit to compel the City Clerk to receive a petition of Murtha as a candidate for the office of Judge of the Recorder's Court of the City of Detroit. The City Clerk refused to receive the petition because Murtha was a member of the State Legislature and the State Constitution provided:

> "No person elected a member of the legislature shall receive any civil appointment within this State or to the Senate of the United States from the Governor, except notaries public, or from the Governor and Senate, from the legislature, or any other State authority, during the term for which he is elected."

The Court concluded that the Judge of the Recorder's Court of the City of Detroit was a State official and that, therefore, he could not aspire to the office of the recordership because he was a member of the legislature. In the first place, it is to be noted that the holding of the Michigan Court that the Recorder of Detroit was a State officer is directly in conflict with *Perry v. Bianchi, supra,* in our own State. Secondly, it appears that the Recorder of Detroit was elected by the people so, conceivably, the aspect might be presented of a person running for the legislature and the recordership of Detroit at the same time. Furthermore, under the Michigan Constitution and pertinent Statutes upon the vacation of the office of recorder, his successor was appointed by the governor; and finally, as appears from the opinion, the Judge of the Recorder's Court of Detroit exercised the same powers as a Circuit Court Judge, which latter judge, under the Constitution of Michigan, had original jurisdiction in all matters of a civil nature not excepted by the Constitution or prohibited by law. It is, therefore, readily apparent that *Murtha v. Lindsay* is likewise in no way a cogent precedent for any decision in the instant case.

We respectfully submit that taking the Constitution as a whole and having in mind that municipal officers are not referred to or mentioned therein, that, therefore, a proper construction of the word "judge" in the Article in question does not apply to persons holding recorder's courts or municipal courts of that character. It does not apply to

mayors of cities sitting as police justices nor to police justices holding municipal courts when named as such. It does not apply to the vast number of persons sitting in administrative bodies and performing judicial functions in the hearing and determining of questions therein. It does not apply to coroners and surrogates, although they both perform judicial acts of a highly important nature. In short, its application is limited to those judges who are designated in the Constitution as of the judicial department of the State.

Long course of practice and practical interpretation have limited the scope of Article IV, Section V, Paragraph 3, of the New Jersey Constitution as amended to State Judges, and does not include municipal officers exercising judicial power.

At the time of the adoption of the Constitution of 1844, there were many municipalities in the State having a mayor, a recorder, and frequently aldermen, on whom the legislature had conferred, within the limits of their municipality, not only the powers of police judge, but also some of the judicial powers that were exercised by the justice of the peace, so that these persons were just as much judges within their territory as the justice of the peace was a judge in his county, and none of them was referred to in the Constitution as being ineligible to the office of Assemblyman or State Senator, or indeed any other office, either civil or military under the Constitution, as they undoubtedly would have been if the judicial

powers exercised by the justice of the peace or the judicial powers exercised by the mayor, recorder, or aldermen of the municipalities were considered controlling. As heretofore pointed out, these municipalities included Burlington, Camden, Trenton, Princeton, Perth Amboy, Elizabethtown, Jersey City, and in addition, there is also New Brunswick, referred to in *Weeks v. Forman,* 16 N. J. L. 237.

Appellant's plea sets forth a number of instances where a recorder or mayor was at the same time a member of the legislature of the State; in addition to those instances are the following instances where a mayor previously served in the Assembly: In 1904, Melanchton S. Ayres, Mayor of Fairview; in 1907, Richard John Chaplin, Mayor of Mt. Arlington; in 1907, Randolph Perkins, Mayor of Westfield; in 1908, Joseph H. Firth, Mayor of Phillipsburg; in 1909, Monroe Van Brockle Poole, Mayor of Keyport; in 1910, Oliver Huff Brown, Mayor of Spring Lake; and in 1918, Henry G. Hershfield, Mayor of Pompton Lakes.

In addition to the above, there are in the present legislature several mayors, city solicitors, county solicitors, county engineers, members of the national guard, a clerk of a board of freeholders, recorder of a municipality, a president of the State Board of Education, a city commissioner, and an agent of the State Department of Motor Vehicles.

Many, if not all, of these officials would be excluded from the legislature under the broad interpretation of the Constitution as adjudicated by the Supreme Court, for obviously the powers they exercise aside from their legislative duties are executive

or judicial. If Article III of the Constitution extends to every officer, whether State or municipal, then each of these officers is a member of one department performing duties in one of the other departments.

If the language of Article IV, Section V, Paragraph 3, of the Constitution, as amended, is uncertain, and we submit that it is uncertain, then the interpretation placed upon it over a long period of years by those who were required to give it interpretation and application will be construed by this Court to be the proper interpretation.

State v. Kelsey, 44 N. J. L. 1;
State Board of Assessors v. Central R. R., 48 L. 146, at 304;
Fritts v. Cool, 51 L. 191, at 200;
Briscoe v. Bank, 11 Peters 257, at 318;
Engeman v. State, 54 L. 247, at 252;
McNeal v. Lippincott, 57 L. 540, at 542;
State Suburban Elec. v. City of Elizabeth, 59 L. 134, at 138;
Stevens v. Civil Service, 101 L. 192, at 194;
In re Hudson County, 106 L. 62, at 64;
Kenny v. Hudspeth, 59 L. 504;
State v. Lorenzo, 81 l. 613.

We have argued that the framers of the Constitution, not having mentioned municipal officers as being excluded from participation in the State Government, notwithstanding at the time of the adoption of the Constitution there were municipal officers, viz., mayors, aldermen, and recorders who performed judicial as well as executive and legislative functions,

did not intend by Article IV, Section V, Paragraph 3, to exclude these municipal officers as judges from holding seats in the legislature. In addition to this fact, we have the contemporaneous view of the legislature above referred to as shown in the Election Act of 1847 and continued down with practically no change until the present day.

The cases cited under this point disclose in no uncertain manner the course the construction of the Constitution has taken by virtue of long continued use and application of its several provisions. Applying the rule of contemporaneous construction to the present case, we find that in times gone by many persons holding posts of a judicial character in more or less varying degrees have occupied seats in the legislature without anyone doubting their right so to do. It cannot be said that their occupation of those seats was or is in any way detrimental to the conception of the departmental character of our government nor can it reasonably be said that they were intended to be excluded by anything expressed or implied in the Constitution. The evil which the Constitutional Convention of 1844 desired to overcome was the power of the governor, council and assembly to dominate the judicial department and to combine in themselves the legislative, executive, and judicial departments. A conspicuous case was the sitting of Judge Drake, a judge of the Supreme Court, in the council as disclosed in Judge Elmer's Reminiscences. The evil intended to be corrected was the combination of the legislative, executive, and judicial departments of the State as such in one branch of the government or under one control. Di-

rected to this end, the exclusion of State judges from seats in the legislature is clearly understandable. The practical construction of the Constitution since 1844 demonstrates that the exclusion of municipal officers, whether judicial or otherwise, was not the evil which was feared nor an evil which was intended to be corrected.

There is no common law incompatibility in the office of Recorder and member of the Assembly.

The Supreme Court did not consider the question of common law incompatibility between the office of recorder and member of the assembly apparently for the obvious reason that there is no such incompatibility.

There is nothing in the office of recorder, either in its functions, its duties, or in the time required for its administration, that in any way interferes with the office of a member of the General Assembly. A person occupying the office of recorder can readily perform the duties of that office as well as the duties of a legislator. There are no conflicting interests between the office of recorder and that of a legislator; nor are the interests of these respective offices inconsistent; nor can it be said that one is superior to the other in any respect whatever. The recorder is an officer of a municipal corporation, whereas a legislator is a Constitutional officer of the State.

In this connection it should be observed that the recorder is not removable from office by the legisla-

ture but only by the City Commissioners who appointed him.

We have pointed out the several incompatibility clauses in the Constitution. The Election Act above referred to extends this incompatibility to several other offices; viz.: surrogate, county clerk, coroner and electors for president and vice-president. Nowhere, either in the Constitution or Statute are officers of municipal corporations named. So far as regards incompatibility, we contend that where specific mention is made either in the Constitution or in the Statute, of certain offices, which were declared to be incompatible, that there is no legal justification for the extension of this incompatibility to other offices not so named. *Klair v. Bacharach,* 10 Misc. 448, 451.

The rule of incompatibility is stated by Bacon in *Abr. title "Office K,"* as follows:

> "Offices are incompatible or inconsistent, when they cannot be executed with care and ability; or where one is subordinate to, or interferes with another."

Measured by this definition, it cannot be said that the office of recorder and legislator are incompatible.

In *Clawson v. Thompson,* 20 N. J. L., 689, the question was whether the offices of Attorney-General and Prosecutor were incompatible offices so as to prevent the Attorney-General from holding the office of Prosecutor. The Court, in an Opinion by Justice Nevius, held that the offices were incompatible, because the office of Prosecutor was subordinate to and under the control of the Attorney-General. As

learned counsel, in his brief in the case of *Klair v. Bacharach, supra,* pointed out, the illustrations used by Justice Nevius were perhaps unfortunate. Justice Nevins opined that a master in chancery, when appointed to the office of chancellor, vacated his office as master in chancery. By analogous reasoning, a vice-chancellor would vacate his office as master in chancery, and a justice of the supreme court or circuit court would likewise vacate his office as supreme court commissioner for the reason that masters in chancery and supreme court commissioners are subordinate to the superior office. It is obvious, however, that these offices are merely submerged in the superior office, and when the holders of these superior offices cease to hold the same, they can exercise the office of either Supreme Court Commissioner or Master in Chancery without any new appointment to those offices.

In the case of *People, ex rel Ryan v. Green,* 58 N. Y. 295, the Court of Appeals of the State of New York, after deciding that a charter of the City of New York, providing that any person holding an office under the City Government, who accepted a seat in the legislature, thereby vacated his city office, could not operate retroactively, held that the office of Deputy Clerk of the Court of Special Sessions of the City and County of New York, was not incompatible with that of a legislator.

We submit that there is no common law incompatibility between the office of recorder and that of a member of the assembly.

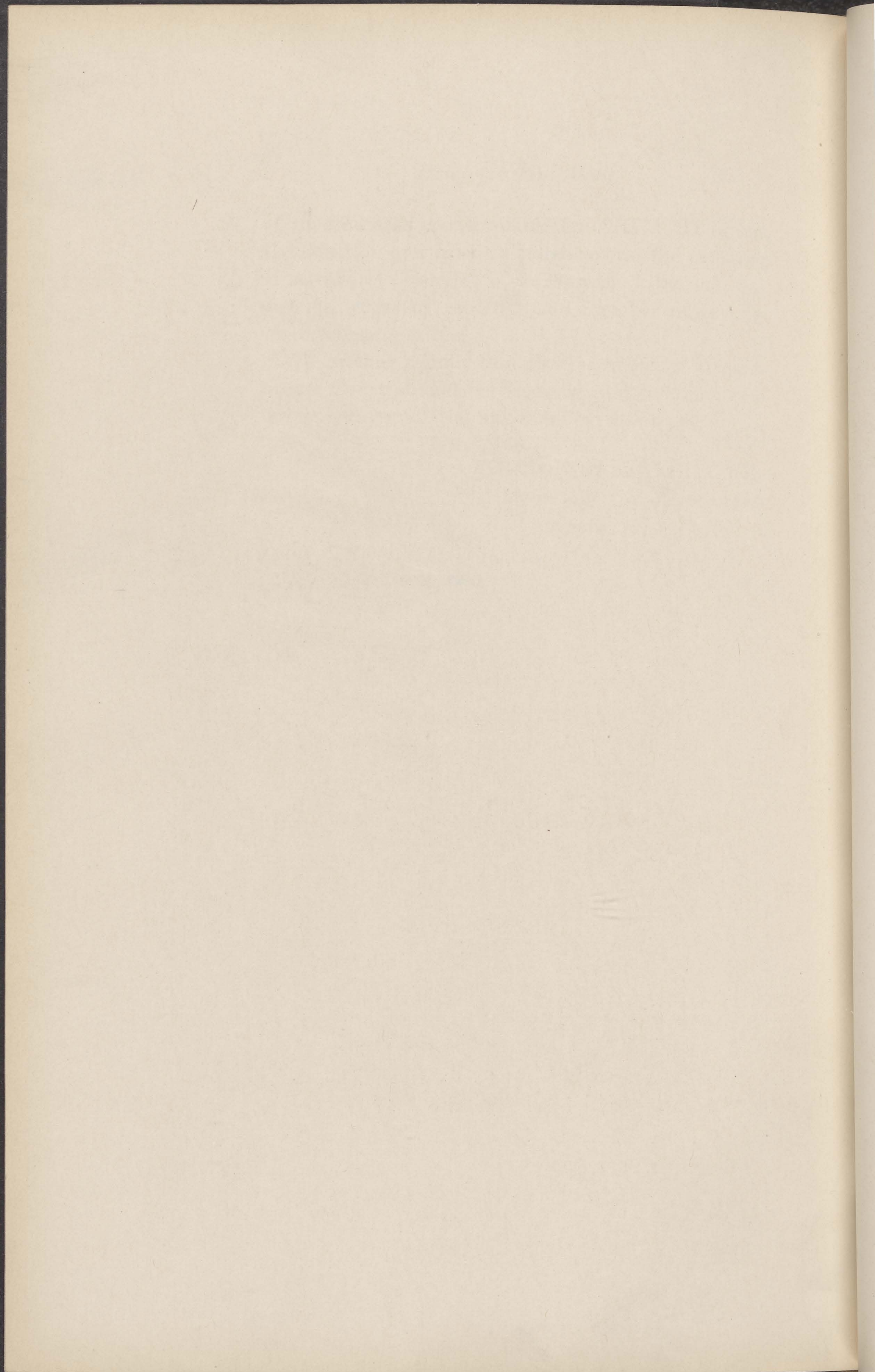
In conclusion we respectfully submit that the appellant is not a member of the judicial department

of the State as contemplated by Article III of the Constitution and is not a judge within the meaning of Article IV, Section V, Paragraph 3, thereof, nor are the offices of recorder and member of the assembly incompatible.

We further submit that the judgment of the Supreme Court should be reversed and judgment entered in favor of the appellant on the writ.

BOURGEOIS & COULOMB,
Attorneys for Respondent-Appellant.

To be Argued by:
H. R. Coulomb, Esq.



NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, DAVID T. WILENTZ, Attorney-General, *ex rel.*, JOSEPH L. RODGERS,
Relator-Appellee,

v.

THOMAS D. TAGGART, JR.,
Respondent-Appellant.

ON QUO WARRANTO.

ON APPEAL FROM SUPREME COURT.

BRIEF OF EDWARD I. BAKER, ATTORNEY AND COUNSEL OF APPELLEE.

STATEMENT.

This is an appeal from a judgment of the Supreme Court entered on a demurrer to a plea to a writ in the nature of *Quo Warranto,* whereby the appellant, Thomas D. Taggart, Jr., was ousted from

the office of Recorder of Atlantic City upon the ground that having been elected to and having taken his seat in the assembly, his office of recorder was thereby vacated by virtue of the application of Article IV, Section V, paragraph 3 of the Constitution of 1844, as amended, which reads as follows:

> "No justice of the supreme court, nor judge of any other court, sheriff, justice of the peace, nor any person or persons possessed of any office of profit under the government of this state shall be entitled to a seat either in the senate or in the general assembly; but on being elected and taking his seat his office shall be considered vacant; and no person holding any office of profit under the government of the United States shall be entitled to a seat in either house."

QUESTIONS FOR DECISION.

The two basic questions presented to this Honorable Court on appeal are the same as those which were presented to the Supreme Court for decision.

First: Is the Recorder of Atlantic City, New Jersey, within the meaning of the words "nor judge of any other court" in Article IV, Section V, Paragraph 3 of the Constitution of New Jersey (1844), as amended?

Second: Are the offices of Recorder of Atlantic City, New Jersey and member of the Assembly of New Jersey incompatible?

ARGUMENT.

The relator-appellee contends that the answer to the first question must be in the affirmative; that the Recorder of Atlantic City is within the meaning of the words "nor judge of any other court" in the paragraph of the Constitution under consideration. The respondent-appellant contends that the Recorder of Atlantic City, being a municipal judge and not a judge of a State court, is therefore not within the meaning of the words "nor judge of any other court" because the framers of the Constitution did not intend the words in question to apply to judges of municipal courts, as distinguished from State courts. Respondent-appellant also contends that the office of recorder is not incompatible with that of legislator.

The relator-appellee contends that it was the intention of the framers of the Constitution that no judge of any court, whether State, county or municipal, should at the same time be a member of the Senate or Assembly of New Jersey, and that the Recorder of Atlantic City is within the prohibition.

The relator-appellee further contends that even aside from the constitutional provision, the offices of Recorder of Atlantic City and assemblyman are incompatible and therefore the appellant's office of recorder became vacant when he was elected to the State Legislature and took his seat therein.

These conclusions are based on the following points:

Point 1.

The Recorder of the City of Atlantic City is a Judge.

Bouvier's Law Dictionary (Rawle's Third Revision, Vol. 2, p. 2847) defines "Recorder" as follows:

> "Recorder. A judicial officer of some cities, possessing generally the powers and authority of a judge. Anciently, recorder signified to recite or testify on recollection as occasion might require, what had previously passed in court; and this was the duty of the judges, thence called recordeurs."

A judge may be defined as "a public officer lawfully appointed to decide litigated questions according to law." (*Bouvier's Law Dictionary*, Rawle's 3rd Ed., p. 1711; Am. & Eng. Ency. Vol. 12, p. 716.)

Corpus Juris (33 C. J. 924, Section 2) defines the term "judge" and says, "Judge is a term employed to designate a public officer appointed to preside and to administer the law in a court of justice. In its most extensive sense, the term is used to include all officers appointed to decide litigated questions while acting in that capacity. In its more limited sense, the term "judge" signifies an officer who is so named in his commission and who presides in some court. According to the intent and context the term "judge" may include a judge of the recorder's court, a recorder of a city, a recorder of the mayor's court.

A judge is a public officer, who by virtue of his office is clothed with judicial authority.

United States v. Clark (U. S.), 25 Fed. Cas. 441, 442;
Todd v. United States, 15 Sup. Ct. 889, 891, 158 U. S. 278, 39 L. Ed. 982.

In the Pennsylvania case of the *Commonwealth ex rel., The Attorney-General v. John N. Conyngham* (Supreme Court of Pennsylvania, 1870), 65 Pa. State Reports, 76, the Court says this of the recorder:

> "That the recorder is a judge, all text writers who speak of the office affirm. The references in the argument of the Attorney-General clearly establishes this. In 1 Bac. Abr. 657, it is said that in the Court of Hustings, at Guild Hall, before the Lord Mayor and Sheriffs, when any matter is to be argued and determined, the recorder sits as a judge, with the mayor and sheriffs, and gives rules and judgments therein. In a constitutional view, the name is nothing. If it be the recorder's duty to act as a judge of a court, as it certainly is, under this act of incorporation, the constitution requires that he be elected by the qualified citizens over whom he is to be the judge," etc.

Point 2.

Assuming, for the purpose of argument, that at the time of the drafting of the Constitution of 1844, Recorders were not regarded as judges, that fact is not controlling, for the inquiry in the case at bar is whether or not the Recorder of Atlantic City is NOW a judge within the meaning of the words "nor judge of any other court."

As was aptly stated by the Court in the case of *State of Louisiana v. George H. Grandjean* (51 La. 1099), at page 1102, "Law dictionaries and books of reference concur in the general proposition that recorders are judicial officers, but, after all, the determination of the question, in any given case, depends upon the law creating the particular office, and the functions and duties imposed upon that particular officer."

The Recorder of the City of Atlantic City, New Jersey, is the judge of a court of record. His court has a seal and the power to commit for contempt.

The Charter Act of Atlantic City (P. L. 1902, p. 284), created the office of recorder. Atlantic City adopted that Act on May 6, 1902—*Cole v. Atlantic City*, 69 N. J. L. 131.

Section 114 of said Charter Act (1. C. S. 1162), reads as follows:

> "Such court shall be a court of record and shall have an official seal, and all persons shall be amenable to punishment for contempt of said court in the same manner as other courts of

record in this State having power to punish for contempt of court, and such *judge* may make such rules," etc.

Said Charter Act (1 C. S. 1160—paragraphs 2026 to 2030) gives the Recorder considerable judicial power and then the Recorder was given additional powers by P. L. 1933, p. 331, Section 6 of which reads as follows:

> "It shall be the duty of the recorder, police justice or other official presiding over any recorder's court, police court or other municipal court having jurisdiction over criminal offenses and power of committal of cities of the fourth class in this State, to try, determine and dispose of in the manner now provided by law, and inflict such penalty as now authorized by law, all cases so brought before such recorder, police justice or other official presiding over any recorder's court, police court or other municipal court having jurisdiction over criminal offenses and power of committal of assault, simple assault and battery, malicious mischief, larceny or embezzlement where the price or value of the article, property or things alleged to have been taken or stolen is under fifty ($50.00) dollars; obtaining money or property under false pretenses where the amount or value of the article, property or thing alleged to have been obtained is under fifty ($50.00) dollars; receiving stolen property where the value of the article, property or thing alleged to have been received is under fifty ($50.00) dollars; unlawful conversion where the property or thing alleged to have been converted is under the value of fifty ($50.00) dollars; desertion and non-support,

> fornication, adultery, selling cigarettes to minors, allowing minors to congregate and play in pool rooms, any offense or offenses within the intent and meaning of chapter one hundred and twenty-seven of the laws of one thousand nine hundred and five, approved April twelfth, one thousand nine hundred and five, any offense or offenses within the intent and meaning of chapter one hundred twenty-one of the laws of one thousand nine hundred and thirty, approved April fourteenth, one thousand nine hundred and thirty, and also other criminal offenses the penalty for which does not exceed a fine of two hundred dollars ($2.00.00) or imprisonment for a term not exceeding six months, where any of the crimes heretofore specified are committed within the corporate limits of the municipality in which such recorder, police justice or other official presiding over any recorder's court, police court,'' etc.

The above Act affects cities of the fourth class. The Act so provides. Atlantic City, by virtue of 1 C. S., p. 956—Sec. 1338, is a city of the fourth class.

The case of *Keffer v. Gaskill,* 88 N. J. L. 77, holds that the adoption by Atlantic City of the Walsh Act (P. L. 1911, p. 462) did not abolish the charter office of Recorder previously existing. At page 79 the Court says:

> ''and we do not consider that the decision affects or was intended to affect a judicial office created, and whose powers and duties are prescribed by the charter statute.''

In the Maine case of *Woodside v. Wagg,* 71 Maine 207, Humphreys was Judge of the Municipal Court

of the town of Brunswick. Before he rendered a judgment against Woodside, he qualified as a member of the Legislature. The Court said:

> "That the two offices, judge of the municipal court and member of the legislature, were incompatible, cannot be denied. Const. of Maine, Art. 9, Sec. 2. That to accept and qualify for one of these offices, while holding the other, would be a resignation of the one first held. It follows that when Judge Humphreys was qualified as a member of the legislature, his strictly legal authority to act as judge of the municipal court ceased. He was no longer judge *de jure.* If he continued to exercise the functions of a judge he might have been ousted by an Information in the nature of a *quo warranto.*"

Article 9, Section 2 of the Constitution of Maine (Const. 1819 as amended 1876) reads as follows:

> "No person holding the office of justice of the Supreme Judicial Court, or of any inferior court, attorney general, county attorney, treasurer of the State, adjutant general, judge of probate, register of probate, register of deeds, sheriffs or their deputies clerks of the judicial courts, shall be a member of the Legislature; and any person holding either of the foregoing offices, elected to, and accepting a seat in the Congress of the United States, shall thereby vacate said office; and no person shall be capable of holding or exercising at the same time within this state, more than one of the offices before mentioned."

Point 3.

Municipal courts were not excepted from the operation of Article VI, Section I and Article IV, Section IV, paragraph 3 of the Constitution of 1844, as amended.

Article VI, Section 1, reads as follows:

> "The judicial power shall be vested in a court of errors and appeals in the last resort in all causes as heretofore; a court for the trial of impeachments; a court of chancery; a prerogative court; circuit courts, and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish as the public good shall require."

The courts of New Jersey can only exist and be created by virtue of the above section of the Constitution. The creation of the Recorder's Court of Atlantic City was obviously under and by virtue of said section which vested the judicial power in certain specified courts and in "such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish as the public good shall require." Municipal courts were not excepted. To say that only State courts were contemplated by this section would preclude the creation of municipal courts which have always been found necessary to the administration of justice. Nowhere, either in the Constitution or outside of it, is there a sugges-

tion that the framers thereof intended to distinguish municipal courts from State courts with regard to judges thereof holding seats in the Legislature.

The appellant argues (see pages 8 and 9 of Appellant's Brief) that there was a uniform system of local government in existence at the time of the adoption of the Constitution of 1844 and that the principles thereof were incorporated by implication into the State Constitution. This argument does not hold true in the State of New Jersey, for, in the case of *Attorney-General v. McGuinness,* 78 N. J. L. 346, decided by the Court of Errors and Appeals in 1910, Justice Garrison, writing the opinion for the Court, says at page 355:

> "With respect to the first point, the Constitution of this State was not adopted in view of any uniform system of local government for we have had none such; certainly no uniform recognition of the right of local self-government that is here contended for."

The Court then refers to many charters of that period and then at page 357, says:

> "Our present Constitution is therefore not to be construed as if it were adopted in view of any established and uniform system of local self government."

The framers of the Constitution, thus, by Article VI, Section I provided for the future creation of municipal courts and therefore knew when they used the words "nor judge of any other court" is Article IV, Section V, paragraph 3, that those words were

comprehensive enough, when considered together with Article VI, Section 1, to extend to the judge of a municipal court thereafter ordained and established.

> "It is elementary that all the provisions of a law or constitution must be read together, and that the construction must be adopted which will harmonize the whole, making every word operative and none idle or nugatory." *Cooley Const. Lim.* *58. See also 20 N. J. E. 421 and 116 N. J. L. 219.

If they had intended to except municipal judges they could easily have done so by the use of appropriate language. That they did consider exceptions to Article IV, Section V, paragraph 3 of the Constitution is evident from the minutes of the Constitutional Convention of 1844 (New Jersey State Library, Trenton, N. J.) at page 157, of which the following appears:

> "Mr. Connoly moved to amend the same section by inserting after the words 'of this State', the words 'postmasters excepted', which was disagreed to."

In the California Supreme Court case of *Boys' and Girls' Aid Society v. Reis,* 71 Cal. 627, 12 Pac. 796, 1st Series (1887) 798, the Court held that the term "inferior court," as used in Const. Art. 6, p. 1, providing that all the judicial power of the State shall be vested in certain specified courts, and in such other inferior courts as the Legislature may establish in any incorporated city or town, includes a "tribunal presided over by a police judge."

In the Massachusetts case of *Commonwealth v. Hawkes,* 123 Mass. 525, Nathan Hawkes was a special justice of the Police Court of the City of Lynn, Mass. The Police Court consisted of one standing justice and two special justices. While holding that office, Hawkes was also elected to the Massachusetts Legislature and was duly qualified and took his seat therein. There were no police courts in Massachusetts at the time of the adoption of the amendment to the Mass. Constitution (8th Art. of amendment) which provided that "no judge of any court of this Commonwealth (except the Court of Sessions) shall at the same time hold the office * * * or have a seat in the Senate or House of Representatives of this Commonwealth." (The Court of Sessions had only administrative functions as agent and representative of the county in all matters touching its finances, etc.)

The jurisdiction of police courts was substantially that then exercised by justices of the peace. The Court held that a special justice of a police court is a "judge of any court of this Commonwealth (except the Court of Sessions)" within the 8th Article of amendment of the Constitution and therefore cannot at the same time have a seat in the House of Representatives of the Commonwealth. The Court held that such judge vacates his office on taking a seat in the House of Representatives and may be ousted by an information in the nature of a *quo warranto.*

The Eighth Article of Amendment of the Massachusetts Constitution reads as follows:

"Incompatibility of Offices—No judge of any court of this commonwealth (except the court of sessions) and no person holding any office under the authority of the United States (postmasters excepted) shall, at the same time, hold the office of governor, lieutenant governor, or councillor, or have a seat in the senate or house of representatives of this commonwealth; and no judge of any court of this commonwealth (except the court of sessions) nor the attorney-general, solicitor general, county attorney, clerk of any court, sheriff, treasurer and receiver general, register of probate, nor register of deeds, shall continue to hold his said office after being elected a member of Congress of the United States, and accepting that trust; but on acceptance of such trust by any of the officers aforesaid shall be deemed and taken to be a resignation of his said office; and judges of the courts of common pleas shall hold no other office under the government of this commonwealth, the office of justice of the peace and militia offices excepted."

Point 4.

There was no logical reason why the framers of the Constitution should have excepted municipal judges from the operation of Article IV, Section V, paragraph 3.

The purpose of Article IV, Section V, Paragraph 3 of the Constitution was to declare what offices were deemed incompatible with that of Assemblyman and Senator. Article IV, Section V is entirely devoted

to the placing of limitations upon members of the Legislature with regard to holding other offices.

Paragraph 1 of that section reads as follows:

> "1. Members of senate and general assembly not to hold certain other offices.—No member of the senate or general assembly shall, during the time for which he was elected, be nominated or appointed by the governor or by the legislature in joint meeting, to any civil office under the authority of this State, which shall have been created, or the emoluments whereof shall have been increased, during such time."

Paragraph 2 reads as follows:

> "2. Vacation of seat in senate or general assembly on acceptance of incompatible office.—If any member of the senate or general assembly shall be elected to represent this State in the Senate or House of Representatives of the United States, and shall accept thereof, or shall accept of any office or appointment under the Government of the United States, his seat in the legislature of this State shall thereby be vacated."

The distinction between State and municipal judges has never been satisfactorily defined in general terms and the law on this subject is in a rather confused state. An exact criterion determinative of all cases alike, has not apparently been established.

The framers of the Constitution wanted to exclude judges from the legislature because they deemed the functions of the two offices incompatible. It is more reasonable to suppose that they deemed the incompatibility to exist in the functions of judges gener-

ally, as distinguished from those of legislators, rather than in the uncertain distinction between State and municipal offices.

McQuillin on Municipal Corporations (2nd Edition, Section 200) says:

> "There is a recognized distinction between State officers, whose duties concern the State at large, or the general public, although exercised within defined territorial limits, and municipal officers whose functions relate exclusively to the particular municipality. Here it is important to remember the distinction already stated between the State and municipal functions of the city. A State officer may be connected with some of the municipal functions, but he must derive his power from a State statute and execute them in obedience to a State law. Although the jurisdiction of the officers is coextensive with the limits of the municipal corporation, if they fill offices that are governmental rather than municipal, if they serve the public generally and not merely the local corporation or the inhabitants thereof, they are properly controlled by the State and are considered State officers."

At Section 200, note 78, McQuillin says:

> "The general rule in the absence of special constitutional provision is that all officers whose duties pertain to the exercise of the police power of the State are in that sense State officers, and under the control of the legislature, even though they may be officers of the municipality charged with the enforcement of the local police regulations of such municipality."

Note 79 says:

> "In a popular sense a State officer is one whose jurisdiction is coextensive with the State. In a more enlarged sense a State officer is one who received his authority under the laws of the State, and performs some of the governmental functions of the State."

And at Section 1131, note 7, McQuillin says:

> "A municipal court is a court whose territorial jurisdiction is usually coterminus with the jurisdiction of the municipality. Under ample grant of power, such a court may exercise either civil or criminal jurisdiction or sometimes both. Ordinarily Constitutions did not define jurisdiction and the words are *assumed* and *believed* to have an established meaning."

It appears that in the State of New Jersey, the difference between a State officer and a municipal officer is not made to depend upon whether the officer is appointed by the State government or by the municipal government.

In the case of *Attorney-General v. McGuinness,* 78 N. J. L., 346, at page 355, the Court says:

> "From the commencement of our existence as a State, under the Constitution of 1776 until the adoption of the present Constitution in 1844, municipal charters in considerable number were enacted by the legislature without any semblance of uniform adherence to the principle of local self-government. Counsel for plaintiff-in-error has submitted references to many of the charters of that period, among which the following may be mentioned:

The town of New Brunswick was incorporated in 1784. Pat. L., p. 56. The first officers were named in the Act; their successors were to be chosen by the qualified voters of the city. A new charter was substituted in 1801. Pamph. L., p. 244. This provided that the mayor, recorder and aldermen should be appointed by the council and general assembly of the State in joint meeting and commissioned by the governor; councilmen to be chosen by the local electors. The City of Burlington was incorporated in 1784. Pat. L., p. 70. The mayor, recorder and aldermen were to be appointed by the council and general assembly in joint meeting. The City of Perth Amboy was incorporated in 1784. Pat. L., p. 64. The charter provided that the mayor, recorder and aldermen should be appointed by the council and general assembly. So with the charter of the Borough of Elizabeth, enacted in 1789. Pat. L., p. 94. The City of Trenton was incorporated in 1792. Pat. L., p. 116. Its charter provided that the mayor, recorder and aldermen were to be appointed by the general assembly of the State in joint meeting, and commissioned by the governor, with assistants, and a clerk, assessor and collector, to be chosen by the freeholders and inhabitants of the city. The Borough of Princeton was incorporated in 1813. Pamph. L., p. 7. The mode of choosing the officials was the same as in the case of Trenton. Jersey City was incorporated by Pamph. L. 1820, p. 86. The first board of selectmen were appointed by the Act, to serve until their successors were chosen by the freeholders and other taxable inhabitants. Bordentown was incorporated by Pamph. L. 1825, p. 25, the first officials being appointed by the Act, their successors to be elected. On the other

hand, the City of Camden, incorporated in 1828, and the City of Newark, incorporated in 1836, had from the beginning the power of choosing their own officials. Pamph. L. 1828, p. 193; Pamph. L. 1836, p. 185.

These charters were likewise different one from the other in respect to the powers that were conferred upon the several municipalities.

We thus see that prior to the adoption of our present Constitution no uniform system of local governments had been established, nor was there any general recognition of the right of local self-government. Municipal powers were conferred or withheld as the legislature deemed proper. And the privilege of local self-government was likewise conferred in some instances and withheld in other instances, according to the wisdom of the lawmakers.

Our present Constitution is therefore not to be construed as if it were adopted in view of any established and uniform system of local self-government."

It thus appears from the above, that in some cases recorders were appointed by the council and general assembly of the State and commissioned by the governor; the councilmen being chosen by the local electors, while in some cases the recorder was appointed by the general assembly of the State in joint meeting and commissioned by the governor and in still other cases, cities had the power of choosing their own officials.

In the case of *Perry v. Bianchi,* 96 N. J. L., 113, the Court held that the office of police justice or judge of the police court has always been regarded as a municipal office. The Court in this case cites *State v.*

Churchman, a Delaware case reporter in 51 Atlantic Reporter, page 49, in which the Delaware Supreme Court held that the Judge of the Wilmington City Court, appointed by the Governor was a municipal officer and not a State officer requiring confirmation by the senate.

In view of the different methods of appointing recorders as shown above and in view of the decision in *Perry v. Bianchi, supra,* it thus appears that the source of the recorder's appointment has not been considered determinative of the question as to whether recorders are State or municipal officers. The distinction then must rest on other grounds. The only possible remaining grounds for distinction are the fact that the jurisdiction of the recorder's court is limited to the boundaries of a city and that the recorder has purely local functions to perform. It is obvious that the mere fact that the jurisdiction of a judge extends only to the limits of a city, would not prevent him from being considered a State judge if the other usual factors which enter into the consideration of what constitutes a State judge are present. Nor can it be said that the recorder of a city who enforces and applies not only municipal ordinances but also State laws, is merely performing local functions. The administration of law is obviously of State-wide concern.

We respectfully submit that if the framers of the Constitution had intended to except municipal judges from the operation of Article IV, Section 5, paragraph 3, the exception would have been based upon some clearly recognized difference or distinction between State judges and municipal judges. The dis-

tinction as to who are State judges and who are municipal judges is not entirely clear now, and the distinction certainly could not have been clear to the framers of the Constitution because if it had been clear they would readily have stated "Nor judge of any *State* court" rather than "nor judge of any other court."

It is unreasonable to suppose that the framers of the Constitution contemplated that the office of judge of a court thereafter ordained and established, whose powers and functions might be almost identical with those of a judge of a State court, would be eligible for the Legislature because his jurisdiction extends only to the limits of a city while the judge of the State court would be excluded merely because his jurisdiction extended beyond the city limits. That the framers of the Constitution made no such distinction and did not intend such a result is evident from a reading of Section XX of the Constitution of 1776 and the minutes of the Constitution Convention of 1844.

The Constitution of 1776 (Section XX) said:

> "That the legislative department of this colony may, as much as possible, be preserved from all suspicion of corruption, none of the judges of the Supreme or other court, sheriffs, or any other person or persons possessed of any post of profit under the government, other than justices of the peace, shall be entitled to a seat in the assembly; but that on his being elected and taking his seat, his office or post shall be considered vacant."

The minutes of the Constitutional Convention of 1844 (N. J. State Library, Trenton, N. J.), show that on May 28, 1844, Mr. Vroom from the Legislative Committee made his report as follows:

> "XV. That the legislative department of this colony may, as much as possible be preserved from all suspicion of corruption none of the judges of the Supreme Court, or of any other Court, Sheriffs, nor any person or persons, possessed of any office of profit under the government of this State, or of the United States, shall be entitled to a seat, either in the Senate or in the General Assembly, but that on being elected, and taking his seat, his office shall be declared vacant."

If the framers of the Constitution of 1776 and 1844, thought that the legislative department would "be preserved from all suspicion of corruption" by excluding judges therefrom, it is illogical to assume that they believed that there would be no danger of "suspicion of corruption" if they permitted municipal judges to sit in the Legislature. It is far more reasonable to consider that they probably felt that the more inferior the judge, the greater was the danger that there be a "suspicion of corruption."

Point 5.

The fact that justices of the peace, the most inferior of all judicial officers in the State, were excluded from the Legislature by Article IV, Section V, paragraph 3, indicates that the framers of the Constitution intended to bar all persons whose functions were principally judicial.

In the case of *Schalk v. Wrightson,* 58 N. J. L. 50, at page 65, paragraph 5, the Court says:

> "From the date of the adoption of the Constitution until the adoption of the Constitution of 1844, no limit had been established to the number of judges appointable in this court (The Inferior Court of Common Pleas). The court itself was held by the justices of the peace of the county, the most inferior of all judicial officers in the state. 4 N. J. Archives 166."

The office of justice of the peace was not considered that of a judge. He was a conservator of the peace and did not come within the expression "nor judge of any other court" and therefore was excluded from the Legislature by express designation (17 N. J. L. 358, at pp. 366, 367; 43 N. J. L. 49, at p. 52).

The case of *Respublica v. Dallas* (3 Yeates, page 300), relied upon by the appellant (see p. 40 of appellant's brief), which held that the office of recorder of the City of Philadelphia was not incompatible with the office of United States District Attorney for the Eastern District of Pennsylvania

is not persuasive authority. It is distinguishable from the case at bar.

A reading of the opinion discloses that the basis for the decision was as follows:

> "The general operative motive which induced the convention to adopt any disqualification of the nature of the present, seems to have arisen from an apprehension of a possible collision, between the general and state governments, and a jealousy lest the admission of their officers into our places of trust and power, might lead to a possible preference in the minds of those who might hold offices under both, in favour of the general government, to the prejudice of the State government. Whether this was a reasonable or unreasonable jealousy, it is not our business to examine. They have not, however, extended it to all State officers. The question before us is, whether there are any words or expressions in the instrument, indicative of their intention either to extend the word judges to all, who in strictness of law come under that denomination, or to restrict it to judges of a particular class.
>
> In considering this question, we acknowledge our judgments have vibrated between two opinions. We have, however, at length made up our minds to the best of our understandings, and we hope without prejudice or partiality. *From the generality of the word judge, used in the constitution, without any limitation or exception whatever, and from supposing that the mischiefs intended to be prevented by the prohibition, extended equally to the case of every judge, we were at first strongly inclined to the opinion, that every judicial officer was included*

in the prohibition; but on further consideration, and analysing such parts of the instrument as relate to this subject, our opinions preponderate in favour of the contrary construction, that the recorder of the city court is not included in the prohibition.

Our reasons are these:—First, justices of the peace, a part of the judiciary power, although a numerous body of men dispersed throughout the State, and particularly designated by that name, are not *eo nomine* included in the prohibition, for which I cannot account, but on the presumption that they were not intended to be included in it, and of course that every judicial power was not intended to be included. The Courts of Quarter Sessions for each county, by the 5th article of the same constitution, are made part of the judicial power of the State, and yet are not expressly included. The city court is not mentioned in the 5th article as part of the judicial power of the State, much less, therefore, can that court, or its members, be supposed to be included in it.

Again, not only some of the judicial characters, as justices of the peace, are omitted in the prohibition, but others, as registers of wills, although as constituting a part of the Register's Court, they are declared to be part of the judicial power of the State, are particularly included in the prohibition, showing the sense of the convention, that every person exercising judicial power was not intended to be included under the word judge, otherwise it would have been nugatory to have expressly included the registers."

Point 6.

That the framers of the Constitution did not intend to bar only State officers from the Legislature is evident from the fact that sheriffs and justices of the peace, who are county officers, are among those prohibited in Article IV, Section V, paragraph 3 of the Constitution.

Sheriffs and justices of the peace are held to be county officers in the Supreme Court case of *Gage v. Clark,* 51 N. J. L. 97.

The fact that the framers of the Constitution did not regard sheriffs and justices of the peace as State officers is shown by the fact that sheriffs and justices of the peace were expressly excepted. If they had not been so regarded, they would have been deemed within the words ''nor any person or persons possessed of any office of profit under the government of this State.''

The fact that the framers of the Constitution omitted the words ''of this State'' or ''under the government of this State'' after the words ''nor judge of any other court,'' indicates that they did not intend to prohibit only State judges. With respect to holding offices of profit they deemed it necessary to specifically state that the disqualification was to extend only to offices of profit under the State or Federal government, but with respect to judges, the exclusion was made in general, comprehensive language.

The appellant contends that the functions of re-

corders were well known to the framers of the Constitution and that because recorders were not specifically mentioned it indicates that recorders were not intended to be excluded from the Legislature. The obvious answer to this suggestion is that even assuming for the purpose of argument, that the framers of the Constitution did not regard recorders as judges THEN, the question in the case at bar is whether or not the recorder is NOW the judge of a court and within the meaning of the words "nor judge of any other court," as stated in Point 2 of this brief.

Point 7.

The meaning of Article IV, Section V, paragraph 3, of the Constitution of New Jersey (1844), as amended is clear and unambiguous and therefore a resort to a practical construction thereof is unnecessary and improper.

The appellant contends that the meaning of the words "nor judge of any other court" as used in the section of the Constitution in question, is doubtful and therefore asks the Court to give effect to the interpretation given that section by various persons who, while in the Legislature, simultaneously held the office of recorder and mayor of certain cities. We submit that the meaning of the words "nor judge of any other court" is clear, definite, precise and unambiguous and that therefore a resort to a "practical construction" of the Constitution is un-

necessary and improper. See *State v. Wrightson*, 56 N. J. L. 126, in which the election of members of the New Jersey Assembly from assembly districts set up within the county was held to be unconstitutional, although for many years members of the assembly had been elected by districts and the practice had been generally accepted.

The meaning of the words in Article IV, Section V, paragraph 3, of the Constitution is clear, even without intrinsic aids found in the Constitution, such as are mentioned in other paragraphs of this brief.

The law is well settled that no matter how long a usage has been established, or how general the acquiescence in the customary construction, it will not be permitted to override the plain meaning of a statute. *Public Service Railway Co. v. Board of Chosen Freeholders of Hudson County*, 78 N. J. Equity, 20. The same rule obviously applies to the Constitution of New Jersey.

It is primarily the function and duty of the courts to interpret the meaning of a statute and a resort to contemporaneous construction is both unnecessary and improper where the language used is clear, or its meaning can be ascertained by the use of intrinsic aids alone.—59 *Corpus Juris*, 1022, Section 607f. The same rule obviously applies to cases where a resort to a practical construction, based on custom or usage, is attempted.

Point 8.

Article III of the New Jersey Constitution does not exclusively control the interpretation of Article IV, Section V, paragraph 3.

Article III provides for the tri-partite division of our State government into executive, legislative and judicial departments. Article IV, Section V, paragraph 3, was not intended as a subsidiary provision of Article III for the purpose of further assuring the separation of the three powers of the State government. If it had been so intended it would have been written as a part of Article III. As has been previously argued in this brief (See Point 4), Article IV, Section V, paragraph 3, was intended to specify what offices were incompatible with that of assemblyman or senator.

Many of the State constitutions throughout this country had sections which declared judges ineligible to serve in the Legislature in addition to the sections which divide the powers of government into executive, legislative and judicial, so that it clearly appears that the constitution makers of this country considered the question of incompatibility as a separate problem and not merely as a part of the question relating to the separation of three powers of government. Such State constitutions are as follows:

Mass. Part II, Chapter VI, 2, as amended by Art VIII of Amendments; Maine IX, 2; Arkansas V, 7; Ill. IV, 3; N. D. II, 37; Texas III,

19; N. J. IV, Sec. V, 3; Va. IV, 44; N. H. II, 94; Tenn. II, 26, VI, 7; Md. D. R. 33; W. Va. VIII, 16; Pa. V, 18; R. I. IX, 6; Ala. VI, 150.

The following appears in 89 A. L. R., 1116:

In Massachusetts, under constitutional provisions that in the government of the commonwealth the legislative department should never exercise the executive and judicial powers, or either of them; the executive should never exercise the legislative and judicial powers, or either of them; the judicial should never exercise the legislative and executive powers, or either of them—it was held in *Comm. v. Kirby* (1849) 2 Cush. (Mass.) 577, that the offices of justice of the peace and constable were tenable by one person at the same time. The Court said:

> "The provisions of this article are general in their terms, expressive only of a principle, and not intended to mark with precision the incompatibility of different offices. The article must have been so understood by the framers of the constitution, as in other parts of that instrument certain offices are enumerated and their incompatibility directly declared."

The appellant contends that the Supreme Court based its decision on the tri-partite division of our State government under three departments, legislative, executive and judicial, and refers to State of the Case at page 24.

We respectfully submit that the appellant does not correctly state the basis of the Supreme Court's decision.

A reading of the opinion of the Supreme Court

reveals that the reasons for the Court's decision were these:

1. (Case, p. 24, line 30) A consideration of the third Article, just quoted (Article III, Section 1 of the New Jersey Constitution of 1844, as amended), makes it plain that the intention of those who framed the Constitution was that legislators should not exercise any judicial power, generally.

2. (Case, p. 25) The Recorder is a judge.

3. (Case, p. 25) A recorder's court is a court in the comprehensive sense in which that word is used in the constitutional section under consideration and the recorder is the judge of it. The fact that it is a municipal court does not remove it from the all-embracing term "court," and we, therefore, think that the respondent's first point fails.

4. (Case, p. 25) Resort to a practical construction is not warranted because the language is clear, definite, precise and unambiguous.

Point 9.

Even aside from the question of constitutional or statutory incompatibility, the application of common law principles renders the office of Recorder of Atlantic City and the office of member of the State Legislature incompatible and the acceptance of the second office renders the first vacant.

The rule that acceptance of an incompatible second office renders the first vacant was enunciated in the case of *Tonkin v. Kenworthy,* 112, N. J. L. 274, in which the opinion was written by Justice Heher in 1934. This case cites 63 N. J. L. 634, 80 N. J. L. 528, 87 N. J. L. 410 and 20 N. J. L. 689.

Blackstone said (Commentaries, 269), "Nothing is more to be avoided in a free Constitution than uniting the province of a judge and a minister of State." In the case of *The State, ex rel. Adams v. Young* (6 N. J. Misc. 224, Supreme Court, 1928) there was a *quo warranto* to test the right of Young to the office of councilman of Burlington, N. J., on ground that he was elected as an alderman and therefore vacated the office of councilman on account of the incompatibility of the two offices.

At page 225 the Court says:

> "The council is the actual legislative body; the aldermen and mayor are constituted justices of the peace *ex officio,* but with no power to try civil cases except such as arise under an ordinance or by-law of the city (penalties, etc.), under the charter, they constitute the local

judicial department as council constitutes the legislative; so that when we consider that the whole scheme of local government is laid down by this one statute, and that the separation of legislative and judicial departments was at that time one of the fundamental ideas of civil government in this State, we cannot but conclude that the legislature never intended that the same person should hold office in each of those departments; a situation certain to produce a confusion in administration. *As for example, entrusting to the same person the enforcement of an ordinance, which he had taken part in enacting,* we hold, therefore, that by the scheme of the charter the offices of alderman and councilman were inconsistent, and incompatible with each other.''

The holding of the office of judge of a municipal court and that of member of the State Legislature is contrary to public policy.

> ''Public policy has been defined to be that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good.
>
> Public policy is manifested by public acts, legislative and judicial and not by private opinion, however eminent.'' (*Bouvier's Dictionary*, Vol. 2, p. 2765, Rawle's 3rd Revision.)

The public policy in the State of New Jersey with respect to judges, generally, holding offices in the Legislature, is definitely established by Article IV, Section V, par. 3 of our Constitution and as has been shown, that public policy is based upon in-

compatibility in the functions of the two offices rather than on the doubtful distinction between State and local officers. The mischiefs intended to be prevented by the prohibition against judges holding seats in the State legislature are the same in the case of municipal judges as with State judges.

It has been the policy in this State to provide for the appointment of judges rather than to have them elected by the voters. Our method of appointing judges tends toward a greater dignity in the judiciary than would be the case if they were obliged to campaign for votes. It cannot be denied that the proper administration of justice requires that judges remain aloof from political activity. We respectfully submit that the office of assemblyman involves great political activity, a fact of which this Honorable Court ought to take judicial knowledge.

A legislator in New Jersey is elected. He must be a popular vote-getter. A recorder cannot function properly when he realizes all the while that to retain his seat in the legislature he must be a popular vote-getter. The temptation to yield to pressure for favors, the inclination to excess leniency in the enforcement of laws is greater when the recorder knows that soon he must again appear before the electorate and solicit their votes.

Further, there is actual physical incompatibility in the two offices in question. The recorder is obliged to hold court daily in Atlantic City and if he is at the same time a member of the assembly, he must be in Trenton during sessions of the legislature. It is common knowledge that the City of At-

lantic City has for many years been obliged to have an "Acting Recorder" on a great many days, while the Recorder was in Trenton on business pertaining to the legislature.

In the case of the State against Parkhurst (9 N. J. L. 427, decided in 1802), there was a *quo warranto* proceeding charging that Parkhurst was unlawfully holding the office of Clerk of the Common Pleas Court of Essex County. Parkhurst in reply charged that Odgen was not entitled to that office because Odgen had been elected to and accepted a seat in the United States Senate. In discussing the question of incompatibility, Chief-Justice Kirkpatrick says at page 445.

> "Certain offices are in their own nature incompatible and inconsistent, and cannot be exercised by the same person at the same time. Certain other offices which might be fully executed by the same person at the same time upon considerations of policy, may be rendered incompatible by positive law."

And at page 446, the Chief Justice says.

> "It is said by Lord Coke, 4 Inst. 100, that offices are said to be incompatible or inconsistent, when from the nature or multiplicity of business in them, they cannot be executed with care and ability by the same person at the same time."

> Now it is very obvious, and therefore will readily conceded, that it is physically impossible for the same man, in his own proper person, to do the duties of the Clerkship of Essex, and to sit in the Senate of the United States at Wash-

ington, at the same time. But it is said he may execute the clerkship by deputy.

It is somewhat difficult to say what offices in our government, may and what may not, before the principles of common law can be executed by deputy. Ancient government and local customs and usages in England have so far broken in before the general principle that it is not very easy, at this day, to distinguish what the general principle is. Nor can we draw much assistance in this matter from our own experience while in our colonial situation. For it cannot be dissembled, that in England, as well as in all other countries, I believe, both ancient and modern, colonial offices have always been considered and distributed as the perquisites of the parasites and panders of the court, to be exercised as may best subserve their purposes. A practice too corrupt to give precedence to a free and virtuous republic.

Notwithstanding this obscurity, however, it is pretty clear, both from authorities and from the nature of the thing itself that a judicial officer, generally speaking, cannot execute his office by deputy."

To recapitulate, we urge that the Recorder of Atlantic City is a judge of a court within the meaning of "nor judge of any other court," because

1. The Recorder of the City of Atlantic City is a judge.

2. The Charter Act of Atlantic City makes the Recorder a judge of a court of record, having a seal and the power to commit for contempt.

3. Municipal courts were not excepted from the operation of either the judiciary clause (Art. VI, Sec. 1) or the incompatibility clause (Art. IV, V, par. 3) of the Constitution of 1844, as amended.

4. There was no logical reason why the framers of the Constitution should have excepted municipal judges from the operation of Article IV, Section V, par. 3.

5. The fact that Justices of the Peace, the most inferior of all judicial officers in the State, were excluded from the Legislature by Art. IV, Sec. V, par. 3, indicates that the framers of the Constitution intended to bar all persons whose functions were principally judicial.

6. That the framers of the Constitution did not intend to bar only State officers from the Legisture is evident from the fact that Sheriffs and Justices of the Peace, who are county officers, are among those prohibited in Article IV, Sec. 5, par. 3.

7. The meaning of the words "nor judge of any other court" is clear and unambiguous and therefore a resort to a practical construction thereof is unnecessary and improper.

8. Article III does not exclusively control the interpretation of Article IV, Section V, par. 3.

9. Aside from the Constitutional prohibition in question, the application of common law principles renders the office of Recorder of Atlantic City and member of the Legislature incompatible and the acceptance of the second office vacates the first.

We respectfully submit that the judgment of the Supreme Court ought to be affirmed.

EDWARD I. BAKER,
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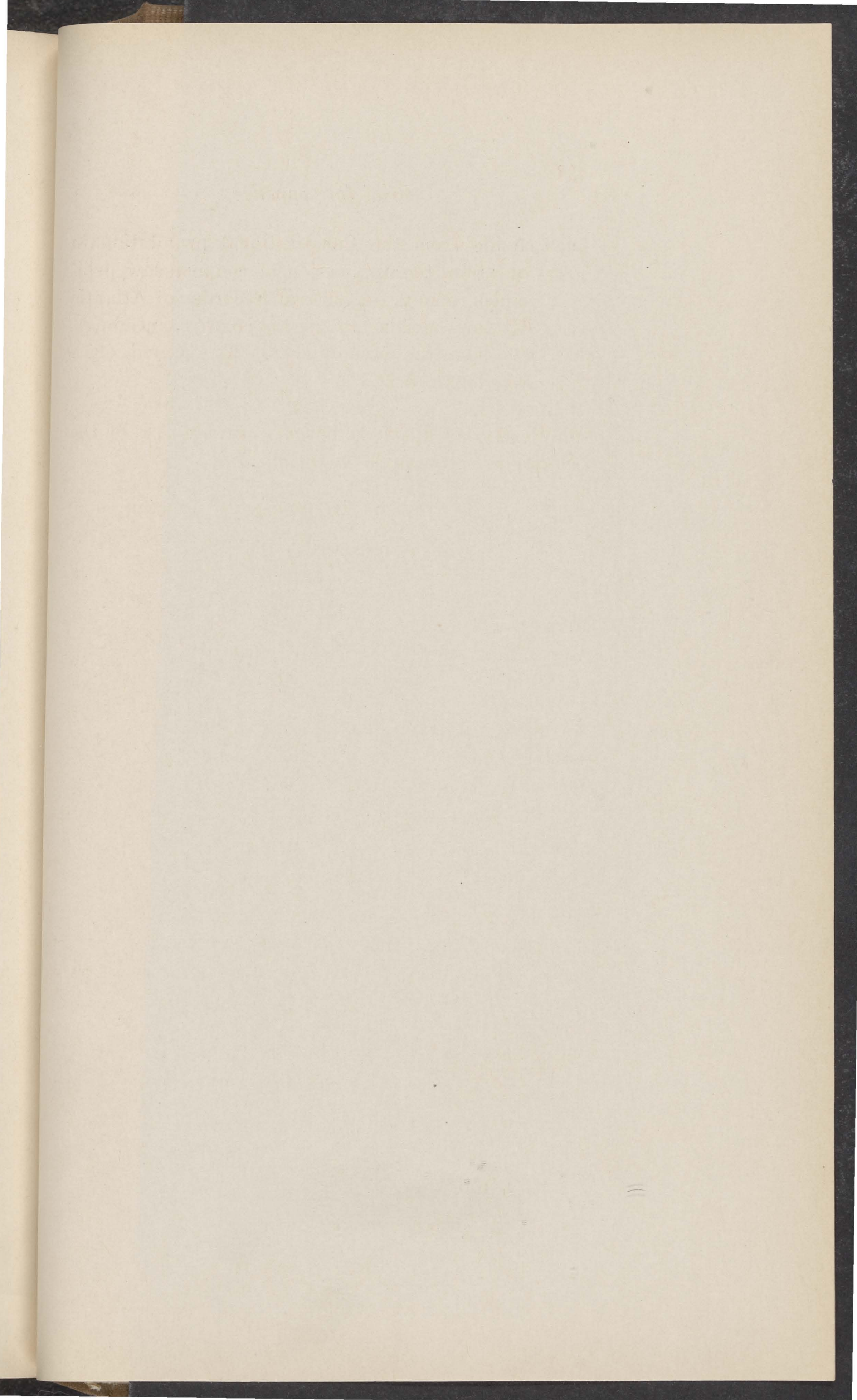

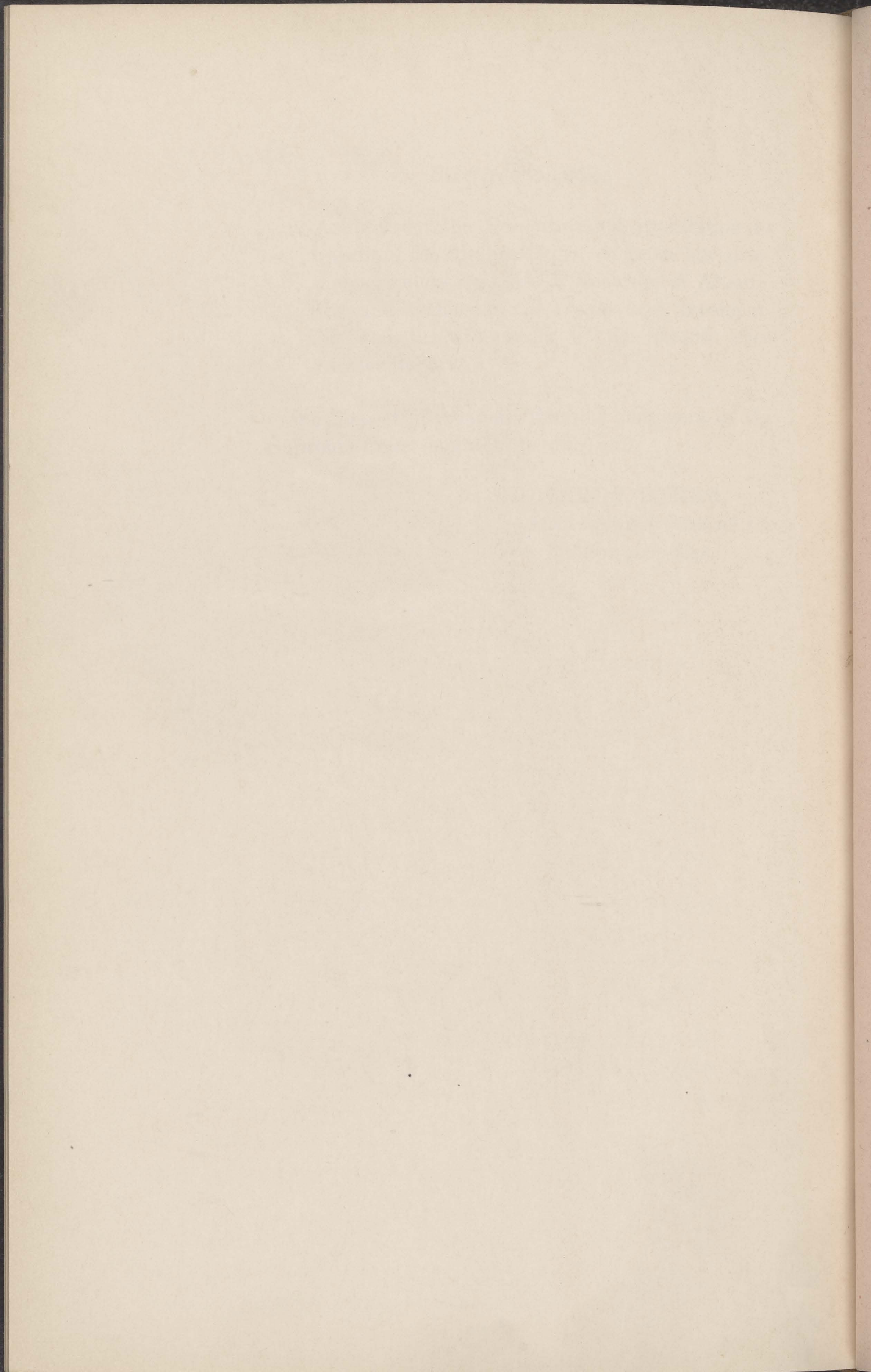

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