State of New Jersey

CONSTITUTIONAL CONVENTION

OF

1947

HELD AT

RUTGERS UNIVERSITY

The State University of New Jersey

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Volume IV

COMMITTEE ON THE JUDICIARY
RECORD

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Transition

According to the Commission's proposal, the Governor was instructed to appoint the Chief Justice and six Associate Justices of the new Supreme Court from the persons then holding the offices of Chancellor, Chief Justice, Supreme Court Justices, Vice-Chancellors, Circuit Court Judges, and such lay Judges of the Court of Errors as were counsellors-at-law of ten years' standing. The remaining judicial officers enumerated and the Judges of the Courts of Common Pleas were to constitute the Justices of the Superior Court, each for the unexpired term of his original term. The part-time Common Pleas Judges in the 16 smaller counties were, however, to continue as part-time judges for the balance of their terms, at the salaries for which they were appointed. However, they were to be eligible for reappointment as full-time judges on the same basis as all other Superior Court Justices.

These are the principal points in the Judicial Article proposed by the Commission on Revision in 1942. You will find that in the main they were adopted by the Legislature in the Constitution prepared by it in 1944. I urge them now for your consideration.

I am terribly sorry, Mr. Chairman, that I haven't a sufficient number of copies of the Revision Commission Report to go around. I searched all through the State House, the Library, in my office in Woodbury, and in my office in Trenton. I found this one office copy which I will gladly leave with the Commission. I also found two copies of the Revised Constitution prepared by the Legislature for submission in the General Election of 1944.[1]

I shall be glad, if the Committee has time, to answer any questions which might be asked.

VICE-CHAIRMAN: Do any members of the Committee have any questions to ask of Mr. Hendrickson?

MR. GEORGE F. SMITH: You made reference, Mr. Hendrickson, to the plan that in the event of more than a two months' delay in the disposition of an appeal after it was perfected, that fact was to be certified to the Governor who would appoint a special court of five justices to assist in that situation. There is some confusion in my mind as to whether that contemplated the lifting of delayed appeals from the Supreme Court and assigning them to another court, or whether they would come under another group.

MR. HENDRICKSON: Those five judges would, under our plan, come from the Superior Court Justices.

MR. SMITH: Would they hear other appeals, or was it contemplated they should just take over appeals that were delayed?

MR. HENDRICKSON: That is contemplated. I am quite sure

[1]The Judicial Article of each draft, as well as the section of the Schedule relating to the Judiciary, appear in the Appendix to these Committee Proceedings.

posal is something to be considered, I think, by this Committee. We did not have it before us in 1942.

The Revision Commission in 1942 proposed that the Justices of the Supreme and Superior Court be counsellors-at-law of ten years' standing, and that they should not engage in the practice of law or other gainful occupation. Moreover, it proposed that each Justice of the Supreme Court prior to his appointment must have been at least one year a Justice of the Superior Court; however, after appointment he was to hold office during good behavior until age 70. The Justices of the Superior Court were each to hold office for a term of seven years, and if re-appointed, then to hold office during good behavior until age 70. Thus, each member of these courts was to serve a trial term, and if he was then promoted to the highest court or re-appointed to the Superior Court, he need not thereafter in his judicial career look to political influence for further reappointments. I think that that was one of the finest proposals we made. This business of limiting tenure for judges is, I think, very disastrous.

According to the plan advocated by Hon. Hatton Sumner for the federal system, the issue of good behavior with respect to the highest court was to be triable by the Senate, and with respect to all other judges of the State, by the Supreme Court.

Administration of the Courts

Under the Commission's plan, the Chief Justice of the Supreme Court was constituted the administrative head of all the courts of the State and required to supervise the work of all the courts. Thus, the Commission sought to construct a unified judicial department of government in place of the large number of one-judge tribunals we now have throughout the State. Perhaps the most important function of the Chief Justice was to assign the Justices on their appointment and annually thereafter, and from time to time as need appeared. By leaving the power of assignment to the Chief Justice, a lawyer, the specialized experiences of the judges would most surely be availed of. By providing for annual reassignments, an opportunity was presented, without disturbing the usual course of things, to move a judge to another section or county when it would best serve justice.

The Revision Commission also proposed that the Chief Justice be directed to appoint an executive director to serve at his pleasure and to assist him in his administrative tasks. I think that is highly important, and it should not be expected of a man, a man learned in the law, that he should constantly have his mind disturbed by administrative details which now must disturb the Chief Justice tremendously.

latter has exceeded that of the Common Pleas Judge. Thus, it has come about in this State that we have a hierarchy of trial judges, the Vice-Chancellors outranking the Circuit Court Judges and the Circuit Court Judges outranking the Common Pleas Judges. This is an historical accident. Equitable property rights, with which the Court of Chancery is chiefly concerned, receive the consideration of the ranking class in this hierarchy, namely, the Vice-Chancellors; whereas personal rights, the rights of those charged with crimes, are entrusted to the judiciary lowest in the scale. Surely, cases involving human rights are to be accorded—ought to be accorded—equal treatment with those involving property rights. Moreover it is not to be denied that important murder and criminal cases now entrusted to Common Pleas Judges are, of all cases, the most demanding on the talents of a trial judge.

The objective of the Commission's proposal was to elevate the position of the Common Pleas Judges and Circuit Court Judges to that held by the Vice-Chancellors. Certainly, in so doing there need be no derogation from Chancery's dignity.

Tenure and Qualification of Judges

Under the Commission's proposal the Governor was to appoint, with the advice and consent of the Senate, all the judges of the State other than those with jurisdiction limited to one municipality. Moreover, it was provided that these municipal judges must be appointed under a uniform method.

The Legislature in 1944 changed our plan in one respect, namely, by requiring that there be at least one so-called Resident Judge or Justice of the Superior Court residing in and appointed for each county. In my opinion, this was a deplorable attempt, designed primarily to secure for each Senator—and I have been a Senator, and I know what Senators do—a certain amount of patronage. I trust the Convention will not yield to any arguments in that direction, because in the long run I see nothing whatsoever to be gained by this except the one claim that is made for it, that of placing the judge near his home so that the lawyers can readily get in touch with him.

Since the 1942 proposal was promulgated much publicity has been given to the plan adopted in Missouri in 1940 for the selection of judges there. Under this plan, insofar as it is applicable in this State, the Governor, with the advice and consent of the Senate, will appoint judges from a list of three names submitted to him by a Selection Commission. The Commission could be composed of the Chief Justice of the Supreme Court as chairman, two lawyers elected by the bar at large, and two laymen appointed by the Governor. The members other than the Chief Justice would have four-year terms each, staggered so that one term expires at the end of each year, and they would be eligible to succeed themselves. This pro-

sistent, recurring and ineradicable conflict between the Court of Chancery and the various law and probate courts."

Not only does our present system give rise to wasteful jurisdictional controversies, but it results in the trial of a single controversy in piecemeal fashion before two and sometimes more courts. Speaking of the benefits accomplished in England in 1873 by the merger of courts, and taking notice of the 1909 amendments, Vice-Chancellor Stevenson, one of our very great Vice-Chancellors, in *Martin Co.* v *Martin & Wilckes Co., 75 N. J. Eq. 39, 56,* (1908), remarks:

". . . Justice, convenience and common sense should not be sacrificed in order to maintain a rigid remedial system. . . .

After trying a nuisance case for three or four days and granting an injunction, it gives me no satisfaction, but, on the contrary, somewhat shocks my sense of justice to refuse to hear the complainant's appeal for his damages, and to require him to bring an action at law involving perhaps three or four days of trial in order that his damages may be assessed by a jury. . . ."

The proposal of the Commission on Revision in 1942 serves to resolve those difficulties. Under its plan, each Justice of the Superior Court was expressly constituted a Justice of the entire court with power to exercise the jurisdiction of the whole court; and it was expressly required that every controversy coming before him should be fully determined by him.

Elevating the Dignity of the Offices of Those Entrusted with the Trial of Important Criminal Actions and Jury Cases

The Commission's proposal was to integrate our present system of nine separate superior courts into a single Superior Court. That was our proposal. This plan serves, not only to eliminate jurisdictional controversies and to prevent piecemeal litigation of a single cause, but it serves one other major purpose. Under the scheme of the 1844 Constitution, important criminal and civil cases were tried before a jury by a Justice of the Supreme Court, a judicial officer who outranks even a Vice-Chancellor in our judicial hiearchy. The office of Vice-Chancellor was, by the way, established by *Laws of 1871, page 30.* Such trials continued before the Justices for many years after 1871. However, their duties became so onerous with the increase of litigation that these functions were delegated to lower court judges—the civil cases to the Judges of the Circuit Courts (the office of Circuit Court Judge was established by *Laws of 1893, page 158*) and Common Pleas Courts, and the criminal cases to the Common Pleas Judges. It was not until 1928 *(Laws of 1928, chapter 248)* that the Common Pleas Judges in the 19 smaller counties in the State came to be entrusted with the trial of murder cases.

At all times in our history the salary of the Vice-Chancellor has exceeded that of the Circuit Court Judge; and the salary of the

a question which must, of course, be considered by your Committee.

In any event, you will need Appellate Divisions, or some intermediate appellate bench or benches of three men each, depending on your judgment, to hear appeals from District Courts, the Workmen's Compensation Bureau and other appeals from lower courts and statutory tribunals heard on the record below.

Superior Court

Below the Appellate Divisions there was to be established, according to the Commission's plan, a Superior Court with general trial jurisdiction in all cases. This court was to be divided into two sections, a Law Section with civil, criminal and matrimonial jurisdiction, and an Equity and Probate Section exercising the remaining jurisdiction of the court. In broad outline, this plan was modeled on that adopted in England 74 years ago, which has proved eminently satisfactory there.

I might say that during my travels abroad I served under a British officer who is now head of the Admiralty Courts of Great Britain. We discussed this whole situation at great length many, many times, and he did not have enough praise for the British system. He could not understand how we still have a separate Court of Chancery after what they had done with their Court of Chancery under the 1873 Judiciary Act.

Jurisdictional Difficulties

The proposal of the Commission relative to the establishment of a Superior Court has two principal virtues. First of all, it would serve to eliminate the inefficiencies which inhere in our system of separate law, equity and probate courts, each with fixed jurisdictions. It will be recalled that the jurisdiction of each of the major courts, modeled on the English courts of the 17th Century, was rendered largely immutable by the present Constitution. It continued as it stood when the Constitution was adopted in 1844. This situation has given rise to many jurisdictional controversies in the courts. So far as the litigant is concerned, such controversies as these serve utterly no purpose and, of course, are quite expensive. In a report by a committee of the Essex County Bar Association, published June 5, 1947, an analysis is made of the cases found in *137 Equity,* the latest bound volume of the *New Jersey Equity Reports.* I quote from that report:

> "The volume, covering nine months of Chancery decisions, contains 119 opinions, of which 102 were Vice-Chancellors' decisions. Of that number 14 dealt with the right of Chancery to take jurisdiction in preference to the law courts, 2 considered the right of the Court of Chancery to remove administration of two estates from the Orphans' Court, and 20 involved the removal of fiduciaries and instructions to them, where the estates in other respects were being administered by the Orphans' Court. Thus one out of every three of these reported cases illustrates the per-

attending to the appeals from the Equity and Probate Section of the Superior Court and at least one other attending to appeals from the Law Section of the Superior Court. Each of these Appellate Divisions was to consist of a bench of three Justices of the Superior Court.

Appeals were to be taken directly from trial courts to the Supreme Court only in three classes of cases: capital cases, cases involving a constitutional question, and cases which the Supreme Court in its discretion agreed to review directly. In all other cases heard in the Superior Court, appeals had to be taken first to an Appellate Division. Where an Appellate Division had passed upon a case, its judgment was to be final, except in three situations, namely:

(1) where there had been a dissenting opinion in the Appellate Division;

(2) where the Appellate Division asked the Supreme Court to review a case; or

(3) where the Supreme Court in its discretion decided to review the matter.

We thought that the elementary principle here was that every litigant aggrieved by an order or judgment against him is entitled to have his case fully reviewed by one appellate bench of at least three men. However, since appeals are costly and dilatory, a further appeal was to be allowed only in important matters, or where there had been a dissenting opinion in the Appellate Division.

This system of Appellate Divisions, designed to sift out unimportant matters so that the Supreme Court might have the time to give profound consideration to the major legal questions before the State, was modeled somewhat on the system adopted in New York, a few other states and the federal courts. I might say here that from the very beginning of the Commission's meetings—our very first meeting—I held that our federal system could not very much be improved on in anything. However, New York and the federal system each has more than three times the judicial business that New Jersey has. Indeed, in view of the comparatively small volume of appellate business in this State—I have to point out here before I make that statement, that the New York and federal courts all have considerably more business than we do, but in view of the fact that our business, our appellate business, is small in comparison—it has been feared by some that if in nearly all cases appeals had to be taken first to Appellate Divisions and appeals to the Supreme Court were to be limited largely to those which it chose to entertain, there would either, on the one hand, be double appeals in most all cases—and that, of course, is most undesirable—or, on the other hand, there would be so little business in the Supreme Court as to leave the Justices of that court with not enough to occupy themselves. That is

set up by our Constitution. The question you are met with is not whether there should be a change, but what change there should be.

There is wide agreement on all sides that our top court should be, not a court of 16 men as it is now, but a court of five or seven men, or I may say even nine, and that the members of the court should be required by the Constitution to devote their full time to the business of this court and not undertake, as they each do now, assignments outside of the court. In 1942 the Revision Commission designated this court the Supreme Court and constituted it a court of seven members—a Chief Justice and six Associate Justices. Our present huge court of 16 men is unique in the English-speaking world. One State Senator, in a remark now classic, has described it as "little larger than a jury, little less than a mob." In 1846, according to the reports, *seven* cases came before the Court of Errors and Appeals, then a court of 12 men; in 1946, *190* cases were listed in the printed lists of that court. As adequate as such a court may have been in the leisurely days of 1844 when our Constitution was adopted, it has no place in our age.

There should be some constitutional device to keep the top court abreast of its work. The Commission proposed that whenever the Supreme Court

(a) should fail to hear a case within two months after an appeal was perfected, or

(b) should fail to decide a case within two months after it had been heard,

the Chief Justice of the court was obliged to certify that fact to the Governor. Thereupon the Governor might, if he saw fit, appoint at least five Justices of the Superior Court to sit as a Special Term of the Supreme Court and exercise concurrently the jurisdiction of the Supreme Court until the delay was cured. This was an attempt to reduce to more solid terms the proposed amendment to the Constitution made in 1909 *(Laws of 1909, page 379)* which was passed by two Legislatures but rejected by the people. Under the 1909 proposal, whenever the top court could not "promptly" pass upon the causes before it, the Governor was obliged, if authorized by statute, to call up a bench of five Justices from the trial divisions to exercise concurrently the jurisdiction of the court for a temporary period. It was the view of the Revision Commission that such a provision as that advanced by it in 1942 was necessary to assure prompt hearings on appeal.

Appellate Divisions and Appeals

Below the Supreme Court, the Commission on Revision proposed to establish intermediate appellate tribunals called Appellate Divisions of the Superior Court. At least two Appellate Divisions were provided for, so that there would be at least one tribunal

your first speaker. I am mindful of the fact that I am not here because of any great legal talents on my part, but because I had the privilege and the honor of being chairman of the Revision Commission in 1942.

I dislike very much to announce that I am going to read to you from a prepared paper. I would much prefer to treat with this whole subject informally—to deal with it on an informal question-and-answer basis. But in keeping with the dignity and integrity of those men with whom I served in 1942, I want to see that at least their views are accurately recorded—and hence this written document. After I have finished the reading of the paper, I will submit to questions, and I will be very happy to put myself on the spot in any way you want to put me on the spot.

The Commission on Revision was constituted by Joint Resolution of the Legislature, approved November 18, 1941. Of the seven members of the Commission, Governor Charles Edison appointed two, namely, Crawford Jamieson, Senator from Mercer County, and Arthur T. Vanderbilt, County Counsel of Essex County; the then President of the Senate appointed two others, namely, John F. Sly, Director of the Princeton Surveys, and me; the Speaker of the House of Assembly appointed two others, Walter D. Van Riper, now Attorney-General, and Walter J. Freund, now Judge of the Court of Errors and Appeals; and those six appointed a seventh, James Kerney, Jr., editor of the *Trenton Times*. The Commission elected me its chairman.

I might say here, for your enlightenment and benefit, that when we first convened I never met seven members with more divergent views on the theory and principles of government, and that applies to all branches of the government, judicial, executive, legislative and administrative. But by the exercise of patience and tolerance and with due courtesy for each other, after months and months of sitting together—we usually met together at the University Club in New York City toward the end of each week, we stayed on each occasion throughout the weekend—through this tolerance and patience we felt that we came out of our sessions with a rather credible document, a document which ought to help materially in this Convention. After months of deliberation, we unanimously came to an agreement on a draft of a revised Constitution. That draft formed the basis for the deliberations of the Legislature in 1944, as you will observe if you compare our proposal with that drawn by the Legislature of that year.

The Supreme Court

I might say that opinion among informed people throughout the State is—and I am sure you will find it true—largely in accord on this, namely, that there must be some change in the system of courts

sider today or tomorrow to be full public hearings, in the sense of having the public generally present, and I understand that we will continue on with special invitations. The Chief Justice has indicated a willingness to appear, and, of course, we will want to hear his views. It may be that we will want to hear those views at an informal session without any other persons being present.

MR. EDWARD A. McGRATH: Will the Convention meet next Tuesday?

VICE-CHAIRMAN: The Convention will meet every Tuesday.

MR. McGRATH: Then I move we have our hearings next week, also at the same hour.

VICE-CHAIRMAN: Since you have opened that subject, I want to give you my tentative thought as to our calendar. We meet today and tomorrow. My suggestion is that we meet next Tuesday, Wednesday and Thursday to hear invited persons, such as the Chief Justice, the Chancellor, the Vice-Chancellors, and others whom we may invite to appear before this Committee; and that we reserve the week following for our own deliberation and the preparation of our own tentative proposals, with a view to submitting them for public hearings. That will bring us to the week of July 14, at which time I suggest that we reserve the entire week for full formal hearings. This brings us to the week of July 21, which we will have to reserve for the preparation of our final report and conclusions, for submission to the Convention before the close of the month.

Does that sound like a suitable schedule, or do you have any suggestions as to any changes?

MR. McGRATH: I move that the chairman's schedule be adopted.

VICE-CHAIRMAN: Does anybody have any different views?

(Silence)

VICE-CHAIRMAN: Then I will prepare the schedule and members of the Committee may, of course, make any changes they desire as we go along.

MR. McGRATH: I move that the chairman make a notation of all those who wish to appear.

VICE-CHAIRMAN: May I modify that—to have the Secretary notify those who wish to appear before this Committee.

If you have no further business I suggest that we hear Senator Hendrickson. Senator Hendrickson seems to be ready to start and, if you all are ready, we will proceed.

Mr. Hendrickson, may I suggest you come up here so that the members of the Committee will better be able to hear you?

MR. ROBERT C. HENDRICKSON: Mr. Chairman, good lady, and members of the Committee:

At the start, I want to say I appreciate the honor of being here as

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Tuesday, June 24, 1947

(Morning session)

(The session began at 11:00 A. M.)

The second meeting of the Committee on the Judiciary was held in Room 202, Rutgers University Gymnasium.

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., and Smith, G. F.

VICE-CHAIRMAN NATHAN L. JACOBS: I want to report that Dean Sommer is still ill, although I understand he is getting along nicely and expects to be at the Convention next week.

We have been receiving a good many communications which are being referred to the Secretary. I think in due course the Committee, in executive session, should consider those communications, particularly the requests for appearances before the Committee.

You will recall it was our plan to spend today and tomorrow hearing representatives of groups which have heretofore indicated their support for varying proposals.

I have given to each member of the Committee a chart which has been submitted to us and which will, undoubtedly, be referred to by one or more of the groups. It purports to set forth the present New Jersey court system.[1]

In addition, one of the members of the Committee this morning thought it might be helpful to have an analysis of the various proposals. I have had an analysis prepared over the weekend. I won't vouch for its complete accuracy because I have not studied the details, but on preliminary reading it seems to be accurate. It sets forth the differences between the proposals. Unfortunately, we do not have enough copies to go around, but we will undertake to have copies for the members of the Committee. It should be of some help in considering the various proposals.

The first representative we have requested to appear before this Committee is Senator Robert C. Hendrickson, who was chairman of the 1942 Commission. You are all familiar with the Senator, and I think that he will be a good starting point for us in today's session.

Incidentally, I would like, before we close, to discuss with you the plans for the remainder of the month so that we can outline our next hearings and what public hearings we will have. I don't con-

[1] The chart appears in the Appendix to these Committee Proceedings.

of next week and at such later times as are thereafter announced, and in the meantime the Committee invites requests for permission to appear at subsequent dates, together with proposals from all persons interested in the Judicial Article of the Constitution.

Is there anything anyone wants to say by way of supplement?

(Silence)

MR. EDWARD A. McGRATH: I move we adjourn until Tuesday at eleven o'clock.

(Carried. The session adjourned)

STATE OF NEW JERSEY
CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Wednesday, June 18, 1947

(The session began at 2:30 P. M.)

The first meeting of the Committee on the Judiciary of the Constitutional Convention was held in Room 202, Rutgers University Gymnasium.

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, Miller, G. W., Peterson, H. W., and Smith, G. F.

(Discussion off the record)

MR. HENRY W. PETERSON: I move that Mrs. Miller be the Secretary of this Committee.

(Seconded)

VICE-CHAIRMAN NATHAN L. JACOBS: The Secretary will be charged with sending out the letters that we have discussed. We expect to have a stenographer at every meeting, therefore the position of Secretary actually will be more or less of a supervisory nature.

It is moved and seconded that Mrs. Miller be Secretary of this Committee.

(Motion carried)

So far as our arrangements are concerned, after discussion it is agreed that the Committee meet on Tuesday, at 11 A. M., subject, however, to the Convention's having recessed at that time. If, perchance, the Convention is still in session, our meeting will be deferred until the Convention has adjourned on Tuesday. In addition, this Committee will meet on Wednesday at 10 A. M.

For Tuesday's meeting, we will invite, through formal invitation, the Committee on Revision, headed by Senator Robert C. Hendrickson; the Constitutional Convention Committee now headed, I believe, by James Kerney; the State Bar Association, and the League of Women Voters.

For Wednesday, we will invite the Hudson County Bar Association, the Essex County Bar Association, the Camden County Bar Association, and the Gloucester County Bar Association.

In addition, we will, by formal notice, invite all of the other County Bar Associations to appear at later dates and will inquire what dates they prefer to appear before the Committee.

We will ask the gentlemen of the press to carry public notice to the effect that the Committee will meet on Tuesday and Wednesday

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in mimeograph form to the delegates before the Convention debated the provisions of the proposed Judicial Article. These proceedings are reproduced in this volume. Each person who appeared before the Committee was given an opportunity to go over his material. The only changes permitted and made were those relating to style and grammar, or to insure smoothness; otherwise the record is as it was taken down.

The executive sessions were closed meetings. No record was made in order to insure the fullest possible discussion. This made possible a free exchange of views and undoubtedly resulted in bringing the great majority of the Committee members into agreement on all major provisions.

The index to these proceedings will appear at the close of Volume V.

SIDNEY GOLDMANN
HERMAN CRYSTAL
Editors

PREFACE

THE COMMITTEE on the Judiciary consisted of Thomas J Brogan, Amos F. Dixon, Lester A. Drenk, Nathan L. Jacobs, Edward A. McGrath, Wayne D. McMurray, Mrs. Gene W. Miller, Henry W. Peterson, George F. Smith, Frank H. Sommer and Walter G. Winne. The Committee first met on Wednesday, June 18, 1947, and organized. Dean Sommer was elected chairman, Mr. Jacobs vice-chairman and Mrs. Miller secretary. Vice-chairman Jacobs presided at the open sessions of the Committee at the request of Dean Sommer.

The Committee met on 17 different Convention days. A general invitation was extended to the public to attend the hearings and to present individual views. In addition, a large number of special invitations were sent out to authorities in the field of judicial organization and administration, members of the judiciary, leaders of the bar, bar associations, deans of law schools, representatives of interested civic organizations, and others who might be of help to the Committee in making suggestions and helping shape its views. Fifty-five persons appeared before the Committee in its open meetings held on June 24 and 25 and July 1, 2, 3, 8, 9, 10 and 24, 1947.

The Committee on the Judiciary held executive sessions on July 15, 16, 17, 22 and 23, 1947 to consider the testimony it had taken and to formulate a tentative draft of the Judicial Article. The tentative draft was published July 24. There was another executive session on July 29 and a final public hearing on July 30, 1947, at which some two dozen persons appeared to give their views on the draft. The final draft which was presented to the Convention as a whole was published on July 31, 1947. A narrative report explaining the draft was issued by the Committee on August 26, 1947.

The testimony given at the open meetings and the public hearing was taken down stenographically and made available

that the Chief Justice would assign the cases to be heard, and if there was a delay in such cases, he would be called before the Governor for an explanation.

VICE-CHAIRMAN: Presumably it would not necessarily be as to the delayed cases, but for the purpose of relieving the general situation?

MR. HENDRICKSON: I must have misunderstood your question. I thought you meant that these justices would not be coordinated with the other activities of the courts.

MR. SMITH: I didn't mean that. I just wanted to know whether the court would be relieved of that case.

MR. HENDRICKSON: No.

VICE-CHAIRMAN: What you want to know is whether the court would be relieved of the case under appeal. Isn't that correct?

MR. SMITH: That's right.

MR. HENDRICKSON: It would.

MR. LESTER A. DRENK: But the court would not ordinarily be relieved of a case that had been partly heard and had been delayed. Presumably it was not intended that it should apply to those cases, but it was intended to apply if the court had not as yet heard the case; that in most of those cases, they would be picked up and turned over to five other justices.

MR. HENDRICKSON: No, it would not apply to cases that had been partly heard.

MR. DRENK: None of those cases would be picked up?

MR. HENDRICKSON: No.

MR. DRENK: They would merely take the cases that had been delayed for more than two months so as to relieve the calendar?

MR. HENDRICKSON: Yes.

MR. WAYNE D. McMURRAY: Senator, do they operate under those provisions in New York State?

MR. HENDRICKSON: In New York State and under the federal system.

MR. McMURRAY: What is the length of time for appeals under that system?

MR. HENDRICKSON: I can't answer that at this time.

MR. McMURRAY: Is it a shorter period of time?

MR. HENDRICKSON: Yes, I believe it is.

VICE-CHAIRMAN: I think these statistics will be available to the Committee.

MR. HENDRICKSON: I might say, on that score, that we had Dr. Temple's report[1] before the Commission in 1942, and it furnished a great many of those statistics. They were our guide purely as to the statistical side of the question before us.

[1] Temple, Ralph R. *Report on the Constitutional Courts of New Jersey.* Submitted to the Commission on Revision of the New Jersey Constitution, July, 1942. Trenton, 1942.

MR. McGRATH: Does that report include the cost of the new system as outlined in your statement?

MR. HENDRICKSON: There are some figures on the cost.

MR. McGRATH: But there is such a report?

MR. HENDRICKSON: Yes, and if I am not mistaken it went into a great deal of detail in respect to the cost—not only as to the cost, but as to the number of cases listed, the number of cases tried, and all the statistical facts wanted or that you might have wanted at that time. I think it may be assumed that the situation is somewhat parallel. Of course, we all know that the load of cases fell off tremendously during the war, to a point where there were only about, as I remember it, one-fourth the number of cases before the war.

MR. McGRATH: Do you think that the number of cases will come back?

MR. HENDRICKSON: Oh, yes, they are coming back.

VICE-CHAIRMAN: However, there is no indication that they will ever come back to the early days of 1931 and 1932.

MR. HENDRICKSON: No, but they are coming back, and I think Mr. Chairman, they will continue to climb until it gets to that level. In other words, it will reach the peak of 1931 and 1932.

MR. HENRY W. PETERSON: In your reference to the federal structure, you were referring entirely to the Supreme Court, not the District Court?

MR. HENDRICKSON: I was referring to the entire federal system. I don't think you can improve much on the federal system in any way at all.

VICE-CHAIRMAN: Of course, our federal system goes further than the so-called English system, in that there is no division.

MR. HENDRICKSON: That is true.

MR. McGRATH: But there is no division in the United States District Court.

VICE-CHAIRMAN: There is no division between the functions, such as admiralty law, etc.

MR. HENDRICKSON: Don't mistake me. Our recommendation in 1942 was the result of hours of labor and hours of conflict and many compromises, each convincing the other in a fair and impartial manner. I don't feel you can improve much on the system which was laid down by the 1942 Commission.

MR. PETERSON: Senator, I have another question. In the unification as proposed in the 1942 Commission Report, all of the sitting judges, whether equity or law, are provided for in these courts that are set up.

MR. HENDRICKSON: Yes, they are provided for.

MR. AMOS F. DIXON: As the terms expire, will the whole

court system be reduced, or will they be carried on as a matter of fairness?

MR. HENDRICKSON: It is my guess, Assemblyman, that they will probably use all the judges we have at the moment in this system. That was our feeling in 1942, and I don't think there has been any change in that respect.

VICE-CHAIRMAN: On the other hand, if the volume of business is such that you don't need them all, there will be no difficulty in reducing them?

MR. HENDRICKSON: No.

VICE-CHAIRMAN: Are there any further questions?

MRS. GENE W. MILLER: What assurance have you that the special judges so appointed would be used in their best capacity? Would it be up to the Chief Justice to appoint these judges where he feels they will be needed most?

MR. HENDRICKSON: It would be up to the Chief Justice to appoint these judges to areas where he feels they would best be used. That is how they are to be assigned under this system.

MRS. MILLER: But that would not be in the system; it would just be understood?

MR. HENDRICKSON: Yes, under a gentleman's agreement.

VICE-CHAIRMAN: Is there anything further?

(Silence)

VICE-CHAIRMAN: May I express the Committee's thanks to you, Senator.

MR. HENDRICKSON: It was my pleasure, and may I express my thanks to the Committee for inviting me.

VICE-CHAIRMAN: As we go along we will try to clarify our thoughts on these various proposals, and in case there is some doubt amongst some of the members of the Committee as to what proposals have already been referred to, may I summarize them?

As I understand Mr. Hendrickson, the Commission proposed a smaller court of appeals. It also proposed a so-called unified court at the trial level. You will notice that the Senator referred to the federal system and the English system. We might clarify both systems because they will be referred to later on. Under the English system, they have a unified court with separate divisions provided by law. Of course, they have no constitution, so I am referring to their Judiciary Act which provides that there is a court A with an X division administering law and a Y division administering equity, etc. Under the federal system we now have the United States District Court which has no separation between law and equity. It is a unified court, but it goes one step further than the English system in that there is no separation. A United States District Court judge, who is the judge sitting in the federal court, is the law judge, the

equity judge, the admiralty judge, the bankruptcy judge, etc. In other words, he is the judge before whom you appear, and he hears all your cases, with no separation at all. There are legal questions that may be raised as to how he exercises those functions when he administers equity principles, etc., but I don't think we have to go into that now.

I just wanted to clarify your thinking now, so that when later speakers refer to these various systems you will have it clear in your own mind and will know exactly to what they are referring. Of course, in our system we have a complete separation. We have a Court of Chancery, which is a separate court. We have a court of law, which is a completely separate court.

Mr. Hendrickson referred to the Missouri plan, which is relatively new. Under the Missouri plan a commission submits names to the Governor; the Governor, in turn, selects from the list submitted by the commission. Incidentally, under the Missouri system they have not only that, but it is followed up by an election to which the Senator did not refer. His reference actually was to a so-called modified Missouri plan which simply contemplates a commission to submit names to the Governor, and the Governor is to select from those names.

As to the courts' administrative head, we have no statutory provision comparable to those referred to by the Senator. However, this subject will be referred to from time to time, when the need for designating perhaps one judge to be head of the entire system is mentioned.

As to an administrative director, we have no such officer in our present system. We do, in our federal system, have an Administrative Officer who takes care of the administrative features of the whole court system. He is not a judge, he is there to see that everything is functioning properly, to get the most efficient service out of the personnel, and to see to it that decisions are expeditiously rendered. He will recommend to the Chief Justice when certain areas need additional judges, or when there is a surplus of judges in any area or division.

There was some reference to the removal of judges. We will have to consider that subject as we go along. Removal, under our present system, is by impeachment. Various alternatives will be submitted, such as that the judges of the Court of Errors and Appeals, or whatever you may call the court of last resort, will have the right to hear proceedings to remove lower court judges. That will be one of the proposals made to you. There will be alternative proposals.

It will be helpful if we try to keep the various proposals in mind. Then you may direct your questions and ask why they think their particular proposal is better than some other proposal.

We still have some time before the hour scheduled for the next speaker. Is there anything you would like to discuss?

(Silence)

VICE-CHAIRMAN: If not, we can call the next speaker as soon as the Committee is ready.

MR. McGRATH: I move that we go right on.

VICE-CHAIRMAN: Any other thoughts?

(Silence)

VICE-CHAIRMAN: All right, we will call the next speaker, Mr. Louis Le Duc.

Mr. Le Duc is an attorney from Camden, and—I think, Mr. Le Duc, you had better state your own representation.

MR. LOUIS LE DUC: Ladies and gentlemen, my appearance here is solely in a representative capacity. I am not voicing my own views, but those of the New Jersey Committee for Constitutional Revision. The true significance of our proposals should be before you.

I will take a minute to explain what our committee is, and whom it represents. It was organized in 1940 and has been active ever since in promoting the subject of a constitutional revision. Many of you know of its activities in 1944. It draws its strength from the representation of a great many statewide organizations—social, economic and civic, of New Jersey—and these organizations that I am going to name to you have joined in the recommendations which my report presents. In other words, these are the minimal proposals of some dozen organizations of this State—statewide in their activities and outlook—and they are the unanimous proposals of these several organizations.

Without suggesting any priorities, I read the list of our affiliated associations:

New Jersey Taxpayers Association

New Jersey Association of Real Estate Boards

Consumers League of New Jersey

State Federation of Labor—that is the A. F. of L. state organization

New Jersey State CIO Council

American Association of University Women

New Jersey League of Women Voters

State Federation of Women's Clubs

National Council of Jewish Women

New Jersey Federation of Colored Women

New Jersey League of Shoppers.

So that, with that varied background and viewpoint, I think you will realize that what we propose is nothing more simple or fundamental than the detailed picture given you by Senator Hendrickson.

Mr. Chairman, first—I am now reading my report—first, we propose that there be established a small Court of Appeals, composed of judges with no other duties. This proposal is aimed at two conspicuous defects in our present Court of Errors and Appeals. This court, with its 16 members, is the largest court in the world. It has been said of it that it is "a little larger than a jury, a little smaller than a mob." It has grown even beyond the dimensions intended by the 1844 Constitution, when the Supreme Court had only seven Justices as against the nine who now compose it. The experience of other states indicates a court of five, or at most, of seven members, the latter being the maximum number of judges in any court of appeals of any of our states.

We urge further that the judges composing the Court of Appeals must owe no allegiance except to their court. In our present Court of Errors and Appeals the Chancellor, of necessity, devotes a large, if not the greater part of his time, to the administration of the Court of Chancery. The Justices of the Supreme Court are similarly occupied with the duties of their several judicial districts. The Chief Justice, in addition, must supervise their work. The six "lay" Judges, with the Chancellor, sit *ex officio* on the Court of Pardons, and these Judges besides are free to follow their private vocations. These burdensome and often conflicting activities must be eliminated in the new Court of Appeals so that its members may be free to devote their entire time to the supreme responsibilities of their appellate work.

Our second proposal is that the presiding judge, or Chief Justice, of this Court of Appeals must be the responsible administrative chief of the whole judicial department. In our existing judicial structure the Chancellor has the post of greatest honor, but his administrative control is only of the Court of Chancery and also as the presiding judge, and he sits in the Court of Errors and Appeals only on appeals from the law courts. The Chief Justice has administrative authority only over the law courts and presides in the Court of Errors and Appeals only over equity appeals.

The principle invoked by this proposal is the centering of responsibility in one man for the proper functioning of all the state and municipal courts. That man is appropriately the titular head of the highest court. From that vantage point he can oversee the needs of the whole judicial system, can arrange for the proper allocation of judges, deal with abuses, and in so doing speak with the voice of supreme authority. The power vested in him would closely knit the courts of original jurisdiction with our single Court of Appeals.

The third proposal is that the Constitution provide a unified court of statewide jurisdiction, sitting in appropriate divisions and

sections, to handle law, equity and probate matters. That, of course, is the same proposal which Senator Hendrickson has made —that the Commission of which he was chairman made.

VICE-CHAIRMAN: Was it your thought that these provisions be set forth in the Constitution?

MR. LE DUC: My report and the action taken by our affiliate associations does not go that far, Mr. Chairman. My own personal thought would be that they would merely be indicated in the Constitution. Nothing other than that, but I certainly would not want the Constitution to bind the court in the number of divisions to be made. I think it would be far better to leave it open, leaving it to the discretion of the Chief Justices to create their own sections.

VICE-CHAIRMAN: You mean, by rules?

MR. LE DUC: Yes. Now, I have prepared a small graph, showing the proposed court system.[1] May I pass that graph out to your members, Mr. Chairman?

VICE-CHAIRMAN: We already have one, thank you.

MR. LE DUC: If you will look at that graph, I think you will be better able to follow me as I go along. It will help to illustrate our proposals for a more unified court system.

New Jersey has today an amazing congeries of courts of antique vintage and varying jurisdiction. Many of these courts exercise concurrent or overlapping jurisdiction. Each is more or less independent of the others, with no one directing head. There is no reason why these courts of original jurisdiction should not be consolidated into a single statewide court, the separate, distinctive functions of these courts, however, to be preserved by assigning judges experienced in different branches of the law to appropriate divisions and sections.

The most controversial feature of our proposal is the merger of the courts of law and equity. A strong sentiment in favor of preserving the New Jersey Court of Chancery in its present integrity has been evidenced by the Bar of this State—a natural outgrowth of its loyalty to a court that has made a distinguished name for itself. It is not perceived, however, how the integration of this court in the single court of statewide original jurisdiction will in any way diminish the value of the services of our Vice-Chancellors, whose special experience in equity will be utilized by their assignment to an equity division. Equity jurisprudence would continue unimpaired as it has in the federal courts and in all the state courts where equity and law are administered by a single court (which means all states except only New Jersey and Delaware, Mississippi and Arkansas), in which they remain together but are separate courts of equity and law, in the sense that there are separate judges

[1] The chart appears on page 30.

over those courts.

Great and compelling advantages would be gained by the administration of law and equity in one court. Thereby it will be rendered possible to try in one litigation a cause that involves both legal and equitable issues, which, under our present system, requires separate trials in separate courts. Of even greater moment, there would be avoided the prevalent danger to a litigant of losing a cause of action through its mistaken assertion in the wrong court. This liability every year costs many litigants their rights. I know that because several years ago I made a compilation for my own guidance of cases in which litigants had forfeited the right to proceed with a cause of action by reason of getting into a court of law, whereas they should have been in Chancery, etc., and it was really appalling to find what losses had been suffered by litigants because of this mistaken action. It is the plain duty of this Convention to eliminate this danger.

The Court of Chancery is an ancient and revered landmark, but one that has been left far behind by the advancing tides of time and progress. Its origin in English history was an historic accident; its survival today is purely vestigial. It is significant that neither in England, where the court was abolished in 1873, nor in any one of our 44 states where law and equity are merged, has there been any movement to recreate a separate court of equity. To leave our Court of Chancery standing alone in splendid isolation might satisfy the legal antiquarian, but would destroy the principle of integration which should be the root principle of the reconstruction of our judiciary. If the dominating purpose in such reconstruction is scientific and not sentimental, we cannot afford to compromise with this principle.

Finally, we propose that the Legislature should be constitutionally empowered to provide for lower courts, such as our District Courts, these courts to be placed under the administrative supervision of the Chief Justice.

Our fourth proposal is that all judges shall be adequately paid for *full-time* judicial service. This needs little comment. The emphasis is on a full-time service, which would exclude any private enterprise or conflicting loyalty in any judge. Members of our state judiciary should not be privileged, as county judges are today, to preside over their courts one day and to appear the next day at the bar of another court.

The fifth and last proposal is that the term of a judge, at least after an initial test term of modest length, should be extended to 12 or 15 years, subject to retirement. This suggestion, of course, approximates that made by Senator Hendrickson. This proposal stands midway between the federal system which provides life terms

for its judges and our own system of limited judicial terms, none of which exceeds seven years. For the highest type of judicial service the first requirement is the independence of the judge. He must be free from financial worry and from the concern that he may be required after years on the bench to rebuild a lost practice at the bar. Above all, he must be free from political pressure by those exercising the appointing power. These ends can only be achieved in New Jersey if the judge's term of office is extended. A test period to determine adequacy may properly be provided, but when the incumbent has proved his mettle, he should be assured of reappointment for an extended tenure. The public will gain by his accumulated experience as well as by the prestige which attaches to a court of long-term judges. A minimum term of 15 years is not too long to assure this gain.

These are the principles which our committee asks the Convention to follow in rebuilding our house of justice.

Those I say, Mr. Chairman, are our proposals, which have been agreed upon by the several affiliated organizations whom I have named.

VICE-CHAIRMAN: Does any member of the Committee wish to ask Mr. Le Duc any question? Mrs. Miller.

MRS. MILLER: Mr. Le Duc, in referring to this group of organizations, in whose behalf you are appearing today, has there been any change in this list since 1944?

MR. LE DUC: The only thing I can think of, that I know of, is that at that time the Women's Christian Temperance Union was a member of our group, and I don't think it is now affiliated with us. I don't know of any other changes. I think this represents almost the original affiliates of the organization. In other words, we worked on this for six or seven years in harmony—not always in perfect harmony, but still, in working harmony—with these various organizations of varied viewpoint and background. I think it is significant of the unanimity which supports these proposals of ours.

MR. DIXON: Your report ends up with the recommendations and proposals advanced by your affiliated associations, and that they be used in the proposed revision of the Constitution. Are these recommendations and proposals being brought up as the result of consultation with legal counsel of these various organizations whom you named, or do they come from the executive committees? How far down the line does it go?

MR. LE DUC: The lawyers had no monopoly in framing these proposals. Of course, they were called on for their expert knowledge and experience, but these particular proposals were worked out, I know, originally for the 1944 Constitution when it was in process that year, and they were discussed on the floor at fully attended

myself. However, I do feel that your Committee should study that matter.

MR. DIXON: Do you feel that there should be some provision to that effect in the Constitution?

VICE-CHAIRMAN: When we come to the question of tenure, that will be one of the points to be considered, if you want to talk about life tenure. I anticipated other matters for discussion today—whether you want to compel judges to retire at a certain age, in accordance with the procedure in other states. Take the New York system, which compels a judge to retire at age 70. The possibility is that these cases of incapacity will not arise frequently.

MR. McGRATH: Under our Constitution the Legislature has the full right to take care of that.

MR. PETERSON: You heard the question I put to Colonel Hendrickson. Now, do you feel it would be comparable to the United States District Court judges? You know, under the federal system they do not have the courts you do under the state system.

MR. LE DUC: You would not have the same provisions, because under the federal system a single judge exercises comprehensive jurisdiction, but under this scheme there would be a marked difference, in that the Chief Justice—presumably the Chief Justice—would make the assignment to the several divisions, in accordance with the special experience and background of the judge assigned.

MR. SMITH: Would that be an improvement over the United States District Court set-up?

MR. LE DUC: I think so, although the two systems are hardly comparable. You have in the State a large judiciary, which is the court of original jurisdiction. In the United States District Court for the District of New Jersey you have five judges, and this does not lend itself to a separation of their particular ability and experience. It is almost mandatory that your federal judge exercise all jurisdiction. He can't separate himself very well. Many of the districts have only one judge, so that it is impossible to make division, whereas it would be possible to make division in a large state court.

MR. SMITH: That is what I had in mind. For instance, in the morning the judge has a case involving collision, or theft, or any of the other things that you are likely to run into in the gamut of the law. He has everything before him. Then, in the afternoon he might have a case involving a violation of the income tax law, or something else.

VICE-CHAIRMAN: That is true of our appellate court judges.

MR. PETERSON: But the appellate court judges have had the advantage of reading the briefs of the learned advocates on both sides. They do not have to start from scratch.

MR. McGRATH: A United States District Court judge hears everything within his jurisdiction.

MR. BROGAN: Except motor vehicle cases.

MR. McGRATH: And except probate cases.

MR. SMITH: Does your report indicate what the present cost is to the State and to the litigants by reason of starting actions in the wrong courts?

MR. LE DUC: No.

MR. SMITH: Would it be possible to get those figures—from your own personal report?

MR. LE DUC: I will have to dig into my files and try to find it for you.

MR. McGRATH: Do you feel that under the proposed Constitution any of the rule-making powers should reside in the Chief Justice?

MR. LE DUC: I think that power should reside in the Chief Justice. I don't think there should be any limitation put upon that power.

MR. McGRATH: That is not the point. The point is not whether he should have any power, but whether the judge should customarily extend it to the district to which he is assigned. Of course, the way they have it now they can sit anywhere a Supreme Court judge can sit.

MR. LE DUC: There is no question about that.

VICE-CHAIRMAN: I take it you agree with that, plus the right of the Chief Justice to transfer the judges pretty much freely.

MR. LE DUC: I think so. I do not feel that it should in any way very limited.

VICE-CHAIRMAN: Do you favor allowing the courts power to promulgate their own rules as to division, etc., rather than the Legislature?

MR. LE DUC: I do. Of course, I think the court is the proper source of what we may call the legislation that determines the whole management of the administration and the members of the court.

MR. McGRATH: Would you consider that a man is an expert when he sits in on a case or on a committee?

MR. LE DUC: No, not at first, but if he continues to act in that capacity for a certain length of time, he will likely become an expert.

MR. McGRATH: What makes an expert?

MR. LE DUC: An expert is one who knows more and more about less and less.

(Laughter)

VICE-CHAIRMAN: Any further questions?

(Silence)

MR. McGRATH: I move that we extend the thanks of the Com-

mittee to Mr. Le Duc for his appearance here today.

MR. PETERSON: I second that motion.

VICE-CHAIRMAN: Thank you very much, Mr. Le Duc, for your kindness in appearing here today.

MR. LE DUC: It was my pleasure. Thank you for the privilege.

VICE-CHAIRMAN: Lady and gentlemen, if you are ready, we will call our next speaker, Miss Evelyn Seufert. Miss Seufert, will you please come forward?

MISS EVELYN SEUFERT: Mr. Chairman, lady and gentlemen: What I am submitting here is an actual draft of the Judicial Article for the proposed Constitution. This draft is based to some extent upon the general principles which have just been discussed by Mr. Le Duc, and which were adopted by the New Jersey Committee for Constitutional Revision. However, mostly because of the pressure of time and the fact that we wished to get something ready for today's presentation, the Constitutional Revision Committee has not, as a whole, passed upon this draft for a proposed Judicial Article, and some of the provisions have not even been considered by the Constitutional Revision Committee.

Therefore, Mr. Chairman, I would like to present this draft, as an individual, along with my comments and those of my colleague who worked this out with me, Mr. John Bebout. We are both members of the New Jersey Committee for Constitutional Revision, and Mr. Bebout is chairman of the sub-committee on research and drafting.

If that is satisfactory to you, I would like to proceed on that basis.

VICE-CHAIRMAN: May I suggest that you proceed in that manner, but let us know in due course of the action taken by your organization and what modification, if any, is made.

MISS SEUFERT: All right. Mr. Chairman, I have copies here of our Judicial Article. I thought it would simplify matters if each member had a copy to follow. There are a few points which I would like to mention, and which might be confusing.

First, I would like to state that these copies were finished last night, after midnight, by some kind volunteer typists. They have not been checked for errors.

I believe you already have the chart of the proposed court system itself.[1] Now, if I may, I would like to pass out copies of the Judicial Article.

VICE-CHAIRMAN: All right.

DRAFT OF JUDICIAL ARTICLE[2]

Submitted by

NEW JERSEY COMMITTEE FOR CONSTITUTIONAL REVISION

[1] See page 30.

[2] Draft included in the original transcript at this point for convenience. See Appendix for detailed formal explanation furnished the Committee by Miss Seufert.

ARTICLE V
JUDICIAL

Section I

1. The judicial power shall be vested in a judicial department which shall consist of a supreme court and a general court.

2. In all matters in which there is any conflict or variance between equity and common law, equity shall prevail and, subject to rules of the supreme court, every controversy shall be fully determined by the justice hearing it.

3. The supreme court shall hold continuous yearly terms, and the general court and the divisions and sections thereof shall hold such terms as may be determined by rule of the supreme court.

Section II

1. The supreme court shall consist of a chief justice and six associate justices. Five members of the court shall constitute a quorum. The presiding justice shall designate a justice or justices of the general court to serve temporarily when necessary to constitute a quorum.

2. The supreme court shall exercise appellate jurisdiction in the last resort in accordance with this constitution.

3. The supreme court shall make rules governing the administration of the courts. It shall have power to make rules not inconsistent with law as to pleading, practice and evidence in each of the courts and for the admission and discipline of the bar.

Section III

1. The general court shall consist of as many judges as may be authorized by law.

2. The general court shall have original general jurisdiction throughout the state.

3. The general court shall be divided into such sections, departments, parts, or special tribunals as may be provided by law or by rule of the supreme court not inconsistent with law, provided however that there shall always be one or more law sections and an equity section. Each section shall exercise jurisdiction assigned by law or by rule not inconsistent with law and the equity section shall exercise any jurisdiction not otherwise assigned.

4. The legislature may provide by law or the supreme court may provide by rule subject to law for the appointment of especially qualified persons to serve particular sections, departments or tribunals of the general court as referees in aid of the court.

5. The legislature may authorize the governing bodies of municipalities to establish municipal tribunals with jurisdiction limited to questions arising under municipal ordinances; provided that any matter shall be transferred before trial from a municipal court to the general court at the request of either party or on order of a judge of the general court.

Section IV

1. There shall be in the general court two or more appellate divisions as prescribed by rules of the supreme court. Each appellate division shall consist of three judges of the general court assigned by the chief justice subject to the rules of the supreme court.

2. The jurisdiction of the appellate divisions shall be determined by rule of the supreme court subject to law, provided that an appeal to an appellate division may be taken from any final order, judgment or decree of the general court as a matter of right.

3. Appeals to the supreme court may be taken only:

(1) In capital cases and cases involving a question arising under the constitution of the United States or of this state, which appeals shall be taken directly to the supreme court;

(2) In the event of a dissenting opinion in an appellate division;
(3) On certification by an appellate division; or
(4) On order of the supreme court.

In all other cases judgments and orders of an appellate division shall be final.

4. The supreme court and the appellate divisions of the general court, in addition to considering questions of law, may also set aside judgments, wholly or in part, for insufficiency of evidence or because of an excessive or inadequate verdict and may exercise original jurisdiction necessary to complete determination of the controversy.

Section V

1. There shall be a judicial council whose composition shall be determined by law, provided, however, that the members of the council shall not exceed nine in number and shall include representatives from the judicial department and from the lay public. The judicial council shall assist the governor in the selection of judicial nominees and shall perform such other duties as may be assigned by the constitution or by law.

2. The chief justice, the associate justices of the supreme court, and the judges of the general court shall be nominated by the governor after consultation with the judicial council and appointed by him with the consent of the senate. When a vacancy results from the expiration of the term of a justice or judge who is eligible to succeed himself, the judicial council shall hold a public hearing on the question of reappointment. The judicial council may thereupon recommend reappointment; advise against reappointment; or submit the name of the justice or judge to the governor, together with a list of other persons deemed qualified for appointment. If the judicial council advises against reappointment or if the governor declines to reappoint, or if there is no one eligible for reappointment, the governor shall obtain from it one or more public lists of persons qualified in its opinion for the appointment. If the governor nominates a person proposed by the judicial council; he shall send the name to the senate, together with the recommendation of the council; but if he nominates a person not proposed by the council he shall send the senate a message giving his reasons for the nomination, together with a report by the judicial council on the qualifications of the nominated.

3. The first appointment of any person as a judge or justice shall be for a term of five years; but the term of any person appointed after five years of judicial service in the department shall be twelve years.

4. Any justice or judge shall be liable to removal by the senate for nonfeasance, misfeasance, or malfeasance in office or for conduct unbecoming a judge, on charges preferred by the general assembly, by the governor, by the supreme court, or by the judicial council. During the time between the preferring of charges against a justice or judge and his conviction or acquittal, he shall be suspended from exercising the duties of his office. Judgment in case of conviction shall not extend further than to removal from office, and to disqualification to hold and enjoy any office of honor, profit or trust under this state; but the person convicted shall nevertheless be liable to indictment, trial and punishment according to law.

The supreme court may remove any justice or judge for cause, after due notice and opportunity for defense and may suspend the justice or judge pending determination of the case. Any justice or judge who is unable to discharge the duties of his office with effiiciency by reason of continued sickness or physical or mental infirmity shall be retired from office by order of the supreme court, after notice and a fair hearing and on a finding of five of the judges that the disability is permanent.

5. No justice or judge shall remain in continuous service after he has attained the age of seventy years; but the chief justice may assign any such judicial officer who has attained the age of 70 years before his term has expired to temporary service in the supreme court or in the general court, as need appears.

6. The chief justice, the associate justices of the supreme court and the judges of the general court shall, at stated intervals, receive for their services such salaries as may be provided by law which shall not be diminished during the term of their appointment. They shall hold no other office, or position, of profit under the government of this state or of the United States or of any instrumentality or political subdivision of either of them. Any justice or judge who shall become a candidate for an elective public office shall thereby forfeit his judicial office. The justices and judges shall not, while in office, engage in the practice of law or other gainful occupation.

7. Judges of municipal courts may be removed from office in such manner as may be provided by law.

Section VI

1. The chief justice of the supreme court shall be the administrative head of all the courts in this state and shall supervise their work. He shall appoint an executive director of the courts to serve at his pleasure.

2. The executive director shall:

(1) Assist the chief justice in all matters related to the administration, finance and personnel of the courts;

(2) Publish a statistical record of the judicial services of all the courts, justices and judges in the state, and of the cost thereof, at such times as shall be required by law;

(3) Prescribe records, reports and audits;

(4) Have such other duties as may be designated by the chief justice.

3. The supreme court shall provide by rule for reporters, clerks and other officers of the supreme court and the general court.

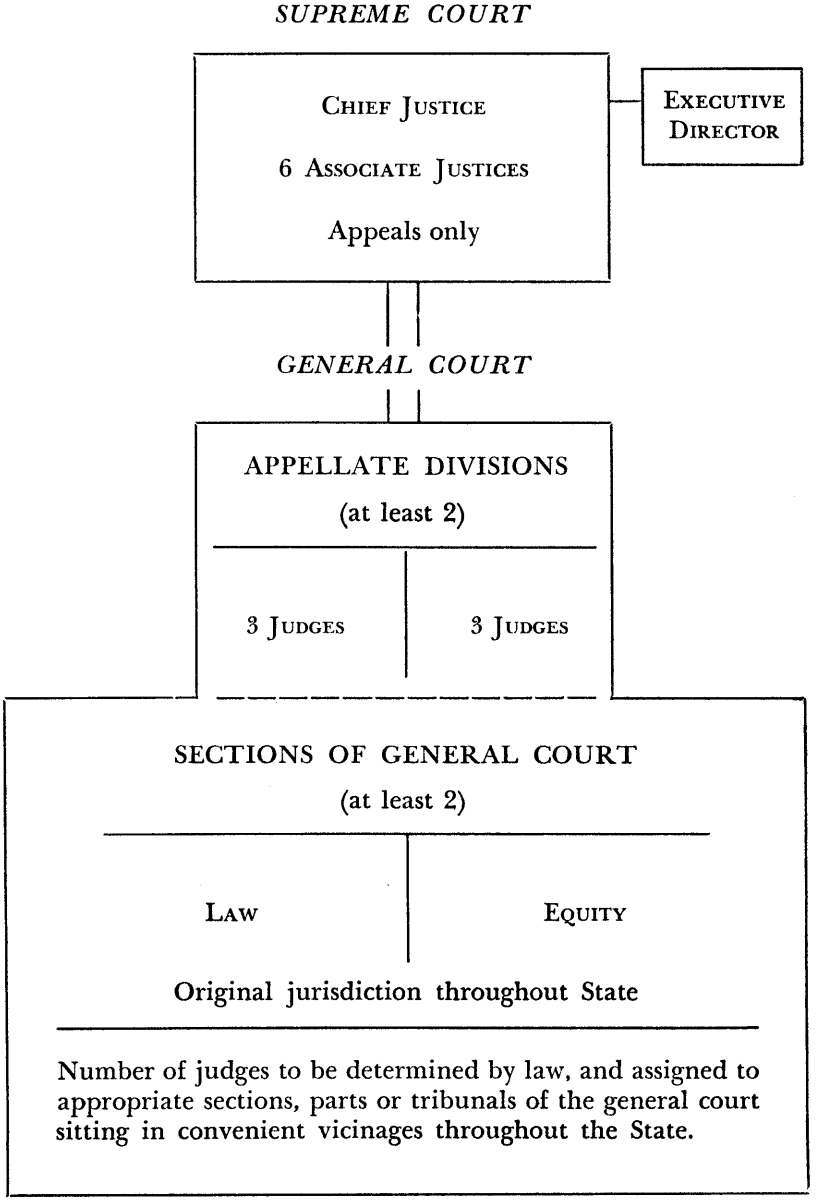
4. Judgments may be docketed and notices of pendency of action and other papers and documents may be filed or recorded in such offices with such effect, and in such manner, as may be prescribed by law or by rules of the supreme court not inconsistent with law. As many offices shall be established in each county as may be necessary for the convenience of the public. Such offices shall be in charge of an officer of the general court, who shall, subject to law and rules of the supreme court, issue and receive papers and admit to bail on criminal charges.

5. The chief justice shall subject to law and rules of the supreme court provide for sittings and any section, part, or other subdivision of the general court in as many localities in each county as the needs of justice and the convenience of the public may require. The chief justice, subject to the provisions of this constitution and the rules of the supreme court, shall annually assign the judges of the general court among subdivisions of the general court, and may from time to time transfer judges from one assignment to another.

6. Prior to each legislative session the chief justice shall file with the governor and the legislature a report of the work of the courts as provided by law.

—Evelyn Seufert
John Bebout
Revised Draft, June 23, 1947

PROPOSED COURT SYSTEM



MISS SEUFERT: This draft of the proposed Judiciary Article and the accompanying chart, to our mind, emphasize four main features which we feel are essential to a good judicial system. The first major feature is that of a complete unification of the courts. I do not propose to go into a particular discussion of that, because it has been mentioned in detail several times this morning.

We feel, however—Mr. Bebout and I—that unification of the courts is not satisfactory unless it is complete unification; that *all* of the state courts should be included in this unification.

Most of the plans that have been submitted, and that probably will be submitted, do not include the inferior courts in this unification plan. We submit that these inferior courts, which contain the bulk of the judicial business of the State, are the most important part of a unified court system.

It is in these lower courts that the greatest number of litigants in the State appear. Their idea of Jersey justice comes from these lower courts, and I think we will find that it is in these lower courts that we get the greatest amount of criticism of the administration of justice. We feel that unification fails unless it does include these inferior courts. And so, you will see in our article and in this chart, that the lower courts (including the county courts and the inferior courts), are to be included. Some of them have been somewhat notorious for maladministration of justice, and we feel that all of them should be under one system, subject to the direct control of the chief administrative judicial agent, who probably would be the Chief Justice. This should go a long way in relieving the unfortunate situation which exists in some of the courts today.

Particularly is this true of the lower criminal courts in this State. Back in 1938 the Judicial Council of New Jersey reported to the Governor and to the Legislature that it was advisable to unify the criminal courts. This report recommended a unification of the criminal courts into one criminal court for the State of New Jersey; and the Judicial Council in that report pointed out that the collapse, and I am quoting "collapse," of our lower criminal courts was due to the fact that they are not independent judicial tribunals, but part of the police system of this State, and as such they became political instrumentalities.

Such situations, of course, would be wiped out completely if the lower criminal courts, along with other small courts, were integrated into one system, and if, as in our proposal here, the Legislature had the power to set up districts or departments within this system, as it finds necessary.

VICE-CHAIRMAN: Miss Seufert, do you think that under our present system it would have been possible to integrate our superior courts and the lower courts under one system?

MISS SEUFERT: I think it would have been possible, Mr. Chairman, but I think that *practically* it would have been very difficult to accomplish.

VICE-CHAIRMAN: What you are saying is that we should strive to set up that type of a system under the Constitution to avoid legislative changes from time to time?

MISS SEUFERT: Yes, that would be the main reason, but we do believe that it is as essential a part of the court system as any other provision. If there is going to be a unification, we recommend that it be a complete unification of the system.

VICE-CHAIRMAN: It seems to me to be more advisable, under the proposed Constitution, not to fix all details, but to leave to the Legislature power to change it from time to time.

MISS SEUFERT: Well, we do provide in our proposal that the Legislature have the power to set up any districts or departments within this system, as it finds necessary.

VICE-CHAIRMAN: So that in this unification of the court system as proposed, the Legislature still could provide for police courts within the different municipalities?

MISS SEUFERT: But within the proposed system. I would like to point out this, Mr. Chairman, that this integration plan does not include the municipal courts. The municipal courts, we feel, are purely a part of the administration of the municipality, and we provide in our constitutional proposal that these municipal courts should be part of the municipal government, limited in their jurisdiction to the determination of municipal ordinances only. In that way, this unified court plan system would not interfere with our policy of home rule for municipalities, for these courts would consider only matters pertaining to municipal ordinances. They would, however, under our proposal here, be subject to the administrative authority of the court. There would be supervision of these municipal courts by our chief judicial supervisor in this system.

Now, the second major point we feel that is necessary—

MR. BROGAN: What would happen under that system to a disorderly conduct charge?

MISS SEUFERT: A disorderly conduct charge, if based on a municipal ordinance, would probably go into the municipal court, unless the State Legislature had set up a special section for that. I presume the local ordinances would take care of such minor crimes.

MR. BROGAN: If it was just a drunk and disorderly charge?

MISS SEUFERT: That would depend on whether it was a violation of the statute or a municipal ordinance.

MR. BROGAN: If it were under the statute?

MISS SEUFERT: If it were under the statute, it would probably go into the lower criminal court, which would be part of the state

courts, unless the State Legislature had set up a special section.

MR. BROGAN: And what if it was an ordinary police court matter?

MISS SEUFERT: I presume that local ordinances would take care of that.

MR. McGRATH: Where would such courts be located?

MISS SEUFERT: In the municipalities.

MR. McGRATH: In each municipality of New Jersey?

MISS SEUFERT: In each municipality that was to have one—as it is today.

MR. SMITH: Would you make it a part of the state courts?

MISS SEUFERT: The municipal courts would be subject to, but they would not be within, the state system.

MR. McGRATH: Supposing it were a drunken driving charge, where would that go?

MISS SEUFERT: I presume that would be a violation of the statute, and it would go in one of the state courts.

MR. McGRATH: Where would they be located?

MISS SEUFERT: That we would leave to the Legislature of the State to set up as may be necessary. It would be in the general, statewide court system.

MR. McGRATH: Have you any idea of the cost of such a system?

MISS SEUFERT: No, sir, but I don't believe it would cost any more than the system we use today. This system of a statewide court would integrate many of the present courts that we have today.

MR. DIXON: Suppose it was a case of a minor infraction and there wasn't even a justice of the peace there. What happens then?

MISS SEUFERT: That would all, Mr. Dixon, be under the statewide court system. Now, just how many divisions of the statewide court we would have would depend on the Legislature—as many divisions of that statewide court as it would be necessary to set up in the particular sections.

MR. DIXON: At the present time most cases of this nature are taken over to the municipalities in question and taken before a justice of the peace.

MISS SEUFERT: There wouldn't be any more justices of the peace.

MR. DIXON: That is what I wanted to find out, how it would work under your proposal?

MISS SEUFERT: I presume the Legislature would set up a court which would include a certain area—a local area—of say, perhaps half a dozen towns, but that would all depend on the actual geography of the area, and instead of going to the justice of the peace, you would go to that division which would be within the general statewide court.

MR. DIXON: It would be a minor district court?

MISS SEUFERT: I presume so. The details of the sections, of the general statewide court in departments, and any particularities—unless it is in the proposal—I would leave to the Legislature to set up. The Constitution should provide just the general principles of the whole court system, because we believe that one of the difficulties in our judicial system today is the fact that the Constitution binds our court system to a certain extent and limits it. We feel that the Judiciary Article should establish the major proposals for a state system, but leave the details of the court to the Legislature, so that the system may contract and expand, as the times demand.

VICE-CHAIRMAN: Your argument is that all courts be left to the Legislature and to the control of the Superior Court?

MISS SEUFERT: That is, I believe, the previous plan.

VICE-CHAIRMAN: We now have criminal district courts, so that our Legislature has had experience in setting up criminal courts, particularly district courts based on geographical lines.

MR. PETERSON: I would like to ask Miss Seufert this: Were such a system adopted for these local municipal courts, on a statewide level, along the lines you propose, how would a motor vehicle violator from out-of-state obtain a speedy trial, unless that judge would be on call 24 hours a day, 365 days a year? Under that law a violator can ask to be taken to the nearest magistrate for immediate trial. He does not have to come back some other date.

MISS SEUFERT: I believe that the Legislature would certainly take care of that as far as state violations are concerned. I didn't mean to give the impression that these municipal courts are to be part of the state court system. They are not. Each municipality would, of course, have the power to set up its own rules and regulations for handling local violations.

MR. PETERSON: What I mean is, they would not be part of the inferior courts?

MISS SEUFERT: No, the municipal courts would not be part of the inferior courts. . . . The Legislature will certainly, in setting up the administration of the entire court system, provide for the availability of a judge.

MR. McGRATH: Would you be satisfied if it were left to the Legislature, instead of putting it in the Constitution? I am speaking only of the small inferior courts.

MISS SEUFERT: Yes, we would be satisfied with that.

MR. DIXON: What would be your argument against leaving the court question up to the Supreme Court Justices themselves? Just let the Constitution establish the Supreme Court—just on those two levels, somewhere between those two levels—and place on it the

entire responsibility for all courts, superior and inferior and small cause courts and all courts, in that judicial structure.

MISS SEUFERT: You mean, letting the Supreme Court exercise jurisdiction over every court in the State of New Jersey?

MR. DIXON: I said, what would be the argument against making the judicial structure similar for all courts, all the way down to the very minor courts, with the right to establish their control by rules and regulations—take it out of their hands? I am looking at this from the standpoint of getting the most satisfactory court set-up.

MISS SEUFERT: Personally, Mr. Dixon, I would have no objections to that whatsoever. It seems to me, however, that the Legislature would insist upon maintaining its power over the creation of the courts. I would rather see the Supreme Court itself do that, by rules, although I cannot see that such a system could be practically adopted, because of political objections.

VICE-CHAIRMAN: Mr. Dixon, your suggestion runs counter to our basic philosophy of separation of powers, and while I don't think Miss Seufert knows whether or not the legislators would object to it, since it is the Constitution we are talking about, I do think that in your deliberations you will want to give recognition to the historical philosophy of the separation of powers. Historically, we have visualized our democratic system, not only in New Jersey, but throughout the country—federal and state—as involving separation of functions, so that the judiciary performs the judicial functions, and the legislature performs the legislative functions. Setting up the court system within the constitutional framework has always been left to the Legislature. I know of no system in which the courts have been created by the courts. While it is conceivable that you would have a system of that kind, I say that you are going to run counter to the philosophy that I mentioned. That is probably the objection, as distinguished from the politics that you mentioned.

MR. DIXON: I am not expressing my own mind. I am trying to explore—to see what arguments we get—*pro* and *con*.

VICE-CHAIRMAN: May I suggest that you take five or ten minutes more, Miss Seufert? We have to leave here 20 minutes before the hour.

MISS SEUFERT: Our second major point is that this proposed court system will provide for a convenience to litigants which does not at the present time exist for litigants in our State. The general court of statewide jurisdiction can be made readily available to all litigants throughout the State. The Chief Justice is given the power to set up offices throughout the State for the filing of papers and for the issuing of papers, wherever he believes it is necessary, for the

convenience of the litigants and also to bring about speedy justice. The clerks in these offices would be empowered to receive complaints and to admit to bail, as in the particular districts; and in order to get a mobile and efficient court system, the Chief Justice has the power to assign judges to any part of the State where he believes that a court session at that particular time is necessary.

The third major point is that of providing flexibility—the division of the general court into sections, departments and special tribunals, permits a specialization and an expansion and a contraction, which is not possible now. And while we would maintain a single administrative responsibility through this unified court system, we would be able to get specialization. You will find that we provide for special referees and aides to assist the courts in certain types of cases, as, for example, in matters involving juveniles, in tax matters, and even, perhaps, in certain domestic relations situations.

And fourth and last, we believe that this system sets up independence for the judiciary, and provides for more responsibility of the judges. That brings up other questions of the method of selection and tenure, retirement and removal, which we believe are most important, and you will note that our proposal on method of selection goes further than the present methods. We provide that there should be some sort of judicial council, as has been previously suggested this morning, consisting of representatives of the judiciary and of the lay public to advise with the Governor when he is to make a nomination, and they may submit a list to the Governor, from which the Governor will pick one name and then submit it to the Senate, the Senate having the final confirmation authority.

Now, we also provide, realizing that the Governor must be allowed some latitude in his selection, that if the Governor does not pick a name suggested by this judicial council, he must, when he submits his own selection to the Senate, give his reasons for his own individual selection.

Then, in the matter of tenure, we feel we have changed our position from several years ago when we approved of life tenure. We feel that now an immediate period of trial, a period of five years, is advisable, with a full appointment of, say, 12 years—the exact number of years is not too important—to follow, and reappointment permissible. A life tenure, as such, has its difficulties. For example, promotions are apt to become very much affected by a life tenure system. The opportunity for promotion is lessened by life tenure, and it may promote stagnation on the bench and lack of incentive for judges in the lower courts when there is such life tenure. However, if you provide in the system for a five-year trial period, reappointment for 12 years, you have then a service of 17 years. There can be and, of course, the custom is more and more to

have the appointment again for a full term of 12 years. The judge then, practically, comes up to the period of retirement, and we suggest 70 as an automatic retirement age.

We also suggest other methods of removal in this Constitution, besides impeachment. Impeachment has proved to be very unsatisfactory in all the states. Every state in the union provides for the impeachment method of removal, but it seldom works. Besides impeachment by the Legislature, we provide that the Supreme Court and the Governor and the Judicial Council have the power to prefer charges before the Senate. Not only that—we go further and give the Supreme Court the power to remove for cause after hearing.

I believe I have used up my time so I will stop this discussion and submit our proposals to you in the form of a Judiciary Article. Thank you very much.

VICE-CHAIRMAN: Thank you very much. . . . Please bear in mind that we reconvene at 2 o'clock.

(Recess for luncheon)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Tuesday, June 24, 1947

(Afternoon session)

(The session began at 2:00 P. M.)

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., and Smith, G. F.

VICE-CHAIRMAN NATHAN L. JACOBS: If you are ready to proceed, we have Mr. George McCarter here, representing the Committee of the State Bar Association, and Mr. Herbert Hannoch, also appearing for the State Bar Association. I have advised them that they will have an hour.

We plan to hear three other representatives, Mrs. Henderson, Mrs. Irene Baldwin, and Mrs. Halligan, who will appear in behalf of the League of Women Voters of New Jersey.

Lady and gentlemen, I have the honor of presenting Mr. McCarter. Mr. McCarter, will you please come forward?

MR. GEORGE W. C. McCARTER: I am Chairman of the Committee on Law Reform of the New Jersey State Bar Association. When the 1944 draft of the new Constitution was under consideration, that Association appointed a special committee to make proposals. We did a lot of work, and made a draft, which was placed before the Joint Legislative Committee at that time. It deviated very materially from the proposal that was put before the people.

Since then, the Committee on Law Reform has met and made certain modifications to the former draft, some of which will be quite apparent to you when you see this typewritten paper that is before you.[1]

PROPOSED REVISED JUDICIAL ARTICLE — NEW JERSEY CONSTITUTION

SECTION I.

General

1. The judicial power shall be vested in a Court of Appeals, a Court for the Trial of Impeachments, a Supreme Court, and such courts inferior to the Supreme Court 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.

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[1] Draft included in the original transcript at this point for convenience.

SECTION II.

The Court of Appeals

1. The Court of Appeals shall consist of the Chancellor, the Chief Justice of the Supreme Court and five Justices of Appeal, or a major part of them.

2. The Court of Appeals shall be vested with all jurisdiction and power heretofore vested in the Court of Errors and Appeals, and such additional appellate jurisdiction as the Legislature may by general prospective act provide. The Legislature may by general prospective act empower the Court of Appeals to provide by rule that appeals be taken only by its leave. The Court of Appeals may by rule designate one or more of its members to pass on applications for leave to appeal, applications to continue or dissolve restraints, or other interlocutory matters.

3. The Secretary of State shall be clerk of this court.

4. No member of the Court of Appeals who has given a judicial opinion in the cause in favor of or against any matter complained of shall sit as a member or have a voice on the hearing or for its affirmance or reversal, but the reasons for such opinion shall be assigned to the court in writing.

5. Whenever by reason of disability, disqualification or absence a majority of the Court of Appeals shall not be available, the Court of Appeals may temporarily assign one or more Justices of the Supreme Court to the Court of Appeals.

SECTION III.

Court for the Trial of Impeachments

(as now)

SECTION IV.

The Supreme Court

1. The Supreme Court shall consist of the Chancellor, the Chief Justice of the Supreme Court and thirty Associate Justices. The number of Associate Justices may be increased or decreased by law but shall never be less than twenty.

2. The Supreme Court shall be vested with all the jurisdiction and power heretofore vested by the Constitution in the Court of Chancery, the Chancellor, the Prerogative Court, the Ordinary or Surrogate General, the Supreme Court, and the justices thereof.

3. For the more convenient dispatch of business the Supreme Court shall be organized in two divisions, the Chancery Division and the Law Division.

4. The Chancery Division shall, subject to the provisions hereof, exercise the jurisdiction heretofore vested in or capable of being exercised by the Court of Chancery, the Chancellor, the Prerogative Court and the Ordinary or Surrogate General. The Law Division shall exercise all the remaining jurisdiction of the Supreme Court as herein constituted.

5. The Chancery Division shall consist of the Chancellor and such number of Associate Justices as shall be assigned thereto. The Law Division shall consist of the Chief Justice and such Associate Justices as shall not be assigned to the Chancery Division.

6. In both the Chancery and Law Divisions all appeals from inferior tribunals and such other matters as, subject to law, the rules of the Supreme Court may provide, shall be heard before three Justices sitting together, which bench of three Justices shall be called an Appellate Court. Subject to law, rules of the Supreme Court may provide that any judgment, decree or order of a single Justice may be reviewed by an Appellate Court.

7. Without prejudice to the provisions of this Constitution relating to the distribution of business in the Supreme Court, all jurisdiction vested in the Supreme Court shall belong to each division alike, and subject to the provisions hereof relative to Appellate Courts, may be exercised by a single justice.

8. Subject to rules of the Supreme Court every controversy shall be fully determined by the Justice hearing it.

9. The Chancellor and the Chief Justice shall be appointed as such. Associate Justices of the Supreme Court shall be appointed to either the Chancery or Law Division and, subject to liability to temporary assignment, shall remain for their terms of office assigned to the division to which they shall have been appointed. The Chancellor, the Chief Justice, and the Senior Justice of Appeal, or a majority of them, may temporarily assign justices to a division other than that to which they may have been appointed and, from time to time, re-assign them as the business of the court may require.

10. There shall be a Rules Commission, consisting of the Chancellor, the Chief Justice, the Senior Justice of Appeal, four Justices of the Supreme Court, two appointed by the Chancellor and two by the Chief Justice, and two Counsellors at Law appointed by the Governor. All such appointments shall be at the pleasure of the appointing power. The Rules Commission shall be convened and presided over by the Chancellor, or, in his absence or failure for any reason to act, by the Chief Justice. The Rules Commission shall make rules for the assignment of any cause to the Chancery Division or the Law Division, the transfer of any cause or issue from the Law Division to the Chancery Division, from the Chancery Division to the Law Division, and from an inferior Court to the Supreme Court and the appropriate Division thereof; rules as to the administration of all the Courts, and, subject to law, as to pleading, practice and evidence in all causes, and rules as to all matters as to which by this Constitution rules of the Supreme Court may be made.

11. The Supreme Court shall appoint and remove the Clerk of the Supreme Court who shall hold office during its pleasure. Such Clerk shall succeed to the duties heretofore performed by the Clerk of the Supreme Court, Clerk in Chancery and Register of the Prerogative Court.

12. The Chancellor shall be administrative head of the Chancery Division, and the Chief Justice of the Law Division. As such they shall have power to assign the Justices of their respective divisions to specific duties and causes, and to prescribe records and reports from them and from inferior courts and judicial officers.

SECTION V.

Appointment, Tenure and Removal

1. The Chancellor, the Chief Justice, Justices of Appeal, and Justices of the Supreme Court shall be counsellors at law of ten years' standing. They shall be appointed by the Governor by and with the advice and consent of the Senate. The Justices of Appeal shall be chosen from the Justices of the Supreme Court who have been such for at least a year, and when so chosen shall, except as to those first to be appointed, create a vacancy in the Supreme Court.

2. The Chancellor, the Chief Justice and the Justices of the Supreme Court shall, when first appointed, hold office for seven years, and if reappointed shall thereafter hold office during good behavior. The Justices of Appeal shall hold office during good behavior.

3. All judicial officers shall be subject to impeachment. All judicial officers except the Chancellor, the Chief Justice, and the Justices of Appeal may be removed from office by the Court of Appeals after notice and hearing upon the issue of good behavior.

4. Anything herein contained to the contrary notwithstanding, the term of office of any judge shall end on the first day of January next after he shall have attained the age of seventy-five years.

5. Justices and judges of every court shall, at stated times, receive for their services such salary as may be provided by law, which shall not be diminished during their term of appointment. They shall hold no other office or position of profit in the government of this State, or of the United

States, or of any instrumentality or political subdivision of either of them. No member of the Court of Appeals, of the Supreme Court, nor such other judicial office as may be provided by law, shall during his continuance in office engage in the practice of law or other gainful occupation.

6. Judges of inferior courts, other than Justices of Peace, Police Judges, Recorders, Magistrates, and the like, shall be appointed by the Governor by and with the advice and consent of the Senate. They shall hold their offices for such terms as may be fixed by law. The Legislature shall provide by general law for the appointment of all other judges.

SECTION VI.

1. The Chancellor and Chief Justice now in office shall continue in office for the term for which they were appointed. If re-appointed they shall hold office during good behavior. The Justices of Appeal first to be appointed shall be selected by the Governor, by and with the advice and consent of the Senate, from among the Justices of the Supreme Court, Vice-Chancellors and Circuit Court Judges now in office, and shall be so selected that no more than four members of the Court of Appeals as originally constituted shall be members of one political party. The Justices of the Supreme Court, Vice-Chancellors and Circuit Court Judges, and such of the Judges of the Court of Errors and Appeals as are counsellors at law of ten years' standing, shall become Justices of the Supreme Court as newly constituted and shall continue in office for the terms for which they severally were appointed. If re-appointed they shall hold office during good behavior.

2. This amendment to the Constitution shall not cause the abatement of any suit or proceeding pending when it takes effect. All causes then pending in the Court of Errors and Appeals shall be transferred to the Court of Appeals. All causes then pending in the Court of Chancery and the Prerogative Court shall be transferred to the Chancery Division of the Supreme Court; all causes then pending in the Supreme Court as heretofore constituted shall be transferred to the Law Division of the Supreme Court. Matters argued or submitted but undecided when this amendment takes effect shall be decided by the judge or judges to whom they were submitted, and the appropriate order, judgment or decree shall be entered as that of the division or court to whom the cause shall have been transferred.

3. The various inferior courts now in existence shall continue in existence with their jurisdiction unimpaired until the Legslature shall otherwise provide.

MR. McCARTER: I understood, when Mr. Jacobs sent me the very courteous invitation of this body, that the presentation was to be primarily objective rather than argumentative, informative rather than an effort to convince. So I will start off that way.

I might say that there are two theses back of this draft: first, that it is the Constitution that we are working on here, not legislation, and that nothing more should be in the Constitution than has to be there, and that a great deal should be left in the hands of the elected representatives of the people, for them to act on as the future may make it advisable. The second thesis might be said to be that we are not in favor of change for change's sake, and we think that where it is possible to hold on to forms and names that have been tried by time, they should be held on to. You will see, however, that we do make in our proposition some very radical changes, and I shall,

with your permission, go briefly over this draft which has been put in your hands.

(Reads Section I of draft)[1]

Now, on that I should like to make a few comments. The first is that we think that the name of the court of last resort should be the Court of Appeals. It would be less confusing than if this new Constitution changes the name of the court of last resort by calling it the Supreme Court.

Hitherto the Supreme Court was not the court of last resort, but the intermediate court, and it will cause great confusion if the status of the court in the future is changed. The Court of Appeals was the name of the court of last resort under the Constitution of 1776, and, I think, it would be a shorter and neater name than the present name by which it is now known.

VICE-CHAIRMAN: Mr. McCarter, you say "such courts inferior to the Supreme Court as now exist . . ." I notice that other proposals have referred to it as "such courts of limited jurisdiction inferior to the Supreme Court." Do you want to comment on that?

MR. McCARTER: That does not mean anything. Limited in what way? Territorially or functionally? The District Court is a court of limited jurisdiction. I don't think the words "limited jurisdiction" add anything, and will only provide a chance to litigate the question of whether it was properly constituted, and whether or not it was limited. I think if you have a court inferior to the Supreme Court, it is up to the Legislature to say whether it is limited or not.

VICE-CHAIRMAN: But, would you give the Legislature comprehensive powers to fix the jurisdiction of these courts?

MR. McCARTER: I certainly would.

(Off-the-record discussion)

MR. McCARTER: By the way, as your chairman brought out by a question, I have here an example of the first thesis, that a great deal should be left to the Legislature.

Now, we come to—

MR. AMOS F. DIXON: May I interrupt here to ask a question? You say "such courts inferior to the Supreme Court as now exist . . ." They do not now so exist. Do you want to tie this up to the courts that do now exist? I think you ought to give a free hand to the Legislature.

MR. McCARTER: ". . . which inferior courts"—that is the last sentence—"the Legislature may alter or abolish, as the public good shall require."

MR. DIXON: The Legislature, under the proposed Constitution,

[1] See page 38.

can abolish the Common Pleas Court, the Court of Oyer and Terminer, the District Court, anything they want.

VICE-CHAIRMAN: Not the same way there, I gather, Mr. Dixon, if you are using the phrase "such inferior courts as the Legislature may establish from time to time, etc." That is federal phraseology, Mr. Dixon, and I don't think we want to spend too much time on that.

MR. McCARTER: This language referring to the inferior courts, I think, is taken verbatim from the present Constitution, the thought being that there is very little change that the Legislature need worry about.

Now, we come to the next paragraph—Section II.

(Reads Section II, paragraph 1 of draft) [1]

I think we are all agreed that the Court of Appeals should be composed of not more than seven men, and members of the court should have no other important duties. That doesn't mean that some of them can't have rule-making powers, and doesn't mean that some of them can't have administrative powers, but what we want to get away from is the situation that the Justices of the Supreme Court have found themselves in the past—they have duties in the Court of Errors and Appeals, they have duties in the Supreme Court, and they have duties in the Circuit Courts.

VICE-CHAIRMAN: Will there be a Chancellor under your set-up?

MR. McCARTER: Yes, there will be. I will pass that by for the moment. Paragraph 2—

(Reads Section II, paragraph 2 of draft)[2]

That makes it possible, or rather should I say that makes it impossible, for it to be said that certain decisions of the Supreme Court are constitutionally unreviewable.

Now, a decision of the Supreme Court today, on the question of the weight of the evidence, that is, whether the weight of the evidence is in favor of the plaintiff or against the defendant, cannot be reviewed on appeal. What we want to do is to have the Legislature have power to give such jurisdiction and to take it away, but that must be by a general prospective act. In other words, they can't say that in the case of *Jones* v *Smith* there should be no right of appeal. They can't take away the rights of appeal that have vested.

If I recall my history correctly, shortly after the Civil War, when the radical Republicans were riding high, wide and handsome, they took away such right of appeal in a pending case.

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[1] See page 39.
[2] See page 39.

(Reads Section IV, paragraphs 1, 2 and 3) [1]

I do not speak for the State Bar Association as a whole. There is at present a referendum as to whether there should be a separate Court of Chancery, or whether it should be this type of tribunal. That referendum is in the hands of Miss Dillon, the Secretary. She is going to mail them tomorrow and I have been instructed by the president of the Association, Mr. Starr, to ask this Committee's permission to have the returns brought in not later than July 14. We don't feel that we could give the members sufficient time in view of the 4th of July holiday to demand that the returns be in by the 4th, so I make that request and trust you will consider it. Returns that are not in the hands of the Secretary by July 10 will not be counted.

VICE-CHAIRMAN: Will you arrange to send that in to us?

MR. McCARTER: The Secretary of the Association will see that it gets to this Committee. I think every member should vote.[2]

Now we come to perhaps the most contentious thing in the whole draft, and that is what should be the great court of general jurisdiction, or should there be several of them? I am going to speak in general, rather than paragraph after paragraph. The jurisdiction now vested in the Supreme Court—that's top law jurisdiction in all its branches, and the Prerogative Court, which is probate jurisdiction, and the Court of Chancery, with equity jurisdiction in full—those three courts now between them contain every bit of judicial power that exists in the State of New Jersey. If we merge them into one court, that court will have every bit of judicial power and authority. The proponents of the separate Court of Chancery say that that is bad because it will take away the existing specialists, the men who have grown up and administered equity and whose administration in the past has been so successful that the *New Jersey Equity Reports* are now read from one end of the country to the other. Perhaps one of you may ask, "So what do you care whether *Equity Reports* are read in California, Florida or Maine?" The answer is because a high grade of equity is administered.

We feel that this plan, set out here in Section IV, insures equity specialists and prevents what I consider outrageous—something which is now found nowhere—of a man being sent from court to court. The plan as outlined here provides that judges shall definitely be assigned to the Chancery Division, subject to temporary assignment to the other Division.

If an equitable question comes up in an action at law, the judge trying that case will handle it. If, for example, an action is brought, say, on a policy of life insurance, and the insurance company has

[1] See page 39.

[2] The results of the New Jersey State Bar Association referendum appear in the Appendix to these Committee Proceedings.

an equitable defense, which defense is not or cannot be heard in a law court, the insurance company must now bring a suit in Chancery to cancel the policy. That won't have to be done under this plan. Everything can be taken care of in the first suit. We also visualize that certain kinds of litigation that are presently of a law nature should be assigned to the Chancery Division so that the separation would be functional, not historical.

Now, where this proposal differs partly from the plan proposed in 1944 is that this plan provides that the judges of the Chancery Division shall be appointed to that Division and shall be in that Division throughout their term of office. There will be temporary assignments, if needed, but we feel that you have to provide for a permanent appointment to keep your equity specialists. With this plan you completely cut the ground from under the feet of the die-hard Chancery men. They haven't an argument left to stand on, and you have all the advantages, or 99 percent of the present advantages. You have a separate Court of Chancery with none of the disadvantages, and all litigation is disposed of in one and the same controversy.

VICE-CHAIRMAN: Do I take it that you propose restricting the power of the Chief Justice or the Court to assign men between Divisions?

MR. McCARTER: If you will turn to the rider attached to page three, paragraph nine, here is where there is a change from the way it was drafted in 1944. We specified that they keep a man where he belongs. To meet the criticism of the die-hard Chancery men we put it this way—Associate Justices of the Supreme Court shall be "subject to liability of temporary assignment, shall remain for their terms of office assigned to the division for which they shall have been appointed." That is because the problem is to get your specialists assigned to each Division and have that Division deal with certain kinds of litigation, and yet enable full justice to be done in one court. We looked for the know-how on that to the English Judicature Act, where the job has been done and which has worked with outstanding success, as any lawyer can say, since 1873 when the Judicature Act was passed.

Look at Section IV, paragraph 2: "The Supreme Court shall be vested with all the jurisdiction and power heretofore vested by the Constitution in the Court of Chancery, the Chancellor, the Prerogative Court, the Ordinary or Surrogate General, the Supreme Court and the justices thereof." Then it goes on to say, paragraph 3: "For the more convenient dispatch of business"—that is a very vital phrase in there; it shows us what the purpose of paragraph 3 is—"the Supreme Court shall be organized in two divisions, the Chancery Division and the Law Division." Then it goes on to paragraph 4—

the Chancery Division shall be "subject to the provisions hereof." What are they?

(Reads paragraphs 4, 6, 7, and 8)[1]

MR. HENRY W. PETERSON: May I interrupt a moment?

MR. McCARTER: Yes, sir.

MR. PETERSON: As a layman, you will pardon my question, but where do you quote that law and equity shall be fully determined in one action?

MR.McCARTER: Paragraph 8 of Article IV.

MR. DIXON: May I ask a question too, please? I am a layman also. I take it that your thesis here is based on the fact that at the present time we have some ten Vice-Chancellors. What you are trying to do is set up a constitutional provision based on what has been for a hundred years the experience of these men.

MR. McCARTER: Yes. We have men of great ability who act as judges. Will they not be better judges, able to take a broader view of the questions that come before them, whatever they may be; will they not in time gain a better experience and be abler men in law and Chancery? Today certain cases go into Chancery Court and certain cases go into the law courts. There is a very wide, broad no-man's land between the courts, and disagreement as to whether cases go into the law courts or Chancery. Now, I wonder if we had those combined, so that one judge sat in all kinds of cases, whether the judge would give better service to the public, to the litigants, and to the State; if he is broad enough to take these cases, will he gain, not a narrower experience, but a broader experience by handling all these cases?

That is what you might call the New York system and of other states nearby, with which we are familiar. I have never talked to a New York lawyer who didn't say he wished that their judges stayed in equity or in law, instead of shifting from one to the other, month after month.

VICE-CHAIRMAN: There has never been a case in history where they have ever gone back to a separate court where they have combined, has there?

MR. McCARTER: I don't know of any having gone back.

VICE-CHAIRMAN: I'd like to interrupt here. In the federal system they do exactly what you say; in New York they don't.

COMMITTEE MEMBER: They have a different system, but as I get your question, it is identical with what happens today in the federal court. What I would like to ask Mr. McCarter is, do they have a different system?

MR. McCARTER: There is the system used on the continent of Europe, and that demonstrates the value of having specialists.

[1] See pages 39 and 40.

It's right in the trial court that you need the experts; the legal principles can be settled easily enough in the Court of Appeals. But meanwhile, if the man below is not an expert, a lot of little things in the trial are barred and perhaps can never be really cured.

I think in the federal courts an almost intolerable burden is put on those judges who are handling ordinary negligence cases, ordinary equity cases, administration of bankruptcy—a horrible burden is put on them. I don't know, but I think in some of the federal districts where they have more than one judge they more or less do try to escape from the situation which they are in.

Now, you will see Article IV, paragraph 6, what I call here the Appellate Courts, that is three Justices sitting together to hear appeals from lower courts and from municipal bodies, or from such interlocutory orders as the rule-making power may decide should be reviewed. I don't think there is any argument on that.

We come to the rule-making body, and I do want to say a word on that. Where this draft differs markedly from the 1944 proposal is that the draft proposed that the rule-making power should be in the Court of Appeals. We have, therefore, adopted for the Rules Commission[1] the plan that was taken from the English Judicature Act, which calls for a Rules Commission consisting of the Chancellor, the Chief Justice, the Senior Justice of Appeal, four Justices of the Supreme Court and two counselors-at-law. Now, that was taken from the English and the value of it, I think, was found right there.

Ladies and gentlemen, I have been practicing law since 1911 and we have never had a single advance in our rules except the two that were put in by the Legislature in 1912 and 1915. The Practice Act of 1912 and the Practice Act of 1915 set up a schedule of rules and made material changes in the practice. The rules are subject to change by the Supreme Court and by the Court of Chancery, and they have been improved upon; but there has been no advance, no material overhauling of the practice in either court, except by those two changes which I think were spark-plugged by the Legislature. Now, we propose a Rules Committee which contains two practicing lawyers and I feel they might spark-plug the Committee and stir it to action. They have been so successful over in England that I think it is worth paying attention to.

MR. EDWARD A. McGRATH: Mr. McCarter, what proof have you got that it has been so successful?

MR. McCARTER: Proof, sir? Just the general opinion of lawyers, and I have never heard anything said to the contrary. I have read their rules and they seem to be extremely up-to-date, extremely liberal, and they give you the greatest opportunity to do things you want to do. None of this shifting from court to court

[1] See Section IV, paragraph 10, page 40.

that we have had here. The decisions of the English court are frequently cited here in this country and relied upon. Of course, they are getting less and less important as the years go by, but I think the general opinion of the bar in this country is that the practice in England is eminently reasonable, not historical; it is reasonable and fair. I think the only criticism you may hear is the expense involved, but I think that can be worked out.

COMMITTEE MEMBER: I thought the tendency was to get this judicial system streamlined.

(Discussion among several members)

VICE-CHAIRMAN: May I suggest, Mr. McCarter, that you give us the highlights.

MR. McCARTER: There are only two or three things that I would like to say. In the 1944 draft the Chief Justice was a legal czar and he assigned the people to this branch and that branch. It would seem to me that this plan, where the duties are divided rather than vested in one judicial czar, would avoid putting an awful lot of power in one man. It might be very difficult to get the right kind of action with one man, whereas if we have three, then the powers are not so concentrated. I do not think there is anything further I wish to say.

I am sorry to say, Mr. Chairman, that it was impossible for me to have printed matter at this meeting due to an unfortunate incident, whereby my brief case with all my papers was left in Atlantic City and I did not get it back until a short time ago. However, if it is agreeable with you, I will have printed matter made up. What is the deadline?

VICE-CHAIRMAN: Technically, it is the seventh of July, but actually, if you get it here within the next month we will be happy to accept it. Thank you very much. . . . I might point out that it is the principles which Mr. McCarter advocates that we are primarily interested in. Frankly, we are not too concerned with the language, because when we get to that we will try to draw something on our own and we will have the principles which we recommend.

Mr. Herbert J. Hannoch, I understand, is also speaking for the State Bar as to specific items for which he has recommendations. . . . Please pass these copies to the Secretary and the rest of the members.[1]

MR. HERBERT J. HANNOCH: Mr. Chairman, I speak on behalf of the State Bar Association and direct my remarks exclusively to one subject, and that is the subject of prerogative writs, a very, very technical subject.

While you may have a lot of controversial matters, I am certain that with very few exceptions there is unanimity in the thought

[1] This proposal, dealing with the prerogative writs, appears in the Appendix.

that the practice with respect to the prerogative writs should be changed. Attempts have been made to change it for years. The Legislature passed an act in 1938 authorizing the Supreme Court to change the practice. Nothing was done with respect to it for the reason I shall give you in a moment. An act was introduced in the Legislature a few years ago, but because of constitutional limitations an effective change in procedure could not be carried into effect. Last year an attempt was made to modernize the practice by submitting a set of rules to the Supreme Court for adoption. Again, because of constitutional objections effective procedural changes could not be carried into effect. Every time a change was sought we suffered from the fact that under the Constitution certain things may not be done.

I am going to address myself to the lay members of the Committee, since the prerogative writs are known to the Bar—at least they are known to 10 per cent of the Bar, the other 90 per cent probably never had a case involving them. These prerogative writs involve proceedings which compel public officers to act, that is, mandamus proceedings; to stop a public officer from improperly acting, that is, a writ of quo warranto; and proceedings under which the actions of governmental bodies are reviewed, that is, the ordinances of municipalities, actions of the Tax Board, review of workmen's compensation cases, review of all administrative bodies—all are reviewed under what is generally known as a writ of certiorari.

These writs are very, very old. They come to us from England, and they are the writs which were granted by the King under special circumstances, for special purposes—the cases in which the ordinary rules of law did not apply. And, strange as it may seem, while we here in New Jersey have substantially the same practice as was in existence back in the colonial days, as far as our research shows almost every other state in the Union, and England, have changed their practice and procedure so as to bring about a more modern, simple method and procedure.

These writs are very technical. The best way that I can explain what these writs do and what difficulties counsel get into, is to take two classes of cases and compare them.

Let me take, for example, an automobile accident case. You may have your car parked in front of your house with a light on it, and you may be nowhere around, and somebody runs into your car and damages it. But instead of you suing, the other fellow starts a suit. He has a perfect right to bring that suit; there is nothing that anybody can do to stop him. He may subject you to all sorts of expense. He may carry on his litigation and you may eventually win, but he has to ask no one's permission to bring the suit. He has the right to sue as of right.

On the other hand, if a civil service employee is discharged, if you do not like the tax assessment that has been levied against your property, or you ask for a building permit to alter your home or to build a new home, and the permit is refused, you must apply for one of these writs. That subjects the matter to the discretion of the court which may or may not grant the writ, as it sees fit. Generally, writs are granted where a debatable question arises, but frequently they are not granted.

At the present time, the Justice may or may not see fit to grant your writ. His idea may be that under the law you have no right to start your suit. If he refuses, you are now given permission to apply to the Supreme Court itself, and the Supreme Court will decide whether or not you may bring your suit. Sometimes the greater portion of a year is consumed, *not* in litigating the meritorious question, but merely in getting permission to bring suit. If your application for the writ is denied by the Supreme Court, under the present practice you have no appeal. That is the end of the case. As the granting of your application was discretionary, there is no method of review by the court of last resort. You are through with that proceeding.

If by chance, however, you are allowed a writ, you may not know until your case is decided by the Court of Errors and Appeals—after you have taken your testimony, printed your records and argued the case—whether you have sued under the proper writ. You may get to the Court of Errors and Appeals and the court may say, you should not be here on a writ of mandamus, you should be here on a writ of certiorari; or you should not be here on a writ of certiorari, you should be here on a writ of quo warranto. Then you start all over again. And the difficulty is, that it may not be the fault of counsel or the court that you have selected the wrong writ. The facts as they are developed in the case by the testimony taken may be such that then, for the first time, you learn what your writ should have been.

I can give you one very brief example of this. The other members of the Bar who are here know these cases by rote. We have had a lot of prerogative writ litigation in Newark—and Newark, next to Bayonne, has more prerogative writs than any two towns. Some time ago they had a dispute about the organization of the City Commission. The question was whether or not certain officers in charge of revenue and finance should be appointed by the Commissioner of Revenue and Finance or by the Commission as a whole. There were eight to nine officers involved. Counsel wanted to play safe, so he drew up papers in quo warranto, in certiorari, and in mandamus. He presented all three to one of our Justices and the Justice quickly decided that one of them was not the proper one, but one of the

other two might be. He allowed a rule on both applications, so that counsel could argue which one of the two writs should be allowed. Thereafter one of the two was allowed, and when the case was argued in the Court of Errors and Appeals, it was finally decided by that court that the case should have been presented under the writ which the Justice originally refused to allow as not being the proper proceeding.

In order to eliminate this question, one of our legal lights, one of the outstanding members of the Bar, Merritt Lane, in a simple case asking for a building permit in Glen Ridge, prosecuted simultaneously four writs of certiorari and five applications for mandamus in order to be certain that he was correct.

May I point out that this is not the fault of the court, it is not any fault of the Legislature, nor of counsel. You may not know until the facts develop just which writ should be used, and you can't very well change.

Attempts have been made to change all this. The Justices, recognizing this difficulty, very frequently take a proceeding in which a man has started with a writ of certiorari, and where he should have had a writ of mandamus, and try to switch it in order to give the people their rights. But then you run into the difficulty that in some of these writs you are entitled to a jury trial. If you have started one way, with a proceeding in which you are not entitled to a jury, you cannot very well switch to another method at the end of the proceedings because the party said he preferred having a jury trial. And, similarly, under some of these writs you have an absolute right of appeal after a final decision, but in others you do not.

Now, let me go back. I have spoken to you for a moment about the institution of these proceedings. Let me say something about the prosecution of the suit. In the automobile case that I gave you, the case is tried before a judge or jury. He rules on the testimony under fixed rules of evidence. When the evidence is in, the case is completed. There is a jury trial, or not, as the party may decide in those cases.

Under the prerogative writs the same testimony may be offered several times before the final disposition of the case. Very frequently, before you are granted a writ you obtain permission to take testimony, because you may not have all the facts before you. This testimony is taken under what is known as a rule to show cause why the writ should not issue. Once the writ is issued, all the testimony that was taken prior to that time loses its value and you take the same testimony over again in support of the writ. I have in mind a case at the present time where I have taken the same testimony three times, and there has really been no dispute. All this arises because of the practice which has been followed in the past.

Similarly, the law may change during the course of the proceedings. Under our cases, whether or not relief under these prerogative writs should be granted depends on what the law is on the day the court finally disposes of it. Now, that may sound rather peculiar, but it comes up very frequently in some of the municipal ordinance cases. If, while you are litigating, the municipal body decides the thing to do is change the ordinance under attack, that is bad. You find that after you have gotten all the way through and had your writ allowed, a new ordinance has passed, and you then have to proceed to litigate on your new ordinance.

Now, in our example, when the accident trial is over the plaintiff has gotten the judgment, or the defendant has the judgment. The case is over, except for appeal. In the prerogative writs that does not always follow. In a building permit case, for example, you may, by a writ of certiorari, review the propriety of the action of the building inspector, or the board of adjustment, or the municipal body, but after the court has held those proceedings wrong and decided in your favor, you haven't gotten your building permit at all. You may have to apply for a writ of mandamus and start all over again to compel the municipality to carry out its duties.

There is an absolute right of appeal in the auto case. But you may not appeal all judgments of the Supreme Court in prerogative writ cases. Most of them you can, some of them you cannot.

We are proposing that in view of the constitutional limitations which now exist, there should be granted to the Legislature a very elastic authority to handle this matter—so that the court which, I think, desires to change these things but cannot, and the Legislature similarly, should be allowed to do it. We have suggested this—and I will read it to you, because there are one or two words that may require explanation *(reading)*:

> "Any relief or remedy now afforded by the writs of certiorari, mandamus, quo warranto, prohibition and proceedings in the nature thereof, shall be afforded in such action, in such courts, under such practice and procedure, and subject to such rights, limitations and other provisions respecting trial by jury, appeals, and other matters as may be established by law. Any such relief or remedy may be made a matter of right, when so provided by law."

We feel that if that were inserted in the Constitution it would then put in the hands of the Legislature power to act. And anything that they undertook to do, if it did not work out satisfactorily, could be changed by amendment in a subsequent year, rather than to wait until the Constitution is again amended.

VICE-CHAIRMAN: Thank you, Mr. Hannoch. When the invitation was sent to the State Bar Association, we had in mind that they would submit their report with respect to court structure. It was not our plan to get into these technical matters this early. How-

ever, now that you have presented it, I might say for the benefit of the lay members that I do not think any of the lawyers will seek to preserve the distinctions Mr. Hannoch discussed.

I think we might decide on whether it is the sort of provision that should go into the Constitution. Bear in mind that we will recommend some new court structure, whatever it may be, and there will have to be some general provisions with respect to rules of practice and procedure.

I assume this will be contained within our more general problem. Are we going to say that we will leave to the court, or to the Legislature, power to promulgate rules of practice and procedure, etc. I don't consider that at the moment this requires special consideration in the Constitution. However, I think that at a later date we will have an opportunity to get into the technical procedures, and at that time consider whether we want a provision of that type in the Constitution.

COMMITTEE MEMBER: Mr. Chairman, may I ask one question? What provisions are there in the present Constitution that prevent the Legislature from enacting such a law?

MR. HANNOCH: There is nothing in the Constitution at all on the subject. That is the comment that I wanted to make—in this Constitution that you are adopting, you are going to say something to this effect: that the court, whatever the name of the court may be, shall have the same power now exercised by the Supreme Court. You may, by phraseology of that kind, carry into the new court system all the things that are now causing all the difficulty. As matters now stand, the Supreme Court's power over these prerogative writs comes down to it over a period of years—they are inherited from colonial days, carrying over the rights of the courts of England. If you continue in some court the same power that there now exists in the Supreme Court, we are afraid that some of the limitations which now exist will be carried over into them. We are therefore understood to say, specifically, that the Legislature should be given power to do whatever it wants with respect to prerogative writs, and that's the sum and substance.

There is nothing expressly in the Constitution that limits the powers of the Supreme Court at the present time. As I said, there has been carried over into that Constitution all of the rights that existed under the old colonial practice which, in turn, were inherited from England. The court itself could not create the right of appeal if it wanted to. The Chief Justice will undoubtedly talk to you at much greater length than I have because I think that he, himself, recognizes some of these limitations.

VICE-CHAIRMAN: The provisions you have here now have

been worked out and were approved by the State Bar Association at its meeting on Saturday.

COMMITTEE MEMBER: Mr. Chairman, I move that this matter brought here by Mr. Hannoch be put on our agenda for consideration.

VICE-CHAIRMAN: All the matters that are brought before us are on our agenda for future consideration. In answer to your questions, I might say that a good deal of the so-called restrictions have been by what we call judicial interpretation. Mr. Hannoch says there is nothing in the Constitution. The court may, in the course of its interpretations as to the meaning of our present Constitution, say that certain jurisdictions are frozen by virtue of the fact that the Constitution made specific reference to a particular court.

What Mr. Hannoch is driving at, as I understand it, is that we should make certain to avoid in our phraseology a perpetuation of the difficulties that have been encountered by virtue of the fact that certain things have been frozen since 1844 under general language in the Constitution. Now, it isn't a matter of just this problem. As we go along we will see that there are many others, and I do think that we will have as one of our problems the question of what phraseology we want in the Constitution which will allow changes as time goes on, in this regard and in other regards, particularly with respect to practice and procedure.

COMMITTEE MEMBER: In other words, the courts are bound by their jurisdictions. Is there a law which prohibits the Supreme Court or Chief Justice from putting a new interpretation on the law?

VICE-CHAIRMAN: The answer to that is no. The person who reads the decisions of the United States Supreme Court will see that it is being done every day. Some lawyers might suggest that the courts are powerless to eliminate some of the difficulties in connection with these prerogative writs. Many members of the Bar feel that many of the difficulties could have been eliminated by the courts—not necessarily the right of appeals, but certainly those relating to procedural rights—for example, the question as to whether you should proceed by quo warranto, or mandamus, or certiorari.

I don't think we ought to spend too much time on that. I think our inquiry will be, in the light of whatever Judicial Article we recommend, what provisions we are going to include so as to make certain that these problems are taken care of.

MR. DIXON: I think that is one of the important things in the lay mind, with respect to procedure, because as a layman who reads and knows from personal experience about such procedures in the courts, they are out of all reason, particularly to men who have been

in business. I think in the lay mind there is a feeling that we must be careful that in our Constitution we do not restrict any changes in procedure.

I might mention just one thing, if you want to take the time, particularly in connection with indictments. We see cases thrown out of court, criminals let go because of faulty indictments. Just for an example, we have had up in our own neighborhood a man who attempted to have his wife murdered. He hired two people to murder his wife, and the man was finally let go by the Court of Errors and Appeals. The case was thrown out and he was let go because the indictment didn't say that this was done with malicious intent, although he hired two men, he paid them money, he arranged the set-up, but the indictment failed to state that he did this maliciously.

There is another case, where a man drowned his wife in the bathtub, and the Court of Errors and Appeals, after he was convicted without question, said the indictment failed to specify what liquid she was drowned in and therefore the case was thrown out.

VICE-CHAIRMAN: We have new federal rules on procedure in criminal cases, including the items you mention, which rules provide that an indictment may be in short form without any technical charge of maliciousness, etc. On the other hand, you do know that there is a system which is apparent throughout those philosophies, and I think as we go on we'll discuss the wisdom or non-wisdom of these matters.

We have some ladies with us who have patiently been waiting to be heard, so I think we'll get on with the representatives of the League of Women Voters. Mrs. Stuart Henderson.[1]

MRS. STUART HENDERSON: It might be interesting to the Committee to know just what the League of Women Voters is. We are composed of 43 separate leagues scattered throughout the State, not as large, however, as we wish to be. We have been interested in the cause of a new Constitution for many years, and those of you who have followed the history of this series of attempts to change the Constitution are probably aware of the part the League of Women Voters has played, of which we are rather proud. The League of Women Voters today wish to talk to you about the proposals which have been submitted by us as a lay body, in direct contrast to our predecessors, who were talking in terms of technical experts.

We are interested in government because that is our special job. We are interested in government and in what happens to government for the good of the largest number of people. We think that

[1] The complete proposal of the League of Women Voters regarding the Judicial Article is set out in the Appendix to these Committee Proceedings. It is part of the mimeographed proposal distributed to the delegates by the League, "Constitutional Changes Recommended by the League of Women Voters" (June, 1947).

there are some rather fundamental principles of government that apply to the Executive, to the Legislative and even to the Judiciary, and we are not sure that they are always considered. Particularly do we realize that our judiciary framework has grown up through long centuries and has, perhaps, not had the opportunity that you as a Committee are having right now in reframing and re-thinking the matter in the light of modern and contemporary problems.

We are particularly concerned with four basic principles. We are concerned, particularly, that every branch of government shall have a unified, integrated system, and I am going to be the person who will present that matter to you. We also think that government, including the Judiciary, functions in direct proportion to the quality of the people who administer it. We think that two of the extremely important parts, about which we would like to talk to you, consist in the question of how judges are selected, and also what can be done in a framework structure which we all know should be as brief as possible, which will help to set a very definite standard of terms and performance, and which will help that personnel as much as possible. We are also inclined to believe that your particular function in framing the Judiciary Article as part of the Constitution is to set up an efficient form of administration—and that, we think, is extremely important for the sake of what is going to come out of our continuing judiciary performance.

I am going to present to you three other people whom I shall call on. We are going to ask Miss Seufert, who is among our membership and who is a practicing attorney, to answer any technical questions which arise.

I have heard it suggested that there was just a bare possibility that we, the people, do not want to change the judiciary set-up. We in the League feel very sure that that is not the right point of view. We feel very certain, after a century and more of experience under the rather complex and quickly arranged Judiciary Article in the 1844 Constitution, that this Committee has a wonderful opportunity to fashion a much improved basic structure for this particular branch of government. I do not know how to prove to you at the present time that the system we are going to introduce to you will be completely satisfactory. A great many attorneys have spoken to me, as have practicing judges, and they have expressed the opinion, in public and in writing for at least 50 or 75 years, that there are improvements which can be made.

I want to point out to you the report of Ralph H. Temple[1] which was probably spoken about when Mr. Hannoch presented his report. Certainly a complete reading of that report will convince any person

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[1] *Report on the Constitutional Courts of the State of New Jersey.* Submitted to the Commission on Revision of the New Jersey Constitution, July, 1942 (Trenton, 1942).

that there are things that could be done to improve the judiciary. Considering all the states, it is interesting to see that New Jersey is not alone in a rather chaotic situation. Apparently a good deal of the judicial procedure has grown up in, shall I say, a rather topsy fashion. We are not alone in this, but it does seem to me, after studying the reports and having gone into the matter in considerable detail, that some of the practices that have come about in our system are a bit on the fantastic side.

The set-up of the League proposals stresses as its fundamental requisite that a system of courts which can be explained and understood by the average intelligent citizen is a very desirable situation. As you are aware, that is not the case now. I asked a New York lawyer, who happens to be a resident of the State of New Jersey, to explain to me the New Jersey system of courts, and he said, "It is far too intricate for me to understand." I don't think I would have any contradiction from you if I said to you, if you chose the upper ten percent of the most intelligent, best informed people in any group in any community in the State, they would have considerable difficulty in explaining the system we now have.

Why do we think that this simplified unity is important? There are three reasons. One of them is so simple as to be practically axiomatic. Anything which is simple, any kind of machinery for any kind of performance, is likely to work better. It is much less likely to substitute gear noises for the turning of wheels.

Second, if the court system could be understood by the average layman, it would increase his interest in government. We realize more and more that better understanding by the average citizen of his government is going to be increasingly important if, as a democracy, we are going to continue to exist.

Third, and most important—a simplified system of any branch of government fixes responsibility clearly. If it breaks down, we know where the responsibility lies and the error may be corrected more carefully, more quickly and more reasonably. I am afraid that it is a little vulgar to say, but I think it expresses the idea—a chaotic system like this is likely to produce a system which results in "passing the buck."

What, in the simplest essence, is the system of courts proposed by the League? In the first place, a Supreme Court—this follows the nomenclature of the United States and 38 of the 48 states—with a personnel to consist of a Chief Justice and six Associate Justices. I think common experience in the handling of business makes anyone realize that it is much quicker to bring seven to a conclusion than 16, and the decision is quite as wise if the average calibre is equal.

We would like to have all other courts which administer justice

to be comprised in a General Court which has two main divisions, and other parts if needed. The valuable fund of equity lore, which has done honor to New Jersey justice, we feel would be retained if we had an equity section. By this the General Court would gain considerable integration in administration and speed in litigation. We propose that one type of court should be excepted from the General Court—the municipal court which administers municipal law and which may be authorized by the Legislature. We do not feel that the Legislature should be permitted to create additional layers of court structure lest time develop the same kind of chaos in our system which exists now.

I have tried to point out to you that we are interested in a simplified unit of structure. That, we think, belongs in the Constitution. I want now to discuss with you, or rather to have discussed with you, the problem of the selection of justices, and I would like to introduce to you Mrs. Heinz.

VICE-CHAIRMAN: Thank you very much, Mrs. Henderson. Mrs. Heinz—pardon me, are you going to read, Mrs. Heinz?

MRS. WINFIELD B. HEINZ: No, not exactly.

VICE-CHAIRMAN: Will you please pass to the members of the Committee, your printed statement, that is, if you have enough of them.

MRS. HEINZ: Yes, I have plenty of them.

Mr. Chairman, and members of the Committee: In the opinion of the League of Women Voters, no judicial system, no matter how carefully devised, can be better than the judges who administer it, and therefore, in our opinion, the new Constitution should provide a method of choosing judges designed to insure a judiciary of the highest possible calibre.

There are currently in the United States two methods of selecting judges. One is by executive appointment and the other is by election by the people. There are disadvantages to both. It seems to us that the whole question of political considerations has really no bearing on the fundamental issue. Such considerations tend to lower the general quality of the judiciary as a whole, and where terms are limited, frequently result in unwise and unnecessary turnover in judicial personnel. They may also impair freedom of judicial decision.

The plan for the selection of judges which the League of Women Voters recommends attempts to avoid these difficulties. The procedure outlined for the initial selection of judges is designed to facilitate the choice of individuals of the highest possible qualifications. It is proposed that a Commission on Judicial Appointment be established, composed of the Chief Justice of the Supreme Court, three members of the bar selected by the State Bar Association, and

three lay members appointed by the Governor. One responsibility of this Commission is to recommend to the Governor a list of qualified candidates for each judicial vacancy, from which list the appointment must be made with the consent of the Senate. Both lawyers and lay members are included on the Commission in order to encourage consideration of both general standing and professional ability.

A satisfactory judicial system must, as far as possible, remove a judge from extraneous pressures in order to give him real freedom of decision. Such freedom is commonly provided for by the unlimited judicial term, subject to good behavior. An unlimited term, however, makes it impossible to remove a judge who has demonstrated lack of capacity for the position. The proposal recommended by the League of Women Voters is designed to make possible the removal of an incompetent judge after a limited period of time and, at the same time, assure a high degree of judicial freedom.

It is proposed that a judge be appointed for an initial term of seven years. At the end of this period the Commission on Judicial Appointment must consider the reappointment, after holding a public hearing. It may then recommend reappointment, advise against reappointment, or submit the name together with other names to the Governor. If reappointed, the judge serves during good behavior until retirement. Thank you.

VICE-CHAIRMAN: Thank you very much . . . Mrs. Halligan—

MRS. H. K. HALLIGAN: Mr. Chairman, and members of the Committee: I would like to hand out these printed forms that have been prepared for this purpose.

VICE-CHAIRMAN: Thank you.

MRS. HALLIGAN: I believe Mrs. Heinz covered a few of the points here, and we might be doubling up just a bit. However, regardless of what Mrs. Heinz said about the method of appointing justices and the terms, it is our suggestion, after examining all of the proposals which have been made—and I would like to say a word here, Mr. Chairman, to the effect that these proposals of the League of Women Voters have been discussed very, very thoroughly in communities throughout the State, and we have had advice from a great many expert sources, and the proposals would represent a layman's conception of what these things might perhaps be—we propose that the Justices of the General Court shall, prior to their appointment, have been practicing attorneys in good standing for at least ten years.

Mrs. Heinz has already covered paragraph 2, in that they shall be appointed for a term of seven years. If reappointed, the Justice shall hold office during good behavior. We felt the issue of good behavior

should, with respect to Justices of the General Court, be triable by the Supreme Court.

So far as Justices of the Supreme Court are concerned, it is the recommendation of the League of Women Voters that prior to his appointment a Justice shall have served a term in the General Court, so that his case will come up for review by the Committee on Judicial Appointment before his name has been presented to the Governor. The Chief Justice and Associate Justices of the Supreme Court shall be appointed to hold office during good behavior. The issue of good behavior would be triable by the Senate.

No Justice shall continue in office after he has attained the age of 70 years. One exception that we made here was that the Supreme Court by rule, or the Legislature by law, may provide for the appointment by the Commission on Judicial Appointment of specially qualified referees to serve in special tribunals, such as the Juvenile Court.

And the last paragraph presented here, Mr. Chairman, is just the same as in the previous representations, so that I do not think it is necessary to go into that.

VICE-CHAIRMAN: Thank you very much.

MRS. HEINZ: Mrs. Griffith will speak to you on the importance of judicial administration, Mr. Chairman.

VICE-CHAIRMAN: Mrs. Griffith.

MRS. B. G. GRIFFITH: I am going to stress this as simply as possible, since you did hear about it this morning. Administration of the courts, we believe, can be more business-like and effective under one responsible executive, and we therefore propose that the Chief Justice of the Supreme Court shall be the administrative head of all the courts, and shall supervise their work.

We also propose that the Chief Justice of the Supreme Court shall annually assign justices of the General Court to divisions, sections, or parts thereof, and may from time to time transfer Justices from one assignment to another as need appears.

Whenever the Supreme Court or any court fails to hear any case within two months after an appeal therein is perfected, or fails to decide any case within two months after it has been argued or submitted, the Chief Justice shall certify that fact to the Governor. At the request of the Chief Justice, the Governor may, with the consent of the Senate, appoint special judges from the General Court to sit in the Supreme Court or special judges to serve in the General Court from a list of candidates presented by the Commission on Judicial Appointments, to serve for not more than one year. Such special judges may exercise all the powers of a Justice of the court to which they are appointed.

All of this, of course, is designed to relieve temporarily congested

calendars. We believe that the courts should be merciful as well as just, because it is the citizen who suffers most. He suffers because of extended litigation, because of court congestion, and because of the expense involved—in some instances even to the jeopardy of his liberty.

VICE-CHAIRMAN: Thank you, Mrs. Griffith. It is a quarter to four and we are due to reconvene at ten tomorrow. We will have the Essex and Hudson County Bar Associations. Samuel Lockburn is in Camden and will not be present tomorrow, but wants to be heard at a later date. I would suggest that we have the executive session then, because I think it will be helpful to all of us if we start outlining what we have heard and what these various proposals are. We will have a full day tomorrow.

If that is agreeable to all of you, and if there is no further discussion, I suggest that we adjourn until ten o'clock tomorrow morning.

(The session adjourned at 3:45 P. M.)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Wednesday, June 25, 1947

(Morning session)

(The session began at 10:30 A. M.)

The third meeting of the Committee on the Judiciary was held in Room 202, Rutgers University Gymnasium.

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., and Smith, G. F.

VICE-CHAIRMAN NATHAN L. JACOBS: We will today hear from Mr. Harold Simandl.

MR. HAROLD SIMANDL: Mr. Chairman and members of the Judiciary Committee of the Constitutional Convention:

I assure you that the officers and trustees of the Essex County Bar Association welcomed and were greatly honored to receive your kind invitation. We have a sincere desire to be of service to your Committee. They felt, however, that it would be helpful and perhaps clarifying if I appeared here as President and made a brief introductory statement with regard to the formation of our committee, its activity and the present status of the committee's report. With your permission, therefore, may I state that:

At a regular meeting of the Essex County Bar Association held on March 18, 1947, the following resolution was adopted:

> "That a committee of eleven be appointed to study the subject of a judicial article to be included in the new Constitution and to submit a report on its researches to the Association by way of information and education, and to submit to the Association recommendations on points where the committee may think recommendations desirable."

The following committee was appointed: Milton B. Conford, Chairman, Augustus C. Studer, Jr., Dominic A. Cavicchia, Samuel Kaufman, James F. X. O'Brien, Mortimer Eisner, Harry Schaffer, Morris M. Schnitzer, Charles E. McCraith, Jr., Ward J. Herbert and Aaron Marder.

A study was made by the committee and a report with certain recommendations of the committee was presented to the Association and published in the June 5 issue of the *New Jersey Law Journal,* so that all members of the Association might have an opportunity to read and study the same. I have copies of that report.[1]

Two special meetings of the Association were held on the afternoons of June 11 and June 12, 1947, at which time the report and

[1] The report appears in the Appendix to these Committee Proceedings.

proposals of the committee, which contain not only the majority view on each point but the minority view as well, were debated. A stenographic transcript of the debate was taken. At the conclusion of the special meeting on June 12, a motion was made that the stenographer's notes be written up and published in a suitable manner and that thereafter a poll of the membership of the Essex County Bar Association be taken by mail on the various proposals set forth in the committee's report. The stenographer's transcript has not yet been received. Therefore, no ballot has been prepared and sent to the membership.

However, Mr. Conford and Mr. Schnitzer, two members of the committee, are present to give you the benefit of their study, as lawyers, of the problems arising in the writing of a judicial section of the new Constitution. They do not express the view of the Essex County Bar Association, as the members have not yet had an opportunity to vote on the committee's proposals.

VICE-CHAIRMAN: Thank you, Mr. Simandl. Will we be able to have copies of that transcript?

MR. SIMANDL: We will be glad to give this Committee a copy of the debate which we are going to boil down and clear out the unnecessary parts of, and we will see that you get suitable copies so that you will know what was said at the time. And then, when we finish our poll, we will be glad to furnish you a copy of the results.

VICE-CHAIRMAN: Will you please send those direct to our Secretary, Mrs. Miller?

MR. SIMANDL: I will be glad to do that.

VICE-CHAIRMAN: Mr. Conford, Chairman of the Essex County Bar Association Committee.

MR. MILTON B. CONFORD: At this time, Mr. Chairman, madam and gentlemen, I would like to preface what Mr. Schnitzer and I will say. During the necessarily limited time that has been made available to us this morning, we cannot, of course, attempt to summarize the purport of this entire report. We feel that it has, perhaps, been written with sufficient clarity so that the reading of it by Committee members will, better than any oral presentation, convey what we have in mind. However, as we understand, the subject of integration of the courts is one of primary concern, or at least of very substantial concern, to the Committee. We are this morning going to confine ourselves to presentation of the salient points which can be made for both sides, or perhaps I should say, three sides.

VICE-CHAIRMAN: You might do this—give us your ultimate recommendations in the preface as they pertain to the entire structure.

MR. CONFORD: I can do that, and then when I finish, Mr. Schnitzer will furnish one point, and I will furnish the other, and

we will leave the balance of the matter with you in our report.

I might say, as we see it, there have been five separate approaches to this question of integration of the law and equity courts.

VICE-CHAIRMAN: That still doesn't meet what I have in mind. We would like you to let us have the entire court structure as the committee recommends it—as pertains to the court of appeals, the intermediate court, and the lower court. Do it extemporaneously at this stage.

We want to hear all of the proposals. We have heard four or five, and we would like to know if there are any others. Then, when we have them all, what we plan on doing is to sit down and prepare a tentative draft which will be submitted for full hearing.

MR. CONFORD: I don't think you can simply say "here is another proposal." There is no such thing as an integrated proposal. A plan is a series of recommendations on separate items.

VICE-CHAIRMAN: I understand that. What do you recommend for the Court of Appeals? What type of court do you want?

MR. CONFORD: I now speak for the majority. We recommend, as I believe everyone else does, a single integrated Court of Appeals with no one on it but judges, and the members to have no other duties or responsibilities whatever—the court to consist of seven men. The majority of the committee recommends a general court with unlimited original jurisdiction which we describe as the Supreme Court.

VICE-CHAIRMAN: What do you call your upper court?

MR. CONFORD: Court of Appeals. The Supreme Court would consist of three sections. One would be Equity and Probate, the other a Law Section, and the third an Appellate Section.

VICE-CHAIRMAN: Is it your thought that the Constitution fix those sections?

MR. CONFORD: Right. The Equity and Probate section would have what is now commonly known as equity and probate, or Chancery; the Law Section would have original civil and criminal jurisdiction; the Appellate Section, appellate jurisdiction of all final or interlocutory determinations of inferior courts and final determinations of statutory tribunals. All final judgments, decrees or determinations of the Supreme Court in the exercise of its original jurisdiction, whether in the Equity or Law Section, would be appealable directly and as of right to the Court of Appeals. There would be no intermediate appeal so far as the final judgment of the court of original jurisdiction was concerned. Appeals from the Appellate Section of the Supreme Court to the Court of Appeals would be taken in cases where the Supreme Court made a judgment of reversal or modification, where there is a dissent in an Appellate Section, or on certification by the judge or Appellate Section rendering

the judgment, on certification of the Court of Appeals, or in such other cases as may be provided by law.

The Constitution would permit creation of other inferior courts of limited jurisdiction. That, in brief, is the structure of the system as a whole.

VICE-CHAIRMAN: Is that modeled specifically on any other system?

MR. CONFORD: It is not an attempt to model it after anything else, although our committee has naturally profited by the suggestions and studies which other people have made prior to the studies we undertook. With your permission, I would like to give you what we have in mind this morning.

VICE-CHAIRMAN: Go ahead.

MR. CONFORD: I would like to say first, that this indicates what we regard as the five general approaches to be taken in this subject of law and equity merger. Mr. Schnitzer will then develop one approach, I will develop the others. We would like to cover the entire report, but obviously that is impossible in the time available. We have heard a great deal of discussion, *pro* and *con,* on equity. We feel that is the thing you are primarily interested in, and the thing about which we have a great many misconceptions; and we would like to clear that up. As I have said, five general approaches to this question have been advanced.

MR. THOMAS J. BROGAN: What you are going to say is a criticism.

MR. CONFORD: No, we are attempting to be objective this morning.

MR. BROGAN: What you are doing is pointing out what you consider the inadequacies of the other schemes for a court structure.

MR. CONFORD: I will this morning first present, without comment, five approaches which we have heard advanced. We will then offer the comments we have.

The first approach advanced, incidentally, by four members of our committee, was complete integration of the law and equity courts.

MR. BROGAN: I think this will be very helpful to the Committee—to have the alternative approaches.

MR. CONFORD: The first is one for complete integration of the law and equity jurisdictions without separate law and equity divisions. That is, I understand, the federal system, and the system in New York and other states.

MR. BROGAN: Except the federal system differs from New York; New York is not as completely integrated as the federal system.

MR. CONFORD: They do not have a separate law section and

a separate equity and probate section.

VICE-CHAIRMAN: Do they have definite terms?

MR. CONFORD: Not to my understanding, Mr. Jacobs. The justices of the Supreme Court of New York, who are the judges with original unlimited jurisdiction, are subject to assignment at any time for different type cases.

VICE-CHAIRMAN: They are assigned to different type cases, where federal judges are not.

MR. CONFORD: They are assigned to type cases for a limited period of time.

VICE-CHAIRMAN: Judge Forman in the U. S. District Court at Trenton hears all District Court cases, doesn't he?

MR. CONFORD: I understand they do. At least the information I have is that they may take a judge and assign him to a criminal case and then to a civil case.

VICE-CHAIRMAN: Except in a Federal District where there is only one judge.

MR. CONFORD: That is not a matter of organization. What I am talking about is the first approach, which is to have no separate law and equity sections. The minority of four members of our committee advocated that as their first choice.

The second approach would be that which the majority of the committee adopted as a final choice by a vote of seven to four, and that is the proposal you heard me summarize:—a single court of original unlimited jurisdiction and the separate sections, but having judges not permanently assigned, subject to transfer from section to section in the wisdom or at the discretion of the administrative officer.

VICE-CHAIRMAN: You recommend that that should be left with the Chief Justice?

MR. CONFORD: The majority of the committee entertained that view.

VICE-CHAIRMAN: Did the committee consider the question of leaving that to the Legislature?

MR. CONFORD: They did, and I think they felt that was a matter which should be as flexible as possible and best accomplished by leaving it to the court or the discretion of the Chief Justice of the court.

The third approach was that of having law and equity sections as I have just mentioned, but provide that judges in each section—law, and equity and probate—be permanently assigned to those divisions. I understand that is the point of view advanced here yesterday on behalf of the State Bar Association.

VICE-CHAIRMAN: What proportion of your committee was in favor of number three?

MR. CONFORD: Four members of our committee were in favor of that as second choice.

VICE-CHAIRMAN: That is number three?

MR. CONFORD: Yes. The fourth approach—and this is the approach for which four members of our committee voted as first choice, including myself, and on which I will speak at greater length later—is for the creation of a new separate Chancery Court for the exercise of Chancery jurisdiction, with judges to be appointed in exactly the same way as law judges are appointed, and with a chief judge who is to exercise judicial power and not merely administrative functions, as is the situation with the Court of Chancery today; and further, with the provision that the Court of Chancery entertain law jurisdiction, and law courts equitable jurisdiction wherever, in either case, it is necessary to do so in order to effectuate complete determination of a single controversy.

The fifth approach is what I might call *status quo*—the Court of Chancery exactly as now, appointments exactly as now made and, I think, the exclusiveness of jurisdiction now existing to be retained. No member of our committee advanced that point of view.

Now, Mr. Schnitzer will develop one approach, and I will follow with the other.

VICE-CHAIRMAN: I gather your presentation is in respect to submitting the various issues you support, and Mr. Schnitzer is appearing on—

MR. MORRIS M. SCHNITZER: My assignment is to develop the arguments in favor of total merger of the courts.

VICE-CHAIRMAN: Number one?

MR. SCHNITZER: It may be number one, or it may be considered, in part, to be number two. The essence of it is—

VICE-CHAIRMAN: You will direct your remarks to one and two?

MR. SCHNITZER: In effect. At the outset, I would like to take a brief glance at history. Literally, the Court of Chancery came about as an historical accident in the development of English law. At that time the procedure by which the law court would entertain a case was for a litigant to seek a writ from the clerk of the King's Chancery at Westminster. In time these writs became so standardized in form that unless a litigant could perform a Procrustean operation and cut down his case or expand it to match the writ, he literally could have no relief from the court. So the practice developed to go to the King for royal relief because the law courts were inadequate to grant this relief.

Finally, the volume became such that the King's Chancellor, a part-time judicial officer, as well as an administrative and fiscal officer, having taken on the work of disposing of petitions, came to be

considered as the whole court. By the 15th Century England had a High Court of Chancery presided over by the Chancellor who had, in addition, the other functions I spoke of.

Incidentally, you may wish to know the paradox in this historical development. It was the King's Chancellor, who was in charge of issuing the very writs under which the law courts functioned. It has always been an historical question why, particularly after the act of Parliament in 1285 which directed the King's Chancellor to liberalize the writs of action, the Chancellor failed to do so, and thereby brought about the very situation which gave rise to the separate court over which he presided.

There is one other feature of this development, and it is the controversy which developed between these two rival court structures, namely the Court of Chancery on the one hand and the courts of law on the other. The contest became very bitter and, occasionally, bloody as well. However, in 1614, in the reign of King James I, the decision in the famous controversy between Chancellor Ellsmere and Chief Justice Coke was finally decided in favor of the Chancellor and, specifically, the Chancellor's right to enjoin law courts was settled by a royal ordinance.

Now, just about the time this conflict was being resolved in England, the American colonies had their start. As you will recall, of the ultimate 13 American colonies, only five had independent courts of chancery, and New Jersey was not one of the five. The Governor was Chancellor *ex-officio,* and that same duality of function was carried into the first State Constitution of 1776. An independent Court of Chancery, in the person of the Chancellor, was created in New Jersey for the first time by our Constitution of 1844. That is important because it is commonplace to assume that the independent Court of Chancerry in New Jersey has a very ancient history. In point of fact, it dates back just a little more than a century.

Just about the time the 1844 Constitution was being adopted, New York was arranging to hold its own Constitutional Convention of 1846. While New Jersey was creating an independent Court of Chancery, New York, which had had an independent Court of Chancery right along, proceeded to abolish it and merged all its courts into the type of court Mr. Jacobs discussed.

Now, here were two contemporary models for the other states and territories to consider, and the fact is that New Jersey's model was not followed, and New York's was. It became the standard for the judicial structure of other states and territories until at the present time there are only three of our 48 states which, like New Jersey, have an independent Court of Chancery.

About the time we were holding our Constitutional Conventions in New Jersey and New York, in the 19th Century, a movement for

reform of the English judicial system had developed. Those of you who read Charles Dickens will remember his famous case of *Jarndyce* v *Jarndyce*. It is perhaps better known than any actual, decided case, but it indicates, as well as anything might, the low esteem into which the Court of Chancery had fallen with the general public in England. The movement for reform culminated in England in 1873 in adoption of the Judicature Act. By that act, all the courts of England were merged into a single High Court of Judicature, with divisions of which Chancery was one. Here, again, the English model became the standard for the revision of judicial structures all over the Dominions. The only remaining independent Court of Chancery in the British Empire is in the Dominion of New South Wales, according to my latest report, which isn't very recent.

In reviewing the entire picture of the historical development of the Court of Chancery, there are two features particularly noteworthy—the first one is that no state, no territory, no nation which had an independent Court of Chancery and once discarded it, has ever recreated it. There is not one such example in history. Secondly, all the information and comment on the experience with totally merged court structures is that the gains anticipated from a centralized administration of justice have been realized, either fully or at least very largely.

One feature of a dual court structure deserves particular attention —all experience demonstrates that wherever two rivals exist, there is an internecine conflict between them. The relations which have prevailed between courts of chancery and courts of law in history are pretty good examples of that.

Now, for modern, everyday, ordinary, commonplace illustrations of that conflict, there are four typical cases referred to in the report. I would like to mention one briefly. Mr. Smith is injured crossing the street, run down by an automobile, and the following day the insurance adjuster succeeds in obtaining a release by fraud. After Mr. Smith recovers, he consults his lawyer who starts an action in the law court and claims damages. The defendant sets up, by way of defense, the release. The parties adjourn to the Court of Chancery and start a new case in that court. The answer is filed, the trial held, and the Court of Chancery decides the release was obtained by fraud and cancels it. Now the parties go back into the law court, try the case over again, and Mr. Smith retires with a verdict for damages. Compare that with the federal court. There would have been one statement by Mr. Smith in which he tells his version of the facts, including the story with respect to the release; the defendant gives his version, including the release; and there is one trial and one final result. The matter is concluded right there. That is one commonplace example of procedure in a merged court.

Another example. Mr. Smith starts out to buy a home from a Mr. Jones, and when the time comes to perform the contract, Mr. Jones refuses. This time Mr. Smith starts in the Court of Chancery and asks for specific performance of the contract. The Court of Chancery finds the contract perfectly legal and valid, but lacking in mutuality, and denies relief. Mr. Smith then goes back to the law court and retries the same case—the same witnesses, the same documents—before he gets his verdict for damages. Here, again, there would have been one set of pleadings in the federal court, or in the New York Supreme Court, or in the courts of most of the states in this country and in England.

Another familiar example. Mrs. Smith brings an action in the law court against an insurance company to recover on a life insurance policy on her husband's life. The insurance company files a bill in the Court of Chancery to cancel the policy on the ground that Mr. Smith, however unintentionally, misstated facts when he applied for insurance. Now, the Court of Chancery finds that fraud, at least the intentional misrepresentation type, is a perfect defense in the law court and decides that the parties had better go back and try the case there first. The parties do that, and the jury's verdict is in favor of Mrs. Smith. With that completed, the insurance company now goes back to the Court of Chancery where the case is tried all over—the same case, the same witnesses—only this time the Court of Chancery finds there was equitable fraud. And now, at long last, after two trials, the policy is cancelled, and Mrs. Smith is out of court. While the result would certainly have been the same in the federal court or in any unified court structure, there would have been one trial, one hearing, one final decision.

For a concluding illustration, a group of neighbors are disturbed by noise, soot, or smoke from a factory erected in their neighborhood. They go to the Court of Chancery for an injunction, and their case is tried and the injunction awarded. In the meantime, they have sustained pecuniary damages. Now, before collecting these damages, they must go to the law court and try the case all over again. Here again, almost everywhere else in the country there would have been one trial, which would have resulted both in an award for damages and an injunction.

Despite all these apparent advantages of a totally merged, simplified and unified court structure, you would nevertheless gather from what Mr. Conford has said that the advantages of an independent Court of Chancery, or some form of permanent Chancery institution, would very strongly recommend itself to the Committee. The first argument would be that there are very superior advantages to be had from creating a specialized body of judges who will deal with the same material, become very familiar with it and give quick and

expert decisions. Now, that argument, in its presentation today, will exhibit at least one outstanding deficiency. The Chief Justice and the lawyer members of the Committee will certainly recall Maitland's dictum that the law is a seamless, endless web, and yet there are at least four major branches of judicial business: criminal cases, the broad field of civil litigation, probate administration and miscellaneous jurisdiction.

Almost everyone who will urge retention of the Court of Chancery will be quite willing that all other courts should be merged into one so that there will be this one court for criminal business, all remaining civil business, all probate and all miscellaneous business. And yet, what benefit, what advantage, or what logic can there be in isolating one segment of one branch, namely, equity law, and creating or maintaining an independent body to administer that alone, while all other judicial business is merged into a single court?

There is another feature of the argument in favor of specialization of judges which is particularly interesting to me. It seems the advocates of this point of view prove either too much or too little. Let the Committee consider, for example, that the Court of Chancery, in one form or another, has been in existence over 800 years. A survey was recently made of the latest published volume of Chancery decisions. A full one-third were concerned with controversies over jurisdiction as between the Court of Chancery and the courts of law. The conclusion is that after 800 years, litigants still have to pay in time, money and delayed justice for the piecemeal determination of their causes by the Court of Chancery and the law courts, case by case, in 1947. Just what the correct boundaries of their jurisdictions are is still questioned.

Arguments in favor of specialization also assume that the Court of Chancery deals with specialized subject matter. In the main, the Court of Chancery deals with the same subject matter as law courts—for example, contracts, property, personal and private rights, and the like. The chief difference between the courts concerns the remedy, not the subject matter. If it is damages you want for breach of contract, you start in the law court. If you want an injunction or decree for a specific performance, the Court of Chancery is the place to go. Thus the specialists would not specialize in the substantive phases of a case, but only in knowing just when there ought to be an injunction rather than a verdict for damages.

As a matter of fact, Lord Chancellor Loreburn, visiting in this country some time ago, when asked to comment on how the bar and people in England regarded the merger of their court system, had something to say which bears out this particular point. What he said was: "No one has ever doubted the wisdom of this change, and its practical benefit is simply that a litigant can no longer be tossed

about from one of the king's courts to another, at great cost, and with needless delay, upon grounds which have no justification of utility or public policy. It used to be just as if a surgeon, when called in to a patient, were forbidden to give any medicine or afford any relief except it were surgical."

The lawyer members of the Committee will bear me out on this.

VICE-CHAIRMAN: They are a substantial minority.

MR. SCHNITZER: This is technical,—every suit instituted in the Court of Chancery must allege that the plaintiff or petitioner has no adequate remedy at law. Now, those who argue that Chancery judges should be specialists must take into account that a Chancery judge, in every case, must know the law pretty thoroughly before deciding whether or not there is an adequate remedy. Are we to suppose, since he practices Chancery law, that his decisions as to the legal remedies available are second-class decisions? You won't find anybody who will advocate or admit that point of view, and in my conception, it isn't true that they are necessarily second-class judges with respect to any phase of their work.

From Mr. Conford you will or have heard that most of those who advocate a retention of the Chancery Court in some form or other, insist that both the Court of Chancery and the law courts should hereafter dispose of each case as it comes before them in all its aspects, just as in the federal court or in the courts of most other states. If the argument on the phase of specialization has validity, the result is bound to be that if a law trial occurs in Chancery, we will get a first-class decision on equitable phases of the case and an inferior determination on the legal phases, just because the judges never get a chance to become specialists in the legal cases. If we begin in a law court, the situation will be true in reverse. Now, certainly we ought not to have an unfair administration of justice, depending upon the accident of where the particular case happens to originate, and yet if there is validity in the argument of specialization, such would be the case. Practical experience would dictate that the opportunity should at all costs be given all our judges to become specialists by practicing in the entire domain of jurisdiction.

Again, the arguments in favor of an independent Court of Chancery will emphasize the high prestige and regard which the New Jersey equity court has commanded within and without the State. But if the assertion that the equity court does command prestige is correct, we know that the law in the equity court was made not by Vice-Chancellors, but by the Court of Errors and Appeals, on review of their decisions. The Court of Errors and Appeals reviewing Chancery decisions is comprised of the Chief Justice, eight Associate Justices of the Supreme Court and seven lay judges, who may or may

not be lawyers—and the lawyers may or may not be Chancery specialists.

The fact of the matter is that the law of New Jersey has been made by a court which is an outstanding example of lack of specialization. I think it can fairly be said that if the Court of Chancery originated in an historical accident, to survive where it does today is an historical anachronism. Whatever the theoretical advantage of a high degree of specialization may be, I do not think it can be said that any such benefit has been realized by an independent Court of Chancery. Nor do we believe that an independent Court of Chancery has proved itself to be an efficient, economical, or superior instrument for the administration of justice.

MR. HENRY W. PETERSON: May I ask one or two questions? Regarding the nuisance case which you cited, was that merely an error of the counsellor to go into Chancery for an injunction? Wouldn't the correct place for remedy have been in the law court, and had they found there was a nuisance of smoke and that they had suffered pecuniary damages, wouldn't the law court determine that fact and award damages without three separate actions?

MR. SCHNITZER: It is true that in actual practice there is perhaps more fractional litigation than need be, and the case you refer to may be an illustration of it. I have this in mind—we have a Transfer of Causes Act. What it means is that if you find you have chosen the wrong forum in the first instance, a new case need not be started. The very same case may be transferred from one judge to another and yet, in actual practice, the Transfer of Causes Act is resorted to about as seldom as examinations before trial are awarded in law courts. In the federal courts or in the New York courts, where a total merger has occurred, examinations before trial and interrogatories are commonplace, and the occasion for transfer of causes simply does not exist.

MR. PETERSON: Yes, but I raised the question regarding New Jersey. In New Jersey I am an aggrieved property owner who suffered a nuisance from a factory. Isn't my remedy, if I have proper counsel, to go to the law court without first going to the Court of Chancery and then to the law court?

MR. SCHNITZER: It isn't that—the law court could award damages once you had an injunction, but it would have no power to abate the nuisance.

MR. PETERSON: Can they issue a cease and desist order and award the damages at the same time?

MR. SCHNITZER: They certainly can award damages. I don't know the basis for their authority to abate the nuisance specifically—and yet I notice Mr. Simandl's vigorous nod. They have to have the authority, and perhaps the Chief Justice will confirm this.

MR. PETERSON: It would be my opinion that basic law and commonsense would prevail in New Jersey.

MR. AMOS F. DIXON: Can a law court issue an injunction?

MR. SCHNITZER: I know of no instance, but here again there is much higher authority present.

MR. PETERSON: Another point I would like to ask, in your number 8 on page 3, all prerogative writs are abolished.[1]

MR. SCHNITZER: That is Mr. Conford's special subject.

MR. PETERSON: I would like to have Mr. Conford answer that.

MR. CONFORD: I—

VICE-CHAIRMAN: We will proceed with Mr. Schnitzer at this time, and you may answer Mr. Peterson later.

MR. PETERSON: Have you any statistics relative to the expense in comparison with New York?

MR. SCHNITZER: With regard to that, I remember at Harvard there was a very well-organized attempt made to develop statistics about New York's administration of justice. In the end, the confession was that the statistics were not a reliable basis for comparison for the reason that records are not uniformly kept, and therefore comparison is difficult.

VICE-CHAIRMAN: Has anyone any further questions?

MR. DIXON: How about the length of time—are there any statistics on the disposition of cases?

MR. SCHNITZER: Yes, but there are not in our own State, so there again comparisons would be difficult.

VICE-CHAIRMAN: In Dr. Temple's report [2] I think you will find a reference to the time it would take to decide a case. That was referred to, and I believe we will have the current report soon.

MR. SCHNITZER: But in that report, if it is the one I have in mind, it was restricted to a certain number of courts, and complaint was again made that records of the respective courts were not properly kept. The point I mean to make is this—the best comparisons are to be made within the same system before and after the change. You will be dealing with the same judicial personnel. I have heard repeatedly the acrimonious suggestion that before creation of the Administrative Officer, the courts of the United States had no immediate clerical supervision over the rate at which they decided their cases. They now do function under such supervision, and the complainant would imply that the practice has changed somewhat merely as the result of unification and business administration.

VICE-CHAIRMAN: I understand that you were one of the

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[1] The reference is to the report of the Essex County Bar Association Committee. See Appendix.

[2] Temple, Ralph R. *Report on the Constitutional Courts of the State of New Jersey.* Submitted to the Commission on Revision of the New Jersey Constitution, July, 1942. (Trenton, 1942).

minority in favor of the federal system as distinguished from the majority which recommended unification with sections. What advantages do you see in your own position as distinguished from the majority report?

MR. SCHNITZER: From my point of view, the total merger is the one which, by taking a fresh start, eliminates any possibility of an inheritance of the old and still controversial methods. Take the Court of Chancery in our present judicial structure. It started, as we know, to relieve against inadequacies in the law courts. After the first 300 years the Court of Chancery began to say that it didn't matter any longer whether the law courts can give complete relief. If we as a Court of Chancery once have this jurisdiction, we intend to continue it. Even if you create a merged court but retain in it separate sections, you carry over the same set of rivalries and conditions which we witness in the functioning of a dual court structure, and that engenders the arbitrary—and it has become more or less arbitrary—division of the same subject matter into legal and equitable principles. For example, dealing with fraud—legal fraud—which is intentional fraud. . . .

MR. PETERSON: Will you define legal fraud?

MR. SCHNITZER: Fraud has four elements, but the primary distinction is in one element. At law it is not sufficient to show that misrepresentation was made, that it was material and that it was relied upon, because in addition to those three elements you must also show that the misrepresentation was intentionally and knowingly made. The Court of Chancery takes the point of view that if the misrepresentation was actually made and if it was false and if the complaining party relied upon it to his detriment, the Court of Chancery should give relief regardless of whether it was intentional or not. This discrepancy between the legal and equitable doctrines of fraud gives rise to two distinct lines of learning about specifically the same subject matter. If asked to summarize the practical importance of the distinction it would be merely this:—neither in a law court nor in the court of equity will unintentional fraud ever result in an award of damages—neither court will redress an honest misrepresentation that way—but in the Court of Chancery (and, therefore, why not in the court of law?) unintentional fraud will result in a decree of the court that puts the parties back, so far as humanly possible, *in statu quo,* or the condition which existed before this misrepresentation was made and relied upon. What reason can there be, 800 years after the event, for continuing to develop parallel lines of doctrine about the same subject matter, the same controversy, by continuing administration of fraud cases by separate judges—and if not separate judges, by members of separate courts? And after you go further, with the very same judges

sitting in rotating assignments, the distinction still remains.

The proposal I made as a member of the Special Committee of the Essex County Bar Association was that the rules of the Court of Appeals should designate such parts as should exist in the trial court, which we have referred to here as the Supreme Court. Now, a *part,* as distinguished from a *division,* may require explanation. A division would be a permanently constituted branch of the court with a permanently assigned species of jurisdiction, according to type rather than functional considerations. The English High Court of Judicature, as an example, has a Chancery Division, a King's Bench Division and a Probate and Admiralty Division, and the judges (and they are all members of the same court) are assigned to each division more or less permanently.

Now, New York, by contrast, has parts, and here is what happens when you start your case there in the Supreme Court. You don't describe it as legal or equitable; you merely tell your story and ask for the relief you think you are entitled to, whether it be damages, or an injunction, or a decree for specific performance. Then the answer is filed, and the lawyer for the plaintiff will decide whether he wants his case heard in one of the three parts which they have. One would be the trial part or term, which means cases heard by judge and jury; the other would be—I may not have the nomenclature quite correct—but this part hears cases without a jury, though normally these are the type of cases in which a jury would have been empaneled had it been requested; and, finally, a special part where cases which are plainly and unmistakably for specific performance or injunctions are conventionally heard.

In the federal courts the arrangement is even simpler. The only distinction maintained there is two trial calendars. Once the pleadings have been filed, if a jury hasn't been requested by either party —and if the request is made, it is instantly subject to contest, litigation and decision—if a jury hasn't been requested, it simply goes on the non-jury list with this consequence: if a federal judge in the month of June is holding the non-jury list, his first case might be an accident action in which nobody has demanded a jury although it is peculiarly the kind which law courts would have handled; and the very next case on the same list might well be a suit for injunction; and they are taken in turn.

VICE-CHAIRMAN: Am I right in assuming the distinction between one and two would be that instead of fixing it in the Constitution, you would leave it to the court?

MR. SCHNITZER: To establish the divisions?

VICE-CHAIRMAN: Would the court under its power establish divisions?

MR. SCHNITZER: Not divisions, as such.

VICE-CHAIRMAN: You would not allow the court, if it so desired, to say—I will have these judges sit in non-jury or equity cases?

MR. SCHNITZER: That isn't what I meant, because the creation of parts, with functional assignment of cases to the several parts, will necessarily, with the number and variety of judges and litigation, lead to this conclusion—that if eight judges in Essex were members of the new Supreme Court and there were three conventional parts—one for jury cases, one for non-jury, and one for probate and former equity—two of those judges might be assigned six months to one part, two to another, and two to another part, and two on roving commissions to fill in whenever any part fell into arrears. That would be arranged subject to the division of cases, creation of parts and assignment of judges. The creation of divisions would be permanent.

VICE-CHAIRMAN: Even if the court were given complete power to establish divisions, there would be nothing to stop its modifying or making temporary divisions as it pleased.

MR. SCHNITZER: We may not mean the same thing. I speak of divisions as parts, it is true; the only court divisions I am familiar with are those in England.

VICE-CHAIRMAN: Under your plan did you intend to give the court comprehensive power to establish rules?

MR. SCHNITZER: Without any restriction except one, and that is the power of the Legislature to legislate on the very same subject.

VICE-CHAIRMAN: Yes, that is the federal system.

Does anyone wish to ask any further questions of Mr. Schnitzer? If not, we will recess for five minutes.

(After recess)

VICE-CHAIRMAN: All right, Mr. Conford?

MR. CONFORD: I should like to devote the time I have available this morning to two things, first, to a demonstration of the case for the particular proposal which the four minority members of our committee support, and that includes myself,—that is the retention of the primary Chancery jurisdiction in a separate Court of Chancery, that court to be recreated by the Legislature so that it will have a Chief and other Chancery Judges who will be appointed in the same way that the law judges are appointed and all of whom will be judges of the court, and not as they are today, Vice-Chancellors who merely advise the Chancellor's decisions. The Chief Chancery Judge will be a working judge and have a position analogous to that which today is exercised by the Chief Justice of the Supreme Court; he would be the administrative head of the court and he would oversee its activities, but he would be, as I say, a working judge.

VICE-CHAIRMAN: Do you have any provision for the number,

or would that be left to the Legislature?

MR. CONFORD: Leave that to the Legislature—leave all the mechanics of the court to the Legislature. We would insist, however, that the Constitution contain a provision that any case instituted in either the Court of Chancery or in any of the law courts be proceeded with to a final and complete determination of the particular controversy, so that the Chancery Court would be required to exercise law jurisdiction and the law courts equity jurisdiction in those cases only where it would be necessary for them so to do in order to wind up in one case the entirety of any particular piece of litigation.

MR. DIXON: May I interrupt here? Does that mean, in certain cases where you cover both law and equity, you would get an inferior treatment of that case compared to what you would where you separate it? You are saying that certain cases may be started to cover both, so they are going to cover the whole thing.

MR. CONFORD: I think not. I intend to deal with that later, and if I overlook it, don't hesitate to remind me.

MR. DIXON: All right then, go ahead.

MR. CONFORD: I would like to say at the very outset something which I think is completely overlooked in considering the position of those who advocate the retention of a separate Chancery Court, and that is, it is not proposed, or at least I personally don't propose, to recommend the continuance of a separate Court of Chancery as any reward to the court or its members for the high prestige assertedly gained by this court in the administration of equity jurisprudence. It isn't the business of this Convention, as I see it, to reward any court or any group of judges for merits or demerits for what has happened in the past. It is the business of this Convention to recommend a Judicial Article which will work best on the whole for the most of the people. I sincerely and firmly believe that the plan that the four members of our committee are recommending, and for which I speak here today, will work best on the whole for most of the people, and I hope to tell you why.

The bulk of the administration of justice consists in the day-to-day operations of trial courts. Many people who get into court either as plaintiffs or defendants get their last answer from the trial court. They neither have the money nor the opportunity for, and frequently circumstances don't permit, an appeal to be taken. It is what happens in the trial court that has the greatest impact upon the citizen who has the fortune or misfortune to deal with the courts. If he does not get a high average of efficient judgment in that court, all the beauties of a beautiful set of principles, all the symmetry of a streamlined system, do him absolutely no good. He is interested in getting the most for his money in the place where he is most

likely to have to go, and that is in the court of original jurisdiction.

Now, it has been said, and truly, that the basis for the contention that the Chancery jurisdiction, the equity jurisdiction, should, as a primary matter, be confined to one court, is the benefit, the unquestionable benefit, that comes from having a trial court limited in the subject matters which it handles from day to day, rather than being saddled and overloaded with the necessity of knowing and being able to handle efficiently, day by day, the entire body of the law.

We accept as commonplace that in modern society the services which we seek from our professions—medicine, law, accounting, engineering, and many others—are most serviceably rendered to us by specialists in those fields. When we get seriously sick, we may start with the family doctor, but we wind up with a specialist, and many of us go to the specialist in the first place. If we have a complicated legal question that involves a matter of federal taxation, either income taxation or state taxation, if we know what we are doing, we don't go to the general practitioner, but we go to the man who is a specialist in the field of federal taxation. We can't afford to get a wrong answer. We can't afford to get inexpert treatment at the beginning. Now, I submit as a matter of elementary commonsense, that every consideration which dictates the necessity and the wisdom of seeking specialized and professional services, or any kind of professionalized service in our daily lives, is immeasurably emphasized in the necessity that we shall have specialized administration of justice at the trial level.

VICE-CHAIRMAN: Does that apply to every court?

MR. CONFORD: Certainly it does.

VICE-CHAIRMAN: Would you have a separate criminal court, a separate probate court?

MR. CONFORD: No, I would not, and for this reason: The clear necessity for specialization in the field of probate and, I believe, a fairly clear necessity for the desirability of a separate administration of criminal law, has been so apparent that I don't think there would be any question but that in the creation of a new court and a single court for entertainment of law jurisdiction, that separate parts would be set out.

VICE-CHAIRMAN: To whom would you leave that?

MR. CONFORD: I would leave that to an administrative judicial officer, such as the Chief Justice, because I don't have the slightest doubt in my mind that a Chief Justice of the Supreme Court, or any other officer to whom the job might be assigned, would create a separate and permanent probate section and would permanently assign judges to exercise duties exclusively in that section. But I am not at all sure—as a matter of fact, I am positive there could be no certainty that would be done in the field of equity jurisdiction. If the

Chief Justice entertains the views Mr. Schnitzer advanced here this morning, it is obvious that no separate court would be set up for entertaining any segment of the civil jurisdiction.

VICE-CHAIRMAN: Just a moment. Did you say that you are sure that the new Chief Justice, under a new set-up, would have a separate criminal court?

MR. CONFORD: I am not sure about the criminal court, but I am sure about the probate.

VICE-CHAIRMAN: You are not sure that he would have a separate criminal court, but under your theory a new Chief Justice could take this unified court, exclusive of Chancery, and could say that one judge handle criminal law, or probate law, and so on?

MR. CONFORD: Yes, he could.

VICE-CHAIRMAN: You are willing to leave that to the new Chief Justice, but you are not willing to leave to him the determination as to whether he should have a separate Chancery part?

MR. CONFORD: I am willing to leave the other because I think, in the long run, and judged by a fair expectation of the commonsense which we might expect from a chief administrative officer, there would be an adequate degree of specialization provided in those fields allied to the law jurisdiction. But I am, as I said, not at all certain that there would be any such decision by a chief administrative officer on the equity side.

MR. DIXON: Isn't the place where you go for specialization to the attorney who is a specialist? Isn't that the place to go for the preparation to be done, to a specialist?

MR. CONFORD: That's right. He is one-half of the specialist process. The other half is the administration of the matter by the court that he comes before.

MR. DIXON: Only one-half?

MR. CONFORD: Well, I don't know how it is to be divided, but certainly an integral and important portion of it is the trial court. The other part is perhaps the lawyer—is unquestionably the lawyer. Let me illustrate what I mean by that. I think I can best make my point by answering the contention which Mr. Schnitzer and others have advanced, that our equity law is not made by the trial court, but is made by the Court of Errors and Appeals whose members are not equity specialists.

Now, there are two answers to that. First and foremost is the fact that the day-to-day handling of trials at the first level and day-to-day handling of motions on crowded motion calendars by trial judges requires ability to recognize and determine with keenness and dispatch, and a high average of correctness, multitudinous matters pertaining to the work of the courts.

You don't have that situation in the appellate courts; the appel-

late court sits as a deliberative body, causes proceed slowly, counsel argue at length, they submit briefs, the court reserves decision and then retires to determine what the law shall be. And it is proper that the highest appellate court shall have overall jurisdiction, because it is the function of that court to lay down the broad, general principles applicable to our entire law. In order that these principles may be consistent with each other, and in order that the final word may be said on the subject by a single court, it is important that that court have complete jurisdiction over all matters appellate in the last resort.

But when you come to a trial court you come before a court that can't sit back and take days or weeks or months for the decision of each matter that comes before it. Frequently, on motion calendars a judge is required to decide 30 or 40 matters on the same day, or within the space of a couple of days. He has got to know his field, he has got to be familiar not only with the practice of the matters that come before him, but with the substantive background and the non-legal associate knowledge which is required to handle the legal matters. And I say, I don't care whether the subdivision of matter is our present equity jurisdiction as we know it; we have merely taken that as a matter of convenience because it is developed and it is readily available. But it is important, in my opinion, that there should be a division of the entire body of the law so that no judge is expected this week to be able to handle adequately, efficiently and quickly anything that may be thrown at him in the entire body of the civil law, and next week an entirely unrelated, different problem. I don't think that we could expect high average efficiency.

With all that has been said about the adoption of an integrated system in other states, such as New York, there is no statistical or quantitative way of measuring the superiority of the product that comes out of the New York courts in an average case over that which comes out of New Jersey in an average case. I have heard many respectable opinions to the effect that the average degree of correctness and efficiency with which a New York judge, who has the entire body of the law to deal with, determines an equity case is inferior to the average correctness and efficiency with which we may expect a New Jersey Vice-Chancellor, who has had the job for several years and done nothing but that work, will decide the matter in his court. I submit that the matter is one that has to be determined on the basis of commonsense. And commonsense, it seems to me, requires, absolutely requires, that no judge in this day of complex laws and practical knowledge and experience with non-legal material which must enter into the determination of legal matters —that no judge can fairly be expected within a reasonable time after his ascension to the bench so fully to master this entire body of the

law that he can be expected to render day-by-day, quick, accurate decisions and be highly correct on the average decision. It just isn't in the cards.

VICE-CHAIRMAN: I take it from that that the Federal District Court judge is inefficient?

MR. CONFORD: Yes, very definitely; and I have heard expressions by persons closely connected with the federal judges, or with some of them, who lament the encyclopedic knowledge that those gentlemen are today required and expected to be able to master and put forth at the pressing of a button in their day-to-day work.

MR. GEORGE F. SMITH: Mr. Conford, what you are saying in substance is that you have a fear in respect to equity cases. What is so unusual about equity cases that would call for specialization there, and not in other phases of the judiciary?

MR. CONFORD: May I say this—I don't say that the specialization is called for only in equity cases; I say that specialization is called for in any type of litigation where you find a continuous similarity of subject matter, where you find complexity of both the legal and non-legal problems which enter into the determination of the cases. An outstanding example of that, of course, is the administration of probate law. There certainly should be a separate court or division of a court, with judges permanently assigned to the handling of probate matters. My difference with other people is merely as to whether that particular thing needs to be provided for in a Constitution, or whether it can be left to the Legislature and to the judges who make our rules. I think it can safely be left to them.

Now, as to whether equity jurisdiction in and of itself inherently represents a peculiar type of animal which requires specialization, in contrast to the law, I say, perhaps not so. But by confining, in the main, the administration of equity to a group of equity judges, you are by the same token confining the administration of equally complex and difficult legal problems to a set of law judges; you are not requiring either the law judges or the equity judges to master the entire body of the law so that they are called upon in day-to-day matters to make instantaneous, speedy and frequent decisions in practically any field of the law that may be thrown upon them, or thrown at them, at a moment's notice. The benefits go to the law judges as well as to the equity judges.

Now, further to answer your question, there are definite differences in the techniques and in some of the knowledge required of equity judges. First and foremost—and this hasn't been mentioned, but it's of exceeding importance—factual issues in equity cases are tried by the judge without a jury. He has the job of deciding not only the law applicable to the case, but deciding which of the wit-

nesses are telling the truth. The law judge is relieved of that obligation; the jury decides who is telling the truth.

I don't believe that you can say that any one individual, picked before he goes on the bench, is going to be a more superior equity judge than another individual. Other things being equal, one man will make just as good an equity judge as a law judge. But the point that I do make is that Mr. A, whom you select to go on the equity bench, or Mr. B—either one of those gentlemen is going to be a much better exponent and administrator of equity jurisprudence within a reasonably short time after his ascension to the bench, if his work is confined to that field. I don't care whether it's the equity field, as we now have it, or any other field which might be segregated and put aside for separate treatment. It just happens that historically we do have a separate body of equity jurisdiction which has certain necessarily peculiar features in its administration, primarily because of the fact that many of its remedies are discretionary and not mandatory, and the fact that the trial of factual issues is by the judge and not by the jury. And that is something which you are never going to get rid of, because as I see it, this Convention will unquestionably preserve the right of trial by jury as it has existed heretofore. And what does that mean? It means that in all cases where heretofore there was a jury trial—which means legal issues—jury trial continues. In all issues where there was heretofore no jury trial, there will be no jury trial. You can have all the integration in the world, every judge is going to be called upon from time to time to decide whether a case before him is an equity case or a law case, because if it's an equity case the party can't get a jury trial, and if it's a law case he does.

MR. SMITH: Mr. Conford, how long do you think it would take a newly assigned equity judge to acquire the skill which you make so much of?

MR. CONFORD: Well, it depends on the man. I think that considering the calibre of the average lawyer who ascends the Chancery bench, it probably takes two or three or four years, before he is really competent.

MR. SMITH: What is the fate of the litigant who happens to have his case heard before that judge who is learning the equity rules?

MR. CONFORD: It's just too bad, but it's twice as bad for that litigant if the equity judge whom he appeared before has during those two or three years been learning not only equity but everything else. That's the heart of the point that I make, sir.

MR. SMITH: Then, of course, the situation would be further complicated by the fact that under your proposal, as I understand it, this equity judge on occasion would be called upon to rule on

law issues.

MR. CONFORD: Yes, and I would like to answer that. That is the major point that I have heard raised, and certainly a very respectable observation and one that should be answered. My answer is this—although those cases are not uncommon, I mean they frequently arise in a lawyer's experience, of necessity the equitable defense should be heard in legal cases in order to completely determine the case. If you added up the total number of litigations which are brought in all of our courts, that is, the total number of separate pieces of litigation which are instituted in our law courts and in our equity courts, I venture to say that 499 out of 500 of those cases would be situations where there was only an equitable problem to be determined, or only a legal problem to be determined, and only in the one other case of the 500 would you have that situation.

Now, Mr. Schnitzer pointed out that in one of our recent volumes of reports a large proportion of the opinions dealt with matters of divided jurisdiction. But for every case that gets into an opinion in our reports, there are 500 or 1,000 cases which are equally important to the people involved that never get into any report. I am thinking of the 499 litigants in the 499 cases which don't involve questions of divided jurisdiction—which involve solely equity situations or solely law situations.

Take our equity jurisdiction. Consider the vast number of types of cases and types of jurisdiction where very rarely is there any intermixed question. Take enforcement and construction of trusts, foreclosure of mortgages and equitable liens, construction of wills, specific performance of contracts, appointments of receivers of insolvent corporations, injunctions (as, for example, in labor disputes), and many other types of cases—matrimonial disputes, protection of infants and persons of unsound mind. I could mention a number of others in which I have no hesitancy in asserting that 499 out of 500 of all of the separate pieces of litigation would be straight Chancery cases, not in any sense requiring intervention of the law court. And by equal reasoning, you know of your own knowledge of the thousands of automobile accident cases and contract actions which are instituted in the law courts in which there is no necessity for equitable intervention.

Now, when we are reconstructing the courts and are looking to the future, let us do what is best for the people involved in those 499 cases and let us not be too much concerned with the one out of the 500. But let us be sufficiently concerned with the one case out of 500 where you do have a mixed problem to take care of it. I am, and the other members of the minority on our committee are, just as emphatic as the majority members of this committee as to the importance of seeing to it, from a layman's standpoint, that in that

one case out of the 500—the case which Mr. Schnitzer advanced where a woman sues on a life insurance policy and the insurance company pleads fraud, but not intentional fraud, just plain, ordinary misrepresentation which is cognizable only in a Court of Chancery —I think certainly the law court should be required to determine that matter. What has the law court got to do in that case, as distinguished from the equity court? Merely to decide whether the matter was intentionally fraudulent. There certainly is nothing complicated about that, and there is no reason why a law court should not proceed to a complete determination of that matter. And the same with the other cases which Mr. Schnitzer—

MR. EDWARD A. McGRATH: In what cases would a law court not be able to proceed in a case of fraud?

MR. CONFORD: The law court would not be able to proceed to entertain a defense of fraud, as Mr. Schnitzer explained, if the type of fraud was unintentional; in other words, if on the application for the insurance policy the applicant had made a false statement, but not intentionally false. That is what is called equitable fraud, and under our present system if that's what the insurance company claims, the law judge can do nothing, but the party must go into the Court of Chancery, get an injunction against the law court continuing, and have Chancery take jurisdiction of the matter. Now, of course, that is ridiculous—

MR. McGRATH: I think that if the Legislature can give a law court jurisdiction over one type of fraud, I am sure they can give jurisdiction over any type.

MR. CONFORD: I think that many lawyers would doubt the constitutionality of an act, if it were passed today, giving the law courts jurisdiction over equitable fraud because—

MR. McGRATH: I have been a law judge for 20 years and never had any such case.

MR. CONFORD: What you are saying, Judge McGrath, I think leads in the direction of what I am talking about. While you may not have those cases, they have arisen. But there are certainly no more than one out of 500, taking the total number of litigations which arise.

I haven't answered Mr. Dixon's question—I am leading up to it. He has asked me, and quite properly, how about in this one case out of 500; is the law judge going to give an inexpert type of relief? Well, I say in the first place, the usual situation of an equitable defense or an equitable reply is of the type that I have mentioned, where matters of fraud or accident—

MR. McGRATH: It would be very easy to amend the insurance law to provide for that, without us putting it in the Constitution. Insurance policies are governed by statute. It is strictly a matter of

amending the insurance laws without us wasting our time putting it in the Constitution.

VICE-CHAIRMAN: I don't think the Committee is concerned with that particular document.

MR. CONFORD: I wanted to answer Mr. Dixon.

VICE-CHAIRMAN: Yes, well go ahead without reference to that document. I don't think we want to spend any more time on that.

MR. CONFORD: I won't talk about that any more. I just want to say this, that in the one case out of the 500 or more where there is an equity question that gets into a law case, the judge can take a little more time off and read the decisions and reserve decision in the case, and because of the fact that—

VICE-CHAIRMAN: Can you reserve decision in every case?

MR. CONFORD: Certainly, but it is not expedient that he should have to reserve decision in the great bulk of the cases that come before him. It's important that in the great bulk of the cases that come before him he be sufficiently familiar wtih the matters so that he can decide them expeditiously and quickly and with a high degree of average accuracy.

VICE-CHAIRMAN: How many recent Chancery cases have you handled which the judge decided on the bench?

MR. CONFORD: You mean hearings?

VICE-CHAIRMAN: Yes.

MR. CONFORD: Well, hearings usually involve a determination—

VICE-CHAIRMAN: I would like you to answer my question. How many have you handled recently in which they decided from the bench?

MR. CONFORD: Very few.

VICE-CHAIRMAN: All right.

MR. CONFORD: But they must rule on matters of evidence—

VICE-CHAIRMAN: Yes—

MR. CONFORD: And they must decide instantly upon those questions—

VICE-CHAIRMAN: Yes, but so do all law judges.

MR. CONFORD: And the evidential questions which arise in equity cases are, because of the character of the jurisdiction, frequently distinguishable from the type of evidential questions which arise in a law case.

VICE-CHAIRMAN: As a matter of fact, and on the contrary, a law judge has more difficulty with rulings on evidence, because his ruling is generally unchangeable, where the Chancery judge has a chance to change it before the case is closed.

MR. CONFORD: That may be, but you also have the fact that a great amount of the day-to-day work in these causes is on motions

and the judges are expected to decide the bulk of the motions practically instantaneously, and they should be able to.

And then there is the great matter of administrative work which the Court of Chancery has—take the administration of insolvent estates, building and loan associations, other types of matters where they do an administrative job and where they must be familiar with the subject matter.

Let's just look, for example, at the type of non-legal knowledge that today necessarily enters into Chancery work, with—

MR. McGRATH: Mr. Conford, I came late. Would you kindly state your problem and the point you are making?

MR. CONFORD: The point I am making is that the recommendation of four members of our committee, including myself, was for the maintenance of a separate Court of Chancery for the entertainment of equity jurisdiction, to be created by the Legislature, with judges appointed the same way as other judges, but with the qualification that the law judges be required to entertain equitable defenses and replies in order to completely determine any controversies started in the law court, and by the same token the—

MR. McGRATH: You are in favor of the present court?

MR. CONFORD: I am in favor of the principle of a separate court charged with the primary responsibility for the determination of equity jurisdiction.

MR. McGRATH: How would you change it?

MR. CONFORD: My change would be solely to the extent that the judges, instead of being Vice-Chancellors advising decrees, would make judgments and decrees. The Chancellor would be like the Chief Justice of the Supreme Court; he would also decide cases, but at the same time he would be the chief administrative head of the court and generally control its operations.

MR. McGRATH: Advising decrees—you could take an appeal from the decree, the Chancellor never removes any decrees—

MR. CONFORD: I know, it is perhaps only a theoretical difference, but I would eliminate the theory under which our court operates today.

MR. DIXON: You have raised a question about the need for experts along this particular line, presumably. Our law requires that our judges have to be counsellors-of-law with at least ten years' experience. Isn't it a fact that a man who is to be appointed a judge, with ten years' experience, has handled both equity and law cases, so that when he goes on the bench he has had a broad experience in both law and equity? After all, he is able to work in either case, not as a completely raw recruit, but as a man who is expert in all these lines of law.

MR. CONFORD: Mr. Dixon, what you are asking about is some-

thing which I don't think exists in one case out of 25. I don't think that in one case out of 25 does a judge ascend the bench with a broad, comprehensive background of practice in both equity and law cases. Most judges very soon after their commencement of practice develop some sort of specialty, and many of them hardly ever get out of a certain court or bureau or board. It is only the rare case where you find a lawyer has a broad background.

MR. DIXON: That's where they go to find justices, from among lawyers who have specialized in special lines?

MR. CONFORD: Mr. Dixon, you know as well as I do how and where judges come from.

I was about to point out in emphasis of the necessity for this specialization that it isn't only specialized knowledge in law that is expected of a judge. It is increasingly important that a judge have a specialized knowledge of non-legal or disassociated legal problems, not directly connected with the legal work that he does.

Let me make that clear. In the field of trusts, for example—administration of trusts—you have situations where the judge is expected to oversee and advise trustees on matters involving stocks and bonds and business organization, and questions of investment and reinvestment, involving knowledge or being able to pass competently upon advice with respect to federal taxation, estate taxation and things of that sort. In the field of receivership a judge is required to have a background of corporate organization and reorganization. In the field of injunctions in labor disputes, the judge should, if he is to be a good judge, have an understanding of labor relationships, unions, labor organization.

Now, I say that the continuous handling of a particular type of work familiarizes a judge in the non-legal knowledge which he must have to do a good job as a judge, and the more you dilute the experience of an individual judge, the less satisfactory and the less efficient average performance in his daily work can be expected of him, in my opinion. And I think that that dilution is the absolutely unmistakable consequence of the complete integration which Mr. Schnitzer expounded. I don't see why, if what we are interested in is the 499 cases which the average person gets confronted with and has to experience, we should not give him the benefit, by and large, of the same specialized handling of his dispute in a trial court that we expect for ourselves when we seek advice in medicine, or law, or accounting, or engineering, or painting our house. We go to the best man, the man who has had the experience in that field and has the specialized knowledge to do a good job, and I think we should give the layman the same expert, specialized administration of his judicial problems at the level of the trial court.

MR. PETERSON: Mr. Conford, digesting, or trying to, what you

have just said in answer to Mr. Dixon's question, you seem to me, in my layman's mind, to be building up a case against the jury system. If it is so difficult for a judge to arrive at a just decision supported by the testimony of expert witnesses, and he has such great difficulty in arriving at an equitable decision, how do you expect a jury to sit in the box and render a decision on the spot, to say "yes" or "no," or fix the damages in all of these intricate problems that you are building up around the ability of a judge to decide?

MR. CONFORD: Well, that certainly is a very fair question and I don't think that anybody has had the temerity, or very few people have had the temerity, to even think of suggesting to this Constitutional Convention that jury trials in law cases be abolished. I mean, it's not the sort of thing you reason about; you feel that in the dispute of factual issues our traditions have proven that the judgment of a jury of 12 laymen is what the thirteenth layman on trial wants and expects, and won't be satisfied unless he gets it. We have all assumed that this Convention will merely write that into a new Constitution. I am not prepared today to argue for or against the abolition of jury trials.

MR. PETERSON: My question wasn't so intended. I am just going over in my mind your statement about the difficulty judges have to arrive at a decision, because in one day he may have an equity decision and in the same day a law decision. If there is a court created such—

MR. CONFORD: That wasn't my point, sir. The point that I was making was this—I was attempting to show that the argument for complete integration of our law and equity courts cannot result in the simple, streamlined result that is envisioned; that you will perpetually—as long as you preserve the right of jury trials in law cases, as I assume this Convention will—that you will perpetually, in every single litigation, be confronted with the necessity of determining, is this an equity case or is this a law case? Because if it is a law case, then it's the same type of case that it was prior to 1844 and 1776, when our first Constitutions were adopted; the jury trial must continue to be given. If it was not that kind of a case, then it's an equity case in which the judge can decide the factual questions for himself. The point I am making is that even under an integrated system you won't be able simply to walk into a court and have a judge proceed to take over the case and decide the matter in its entirety.

MR. PETERSON: I understand that—but after all the briefs of counsel are submitted to the judge, he has them before him, he has the pleadings of both sides and he, in my opinion, the learned judge can decide whether it's to be tried by a jury or by a court of one justice or two or three, whatever the case may be—

MR. CONFORD: That's right—

MR. PETERSON: . . . . and therefore you would get away from all of this transfer from one court to another.

MR. CONFORD: There won't be any transfer from one court to another, to any appreciable extent, if the modification which we recommend is adopted, because the bulk of transfers that happen arise because of the fact that the law courts cannot entertain equitable defenses or replies or counter-claims. If, by the adoption of our suggestion that the law courts be permitted to do that, and by the further suggestion that the Chancery Court be compelled to decide legal issues—for example, title to land, which they usually don't do—in a case which starts in Chancery court, the vast percentage, the great percentage of these conflicts of jurisdiction will be eliminated, and you will have both what really amounts to integrated disposition of litigations, which we are all in favor of, and at the same time have the benefit of specialized administration of particular causes. We are very much in favor of integrated disposition of particular litigations, but not of complete integration of courts. That's the distinction that we make.

MR. BROGAN: Mr. Conford, the only point on which you differ with Mr. Schnitzer, as I understand, is that you want what you call an Equity Division, which division or court would be manned by the same equity judges, who would have no other duties except the incidental ones where law questions would creep in, and there they would have the jurisdiction to decide those.

MR. CONFORD: Now, that's my second choice. My first choice would be that the Court of Chancery, or the equity court, or whatever you may want to call it, be a separate court, separately administered under the supervision of a chief equity judge.

MR. BROGAN: As now?

MR. CONFORD: Yes, except that the chief judge would be on the same par, so far as deciding cases, as the other judges—the same as the relationship of the Chief Justice now is to the Associate Justices of the Supreme Court. I mean, a matter might be referred to a Vice-Chancellor, or an equity judge, and he would decide the case, not merely advise the decision.

MR. BROGAN: Would you have each of these equity judges be a constituent part of the court of equity so that it might make its own decrees.

MR. CONFORD: Absolutely.

MR. BROGAN: Then what function would the chief equity judge have other than another equity judge?

MR. CONFORD: He would be another equity judge so far as judicial business is concerned, but he would be the chief administrative head from the standpoint of organization and administration of

the court.

MR. BROGAN: Then you think he should administer the division's business.

MR. CONFORD: Definitely. His should be the responsibility for the making of the rules of the court, for the assignment of the judges to their circuits, for the general administrative and business conduct of matters pertaining to the court.

VICE-CHAIRMAN: Then, unlike the head of the criminal division and the probate division and all the other divisions, he would not be subject to any directions of the Chief Justice of the Court of Appeals?

MR. CONFORD: Well, I don't see any reason why it could not be made possible that there be an overall supervision by a judicial council or other type of organization, to be head of the entire operations of all of the courts where the matters pertain to problems which are common to all the courts. But so far as the day-to-day operation of the court and the administration of its financial affairs, and the administration of its daily work, I think that that should be primarily committed to those who are directly involved in the matter, and they would be the judges and the chief judge of the court. I think that you get better rules of court, for example, in either the law court or the Chancery court, if the primary responsibility for those rules is vested in those judges rather than in some outside organization.

VICE-CHAIRMAN: Well, you disagree with the rules promulgated by the United States Supreme Court for the lower Federal District Courts?

MR. CONFORD: As a practical matter, I prefer what happened because the United States Supreme Court got the benefit of conferences of all the judges of the lower federal courts and of expert students of the subject of federal organization and administration, and built the rules on that basis. They were not promulgated from on high, as it were.

VICE-CHAIRMAN: We assume that any new court that might be set up under the new Constitution would do the same thing.

MR. McGRATH: In general, you are in favor of retaining the Court of Chancery.

MR. CONFORD: Of retaining a separate Court of Chancery.

MR. McGRATH: Well, we've either got to retain it or dismiss it.

MR. CONFORD: I think I've made myself clear—

VICE-CHAIRMAN: I think we have that, so let's not go through that again.

MR. BROGAN: So that our Committee will understand exactly what you mean, if I may be presumptuous—your reason for the retention of this court is that it takes a much longer time for a man

to become a competent equity judge than it does for a lawyer, let us say, who is appointed to the Circuit Court to become a reasonably good law judge?

MR. CONFORD: That is not a fair statement of my position.

MR. BROGAN: Well, will you tell me what is a fair statement?

MR. CONFORD: Both the average equity judge and the average law judge will each become competent more quickly and more completely if each of them is confined to less than the entire body of the law.

MR. BROGAN: Well, then, you would want a separate Law Division too, where Circuit Court judges would be Circuit Court judges.

MR. CONFORD: Well, there would be a separate organization of the law courts.

MR. BROGAN: Your idea would be, then, that a circuit judge should stay in the circuit and try the ordinary civil cases that come before him, and that a probate judge would do probate work?

MR. CONFORD: Exactly.

MR. BROGAN: Like the Surrogate's Court in New York?

MR. CONFORD: Yes. The Surrogate's Court of New York, incidentally, is a completely and absolutely independent court. That is one respect in which New York does not have integration. The Surrogate's Court is not a part of the Supreme Court, and I would—

MR. BROGAN: Would there be enough business in this State for a separate probate court?

MR. CONFORD: There might be for one court for the entire State, sitting in different parts of the State.

MR. McGRATH: What are you in favor of—leaving the Court of Chancery as is, or that it be amended according to your ideas, retaining the other courts practically as they are?

MR. CONFORD: No, I would put all of the law courts in one court, with separate parts or sections for handling of—

MR. McGRATH: Well, suppose a man up in Sussex County wanted to get administration of a $200 estate, what would you do?

MR. CONFORD: Well, so far as probate is concerned, I think that there should be a distinction taken between uncontested routine matters and contested matters.

MR. McGRATH: This matter is contested.

MR. CONFORD: Well, that would be—if it were a contest over a will, it should be referred to the probate court which would sit in parts of the State that would be convenient to the litigant.

MR. McGRATH: Well, what would be more convenient for that litigant than to go to somebody who is sitting in a county court?

MR. CONFORD: That would be very convenient for that litigant, but I think it would be inconvenient for the handling of the

work of the court as a whole, because there isn't enough litigated probate work to warrant the maintenance of a—

MR. McGRATH: Well, now, where would this man go with the $200 will, where would he go?

MR. CONFORD: Well, he would go to wherever the court would set up a division or a section for hearing those matters.

MR. McGRATH: Well, Mr. Conford, say this man with the little will was from Newton. Should he pass by the court house in Newton and drive all the way to Trenton?

MR. CONFORD: You have just mentioned the routine case of an uncontested matter. Certainly there should be an office or an officer of the probate court in each county of the State to handle routine matters of uncontested estates—

MR. McGRATH: Why pass up the county judge in Sussex County for an ordinary will case?

MR. CONFORD: You mean a will contest—

VICE-CHAIRMAN: You are not trying to fix the answer to these questions; you would leave that to the court, as I understand your plan. Actually, the problems which Judge McGrath referred to would be disposed of as justice dictates?

MR. CONFORD: That is exactly so, but I was putting myself in the position of a Chief Justice making an assignment.

VICE-CHAIRMAN: But we are still talking about the Constitution. As I understand your plan, it is calculated to leave to the court the right to fix all divisions by rules, except this one which you say should be outside of the court's power to fix by rules—which would be a separate court, established in the Constitution, with one or more judges as determined by the Legislature?

MR. CONFORD: Exactly.

VICE-CHAIRMAN: All right. Now, is there anything further this morning?

MR. McGRATH: Yes, one more question. Does your plan provide for an intermediate appellate court?

MR. CONFORD: The plan recommended by the majority of our —and I think we were pretty unanimous on this—committee provided, not for an intermediate court, but a section of the general court, a section of the Supreme Court, which would be called the Appellate Section.

MR. McGRATH: That's like the New York system.

MR. CONFORD: Except in this respect. Under the New York system practically all cases and the great bulk of final judgments in matters in the Supreme Court must first be appealed to the Appellate Division before you can go further. Our committee does not think that in the average case of a final judgment, there should be the necessity of intermediate appeal. We would make every final

judgment of the Supreme Court appealable as of right to the Court of Appeals. But, so far as statutory tribunals are concerned—statutory quasi-judicial tribunals are concerned—and inferior courts, we would require that an appeal be first taken to this Appellate Section of the Supreme Court, with further appeal to the Court of Appeals in certain limited categories and cases which we have specified in our report.

Now, I wanted to spend a few minutes on the prerogative writs. If you don't have the time—

VICE-CHAIRMAN: Well, it doesn't matter to me, except we had an elaborate discussion on prerogative writs by Mr. Hannoch yesterday.

MR. CONFORD: I know you did, and I don't want to trespass too much on what he said, except I do want to say this on behalf of our entire committee—we want to get across to this Committee that the viewpoint that Mr. Hannoch advanced yesterday was not peculiar to Mr. Hannoch or the State Bar Association. As a matter of fact, our own Essex County Bar Association collaborated through a committee, of which I was a member, with a committee of the State Bar Association, of which Mr. Hannoch was chairman.

MR. McGRATH: Are you in favor of Mr. Hannoch's proposal?

MR. CONFORD: In a broad sense. There are two ways of handling this, and our committee split with respect to these two broad ways. A majority of our committee are in favor of proposal number eight, which I think you, Judge McGrath, asked Mr. Schnitzer about, or one of the members of the Committee did, on the proposition for outright abolition of prerogative writs at this time.

MR. McGRATH: Were you with the majority on that?

MR. CONFORD: I was with the majority.

MR. McGRATH: Your plan would be, then, to abolish all writs, but then provide an appeal, as now provided, in lieu of the writ.

MR. CONFORD: In lieu of the writ, so far as it operates as an appeal mechanism. But for the trial of an action betwen the parties, as an original action—assimilate them to the class of original actions at law. The minority of our committee strongly feel that the Constitution should not itself abolish the prerogative writs, but they do agree with the one thing that absolutely should be done, and that is to eliminate the present constitutional protection of the majesty and exclusiveness of these writs in the Supreme Court, free and exempt from any legislative regulation or interference. That, we think, is a minimum which the lawyers of the State expect and would like to have from the Convention.

VICE-CHAIRMAN: Thank you very much, Mr. Conford. I think I express the sentiments of the whole Committee that the work of the Essex Bar Committee has been of great help to us. Thank you

very much for coming.

MR. CONFORD: Thank you. We appreciate the opportunity of coming here today.

VICE-CHAIRMAN: I think we have a short statement from a representative of the Hudson County Bar Association. I might mention that luncheon for the delegates will be served at 1:00; it's not quite 12:30.

MR. WILLIAM T. CAHILL: My name is William T. Cahill, President of the Hudson County Bar Association. We received an invitation to attend this meeting too late to prepare a presentation. We will take means to prepare a report and recommendations to this Committee and will either make them orally or in writing, as this Committee desires.

VICE-CHAIRMAN: Might I suggest that you make them in writing, with a sufficient number of copies so that we may each have a copy. You will, of course, be given the opportunity to appear at the time you submit the written proposal. We would like to have the written proposal before July 7.

MR. CAHILL: How many copies?

VICE-CHAIRMAN: Eleven for the members of the Committee and one for the Archives.

MR. CAHILL: All right, sir.[1]

VICE-CHAIRMAN: Thank you very much.

(Discussion off the record)
(Recess for lunch)

[1] The Hudson County Bar Association resolution appears in the Appendix.

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Wednesday, June 25, 1947

(Afternoon session)

(The session began at 3:00 P. M.)

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W. and Smith, G. F.

VICE-CHAIRMAN NATHAN L. JACOBS: Who is appearing for the Gloucester County Bar Association?

MR. WADSWORTH CRESSE, JR.: My name is Wadsworth Cresse, Jr. I am an attorney-at-law with offices in Woodbury, Gloucester County. I represent the Gloucester County Bar Association; and I request the permission of the Chairman and the Committee to file with your Secretary a formal statement that we have prepared and, briefly, to expand that orally.[1]

The position we take is that it would be, in our opinion, a mistake to disregard all of the spade work that has been done in the past for the drafting of the judicial section in the Constitution. We have made a study of the 1944 Constitution which was rejected by the people, insofar as it relates to the judiciary, and, in substance, we approved that Constitution or that section of the Constitution.

We have three objections, or three minor reservations, to the judiciary section of the 1944 Constitution. The first of those is the technical point relating to appeals. The 1944 Constitution, Section IV, paragraph 4, might be interpreted to foreclose us from making a motion before a trial court for a new trial. We don't think the section should be so interpreted, but we believe there is a danger of misinterpretation. So, to avoid that possibility of misinterpretation, we suggested the insertion of a few words at the beginning of paragraph 4, to the effect that "notwithstanding a motion for a new trial before the trial court," and so on. That is our first reservation in connection with the 1944 Constitution.

Our second reservation has to do with tenure of justices. We feel that the Chief Justice and the Justices of the Supreme Court should have the same tenure as Justices of the Superior Court. In other words, we feel that they should first serve a term of seven years and then, if reappointed, hold office during good behavior to age 70.

It has been the case in the past where the President of the United States has appointed a Justice to the Supreme Court of the United

[1] The statement appears in the Appendix to these Committee Proceedings.

States, and later it turned out that that Justice was not fitted temperamentally or emotionally, to handle the work of the Supreme Court of the United States. And there is no way of determining beforehand, no matter how good a man's judicial background is, whether he is fitted to handle high court appellate work. We believe, therefore, that there should be that first term of seven years before a Justice of the Supreme Court holds under tenure during good behavior. That is our second reservation in connection with the 1944 Constitution on the judiciary.

Our third objection relates to the question of impeachment. We believe the present Constitution of the State of New Jersey, insofar as it relates to impeachment, contains a better provision than the provision in the 1944 draft. The 1944 draft provides that impeachment shall be found by the Assembly with a majority vote and should be tried by the Senate—with convictions on the basis of a majority vote. We believe that the convictions should be on a two-thirds vote of the Senate rather than a majority—in effect, following the present Constitution of the State of New Jersey. That is our third reservation in connection with the 1944 Constitution.

The first one, on the question of appeals, the appeal section shall not be interpreted as foreclosing or limiting the right to make a motion for a new trial before the trial court. Second, on the tenure, holding that Judges and Justices of the Supreme Court shall hold office under tenure only after an original appointment of seven years. And our third reservation—conviction on impeachment by a two-thirds majority of the membership of the Senate.

That is all I have to say in connection with our objections. There is here with me Mr. William Kramer, the president of the Gloucester County Bar Association, and Mr. Horace Brown, also a member of the Gloucester County Bar Association. If the members of the Committee have any questions they care to ask among the three of us, I hope we may be able to answer them.

VICE-CHAIRMAN: Are there any questions?

MR. HENRY W. PETERSON: My question, Mr. Cresse, is: wouldn't a seven-year trial period be entirely too long a period if incompetency developed on the part of the Chief Justice or the members of the Supreme Court?

MR. CRESSE: Well, I suppose that is a matter of opinion. You could say three years, I would say seven, and someone else could say ten years. I don't believe there is any absolute answer to your question, Mr. Peterson.

MR. PETERSON: I don't believe there is. I was just wondering why a bar association would recommend a term of seven years if incompetency was contemplated?

MR. CRESSE: That is the provision set up in the 1944 draft for

Justices of the Superior Court, and we felt that the Justices of the Supreme Court should at least be subject to that same review.

VICE-CHAIRMAN: Seven years is borrowed from the present term . . .

MR. PETERSON: I know.

VICE-CHAIRMAN: Are there any further questions?

MR. HORACE G. BROWN: The question might be asked as to how we felt about the unified court system and the abolition of the Court of Chancery. We are only interested in seeing that litigation is streamlined to this extent. We hope that we can overcome the old system where you start a proceeding in one court that would be an appeal to the Court of Chancery, assuming the first proceeding was started in a law court, and you ask for an injunction to withhold the proceeding in the law court until the Court of Chancery can decide something. We feel, whatever the final setup is in regard to the administration of equity and legal principles, that either court who takes jurisdiction should be able to make the remedy complete —follow it to the conclusion without having to go to another court.

VICE-CHAIRMAN: You think the 1944 proposal would accomplish that?

MR. BROWN: We think so.

MR. CRESSE: Some of the older members of our bar felt that the present system was adequate and satisfactory, but out of deference to the wishes of the overwhelming majority of the younger members of the bar, they agreed to go along, and I bear with me no minority recommendation.

MR. AMOS F. DIXON: How many cases of this trouble—this jurisdictional trouble—have you had? Is it a large percentage?

MR. BROWN: Very few.

MR. DIXON: Is it one out of a hundred or one out of a thousand?

MR. BROWN: That depends on what type of practice you have.

MR. DIXON: Take your bar association, if you wish. Consider the bar association as a whole, the total number of cases. Is it a large percentage that have jurisdictional trouble?

MR. BROWN: No, not a large percentage.

MR. DIXON: Could you guess what it is among your men—one per cent, one out of a hundred that have jurisdictional trouble?

MR. BROWN: Maybe one or two out of a hundred.

MR. DIXON: Take the whole run of cases.

MR. BROWN: But a large percentage of cases involve real property matters and estate matters. In a large percentage of those cases you could be subjected to intervention of a Court of Chancery.

MR. CRESSE: It is very difficult to arrive at an absolute answer to your question, too, because in many of those jurisdictional ques-

tions you just grin and bear it, and go along and get the relief that you sought originally, when you know in your heart that you should stop and go back and start on the other trail.

MR. BROWN: Many times a threat is there, but no one exercises it.

MR. CRESSE: That is our recommendation.

VICE-CHAIRMAN: Is there anything further?

(Silence)

VICE-CHAIRMAN: Thank you very much. I suggest that we adjourn to Tuesday morning at 10:00. Our meeting will be at 11:00.

(The session adjourned at 3:20 P. M.)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Tuesday, July 1, 1947

(Morning session)

(The session began at 11:00 A. M.)

The fourth meeting of the Committee on the Judiciary was held in Room 204, Rutgers University Gymnasium.

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., Sommer, Smith, G. F. and Winne.

Mr. Nathan L. Jacobs, Vice-Chairman, presided at the request of Chairman Sommer.

(Informal off-the-record discussion regarding people to be invited to appear before this Committee)

VICE-CHAIRMAN NATHAN L. JACOBS: Gentlemen, if you are ready, I will call the meeting to order. We have with us this morning Dean Roscoe Pound. To the lawyers I need not say any more than "Dean Roscoe Pound." To the laymen I might say that lawyers throughout the country regard him as the leading legal scholar in the United States and, I might add, throughout the world.

I had the pleasure of being one of his students many, many years ago, and I think, perhaps, some others here have been students of the Dean.

Several years ago the Dean undertook a study which resulted in the publication of his book *Organization of Courts.*[1] It is available to you, and I suggest that you run through it, particularly the parts that relate to recommendations, conclusions, etc. It has considerable background material and, of course, it will be helpful if you could read all of it. But with all the other material we have on hand to read right now, you may not be able to do that.

The Dean has been kind enough to come down here on pretty short notice, and I suggest that we permit him to make his own remarks, and then, when he is through, I hope he will give us the privilege of asking questions. Dean Roscoe Pound.

(Applause)

DEAN ROSCOE POUND: Mr. Chairman, lady and gentlemen of the Committee,—what is this gadget?

(Laughter)

VICE-CHAIRMAN: That is for the recording system, and it will

[1] Published in 1940 as part of the Judicial Administration Series (Little, Brown; Boston).

be appreciated if you will address your remarks to the microphone.

DEAN POUND: In that case, I will have to be extremely careful. This recalls to my mind an incident that happened some years ago, when I appeared before the Wisconsin Bar Association. They had a stenographer to record the speech, and I was assured that the stenographer was 100% perfect, and that I didn't need to bother looking at his transcript. It would come out exactly as I had said it. At one point I said, "These things do not happen in a vacuum," but when I came to read the report it said this: "These things do not happen in back rooms."

(Laughter)

Now, Mr. Chairman, ladies and gentlemen, I think, perhaps by way of explanation of the method that I have in mind to employ, I might tell you about an occasion on which, when I was in the practice, by appointment of the County Commissioners I sat for a time on a statutory board, the statutory name of which was the Board of Insane Commissioners.

(Laughter)

The legislative language ran: "and it shall be further the duty of the said Insane Board to . . ."

(Laughter)

Well, while I was sitting as an Insane Commissioner on the Insane Board, we had before us a retired clergyman who was in an insane hospital. Aside from that, it was a very sane meeting in every respect. The circumstances which led to his appearing before us was that on the Sunday before he had thrown a hatchet at his daughter, which didn't seem in keeping with his clerical profession and his general appearance, solemnity, courtesy, and so on. Because of the embarrassing circumstances in which both he and the Commissioners found themselves, an inquiry was made into his sanity. So I asked him if it was true that he had thrown a hatchet at his daughter, and he said, "Yes, it was true, I did." I said, perhaps you will tell us how you came to do it. He said, "Certainly, gentlemen, she was in my pathway." I said, "The affidavit seems to show that you were behind her all the time." "That's quite right, gentlemen, she was, but I have two pathways, one coming and one going."

(Laughter)

Now, there is a moral in what he said there. To understand almost anything, we have got to understand the coming pathway, that comes down to us and leads to the situation which we are considering today; and then we are in a position to consider the going pathway, that goes out from us, that largely is to be predicted, after all, by the coming pathway, by the course it has taken. And that

is profoundly true in this matter of the organization of the courts. Without some idea of its history, we can hardly understand what largely came to be in this country—its fundamental points.

Of course, we inherited the English judicial organization when it was at its worst. In the 17th Century, when a study of the organization of the courts was first instituted, it was established that there were 90 courts in England that had to be considered. Later, in 1873, when they reorganized the judicial system, those 90 courts became three, or you might say, in a sense, four.

Multiplication of the courts is a characteristic of beginnings everywhere, and even today we see the administrative organization moving in that same direction. Every time there is a new administrative problem, it is set up by an administrative agency. And our state legislature, every time there is some new type of case that arises, sets up a separate court.

I have been for nine years president of the National Probation Association, and I have had trouble in all those nine years persuading my friends on the board of trustees not to agree to a lot more courts, because when you have this multiplicity of courts you are eternally bothered with jurisdictional lines and jurisdictional questions, and every jurisdictional question is a waste of judicial power. It's a waste of time and money to the litigants.

The things that I think need to be avoided more than anything else in all judicial organization, are jurisdictional questions and multiplicity of excessive appeals. Those are the things that waste judicial power and are the things that cost the time and money of litigants. Those are the things also, I think, that have led in no small degree to the multiplication of administrative agencies—in the continual whittling away of the jurisdiction of courts in permitting this thing and that in the administrative agencies—where it is conceived, and I don't think it is rightly conceived, that you get speedier results. You will find that this all results in jurisdictional questions, and these multiplied result in excessive appeals.

Now, as to this coming pathway, we have to ask ourselves how it happened. When Lord Coke instituted his study he found 90 courts administering justice in England in the 17th Century. Well, there were certain courts that came down from before the Conquest, but the King's Court had superseded them in everything except local petty controversies. So they had a great system of inferior small cause courts, from the small beginning to the well-ordered county courts, of which I shall speak presently.

But in addition to that, the King's power to do justice very largely devolved upon the superior courts in Westminster, for historical reasons and geographical reasons, but their jurisdiction was limited. All probate, all matrimonial controversies, and the whole adminis-

tration of estates at that time was within the jurisdiction of the church, until there was a system of ecclesiastical courts.

Then again, the King had residual powers to do justice in cases of great hardship, and when he found that he had so much of his time taken up with his wars in France, he turned all these cases over by ordinance to the Chancellor, and there grew up what we now call the Court of Chancery.

So you have in Coke's time a great number of local courts which have only a petty jurisdiction air, the three superior courts of common law, the Court of Chancery and the ecclesiastical courts, and that has stuck with us, largely.

The ordinary organization of courts in this country, coming down from Colonial America, has pretty well kept up that distinction between the courts of general common-law jurisdiction, the courts of equity jurisdiction, and the court of probate jurisdiction. Matrimonial jurisdiction passed over to equity because our forebears in this country wouldn't stand for the ecclesiastical courts, and that passed over into the domain of equity.

In addition to that, the King's Bench had the criminal jurisdiction, but it was like trying to dispose of mosquitoes with powerful ordnance to have all sorts of criminal matters brought to the King's Bench. And so criminal jurisdiction got, very largely but not entirely, separated.

Then too, it was a pretty serious matter if a man had to come from Northumberland or Westmorland to London whenever he had an action at law. So the court for the general jurisdiction of law was centralized. Nevertheless, the justices went about all over the Kingdom to try cases, with a jury from the locality. And after the Court of Chancery was centralized, evidence was taken in the locality—the system which you know of, the examination of witnesses by commissioners, in the locality.

That gave us the general picture of separate courts with petty jurisdiction, separate courts with general jurisdiction of law, a separate court of equity jurisdiction, a separate system of courts with a probate and to some extent matrimonial jurisdiction.

Now, the difficulty about that whole system is that it involves, it always involves, a waste of judicial power and excessive multiplicity of appeals.

In this country conditions were such after the Revolution as to aggravate that situation. Conditions of travel were bad. When Washington was appointed Commander-in-Chief of the Armies of the Continental Congress during the Revolution, he went on horseback from Philadelphia to Cambridge. It took the Commander of the Continental Armies eight days. Today you can go by train in eight hours, and you can go in much less than that time by air.

But it was a very serious situation at the time when our courts were set up, to have only central courts. The conditions of travel were such that it seemed necessary to have a court at every man's door. And so, very generally in this country the result was to set up a local court of general jurisdiction of law, on the model of the King's Bench, in every county.

In California there is a superior court, and while the judges are judges for the whole state, there is a court for the general jurisdiction of law and equity in every county. Most states have districts or circuits.

The model, of course, I suppose, was the organization of our federal courts under the Judiciary Act of 1789. But at any rate, what we set out to do was to have local courts of petty jurisdiction, a series of courts of general jurisdiction at law, a court of general jurisdiction in equity. But more and more we came to commit equity jurisdiction to the court of general jurisdiction at law. And there were a separate set of courts of probate jurisdiction.

We have the central courts of federal jurisdiction, but a good many states began to set up intermediate appellate courts—a very unfortunate thing, it always seemed to me. In fact, in the 19th Century they carried that to extremes. We didn't trust the courts of petty jurisdiction, so that you could take an appeal to the court of general jurisdiction, try the case all over again, and you then went from that to the intermediate appellate court, and finally to the old appellate court. It took a long time to get a case through the judicial mill, you might say. In fact, I think that the pioneers rather liked litigation in the days before the movies, in the days before the radio. The farmer could find his theatre in the local court house.

When I came to the Bar in Nebraska in 1890, when the court would meet in one of the local rural counties you would find the lumber wagons lined up around the court house square three deep, and all the farmers of the county were there to watch the controversy carried on and to appraise the work of the lawyers, and to speculate on the outcome of the verdict of the jury. It did not have the best effect on our policies of practice and procedure. It had to, in some measure, follow the lines of what we used to call a sporting theory of judicial practice. That, to a certain extent, was a gain. As Sir Frederick Pollock put it, its similar phenomena could have been perceived in rural England at one time where everybody turned out to see a trial. The idea was that the party should prevail whose advocate was the gamest bird with the longest spurs. At any rate, not only our judicial organization, but much of our precedure was shaped by those circumstances.

The first idea of simplifying this system came from Lord Selborne, whose work culminated in the Judiciary Act in England in

1873. He had what has always seemed to me to be an ideal of what judicial organization should be. He conceived of one great court which had branches, but after all, branches of the one court. He conceived that the bottom of these branches should be called the county courts, with jurisdiction of the small courts; then a central court of general jurisdiction at law, in equity, in probate, in matrimony; and above that—still a branch of the same court—a central court of appeal.

That was too much for conservative England of the '70's, so they cut off the county courts at the bottom. The conservatives couldn't quite stand for doing away with the appellate jurisdiction of the House of Lords, so they put the House of Lords back at the top with the ultimate appellate courts. The result is that you have an intermediate of that system. You appeal from the high court to the court of appeal, but that is right in the same court; then you go to the House of Lords. That's expensive, and I don't know that it justifies itself. In fact, Sir John Hollams, who was one of the leaders among the solicitors, insisted it was one of the grievances of the layman that a litigation could not be finished until it had gone before that expensive body, with all the delay that that involved.

Now, the great advantage of the unified courts, as he saw it, was first, that it did away with wasting judicial power; where a judge was needed, you could put a judge. Where you have these separate courts, especially if they are very tightly organized—in some states you have that situation, and they still do have it—a judge in one district or circuit hasn't anything to do and can go fishing, while a judge in another has a docket which is clogged with a multiplicity of cases that can't be heard anywhere else, and he is forever wrestling with a hopeless accumulation.

As I see it, you can spare some of these things here in New Jersey. What I think is the most commendable feature of your judicial organization here is that when you have a superlative case which calls for a strong judge, you can take the best judicial talent you have in the State and put him there to try that case. That is a great advantage.

In England, when they have a superlative case of superlative importance, the Lord Chief Justice, one of their very best men of the high court of justice, can be sent to try that case. It doesn't have to be tried by the local court judge. That makes a great difference in some of these big cases which require a strong judge and one where the question is one which requires high honor on the bench. That, I say, is a pretty good feature, but it's a feature that is involved in any thorough-going unification of the judicial system.

In other words, if a judicial system is properly organized and you have a superintending power properly provided for, you have some-

one whose duty it is, as it was the duty of the Lord Chancellor in England, to see that the judges are where judges are needed; to see that the business of the courts goes on; that there is no delay. He can be held responsible if there is a wasting of judicial power.

Well, the results of that have proved they were wonderful. Once in a while you get a Chancellor who is an admirable lawyer but a poor administrator, but he doesn't last long. Then there is a general feeling of having a new Chancellor take over the reins. Perhaps he is not so strong a lawyer, but he is a good lawyer who has that administrative ability. He won't be found sitting on the roadside. And all the difficulties I have spoken of seem to disappear.

Then there is another feature—Lord Selborne's idea which has proved very important. In the old days in England if you wanted to take a case from one court to another you had to have a transcript of the record, you had to have a bill of exceptions transmitted to another court, and you started a new proceeding there. Whereas under the system which has obtained in England since 1873, you go from one branch of the court to another simply by taking the papers across the corridor and getting a receipt for them from the registrar of one branch and depositing it in the branch from which those papers are being taken. This is the simplest, shortest and easiest move of procuring the opinion of another judge. When you think of the expense that used to be involved—and that today too often is involved in many of our states in appellate procedure—you can see how important that is.

The matter, I suppose, that this Committee would like me to go on with is this whole matter of administering the clerical work of the courts. When I came to the Bar it was very generally true in most of the states that when a judge had a case tried before him he wrote some things on a blotter. That went to a clerk who could decipher his handwriting; he was to put into typewritten form what was on that blotter and make a journal entry of it, and that was elaborated into a long recital of what had taken place. Then, when you wanted to sue on that judgment in some other court, you had an elaborate transcript of this elaborate record which really got down to a very small entry on the judge's blotter.

Now, they discovered in Illinois in 1906 that there was an enormous amount of expense involved that wasn't necessary there, and so they adopted a system whereby the judge's notes simply were recorded, and then if you had to sue in some other jurisdiction, or wanted to prove that judgment somewhere, you moved to have those expanded into a formal record—and you had that whole record, if anybody needed it for any purpose. Why, it was just as if it were the original.

When I tell you that the nuisance and expense involved there

proved to be enormous, you can see how important it is after all to have a simple organization whereby you can take the original papers from one court and deposit them in the other, and have things run along smoothly—not under a separate system of courts with separate branches, but in a single court.

The thing that I suppose will give you most trouble in New Jersey, the thing that is perhaps most necessary to speak about, is this matter of a separate Court of Chancery. I taught equity for a great many years, and the *New Jersey Equity Reports* were a joy forever to a teacher of equity. *Johnson's Chancery,* of New York, and the *New Jersey Equity Reports* were the reports to which a teacher of equity has always turned. I should feel very badly if I thought that any judicial organization which you might work out here would result in any diminution of that splendid development of equity that is going on here, because after all, equity is the most important part of the Anglo-American system of administering justice. It is increasingly important today; but after all, I don't believe it is necessary to have a separate, independent court of equity to achieve that. It is not only possible, but I think it is necessary in any unified judicial organization, to permit of divisions in the courts.

In England, of course, they have in the high courts of justice the King's Bench Division, the Chancery Division and the Probate and Divorce Divisions; but those are not so hard and fast that a case has got inevitably to stick in one of those divisions and be judged from the standpoint of that one division only. Not only is it perfectly possible to just simply take a case over by taking the papers from one division to another, but it is perfectly possible, if in one division the court feels that they need the help of some judge who has especially developed his power and talent more than another, to have him sit with them. It is a simple matter. The Lord Chancellor will designate Mr. Justice so and so to sit, not in his division but in the other court for the purpose of some particular situation where that is required.

I noticed the other day, in looking for something in your *New Jersey Equity Reports,* that in a case where a declaratory judgment was required, the Court of Chancery did not feel authorized to do what really was required there—to make a pronouncement so that the people would know what their rights were—because the questions were questions of law and not pertinent to the jurisdiction of the court of equity. Well, it is unfortunate that that kind of thing has to happen. The thing to do was to send over for the justice from the division of the courts that has to do with questions of law, whose next duty would be to come and sit with the justice or justices who have this matter before them. In that way, without having to pass

on any jurisdictional question, or waste the time or money of the litigants, you would have the matter settled where it ought to be settled, speedily settled, in the one procedure. In other words, under a unified system, with proper provision for superintendence, with proper provision whereby the justices of any division are justices of the whole court, it is perfectly easy to preserve all that is essentially required for a system of equity, such as you have developed here.

Now, it is perfectly true in a good many of our states, where from the beginning the court of general jurisdiction was given equity as well as common law jurisdiction, that there was a certain—as I have called it—decadence of equity, but that was largely because in the jurisdictions that were taken for model there was a pretty well developed equity jurisdiction anyway. In Massachusetts the courts did not believe in equity, and it wasn't until 1877 that Massachusetts had a full equity jurisdiction in its courts. The consequence is that equity jurisdiction was added gradually, by statute after statute, until the courts were given full jurisdiction. While certain limitations have been inherited there, the Massachusetts equity, I say frankly, is not satisfactory.

In other states, where there is a confusion of law and equity jurisdiction from the beginning, before equity had had much chance to develop, you see much of the same thing. But with your tradition of equity here, I don't see that there is any reason why an equity division which would not involve jurisdictional questions, which need not involve any wasted judicial power through excessive appeals on jurisdictional questions, could not do the whole work. Certainly it has in England. There hasn't been any difficulty there at all.

Equity is just as much equity now as it was in the days of Lord Selborne. But they got rid of a good deal of that. Now, the case of *Jarndyce* v *Jarndyce* is rather famous as an example of what a separate court of equity can do and, I think, if you will give me leave to say so, I have been a little worried about some things I have noticed in your *Equity Reports.* Equity, after all, is a great supplement to the common law. It deals with everything all over the whole domain of the common law. It is a remedial system, really, a great system of remedies where the common law is not equal to maintaining the legal rights which it developed and which it recognizes. I think I have noticed in the *Reports*—I might give you examples—certain tendencies to allow a very narrow system of equity to develop in a specialized court of equity, that can think only in terms of equity. After all, it is not merely that equity follows the law. Equity, in a sense, is administering the law, but it is administering it by different kinds of remedies and within a different atmosphere, you might say, by application of those remedies. But after

that atmosphere gets to be thought of as the whole thing, you can see a narrowing of equity which, to my mind, is just as bad as the decadence that I have spoken of.

I cannot help thinking that you will find advantages in doing what they have done in England, in having a Chancery Division rather than a separate Court of Chancery. At any rate, those are the things that I think you will wish to examine for the most part—the importance of as much unification as you can achieve. Now, perhaps, you may feel that Lord Selborne's idea of a single court of complete jurisdiction in which every judge is a judge of the whole court, sitting in branches, in those branches and divisions, is more than you are willing to achieve at the outset. At any rate, you could be, to my mind, perfectly assured of setting up, if not three branches, then three courts—a court of general jurisdiction of small courts, a court of general jurisdiction of law and equity and probate, and an ultimate court of review.

Now, why, you will ask, do you have to have a separate probate jurisdiction, a separate equity jurisdiction, and a separate criminal jurisdiction? Well, a good many states have seen for some time that that was not necessary and have given the complete general jurisdiction of law and equity and probate and criminal causes to a central court of general jurisdiction. The only reason that that isn't done generally is historical—for the historical reasons that I have explained to you, that developed separately.

Way back in Colonial times some of the colonies felt the need of exactly that unification. And why couldn't they achieve it? Well, the Archbishop of Canterbury cut a considerable figure in the British Privy Council, and he insisted on having ecclesiastical courts. The colonies did not believe in ecclesiastical courts, but the Privy Council was satisfied with the British courts of probate jurisdiction. Many of the colonists did not believe in equity at all, and it was hard work to get courts of equity set up in some of the colonies, and finally, after the jurisdiction was granted and conceded, some of them set up separate courts of equity. So you have that English situation of a separate court of common law jurisdiction, a separate court of equity jurisdiction, a separate court of probate jurisdiction, and very generally, a separate system of criminal courts. That was really necessary, because the King's Bench had no court of criminal jurisdiction. The idea of multiplying courts is really a hard thing to get rid of.

Now, in Continental Europe they had a similar situation. Justinian fused law and equity in the Roman law. We have inherited the idea of a separate court of equity. The Roman judicial set-up called for jurisdiction over administration of estates and such things by the same court, exactly as the general jurisdiction at law, but sepa-

rate commercial courts are to be found all over Continental Europe. It is hard for an Anglo-American lawyer to understand the difference between a civil partnership and a commercial partnership, and the need of a separate court—a commercial court, just as the Continental lawyer can't understand why we have that distinction between law and equity. Well, the answer is that it is purely historical. Mark Twain said the explanation of the judgment of Solomon was in the way that Solomon was raised, and that is the way the legal system grew up historically. That explains these things.

In the Middle Ages the merchants were a separate class. They were a sort of universal peddler, I would say. A man took a ship, fitted it up with a lot of goods that he thought he could sell, and went somewhere—to Italy, or the Baltic—and he traded what he had on his boat for what he could get there. A universal custom of merchants grew up, and for a long time the custom of merchants was administered by such courts as the one in London, which was the court of commercial jurisdiction.

On the Continent they never got away from that. They still have commercial courts, but in England—England didn't like those local courts and things of that sort, and they persisted in bringing their cases into the King's Court. You remember how they got around the difficulty. At common law you had to have a jury from the vicinage, and if you had a transaction on the Island of Minorca, and you wanted to sue on it, say, in the City of London, how could you get a jury there? Why, by the simple method of laying your venue in London, the venue where this transaction took place, to wit, in the Parish of St. Mary le Bow, in the City of London. That practice was so convenient that nobody bothered about the truth of it, or what trouble it was likely to lead to, by having it in the King's Court. And, consequently, we were spared a separate commercial court.

But there is no more sense, really, to a separate court of probate, a separate court of equity, a separate system of criminal courts, than there is to having a separate set of commercial courts. It is a matter of history and, as I said before, it's a matter of this "coming pathway."

There are two things that I think I especially ought to suggest to you in this general connection. One of them is the great importance of a proper development of the superintending power. In many of our states where they have these local districts or county courts of general jurisdiction, the court is very like a large military company. During the Civil War they allowed a person to organize a volunteer regiment. He could arrange for the election of officers and anything of that kind in his company or in his regiment. He could advertise

the company which he was enlisting. There was a great advantage in this—every man was to be an officer, and was to be a superior over the others.

Now, in many of our courts, in our large cities, where it was necessary to have a number of judges, when we started this system you could have one judge in each county or circuit. We had one judge in every county in California until recently. Now we have two dozen in Los Angeles County, and I believe more than a dozen in San Francisco. Where you get those courts with a number of co-equal judges, it is very like Artemus Ward's company, unless you get some superintending power to see to it that the work is properly distributed and that clashes are avoided. If you get a clash of jurisdiction between two of them, you don't have to go to another to get a reversal, and things of that kind, but you have the matter attended to right at the start. So you can see that that is a great advantage.

In our federal courts we have been achieving that by an organized dual judicial administration, but I think the English system where they have the compulsion of a head of the court is a better one. My answer is that if you have these separate branches and divisions, with an administrative head for each of them, but have one administrative head responsible, that can be achieved without any difficulty at all. You can look at the English courts from beginning to end and you won't see the conflicts of judicial power that our American courts are so full of. If you set up a system of coordinated local courts, with a number of co-equal judges in cities where there is a large volume of business, you can very easily avoid running into that situation.

Then there is another situation. A large part of the expense of the judicial administration of justice is in administrative and clerical work. Costs pile up and there is a vast amount of it that is downright unnecessary. If you have a system of separate courts, each has a separate clerk, each has a separate staff. You can't overcome it. In England, in the county courts, they have solved that matter in a very interesting way. They have 54 judges, each of whom is the judge of the county court, and they can sit anywhere in England. They assign a judge to a certain number of localities. If there is no business there, he can be sent anywhere else where he is needed, and he goes about from one locality to another. But he doesn't go to a place unless there is business there. The way that is handled is, if you have a complaint to make in some small cause, you go to any postoffice and you file it, and it is then forwarded to the registrar of the county courts at the nearest center. And when there are a certain number of these, he sees that a judge is sent to this spot in due course. But the judge doesn't go there if there is nothing to do, and he doesn't stay there for a fixed term; and if there is too much there

for him to do and if somebody else isn't at work, that judge goes there too. The result is that the 54 judges are able to handle practically the whole small cause court business, which is an enormous advantage indeed.

If you want something interesting to read, get the book by Judge Crawford. It is called *Recollections.* He for a generation was one of the county court judges in England, and that book is illuminating as to the way in which causes can be disposed of satisfactorily, cheaply and speedily by a relatively small number of judges.

What our American system of organizing courts leads to is illustrated by what, I think, is a horrible example in this country, and that is the State of Vermont. Vermont has a population of 375,000, and it has more judges than England has with a population a little more than 100 times as great. Now why is that? It's because every little community has to have its municipal court, it has to have a very complete apparatus of judges and works over the whole state. Distances are not magnificent nowadays, so it is only very small causes that won't justify the going, and you can go very easily today all over a state the size of Vermont. Now, it's true if it were Texas or California, that is another matter, because the distances there are enormous. If you think of it, there are 14 states along the Atlantic border and three along the Pacific border, which is quite as long, and they have problems there of distances that you don't have here, but there isn't any reason why some such organization of small causes on the order of the English county courts could not give us that in many states of ordinary size.

So, as I say, I think the important thing that you will have to consider is how far you can organize these small cause courts. How far can you organize superintendence? How far can you organize the administrative work of the courts?

And then one thing more. The beginning of wisdom, as I see it, in the administration of justice is the rule-making power of the courts. Every time an administrative agency is set up it is given power—rule-making power—but we have been awfully conservative about giving rule-making power to the courts. You seem to think that even the smallest changes in practice should first go to the legislature. The place where those things can be done is in the making of rules of court, made by men who have everyday experience and know what is called for—the old law, the mischief and the remedy; who can change the rule if it doesn't work, who can improve it and make it work better. But as you know—you don't know if you have never been bothered by it as I have, about the tinkering of civil procedure—or you would know what a nuisance it is to have the legislature amending court procedure at every single session.

My father, who was a judge for more than a generation out in

Nebraska, used to say that he would welcome a constitutional provision that precluded amending the dower law or the law of distribution or the code of procedure more than once in ten years. Every session of the legislature amended all of them, and you can imagine what the difficulties were that they worked under. Sometimes the Supreme Court would forget that the code had been amended and would decide something with results which you can imagine. So those are things that I suggest to you as particularly inviting attention.

Just one thing more. If there is anything that needs to be borne in mind in the Constitution it is not to put in too much. Robert Louis Stevenson said, the difference between Homer and the ordinary poet was that Homer knew what to leave out. The difference between the man who writes a good constitution and one who doesn't is that the former knows what to leave out. Amending a constitution is a slow business, and the way to achieve a thing that has to be achieved is on the basis of experience by those who have the experience. Don't, therefore, lay down a hard and fast elaborate scheme of courts, their boundaries rigidly defined, and their personnel rigidly defined. The framers of the Constitution of the United States did a very good job when they provided for just one court and left the rest to legislation. It's true, legislation multiplied the courts fearfully.

My friends who teach taxation are very anxious to have a new court for taxes, but it isn't necessary. The learning of taxes is mostly a question of the provisions of the statutes. The general law on the subject isn't different from the general law on the subjects which the courts have to deal with every day, and when I see so many of my former students devoting themselves to studying the last tax statute—almost getting it by heart—I think about the story they tell about Senator Vest from Missouri. After a generation of service in the United States Senate, he felt he still ought to be able to do something in the way of public service, and he undertook the chairmanship of the board to examine applicants for admission to the bar. In the beginning the examination on the common law was attended by a very considerable amount of criticism and discontent, and the legislature was appealed to for abolition of the Senator's commission. But recognizing that here was a very great man to whom the state owed a great deal, they sent for him to explain his system. One of the members on the judiciary committee said, "Now Senator, why don't you examine these young men on the code and the statutes of Missouri?" "Well, sir," said the Senator, "I will tell you. If I were to examine these young men on the code and the statutes of Missouri, find them competent and recommend them for admission to the bar, and they were admitted, then the

legislature might come along tomorrow and repeal everything they knew."

(Laughter)

Now, there's a moral to the story. A great deal of this detail isn't really necessary. If you get the truly fundamental things, the basis for a good judicial organization, you will have to leave the rest to legislation, or as much of it as you can to rules of court. There is no reason why most of these things can't be done by rules of court much better than by legislation, and if you don't invite legislation you probably won't get it. On the other hand, the court, you can be pretty sure, will work out these rules, if for no other reason than because it's got to. Business has got to be transacted, and courts have an instinct for transacting things in an orderly fashion. You know, the whole jurisdiction of the ecclesiastical courts was based upon one of St. Paul's injunctions in one of his epistles—to let all things be done decently and in order. And judicial temperament calls for the doing of things decently and in order. And so with the rules of court. Give them the power, and the rest will follow. The experience in England has abundantly justified that.

Now, gentlemen, my grandfather, a Quaker preacher, used to say that nobody could be sure the spirit was moving him after 50 minutes.

(Laughter)

He said, after 50 minutes it was more likely to be one's wilful pride—

(Laughter)

—and I don't feel that I am justified in inflicting wilful pride upon you, because for the most part I have said what I had in mind.

If you gentlemen have any questions you want to ask me, and you think I can answer them, I shall be very glad to do what I can.

MR. EDWARD A. McGRATH: Now, do I correctly summarize your thought when I say that you think that we should try to eliminate conflicts of jurisdiction?

DEAN POUND: Absolutely.

MR. McGRATH: This can largely be done by the court of appeal which has to live with the thing from the—

DEAN POUND: No, it isn't, because the conflicts in jurisdiction—

MR. McGRATH: No, I mean, after we have set up our plan for the courts.

DEAN POUND: Conflicts of jurisdiction oughtn't to be. They ought not to arise. If they do, it ought to be straightened out right at the start. There ought not be any questions of jurisdiction, or if there are, it ought to be taken care of as soon as possible.

MR. McGRATH: But an ideal constitution would have as few possibilities for conflicts as possible, and then you would eliminate endless appeals?

DEAN POUND: I don't see any reason why not. In fact, the whole tendency today is in that direction, and more and more instead of handling appeals from the small cause courts, there is a provision for an appellate branch in the lower court, in which three judges can review the matters quickly and informally without having to go through the long system of appeals.

MR. McGRATH: You would have a strong administration of all courts, and in this connection, do you think that the system we have in the federal courts, is a good one?

DEAN POUND: Well, that's a good system.

MR. McGRATH: You would find in this highest court and its rule-making powers the thing which would largely minimize conflicts of jurisdiction that might arise, at least the interpretation?

DEAN POUND: Oh, yes. The only trouble is, if jurisdictional lines are constitutional, that is the difficulty.

MR. McGRATH: The thing to do is to avoid that.

DEAN POUND: Avoid that as much as possible.

MR. McGRATH: Among our administrative problems in this State, we have a great deal of zoning questions—a man wants to build a building and finds that he can't do it because of the building ordinance. That's likely to increase tremendously.

DEAN POUND: Well, that's a little different from our jurisdictional problem. That's a problem, after all, of the administration of the zoning law, and the power to do this, that or the other thing. That isn't the question of jurisdiction of the courts.

MR. McGRATH: No, I mean, would you consider it a good policy to refer those things as far as possible to some state building commissioner?

DEAN POUND: No, I don't think so, and I'll tell you why. When you have an administrative agency, dealing with questions of property and things of that kind, you run into the difficulty we have with our federal agencies. These agencies consider themselves out of all proportion. They can't see anything but their particular job; the job is so important that everything else has got to give way. And if you have an administrative agency dealing with zoning laws and questions of property, well, you have an amount of review in the end that isn't necessary. The court has continually been forced to interpret the Constitution against these administrative agencies.

MR. McGRATH: In England, notwithstanding the reforms you speak of, litigations are far more expensive than they are in this country.

DEAN POUND: Yes, and I'll tell you why. It isn't any more

expensive because of these reforms, but more because of the English ideas about costs. In England, the fees of solicitors and the fees of counsel go into the costs. If I bring a lawsuit against you and get beaten, I would not only have to pay my own lawyer, but I'd have to pay yours, too, and that makes it pretty expensive. That is the main source of expense.

Another source of expense is, that they still have a good deal of overgrown administration in the court. They've got rid of a good deal of it, but there is still a lot of it. For example, Charles II wanted to provide for one of his natural sons, so he made him a Sealer of Writs. Everybody who got any writs had to go to Lord Cleveland to get a seal. This was farmed out to others for a consideration. It got so that he would only seal writs on certain days of the week, and at certain hours. If you wanted a writ sealed in a hurry, or at some other time, you had to pay through the nose.

Now, we haven't been troubled too much with that, but we are troubled in this country with another thing, and that is the very great multiplication of jobs in the court houses. But in England, it's the survival of those things which involve a vast amount of unnecessary court expenses, as well as the idea of making the litigant who is defeated fully compensate the man who was brought in the court room.

MR. McGRATH: Do you think that our system, whereby the county judges could be assigned by the Supreme Court on other cases, such as for instance, the Circuit Court or the Supreme Court, makes for a good system?

DEAN POUND: To a certain extent that is a good system, if you could have some way of utilizing the judicial powers. I would like to suggest this to you. Small causes do not require small judges, but good judges, big judges. The judges in England—those county court justices—are just as good judges as the judges of the higher courts, and the consequence is, the people have confidence in them, the work is well done. If you have an organization of your small causes and you put small men into the system, nobody has confidence in them, and you get this volume of appeals. You can have a smaller number of first-class men, doing the work in a first-class manner. That is infinitely better than a great number of third-class men doing it in a third-class manner.

Now, you have the same situation in Vermont, where they have more judges doing the small court business of 375,000 people than they have in England doing the small cause work of a population running pretty close to 40 million. That is simply the result of trying to deal with small causes—which are just as important to a party as the large causes—and other things, in a small way.

MR. McGRATH: You don't regard our county courts as courts

of small causes?

DEAN POUND: No, I know what you mean. As I understand it, the Justice of the Supreme Court hears cases in your county courts.

MR. McGRATH: That's right.

DEAN POUND: But why have a separate court?

MR. McGRATH: Why have a separate court? Because of convenience.

DEAN POUND: It's more convenient to have one court.

MR. McGRATH: You mean, you would have the county court called all one court? The divisions would be as you suggest.

DEAN POUND: You can see the advantages of that.

MR. McGRATH: In other words, the county court will have a criminal division and a probate division.

DEAN POUND: In fact, in California, where the Superior Court has general jurisdiction of law, equity, probate and criminal causes, it works splendidly. There again you don't have to bother yourself with these judisdictional lines. In Iowa, the Circuit Court has law, equity, criminal and probate jurisdiction. Having practiced across the river, where all those things were separate, I can assure you I can appreciate the importance of that system.

MR. McGRATH: When we have a criminal session of the county court we call it the general session.

DEAN POUND: Well, if you have to have a criminal division, why, perhaps you'll have to have it; but is there any historical reason why you have to keep that up? Doesn't that multiply the administration a little bit?

MR. McGRATH: No, it doesn't. I think our system is very efficient.

DEAN POUND: Well, it might be efficient, but I suspect it could be more efficient.

MR. McGRATH: It is efficient, convenient and economical, because it is right in the county where—

DEAN POUND: It's a kind of a circuit system, isn't it.

MR. McGRATH: Yes, it is.

DEAN POUND: In fact, in the Superior Court in Massachusetts the Superior Court judges sit anywhere. That is infinitely better than the system they have in New York.

MR. McGRATH: Thank you very much, Dean Pound. I think your remarks have been wonderfully illuminating. It's really a liberal course in law, and I thank you personally. I'm sure we're all very grateful to you.

MR. WAYNE D. McMURRAY: May I ask a question? Your notion is, I take it, that the ideal thing is to get the case tried and have one review.

DEAN POUND: Exactly, sir.

MR. McMURRAY: Hasn't the Appellate Division worked well, however, in New York?

DEAN POUND: Yes, it has—for this reason. It's a substitute for that old General Term system. It's infinitely better, but after all, there is still the idea of having a case go from the Special Term to the Appellate Division and then to the Court of Appeals.

MR. McMURRAY: Not all of them.

DEAN POUND: Yes, but pretty nearly all of them.

MR. McMURRAY: Well, as I understand the rules, Dean, if the Appellate Division is unanimous in its view there is no right of appeal unless the Court of Appeals takes it as a matter of record.

DEAN POUND: Now, let me make this suggestion to you. Instead of having that separate and elaborate Appellate Division—let's take the New York practice, I am most familiar with that. A case is tried, there is a motion for a new trial before the trial justice, and you then go to the Appellate Division. Instead of having a motion for a new trial before the trial judge, you have it before three of the judges, and it is as simple as on a motion for a new trial. Wouldn't you save all that intermediate court, and a whole lot of expense and one thing and another?

COMMITTEE MEMBER: I think that might be true. Here was my notion—the Appellate Division does screen out about 90 per cent of the cases reviewed today. Now, when I say 90 per cent, I'm just guessing.

COMMITTEE MEMBER: Well, it's pretty close to that.

DEAN POUND: Well, my suggestion to you is that they could be screened out infinitely better by the simple procedure of, instead of having a motion for a new trial heard before the judge who tried the case, have it heard before three judges right there in that court and be done with it, unless you want to go ahead with it. No one has much compunction with the trial judges overruling or allowing a motion for a new trial.

COMMITTEE MEMBER: There is one thing I wanted to ask you; I don't know the answer to it, but I've often thought about it. Suppose a litigant loses his case and takes the case papers across the hall to another court—

DEAN POUND: Excuse me, they are all sitting right there in the royal courts of justice. Solicitor for the particular party goes to the registrar of the high court, he gives his receipt for the papers, goes across to the Clerk of the Court of Appeals who issues his receipt which is taken back to the first court where the solicitor picks up his own receipt, and there you are.

COMMITTEE MEMBER: Well, then there is only one record, you know. If you have a court of seven sitting—I don't know how

many there are, but the high court of appeal would be seven—it might be nine or it might be five, I don't know—what would you do with the records? They couldn't all be—

DEAN POUND: You have that same situation in any court; you take one record up and then you provide for printing. But if the case isn't worth printing, often what is commonly done nowadays is that the participants designate the parts to be printed. In some states they don't even do that; where there isn't enough involved to justify a great expense, the court relies on the parties and their briefs stating the parts of the record they relied on, and if there is any controversy they can be provided. Where a lawyer knows the papers are there, he isn't going to make any material misstatement. He can get along with very much less expense. There is no reason for printing in cases that do not really involve enough to justify it.

(One of the Committee members asks about the rule-making power, but was inaudible)

DEAN POUND: The rule-making power is the thing that, I think, more and more of the justices rely on. It's a peculiar idea that we can trust an administrative agency to make rules that affect the most vital and intimate concerns of business and industry, and we can't trust the court to make rules that will operate well.

MR. HENRY W. PETERSON: Dean Pound, suppose in your unified system providing for a Chancery Division, a case is being heard which is properly brought in equity, but a question of law is to be determined. Under the unification the Vice-Chancellor would determine the question of law. But if one of the litigants insisted upon his right of having a jury determine that point of law, and there was no jury sitting in the court house at that particular moment, would that be—

DEAN POUND: We get that problem all the time, and it is generally dealt with by requiring the person who insists that he had to have a jury to make that application early, so that the matter could be arranged for. He couldn't spring it at the last moment.

COMMITTEE MEMBER: Well now, the rules of court in some states provide that in that case you must make your application for a jury at once; and then it can be arranged to have the jury trial, if the party insists upon it, in a way that is perfectly consonant with the operation of judicial systems.

MR. McMURRAY: Mr. Chairman, may I speak to Dean Pound?

VICE-CHAIRMAN: Certainly.

MR. McMURRAY: Dean Pound, in the federal system, the judge —I am not a lawyer, so I am asking you this question—the judge trying the case disposes of anything that comes before him, whether it is law or whether it is equity. Now—

DEAN POUND: Prior to 1937 the procedure was different. It used to be very awkward when the cases were removed to the federal court; then would come the controversy on the equity side or the law side of the federal court, and you would get an order on it to conform your pleadings to the federal system. And sometimes it was rather difficult to decide whether to file a declaration or a bill. Well, those things have been ironed out since the procedure of 1937.

COMMITTEE MEMBER: Well, if that system is satisfactory, why, in most of the discussions we have heard of the state court, is there always this talk of dividing it into different divisions? Would you feel that the federal system would be strengthened if that were divided into divisions?

DEAN POUND: No, I don't for this reason—you have to provide for federal districts, anywhere from one to four or five, in 48 different states. In fact, you have a very different problem.

One of the serious difficulties of the federal system, as I see it, is that in the Circuit Court of Appeals there are always three judges. Now, for many cases three judges is enough, but after all, some tremendous questions come into the Circuit Court of Appeals and they are pretty big for three judges.

While I think your court of 16 here is beyond all reason, I think a bench of three to do the work of passing on motions for a new trial—to do the work that's done by the Appellate Division in New York—would be a good thing. I think that your ultimate tribunal might run into such very important questions arising all the time, that three is a little too small.

COMMITTEE MEMBER: Do you think seven would be an ideal number?

DEAN POUND: I think seven is much better than three, sir, to me. In England, in the House of Lords, they habitually use five, but on very important questions, seven. The Judicial Committee of the Privy Council for a long time only used three, but the colonies didn't like that and I notice that five have been sitting recently. Five or seven is about right.

VICE-CHAIRMAN: Are there any further questions?

Dean, may I express the appreciation of the entire Committee. It's been a pleasure to listen to you again. Frankly, as the years have gone on, I've been more and more amazed at your learning and your capacity for learning more. We appreciate your having taken the trouble to come down. I know that you have been performing ever so many public services, and I am sure that the State of New Jersey appreciates your coming.

We have invited Judge Hartshorne to express his views, and we will follow the same procedure as with the previous speakers. You may ask questions of the Judge when he is finished, if that is agree-

able to him.

JUDGE RICHARD HARTSHORNE: Thank you very much.

Mr. Chairman—two "Mr. Chairmans" in fact—ladies and gentlemen: I want to try as best as a mere trial judge can, to bring down to New Jersey specifically, one at least of the points to which Dean Pound alluded, and yet from a slightly different angle. I would like to speak of our court system, not from the standpoint of judges and lawyers, but from the standpoint of the citizens.

There is an ancient adage, you know: "The law was made for man, not man for the law." I have often wondered whether or not the Constitution, despite the best the courts could do, had not handicapped the courts. A little book written over 40 years ago, *The Courts of England and New Jersey,* discussed not only the courts of England and the courts of New Jersey, but also the courts of various other English-speaking commonwealths throughout the world. The conclusion arrived at in this book by a man who was a very careful man—as I think our good friend, the Chief Justice, will agree—Charles Hartshorne, was that our system here, our court system, was the most antiquated and intricate that exists in any considerable community of English-speaking people.

Now, that was said more than 40 years ago, obviously without the slightest reference to any of the contemporary issues that face us at present. Is that conclusion still true? I am going to call your attention to certain facts in the record and let you draw your own conclusion, because as the Chief Justice said here a moment ago, what we want, what the man on the street wants, is to have his whole case tried and disposed of, and then have a right to an appeal in the event of error—but not a lot of trials and not a lot of appeals. I fear that what I have to say would indicate it is the latter which we have.

I think—since I can't go through the records and give you by any means the multitude of cases that appear in the records, and can only pick out here and there—that what Senator Hendrickson told you, I believe a week ago, cannot too often be stressed; that out of the recent 119 opinions filed in the Chancery courts, and I think the same thing applies in the common law courts, out of the last 119, a third of them went off on jurisdictional questions. Now jurisdictional questions mean nothing to a man who wants justice. He wants a decision on the merits, and when the lawyers have to argue on whether they are in the right court or in the wrong court, it's just nothing to the man who is paying the bill.

So let us consider just a few sample cases, and let me give you three general categories of cases into which the multitude fall, where the litigant finds himself pushed from one court to another seeking justice. The first class of cases of double litigation—I call it double litigation, but actually, as I will show you, it runs into double, triple,

quadruple, quintuple, sextuple, and septuple litigations—the first class of these cases is that where the party bringing suit is found to have misjudged the character of his suit and to have brought it in a court which, our Constitution says, has no jurisdiction over that kind of proceedings. Mind you, our Constitution doesn't state it specifically, in so many words, but it is the necessary legal deduction. Thereupon, in that situation, the man's cause can't simply be transferred to the right court under the Transfer of Causes Act. I don't here allude to the fact that the Transfer of Causes Act itself has been rather strictly construed. The man must start his proceedings all over again, in another court.

I am going to follow, if I may, Mr. Chairman, this paper which gives these citations . . . . Let's take a very simple case. A man files an appeal for an accounting against his partner. Actually, what he is asking is interest on a sum that has already been ascertained. The court of equity must, under our Constitution, say: "Stop right here; go over to the other court and start your proceedings all over again there, because while the court of equity has jurisdiction over accountings, the court of law has somewhat similar jurisdiction over some kinds of accounts. When you are suing for a definite sum, or interest on a definite sum, you must go to the law courts." Now, that is the simplest sort of a difficulty.

The cases that I have cited for you here, and the cases with which the records are replete, are cases a glance at which will show you that they are not the fault of, nor is the waste due to, incapable counsel. Take the case of *Richeimer* v *Fischbein, 107 N. J. Eq. 493.* The mistake there, which caused the citizens to go through court after court, was made by probably the outstanding Chancery jurist we have had in years, Vice-Chancellor Backes. Look at the case of *Pridmore* v *Steneck, 122 N. J. Eq. 35.* There is a case which deals with the relative jurisdictions of the law and equity courts in case of fraud. You will have to read that case over three or four times before you think you know the difference, and then you only think you know.

Now, the second class of cases of double litigation is that where one of the parties has a just claim or defense, of which the original court has no jurisdiction, even though that court does have jurisdiction of the original claim that is filed. Let's take a simple example of that. I sue you in ejectment—I am now talking for the benefit of some of the laymen I see on the Committee—to eject you from lands which I claim but which you occupy. You answer, setting up fraud of an equitable character. The law court cannot exercise jurisdiction to determine the validity of the equitable fraud defense. So the case must stop right there, and then proceedings must be instituted in a court of equity to ascertain the validity of this defense

of equitable fraud. After that defense of equitable fraud has been ascertained, back it comes to the court of law to determine whether or not, in the light of what has been ascertained in equity, you should or should not be ejected from your land. Now, that again is a very simple situation compared to some of the cases which I have cited here.

The third category is still different. It consists of cases where a single court cannot itself, because of its lack of jurisdiction under the Constitution, do the full justice to which the citizens have a right. Therefore, there must be resort to the other court to supplement the justice which the first court cannot give under the Constitution. Take this situation: I, for instance, am obstructing what you claim is a right of way to your property. You want to get that obstruction removed. The only place where you can get something removed is in Chancery, by mandatory injunction, so your lawyer tells you to file a bill for a mandatory injunction in the Court of Chancery. You do so. When you come to the hearing, however, the Vice-Chancellor says, "Why, gentlemen, whether you, the man who has filed this bill, or the man who has directed the obstruction, owns this right of way is a real property question; and it happens to be a question of law, not a question of equity. I can't decide that question. That question must go over to a court of law to be decided, so I must stop the case right here. You must go over to the court of law to get a determination of the title to the piece of property. Then, when that question of title has been determined, come back and we will decide in the light of that whether or not the obstruction will be removed." That again, I say, is a very simple example of a whole class of cases which, as Senator Hendrickson has shown to you, takes up one-third of the time of the court, getting nowhere. I think the Chief Justice will agree that probably the most difficult legal problems to consider are the ones of jurisdiction.

Now, let's take two specific examples where litigants have gone through double litigation and running up into multiple litigations. These are actual, recorded cases. The first one is *Wemple* v *W. F. Goodrich Co.,* recorded in *126 N. J. Eq. 220, 127 N. J. Eq. 333* and *126 N. J. Law 465*. It involves proceedings in seven different courts. Now, what was the situation? Wemple and some other people had agreed with the Goodrich Company to transfer certain judgments to them. The Goodrich Company failed to transfer them. Wemple wanted the judgments. To get them he, therefore, (1) filed a bill in Chancery to compel the transfer. Chancery decreed the transfer. There was an appeal. (2) The second step was on the appeal. Our highest court reversed Chancery and ordered the bill dismissed because it held that jurisdiction in that situation lay not in Chancery, but in the common law courts. So, (3) the

matter was returned to Chancery and on the application to the court there, the appeal was dismissed. Mind you, everyone of these applications is a hearing with both lawyers, and counsel fees are ultimately charged properly for the time, and so on, that it takes. So, (4) on the third hearing in Chancery, Chancery reversed itself and transferred the cause to the law courts. Now, (5) there was an appeal from this transfer to the law courts to our highest court again—where they had already been, but on another angle—and on this appeal the Chancery order of transfer was affirmed. Now (6) after all that had happened, Wemple then started his suit at law where he should have been in the first place, and he obtained judgment. (7) Then there was an appeal from that, and on appeal the highest court affirmed. There, finally, the decision was had, but after seven different court hearings. There should, at most, have been but one, with an appeal.

Now let's take another, because this other is an even more clear situation which, to me, indicates that the law is not entirely made for man. The New York Sash and Door Company sued the National House and Farms Association at law. (I don't know whether the Chief Justice will remember this case or not. Somehow or other I have mislaid the citation.)

MR. McGRATH: Just give us the facts.

JUDGE HARTSHORNE: The New York Sash and Door Company get judgment. On appeal, step number two, our highest court held that the New York company had sued in the wrong court, since Chancery had jurisdiction over that kind of an action. But three, meanwhile the National company—and mind you, I have pared these facts down to the very lowest terms to try and make it as simple as possible—meanwhile, the National Company had already instituted proceedings in Chancery to restrain the New York company's suit at law and to obtain reformation of the contract between the two. Here the National company's motion for injunction was denied in Chancery and the New York company's motion to dismiss the bill in Chancery was held until final hearing. Now, the fourth step was this—after the trial at law had occurred, the New York company again moved to dismiss the bill in Chancery, which motion was denied. The fifth step was that the New York company appealed from this decision to our highest court, which affirmed the decision in Chancery.

The point to bear in mind is, that after these five hearings in these three different courts the parties had gotten literally nowhere. They were exactly where they had started in the beginning, because the question still had to be determined whether the contract between the two should have been reformed and then, if reformed or not, the question had to be determined whether the contract

had been broken. Neither of those meritorious questions had been determined after these five proceedings, and in order to determine those meritorious questions the litigants would have to go to two separate courts in addition, common law and Chancery. The report showed that they didn't. Why? I think you can answer it. Possibly they were just tired out.

Obviously, it would seem, in accordance with the principles which the Chief Justice mentioned, that something must be done to enable litigants to obtain justice in one court, at one time, with one possible appeal if they deem an error has been made. And that necessity does not affect in the slightest the question which it strikes me we have been discussing, *i.e.,* what name shall we call these courts? "A rose by any other name would smell as sweet." Whether they shall be separate courts or whether they shall be divisions, what I am calling your attention to here has nothing to do with that. The simplicity, the simple, sure, swift justice which we want, can only exist if we give each of the courts we create complete power to do complete justice.

And it is not at all inconsistent therewith if you have either a separate Court of Chancery or a Chancery Division of an overall court. True, if you have a division, it is easier, as Dean Pound said, to walk across the hall from one division to another than it is to deal with one separate institution and another separate institution. One can be done by a receipt; one can be done by rule of court because it is one court. If you are dealing with different courts, that is a little more difficult; but it can be done in either case—and there is much to be said for both—of having judges who are accustomed to dealing with a certain kind of litigation, continue to handle that kind of litigation. That can continue; that has nothing to do with what I am suggesting here.

Our facts show the inability of our courts to do complete justice when they have their litigants before them. All that would seem to be necessary is to be sure of a simple method of getting the litigation before the right court and then giving incidental powers to the court which is caring for the kind of litigation which it is best fitted to hear. Specifically, if a proper accounting bill is filed before Chancery, or a Chancery Division, then that Chancery Division should have the power to decide such incidental common law questions as arise. Conversely, if a proper matter of common law jurisdiction is before a common law court, that court should have the power to decide not main equitable controversies, but incidental equitable matters which arise in the course of that common law proceeding.

This is not a novel suggestion. New Jersey is novel for not adopting it. England had the New Jersey system and saw the

error of the situation 75 years ago. So have most of the states of the Union. New Jersey itself has done the very same thing in its present Constitution, and has done it to an extent which I submit is further than would seem necessary. I refer to Article IV, Section VII, paragraph 10 of the present Constitution, which specifically provides that "The Legislature may vest in the Circuit Courts or Courts of Common Pleas within the several counties of this State Chancery powers, so far as relates to the foreclosure of mortgages, and sale of mortgaged premises." The Legislature has enacted *R.S. 2:65-35*. The courts—that is, the Circuit Courts (I see a Circuit Court judge sitting there)—I know and the courts know, that while not often, both the Circuit and the Common Pleas Courts do foreclose mortgages,—and the heavens have not yet fallen.

Now, I don't think, gentlemen, that to remedy the differences to which I have been alluding here, New Jersey need in its new Constitution go as far as it has gone in its old Constitution, because New Jersey here, in what I have just read to you, has taken Chancery powers by the throat and put them entirely in that classification, put them entirely in the common law courts. That is not necessary; I can see reasons why that should not be done. But it is a very much less thing to do to give the common law courts equitable jurisdiction over purely incidental matters. And if that is done, then it would seem, upon the basis of the legal facts, that the law would be built for man and not man for the law.

MR. McGRATH: Judge, may I make this clear? I think it's very important that we all understand your ideas. Your idea is that the Court of Chancery should be left alone, with powers given to it to decide any question of law which might arise—

JUDGE HARTSHORNE: I did not say quite that. I said that to my mind it was not so important whether the Court of Chancery was left alone, or was created as a Chancery Division; that in either event, the thing of outstanding importance to me was that the people for whom the courts exist should be entitled to complete justice in a single hearing with a single jury.

MR. AMOS F. DIXON: I have a question I would like to ask. Suppose that we went to Hawaii and set up a court system on the same basis as I understand the federal court system is set up, so that we just have one court that covers all questions—that is, eliminate the divisions. In your opinion, would that work satisfactorily in New Jersey? Would it be a vast improvement; would it be better than if we set up a simplified court with divisions?

JUDGE HARTSHORNE: You would be getting an advantage, and at the same time you would be getting a disadvantage. The advantage you would get would be the elimination of the difficulties to which I have been alluding. The disadvantage you would get

would be that the judges, having to cover the whole field of everything, might not be as fully skilled in everything as in a particular field of knowledge.

Now, I'll be specific. Personally, I like the Common Pleas very much because we have a series of different kinds of jurisdictions—civil common law, criminal and probate. But it would be perfectly impossible for me to try a common law civil case today, a criminal case tomorrow, a probate case the day after that, without perhaps jumbling one. What we have to do is this. We have our judges sitting an entire term trying criminal cases; then the next entire term they try actions at law. They do not take a separate term trying probate, but they put probate in a separate week when they are not trying jury trials of either criminal or civil nature. In other words, we have tried to give ourselves the intellectual stimulant of a change of scenery, which, to my mind, is very helpful, without jumbling it all up, one right on top of the other. This makes us, perchance, a jack of all trades, and that's good enough.

VICE-CHAIRMAN: In federal practice they do very much the same thing.

MR. THOMAS J. BROGAN: Judge, do you welcome this power of review that the court has, for instance, in compensation cases and certain drunken driving cases and such other polyglot things, by statute?

JUDGE HARTSHORNE: Personally, yes, I welcome them. I really enjoy compensation cases. I know that there are others who do not.

MR. DIXON: You have spoken quite a little bit about expense to litigants. We haven't said very much about expense to taxpayers who support these courts. It seems to me that the simplification of the court system is going to have a very definite reaction in reducing the expenses of the taxpayers, who have to support these courts. I think that that is an extremely important thing, when we review the appropriations that are made from year to year for the courts.

JUDGE HARTSHORNE: If you have a third of the court's time taken up with jurisdictional cases that get nowhere on the merits, then if you didn't have them you could go along with a one-third less force.

MR. BROGAN: Judge, I want to ask you this. Do I understand that the present method of awarding compensation in that class of case, with review by certiorari and a review by the Court of Errors and Appeals to follow, has your approval?

JUDGE HARTSHORNE: No, I did not mean that. I was answering your question. If you had certiorari in really important situations, to be used with real discretion—

MR. BROGAN: Then you go to the Court of Errors and Ap-

peals all over again. I've had those things come before me in a district where the judgment of the original hearing was seven years old, and that was a case of a certiorari.

JUDGE HARTSHORNE: I filed an opinion yesterday, sir, in which it was 15.

VICE-CHAIRMAN: Any further questions?

MR. PETERSON: Judge, these complaints, particularly in jurisdictional matters, of cases being kicked around from one court to another—aren't they due principally to the lack of preparation on the part of counsel?

JUDGE HARTSHORNE: No! No, sir! May I suggest that you look at the names of the counsel that appear in this series of cases which I have cited here? Consider that the mistake in this *Richeimer* case was made by Vice-Chancellor Backes as to the jurisdiction of equity.

MR. BROGAN: Was he reaching for jurisdiction?

JUDGE HARTSHORNE: I can't recall.

MR. PETERSON: I imagine it's now apropos for me to apologize to the list of distinguished guests.

COMMITTEE MEMBER: The barristers are not here.

MR. FRANK H. SOMMER: Judge, you keep referring to incidental legal points of law. What do you mean by incidental?

JUDGE HARTSHORNE: If, on the accounting case to which I referred before, common law—

MR. SOMMER: Suppose you take your accounting case and let's see how it works out.

JUDGE HARTSHORNE: All right, take your accounting case. Suppose there is a defense raised there of legal fraud. A court of equity would say, we are accustomed to dealing with equitable fraud, which is very different from legal fraud; therefore, you'll have to fight that defense out in the law court. Now, why shouldn't equity go right ahead and decide the whole thing?

MR. SOMMER: Is that the exercise of incidental power? If, as a matter of fact, you haven't worked out a basis for equity intervention, how do you work out this incidental idea?

JUDGE HARTSHORNE: You may not like my word, Dean. I am very happy to adopt any word you think fits. What I mean is, if the cause of action is one appropriate to the court in which it is filed.

MR. SOMMER: The basic question, I may ask, is whether the court had jurisdiction primarily?

JUDGE HARTSHORNE: The court may not have jurisdiction of some point raised in the answer, of some point raised in the replication, or what not, but if it has jurisdiction of the cause of

action, then since that cause of action should stay there, in order to be in the hands of the tribunal most skilled in handling that cause, it would seem that there should be a complete rendering of justice.

MR. BROGAN: Well, Judge, as a matter of fact, if you file a bill in the Court of Chancery, in a cause of action basically equitable, does not the court, except in rare instances, decide the whole question, even though what you call incidental legal questions arise, and does it decline to do so only in the case involving title to land, or something of that kind?

JUDGE HARTSHORNE: I wish I could pick out a specific case on that particular point. I think it is *Adams* v *Camden Safe Deposit and Trust Co., 121 N. J. Law,* as I have cited here—no, it isn't, it is an equity case, but in one of these cases—

MR. BROGAN: They do a lot of funny things.

JUDGE HARTSHORNE: In one of these cases, they alluded to those provisions of the Chancery Act which sought to give Chancery the very jurisdiction of which you spoke, and Chancery said, "No".

MR. BROGAN: Well, doesn't Chancery only let go when in effect inhibited, you might say, in fundamental law?

JUDGE HARTSHORNE: Yes, that is true.

MR. BROGAN: And isn't it a fact that out of, let us say, 500 questions, jurisdiction arises in only one? Not all cases get into court, you know. I don't suppose that three per cent of them get into court.

JUDGE HARTSHORNE: I alluded to that fact here in the cases I cited—just the very few; I didn't attempt to be exhaustive. I didn't allude to any one of the unreported decisions.

MR. BROGAN: As I understand it, we have a fair notion of what is wrong with the present judicial set-up. You are for a top court of appeals and you are for a trial court, with one appeal, which trial court shall consist of divisions to include equity, if that is the way to do it, or a separate institution, if that's the way to do it. You do not think there should be an appellate division?

JUDGE HARTSHORNE: I personally do, at the moment. I think it has its advantages, by screening out appeals, as Dean Pound was speaking about today. There must be some screening process, but whether that screening process is set up, as Dean Pound suggested, by calling in a group of the trial judges to sit *en banc*—well, it is less formalized that way.

(Question by Mr. McGrath which was inaudible)

JUDGE HARTSHORNE: I certainly agree, sir; there must be a screening process. I have no great fault to find with the New York

Appellate Division. The main difficulty is on the jurisdictional question to which I have alluded.

COMMITTEE MEMBER: For the record, it's ten minutes after lunch time.

VICE-CHAIRMAN: I understand, sir. We will now adjourn and reconvene at a quarter after two.

(Adjourned for lunch at 1:10 P. M.)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Tuesday, July 1, 1947

(Afternoon session)

(The session began at 2:00 P. M.)

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., Sommer, Smith, G. F., and Winne.

VICE-CHAIRMAN NATHAN L. JACOBS: Mrs. Miller and gentlemen of the Committee:

We have the honor of having with us our Chief Justice, one of New Jersey's most distinguished jurists. As you know, we had invited the Chancellor today, but the Chancellor will not be here, I understand, until next week. We had extended our invitation to Chief Justice Case, and through him to the individual members of his court. The Chief Justice might indicate whether any other members of the court intend to appear before us or whether he is going to express the views of any others in addition to his own views.

CHIEF JUSTICE CLARENCE E. CASE: The invitation from your Committee to myself and the members of the Supreme Court was received, and the court conferred upon it. I am authorized to speak for the other members of the court, as well as for myself, and I think that perhaps none of the other members of the Supreme Court will appear except Justice Colie who received a specific, particularized invitation, and will probably be here. I don't know that his views differ. I think that they do not differ in any material respect from those which I may express to you. But in any event, such as they are, he will tell you of them himself.

VICE-CHAIRMAN: May I explain that the reason for the individual invitation to Justice Colie was that he had requested an opportunity to appear. As a result, we extended an individual invitation, but I don't know whether he will appear on Thursday or some day later.

CHIEF JUSTICE CASE: I think so.

VICE-CHAIRMAN: Chief Justice, we should like to have you, in so far as you feel free to do so, express your views on the Judicial Article in connection with our consideration of a proposed Judicial Article for the Constitutional Convention. Our Committee has been meeting and hearing views without any attempt, to date, to reach any tentative conclusions, but primarily for the purpose of obtain-

ing views as to what would be an ideal Constitution for the State of New Jersey.

CHIEF JUSTICE CASE: Well, I did try to make a few scratch notes and to refer to some books to amplify my own knowledge. It may be the books will stay right in my bag—probably they will. As I said, I am authorized to speak for the members of the court, and in giving you my views I think I am giving you the views of all of the members of the Supreme Court. If otherwise, I will tell you so as I come to the particular point. Justice Colie will tell you what he thinks, and I think you will find that in most respects he will say much the same thing as I am saying.

Now, we don't have the feeling that because our Constitution is a hundred years old it is, for that reason, outmoded. I have heard it said that the Constitution was designed for a rural State of small population and that, therefore, it is to be wiped out. Well, age in itself is not a flaw. If it were, we would seriously be considering wiping out the United States Constitution. The United States Constitution is older by, I suppose, 60 years than the State Constitution, but nobody talks about wiping out the United States Constitution because it is old, or because it was designed for a few states along the Atlantic seaboard with a sparse and rural population.

Speaking generally, it should, I think, be noted that nothing that man does is perfect. Anything that this Convention may do in striving to the utmost to achieve perfection will be found to be imperfect when the accomplishment is had. You may have had the experience of attempting to build a house, and you have employed not only the finest architect you could get, but you have devoted your own ideas, and those of your wife, if you are fortunate enough to have one. You think you've got something that's perfect, and you put it in brick and stone and wood, and when it's done you find so many mistakes that you are inclined to start over again and build a house that really suits you. Now that's all aside, except for the point that merely having something that isn't perfect is hardly a reason why we should throw it out of the window.

We have heard it said, also, that in England they do it this way, and in New York they do it that way, and in Missouri they do it another way. Now, ladies and gentlemen, if you were to go to New York and to England and to Missouri, you would find that they do not think that they have achieved perfection. They have different systems, but what I am getting at is not that what we have shouldn't be changed, but that it shouldn't be changed simply because it is old or short of perfection.

Our notion of the correct approach to this problem is that we should first see what is wrong and then, having discovered what is wrong, find out how seriously it is wrong. Then, having answered

that question, the next question will be: "Well, of the proposals to correct that wrong, which is the best? Is it necessary to have something new, or will the changing of present conditions suffice?"

That, in general, is the way we think the motion toward change in the Constitution should go.

We naturally would start with the Court of Errors and Appeals, not only because that is the highest court in the State, but because it is the court about which there seems to be little or no dispute as to the need for a change. We can apply the same system to that court as to the others. How serious, then, is the wrong and what is the remedy? There are a number of things that are wrong about the Court of Errors and Appeals, and that are seriously wrong. It isn't necessary, in order to make the point, to go into all of them; but for one thing, there is the wastefulness of that court. As you lawyer members know, whenever a case comes before the Court of Errors and Appeals in which Supreme Court Justices have sat below, they get up and walk out of the conference. Those high officials of the State cool their heels walking up and down corridors, or otherwise wait until the court has determined the question upon which they sat below. We think that is rather wasteful of valuable time.

There is the size of the court—16 members. Now, at this table there are 11; take this and add five for the court, and you can see that you get something more like a town meeting. That is wasteful, too, because the time consumed in discussing questions is very great. Just the mere matter of roll call consumes time. I am not criticizing the results of that court in the way of decisions. I believe that, whatever you do, you will not have any better law pronounced. That is not the point. We feel that a much smaller number would give as good a cross-section of differing viewpoints and would be much more saving and more efficient in other ways.

But perhaps the most important fault is the conflict in the duties of the Supreme Court Justices in acting contemporaneously upon the Court of Errors and Appeals and upon the Supreme Court. You perhaps have observed that in the proposed Constitution of 1944 which was voted down at the polls there was a provision that there should be a single term of the Court of Errors and Appeals, and a single term of what is there called the Superior Court. I may say to you that it has been the ambition of the Court of Errors and Appeals for a long time to have a single annual term, but that has been impossible because the nine Supreme Court Justices have also to sit in the Supreme Court. The Court of Errors and Appeals has three terms a year, the Supreme Court has three terms a year. The Supreme Court meets, let us say, for the October term, and then two weeks later the Court of Errors and Appeals meets. Naturally, the Court of Errors and Appeals' work takes priority. The Supreme

Court work waits until the Court of Errors and Appeals' work is done, and that often results in a very long delay. It so happens that at the present time there are a limited number of opinions hanging over from the October, 1946, term of the Supreme Court. We all know that is wrong. Such delay should not be. We are not able to make one year-long term for the Court of Errors and Appeals because that would leave no time at all for the term or terms of the Supreme Court.

I have this suggestion to make to you: while I think, in all probability, the newly designed court of last resort would try the experiment of having a single term and that most likely the the experiment would work out successfully, I doubt the wisdom of putting in the Constitution the provision that there shall be but one term. That should be left to the court. There were a number of things in that proposed Constitution of 1944 that I think should not be in a Constitution, not because they are not good, wise and advisable, but because adequate discretion is not left to the court in some instances and to the Legislature in some instances. I may have occasion to speak more lengthily on that, but at the moment I state our view that it would not be advisable to write into the Constitution what the length or number of the terms of any of the courts should be. That is well left to the court.

We recommend, therefore, an independent court of last resort and such incidental changes as are required by that shift. As to the number of members--probably seven; we think not less, and preferably not more. That was the provision in the 1944 proposed Constitution.

Now, as to something that perhaps will seem to you to be selfish on the part of the members of the court. Nevertheless, it is the recommendation of the Justices of the Supreme Court that the nine Supreme Court Justices and the Chancellor should, by the schedule of the Constitution, be preserved as the judges of the court of last resort, even though they number more than the seven which is the suggested number; those members to continue until their service is ended by death, resignation or retirement.

In a very short time the court would be reduced to seven. You start, presumably, with ten--the Chancellor and the nine Supreme Court Justices--although we cannot look into the future and say that there will be a full quota of judicial officers in office at that time. Nor can we say that the nine men who are now Justices, will be the nine then. I want to give you an idea of the quickness with which changes take place in the Supreme Court and, as far as that goes, in the Court of Errors and Appeals--but particularly in the Supreme Court. I went on the court in February of 1929 and, within a year and two or three months, three Justices had either

retired or died. Justice Katzenbach died, Justice Kalisch died, Justice Black retired, so that, had the situation been existing then, as now, it would have taken but a year and two months for the number to have been reduced from the ten to the constitutional quota of seven. Starting now and looking back, Justice Oliphant took office May 21, 1945; Justice Wachenfeld took office on March 25, 1946; Justice Eastwood took office October 15, 1946; Justice Burling took office sometime in 1947, so that in less than two years there have been four—a man had to drop out when a new man was appointed—there have been four withdrawals from the ten. That is all on the question of whether the court work would be seriously retarded by having, for a short time, a few additional men beyond the seven.

We assume you will have in this Constitution a retirement age; possibly a permissible retirement age, say at 70, and a compulsory retirement age, such as was provided for in the 1944 Constitution, at 75. There is a little confusion—I think there must have been some clerical slip-up—in some of the provisions of the proposed 1944 Constitution in that respect, because in one place it seems to anticipate that the compulsory retirement would be at 70; and in one or two other places, at 75. I think the conclusion they arrived at was at the age of 75, and it was not changed in all instances. Well, of the ten men we are talking about, one member, as you may know, is already well past the age of 75, and there is another member who is within a couple of years of that age, and still another member, speaking of myself, who—well, I'm still on the sunny side of 70—but in five years and a few months, I shall be 75, too. And there are bound to be other changes, so that you would be sure, in a very short time, to get down to your seven.

MR. EDWARD A. McGRATH: Do you mean the 75-year limit should not apply to those in office now?

CHIEF JUSTICE CASE: Judge, my experiences have led me to think that a certain age may reasonably be fixed, beyond which a man should retire. The lack of an age limit sometimes works to the disadvantage of the court. We all remember, doubtless, some instances in which men did some of their best work on the court when they were past 75 years of age. One great old man was on his court until he was 90—Justice Holmes, who shone long after 75. Chief Justice Hughes was there until nearly 80, and his withdrawal, I think, was due to his own desires and not to weakening of his powers. In our own court, Chief Justice Gummere did not begin to manifest any failing in his powers until he was, I think, 80. But it does seem as though some age might be fixed. I don't think it should be compulsory under 75. The fact is that men, as a rule, don't get on the court until they are middle-aged.

MR. McGRATH: You would make it 75 for any retirement and

leave the Supreme Court Justices on the Court of Appeals?

CHIEF JUSTICE CASE: Yes, I think so, for compulsory retirement. That is what I was leading up to. That would assure, if you had that limitation, that it wouldn't be too long a time before your number was reduced.

MR. THOMAS J. BROGAN: Well, Chief Justice, then if a man wanted to retire at 70, you would say that would be all right, but he should not be permitted to serve after 75?

CHIEF JUSTICE CASE: I think so. Now, as to the retirement at 70, it is true that most men have some vitality left at that age, and a good deal of vitality, too, particularly in occupations of this sort. Then it would seem, if a man has devoted most of his life and done it to the satisfaction of the State, he should have a little time to enjoy his life before he's laid away in his two by six.

MR. McGRATH: Wouldn't it be sensible to allow them voluntary retirement at 65?

CHIEF JUSTICE CASE: Perhaps so, provided the judge has put in enough years. I think if you get under 70, you should have a certain required number of years of service. Then, too, there is the present provision—which I think is an excellent one, very seldom taken advantage of, but mighty comforting to a judge—that if he becomes afflicted with a disabling illness which arose after his appointment to the court, he may be retired on pension short of that time. Most lawyers who go on the bench do make some sacrifices. A man can work a great deal better, and I believe longer, if he knows that in the event of an emergency for which he is not responsible, he isn't dealt a devastating blow.

While we are on that subject, I would like to call your attention to something on that point. It was contained in—I have here what I am talking about—it is marked "First Special Session—1945—Concurrent Resolution No. (blank), State of New Jersey, Introduced by Mr. (Blank)." I think it was never introduced. It came to my hands a few days ago, I think from the Chancellor. I believe it is a Resolution that was prepared to carry out the majority report of a special constitutional committee appointed after the Constitution of 1944 was defeated at the polls. You may remember that after that Constitution was defeated at the polls, the Legislature passed a Joint Resolution calling for the appointment of a committee to study particularly the judicial section, as to whether or not something could be framed that would go through. The need for something was urgently felt. Three Senators and three Assemblymen acted, and I think there were six lawyers and judges appointed by Governor Edge, and they met through the Spring season and didn't come to a unanimous result. But there was a majority report and this, I think, was the paper that was prepared in compliance with

that majority report. It was not introduced because it was thought unwise, in view of the opposition, to carry the movement further; but the language in it is what I am talking about. It is this schedule: "When this amendment takes effect, the Chief Justice of the Supreme Court then in office"—this does not mention the Chancellor, but we all think the Chancellor should be included in some fashion —"shall be constituted the Chief Justice,"—and don't make the mistake of thinking that I am making the suggestion that the present Chief Justice should be here named the Chief Justice of the new court—that is simply for continuity in office—

VICE-CHAIRMAN: We have had only one suggestion.

CHIEF JUSTICE CASE: "—and each Associate Justice of the Supreme Court then in office shall be constituted an Associate Justice of the Court of Appeals, and each shall continue as such Justice of the Court of Appeals for the period of his unexpired term as Justice of the Supreme Court, and each shall be eligible for appointment to the Court of Appeals after the expiration of such period; all despite any limitation on the total number of Justices for the Court of Appeals and any age limitation, except that no such person shall be eligible to take or continue in office as a Justice of the Court of Appeals after he has attained the age of 75 years."

This language isn't what you would want, but it goes on and says: "So long as the number of Justices hereunder exceeds seven, the Court of Appeals shall consist of all such Justices, and the number of members who may sit in any case shall not exceed the number of Justices hereunder."

So much for that. I beg your pardon for taking so much time in discussing that question.

MR. GEORGE F. SMITH: Chief Justice Case, you apparently propose a Court of Appeals of seven; and under the present circumstances there would be, temporarily, ten Justices. How would you propose—

CHIEF JUSTICE CASE: Including the Chancellor.

MR. SMITH: How would you propose to utilize the talents of the extra three?

CHIEF JUSTICE CASE: I would have them sit as they sit now. As I shall say in a moment, it is a very difficult thing and I think rather impossible, to anticipate just what volume of work will fall upon a Court of Appeals, in view of the changed situation. I am going to make the suggestion—if I don't forget it—that the Legislature be given authority to vary the character of appeals that shall go up. In other words, what appeals may be taken, and to extend them or restrict them.

MR. BROGAN: That has bothered us. I had a note, and I wanted to talk to you about that.

CHIEF JUSTICE CASE: It may be that this is as good a time as any to discuss that question.

MR. BROGAN: Well, Justice Case, I wanted to say this to you. Here's what was set up before us by a very eminent authority this morning, Dean Pound: one appeal, judgment in a trial court and one appeal. If all of those appeals are to go to the court of last resort, a court of seven might well be submerged by the volume of work. As an alternative—I discussed this with him—would it not be wise to permit the Chief Justice of the court of last resort to set up from the trial line judges an appellate division of three, which Appellate Division would screen out, as has been the practice and has been the experience in the states where that has happened, 90 per cent of the appeals? There might be further appeals to the court of last resort where there was a division in the Appellate Division, or where there was a constitutional question, or where the court of last resort said, "This case is so important, we will take it." I just throw that out to you as a background for discussion.

VICE-CHAIRMAN: Might I add to that, that in your thinking on it, in giving to the upper court the power to create this Appellate Division, might that not be broad enough to allow them to create a number of Appellate Divisions?

CHIEF JUSTICE CASE: I wasn't thinking so much of the Legislature having to do with creating these divisions, as of the character of appeals; what might be appealed from. Now, the 1944 proposal provided for these appeals:—first, in capital cases and cases involving a question arising under the Constitution of the United States or of this State, which appeals shall be taken directly to the Supreme Court; second, in the event of a dissent in the Appellate Division; third, on certification by an Appellate Division; and fourth, on certification by the Court of Appeals to the lower court.

MR. BROGAN: We thought the Appellate Division should have nothing to do with the limitation of that. It should be the court of last resort. . . . That is only a detail.

CHIEF JUSTICE CASE: Of course, that's a matter for debate. What they do in New York is to make a provision like this,—"That appeals in civil cases be as follows: as of right from a judgment or order rendered from a decision of the Appellate Division . . ." Now, I'm not going to take the time to read through all of that, because you can read it yourselves. I suggest to you a reading of the provisions of the New York constitutional provision as to what they allow appeals from, and how the appeals should be taken. These are not meant to be followed; but it is a matter of large importance to decide what appeals there may be. You may wish all of the light that you can get and to know what has been done in other places in that respect.

VICE-CHAIRMAN: Do you contemplate putting directly in the Constitution the type of case that can be appealed, assuming you have an Appellate Division, or would you leave it out?

CHIEF JUSTICE CASE: I think that it might be well to put it in initially, but to leave it to the Legislature to vary.

VICE-CHAIRMAN: Not to the court, but to the Legislature?

CHIEF JUSTICE CASE: To the Legislature. I think that the matter of what is appealable is properly a legislative question.

MR. McGRATH: Justice Case, will you answer this question? Have you anything to say as to the advisability of vesting more jurisdiction in the Circuit Court?

CHIEF JUSTICE CASE: In the Circuit Court?

MR. McGRATH: Yes.

CHIEF JUSTICE CASE: I would like to let that question wait for a moment.

MR. McGRATH: Will you bear it in mind?

CHIEF JUSTICE CASE: Yes. I want to tell you what my experience has been as to the volume of work of the Court of Errors and Appeals, and tell you what the nature of our work is and how we do it.

I came on the court in February, 1929. I seem to have no court lists earlier than the February term of 1932, but when I came on the court, the court was in the doldrums, because the cases were constantly accumulating; the hangover was never gotten out of the way, but was increasing, and from a normal list of let us say 65, 70 cases, we had about 300 on the list at each term, and constantly increasing. I have here the February term of 1932 court list, and on that list there were 272 cases. At the May term, which was the next term following, there were 297 cases. In other words, the list had increased by about 25 cases over the preceding term, notwithstanding the fact that we had resorted to an expedient which is still being pursued—of having the court break up into parts for doing some spade work on all of the cases. I'll explain that to you in a minute. We first resorted to three parts; we now are using two. I find by reference to my list that in the May term of 1932 we were using the three-part division. Notwithstanding, the list had increased, as I have said to you, by 25 cases by the February term of 1932. It was humanly impossible for the court, sitting as an entirety, to complete that list or to keep up with it. We did, finally, through strenuous labors bring the list down to normal proportions, so that each term we could take care of the cases of that term. Now and then there is a difficult case on which the court is at odds, and it is held over to await further study and a better understanding. But, take it by and large, each term's list is completed before the following term begins. To do that, we have still continued with what we

call the two-part system.

The reason I speak of this is that it was mentioned some time ago by somebody, publicly, and some misconception about it got abroad. Every case—I say this to the lawyers—every case is studied by every judge, but the spadework on half of the cases is done by one part and the spadework on the other half by the other part, so that the benefit of some of the labor is transferred over to the remaining part before, as a rule, it begins the study of the case. The more important cases, however, are not left to that distribution. The more important cases are designated by us as general conference cases, and those cases are studied initially by all of the members of the Court.

I have told you what the number of cases was back in 1932 at the May term. At the October term of 1946 there were 81 cases. In the May term of 1947, which is usually the lighter term—the October term catches the burden of work—there were 70 cases.

What the ultimate volume of appeal work will be is a problem which we are unable to foretell. There has been, as you all know, a great falling away in litigation during the war period; witnesses absent, lawyers absent, and what not. The cases are now beginning to pile up in the trial courts. Currently, with us it's like a city along the river lower down than the head waters; the flood starts up above and hasn't reached the country farther down, but you know it's coming. But nobody can tell what the far distant volume of appellate work will be. We'll be saved from some of it if the proposed scheme of limiting the appeals goes through, but from how much we don't know. If the appellate court has jurisdiction to certiorari cases from below—it will certainly have applications for writs of certiorari, whether it grants them or not—that means some study of all such cases. No one can accurately forecast what the volume of the appeal work will be and, therefore, my suggestion is that there be a latitude left to the Legislature to determine what kind of matters may be appealed. If changes are made in the Constitution so that the Chancery Court, or division, or whatever it may be, is prepared to settle law questions, and the law courts likewise have the authority to settle equity questions, all these cases would seem to be more or less in the same situation with regard to appeals. It would seem as though the logical development would be an appeal from both sides, both branches, to an intermediate court. I call it an intermediate court—call it a division if you like; I like the word "court," and I may say something about that in a moment—I hope I'm not taking too much time.

VICE-CHAIRMAN: No, go right ahead.

CHIEF JUSTICE CASE: Now we come to the Supreme Court, and I very strongly recommend to you all that something which

answers for the present Supreme Court, whether by that name or otherwise, be continued. That court serves a purpose more useful to the State than is generally known or considered. I am not very much drawn toward the idea of an Appellate Division—I think that is the expression used in the Constitution recently submitted—made up of men selected from the trial judges for a three-year term. There is a great advantage in having an appellate court composed of men permanently appointed to that court. I believe that speed, facility and continuity of legal principles are better had in that way.

Again, the effect, the potential effect—put it that way—of a Supreme Court Justice, one of the high judicial officers of the State, going down into each of the counties regularly and looking things over, the knowledge that he is going to be there, that he is going to charge the grand jury, that he can mold the grand jury and petit jury lists, that he can remove the prosecutor on application to the Attorney-General, that he can set on foot investigations, is incalculable. You say that anybody could do that. Yes, but not so effectively and with such general satisfaction. A Justice of the Supreme Court can walk down into the court house of any of the counties to which he is designated and take his place beside the judge who is trying the case, and he becomes the presiding judge from that moment. You may not realize the importance of that authority, but I say to you that there is great importance.

I think that the Supreme Court—well, I don't say call it the Supreme Court, call it what you will, I rather love the name of Supreme Court—I realize that if you call the highest appellate court by some other name, as the Court of Appeals, the Supreme Court is not the supreme court. It never has been the supreme court; neither is the Supreme Court of New York the supreme court; but we are married to those names, we like them, they are part of our lives. I feel that it is well worth while to preserve the Supreme Court, except for such functions as you take away from it, and perhaps bring to it the appeals not only from the law courts but from the Chancery Court, so that it becomes an intermediate appellate court as to practically all causes. There are quite a number of things that I wanted to say to you about that, but the time is passing and I think that perhaps I have said enough.

Now, answering your question, Judge McGrath, which was about the extension of the powers of the Circuit Court judges—

MR. McGRATH: Justice, possibly I might say this,—I had in mind routine matters other than appeals to the Circuit Court.

CHIEF JUSTICE CASE: There is one more thing that I must say to you about this; it is quite important that you should place in the provision for this intermediate court that it is to have all the powers that were originally in the King's Bench, or that have been

more recently in our Supreme Court. Perhaps the better expression is, that are not otherwise disposed of. The fact is that our Supreme Court today is the embodiment, the residual legatee, of all the powers of the common law courts, the King's Bench, the Exchequer, and all the rest—except as they have constitutionally been taken away. If you have the provision that this intermediate court is vested with all of the powers of the present Supreme Court, except as they are placed elsewhere, you will have done wisely.

MR. BROGAN: You would retain the prerogative writ power?

CHIEF JUSTICE CASE: Yes. You have touched on the subject of prerogative writs. There is a good deal of misconception there. Those writs are powerful things, and the question which Judge McGrath has asked is not directly related, but it's indirectly related, to the issue of these prerogative writs, because some of those proceedings are by way of prerogative writs. I hesitate very much to have those powerful writs placed in the hands of other than this central body. They need plenty of finesse in handling. I mean by that that there is lots of room for confusion, and before you know it, if they were placed in fresh hands over a wide body of judges throughout the State, you will find that things are very much messed up. Why do I say that? Not because the men who are in the Circuit Court are any less wise than those on the Supreme Court, but men on the Supreme Court come in at intervals and they get acclimated to this thing. When a new member comes on the Supreme Court he has to be watched pretty carefully to see what he does with those writs.

MR. BROGAN: Justice Case, I want to ask you a question. There has been advocated before us the abolition of these writs *in toto.* I wanted to ask you what you thought of it?

CHIEF JUSTICE CASE: I don't think much of that suggestion. The reason is this. Those writs call for particular functions which have to be performed, whatever name you give them. They have different attributes. A good many years ago we undertook to do away with the distinction between contract actions and tort actions. Have we completely done away with the difference? Time and again you have to determine whether a claim grounds in tort, or in contract, in order to get to your pertinent principles of law. We might, if such a thing were within the realm of legislation, say, "We shall no longer have particular medical divisions. We'll not have appendicitis. We'll not have the croup. We'll have just bodily ailments. If anybody gets anything wrong with him he simply has a bodily ailment." All right, he gets a bodily ailment. Very simple. But he still has an appendix, which calls for an appendectomy. He still has the croup, which requires a separate kind of treatment. Why not have technical names, which suggest essentially diverse

functions?

You see, there are different questions involved. There are difficulties that arise in some instances to which legal acumen has not as yet found a wholly satisfactory answer. Let us put the case of the building inspector who will not give the owner of property his permit to build. The building inspector will not issue the permit because he doesn't construe the zoning ordinance in the way that will allow the proposed structure or use. Therefore, the land owner gets a writ of certiorari to review the zoning ordinance. It is true that if he wins under his writ of certiorari and succeeds in having the ordinance construed as he would like, there still isn't actually a direction against the building inspector to issue the permit. What I have done in such instances as that is to say, "Put in, also, your application for a writ of mandamus and we shall carry it along, and if you win, we shall issue to you a writ of mandamus against the inspector."

MR. McGRATH: Would you say the rules should provide a new practice?

CHIEF JUSTICE CASE: I feel that to put those powerful writs in the hands of all the trial judges would result in a breakdown of the theory of the writs.

MR. McGRATH: Anyway, you think they should be left in the Supreme Court?

CHIEF JUSTICE CASE: I think so. Does that answer your question?

MR. McGRATH: I think so.

CHIEF JUSTICE CASE: We recommend for your study—I say we, I am talking for the Justices of the Supreme Court—paragraph 1 of section 3 of the amendment as proposed in the 1932 Concurrent Resolution, No. 7, introduced by Senator Wolber, who was later Circuit Court Judge and has recently died. That reads this way: "The Supreme Court shall possess the appellate jurisdiction heretofore vested in the Supreme Court, except where judgment of death is involved, and the original jurisdiction, civil, criminal or otherwise"—this is what I was talking about a while ago, having something in your Constitution that will carry into it all of your old powers—"heretofore vested in the Supreme Court, etc."

I have some citations here which I shall not read to you, but I shall be glad to give them to anybody who is interested, showing how the old powers of English common law survive in the Supreme Court today.

Now, we come to the county courts; and again the series of questions: What is wrong? What should the remedy be? Well, the abolition of county courts would, we think, be unpopular and unnecessary. People like them. Why should they be changed? I have

not heard any good reason. It is said that they duplicate to some extent. Suppose that happens to be correct? If the people like them, why should you take away from them something that they are accustomed to and that works efficiently? If it is desirable to cut down the jurisdiction of the damage amounts—of the amount that may be sued for—to $3,000 or $5,000, to bring it into line with the New York county courts, I don't see any objection to that. And if you want to combine all of these various county courts into one court, I don't see any objection to that, although personally I do love the old name, Common Pleas. That goes back to the roots. But if you like some other name, it's all the same. If you want to combine the courts, you may, but I think we ought not to deprive the people of something they like.

MR. McGRATH: A number of people have suggested that the county courts should be a general court, and I make the observation, and I think you will agree with me, that the word "common" is the old English word for "general." So that when you say "common pleas" you are merely saying "general pleas."

CHIEF JUSTICE CASE: It was a descriptive name, as contrasted with the pleas to the Crown, and came to give title to the court.

MR. McGRATH: It was a general plea.

CHIEF JUSTICE CASE: Yes.

VICE-CHAIRMAN: I don't take it that you are suggesting that these lower courts be set forth specifically in the Constitution?

CHIEF JUSTICE CASE: No, I would leave them as they now are, subject to legislative control. It isn't necessary to do anything with these courts. If the Legislature wanted to wipe out all the inferior courts, it could.

MR. McGRATH: I would like to note here that the Common Pleas Court isn't an inferior court.

CHIEF JUSTICE CASE: Yes.

MR. McGRATH: Would you say that there is any merit in the suggestion that the Chief Justice of the Supreme Court should be Chief Justice of the county courts and have overseeing power over them to some extent?

CHIEF JUSTICE CASE: I hadn't thought about that, but I want to comment on something that was said a while ago. If you provide for an intermediate court to screen appeals to the highest court, there should, of course, be a head to that court—call him Chief Justice, or what you wish. And, it seems to me, and I think it seems to the court, that it is more logical to have him the directing head over the trial judges than to have the presiding judge of the Court of Errors and Appeals so act. Keep this body of last appeal separate and apart.

In the Constitution last voted upon it was proposed that all of that work should be in the hands of the Chief Justice of the court of last resort, and that he should have an administrative assistant, the theory being to relieve him of all that work. But believe me, gentlemen, you can't relieve him of that work and at the same time make him responsible for it. I mean by that, that the burden will be on him. If he is not to be responsible, then don't make him responsible. It is illogical to make a chief judge of the highest appellate court responsible for the assignment of trial judges if you have an intermediate court in which there is a chief justice there.

Today, there rests on me the duty of making assignment of the trial judges in the lower courts. As a matter of fact, and as former Chief Justice Brogan will bear me out, that really imposes a duty upon the senior judge of the Circuit Court. He makes all the recommendations, but that didn't relieve you (*talking to Mr. Brogan*) and doesn't relieve me of the responsibility. I have all those things to take care of as they come along. Sometimes I do follow the recommendations of my helper, and sometimes I don't. I believe that it is an incongruous thing to put that duty upon the head of the chief of the court of last resort, if you have an intermediate court, with a presiding officer—

MR. McGRATH: Would you have the highest appeal court, the appellate court, assign judges to the intermediate courts of appeal?

CHIEF JUSTICE CASE: No, I would not, because I think that those judges should be appointed in the same way that the other judges are appointed—by the Governor, if he is the appointing officer—and that they should be appointed to that court, and not assigned. They should have a direct appointment; they should have the dignity of that appointment.

MR. McGRATH: Then you would have the highest court of appeal fixed, an intermediate court fixed, and then a substitute for the Supreme Court, or the old Supreme Court?

CHIEF JUSTICE CASE: Well, the intermediate court would be the old Supreme Court and, answering your question further, Judge, I would suggest that the head of this intermediate court, which I will call the old Supreme Court, should, I think, be as now, the directing officer over the Common Pleas judges. For instance, as I am today, I have the authority to transfer the Common Pleas judges from one county to another. I think, perhaps, that that should be preserved.

I am getting towards the end, gentlemen. In coming to the Court of Chancery, again come the questions: What is wrong? What should the remedy be? As I get it, the complaints about Chancery chiefly are the difficulties in the way of getting a decision by a single

judge where the actions are, in a sense, split. That is to say, where law questions arise in a Chancery suit, or equity questions arise in a law suit. That is one thing I have heard complained of. The expense I have heard complained of. I have heard it said—indeed, I saw in the press not so long ago; it was somebody's observation—that a large part of the appeals from Chancery consist of disputes over jurisdiction, as to whether it was law or equity, and that that was a wasteful procedure. Also, I have heard it said that matrimonial causes should be transferred from the Court of Chancery to the courts of law.

This is not the time to make detailed distinction between equity and law as branches of jurisprudence. Sufficient now to say that there is a substantial distinction between law and equity which at this time nobody, so far as I know, proposes to wipe out, and which may not be wiped out without throwing our entire judicial structure into chaos.

Further, I do not understand that there is presently substantial support for the proposal to have but one group of judges who shall hear each case as it comes, whether law or equity. That certainly was not the provision in the proposed 1944 Constitution.

MR. BROGAN: Chief Justice Case, I want to ask you this: The main objection seemed to be that the Court of Errors and Appeals wasted a lot of time in deciding questions of jurisdiction, and that law and equity get delayed in appeals where the question of jurisdiction is raised and there is reversal. Now, of course, I know the history of that just about as well as anybody—I have followed the court decisions—and I want to point out that those cases are very few in comparison with the hundreds of cases that go in and out of equity every year. Assuming that it is a question of a difficulty which should be met, would the court have, well, any remedy?

CHIEF JUSTICE CASE: In the first place, I call attention to the fact that inasmuch as the two systems are not being merged into one system, there are different principles applicable to each. In other words, whoever tries a case, if he tries a Chancery question, he must try it by chancery principles. If it is a law question, he must try it by legal principles. Now, if he makes the mistake, which is the mistake that has often been the occasion for these appeals, of applying equitable principles to settle legal questions, or if, on the other hand, he uses legal principles to decide an equity question, that will still be a ground for appeal.

VICE-CHAIRMAN: Except that on appeal, if you had the merged system, the appealing defendant would lose, where under either principle the plaintiff would be entitled to recover.

CHIEF JUSTICE CASE: That frequently comes in the matter

of proof. It is very difficult to anticipate, and oftentimes there are legal questions and equitable questions in the same suit. That is the sort of action we are talking about.

Now, let us assume another question along that same line. Let us assume that the Vice-Chancellor—call him what you will; the judge sitting in the equity division—has a legal question incidental to the Chancery suit, and it is a question on which the litigant, who is affected thereby, is entitled to a jury trial. Well, now, no matter whether you have a Court of Chancery, or a court of law, or a unified court of equity and law—it doesn't seem to us that there is a great advantage in one system over the other in such matters as that.

The equity court, as a rule, is not geared to try jury cases. Juries are not just pulled out of the air. They have to be brought into court. They have to be summoned. They have to be selected in the first place. There have to be jury attendants. There have to be court officers and constables. There have to be jury rooms where they may go and confer on their verdict. Altogether, it seemed as though questions of that kind—at least so it seemed to us—questions requiring a jury trial would be rather a round peg in a square hole in an equity court—whether you call it Court of Chancery, or an Equity Division. And we think that there ought to be a means of finishing a case where it is tried. I don't think there is a serious dispute about that, provided that things like a jury trial can properly be taken care of. You can't constitutionally deprive a man of his jury, if he is entitled to it.

We didn't see the advantage of a unified court with two systems in any of those matters. It seemed to us that the same problems would persist in an equity division as in a separate Court of Chancery.

MR. McGRATH: You would exclude jury trials in those cases?

CHIEF JUSTICE CASE: My observation on that is no, we don't exclude them, but that the Court of Chancery would be a very difficult court to try a jury case—to get a jury in the first place and to use the jury in the second place.

MR. AMOS F. DIXON: Can a man go into court at any time after a case is started and ask for a jury trial?

CHIEF JUSTICE CASE: I don't think that is a question that can be answered categorically, but here you have a proposal to finish where the case begins, to finish in that court. Now, what would happen today would be this. If a man went to a court of equity with an equity case, and there developed in the course of that proceeding a legal question, a fact question, for which, according to our constitutional provisions, he would be entitled to have a jury verdict, the Court of Chancery would hold the decision until

that question has been certified to the law court, and the answer certified back to the equity court; and the equity court would then, in the light of that determination, decide the equitable questions.

In the 1944 proposal, if you are going to use any of it, there are some things that certainly should be clarified. There are some provisions there that I think are unintentional. They look towards a merging of the two courts, so that you would have one system, not two systems—an equity branch and a law branch—but a merging of the two courts, so that legal questions would fade out as such and you would not have any distinction between them and equitable questions. Well, if that is to be done, it should be done with everybody knowing that that is the objective. Certainly, we should not adopt provisions that are so clouded that they would permit the elimination of the distinction between law and equity as branches of jurisprudence, without a clear conception on the part of the public and the bar that that is being done.

I don't know whether I can call your attention to the particular provisions that I have in mind—I am going through my notes rather roughly and rather quickly—but if you are further interested in that, I can give you the citations as to those matters I think you should be very careful about. When I say "you should be very careful about," you will understand that I am not speaking as a schoolmaster, telling you what you should do. I am simply making the suggestion that those things are matters now deserving of your attention.

VICE-CHAIRMAN: After the conclusion of Chief Justice Case's remarks, we will welcome receipt of any comments, but I assume that Chief Justice Case is covering the recommendations of his court and, of course, with respect to the case citations, we can receive them any time while we are still deliberating.

CHIEF JUSTICE CASE: I will be glad to help in any way I can.

VICE-CHAIRMAN: Personally, and I am sure I can speak for the rest of the Committee too, we want to have any help you can offer us.

CHIEF JUSTICE CASE: I think there is one thing that should be made quite clear. I was privileged this morning to have a little talk with Mr. Russell Watson, who is to appear before this Committee, about some of these matters about which I am now going to speak. He said it was the intention of the 1944 Constitution to authorize a litigant to come into, let us say, the Court of Chancery, with a bill in Chancery that doesn't belong there, and then because he is there to insist upon the court's going ahead and trying a legal question. That gives a man the election of choosing which system he wants to follow, and of going into the equity court with a law case. The thought that Mr. Watson expressed— (*speaking to Mr.*

Watson) you will correct me if I am wrong—was that the rules were intended to cover that.

MR. RUSSELL E. WATSON: That's correct.

CHIEF JUSTICE CASE: But those are matters that should be made clear, because a court obviously would be very slow in undertaking to do by rule what seemed to be against the intent of the paragraphs in which the authority was furnished.

(Off-the-record discussion)

MR. WAYNE D. McMURRAY: May I be excused, Mr. Chairman?

VICE-CHAIRMAN: Surely.

MR. McMURRAY: May I apologize to the speaker, Chief Justice Case, for this interruption?

CHIEF JUSTICE CASE: Of course. My apologies for taking so much of your time . . .

VICE-CHAIRMAN: I think we can continue.

CHIEF JUSTICE CASE: There was some question about the expense of Chancery proceedings, and exactly that means the allowances that are sometimes granted in Chancery. You lawyers will recall that every once in a while the Court of Errors and Appeals says its mind about what the amount of allowance should be and reduces it.

Then, there is a question of switching matrimonial cases from equity into law. That, I suggest, is already a legislative question. The jurisdiction of Chancery of matrimonial matters is legislative, not constitutional, and that can be done by the Legislature any time it wants to. I have grave doubt about the wisdom of putting matrimonial questions into the law courts, but that is something I don't wish to say anything further about, except that it is unwise to put such a provision in the Constitution.

Well, now, the result of it all is that we Justices of the Supreme Court are not convinced of the need of abolishing the individuality of the Court of Chancery, which has added such lustre to the interpretation and application of the principles of equity. We are of the opinion that the correction of its defects may be accomplished with more certainty if the court is preserved, than by a shift to a new system, the shortcomings of which we do not now foresee. We know what we have, but we don't know just what we shall get.

In this closing word let me say that we Justices of the Supreme Court are merely giving our views in response to the very courteous invitation of this body that we do so. We advocate nothing. We oppose nothing. We are simply trying to help by telling you what we think and the reasons why we think that way. Any workable plan that will suit you and suit the people, will suit us.

VICE-CHAIRMAN: Thank you very much, Chief Justice Case. I want to express our appreciation for the help you have given us.

It is now 3:45. We will recess for two or three minutes and then we will reconvene for our next speaker, Mr. Russell Watson.

(Recess. The session reconvened at 3:48 P. M.)

VICE-CHAIRMAN: Gentlemen, are you ready to proceed? If so, then I will call our next speaker, Mr. Russell Watson, who is personal counsel to Governor Driscoll.

MR. WATSON: Mr. Chairman, lady and gentlemen of the Committee:

I prefer to appear before your Committee as a member of the bar and as counsel to the Judiciary Committee which drafted the 1944 proposal, and not as counsel to the Governor. Governor Driscoll is well able to express his own views, and I am quite sure that he will be glad to do so if the Committee will invite him to, as it undoubtedly will.

MR. BROGAN: We didn't know whether he would want to come.

(Off-the-record discussion)

MR. WATSON: I have divided what I have to present, for whatever it may be worth, under seven headings. You have already heard much under all of these headings. Therefore, I shall confine myself to the elements of the subject, at the convenience of the Committee, and in the interest of time-saving.

1. I hope that the Judiciary Article in the proposed Constitution will provide for a new court of last resort, composed of judges who have nothing else to do. That is non-controversial.

2. There should be a better system of appeals. Under our present court system, in one category of cases there is one appeal, and that only on the law. In another category there is one appeal, and that on the law and on the facts. In another category there are two, three and four separate proceedings possible before a final determination is reached. Obviously, that is a waste of time and money. There should be only one appeal in the great majority of cases, and only two in cases of greater import, involving constitutional questions, where the question is of sufficient importance to be certified up or down.

Now, as to the intermediate courts—whether called a court division, appellate division, or what you wish, it is unimportant—I adhere to the Hendrickson Commission report, the 1942 report. It seems to me that the system will be more flexible and more efficient if the judges were assigned to the appellate division or divisions and the court or courts—call it what you please—by the chief, the highest administrative officer of the court system. I think that makes for flexibility and efficiency, each judge being assigned where his

talents are most productive and where he is most efficient. But there is nothing dogmatic about that. I wouldn't object fundamentally to permanent assignments to the appellate division or to other branches or divisions of the court. It has been asked, where would you draw the line between your fundamental organization and detail? I think that is a matter of opinion, but my personal opinion is that much of this could be left to the Legislature.

Thirdly, that members of the judiciary—and I stress this with every power of persuasion that I have; I regard it as the heart of any judicial system—third, that the proposal should provide an independent judiciary, achieved by life tenure during good behavior, and it is immaterial whether it be from the time of appointment or after one term. The one-term provision is a compromise and perhaps it rests on wisdom, but life tenure during good behavior with compulsory retirement at age 70 or 75, I think that is relatively important. I would incline toward the 70 age. Large corporations with retirement systems now usually retire executive officials at 65 or 70, and with that should go an adequate retirement allowance.

When our judges accept a judicial appointment and retire from practice, if their judicial careers terminate, it is very difficult indeed —Chief Justice Brogan is one of the very rare exceptions—it is very difficult indeed, and I have had opportunity for observation along that line, for judges to reestablish themselves in private practice. So therefore, with the retirement proviso should go adequate retirement allowance—pension, if you will.

Now that, gentlemen, I think is the heart of any judiciary system. It is not conducive to justice in public law cases, or in cases involving political questions—I am not now speaking of private litigation—it is not conducive to sound justice in such cases that judges be subservient now, or in the near future, to the appointive power or to election. Let's repose justice in the minds and consciences of judges who are independent, who are not, so far as is humanly possible, involved in the practical effects of their decisions, and who administer justice as they see it. As I said, I want to stress that with every power of persuasion that I have, and I sincerely hope that this Committee will introduce such a proposal.

Next, we come to a unified court. Now, we have started with the court of last resort, with an appellate division or appellate court, and next we come to the court or courts of original jurisdiction—the courts which try cases in the first instance. We have been speaking about appeals.

Now, Mr. Dixon asked a question as to whether anybody can have a jury trial. Well, very briefly, Mr. Dixon—

MR. DIXON: In the middle of their case.

MR. WATSON: Very briefly, our Constitution provides that the right of trial by jury shall remain inviolate. That means it can't be diminished below what it was in 1844. So in many cases the judges or lawyers must be historians—to this extent at any rate, as to whether the right of trial exists or not.

Now, quite generally, jury cases, so-called, are tried in the law court. But that is very elementary and too simplified. Quite generally the equity courts—in fact, exclusively, except occasionally in an advisory capacity—equity courts do not employ a jury. Equity cases are tried by a judge without a jury. Where a jury is necessary, for instance, just to use an illustration, if you were partners and if I trespass on your land, and I do it habitually, and have done it for some time, and did it with the intention of continuing to do so, and I do it under a claim of rights, and you want damages for my trespasses, and you want to restrain me from doing it in the future, under our present system you would have to go into the law court for your damages, because damages can be awarded only by a law court and jury, unless the jury is waived. The law court has no jurisdiction to issue an injunction. So, if at the same time you wanted to restrain future trespasses, having established your right in the law court, then you would have to go to a separate court, the Court of Chancery, for an injunction, because the Court of Chancery can allow injunctions, but it cannot award damages.

Thus, we get down to the trial of the case in the court of original jurisdiction. As set forth in the 1944 report, this trial court should be divided into two divisions, sections, branches, or departments—call it what you please—a law court and an equity court, the equity court also having the probate jurisdiction, as now under our present system of Prerogative Court, Circuit Court and Orphans' Court, which are our probate courts and which are quite closely associated with the courts of equity.

Well, now, that is settled. That is not too difficult so far, but the difficulty is—and this is the great controversy raging; I don't know whether "raging" is the proper word or not at the moment—what to do about these cases? They are more frequent than is generally considered. Now, what to do about these cases which exhibit both legal and equitable issues? These are the kind of cases I was just speaking about. Another class of cases that would fall into this group are labor disputes and certain kinds of cases affecting the public interest.

Now, suppose such a tribunal were to make a decision and suppose one party to the dispute wanted to appeal from that decision on the merits, and suppose the other party is recalcitrant and also wanted to enforce the order of the tribunal? Or, suppose the tribunal wanted to enforce its own orders? Now there, under our

present Constitution, we would have to submit to the jurisdiction of two courts, because only in the Supreme Court can one ask for a prerogative writ, a writ of certiorari, which Chief Justice Case would issue. They review the proceedings of an inferior tribunal. The Court of Chancery can do nothing but enforce this order; if it be by injunction—an injunction to enforce the order.

We had a recent decision illustrative of that, the *Lewis* case—the coal strike case. The tribunal, or the third party, would have to go to equity to enforce the injunction, because only a court of equity can issue injunctions. The Supreme Court can't do that. The Court of Chancery only can issue injunctions, but it cannot review the proceedings of the inferior tribunal. So here you would go two ways, to two courts, to review the order of this inferior tribunal. Then, if either party were dissatisfied, you would again go to the Court of Errors and Appeals for review of either or both decisions.

Now, members of the Committee, that seems to be ridiculous. The cases can be multiplied. It is late, and I am not going to take your time to do this, but I have here a practical illustration of this. I will cite for the record the case of *Jessop* v *Passaic Valley Water Commission,* decided by Vice-Chancellor Bigelow, *117 N. J. Eq. 31,* and that is the judge who, sometime ago, in 1934—let me review that case very briefly—just one example.

In that case Mr. Jessop owned land on the Passaic River. He was a riparian owner. The Passaic County Water Commission was diverting water above. Mr. Jessop, the lower riparian owner, complained against that diversion. He said the lower riparian owners were entitled to the undiminished flow of the stream, unimpaired in quality. So he applied to the Court of Chancery for an injunction restraining this diversion. Well, said the Court of Chancery, you can apply, but we can't allow you an injunction unless your legal right as a riparian owner is clear. Now, if there is any doubt about your legal right, said the Court of Chancery, you must first go to a court of law to establish that. Then come to us for an injunction. If you file your bill and it finally appears that there is no doubt about your right—if your legal right is clear—we will allow you an injunction; but if it turns out your legal right isn't clear, we won't, and we will send you to a court of law. If you stay here you will have to gamble as to the outcome.

Now, you will say that is absurd, but there it is—a decision by one of our best judges. I won't take any more of your time, but I have here from the *Advance Sheets*—these are current court decisions, but not yet in the bound copies—I have here four or five cases of disputed questions of jurisdiction, where the parties either had to go to one, to two, or more courts—in one of these cases to three courts—where the parties had to go to two courts to get

final justice.

MR. McGRATH: I was wondering if you wouldn't put those in the record?

MR. WATSON: All right, I am going to refer you to another case by Vice-Chancellor Bigelow. It is in *139 N. J. Eq. 588,* decided in 1947. I think that case is a concrete illustration. In that case a man died, left a will, left some real estate to trustees, to pay the income to one beneficiary and upon death of that beneficiary to turn the property over to others. There was a life beneficiary, a life tenant and the remainder. Now then, there was a mortgage on the property. The trustee used the income to amortize the mortgage —to pay off the principal of the mortgage. There were three accountings. Everything belonged to the life tenant and was used to reduce the principal. So after this had been approved by three accountings in the Orphans' Court, the life tenant discovered that and tried to undo this apparent wrong. She appealed to the Prerogative Court. Now, then, one of the parties wanted the Prerogative Court to restrain the party who was entitled to the principal after the death of the life tenant, from claiming that these payments that had been made from the income should not be charged against corpus. That called for the construction of the will. Vice-Ordinary Bigelow, in the Prerogative Court, said the court can't do that. It had no jurisdiction to instruct a testamentary trustee. A testamentary trustee always has a right to bring suit in Chancery. You must go to the Court of Chancery for that.

Also, one of the parties wanted the property sold. Vice-Ordinary Bigelow held that the Prerogative Court, as well as the Orphans' Court, lacks jurisdiction. All Vice-Ordinary Bigelow had to do in this case was turn his bench around and he was Vice-Chancellor Bigelow. Can you tell me, members of the Committee, why those parties should have to start over again and go back to Chancery? Why, Vice-Ordinary Bigelow should have moved over to the next bench and said, "Now, I'm Vice-Chancellor Bigelow and I'll decide this case."

These other citations I have here are some of the few that you can find—there are dozens of them in the current cases.

VICE-CHAIRMAN: May we have the citations for the record?

MR. WATSON: *Robinson* v *Hodge, 139 N. J. Eq. 189; Weber* v *L. G. Trucking Company, 140 N. J. Eq. 96; Independent Taxi Owners Association* v *Cuthbert, 135 N. J. L. 335.* I picked those out of a couple of dozen *Advance Sheets* of the last six months. Let me hurry along here.

Now, in these matrimonial causes, the 1944 provision was that they should be tried in the law section. The cause is statutory. That was a convenient way. It would provide judicial work that

could well be accomplished by judges sitting in what are now county courts. I don't think it makes much difference whether the matter is in the law section or the equity section.

I'm going back to the unified court. I've left out the punch line. We proponents of a better court system in this respect make a thoroughly concrete suggestion, that cases where the major issue is legal shall be tried in the law section; that cases which are predominantly equitable, where the major relief sought is equitable, should be tried in the court of equity; and that where a case presents both equitable and legal issues, it should be disposed of by the court that hears it. There are two provisions in the 1944 section: one is that each controversy shall be decided by the court and judge who hears it; and the second, that the law section or equity section shall exercise the jurisdiction of the other, where the ends of justice require it. We think that is entirely workable. True, in some cases the Court of Chancery would have to draw a jury. Why shouldn't the Court of Chancery sit in the court houses where juries are and where jury facilities are, and jury rooms are? There is no reason at all why that shouldn't be done. It is a matter of mechanics and presents no insurmountable difficulty.

Now, the county courts—I submit to the Committee that these courts have original jurisdiction. The law section and the equity section should also exercise the jurisdiction now exercised by the county judges. You have heard that before. There is no reason to repeat it. Much is said, and rightly so—I subscribe to it thoroughly —that the county courts should have that local touch; that they should know the conditions in the county in which the judge sits; the people of the county should know the judges—therefore, that in this law section at least one judge should be appointed from and should sit in each county and should exercise this jurisdiction. It would give the local contact which is essential to the efficiency of the court system.

My predecessor at this chair spoke of prerogative writs. He is not only my predecessor, but my friend, and I have great respect for his position, for his experience, and for his legal knowledge. Nevertheless, I disagree with him respecting prerogative writs. He spoke of the difference between a tort and a contract. Chief Justice Case said that was abolished a few years ago. That is true, but tort cases and contract cases are now heard by the same judge in the same court and the litigant doesn't have to litigate any more whether a case is in tort or in contract. We think that same result should be achieved in the prerogative writs. Chief Justice Case spoke of the lawyer who applied for a writ of mandamus, and the Chief Justice had great difficulty making it clear to him that he wasn't entitled to a writ of mandamus, but should have applied for a writ

of certiorari.

Members of the Committee, not only do judges differ, not only do lawyers make such mistakes and make them often, but the justices themselves are in disagreement about it, and you can find many cases in the books where the courts disagreed—lengthy opinions, historical opinions—divided courts, as to whether the litigant is entitled to a writ of mandamus, which is designed to compel somebody to do something; a writ of certiorari, designed to review the proceedings of an inferior tribunal to determine whether they are legal or not; or a writ of quo warranto, by which the title to an office, public or private, is tested.

So you can see how such a situation as the Chief Justice cited, is a close question, whether you merely want the proceedings of the inferior tribunal reviewed and sustained or set aside; or whether, in addition, you want some affirmative relief—somebody compelled to do something about it. The Chief Justice said that he suggested to that litigant's lawyer that he apply for two writs, certiorari and mandamus; and after the certiorari proceedings were completed, if a mandamus proceeding was still necessary he could start that. Why do that, we say? Why bother about whether it is certiorari, mandamus? Let's call it hocus-pocus, or XYZ—that isn't important —let's decide the case. So there again—now this 1944 draft—

(Inaudible question by Mr. Brogan)

MR. WATSON: I think so, but I don't care whether it is done by rule or provision in the Constitution. Let's do it. This provision undertook to accomplish it by Article V, Section III, paragraph 4, which it seems to me would do it, and quite simply. We have an application for any prerogative writ. The Appellate Division, or the Justices of the Supreme Court, shall allow such writ as the case shall warrant. What's the matter with that?

MR. FRANK H. SOMMER: May I ask the Chief Justice a question on that? Isn't it true, under the statutes as they stand now, the court has that power?

MR. BROGAN: Precisely.

MR. SOMMER: They haven't exercised it, that's all.

MR. BROGAN: That's right.

MR. SOMMER: We're not concerned with the reasons why the court has not exercised it.

MR. WATSON: Well, Dean Sommer, the Essex County Bar Association recently published a long dissertation on the refinements of the prerogative writs, the distinctions between them.

VICE-CHAIRMAN: What did you think about them?

MR. WATSON: I was dizzy when I finished reading it.

MR. BROGAN: Did you think it had any real merit?

MR. WATSON: Well, I'd rather not say, Chief Justice Brogan.

It certainly showed this entire subject of prerogative writs is in a vague, ambiguous, hazy, nebulous state, and something should be done about it.

MR. BROGAN: Did you ever make the kind of a mistake you are pointing to, made by others?

MR. WATSON: Yes, sir. Yes, I have; of course I have.

MR. BROGAN: You asked for mandamus when you should have had certiorari?

VICE-CHAIRMAN: Or vice versa.

MR. WATSON: Personally, I've never had that experience; but I have been in many cases, Chief Justice Brogan, in which questions of jurisdiction, usually on the equity side, have been argued. The last one that I had personally, professionally, was an appeal from the Orphans' Court to the Prerogative Court. When I read the cases as to whether the appeal would lie in the Prerogative Court or whether I would have to go to the Court of Chancery, I just rested my head in my hands. I really didn't know, and I couldn't find out from the adjudicated cases. Now, it is said—I heard it said awhile ago here—that these cases are infrequent. That isn't so. In the first place—

MR. BROGAN: I said that; it was said here.

MR. WATSON: All right. If this Committee will examine the reports for the last year or two, you would be surprised to see how many such cases there are. I think you will find that on the equity side—many cases in which jurisdictional questions are argued at length, in which the Vice-Chancellor spent much time deciding those cases. This case of Vice-Chancellor Bigelow that I referred to, goes back to Governor Cornbury, 1744, and the King's Bench, deciding jurisdictional questions. So it does occur frequently.

MR. BROGAN: Don't you know some judges have to shake the tree of knowledge?

MR. WATSON: But the tree of knowledge bears no fruit. There are many such cases. I think you will find it runs up to 20, 25—one case in four, five, six or seven that such cases arise. It is a denial of justice. If I were to consult my client, I would say, "Forget one or the other—you have to go to two courts—take your choice." That's the first trouble. Now, the second trouble—and this goes to this system of appeals, or stated terms, which take so long—the delay, the litigation—most lawyers, I think, say to their clients, "If you get a fifty percent settlement, take it. Don't go to court. The winner is a loser."

So this system denies justice, in that it restrains litigants who are entitled to a decision, whether they win or lose, and who could seek it were it not for these archaic, antiquated rules, which were long ago out-moded and long since discarded.

MR. BROGAN: Wouldn't this trouble, this conflict, be eliminated if in the court of last resort there was a rule-making power?

MR. WATSON: Yes, sir. Where a case presents both legal and equitable issues, which court should exercise jurisdiction would be decided by rules promulgated by the top Court of Appeals.

MR. BROGAN: You couldn't go into equity with a shred of equity and that much law.

MR. WATSON: It would be dismissed.

VICE-CHAIRMAN: You referred to a unified court with provision in the Constitution to allow to the Court of Appeals the rule-making power to change divisions, or enlarge divisions, or create new divisions, as experience required?

MR. WATSON: I say that I favor that. I think it makes for flexibility, efficiency. The presiding justice would know the capacity of the judges, their experience, their attainments, and he will assign them not only where they are most useful, but where they are most needed.

I did say there is a strong sentiment in this State—we hear much about specialization of equity judges. I can't subscribe to that. There are lawyers who practice in both courts. I wouldn't hesitate to take a case in a court of law, or in the court of equity. Now, if I can try cases there, if I were a judge, why couldn't I decide cases there? Chief Justice Brogan never sat in a court of equity, but in the Court of Errors and Appeals he was the presiding judge, in the court that reviewed all equitable decisions, and I say here that he did it very well. A genuine expert. I think the sentiment is rather ill-founded.

MR. SOMMER: I was going to suggest that in the court of last resort you have no one especially qualified in equity sitting, because you disqualified the Chancellor.

MR. BROGAN: Is that quite true? If a man sits for a term or two in the Court of Errors and Appeals reviewing equity decrees and studying equity cases and equity principles, is he not quite expert in equity?

VICE-CHAIRMAN: And law.

MR. BROGAN: Why should he not be?

MR. SOMMER: I don't know.

MR. BROGAN: The answer to that would be the *nisi prius* judge, when he is tossed into an equity court, with a string of trust cases, and constructions of wills, and so on. How would he do with those things?

MR. WATSON: I agree to that. I think there should be an equity branch and a law branch. The question put to me was whether there should be a flexible system for the judges to go from one court to another as the circumstances dictate or whether they

should be permanently assigned. I favor the more flexible system, but I wouldn't quarrel with a permanent assignment. Mind you, just a few minutes ago, Chief Justice Case told of the judges, the number of judges, that had been appointed during his incumbency. It didn't take those judges very long to become really expert in both branches of law.

MR. BROGAN: As a member of the bar, I want to say something for the bar. I think that a splendid body of jurisprudence and equity has been built up by the labors of the members of the bar.

MR. SOMMER: That is the point I want to make.

VICE-CHAIRMAN: Before we get into further executive session, let Mr. Watson finish his remarks.

MR. DIXON: In connection with this matter of rule-making by the highest court, will that power be restricted or will it be so broad that if we had some Justices of the Supreme Court, the highest court, who wished to, could they pass rules which in effect would be, as it were, all the way down without making any of these changes?

MR. WATSON: If these provisions, to which we have been referring, are inserted in the Constitution, the rule-making power would have to do merely with the application of these fundamental principles, namely, if a litigant applied to the equity side, filed a bill in the equity side, and obviously he was seeking a legal remedy, the rules would provide that he be sent over to the other court where he belonged. It is the administration of the principles which your Committee will lay down, I hope, that will be covered by the rules.

Now, also, it could be provided this way. The Court of Appeals, the court of last resort, shall have the power to make rules, procedures, which shall have the force of law, unless otherwise provided by law. Now, some claim that that would give the Legislature some control over the rules. Personally, I don't favor that. We have three coordinated branches of the government—legislative, judicial, and executive. The making of rules governing the courts is a judicial function that should be reposed in the Judicial Department. But the court couldn't circumscribe the constitutional principles.

MR. SMITH: You and Justice Brogan seem to think certain things cannot be in the Constitution, and we come back to your question—could the rule-making body forget to establish some of the desirable rules?

MR. WATSON: Oh, no.

VICE-CHAIRMAN: Remember what Dean Pound said this morning, that with the rule-making power, the Court of Appeals would have to adopt appropriate rules; otherwise the courts couldn't

conduct their business.

MR. SMITH: You were speaking of prerogative writs. You mentioned a section in the 1944 provision that would cover it, and Chief Justice Brogan said, "Could that not be covered by rules," and you said, "Yes." If the court of last resort felt the prerogative writs were not inviolate and should be changed, would it be possible to forget the changes proposed in the revision?

MR. WATSON: I would favor a constitutional provision, such as was cited. Where application is made for prerogative writs, the courts would grant such writ as the facts and circumstances require or justify. I think it should be constitutional. As Dean Sommer just said, the courts couldn't do that now. I think it has not been done.

Now, just one more point, and that is court administration. This entire court system should be administered by the Chief Justice, or whatever his title might be. He should have an administrative assistant. As Chief Justice Case said, that would be a considerable administrative chore, and the Chief Justice would have to rely very heavily on his administrative assistant. Nevertheless, the system prevails in the United States. The Chief Justice of the United States Supreme Court is the administrative head of all the courts. He has an administrative assistant and it works very well. If you think that would be too much of a burden for the Chief Justice, there could well be a presiding justice of this law section, a presiding judge of the equity section—call him Chancellor if you would —who would be responsible for all the administration of each of the two sections. They in turn would be responsible to the Chief Justice. That would lighten the administrative work and streamline it, the way executives like Mr. Smith do in their blueprints.

MR. SOMMER: That would have the advantage in the first instance of having some person who is familiar with the work of the court, and actually they would be concerned, they would be the ones making the assignments.

MR. WATSON: I read in the paper just yesterday that the Court of Pardons, meeting this term, was amazed by the conflicts, dissimilarities, lack of policy, in the imposition of sentences in the criminal court. In some cases defendants convicted of crime were dealt with severely, and others lightly. In an administrative system such as this, the Chief Justice, the top man of the courts, would be the presiding justice of the lower courts, and would see to it that the judges sitting in the counties in criminal cases, had some rhyme and reason, some theory, some coherence about the imposition of sentence.

MR. BROGAN: You would never get through with a thing like that. How could you superintend that?

MR. WATSON: Well, how does the Chief Justice do it?

MR. BROGAN: I don't think he superintends anything of that kind.

MR. WATSON: I think it is done that way. Just the other day I was talking to somebody about it—I was talking to Judge Smith of the United States District Court. Now, there, under the supervision of the Chief Justice, District Court judges meet in conference and discuss the questions that are common to them, questions on the administration of the court and, I assume, I don't say so specifically, I assume the matter of sentencing, so there is some consistent policy. It needs some activating force from up above to convene such conferences and such discussions. How far it would be carried, I don't know. I think it would be a long step. I think this machinery should be provided. That is all I have to say.

VICE-CHAIRMAN: Any questions?

MRS. GENE W. MILLER: You mentioned that you thought it was immaterial whether there would be an initial term for the appointment of a judge and then appointment for tenure, or not. It seems to me to be quite material. Will you give us your personal views about whether there should be a seven-year initial term?

MR. WATSON: Did I say immaterial? It was a poorly chosen word. It isn't immaterial at all. I favor tenure from the beginning.

VICE-CHAIRMAN: Life tenure?

MR. WATSON: Lifetime. That principle has been hotly debated by bar associations all over, and the provision that life tenure become effective after one term, or five, six, seven years, whatever it might be. It's a compromise, of course. All these matters are compromise. I would regard it as an acceptable compromise. It might be the wise compromise.

MR. SMITH: In the 1944 revision there was, under this tenure, a provision that the justice would hold office so long as there was so-called good behavior. There was no provision for physical or mental disability. Do you think such a qualification is—

MR. WATSON: No reference to disability in there?

MR. SMITH: No.

MR. WATSON: There should be. It is provided for in the United States courts by statute. The President may retire a judge who is disabled, for disability shorter than the 20 years—I think it is 20 years—continuous service. The President may retire a judge for disability and retire him on pension, or he may just retire him, subject to recall for special cases.

MR. SMITH: We have no such provision?

MR. WATSON: That's right.

MR. SMITH: It should be?

MR. WATSON: It should be. Well, if not constitutional, then

statutory. I think those subjects should be covered. It was hard enough to get this much in. That didn't stay very long.

MR. DIXON: The Constitution didn't mention that; it just stated that the judges should be retired at 70. Would an attempt to pass a statute to retire a judge on account of disability, would it be thrown out?

MR. WATSON: I don't think so. You could provide by statute —you could not circumscribe the Constitution. You could add to it additional provisions.

MR. DIXON: I take it that you don't feel at all that we ought not to distinguish between equity and law, and have all the cases go into the court with the same judge, regardless, just the same as they do in the federal court.

MR. WATSON: I think not.

MR. DIXON: You think we ought to have divisions?

MR. WATSON: I suppose it happens to other states, too, a lot of times, and effort has been spent and labor has been spent to ascertain what other states have done about this, and that, and the other thing. But after all is said and done, these important questions will be decided in the light of New Jersey experience, New Jersey tradition, New Jersey geography, and New Jersey needs. Now, there is such a strong tradition for the Court of Chancery in the State of New Jersey, that in my judgment it would be well to maintain a separate equity branch.

MR. DIXON: However, you are setting this thing up so that on cases that have some law and a lot of equity, or a lot of law and a little equity, still goes through one court.

MR. WATSON: Exactly—where one judge has to decide the whole thing.

MR. DIXON: Now, if you go that far, you are going to pick that line of cases out and say, "Well, we'll dismiss these cases, they are not going to be very well adjudicated, because the judge doesn't have the right experience." But on the other hand, where it is clearly equity and clearly law, they will do a better job there.

MR. WATSON: I don't admit that. I think those cases will be just as well decided as the other, in my judgment, solely because of the strong tradition in New Jersey for a separate Court of Chancery. It would antagonize many, resistance would be set up and probably jeopardize the entire document.

VICE-CHAIRMAN: If it weren't for that, just discussing your thought as to what would be a perfect system—

MR. WATSON: One trial court.

VICE-CHAIRMAN: One trial court with complete merger?

MR. WATSON: Right.

MR. SMITH: Would that hold true of probate questions, too?

MR. WATSON: Yes.

MR. SMITH: As a layman, it seems to me that we have a very complicated system in our Orphans' Court and probate section. That is something that is not within the provisions of the Constitution, as I see it. How should that be changed to make it more simple?

MR. WATSON: All jurisdiction that is now exercised by those courts should be lodged under the proposal which I have just been discussing. It should be lodged in the equity section. But, in answer to Mr. Dixon's question, if we carry it out to a logical conclusion, disregarding tradition and political consideration, and invest all judicial trials, jury decisions, in one court, then, of course, this probate jurisdiction will go there, too.

VICE-CHAIRMAN: Any further questions?

(Silence)

VICE-CHAIRMAN: Thank you very much, sir. We appreciate your coming and we are sorry we kept you so late.

We shall adjourn until tomorrow morning at 10:00.

(Session adjourned at 4:50 P. M.)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Wednesday, July 2, 1947

(Morning session)

(The session began at 10:00 A. M.)

The fifth meeting of the Committee on the Judiciary was held in Room 202, Rutgers University Gymnasium, New Brunswick, New Jersey.

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., Smith, G. F., and Sommer.

Vice-Chairman Jacobs presided at the request of Chairman Sommer.

VICE-CHAIRMAN NATHAN L. JACOBS: We have invited Judge Brennan of the Essex Circuit to let us have his views with respect to the proposed Judicial Article of the Constitution.

JUDGE DANIEL J. BRENNAN: I don't know whether my appearance here is an intrusion or not, but my viewpoint hasn't changed on the Judicial Article. I spoke on the subject some years ago before the State Bar Association and, apparently, I got to the meeting at night, late, as I usually do, and knew nothing about the action which the State Bar Association had taken in the afternoon. They had gone on record against the then proposed changes which are now a matter of, unfortunately, history.

I have felt for a very long while, as many others have, that certainly the court of last resort is an anachronism, that our judicial structure has changed very little from the time of its institution. If my recollection serves me clearly, it goes back to the early 18th Century. I think we need an integrated court, and I thought so, as I have said, for a number of years. The structure, for want of a better term, the architecture of it is a matter for projection by you men who are older than I, wiser I am sure, and who have been able to spend a great deal more time in actual implementation for the past few weeks, because I have been travelling the circuit—I have just come up from Camden.

There always seems to be, I suppose, the inclusion of the personal. If one has the idea my viewpoint is personal, it isn't. It isn't directed toward anybody; it is directed towards what I think is a system that needs changing. I think it was Emerson who said, "we revere the statute," and he said as well, "so much of life as there is in it is its virtue."

I think, if that is true of the adjective law, it is true as well of

the organic law. Certainly I think our own State has not been remarkable in change. That is essential to the change from error. There seems to be some considerable apprehension about the problem of integration as it affects the courts of equity. Dean Sommer can likely tell much better than I could—I refer to experience, and Chief Justice Brogan has had a longer term—of the success of the system in New York. I think that the equity side was brought in as part of the general partnership, and very effectively. I saw it operate as a much younger man than I am now. I saw judges translated from one court to another with apparently no friction and with the same degree of success on that side as on the law side. Of course, the general court structure certainly ought to have a pattern that would follow to some extent the New York structure, I think. That again, as I say, is a matter of implementation.

As far as my own experience is concerned—I say that without egotism, I hope; I would rather say "we" than "I"—we in the Pleas for a great many years (just going back to the history of the Pleas) have been sitting in on the civil side, on the criminal side and on the probate side, and I think with reasonable effectiveness. Not all judges are men of equal merit. Some are better than others. Most of those that I have met are very good judges, but I haven't noticed any degree of shock if a man goes from law court to probate. Of course, maybe I haven't interrogated the bar as closely as I should. Sometimes lawyers don't tell us the truth about ourselves when we are justices. I say, seriously, that I see no shock by that translation.

Now, it seems to me that we all concede, we who are lawyers, that equity generally is founded on a series of broad maxims and a philosophy which is as well known to the other lawyers as it is to me, and the action proposed is largely the problem of equity. There are confusing human factors, rather unusual situations. But the general philosophy which I have presented is more or less of an umbrella, and in bringing litigants in under that, it would seem to me a no more serious problem than it is in Pleas to go from one branch to another, and it might well make for better on-the-job decisions. That is my entire opinion.

Of course, as far as the general construction is concerned, the extent to which you would go, how many courts should be brought in—it would, I think, seriously be an intrusion for me to say, because I haven't been able to give the present plan the same first-hand examination as I was able to give the last, principally by reason of lack of time. I haven't had time enough. You men probably know that the circuit has been short for some time, and I have been travelling from Camden to Trenton, Woodbury, New Brunswick and Newark.

But that, in brief, is the substance of my feeling about the general structure. I say the architecture of it and its implementation is a matter for a Committee like this, which has given a great deal more time to it than I have been able to do. I don't think there is anything more I can or should say. I don't want to appear pontifical in the presence of such intellects as Dean Sommer and Chief Justice Brogan. That is my viewpoint.

VICE-CHAIRMAN: Do you care to express an opinion on the questions of tenure, compulsory retirement, pension or appointment?

JUDGE BRENNAN: Yes, of course. If a man has done a good job, there is no plausible reason why he should not be continued in office. I think the terms might well be longer, or maybe the experimental term could be shorter, and the secondary term longer.

MRS. GENE W. MILLER: Do you think it necessary to have an experimental term at all?

JUDGE BRENNAN: I don't know. I would rather seek the viewpoint of the Governors, who have been the appointing power, on that.

So far as retirement is concerned, I think it ought to be made compulsory, and I think it ought to be an age younger than 70.

VICE-CHAIRMAN: Younger than 70?

JUDGE BRENNAN: Yes. I saw a striking illustration of that, depending on where you sit. The then President of the United States was accused of packing the court in an unsuccessful attempt to make certain changes. I think it was probably a skirmish in any event, but the best brief on the subject, which nobody saw and which could have been filed by the proponents of that plan, was in the financial section of a paper as conservative as the *New York Times,* to the effect that the then president of the Consolidated Gas or the New York Edison Company was being retired because he had reached the age of 65. I think it was George B. Cortelyou, who was one of the secretaries under Theodore Roosevelt, singularly enough. And attached to, and part of the general arrangement, it was indicated that his successor could only spend 14 months in the position, because he would then have reached the age of 65. It seems to me that the strain put on that man is no greater than that put on judges who work as hard as Supreme Court Justices do.

I don't know whether "compulsory" is the word, but certainly "optional." Of course that is rather an extreme viewpoint.

MR. GEORGE F. SMITH: There is a distinction in business, however, Judge. We generally believe in business that the responsibilities of operation, as distinguished from exercising policy judgment, spell out two different retirement ages. We say, for example, that the problems of supervising wide, separate operations, getting

down into the details of business, may be an unreasonable burden upon, say, a man of 65. The judgment and experience of a man in business can be of great value if he can sit back and guide some of the younger men who have the energy and ability.

JUDGE BRENNAN: I suppose it is a matter of where you sit.

MR. SMITH: That is right.

JUDGE BRENNAN: But as an opposing viewpoint, there is the capacity and the authority of the chief executive in business to delegate a great many of the functions that keep the corporation a fluid and going concern. The judge doesn't have that power of delegation, so I think the wear and tear generally are comparatively much the same. I think maybe I should not have said "compulsory" but "optional."

MR. AMOS F. DIXON: The difficulty with "optional," as I see it, is that the men who are really in a position where they should be retired are the last ones to accept that option, because those men are the last to acknowledge that they have reached the point where, perhaps, they are letting go a little bit. This retirement age of 65, used by a large number of the very largest industries, does unquestionably retire men who have great ability and could continue. But that age is kept compulsory just exactly for that reason, because if you leave it optional—I have seen it time and time again in industry—men who retire at 65 and whose associates really felt should have been retired earlier, were the ones who thought they were being discriminated against when they were supposed to retire. But they could not get away from the firm rule under which everybody was treated the same. Now, in some industries there is an optional retirement at an earlier age—say, at 60—and compulsory retirement at 65.

JUDGE BRENNAN: Yes.

MR. DIXON: And I think in industry as a whole, that has worked very well. I have seen quite a little bit of large industries.

JUDGE BRENNAN: On the whole, it is good. It is rather a human characteristic, I think, to consider age in comparison with the other fellow. It is rather an unpalatable thing to face at a certain age, and very few people will, as far as their own case is concerned, admit to themselves that they are no longer efficient at 70 or 75. Of course, men have varying abilities; not all men of a certain age fall into a class that is fixed, but I would say that 70 would be about the peak of effectiveness either in or outside of industry.

MR. WAYNE D. McMURRAY: Judge Brennan, suppose the retirement age were fixed at the unusual figure you suggest, which is much younger than any we have heard so far. Those men would then, of course, be retired on full pay or part pay, or whatever it

happens to be. Wasn't there a suggestion made in connection with the federal system at one time, that those men be retired, but be subject to call on the part of the Chief Justice?

JUDGE BRENNAN: Not only suggested; it was put in operation, as I recall.

MR. McMURRAY: Wouldn't that solve the thing and be the salvation of the value of the man—we recited instances yesterday—who reached an advanced age and who were still outstanding mentally. Those men could be utilized.

JUDGE BRENNAN: That would depend entirely upon the general judicial structure, whether or not this reference is necessary and advisable. If my recollection is quite clear—I don't know whether you remember or not, Chief Justice Brogan—Justice Sutherland, I think it was, sat in a District Court of New York after he retired—

MR. THOMAS J. BROGAN: Either he or Vandeventer.

VICE-CHAIRMAN: It was Vandeventer.

JUDGE BRENNAN: It was one. That answers that part of the question. But what conditions preceded that? Of necessity comes the structure. Your change may take such form that it isn't necessary or desirable.

VICE-CHAIRMAN: The interesting part about Vandeventer was that they took a man who had been on the Supreme Court for many years and retired, and permitted him to sit as a trial judge which, of course, carried with it the weight of a former Supreme Court Justice. It is the type of case, following Dean Pound's suggestion of using retired justices in celebrated cases, where you might want the public to feel a respect greater than it might toward an ordinary trial judge in that one particular district.

MR. BROGAN: Yes, he cleaned that district up in two or three days, and there was no appeal.

JUDGE BRENNAN: My revered senior, I have the greatest respect for you, but you came in swinging wide open on that. This is my chance to file a rebuttal. You reviewed my mistakes so often, when I ruled four or five hundred times on murder cases. If you will consult the record you will find, although the disposition was rapid in the district, on review it didn't stand up so well.

MR. BROGAN: It didn't?

JUDGE BRENNAN: It did not.

MR. BROGAN: I didn't know about that.

VICE-CHAIRMAN: He is referring to his own—

MR. BROGAN: No, Vandeventer.

JUDGE BRENNAN: Some of the others didn't.

MR. BROGAN: I have a recollection of a counsellor, now a judge in New York, named Leibowitz, than whom there was no

greater trial lawyer. I saw the old man, when Leibowitz was firing those questions, say to the witness, "Do you mean to say this," or "you need not answer that question." And he brushed Mr. Leibowitz off in great shape, and that trial was over, justice was done and there was no appeal.

JUDGE BRENNAN: That is a single case. It may not be true, but it is the general picture I get, and it was demonstrated.

VICE-CHAIRMAN: I can give you another illustration which is outstanding in federal history. Judge Mack was an outstanding federal judge. His court was abolished, and as a result he had no court to preside over. Under federal practice, you may not retire a judge due to the fact that he has life tenure, but they made brilliant use of him. He was transferred from district to district throughout the country for at least ten years, and he sat on such cases as the Standard Oil anti-trust case in Massachusetts. You will see they made fine use of him even though he might have been considered in the nature of retired. His age, at the time he died, was well above the retirement age.

Following up your thought, even if you do have a so-called compulsory retirement age, you may make adequate provision for allowing the court to use these retired judges to the extent of their capacities.

MR. SMITH: Are there complications in the way of heartaches or headaches in cases of those retiring judges who are not called upon by, we will say, the Chief Justice, to serve?

VICE-CHAIRMAN: There haven't been thus far because, under our federal system we haven't had enough retirements. It has been only in recent times that there have been pressures to obtain retirements, and most of the judges have been retiring at such advanced ages that I don't think they have resented the fact that they haven't been called.

JUDGE BRENNAN: In your judgment, the leisure became no problem.

MR. SMITH: I would like to make myself clear. I don't oppose the suggestion. I just submit that if you had ten retired judges and two were being called upon for special service and eight were being ignored, there would be an implication that would be unpleasant.

MRS. MILLER: That is better than the other way around.

VICE-CHAIRMAN: That might be offensive to a certain individual but it wouldn't impair the judicial system.

MR. SMITH: That's right.

JUDGE BRENNAN: The life span is such that I think it would be unusual for a man much more than 70. We have lost two judges in the circuit this year, Judge Wolber and Judge Shay, neither having reached the age of 65.

MR. DIXON: Another point that I think ought to have some weight in this connection, and it has considerable weight with me, is that if we retired the judges at a reasonable age, instead of letting them go on as they do now to a point where they are not very efficient, we would not have the situation where they not only are giving an inefficient administration of justice but are also blocking the progress of a lot of very able men who could step into those positions if they stepped out. If the process is fluid it certainly does inspire more of the younger men if they can see a wider opportunity to advance in the judiciary.

JUDGE BRENNAN: It sometimes happens that these men are not advanced to these higher positions in the judicial structure until they are relatively well along in years, too.

MR. DIXON: I am thinking that that would clear the way.

JUDGE BRENNAN: Well, it might or it might not. That is theoretically perfect, but it depends entirely upon those imponderables connected with the appointive power. The Governor, no matter who the Governor may be, has certain persons in mind whose qualities he admires, whose ability he thinks is great. As I see it, there is no hard and fast promotional system.

MR. DIXON: That is true.

JUDGE BRENNAN: That you can consider in the light of intrusion of the Chief Executive.

MR. DIXON: It is hard for me to picture a situation where the Chief Executive makes very many mistakes—where he doesn't do a fairly good job of selection.

JUDGE BRENNAN: I would say, by and large, that's true; but, of course, you are pointing toward a situation, let's say for example, where a man around 40 might go to the Supreme Court.

MR. DIXON: We are thinking of a judicial council. I don't know how it will work out—I see quite a little difference of opinion on how it would work out—but I suppose if you set up the council (think of it as perfect or imperfect), where we had a selection of names by the members of the State Bar Association, perhaps some laymen, perhaps some members from the Supreme Court —regardless of how it is set up, just think of a council of that complexion selecting names. I know there is a little difference of opinion on it but—

JUDGE BRENNAN: I don't like that technique. I think we still should reserve power of appointment to the Chief Executive, with the advice and consent of the Senate. I think that is his function and I would resent intrusion on that as I would on the judicial body.

VICE-CHAIRMAN: Would your opposition extend to a proposal that merely meant that the council would recommend but that the Governor would still have the right to appoint?

JUDGE BRENNAN: That's a pretty gesture.

MR. DIXON: Recommend say three or four or five names, a plurality of names.

JUDGE BRENNAN: It is still a pretty gesture, I think.

MR. HENRY W. PETERSON: Under the present statute, doesn't the judicial council make any recommendations?

VICE-CHAIRMAN: No.

MR. SMITH: Your point is that the judicial appointments should be exclusively that of the Chief Executive?

JUDGE BRENNAN: Yes.

MR. PETERSON: The way the thing works out is that the Senator makes the recommendations.

JUDGE BRENNAN: The Senate has the power of veto.

MR. PETERSON: I would turn it around. The Senate makes the recommendations but the Governor has the right of veto power.

MR. SMITH: Don't you think, Mr. Peterson, you are dividing the responsibility under your idea?

JUDGE BRENNAN: Aren't you ignoring the traditional balance of power which our forefathers were so wise to insert?

MR. DIXON: I have seen it in a number of cases. I think the balance of power is completely upset because of the Legislature selecting the judges. Here is the actual situation as I have seen it in a number of cases, and I am very closely acquainted with it.

MR. BROGAN: Well, I don't think that the Legislature selects the Supreme Court justices. I have never known it to happen.

MR. DIXON: Well, not when you get into the Supreme Court, but what I have particular reference to is county judges.

JUDGE BRENNAN: Even that isn't strictly true.

MR. BROGAN: In our rural communities, the Governor might not know anybody in the county and he might consult the Senator who is down there and get a nominee that way.

MR. DIXON: Yes I know, but a county judge cannot be appointed from Essex County without the approval of the Senator of the county.

JUDGE BRENNAN: That's true. Now you propose—

MR. DIXON: I am not proposing; I am merely exploring.

JUDGE BRENNAN: Suggesting would be a better way to put it—the offer by the Senator to the Governor, giving the Governor only veto power.

MR. DIXON: No, what I was suggesting was, or what I was thinking of exploring, let us say, is that if we have what we might call a council, for a better term, composed of a representative group of men, as the one I stated, with members of the New Jersey State Bar Association, members from the Supreme Court, the highest court, some laymen and distinguished men of high standing who

would prepare a list for these appointments from which the Governor could select an appointee, all the way from the Supreme Court down—

JUDGE BRENNAN: Now, power is a very dangerous commodity, but I still think you ignore the traditional balance between the departments of government if you take away from the Governor or the President what has always been his traditional executive prerogative. He ought to have the power and the responsibility.

MR. DIXON: Now, let me ask you this question: Suppose we were appointing a Supreme Court judge—the Supreme Court judge comes from the County of Camden or the County of Salem or Ocean —am I not right in saying to you that the judge cannot receive the approval of the Senate unless the particular Senator from the county from which he comes approves it?

JUDGE BRENNAN: I think that is generally true.

VICE-CHAIRMAN: Mr. Dixon, that is not because of any rule or constitutional provision.

MR. DIXON: No, I know that it is senatorial courtesy, but it exists just the same.

VICE-CHAIRMAN: Well, that might evolve under any constitution, as a matter of courtesy.

JUDGE BRENNAN: I have seen very few instances where a Senator hasn't approved.

MR. PETERSON: That doesn't always follow. I first of all pay my respects to Sussex County, but I would like to make an observation applicable to Gloucester County, a predominantly Republican county which builds up majorities as good as Hudson does for its candidates. Bob Hendrickson as the Senator from Gloucester County confirmed Elmer Woods, a Democrat. Elmer Woods has been continued as Judge of the Common Pleas Court because he is doing a good job.

JUDGE BRENNAN: Maybe I didn't make myself quite clear. I know very few instances where a man with outstanding ability and character is offered the job where there was any veto by the Senator. The Senator usually is anxious to be in his favor.

MR. BROGAN: If the Senator has veto power, he may say who the judge shall not be; that doesn't mean he has the right to say who he shall be.

MR. DIXON: On the other hand, if you do have an unreserved veto power it gives the positive power also. You can veto all the way down the line. During the administration of Governor Edison, when the Legislature was Republican and the administration Democratic, that is the Governor was Democratic, we saw this abuse at its height, I think. I think it was an abuse and, being a Republican, I think I can say it was an abuse by the Republican Senate.

MR. BROGAN: It was an abuse by the Republican Senate?

(*Laughter*)

MR. DIXON: Yes, by the Republican Senate.

JUDGE BRENNAN: No system is ideal. Of course, the trouble with the human race is that it is human. You get into those by-passes of personal dislike or past disagreement of some kind. It isn't frequently that you can get into such an impasse as happened during Governor Edison's administration. As a rule, the Governor and Senate are of the same political party.

MR. DIXON: Having spoken of Senator Hendrickson, I might add also that—I would like to have this on the record—that we don't have many Senator Hendricksons.

JUDGE BRENNAN: If you want a confession from me, I am willing to concede that he is a very distinguished citizen and a fine public servant.

MR. PETERSON: May I ask this question of the members of the bar: In the local bar associations or the state bar, whatever the association may be, isn't it true that, as in other organizations, there are very few who actually attend the meetings and actually concern themselves with the proposals such as we are talking about?

JUDGE BRENNAN: You mean the bar association?

MR. PETERSON: Yes.

JUDGE BRENNAN: That depends entirely, I think, on who is at the top.

MR. PETERSON: I am talking about the regular, ordinary, run-of-the-mill meetings where you consider the qualifications of a man for recommendation for appointment to a judgeship.

JUDGE BRENNAN: That isn't a run-of-the-mill meeting; that is a special meeting. A run-of-the-mill meeting is the same as a meeting of the Rotary or any other organization.

MR. PETERSON: Would you get more than 15 or 20 per cent of the members?

JUDGE BRENNAN: I think you do in first-class counties, and I think there is meticulous attention paid to the qualifications and character of a prospective appointee. It gets a good going over.

MR. McMURRAY: Mr. Chairman, I am like Mr. Dixon. My mind is not at all made up on the judicial council. I don't think it's wise to put members—I am speaking now from a local angle—of the bar on such a committee, where they have to pass on the qualifications of a judge. I don't care how good citizens they are; they are human, and I doubt if it is fair to put anyone in the position of coming out to approve or disapprove a candidate for a judgeship. They are not going to forget the fact that some day they may have to appear before that judge.

Now, in our county our bar association seems to me to be par-

ticularly weak in having any opinion on any judgeship, and I am not sure that I blame them for it. It seems to me that you are delegating power to them that might prove embarrassing. I don't think it is wise and, to use the vernacular, they are sticking their necks out.

MR. FRANK H. SOMMER: That reminds me. At a meeting of the State Bar Association the question of judicial appointment was raised, and a lawyer advocated certain propositions. Then he was asked what his attitude was with respect to the Chancellor. He said, "That's pretty hard to say; I practice before him."

VICE-CHAIRMAN: Mr. McMurray, may I distinguish two issues? What you refer to is the bar, or any other group of interested persons, passing on the qualifications of a name that has already been submitted. What I think Mr. Dixon referred to was a permanent or continuing body of men who, in turn, would submit names, not veto any other names. Their function presumably would be to study the qualifications of prospective appointees and recommend the outstanding persons for consideration by the Governor. That is quite novel in this part of the country. They have it in several states, although it is new. I don't think we have enough history to prove that it actually does work. I think that if you do inquire, as we have, you will find that they say, "Oh, yes, it works," but if you ask them how long it has been in existence, you find it has been only a year or two or three, so I don't think you can say it is a proved system. However, I think it is the sort of thing we should think about and should talk about and see whether we want to pursue it or drop it.

MR. SOMMER: Well, Mr. Chairman, the states in which that procedure has been adopted are the states which have the integrated bar, are they not?

VICE-CHAIRMAN: Yes.

MR. BROGAN: Judge Brennan, may I ask you a question?

JUDGE BRENNAN: Yes.

MR. BROGAN: Do you think that the integrated system should be the same as the federal system?

JUDGE BRENNAN: I haven't given it enough study to express an opinion.

VICE-CHAIRMAN: If you were to assume that the federal judge sits as you say a Common Pleas judge does, first in a criminal case, then in a civil case and then in probate, equity and so on, would you support that system?

JUDGE BRENNAN: Yes. I don't think there is a particular genius required to sit in any tribunal. I think it is a question of a man's general intellectual content. To begin with, if he hasn't some of that he doesn't belong on the bench; but given the oppor-

tunity to be on, I see no reason why he shouldn't get all the intellectual exercise that goes with it. I think if you and I were sitting on the law side for a number of years and if we were confronted with equity—well, we didn't get any, but I don't think we would find it a special problem if we were given the opportunity. It is part of the ordinary routine of the judiciary. I think that has been demonstrated, and I think you will agree. In New York it doesn't seem a problem, does it?

MR. BROGAN: No, but I never heard of a New York equity case cited as an authority for anything.

JUDGE BRENNAN: I don't know what that proves.

MR. BROGAN: Well, New Jersey is cited; as Dean Pound said yesterday as a teacher of equity—New Jersey is a treasure house of equity jurisprudence.

JUDGE BRENNAN: That's true. But would it have been less so if these judges were alongside of each other?

MR. BROGAN: That is a point to be proven.

JUDGE BRENNAN: I can't answer that.

MR. BROGAN: I suppose it would make no real difference if, as has been proposed by some, divisions were instituted?

JUDGE BRENNAN: I certainly think we ought to have the benefit of the men we have on the equity side, most of whom I know rather intimately. I consider many of them brilliant men. Because you change the form, you don't change the subject. Probably there could be priority ratings based on experience, but there is no reason why other men should not be trained. Isn't that the well-rounded judge?

MR. BROGAN: Well, of course, that's the thing to be desired.

JUDGE BRENNAN: Yes, and I don't see any shock in the initiation. As you say, the men that you have and train with those others—I think it is more a thing to be desired for the future than a benefit for the present.

MR. BROGAN: Judge, what would you think about the court of last resort? Do you agree that there should be a court say, perhaps, of seven?

JUDGE BRENNAN: I certainly think no larger. I think today —and this is no reflection on our own tribunal—subject to the limitations imposed, that the New York court is one of the most distinguished in this country, and I think largely because of limitation of size. They certainly don't make a football of that court.

MR. PETERSON: What is the size?

JUDGE BRENNAN: Seven. Justice Brogan can speak with first-hand information and knowledge from a man who was a classmate of his—

MRS. MILLER: Who is that?

MR. BROGAN: John T. Laughrin, Chief Judge, New York Court of Appeals.

MRS. MILLER: Would you care to comment, Judge Brennan, on the rule-making power? Where do you think that should be?

MR. BROGAN: That is a very serious question with this Committee. Should the court have the rule-making power; that would be tantamount to the statutory power with regard to the adjective side of the law?

JUDGE BRENNAN: I think so, because it is rapidly approaching that stage now as an expedient—not only for convenience but necessity.

VICE-CHAIRMAN: Would you subject that rule-making power to the Legislature?

JUDGE BRENNAN: No. There again you get into a perplexing dilemma. You ought to keep each branch where it properly belongs.

MR. BROGAN: Isn't the making of law the function of the legislative body?

JUDGE BRENNAN: True enough. But shouldn't the making of rules be the instrumentality of those most intimately associated—

MR. DIXON: But can't that rule-making power actually become the legislative power, as we have seen it happen time and again where they really upset the laws and make the laws?

JUDGE BRENNAN: The Legislature is so much more an amorphous body, and the judicial branch is so much more a closed corporation, but certainly in intimate daily contact with the specific needs of the court. The Legislature is bedeviled by a thousand or more other problems at each session. The Dean could speak much more intimately about that than I can.

MR. BROGAN: The present Constitution provides for lay judges in the Court of Errors and Appeals because the people didn't trust the courts a hundred years ago—because they thought the courts were entirely legalistic and that justice wasn't done when only a technical kind of procedure was involved.

JUDGE BRENNAN: It isn't exactly new to know that we lawyers generally are suspected. I do not doubt that there is a fundamental fear, or whatever you call it. I think we have to recognize that a great many of these things are spiritual and social legacies. After all, a good deal of our whole structure was based on the agrarian outlook of states, the great majority of which were along the Atlantic seaboard, with a uniform viewpoint and no possible concept whatever that we would have cities like Newark and New York. I think Perth Amboy was the largest, and all things were conditioned at the time—

MR. DIXON: Judge Brennan, just a minute. Can't we admit it was not only based on an agrarian outlook but it was based on the

experience with the King's courts in old colonial days, when they all felt—with the law as interpreted by the governors and by the King's officers sent over here—that there was not justice. It seems to me that—

JUDGE BRENNAN: There is no question—

MR. DIXON: In reading the history of the Constitution I gathered that there were two things the people equally feared. One was the military—they didn't want this government to fall into the hands of the military—and the other was the courts. They feared, as the Justice pointed out, and they put these laymen on the court to guard against abuse of the courts. At the same time, they arranged for the military, the militia, to have all the officers elected by men instead of appointed by the Crown, or by the government.

JUDGE BRENNAN: There is no question; it was generated by actual experience.

MR. DIXON: Well, now, I think our experience has shown, from the standpoint of the court, that we don't want this court with the laymen on, and I think there is agreement on that. But there is a feeling, I think, that we ought to put up a framework within which both the court and the Legislature could work, so that they don't infringe on each other's powers, so that the judiciary can't make legislation and so that the Legislature can't intrude themselves on the judiciary.

JUDGE BRENNAN: You have, too, the corrective power which they didn't have in colonial days, the fourth estate. The press is a great power and extremely vocal, and that tends to prevent some abuses that I think were feared by those of colonial days. Their fears were based on the experience that stems from the agression and prohibition of the time, as translated through the colonial governors, and was even enforced in certain states by the mandate of the churches, as in early Virginia. Isn't that true?

MR. DIXON: That's right, yes. They were afraid of the church, they were afraid of the ecclesiastical court.

MR. SMITH: Judge Brennan, you indicated that you studied the proposed 1944 revision very carefully. Are there features in that proposed revision that you would change?

JUDGE BRENNAN: I can't make a comparison because I haven't studied this one. You can't make a comparison without seeing at least the theoretical text of the new set-up.

MR. BROGAN: No, but is there anything in that revision that you think could be improved upon?

JUDGE BRENNAN: In the old one?

MR. BROGAN: Yes, the 1844, and I also mean 1944.

JUDGE BRENNAN: This I gather from Camden circuit. You remember the Pleas—and I thought it was good—the Pleas was

taken in as part of the Superior Court structure. Now, I don't want any of this to appear in the least personal. The men from Camden south on a voluntary basis said it is all right for first-class counties but not all rights for counties of the lower classes and particularly not for the southern counties. Why, I should not say. I don't want to get into a political by-pass.

MR. BROGAN: I want to ask you this—do you think the ideal structure should be based on the proposition that there should be a complete trial and one appeal?

JUDGE BRENNAN: Well—

MR. PETERSON: Except in murder cases.

JUDGE BRENNAN: Not excepting murder cases. I think there should be a complete trial and one appeal.

MR. BROGAN: Would you recommend something in the nature of an appellate division, where we retain the Supreme Court as it now is? I am talking about appellate jurisdiction only as a method of screening out—

JUDGE BRENNAN: I would indeed. In my judgment appeals should be twice heard, even in a capital case. I think I speak with some degree of experience; I think I have had as many as most and more than some. Is there any reason why capital cases should not go to the court of last resort?

MR. BROGAN: That is where they go, they never go to the Supreme Court.

JUDGE BRENNAN: They can.

MR. BROGAN: But I only know of one case in the books, and why that went I will never tell you.

MR. SMITH: Would you care to give your views on this? How do you visualize this intermediate appellate court—as a separate and distinct court, as defined, with two appeals?

JUDGE BRENNAN: Yes, certainly there ought not be this mixed grill that you have at present, the Supreme Court being part of the Court of Errors and Appeals.

MR. BROGAN: No, we are at an independent court of appeals. I mean, everybody seems to agree—

JUDGE BRENNAN: And its constituent members would have no part in the Supreme Court. They would be confined entirely to the court of last resort.

MR. SMITH: The appellate judges to be exclusively in that role and not shifted back and forth?

JUDGE BRENNAN: Is that the picture now?

MR. BROGAN: Both theories were advanced, so to speak; one to take an appellate division from the line of trial judges and have them sit on designations for, let us say, two or three years; and the other to have them appointed as such appellate judges and have them remain as such.

JUDGE BRENNAN: That would seem the idea.

VICE-CHAIRMAN: If the business permitted all appeals to go to the Court of Appeals, would there be any need for an intermediate court of appeals?

JUDGE BRENNAN: I can't answer that.

MR. BROGAN: It comes down to this—if from all courts there was an immediate appeal to the Court of Appeals, it might well result in this court of seven being absolutely deluged and overcome with the volume of business.

JUDGE BRENNAN: Which is what you want to avoid.

MR. BROGAN: Yes.

VICE-CHAIRMAN: If experience shows otherwise, is there any need for this double structure?

JUDGE BRENNAN: I can't answer that, but I want to make this observation—it isn't a sign of softness or sloth to suggest that judges can't operate on timeclocks. I think the need everybody cries for is rapid resolutions, a disposition of a case. And that is what you can't get. Certainly, in many cases the judges are deluged with appellate work. There is no reason why a judge shouldn't have decent leisure.

MR. BROGAN: Judge, what I wanted to ask you—you may not have any opinion on it—have you anything to say about the proposal to abolish the prerogative writs?

JUDGE BRENNAN: I have nothing to say about it. What is to be substituted for it?

MR. BROGAN: Well, a sort of review by the Court of Appeals, or call it what you will.

JUDGE BRENNAN: I have always felt they were instrumentalities which prevented arbitrary injustice. Unless there is something that will take their place, I would like to see them stay. The fiat of local statements sometimes can determine your destiny or mine. You ought to have a speedy and effective right of review.

MR. BROGAN: Of course, a writ of certiorari is today a very potent thing, to stay something that ought to be stayed.

JUDGE BRENNAN: I think that is true, and in many, many instances—some I can cite in my own experience—has prevented immediate and arbitrary injustice. I think if they are going to be abolished there ought to be something, some instrumentality to take their place.

VICE-CHAIRMAN: Judge, we haven't touched upon one problem which the Chief Justice and I have discussed, this appellate division problem, and I don't know whether basically we agree on the thought that that would depend on the volume of business. The Constitution probably should be flexible enough to permit that intermediate court if it is needed.

JUDGE BRENNAN: Make it permissive, not mandatory.

VICE-CHAIRMAN: Well, that is all in the discussion. Assume you had an appellate division, would you permit appeals which are of an interlocutory nature, or stick to our law practice as it now stands?

JUDGE BRENNAN: The appellate division?

VICE-CHAIRMAN: Yes.

JUDGE BRENNAN: Well, you can't take an appeal in New York.

VICE-CHAIRMAN: But in New York you could take an intermediate appeal, that is from interlocutory orders.

JUDGE BRENNAN: And you can then go to the Supreme Court?

VICE-CHAIRMAN: That is to the Appellate Division. If you take your appeal on the preliminary motion you can take that to the Appellate Division.

MR. BROGAN: For instance, a motion to strike, made in the New York Supreme Court; and suppose the answer is struck. You may review that.

JUDGE BRENNAN: In the Appellate Division?

MR. BROGAN: Yes, you may review that. Our practice, which you very well know, prevents an appeal. Now, in Chancery, as opposed to that, you may appeal from any interlocutory order.

MR. SMITH: Is that good or bad?

MR. BROGAN: Well, I think it works a great delay and results in injustice. For instance, there have been many appeals where a man moved to strike a bill of complaint. The court would say, well I won't strike the bill of complaint but I will reserve your motion until final hearing, and they appeal from it.

VICE-CHAIRMAN: One of the proposals that you have before you raises that point, which would be a departure from our present practice. It is mainly a lawyer's problem, but on the other hand, in setting up your court structure, perhaps something should be included to provide for this question of intermediate appeal. You may ultimately conclude that that doesn't belong in the Constitution, but that the Constitution should be flexible enough to allow the Legislature to permit these appeals if it so desires... I mention it now because I think it is one of the problems that we should think about.

Any further questions of Judge Brennan?

MR. McMURRAY: May I just ask one question on a subject which Judge Brennan touched on and which was brought up by the statement that Justice Brogan made. Justice Brogan mentioned the fact that New Jersey equity cases have been outstanding, and that they have been cited and all that sort of thing, where we have

not heard that New York cases have occupied any such position. Now, where do the equity opinions of the federal courts stand? They, I understand, handle both equity and law matters. Are federal equity opinions over quoted? Is the disposition of an equity matter by a federal judge ever the subject of quotation?

JUDGE BRENNAN: Are you addressing your question to the Chief Justice or to me?

MR. BROGAN: I will answer that so far as I can. I suppose there are outstanding men, and I will only mention one, Learned Hand. He disposes of a case, and after he goes into the story and you get his opinion you really and truly have something.

MR. SOMMER: Wouldn't that be true whether it was an opinion on equity or law?

MR. BROGAN: That's true. It depends on the judge, and I couldn't say whether or not they have a body of equity jurisprudence, but I assume they have, that is recognized as outstanding. I have had occasion to consider opinions in some of these equity cases, especially where the United States Supreme Court is concerned, and found them to be absolutely—well, they at least settled the law as far as their jurisdiction was concerned. But I do say that we really and truly have magnificent equity jurisprudence which is more respected abroad than at home.

MR. McMURRAY: Might that be true, Judge, because of the fact that we segregate that type of case so that it readily stands out?

MR. BROGAN: That's what the proponents of a separate Court of Chancery say.

MR. DIXON: After all, isn't that true because New Jersey has had some very outstanding jurists—isn't that the real answer?

MR. BROGAN: They have had them and I think still do have them.

MR. DIXON: They do.

MR. PETERSON: Isn't it true that in equity in New Jersey there is a greater field than there is in federal jurisprudence? In equity in New Jersey, well, you have your title cases, and trespass, and a half a dozen others—

JUDGE BRENNAN: The separate fields have put emphasis on New Jersey.

VICE-CHAIRMAN: In federal practice you have a diversity of jurisdiction which depends entirely on the fact that the parties are citizens of different states. In federal courts, sitting in states such as New Jersey, you may have every equitable question that arises in the state courts. The history of our federal courts will show you outstanding federal judges, just as the history of New Jersey will show you outstanding equity judges. I don't think we ought to lose sight of those brilliant equity opinions that were referred to by

Dean Pound. I recall distinctly that when I went to law school they referred to three or four states as having outstanding equity opinions. New Jersey was one of them. New York, incidentally, in the earlier days, but after the merger, had brilliant equity opinions, shortly after Chancellor Kent's time, and the equity standing in New York continued for quite a while.

When you have impairment of the standing of particular courts, the result is reflected in law school studies. That has been true of New Jersey. If you check through your law school material and compare the old case books that were used in law school, say 25 years ago, with the ones that are in use today, you will notice a very substantial drop in New Jersey equity cases.

JUDGE BRENNAN: That ignores reality, too. After all, to pass the test of validity and to be the law of the State, the decision ultimately goes to the Court of Errors and Appeals, doesn't it?

MR. BROGAN: That's right.

VICE-CHAIRMAN: You recall to my mind that Judge Adams was a lay judge, as was Judge White—

MR. BROGAN: Judge White was a judge of great distinction.

VICE-CHAIRMAN: Of outstanding distinction, but they were assigned not even to law courts, but as lay judges.

MR. PETERSON: They were lawyers, however, weren't they?

JUDGE BRENNAN: Yes. You have one now in New York, McKenna.

MR. PETERSON: It would seem to me that that is an exception to case law that has been set down. When an opinion has once been written, covering all phases of a subject, and been filed, you refer to it as being law and, therefore, the opportunity for writing new law or a new interpretation has gone or hasn't been taken advantage of. Maybe in New Jersey we know what is law or equity —when I say law I mean equity too.

JUDGE BRENNAN: Well, opinions of the court of equity, to be the law, must all pass the muster of the Court of Errors and Appeals.

MR. PETERSON: That's true, but the United States Supreme Court has upset decisions a hundred or a hundred and fifty years old.

JUDGE BRENNAN: It isn't so at all that the opinion of an equity judge is a finality.

MR. BROGAN: Well, a great many are affirmed on opinions below.

JUDGE BRENNAN: That's true.

MR. BROGAN: And a great many are modified or reversed on separate opinions.

VICE-CHAIRMAN: May I suggest, unless there are some other questions of Judge Brennan, that we permit him to leave.

JUDGE BRENNAN: You want me to get out of here?
VICE-CHAIRMAN: No, stay as long as you wish—
MR. BROGAN: But not in that chair.

(*Laughter*)

JUDGE BRENNAN: I will listen for a while.

VICE-CHAIRMAN: Thank you very much, Judge, and I think I speak for all the members here when I say we greatly appreciate your being here this morning.

JUDGE BRENNAN: Thank you.

MRS. MILLER: I have a clipping here which maybe some of the lay people would like to have, about the Judicial Council of New Jersey.

VICE-CHAIRMAN: All right. This is a report of the Judicial Council itself. I think it is available in the *New Jersey Law Journal* and we will see that each member gets a copy.

We have invited Dean Harris of Rutgers Law School—incidentally, the Dean has this year celebrated his 25th teaching year at the school. You may recall the school was originally the New Jersey Law School. It is a great pleasure to receive our Dean and I am sure he will be of great help to us.

MR. GEORGE S. HARRIS: Well, everything has been said that can be said on the subject, I think. And if it hasn't been said, it has been written.

I want to state in the beginning that I assume you have all read Alfred Clapp's articles in the *New Jersey Law Journal.*[1] I think he did a beautiful job and an objective job in getting at the *pros* and *cons* of this matter. I assume, too, that you are familiar with the *Journal of the American Judicature Society,* that has worked pretty steadily for a number of years on better constitutions.

Now, I don't want to take much of your time; my opinion carries no weight. What I want to get down to are some specific matters.

I assume everybody agrees we shall have an independent high court and, therefore, there is nothing to talk about, with the possible exception of how many shall constitute the court. Most of us believe that there should be seven, largely due to the fact that the Chief Justice will have a very heavy burden of administrative duties, and if the volume of business remains about the same as it ought to remain under the set-up adopting the English procedure, with modification, it will not be possible to do the job with less.

Now, you come to the two critical matters—one, the integrated court; and, two, whether or not there shall be an appellate court intermediate between the trial court and the court of last resort.

I listened to Judge Brennan and I agree with him that there

[1] These editorials, here referred to as articles, appear in the Appendix to these Committee Proceedings.

should be one trial that can hear all of the case and determine it finally, and then one appeal and no more.

I agree that there should be such flexibility as will permit the Chief Justice, under any organization, so to dispose of the—what was known in the 1944 draft and 1942 Committee's proposal—so to dispose of the Superior Court judges as to make the best use of them either at the trial level or appellate level.

I personally believe there is no sound argument, I have read no sound argument—for a separate Court of Chancery in New Jersey. I am not impressed with the oft-repeated statement that our Chancery has been great because it has been separate. You can count the great men in Chancery in New Jersey on the fingers of one hand, just the same as great judges. I am not speaking of the living, and I will say nothing of the dead except good.

The greatness of judges, distinguished for opinion, either in Chancery or at law, comes from able minds, legal genius. We have had some, and we are very fortunate. But I don't think that has arisen because Chancery has been a separate court, and I do not see how anybody can fail to realize that the fact that we have had a separate Chancery Court has delayed and befogged issues many, many times.

I would like to make a note of the cases cited in the *Journal of the American Judicature Society,* on page 29 of the June, 1944, issue—cases that are not cited by the Essex County Bar report which you have, I am sure. They might be multiplied many times.

I am glad that this Committee has as many laymen on it as it has, because I am satisfied that if people of this State, not lawyers, not judges, could realize what this duplication of effort has been, what waste there has been in time and effort, they would see to it that we had an integrated court. I don't put much faith in judges or lawyers. Every time you have to go back to another court it is so much money in the lawyer's pocket. They like to play ring-around-the-rosy with the litigant's money and the taxpayer's money. I give you an illustration out of my own experience.

I was representing a man who was divorced from his wife, and there was an agreement—this was back before the days when alienation of affections had been outlawed—made between them that he would not molest, and so on and so forth. Then he did molest, that is, he took the children. He had reason, he thought, and suit was brought by the former wife. I moved to strike on the ground that the contract was illegal as having been made before the separation. A very noted Hudson County lawyer represented her and her second husband, and took it immediately to the court of equity for an injunction to stop the defense. We spent six months in equity, where I was successful. They took an appeal to the Court

of Errors and Appeals, and a year from that time the Court of Errors and Appeals sustained it, and then I had to go back and start my law action from scratch and go all over the whole matter again before I could get a judgment for damages. That is a typical example, a very simple example. It happens all the time.

Now, good pleading requires that you state facts in lucid, terse fashion, setting up a cause of action—and stop. If you do that in an integrated court, you don't have to worry about the jurisdiction; the whole thing will be disposed of, all defenses will be disposed of. That seems to me to be common sense.

I want to say that this effort of the Hendrickson Commission, made in 1942, is in my judgment on the whole a very, very well done job. I should like to bring to your specific attention some matters that I think ought to be changed or altered, just as an assistance, if it will be an assistance, because I think it is better to start with something pretty good than it is to start from scratch in a jumble of what we don't know about.

Now, you spoke of the prerogative writs. I think this Judicial Article in the 1944 Constitution is very vague and uncertain on the question of writs. Paragraph 2 of Section II says, talking about the Supreme Court: "The court may, by certiorari allowed by the court or any justice thereof, review any indictment, before trial, according to law." That's the first reference to writs.

In paragraph 4 of Section III: "Any justice of the Superior Court or an appellate division thereof may allow prerogative writs returnable in an appellate division which shall determine, in such manner as the rules of the Supreme Court may prescribe, and without a jury, questions of fact arising therein."

Now, it speaks generally of prerogative writs, and that I am afraid of; I want to see prerogative writs abolished or I want to see prerogative writs simplified to the point where one writ will do the job. I think there is grave confusion and there has been a great deal of flim-flaming of the public on the question of whether it shall be mandamus or quo warranto or certiorari. Any lawyer will tell you he gets in trouble with it all the time, and I am gravely troubled, if this Constitution is put in effect, or any other when these proceedings are over, that we may not be faced with the same proposition as we were faced with in the 1844 Constitution.

There are a thousand cases, but I cite *New Brunswick* v *McCann* in which the court held that you could not impair the right of the Supreme Court in its prerogative writ practice. It says: "Whatever powers these courts have, whatever jurisdiction they exercise, dated from the adoption of the Constitution, were by such adoption incorporated into fundamental law and insured against destruction except through a change in fundamental law itself. To abolish the

court, to alter the court in its character, to impair its jurisdiction, diminish its authority, are beyond legislative power because that character, jurisdiction and authority are part of a body of law which is on wise ground and immutable by any legislative act."

Now, if in this Constitution, or any other that may be adopted, the word prerogative writs appears as a function of any court, Supreme Court or Superior Court, and there is not an express limitation of power put in the organic body of the law, I fear we shall run into a court interpretation which will leave us with the same handicaps under which we have suffered as the result of a practice that was started about 150 years ago. Some of the technicalities of mandamus or quo warranto that existed then are still in existence today, and I think, too, that the writ of certiorari has been abused, has been overextended in the State of New Jersey by the Supreme Court. Text writers throughout the country recognize it, and I certainly am convinced of it.

MR. BROGAN: How?

MR. HARRIS: Well, by their depositions and making of new cases, substituting their opinions for administrative bodies who have the first evidence before them, in matters of that kind.

MR. BROGAN: Isn't it the duty of any appellate court to correct errors of law or fact in certiorari.

MR. HARRIS: Yes. The rule is good.

MR. BROGAN: Well, you mean it is done improperly and wrongly?

MR. HARRIS: Yes.

MR. BROGAN: In other words, the original body, like the Supreme Court, is wrong—

MR. HARRIS: No, not that. But while they say that where there is evidence to support the finding of the lower tribunal they will support it, there are cases—if you are familiar with them, and you certainly are—

MR. BROGAN: Reasonably so.

MR. HARRIS: —which many times do not follow the rule. Let's take, for example, the matter of zoning. It has come to a point where a new municipal attorney will not dare give a fixed opinion on whether an act of the board of adjustment or the planning board in a municipality is going to be upheld or not, because you cannot square the Supreme Court cases.

MR. BROGAN: You mean that the recommendation of the top court would be considered not to be a reasonable exercise of discretion, or something like that?

MR. HARRIS: Yes, the rule is right, but when you compare the evidence you don't know whether they are going to follow the rule or not.

MR. BROGAN: What the court is going to do?

MR. HARRIS: That's right.

MR. BROGAN: That's rather a strong indictment of the Supreme Court.

MR. HARRIS: Right.

MR. BROGAN: And we have heard it from nobody else.

MR. HARRIS: I am saying that they are prone to substitute their opinion in certiorari on matters dealing with facts, which is outside the rule which they have laid down that if there are legitimate facts they will sustain them.

MR. BROGAN: Doesn't the statute enjoin them so to do, to determine law and fact as it seems best? I am talking about the fifth section of the old Certiorari Act.

MR. HARRIS: I know. I am only saying that sometimes they have gone abroad on the facts in their conclusions.

VICE-CHAIRMAN: You wouldn't suggest that in a Constitution we have any provision that governs the extent of review.

MR. HARRIS: No, but why not do as Hannoch has been urging? Why not have a writ of review, a single writ which could take care of all these matters that have been taken care of by three writs.

MR. BROGAN: Would that eliminate the vice you point to?

MR. HARRIS: No.

MR. BROGAN: Then what good is the recommendation?

MR. HARRIS: The recommendation goes back to what I said before. Perhaps what I said about the writ of certiorari is not the main subject at all but—

VICE-CHAIRMAN: Would you suggest a review from all administrative agencies? Would you suggest that the Constitution contain anything on that subject, or that that be left entirely for legislative determination?

MR. HARRIS: Well, I understand, under the 1944 proposal, that the Chief Justice would have, under its flexibility, the right to make a division of the Superior Court which would handle all those matters.

VICE-CHAIRMAN: I wasn't thinking of that, Dean. I am interested in knowing whether you think the Constitution should deal with the extent of review of administrative agencies?

MR. HARRIS: I don't think the Constitution should.

VICE-CHAIRMAN: You would leave that entirely to legislative action?

MR. HARRIS: I think the less you say in the Constitution, the better; the broader you make it, the better.

Now, coming back to the Committee's work, I think those two sections should have something done to them and I think some-

thing definite should be said about prerogative writs. In paragraph 1, Section IV, they say, talking about the Appellate Division of the Superior Court: "Each such appellate division shall consist of three Justices of the Superior Court who shall be assigned for that purpose by the Chief Justice of the Supreme Court and shall sit therein, solely, for three years." I think that is contrary to the spirit of the Constitution in paragraph 5 of Section V—no that isn't it, that section that gives the Chief Justice the right to shift his judges —and may lead to ambiguity. I think you might say for three years, unless otherwise desired by the Chief Justice, or perhaps you want to say for not less than three years. This looks to me as though it might leave the door open to, say, three years flat, neither less nor more, and that is not in accord with the spirit of the act which should give flexibility.

The point of that is, that in setting up a Chancery and a Law Division, in three years time you get a better experienced court for the particular work they are doing.

A good deal has been said about the separate Chancery Court. Now, as a matter of fact our Chancery Court has habitually been recruited, throughout the years, not from Chancery experts but from prosecuting attorneys and Governors, elective officers, and what not, and our best opinions in Chancery are written by the Court of Errors and Appeals in which there hasn't been a Chancery expert in years.

MR. BROGAN: Why do you say that?

MR. HARRIS: I mean, that came up from Chancery.

MR. BROGAN: Isn't a man who spends half his life, maybe most of his adult life, in the Court of Errors and Appeals, studying equity just as well as law cases—is he not expert?

MR. HARRIS: Yes, but he did not come up from Chancery.

MR. BROGAN: No, but does he have to come from Chancery to be an expert? Can't he be an expert otherwise?

MR. HARRIS: I think he can be. That's why I think a law judge is perfectly capable of applying equity principles, and I think that when a case comes before a judge in the future he would be able to decide the case in principle and dispose of the entire case if necessary.

VICE-CHAIRMAN: I take it that your point is that just as the Court of Errors and Appeals judges have become expert in law and equity, so the trial judge should become expert in law and equity.

MR. HARRIS: I see no difference.

MR. BROGAN: The form, however, is entirely different. The one is a trial judge, and the other a law judge who reviews a record and may go to his books when in doubt and explore the law and come to his conclusion after investigation. So the task is slightly

different.

VICE-CHAIRMAN: Yes, except the way equity is now practiced, most of our important equity principles are decided by the trial judge in the same way.

MR. HARRIS: I don't know why in Section V, paragraph 4, the Senate should be both the prosecutor and judge. Has anybody given an answer to that?

MR. BROGAN: Are you talking about impeachment?

MR. HARRIS: Yes.

MR. BROGAN: We won't have any need for that—that is, we hope.

VICE-CHAIRMAN: We haven't talked about it, but there have been certain plans submitted to us, in writing. I don't think any, as I recall, have expressed it orally. Of course, we will have to come to that, and one of the proposals was that the impeachment of lower court judges be left to the higher court. Another proposal leaves the situation as it is today. Do you have any thoughts on that?

MR. HARRIS: I don't see why the upper court shouldn't discipline the lower court judges and I don't see why, if the upper court judges ever have to be disciplined, which is very unlikely, it shouldn't be as it is now. There should be a charge made by the lower House and trial had in the Senate. That is the proper way, I think. I don't think the Senate should be both the prosecutor and judge of any man's position.

Why do we have an age limit? I am a little bit concerned about that.

VICE-CHAIRMAN: Are you opposed to any age limit?

MR. HARRIS: Yes, I am opposed to putting it in a Constitution.

VICE-CHAIRMAN: What tenure would you give a judge?

MR. HARRIS: Life, after seven years.

VICE-CHAIRMAN: In other words, under your proposal, you would appoint a judge for life without any termination.

MR. HARRIS: I would leave that to the Legislature.

MR. BROGAN: They have changed it constantly.

MR. DIXON: Take the case of a judge disabled, mentally or physically, how would you take care of that?

MR. HARRIS: By the Legislature. Why put that in a Constitution, you don't do that here?

MR. DIXON: That's an omission there, judging by some of the people who appeared before us.

MR. HARRIS: I don't think pension should be in the Constitution, or disability, or age. The time and age of a man for retirement from the high court depends on that man. Some of them ought to get out at 50.

VICE-CHAIRMAN: That is contrary to the federal practice...

Then you would permit the Legislature to remove a judge notwithstanding the tenure for life—that is, for disability or some other cause?

MR. HARRIS: Of course, I suppose if there were misconduct.

VICE-CHAIRMAN: I am not talking about that. I am talking about the federal system where there is life tenure, and the legislature can't do anything about it. That is where they run into certain difficulties. I think we want to consider that.

MR. HARRIS: I assume if a man becomes physically disabled on a high court, or mentally incompetent, that he and his colleagues would have sense enough to advise his retirement.

VICE-CHAIRMAN: The trouble is, Dean, history is to the contrary.

MR. HARRIS: Well, I hate to see the age of 70 put on it. I think some of our good men do their best work after 70.

MR. SMITH: Don't you think—the proposal has been made by several—that there could be voluntary retirement at 70 and compulsory at 75?

MR. HARRIS: That is better.

MR. DIXON: Pull that down five years; make it optional at 65 and compulsory at 70, with the proposal that has already been made that the Supreme Court can draft those judges later on for additional work.

MR. HARRIS: Even after the age of retirement, they may be called on for special duty. That's in the Constitution and I like that. Of course, I think a safeguard should be put around the court in every possible way to induce the best men possible to take positions on it, and not have to leave it for a more lucrative practice because of salary.

MR. SMITH: What is your view on the trial period? Seven years, I think, was specified in the 1944 proposal. Is that too long or too short?

MR. HARRIS: No, I don't think that is too long. Of course, for Superior Court judges I would just as soon not see life tenure. I think the seven-year period is all right if this scheme, or something like it, were put in operation with the Chief Justice as manager of the court itself.

VICE-CHAIRMAN: Administrative director.

MR. HARRIS: It follows through right down the line and keeps the men occupied at where they are best fitted to work and at their maximum efficiency. I think that's what is going to save the thing —streamlining, make it businesslike.

That's all I have to say.

MR. BROGAN: Thank you very much.

VICE-CHAIRMAN: Thank you very much, Dean. We appreciate your coming.

MRS. MILLER: We didn't ask about the rule-making power.

MR. HARRIS: I assume the high court should have all rule-making power.

MR. BROGAN: How far would that go—just as to practice?

MR. HARRIS: Just practice.

MR. BROGAN: But would it mean that there would be any supervision at all in the Legislature, or would it be entrusted entirely to the court?

MR. HARRIS: With respect to procedural matters, all procedural matters, I think, should be entrusted to the court. I wouldn't include evidence. As far as I know, the court has never made any attempt to change rules of evidence.

MR. DIXON: If there was no framework whatever within which these rules had to be made, wouldn't it be possible for the Supreme Court to so make rules that it would entirely alter the intention of the writers of this Judicial Article?

MR. HARRIS: Doesn't it say "not inconsistent with the provisions of this article," in the rule-making power?

MR. DIXON: I am asking how much of a framework. We've got to develop a framework within which those rules should be made.

MR. HARRIS: Of course, you are speaking about construction.

VICE-CHAIRMAN: Of course, any rule-making power would be subject to the provisions of the Constitution, and I think we all have to have faith that the court is going to observe the Constitution.

MR. HARRIS: Section II, paragraph 3, reads: "The Supreme Court shall make rules governing the administration of all of the courts in this State. It shall have power, also, to make rules as to pleading, practice and evidence." Strike that out as far as I am concerned.

VICE-CHAIRMAN: As a matter of basic philosophy, your point is that the rule-making power should be completely in the court, divesting the Legislature of any power over practice and procedure. That seems contrary to history, and it may seem a departure from our doctrine of separation of powers. It may be sound; I am not questioning that.

MR. HARRIS: Why a departure from the powers?

VICE-CHAIRMAN: In our Federal Government we have the rule-making power in the Supreme Court, but only by virtue of the fact that Congress has given it to the Supreme Court. It was quite a struggle, if you look back in the history, as to whether the legislature should divest itself of that power, but it did and it has worked well—I think exceedingly well. But, bear in mind that tomorrow Congress still has dominion over those rules.

Now, in our own State some of our greatest advances in practice

have come from legislative acts as distinguished from judicial rule-making power. Our Practice Act of 1912 was a statutory act. I know that rule-making power in the court works very well now. I am not so sure, though, that I want the Constitution to say that the Legislature shall have no voice in this at all, so that in the event we had a court which refused to make any advances in its exercise of the rule-making power, the hands of the Legislature would be tied and it would have to stand by—

MR. HARRIS: Well, this Constitution, if adopted in something like this form where you have the streamlining of the business end from the Chief Justice down—all rules would be consistent with the Constitution. And who is better able to say how this should be done than the man who is charged with the responsibility of making it run?

VICE-CHAIRMAN: I think the court is the best place to vest it, but on the other hand the court is not accountable to the people, like the Legislature is, and the people are interested in knowing that the rules of practice are modernized. There again, if you look back at history, advances in rules of practice have come from pressure of the people—not so much from lawyers as they have from the public generally. Although, as I say, the court is best equipped to promulgate the rules, it is doing it with knowledge of the fact that the Legislature has the ultimate power.

MR. McMURRAY: Under the Dean's suggestion, do I understand that the Supreme Court would have the right to make its own rules in consonance with the Constitution, but they, of course, would be the judge of whether or not their rules were in consonance with the Constitution?

VICE-CHAIRMAN: The court still would have the ultimate determination as to whether the rules as promulgated by the Legislature were within the Constitution.

MR. DIXON: The thing I have in mind is this—if you give complete rule-making power to the court, we all, it is pretty generally agreed or stated, should do away with or change prerogative writs from the present situation. Now, then, if we gave the complete rule-making power to the court, would they still have power to go ahead regardless of what we might intend to do, and put back all the prerogative writs in just the shape they are now?

MR. HARRIS: That is why I say you must have expressed in the Constitution the prohibition of writs, or substitution of one for three, or whatever the number.

MR. SOMMER: Dean, you would simply have a single extraordinary writ?

MR. HARRIS: Yes.

MR. SOMMER: And grant under that single writ—

MR. HARRIS:——the right to find out whether a man is in office or not. And if you integrate your courts from the beginning, you have that by right of appeal, so that nine-tenths of your practice might be gone. I don't know. It is the feeling of some that they should be abolished and only the right of appeal should exist. I am colored in my thinking by my specializing in municipal law, and I know certiorari has done great service to municipalities, and sometimes disservice.

VICE-CHAIRMAN: Thank you very much, Dean Harris.

Judge Smith was to be here at two o'clock, but he is here now and we will be glad to hear him at this time.

JUDGE WILLIAM A. SMITH: The first thing that I would like to say is that Judge Ackerson was invited to speak, but he has left for his vacation and he asked me to tell you he was sorry he couldn't be here.

On the question of what ought to be done, I think it should be approached with the idea of simplification, and in addition to that, as little change as possible from the present system. I mean, we have the county courts and we have the state courts, and have judges sitting in both courts; and we have personnel, some paid by the State and some paid by the county. There is a lot of detail, I know, that is minor, but we ought to use the present courts insofar as we can and get jurisdiction under them, and also use the present personnel to manage them.

Now, the first thing, of course, is the appellate court. I don't believe there is much dispute about what that court should be. It should be an independent Court of Appeals with probably seven members as finally constituted, and they should have no other duties. Then, it seems to me, there should be a Supreme Court, and you should have an Appellate Division which should take the jurisdiction of the Supreme Court *en banc*—that is, the jurisdiction the Supreme Court exercises through three parts when it sits in Trenton, the jurisdiction they exercise in passing on prerogative writs. But all that jurisdiction should all be centered in the appellate division and, as I say, should take over the jurisdiction of the Supreme Court when it sits together, which is *en banc*.

MR. BROGAN: When it sits as an appellate body?

JUDGE SMITH: When it sits in Trenton, not only as an appellate body, but when it has original jurisdiction.

MR. BROGAN: In other words you think that a court such as the present Supreme Court should be constituted as an Appellate Division?

JUDGE SMITH: No, no, not solely as an Appellate Division. There should be a Supreme Court with an Appellate Division which would take over all the jurisdiction of the Supreme Court

en banc, that is, the Supreme Court as it sits in parts, and also such intermediate appeals and reviews as it now has or—well, I shouldn't say as it now has, because some of them want to go direct to the Court of Errors and Appeals, but such appellate jurisdiction as you want to give it, such intermediate appellate jurisdiction.

MR. DIXON: When you speak of the Supreme Court, partly are you mentioning the high Court of Appeals?

JUDGE SMITH: No. I would say there ought to be a New Jersey Court of Appeals succeeding the New Jersey Court of Errors and Appeals, and as to the present Supreme Court, I would have that continued, the Supreme Court, perhaps revamping somewhat its jurisdiction and personnel. The Appellate Division, as I say, would take over all that duty. Then I would have enough judges of that court to sit in the various counties as the Supreme Court judges now sit—that is, they would have the jurisdiction of the Supreme Court in the respective counties to which they were assigned, and they ought to try cases at the circuit, that is Supreme Court cases. They would then exercise the jurisdiction which a Supreme Court judge exercises in the counties to which he is assigned. And in addition, they formerly, of course, did try Supreme Court issues at the circuit but they don't do it any more; they refer them to the Circuit Court judges for trial. But these Supreme Court judges could try these cases, and if they had too much to do, which I don't think they would, they could refer them to the county court for trial.

Then, the county court—I would turn over all the jurisdiction a Common Pleas judge exercises in the various courts and also the Circuit Court, and put that all into one county court. They are county courts now, but they have different names and they are separated. There you have them all together.

Now, insofar as the managing or the making up of the courts is concerned, I think the Supreme Court judges ought to go into the high appellate court; they ought to man it. There are eight of them now. And speaking as to them, if there are seven to be appointed and the Chancellor and Chief Justice were given the opportunity of being there, there would be some that would be left out. I think it would be wise, however, to ignore the number at the start and reduce to seven after death or resignation. I think there would be one judge who would not qualify and there would be only seven, and then you have the Chancellor and Chief Justice. That would be nine. But I would start at it that way, and there is a specific reason why I think it is advisable. You have got to look at it as a practical matter.

Now, this act under which you are functioning here may be attacked. If it is attacked, the present Supreme Court, I suppose,

is the court which would pass on it. As has been done in the past where the Supreme Court is to determine the constitutionality of an act and there is to be no delay about it, all the members of the Supreme Court sit together *en banc,* and then having decided the case it is not subject to any review because there could not be any quorum in the New Jersey Court of Errors and Appeals because there would be only six judges left and the Chancellor, which would be seven. So when you have that review, you have it, as I say, by the Supreme Court judges.

Now, suppose there are three of them who are not going to sit or must be left out. Suppose they couldn't sit in the Supreme Court; you would then have six lay judges on the Court of Errors and Appels and three Supreme Court Justices and possibly the Chancellor sitting in the Court of Errors and Appeals, and they would review the Supreme Court's ruling on the Constitution. Whereas if you had the present Supreme Court, being the court now to determine such a question, and have them be the court which would in the future be the appellate court, you would have a continuity there which would present no difficulty.

MR. BROGAN: You say you see no problem with respect to the so-called six lay members?

JUDGE SMITH: No. What I was going to suggest was that the six lay members, and I see no reason why you couldn't take the Circuit Court judges, of which there are 14—there are only 12 right now—you could take the Circuit Court judges and the lay judges of the Court of Errors and Appeals who are lawyers, and that would be 5, and you have 14 and 5—that would be 19; you would have 4 or 5 out for your Appellate Division and the balance could be distributed over the State. Now, I think with that setup you wouldn't have a new judge to appoint or to man your courts, and you wouldn't need any more until after you got going. In a year or so, if you found you needed more judges, all right, but there is no more expense, no more judges, or anything to it.

Governor Driscoll down in Camden said there wasn't any kick about the personnel of the court. He said it was what they were dealing with, and he said what we wanted to give them was a better set-up to work with. If that is the case, you've got these judges who can do it.

There would be about ten counties that ought to have a judge assigned to them. In some of the cases those judges could be assigned to one or two other counties where they were small counties.

Now, I think there is a good deal to be said about the Supreme Court judges trying the Supreme Court issues. Don't you think there is a demand by people who don't want to go, or say, be

dragged down, to a small county where the judge is only a part-time judge, and to go down there and have their case tried? I think it is the same proposition as where there is a diversity of citizenship; they take it to the federal court. As it stands now, you can sue in the Circuit or Common Pleas if the defendant is in your county; if not, you sue in the Supreme Court, and there I think you have the Supreme Court judges sitting.

If you can take care of the lay judges who are lawyers in that respect, and the Circuit Court judges, I think you have a set-up in which you will not need any more judges except, as I say, in counties like Essex or Hudson where the lists are heavy. There the Supreme Court judges might not have enough time, but another judge might be assigned to a case or he could refer the issue to the county court for trial if he could not try them all. But those conditions could be worked out.

I think that covers my views as to what I had in mind.

MR. SMITH: Judge, in respect to this intermediate appellate court, you are saying, as I understand it, that there would be the Supreme Court, a trial court for the most part, and sitting *en banc* in a great number of situations as an appellate court. That, of course, would mean that appeals could only be heard on occasion. Would that represent some delay in the adjudication of those cases?

JUDGE SMITH: That could; there is no question about that. They could easily sit once a month and they would have a lot of work, more than the Court of Appeals, I think, because there would be a lot of cases. But they wouldn't necessarily all be important ones; a lot of them wouldn't amount to a hill of beans.

MR. SMITH: What bothers me—would there be so much work that a constantly sitting intermediate Appellate Division might be indicated? Your proposal, as I understand it, is a Supreme Court which would be a combination of a trial court and, at certain periods, maybe once a month as you just said—

JUDGE SMITH: No, no. My point was—there should be, say, five judges assigned to the Appellate Division. I would keep them there right along until there was a vacancy, and we could fill it from the others or outside. I don't think it would be as feasible to rotate them up and down because you would have a diversity of views. I think specialization is better, but they would hear what intermediate appeals you wanted them to and they would also hear miscellaneous writs, say a writ of certiorari—they are something like an appeal, they are original cases—and they would have more cases before them than the Court of Appeals.

MR. SMITH: In that way, they might have too much to do.

JUDGE SMITH: Then you could create extra parts, divide your Appellate Division into parts. There's no trouble about that. The

Court of Errors and Appeals in some case, Wood against somebody, back in 1823 held that the Supreme Court could exercise its jurisdiction in parts, and that's what has been done.

MR. DIXON: Do I understand that this Constitution should be presented to the people and approved by them, and if it is then attacked as being not in accordance with the present Constitution because it provides for amendment instead of convention, that the Supreme Court, as duly constituted, would have the right—

JUDGE SMITH: As presently constituted it has the right now, if called before it—

MR. DIXON: Well, there will be a Schedule, no doubt, which will mean that it will take some little time before these court changes could be made. Now, will the present Supreme Court have the right to say—throw this whole thing out because it is unconstitutional?

JUDGE SMITH: I would assume so, because they have the right to pass upon the constitutionality of any statute.

MR. DIXON: Based on the statute as it is at present. And after it is ultimately constituted, if you move the Supreme Court judges up to the Court of Appeals, they would still have the right—

JUDGE SMITH: The judges who were going to administer the new court would be the same as the judges who are going to pass upon the creation of it. In other words, it is the same personnel.

MR. DIXON: Then you feel that they would have the right to throw this thing out.

JUDGE SMITH: It is based upon a statute and I haven't made any research on it, but I assume the constitutionality of any statute may be passed upon under the present Constitution.

MR. DIXON: But the Bill of Rights—I can't quote this exactly, but it says all power is inherent in the people and the Constitution can be altered or changed as they wish.

JUDGE SMITH: But you go before some court and they say whether this is under the Bill of Rights, don't you see?

MR. DIXON: That is why I ask whether the court has that power.

JUDGE SMITH: Well, you might call the military in and put the new constitutional officers in office. What I am getting at is, it should be made as simple as possible, and that is so that the thing would go right along—the same set-up, but simplified.

VICE-CHAIRMAN: Any further questions?

MR. SMITH: I am a layman on this Committee, so you will forgive some of these questions. You speak of the desirability of full-time judges in the Court of Appeals and in the Supreme Court, and then you imply part-time judges below that—

JUDGE SMITH: That is true. Now you have judges who, I

guess, in small counties get $5,000; who sit possibly once a week, maybe not that; and they practice law in addition. Under the new set-up they would go right into office as judges of the county court in the same manner. Now, of course, it might be well to make some change in that, to have full-time judges, but you've got to give them something more to do. But there is the question of whether you want those judges or not. I mean—I haven't passed on them. I know very few of them, but they were appointed with the idea that they were $5,000-a-year judges and sitting only part-time.

MR. SMITH: Is that good or bad?

JUDGE SMITH: They are not as experienced, I would say, and I think that goes without saying.

MR. SMITH: Well, speaking as a layman, I would have a little less confidence in a part-time judge than I would in a full-time judge.

MRS. MILLER: Not because he is less competent, but because he was practicing.

MR. EDWARD A. McGRATH: Isn't it true that any Common Pleas judge can hold a Circuit Court today?

JUDGE SMITH: The Circuit Court can refer it to him.

MR. McGRATH: I understand the Supreme Court can assign any Common Pleas judge to any Circuit Court.

JUDGE SMITH: They can assign a Common Pleas judge to sit in a Circuit Court, yes. I was speaking about an individual case. In the Circuit we can refer a case to the Common Pleas judge for trial; they can't refer a case to us. But the Supreme Court may direct a Common Pleas judge to sit as in the Circuit Court and try Circuit Court issues. That has been done where the lists were congested, as in Essex. I think we had three assigned at one time to reduce the list up there.

MR. McGRATH: Well, isn't that a better system than throwing them all into one pot with the Circuit Court judges?

JUDGE SMITH: Well, I don't think they ought to be thrown into a pot with the Supreme Court Justices. If you made them full-time judges you could then assign them to other courts to try cases there.

MR. McGRATH: What would be the difference from the present system?

JUDGE SMITH: Not very much.

MR. McGRATH: Isn't the present system better because the Chief Justice knows those Common Pleas judges?

JUDGE SMITH: Certainly. I say the system is all right. Your Common Pleas judges will hold your common court—it isn't so much that the cases they get aren't so important—

MR. McGRATH: The mere fact that a case was started in the

Circuit Court, does it mean that it is any more important than Common Pleas?

JUDGE SMITH: Just jurisdiction over the persons.

MR. McGRATH: It has nothing to do with the importance of the case?

JUDGE SMITH: I think if they handled important cases they would be more likely to bring them to the Supreme Court, that is, the state-wide court. You can go in the Supreme Court and sue a person in another county.

MR. McGRATH: The point I want to make is that the county Common Pleas Court is integrated in the Supreme and Circuit Court so far as the Supreme Court Justices are assigned; it is a matter of discretionary integration with the Chief Justice.

JUDGE SMITH: That is up to him if he wants to use it. If they go out of the county, they are paid extra.

MR. DIXON: Would you put the system of inferior courts in as part of the Constitution, or leave it to the Supreme Court or the Legislature?

JUDGE SMITH: I would have them do this. I would have them carry the courts over into the Constitution as county courts, but I would provide that the Legislature might abolish, alter or transfer their jurisdiction as it saw fit. That would be a safer provision to have there. The Legislature would then have the right to change their jurisdiction, but for the purpose of continuity I think I would create a county court, as now, and have all the jurisdiction in the Circuit Court and under Common Pleas judges all going under that one court. I think you can see the advantage of that.

MR. McGRATH: Would the Circuit Court hold criminal matters?

JUDGE SMITH: No, the Common Pleas judges would take all that jurisdiction, and then they would have the Circuit Court jurisdiction because they exercise similar jurisdiction in the Common Pleas.

MR. McGRATH: You would leave the thing as it is, with the Legislature making changes later as it saw fit?

JUDGE SMITH: If it saw fit.

MR. PETERSON: May I ask one question? What has been the historical background of the Circuit Court?

JUDGE SMITH: There was the constitutional court called the Circuit Court, but it really is the county court of the Supreme Court, and it's the same thing in its exercise. Original jurisdiction is exercised with Supreme Court Justices. Then they created the Circuit Court judges and put them into the administration of the Circuit Court which was the county civil court, and then the Su-

preme Court referred the Supreme Court trial issues to the Circuit Court judges for trial. They finally wound up as the principal trial court, with the exception that Common Pleas judges had that jurisdiction.

MR. McGRATH: In other words, if I wanted to sue somebody in Union County or Essex, I could sue them in the Circuit—

JUDGE SMITH: No, you would have to sue them in the Supreme Court.

MR. McGRATH: Both living in the same county—

JUDGE SMITH: Oh! yes.

MR. McGRATH: —either the Circuit or Supreme, and the advantage of that is that if the Circuit Court list is too large, or vice versa—

JUDGE SMITH: It all depends. In some cases Common Pleas run up pretty heavy lists, as in Hudson County.

MR. SMITH: Judge McGrath, doesn't that tend to duplication, that opportunity of going into either court? It means you have to have two judges, two court rooms, two clerks, and two of everything else.

MR. McGRATH: Well, the clerk is the same—the same County Clerk. It works out to the great advantage of the man with a little suit. He generally starts in Common Pleas. If it is one of more importance, he will start in the Circuit Court.

VICE-CHAIRMAN: Any further questions? Thank you very much Judge; we appreciate your coming here today.

(Adjournment for lunch)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Wednesday, July 2, 1947

(Afternoon session)

(The session began at 3:00 P. M.)

The Committee on the Judiciary reconvened in Room 202, Rutgers University Gymnasium, after luncheon.

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., Smith, G. F., and Sommer.

VICE-CHAIRMAN NATHAN L. JACOBS: We will now hear from Mr. William J. Brennan, Jr., one of the Associate Editors of the *New Jersey Law Journal.*

MR. WILLIAM J. BRENNAN JR.: *(reading from June 12, 1947 issue of the* New Jersey Law Journal) :

"A Modern Court Structure for New Jersey

For the past few months the Law Journal has endeavored to turn an objective eye toward the tangled skein of the New Jersey Courts and their many overlapping jurisdictional images. At this time, with the Convention opening today, it seems appropriate to review and condense the suggestions contained in the series of editorials in the hope that the members of the bar generally will be stimulated into active contemplation of the century-old horse and buggy court structure that is ours.

The editorials began with the prayerfully expressed aspiration that the delegates themselves would become so spiritedly sensitive to the creaking antiquity of the courts that sheer pride in their state and in the opportunity of a lifetime for real service would impel them to put prejudices and politics completely aside and create a Judicial Article in the new Constitution which would forever be a monument to their intellectual integrity. A prayer was breathed also that those non-delegates who for years had been in the forefront of the campaign for revision and whose utterances might be expected to have some influence on the thinking of the delegates would strive mightily in the interest of a finished document which would represent the best in modern methods of administering justice.

I

The Court of Last Resort

It isn't often that unanimity of opinion is found among judges and lawyers. On the subject of the present Court of Errors and Appeals, however, to a man they appear to be in complete accord that the unwieldy court should be relegated to a place among the things that were. So it seems reasonable to assume that the real problem remaining is as to the size of a new Court of Appeals. In the previous articles the view was advanced that it should be composed of either five or seven members. No specific position was taken as to whether the smaller or the larger number was preferable. The answer probably depends upon the structure of an Appellate Division, if one is in fact established. If such a Division is created and endowed with full intermediate appellate power, that is, one which will hear all law and chancery appeals and have jurisdiction over the prerogative writs as well, then five judges in the Court of Appeals

ought to be adequate. This conclusion stems from the modern thought that one full review as a matter of right is all that a litigant is entitled to expect. So it follows that with an Appellate Division having plenary review jurisdiction, there ought to be and will be a definite limitation upon the number of cases that can reach the Court of Appeals. Five judges ought to be able to handle the thus curtailed volume.

If on the other hand an Appellate Division is devised which will have a more limited field of operation and if (as will be discussed hereinafter) direct appeals from the law and chancery divisions to the Court of Appeals are to be ordered, then a seven-member court would seem more advisable.

II

Appellate Divisions

Here again practically no dissension exists among informed members of the bar about the necessity for Appellate Divisions. The real problem centers about the form that such Divisions shall take and the extent of their review jurisdiction. The question agitated is whether they should have intermediate appellate jurisdiction in all causes or whether certain causes, such as appeals from the law and chancery sections of the Supreme Court should be excluded.

The primary objective here is *one appeal* for a litigant *as a matter of right*. The secondary objective is to make certain that the Court of Appeals, because of restriction, by the Constitution and its own rules, on the causes which may be presented to it from the Appellate Divisions, does not become a court without a calendar. The safest and most practicable solution is that set forth generally in the Journal editorial of April 24, 1947. There it was proposed, *first,* that appeals from the law and chancery divisions of the Supreme Court go directly to the Court of Appeals. This would assure a constant source of review work for the court. *Second,* that all other matters of appeal or review (as by the prerogative writs) be assigned to appellate parts or divisions. Such jurisdiction would encompass District Court appeals, Workmen's Compensation appeals, review of the action of administrative agencies, review of the action of municipalities and like branches of government, review of police court convictions, regulation of the admission to the bar, etc. (As an aside in this connection an aim to be sought is the making of the prerogative writs issuable as of right or the refusal of the writ reviewable or the granting to the Legislature of power to create remedies which will operate concurrently with such writs)."

That, of course, is a very broad subject.

"No one need doubt that such Appellate Parts or Divisions would have enough to do. There are literally hundreds of Workmen's Compensation appeals annually, to say nothing of the other review burdens referred to above. The number of Parts and the composition thereof necessary to handle the task must be a matter for thorough study by the convention.

Appeals from these Parts should not be permitted as a matter of right except where the proceedings involve the constitutionality of statutes, the constitutional rights of individuals, the interpretation of statutes involving a large number of persons, questions of jurisdiction, a doubtful question of general law of wide application, or perhaps where there is a dissent in a Part or a certification of a question by a Part to the Court."

And on the issue of a unified court at trial level the Board proposes:

"The proposed revision of 1944 provided for a unified court system of state-wide jurisdiction at the trial level. The proposal grew out of a comprehensive study of our trial courts of original jurisdiction. The archaic character of these courts was responsible for the plan for a single court, then called the Superior Court (but preferably called the Supreme Court) divided into law and chancery divisions. The law section was to have

jurisdiction in all civil and criminal matters at law and the chancery section to have jurisdiction in equity and probate causes. The reasons for such a court are as pressing now as they were then.

In the Journal editorials of May 8th, 15th and 22nd the basic reasons for such a unified court mechanism were outlined and reiterated. The only phase of such a system which may be met with objection at the convention is the absorption of the Court of Chancery and its elimination as a separate and independent tribunal. But emotions and prejudices aside, there is no real reason for the perpetuation of its individuality. In a modern judicial system, where the objective is to provide for full, adequate and expeditious justice for all litigants, its jurisdictional idiosyncrasies and limitations should be ended. The historical accident which gave birth to the court should not now be made a blight on the path of progress."

Incidently, with respect to that controversial issue, another member of the Board is scheduled to testify at another time.

VICE-CHAIRMAN: Mr. Greene is scheduled to appear tomorrow at 10:30.

MR. BRENNAN: There again we might save the Committee's time on that issue and the details that you may be interested in, by having the Board's viewpoint preferably reserved for him. *(Continuing reading):*

"In the editorial of May 15th, a series of deficiencies in the present jurisdiction of the court were alluded to. These deficiencies are not matters of argument, they are matters of established fact and unanswerable, except through the establishment of an equity branch of a unified court.

All probate matters are peculiarly related to the work of a chancery division. At present the Vice Ordinaries and the Orphans' Court Judges have much concurrent and some conflicting jurisdiction over such matters. In the suggested probate division there will be one tribunal of state-wide jurisdiction presided over by judges who will be or become specialists in that field and everyone will know where to go and how to obtain the desired relief.

On the law side of the unified court, civil and criminal causes would be entertained. The disposition of criminal causes presents no particular problem. No one seriously objects to a blending of Oyer and Terminer, Quarter Sessions, General Sessions and Special Sessions into one court. In dealing with common law actions the need for elimination of three courts in whose domain they are now cognizable is more patent. Now the Supreme Court, the Circuit or Common Pleas Court may entertain these actions. Where service of process can be made within the county any one of the three may be chosen as his forum by the litigant. This labyrinthine house of justice has forever been a mystery to the lay mind. Plainly, a unified court system in which these courts are consolidated into one division of a state-wide court of original jurisdiction sitting in each county is most desirable.

To sum up the sense of the series of editorials, the Journal earnestly recommends to the convention:

(1) A separate Court of Appeals consisting of five or seven judges with appeals from the law and chancery divisions of the Supreme Court going directly to it. No other appeal should be permitted as a matter of right, except where constitutional problems, important issues involving interpretation of statutes, doubtful questions of general law of wide application are involved, or where there is a dissent in the Appellate Division or a certification of a question by a Division.

(2) The establishment of Appellate Parts or Divisions of the Supreme

Court to have appellate jurisdiction over all causes except appeals from the law and chancery divisions.

(3) The creation of a state-wide court of original jurisdiction separated into law and chancery divisions."

In considerably greater detail, we have argued the reasons which support those conclusions in the editorials which appeared over the period April 17 to June 5.

VICE-CHAIRMAN: We have copies.[1]

MR. BRENNAN: You have copies, so unless the Committee desires to ask any questions—

VICE-CHAIRMAN: Any questions?

MR. WAYNE D. McMURRAY: Would it be your thought, Mr. Brennan, that the type of appeal that would finally find its way to the top court would be determined in the Constitution, or by the top court itself ruling as to what causes should enjoy an appeal?

MR. BRENNAN: I would think the types of appeals that would come up from the proposed Appellate Division might preferably be enumerated by the court or by legislation, rather than in the Constitution itself.

lation in a way that perhaps is not as readily true of a constitution too detailed, because there is so much, as time goes on, that argues for flexibility which is attainable through court rule or legislation in a way that perhaps is not as readily true of a constitutional provision.

VICE-CHAIRMAN: Any further questions? Thank you very much Mr. Brennan. We shall read the editorials. Some of us have already read them.

It is almost four o'clock now. If there is no further discussion, we will recess until ten o'clock tomorrow morning.

(This session adjourned at 4:00 P. M.)

[1] These editorials appear in the Appendix to these Committee Proceedings.

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Thursday, July 3, 1947

(Morning session)

(The session began at 10:30 A. M.)

The Committee on the Judiciary met in Room 202, Rutgers University Gymnasium.

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., and Smith, G. F.

VICE-CHAIRMAN NATHAN L. JACOBS: Before we start with our morning presentations, there are a few preliminaries. Dean Wilkinson was scheduled to appear this morning but cannot do so and has requested another day next week. We are planning to terminate these hearings at the end of next week. There have been a few who have not been able to attend and we will try to have them here next week. If they cannot appear, we shall ask them to submit written views so that we will have all of the preliminary material before us by the close of next week. In that way, we will have an opportunity to prepare a tentative draft which, as you will recall, will ultimately be followed up by public hearings which must take place before the end of the month.

We have a letter from Theodore McC. Marsh, who was invited to appear but can't, and he expresses his views here. I would like to read them to you.

(Reads communication)[1]

VICE-CHAIRMAN: I see no need for making copies of these various communications.

MR. AMOS F. DIXON: Are they going to be included in the minutes?

VICE-CHAIRMAN: Oh yes, we will have them included in the minutes.

We have a letter from Justice Colie saying he will be happy to appear, and I would like to read part of it *(reading):*

> "It is perhaps of little significance, but your letter states that the committee has been advised that I would like to appear before it. I am only too happy to assist the committee in any way I can, but if it had not been for the telephone invitation, followed by your letter, I would be disinclined to appear, because I am sure that the committee is being swamped with suggestions of one sort or another."

Mr. Kaufman will appear this morning by our invitation, and the

[1] The text of the letter appears in the Appendix to these Proceedings.

Bergen County Bar Association likewise will appear this morning, instead of this afternoon. Chancellor Campbell has written to us saying that he could not accept the invitation that has been extended to him, but he would like to at a later time or, possibly, he could present his views to one or more members of the Committee. I think we will suggest a later time next week, and if he can appear, have him present his views to us either personally, or in writing, whichever he prefers, so that we will have it as part of our records before the close of next week.

MR. DIXON: Do you not think a personal appearance would be better?

VICE-CHAIRMAN: Yes, preferably a personal appearance; otherwise by written communication so that we may have his opinions expressed in the record.

All right, Justice Colie.

JUSTICE FREDERIC R. COLIE: Mr. Jacobs, and members of the Committee:

I do thank you for this invitation. There are a few things that I would like to say. I think, probably, your Committee is pretty much in agreement on many of them.

The first thing I would like to speak on is the court of last resort that is to be established, and I am certain that there must be an agreement on the fact that it should be a court free of all duties other than appellate work. Now, with reference to that court, I thought that I might be of some assistance to you. I have heard suggestions to the effect that that court, unless some method were provided, might find itself short of work to do. That brings to my mind one of the most important things that this Convention has to deal with in connection with courts, namely, the importance in the court of last resort of giving to the members of that court, whoever they may be, adequate time in which to study the cases before them. And that leads me to a brief discussion of matters that should come up to the court of last resort. Necessarily, what I have to say to you may, perhaps, seem a little disjointed. If, at any point, I don't make myself clear, I trust that you will pick me up.

Under our present system, every member of the court of last resort, the present Court of Errors and Appeals, has a volume of work that no man whom I have ever met in my life could do as well as he would wish to do. It is a constant drive from year in to year out, against the clock, and that perhaps is the most serious fault that I have to voice, and one of the faults that I think is most sorely in need of correction. Bear in mind, please, that this court of last resort is, of course, the court in this State where the last word is said. Incidentally, and I think this is important, it is the court which, in its judicial opinions, will attempt so far as it is able to correlate existing

law, to straighten out conflicts between its various decisions and those of other courts, so that its work shall be done in a scholarly and thorough manner. This ought to be self-evident, and I am sure it is.

Now, how to go about that? Under the existing system, and I'll take the year 1946 as an example, there came up to the Court of Errors and Appeals 199 cases, a relatively light year's calendar. And when you think about that figure, 199, and you consider the number of available working days, you will find, I am sorry to say, there is not adequate time for the consideration of important questions. That arises out of the conflict of duties that the members of the court at present have and which, I assume, under any proposal will be eliminated. This court should be confined to appellate work, solely.

The problem is, what is a fair work load? I know of no way to measure it, but if my brief experience of six years is any criterion, I can honestly say this—that whatever court is constituted and whoever goes on it, you may rest assured that the men will put all of their available time into the work. In other words, I am not concerned about there being too little work; I'm concerned about the load getting perhaps too heavy at times, and my suggestion to guard against that is this: that the court of last resort take only certain cases. I think that the enumeration of the type of cases which is contained in the 1944 proposal is probably satisfactory. I have nothing to suggest in lieu of that. I think that there is one provision in there that ought not to be lost sight of. You will recall that the last category of cases to go before the court of last resort is that in which the court of last resort has certified a case to itself. That to me is very important because, if cases involving constitutional questions and cases which the court will certify do not make adequate work, the Chief Justice of the court of last resort can always by certification reach down into the pot, and there will always be a surplus of cases in the appellate divisions or the intermediate court of appeals from which he can take cases. I don't contemplate that that is going to be necessary, but it is one of the conditions that I think should remain, in the event that there ever came an unduly slack time.

Now, my judgment, not based on experience, is that this court should, in the final analysis, probably be a seven-man court. I select seven because that gives a little leeway for illness and temporary disabilities of one sort or another—leeway that would be lacking, I think, in a court of five. So much for that.

As to the intermediate court of appeals . . . I do have a feeling about that which is rather strong. There has been some thought of creating appellate divisions, and I rather look with disfavor upon the creation of appellate divisions for the reason that may not have

occurred to you ladies and gentlemen, and that is this,—you can say what you will, but every court has morale, and without morale it is not as good a court as with it. If the intermediate court of appeals —it will be a tremendously important court in this State; many cases will end there—if that court is made up of appellate divisions in which the judges sit for a temporary period of time, there will not be the same incentive, there won't be the same morale-building quality that exists in a separate, identifiable court, as such. Now, that may seem of slight importance, but I don't think it is. I think the matter of morale is something that is vital to the successful functioning of any court. I can't see how a man sitting in the intermediate court of appeals for two years, and not knowing whether or not he was going to end up in Sussex or Cape May County the third year, trying everything from dispossess suits to specific performances, could do good quality work on that intermediate court of appeals.

Going back for a moment to the court of last resort—I would prefer not to tell you what my view is as to the composition of that court. I have no hesitancy to speak about the provisions for retirement if, Mr. Jacobs, you think the Committee wants to hear me on that.

VICE-CHAIRMAN: I think so. We have heard the Chief Justice express his views on that subject and I think we would like to hear your views also.

JUSTICE COLIE: My views are these. There should most assuredly be a retirement age.

MR. THOMAS J. BROGAN: Compulsory?

JUSTICE COLIE: Compulsory. Whether it should be voluntary at 70 and compulsory at 75, I don't know. During the time that I have been in the court we would have lost the services, had there been compulsory retirement at 70, of some extremely valuable men who had many years of service ahead of them—excellent service. I don't think the Convention can go far wrong if 75 is set as the deadline. And if at 75, I think it is only fair to those men to make some retirement pension system which is a little more generous than the existing one. My reason for saying that is, that it must always be borne in mind that many men going on the court of last resort have given up an existing remunerative practice or the prospect of one. Having been out of practice just a few years, in a great majority of cases I doubt very much their ability to go back successfully into it. We have before us one shining example to the contrary, but his is the exception to the rule. Therefore, it seems to me only fair that they be given a little more adequate protection than they are getting today. That is all I have to say about that phase, that is, the retirement phase.

MR. BROGAN: Would you care to talk about tenure?

JUSTICE COLIE: I have no doubt about that whatsoever, Judge Brogan. I think the way to get at things is to give the judges tenure during good behavior.

MR. BROGAN: Would you favor giving tenure to the judges of the court of last resort without probationary terms, and to the trial judges tenure after probationary terms?

JUSTICE COLIE: Perhaps, Judge Brogan, the probationary term is the best thing in the long run. Mistakes do happen, and if they happen it is better to be able to correct them when it would be least painful to everyone concerned, and that would seem to be at the end of a probationary period which I don't think should be seven years.

MR. GEORGE F. SMITH: How long do you think it should be, Justice Colie?

JUSTICE COLIE: Well, I think it should be considerably less than that. Everyone should be able to tell in considerably less than five years, whether a judge has those qualities which make him acceptable.

COMMITTEE MEMBER: I wouldn't make it less than five, sir.

MR. SMITH: I don't expect it to happen in New Jersey, but it is possible the Governor appointing the justice might, within his own term, change that probationary appointment to a permanent appointment. If, for example, as is proposed, the Governor's term is for four years with the opportunity to succeed himself, he would be in office eight years. Do you think we should concern ourselves with the possibility that we would get the wrong kind of Governor in some future years, that we should protect ourselves against a particular Governor packing that court with men of his own choice?

JUSTICE COLIE: No, sir!

MR. SMITH: It is a possibility, though?

JUSTICE COLIE: It is a possibility, but frankly, it is a condition which I am just unable reasonably to conceive happening.

MR. SMITH: The thing that concerns me in my question—the probationary period is one thing, permanent appointment for life depends upon good behavior, or some other condition, that could freeze that justice in the highest court—

JUSTICE COLIE: I might add one thing in connection with life tenure, or tenure during good behavior. I would like to have some more workable method of removal for cause than impeachment.

MR. SMITH: Before you pass to life tenure—looking back to our history, has this trial period, as far as our high court is concerned, meant anything? As you look back on cases, has there ever been an occasion where there has been denial of reappointment after a first term? I am talking about our top level courts.

JUSTICE COLIE: I know of but one instance when there was a failure to reappoint for anything other than cause. Does that answer your question?

MR. SMITH: Yes sir.

JUSTICE COLIE: The fact of the matter is, we have in practice had this opportunity for trial periods which has never been exercised.

VICE-CHAIRMAN: Justice Colie, however, seemed to give a qualified answer to your question. He said except in those cases where there was the element of cause. Were there some of these?

JUSTICE COLIE: I think so. There were two to my knowledge, one for physical disability and one for another reason.

MR. SMITH: Mr. Chairman, we have had at least three, if the Justice will recollect—

JUSTICE COLIE: Well, not in recent times—

MR. SMITH: We are talking, of course, in this constitutional article about conditions, not of the past, but of the future.

VICE-CHAIRMAN: That is correct, but this trial term for a high court has disadvantages as well as advantages, and that is what we are studying. I think that the high court as well as the lower court will receive most outstanding judges from time to time, and any trial period, you must remember, leaves the opportunity for failure to reappoint for reasons wholly apart from merit.

MR. WAYNE D. McMURRAY: Justice Colie, the method of removal by means other than impeachment, would that at all obviate the necessity for a probationary period? Would that take care of the situation of a man who was appointed and didn't work out—that is, appointed for life, with the possibility of removing him if he didn't prove to be a proper judge.

JUSTICE COLIE: I think so. Now, when you say a proper judge, I want to be sure that I understand your question. You don't mean, perhaps, necessarily to limit yourselves to the ability or lack of ability, or lack of characteristics other than physical. You mean any cause, don't you?

MR. McMURRAY: Well, yes.

JUSTICE COLIE: I would suggest—and I can't give you, I can't attempt to paraphrase it at the moment—but the State of New York has either adopted or has under consideration at the moment a proposal by which the question of removing a judicial officer from office is to be reposed in a committee of which, I think, the Chief Judge is the presiding officer. Now, that will allow you to clean up anything, any reason for dismissal—ill health, or lack of ability, or misconduct. I think that has a great deal to recommend itself.

MR. McMURRAY: You brought out a point there with regard to a probationary period and the reason against it. It seems to me that the argument that if you want to get high type men on the

bench, those men should be guaranteed some permanence in their position—I think that argument also applies against the probationary period. If a man gives up his practice for six or seven years, it is just as hard to get back into it as if he had given it up for six or seven years and then is removed.

JUSTICE COLIE: I agree. I think you put your finger on the nub of the question, so far as the probationary period is concerned. That was a weakness in New Jersey.

MR. DIXON: Do you have a suggestion, Justice Colie, for a definite thing? You spoke of this committee in New York—does it propose to the Chief Justice, and what is the make-up of that committee? Would they hold public hearings or would they decide in chambers?

JUSTICE COLIE: No. Now, I'm not too clear about this. The details I don't have in mind, but none of their hearings, as I recall the statute or the constitutional amendment, or whatever it was—none of the hearings would be private hearings.

MR. DIXON: Have you any suggestions of your own as to how that removal might be accomplished, other than this following of New York at present?

JUSTICE COLIE: No, sir, I do not. I do not approve of impeachment, for the simple reason that it is far too cumbersome, and if the necessity for removal arises, it must be done, and done promptly.

MR. DIXON: Impeachment merely covers misconduct in office. And you feel it is just as important, I take it, if a man becomes disabled—either mentally or physically crosses that intangible line where it is felt he is not suitable for the position—that's the crux—that you would like to see an arrangement made for removal.

JUSTICE COLIE: I would indeed.

MR. DIXON: And yet so circumscribed, of course, that injustice couldn't be done.

JUSTICE COLIE: Yes.

VICE-CHAIRMAN: Would you see any merit in leaving the procedure of removal to the Legislature?

JUSTICE COLIE: I wouldn't.

VICE-CHAIRMAN: You want it in the Constitution?

JUSTICE COLIE: Oh, no, I misunderstood you. I would have no hesitancy in leaving that to the Legislature. In fact, I would leave everything to the Legislature that I possibly could.

VICE-CHAIRMAN: So in answer to the last question, you might, in considering the constitutional provision, permit the establishment by law of some uniform method of retirement.

MR. BROGAN: Had you given any thought to the provision as to which court, outside of the court of last resort, should be a con-

stitutional court, or should the Legislature be empowered to alter the structure of the trial tribunals?

JUSTICE COLIE: I would be inclined, Judge Brogan, to leave that largely to the Legislature. That doesn't answer your question, does it?

MR. BROGAN: Oh, yes—well, when you say largely, you are not definite.

JUSTICE COLIE: Yes, I know. I think the court of last resort—

MR. BROGAN: Must be constitutional.

JUSTICE COLIE: —must be constitutional; and I think the intermediate court of appeals should be constitutional.

MR. BROGAN: Would you like to see preserved as an intermediate court, a court constructed largely as the present Supreme Court is constructed?

JUSTICE COLIE: You mean as to numbers, or as to jurisdiction?

MR. BROGAN: As to jurisdiction. I don't want to make this question too broad, but it has been suggested here that such appellate jurisdiction be retained in a court that we call a Supreme Court for present purposes, not the court of last resort, and it is to have control of prerogative writs and the practice therein and the returns made thereto.

JUSTICE COLIE: I would think so, yes.

MR. BROGAN: Do you favor the retention of prerogative writs, or do you favor this omnibus arrangement proposed by Mr. Hannoch—that there be a review, call it by what name you like, of any matters of jurisdiction, not necessarily limited jurisdiction, but judgments of tribunals like the Workmen's Compensation Bureau, or the various state bureaus or boards, like the Dental Board, or the Medical Board, and whatnot.

JUSTICE COLIE: Judge Brogan, that brings me to something—I'm very glad you mentioned this. I think that this is a tempest in a teapot.

MR. BROGAN: You mean the fuss about prerogative writs?

JUSTICE COLIE: I do, sir. I think that prerogative writs do have a place. I think there exists today all of the adequate mechanics to permit of a person going before the Supreme Court and asking for one kind of a writ and coming out with the other. That's there today.

MR. BROGAN: Yes, I understand that.

JUSTICE COLIE: And I know that because I have exercised it myself. So that merely by changing the procedure of asking for a specific writ, which may be denied you and another writ given, so that you come in on, let us call it a rule to show cause, asking for whatever the court thinks is the right remedy—I don't understand what they are talking about, sir, frankly.

VICE-CHAIRMAN: Might it not be that even though that power has existed over many years, there has been no evidence that the proposed procedural rules are to be adopted.

JUSTICE COLIE: You mean, Mr. Jacobs, that the Legislature, or the court, wherever this power was put, might not provide that you could get the remedy that you needed, even though you asked for the wrong one?

VICE-CHAIRMAN: I'm supplementing the Chief Justice's remark. I agree that that power exists, but this tempest that you talk about has, I think, resulted from the fact that the power has not been exercised.

JUSTICE COLIE: I'm afraid so, sir.

VICE-CHAIRMAN: Over many years.

JUSTICE COLIE: Over many, many years.

MR. SMITH: Why is that, Justice Colie—because of the lack of sympathy with the apparently new procedure?

JUSTICE COLIE: I really can't answer that question, sir. I don't know. I don't really know.

VICE-CHAIRMAN: May I ask a couple of questions on some of your earlier remarks? How large would you make the proposed intermediate court of appeals?

JUSTICE COLIE: Mr. Jacobs, I wish I could answer that question. I have given a lot of thought to it. If it were possible to do so, I would again leave that decision as to the number to be decided upon by some appropriate body, in order to make this new judicial set-up as flexible as we possibly can, to meet conditions that we can only guess at as of today.

VICE-CHAIRMAN: You mentioned that the Court of Errors and Appeals heard 199 cases. Do you know how that compares with other courts of appeals, or the United States Supreme Court? I recognize that those other courts may not have the other duties of our Court of Errors and Appeals, but I am trying to visualize an independent Court of Appeals with 199 cases. Do you know how that compares with work in other courts?

JUSTICE COLIE: I believe that is considerably less, perhaps a hundred less than the number of cases before the Supreme Court of the United States. I endeavored to compare it with the New York Court of Appeals. My method was not effective, because they have a habit over there of calling a lot of things cases, Mr. Jacobs, that we don't call cases. I believe I'm correct in saying that many of their tabulations of figures include motions and applications of one sort or another. They look as though they are litigated cases. They may be litigated, but they are not litigated cases in the sense that I use the term when I mean a case submitted to our court of last resort, or our Supreme Court. So I'm unable, Mr. Jacobs, so far as

New York is concerned, to answer your question.

MR. BROGAN: There is one thing you said, Justice Colie, that I didn't understand. In the event that we had an independent court of appeals of seven, and that independent court of appeals found that under the theory of cases that should go there, there wasn't enough work to do, you said it might reach down into the pot and take cases out. Now, Justice, would you expand on that a little further?

JUSTICE COLIE: What I mean by that, Judge Brogan, is this,—that if the power is given to the court of last resort to certify cases up to itself, which power was given in the 1944 revision, then, if there is a dearth of work, the presiding judge in the court of last resort could bring up cases which were then pending before the appellate division or the intermediate court of appeals. I don't think any necessity for this is ever going to arise.

MR. BROGAN: Do you think that if there were 200 cases, let us say for the sake of round numbers, in a year of ten months or nine months, whatever it may be, including the summer months, for a court of seven, that would be too heavy a load, assuming there is nothing else to do?

JUSTICE COLIE: No, I don't, but they will be working every working day. It is so difficult, in fact it is impossible, to mention time in these cases, as you well know, Judge Brogan.

MR. BROGAN: Some cases take a day and some cases take three weeks or a month.

MR. DIXON: Do you think a situation of overwork might be taken care of by setting up a plan for drafting some of the very able and capable men who might have been forced to retire at 75, still with their full abilities and belief that they can do a good job? Do you advocate such a plan?

JUSTICE COLIE: I think that judges—this perhaps answers your question indirectly—I think that judges who are retired, either voluntarily or because they have reached the age limit, should be kept on the roll, the state roll of the judiciary, so that they can do as they do in Connecticut. There they are sort of referees, or masters, and may be called in by the Chief Justice when the occasion arises, to handle cases.

MR. BROGAN: Not appeal cases?

JUSTICE COLIE: No, they are called in as masters in accountings and receiverships.

MR. BROGAN: Mr. Dixon wanted to know whether you could utilize the services of those men on the court of last resort. I don't think you could.

MR. DIXON: I was wondering whether that would apply to the court of last resort, as well as to the appellate divisions below it.

JUSTICE COLIE: I think not, Mr. Dixon. These things are so difficult to explain, but Judge Brogan will know what I'm talking about, I'm certain. There is a certain feel about appellate work. There is a certain feel about being associated with a given group of men. For a man to absent himself for a period of years and then to try to come back and work in that group—somehow I doubt whether it would be effective.

VICE-CHAIRMAN: Justice Colie, you have said little about this original trial court that has been referred to by the Chief Justice. Will you let us have your thoughts on that?

JUSTICE COLIE: I take it, Mr. Jacobs, that question primarily deals with this Chancery clause.

VICE-CHAIRMAN: Well, not entirely. That is one phase of it.

JUSTICE COLIE: Well, if you get integration, it definitely does; does it not?

VICE-CHAIRMAN: Oh, yes, that is one phase of it. There are others we are interested in.

JUSTICE COLIE: Well, suppose I then say a word or two—maybe it will clear the atmosphere—and then permit you to ask me questions that I can get at. Let me say a word or two about this so-called abolition of the Court of Chancery.

I need to say this as a preliminary to what you are getting at. In my judgment, which is far from infallible, there never was a worse misnomer used anywhere than when people talk about the abolition of the Court of Chancery in this proposed Constitution. And it seems to me so clear that I almost hesitate to explain what I mean. Justice is administered under a system of law, and a system of equity. No system of administration of justice is, in my judgment, worth anything unless law and equity are both present. When they talk of abolishing the Court of Chancery, unfortunately, in the minds of the public at large, there is some sort of queer idea that the things, the acts, which a court of equity, the Court of Chancery, could perform are going to pass out of existence. Well, of course, they are not. They are going to be kept, they are going to be administered as equitable principles, which is just exactly what they are. Now, if the Court of Chancery is not to exist by that name, what is going to happen to the equitable administration of justice? Well, it is perfectly clear to me that there is going to be set up a court that will deal with those principles in exactly the same fashion as the existing Court of Chancery has dealt with them in the past.

That brings me to a question that seems to bother a great many people. It is said, and said properly, that equitable principles should be administered by men who have a peculiar aptitude for that. I agree. Now, someone is going to have the allocation of the individual judges into the niche where they will best perform their

duties. Ladies and gentlemen, it is beyond my conception that the man in whom that duty is reposed will ever put men trained largely in legal principles on a bench where they will hand out and deal in equitable principles, and vice versa. It just doesn't make sense, particularly when you bear in mind that the assigning individual, call him the Chief Judge or whatever you will, is bound to be a man whose primary concern is the efficient, honest, effective functioning of the court system that he is in charge of. So, for that reason, I'm inclined to the belief that all of this talk of abolishing Chancery doesn't mean too much.

The whole administration of equitable principles, than which there is nothing more important, I think will remain in the hands of the men who are peculiarly qualified to administer those rules, the body of equity law that this State justly has every reason to be proud of. I know of no other state whose equity law is comparable to that of the State of New Jersey, and I don't understand why it wouldn't continue the same way, whether you call it the Court of Chancery, or whether it is called some other name.

MR. DIXON: Justice Colie, would you suggest that we keep the present plan of division between equity and law, so that a case having both equity and law in it would be shifted back and forth between divisions and between judges?

JUSTICE COLIE: That is a difficult question. I have no answer, Mr. Dixon. There are today on the books, rules and statutes which permit of the transfer of a case from one court to the other. It is a pretty cumbersome arrangement. I don't myself know the mechanics of how to get around it. The difficulty arises out of the right to a jury trial in law cases. In the *New Jersey Law Journal* of today—I just had a chance glance at it before I left my chambers—there is an article on the effect, I think it is, of the merger of law and equity in Illinois, and I hastily ran through the answers to questions that some judge gave and I find that they haven't solved that problem. The old bogey of a right of trial by jury comes bouncing up to make the transfer of a cause, or the handling of a legal question in the midst of an equity suit by the trial judge impossible, because of this business of a jury trial.

VICE-CHAIRMAN: Justice Colie, let me reserve that and put you back in the law court where the equity issue arises. Is there any reason why the law court can't dispose of that?

JUSTICE COLIE: I see no reason why it shouldn't, sir.

VICE-CHAIRMAN: To that extent you have a complete determination of the law and equitable principles by the law judge sitting in that case?

JUSTICE COLIE: That's right.

VICE-CHAIRMAN: And you think that is a sound procedure?

JUSTICE COLIE: I do.

VICE-CHAIRMAN: Now, it also works that way on the equity side in the federal courts. Do you consider that satisfactory?

JUSTICE COLIE: It seems to have worked out fairly well.

VICE-CHAIRMAN: And this problem of calling in a jury doesn't seem insurmountable at all, does it?

JUSTICE COLIE: No, it doesn't, Mr. Jacobs.

VICE-CHAIRMAN: You seem to be worried about this problem of calling a jury. Is that mechanically difficult?

JUSTICE COLIE: No, there is no mechanical difficulty. Of course, it is a slowing-down process, necessarily, if a jury has to be called in.

MR. DIXON: It would be slower if you turned it over to another court—if you back up—and be more expensive for the litigants?

JUSTICE COLIE: I think so. But the fact remains that I fear, unless the litigants consent to the procedure, that you are going to be confronted by a considerable number of cases in which the right to a jury trial is demanded. I believe that happens with considerable frequency, does it not, in the federal court? I don't mean to be cross-questioning you, but I think so.

VICE-CHAIRMAN: That's all right . . . It happens with less frequency than anticipated because of a procedural rule, namely, that jury trial is automatically waived unless you affirmatively demand it, with the result that many parties don't demand it even where they would be entitled to it. In federal practice you have not only the ordinary equity cases tried without juries, but many law cases are tried without juries.

JUSTICE COLIE: May I just enlarge on one thing. I don't want to appear in a superior light, but some of you Committee members are not lawyers, but laymen. I am jealous to guard the equity law of the State of New Jersey. I am what is known as a law lawyer. I'm not an equity lawyer, except by reason of being on the Court of Errors and Appeals. But there are few things in New Jersey that we can be so proud of as the body of our equity law, and I don't want to see anything done that would impair it. If the composition of the court that will try equity cases follows the suggestions that I made, namely, that a trained equity mind sit in equity cases, I think it will continue unimpaired.

MR. SMITH: Even though it is a division and not a separate court?

JUSTICE COLIE: Yes.

MR. SMITH: I'm confused about this court of intermediate appeal. We have had proposed to us a Supreme Court with several divisions, equity and law, and the appeals from those divisions would be heard where, in your opinion?

JUSTICE COLIE: The appeals from selected cases—I classify cases that have been decided by the intermediate court of appeals—would go up to the court of last resort.

MR. SMITH: I'm thinking of the trial court, in equity or in law at the Supreme Court level. I'm beginning above the small courts.

JUSTICE COLIE: I think they should go into that intermediate court of appeals.

MR. SMITH: You think the order of appeal should be the Supreme Court, the intermediate court of appeals, and finally the highest court of appeals?

JUSTICE COLIE: Starting from the top down, I have visualized a court of last resort, a court of appeals. Below that I visualize an intermediate court of appeals. It may sit in a number of different branches, but nevertheless, all one court—the same as the Supreme Court today sits in three parts, each part of which is the Supreme Court. And then, below that are the trial courts, such as the Circuit Court today, and the Supreme Court Circuit, and the Chancery Court.

MR. SMITH: That's as I understood you to say. Now, what about the appeals from the so-called inferior courts? The small claims courts?

JUSTICE COLIE: Well, of course there must be an appeal, and I would think the logical place to take those appeals would be to the Supreme Court.

MR. BROGAN: Appellate—

MR. SMITH: I don't—

JUSTICE COLIE: I don't visualize—

MR. BROGAN: Mr. Smith's difficulty arises out of this: Justice Case referred to this intermediate court which would have last jurisdiction in the court.

JUSTICE COLIE: Well, if that is where the difficulty arises, Mr. Smith, I conceive of the appellate court—what do you call it?

VICE-CHAIRMAN: Appellate Division.

JUSTICE COLIE: And the Supreme Court as being one court. Does that clarify things?

MR. SMITH: In part. What you are saying, in substance, is that the Appellate Division is at the second level.

JUSTICE COLIE: That's correct.

MR. SMITH: That court would hear the appeals from the courts in the same line, Chancery or law—right? Trial courts?

JUSTICE COLIE: That's correct.

MR. SMITH: And would that same Appellate Division hear the appeals from the still lower courts?

MR. EDWARD A. McGRATH: Take a concrete case, like workmen's compensation cases.

JUSTICE COLIE: That could be decided somewhere, I think—

MR. McGRATH: Wouldn't that make the work at least ten times larger than at present?

JUSTICE COLIE: That's just what I'm concerned about.

MR. McGRATH: Why should that unnecessary expense be put on the public, just for the sake of somebody's idea?

JUSTICE COLIE: You have to be very careful not to overburden this intermediate court of appeals, which is a very easy thing to do.

MR. McGRATH: Mrs. Jones is fined for letting her dog run at large in the City of New Brunswick, and the police judge fines her five dollars. The appeal goes to the Common Pleas, and that is generally the end of it in the 99 out of 100 cases. Why should the upper court be bothered?

JUSTICE COLIE: I don't see why it should be.

MR. DIXON: That would be covered by statute, I take it—that offenses of that kind finally end in the Court of Common Pleas.

MR. McGRATH: You want to beware of any set ideas, and let the thing go where it has always gone, or as it has been done, with the convenience of justice.

VICE-CHAIRMAN: I don't see how you can be worried about overburdening this intermediate court if, as you originally said, you leave to the Legislature the details as to the parts and membership. So that actually, if you left that to the Legislature and you had a tremendous volume of work in the inferior tribunals, you could go right to this appellate court which could sit in separate appellate parts.

JUSTICE COLIE: Indeed they could, Mr. Jacobs.

VICE-CHAIRMAN: Of course, the personnel might be increased.

JUSTICE COLIE: Oh, definitely, but I don't know that I want to see it grow too big.

VICE-CHAIRMAN: All I'm concerned with is that if the occasion arises—we don't anticipate that it will, at the present—where there is such a volume of work that you need two appellate parts sitting on the same level, under your plan you would still be in a position to have them.

JUSTICE COLIE: Indeed, yes.

MRS. GENE W. MILLER: Justice, would you leave the rule-making power, procedure rather, to the court or to the Legislature?

JUSTICE COLIE: Definitely to the court.

VICE-CHAIRMAN: I take it that means you would deprive the Legislature of any right to pass a Practice Act?

JUSTICE COLIE: Oh, no.

VICE-CHAIRMAN: Then the last answer you gave should be modified.

JUSTICE COLIE: Mr. Jacobs, may I hedge on this? The last

thing that I want to see is any such thing as a code of civil procedure, or whatnot, as they have it in New York. There is no New York lawyer who knows what the score is. So you see, I'm not helpful on that.

VICE-CHAIRMAN: Well, we can't hedge on these things. We will have to reach some conclusion on it.

JUSTICE COLIE: I don't think that the Legislature should be foreclosed. I don't think the judiciary ought to be set up so that nobody can even make a suggestion to them.

VICE-CHAIRMAN: You might approve the federal system which, in effect, is that the Congress delegates to the court the rule-making power, but Congress still retains the power to superintend and revise it. You approve of that?

JUSTICE COLIE: Oh, definitely.

VICE-CHAIRMAN: Any further questions?

MR. McMURRAY: May I ask the Justice one further question? Getting back to the question of prerogative writs—as I understood your position, you thought it was unnecessary to lump, shall we say, all these prerogative writs under one general writ, on the theory that the Supreme Court Justice, as I understand it, now has the power, if he wants to, if you applied for mandamus, to say, "No, you should have another writ." He has that power if he wants to exercise it.

JUSTICE COLIE: He has that power today, sir.

MR. McMURRAY: What I was getting at is that, even though he has that power, isn't his ruling in the matter subject to appeal? In other words, if I went in and asked for a writ—I'm not a lawyer so I make a lot of mistakes in my terminology, probably—if I applied for a given writ and the Supreme Court Justice exercised his right and told me, "No, you are applying for the wrong writ, you should have such and such a writ"—wouldn't that matter be appealable, and wouldn't that cause delay and complications, whereas, if the matter were covered by there only being one writ issued there couldn't be any appeal? Am I right in that, or is that—

JUSTICE COLIE: Well, in a way you're right, and in a way you're wrong, sir. If, under the existing system, an application is made to me for, let us say, a writ of certiorari, and I don't think one should go, but a writ of quo warranto should go, it goes. Then the case comes up before the Supreme Court, to which it is made returnable, and there the matter may be dismissed, because the man didn't make out a case which would support either a certiorari or quo warranto. Do you see what I mean, sir? But the fact that I issued quo warranto when I should have issued certiorari, I don't think, if the existing rules are honored, that that would be a reason for dismissal.

MR. BROGAN: I think that the basis of this confusion, if it is

confusion, is this. Many of the witnesses here have said, and not without some reason, that an application is made to a single justice for certiorari. He denies it. It goes to the court and the court denies it. That is the end of it. It is not reviewable. The thought seems to have been—I express no opinion—that regardless, that ought to be appealable, the general theory being that the man ought to be heard. He ought to get his day in court. That is pointed to as a weakness in the prerogative writs system, so far as certiorari is concerned, at least.

MR. DIXON: Do you feel, Justice, if we set up a plan so that a man could in all cases get a review, and substitute for prerogative writs—

JUSTICE COLIE: You don't mean that he would get a review as a matter of right?

MR. DIXON: As a matter of right, yes.

JUSTICE COLIE: Regardless of whether or not there was a showing of merit?

MR. DIXON: Well, that question comes in, but the review itself would show it, and show very quickly whether it was merited. Now, there may be some cases, as has been pointed out here, where we are perhaps working an injustice if we give a review. It would be a matter of such little importance. From the witnesses who have talked here about the difficulty in regard to those prerogative writs, getting the wrong writs, matters of jurisdiction—I believe that word will probably cover it—we would have less trouble if we gave every person a right to review, as a matter of right?

JUSTICE COLIE: In every case?

MR. DIXON: In every case, yes; or perhaps you could make a suggestion for a modification of that so as to eliminate the difficulty that you might foresee in such a plan.

VICE-CHAIRMAN: May I make a comment before you answer? I note the tone of surprise. You, in effect, say: Shall we allow every person to appeal as a matter of right from these administrative determinations? Assuming he does not have a meritorious case—perhaps it is frivolous—is he any worse than a litigant who appeals as a matter of right in the District Court, or the Supreme Court, in a case involving a hundred dollars, two hundred dollars?

JUSTICE COLIE: All appeals are not a matter of right.

VICE-CHAIRMAN: Appeals from the usual judgments in the law actions and equity actions are taken as a matter of right. What we are inquiring about is, should not the losing party have an appeal as a matter of right?

JUSTICE COLIE: I misunderstood completely. Absolutely, yes.

MR. BROGAN: He does not have that under the present system. I might go to you tomorrow and I might not be able to persuade

you to give me a writ of certiorari.

JUSTICE COLIE: You would not have had your appeal.

MR. BROGAN: The Supreme Court might be equally wrong as you would have been in the first instance to have denied it.

JUSTICE COLIE: That's right.

MR. BROGAN: There is no review.

JUSTICE COLIE: There is no review.

MR. BROGAN: So that you are going to do this—you are going to take the discretion out of allowing certiorari anyway, aren't you?

JUSTICE COLIE: Yes.

MR. McMURRAY: It seems, Justice, that with the increasing number of administrative agencies there must be a right of review.

JUSTICE COLIE: There must be a right of review.

MR. McGRATH: Justice Colie, I amused myself last night trying to write out a rule like "all acts, or refusals to act, of any public administrative official shall be reviewable as a matter of right, and an amendment shall be allowed as a matter of right if necessary and proper to the full administration of justice."

MR. BROGAN: Of course, you can't afford to say that that isn't a good statement.

JUSTICE COLIE: I'm in agreement with this,—that there must be, in my judgment, an appeal from these rulings, and an appeal—

MR. McGRATH: Well, a man comes up with his frivolous writ of certiorari, which may turn out not to be frivolous at all. Is he any worse than the fellow who sues you for running into his automobile when he knows very well that you weren't negligent at all?

JUSTICE COLIE: No.

MR. McGRATH: Who decides whether it has merit or not?

JUSTICE COLIE: Well, as it stands now, the jury does in one instance, and the justice to whom application is made in the other, and there are errors made. I have denied writs and they have gone to the Supreme Court.

MR. McGRATH: Couldn't frivolity be punished by double the costs, or something like that? Couldn't the court say the costs shall be doubled, just as they do in many other cases?

JUSTICE COLIE: That again is one of the matters that I would definitely not leave to the Constitution.

MR. McGRATH: Oh, you couldn't go and put it in the Constitution. I wouldn't even put this in. I think the Legislature might well pass it. How many cases of quo warranto actually appeal in the course of the year? Quo warranto—of course, the lay members may not know just what that is. Justice Brogan probably does. Would you say half a dozen would be a lot?

JUSTICE COLIE: Half a dozen—that would be a very generous allowance in my district where they don't have many.

MR. McGRATH: Do you think that is so important that we ought to fuss about it in our Constitution?

JUSTICE COLIE: No, sir, I don't think so.

VICE-CHAIRMAN: Anything further?

(No response)

VICE-CHAIRMAN: Thank you very much, Justice Colie.

JUSTICE COLIE: It has been a great privilege. If I have been of any help at all, I feel that I have not made the trip in vain.

(Discussion off the record)

VICE-CHAIRMAN: Mr. Brennan, who appeared for the *New Jersey Law Journal,* said that Mr. Greene was going to supplement his remarks about one particular phase. Mr. Greene is going to give us the general presentation of the editorials as they appear in the *New Jersey Law Journal.*

MR. ISRAEL B. GREENE: Mr. Chairman, ladies and gentlemen of the Committee:

The editors of the *New Jersey Law Journal,* which is a publication distributed among members of the legal profession, favor an independent court of appeals, an intermediate court of appeals, and a unified court of general jurisdiction, in which law, equity, probate and matrimonial matters are unified in one court, to be patterned somewhat on the modern English system, as established by the Judicature Act of 1873. It is their general view that equity and probate jurisdiction should be administered by a Chancery Division. In other words, they don't advocate, in the vernacular, the abolition of the Court of Chancery. They do advocate, however, that equity, as it has been administered in the past, plus the probate law, should be administered by a Chancery Division. I understand that that was the essence of the 1944 plan.

I should like to review briefly the arguments *pro* and *con* on this rather controversial question as to what to do with the Court of Chancery. It has been a subject that has interested me for as long as I have practiced. I'm in my 27th year. Those who want to preserve the present Chancery Court argue, in the first place, that the present separation of the courts brings about specialization, and they are afraid that that specialization would be lost by integration of the courts. In my opinion that specialization would not be jeopardized if we adopt a court system based on the modern English system. Experience with the English system since 1873 has shown that it has worked out very well, and that there has been no loss in the quality or prestige of the English Court of Chancery. Our Court of Chancery is modelled on the ancient English High Court of Chancery which, after hundreds of years of experience, was repudiated as a separate system. I do not favor the freezing of judges in

any one division. I think the system should be left flexible to give play to special talent, interest of judges, and volume of business.

Another argument that is frequently voiced by those who would like to preserve the present system, is that the prestige and quality of equity jurisprudence, which has been built up during the years, would be sacrificed. I think, generally speaking, that this argument is based on a complete misconception. The real fact, as history will prove, is that the prestige of our equity law has no connection whatever with Chancery as a separate system. That prestige is due in large measure to a number of great judges, and some of them were not Chancery judges—many of them were judges of the Court of Errors and Appeals, who were not regarded as specialists in equity. Judges like Beasley, Henry W. Green and Van Fleet left their imprint on our equity jurisprudence. That was one of the most important factors in that prestige. In other words, it wasn't the separateness of the Chancery Court; it was the personalities in the court.

I want to make special note of the influence of our Court of Errors and Appeals in developing our equity jurisprudence. After all, Errors and Appeals is our court of last resort, and its judges the final fountain of justice in equity as they are in law. The greatest equity opinions have been written by judges in the Court of Errors and Appeals, including your distinguished member, Justice Brogan —and I will refer later to a few opinions written by him.

We had no official equity reports prior to 1830. The first volume of *New Jersey Equity Reports* appeared in that year. Prior to that time, and stretching ages back, our equity practice was very haphazard, and very few people know much about it. I was told recently that some years ago someone in Trenton dug up the Chancery annals during the colonial period and proposed to write a book about it. It was suppressed because the law prior to and during that time was too haphazard and so incomplete. The Court of Chancery administered many legal remedies that now belong to the law courts, and it was feared that that book might disrupt the symmetry of the law which had developed since 1830.

Another factor which gave prestige to our equity law, which had nothing to do with the separateness of the Chancery Court, was the fact that prior to the regime of Governor Wilson New Jersey was considered the "mother of corporations." I would like to quote some New Jersey decisions, if time permitted, because our law was a liberal law for corporations during that period. Therefore, our law became popularized in the large law offices and in the offices maintained by corporations throughout the world. It would even seem that New Jersey has become the "grandmother of corporations" because of its equity law. Chancery enjoys the prestige that

it acquired during the years when New Jersey was the haven of large corporations.

Another argument frequently advanced is that equity is inherently a separate system and that it requires a different type of judicial mind; that somebody is supposed to possess an "equitable conscience," as it is sometimes called. They say that equity and law are conflicting systems, and therefore, that conflict should be manifested by a physical separation. Now, I have the authority to the contrary of one of the greatest equity lawyers of all time, Professor Maitland of England. Every lawyer knows Maitland as well as he knows Blackstone, and Maitland says that equity and law are not conflicting systems; he says they are, rather, complementary. He says equity did not come to destroy the law, but rather to fulfill it. Much of equity as we know it in New Jersey, particularly in the concurrent and auxiliary jurisdiction, overlaps the jurisdiction of the law courts, and in these fields it doesn't make much difference whether you go to the Court of Chancery or the court of law. In most cases it depends on who gets the first jump. If one lawyer can jump into the law court, the other fellow might afterward try to remove the case to the court of equity, or vice versa.

I want to point out that equity administers many legal remedies, and that law courts administer some equitable remedies. For instance, Chancery might grant a writ of habeas corpus. As everyone knows, that originally was a common law writ issued out of the common law courts of England. It was preserved in New Jersey by statute. Somebody mentioned an action in quo warranto; that is a legal writ which issues out of the law court. But that writ influenced the development in Chancery of equitable quo warranto and information. But if you trace the history of that writ you will find that originally it was not an equitable writ at all; it was issued out of the law courts. The English Chancellor in those days, when that writ belonged to the law courts, was akin to a clerk, or secretary of state of the king. It was not an equitable writ.

There are some cases in which a court of equity awards damages, as in the law courts. The judgments, at least the money judgments, of our equity court have exactly the same status as do the judgments of the law courts; they may be enforced in the same way; they become liens in the same way. For all practical purposes, money decrees in equity and money judgments in law occupy the same status.

You can even have a jury trial in Chancery. In labor contempt cases the Vice-Chancellor must call in a jury, and it is very much a law jury. And in numerous other cases the Vice-Chancellor may call in juries to try the issues of fact.

The law courts administer some equitable remedies. I'll mention

a few of them. By the Constitution of 1844 foreclosure suits may be brought in the law court. That is essentially an equitable remedy. On applications to reopen judgments at law, the courts apply equitable principles. The doctrines of equitable estoppel and waiver, which are inherent equitable doctrines, and which originally didn't belong in the law courts, are now administered by the law courts. The right to discovery, which inherently was an equitable right, is now remedial in the law courts under the statutes. In fact, in the last 100 years the law courts, under the statutes, have taken upon themselves many of the old-fashioned equitable remedies—so much so that some of these remedies have fallen into disuse in the Court of Chancery. While the residuary power to exercise these remedies still remains in the Court of Chancery, they are rarely exercised by the Court of Chancery, unless exceptional circumstances at present.

By way of showing this continuous erosion of equitable remedies and their deposit on the banks of the law court, I want to call your attention to a decision which was written by your distinguished member, the former Chief Justice in the case of *Herbert* v *Corby,* reported in *124 N. J. L. 249.* For perhaps a hundred years prior to that case it was the rule in the Court of Errors and Appeals that a mortgagee had to resort to the Court of Chancery to recover a deficiency against a grantee who assumed his mortgage. I won't trouble you with the legal gymnastics by which the court worked out this equitable theory, but the fact of the matter is that in 1896 the Legislature passed a statute which gave a right of action to a third-party beneficiary for whose benefit a contract was made, although not a party to the contract. Despite that statute, our Court of Errors and Appeals and our Court of Chancery still continued to hold that the remedy in a situation of that kind was exclusively in the Court of Chancery. In 1940 the question arose in our Supreme Court in the *Corey* case, and the Chief Justice, following the statute passed in 1896, held that that statute had changed the fundamental substantive law of the State, and that since we now recognize the right of a third-party beneficiary to sue on a contract made for his benefit, there is no reason why a court of law can't award the same remedy. His decision in that case, which is a landmark in equity as well as in law, was affirmed by the Court of Errors and Appeals and has since been followed.

In the case of *Woodbridge* v *DeAngeles,* which was reported in *125 N. J. L. 578,* the Court of Errors and Appeals said that the 1912 Practice Act, which was passed by the Legislature to regulate procedure in the law courts, "was plainly designed to mould procedure and judgments at law, in a large measure according to the patterns in equity." That is the statement made in 1940 by the Court of

Errors and Appeals, saying that the procedure in the law courts, by legislative action, was designed to assimilate and follow the pattern of equity.

So you can see that this process of (if you want to call it) moralizing the law, or making the law more equitable, has been going on for a long, long time and will continue to go on. When you really get down to it, the two systems are not contradictory, they are complementary.

The final argument which has been advanced for maintaining the present system, is a professional item. Many lawyers, particularly the old-time practioners, who are comfortably established in the profession, say it would be a difficult thing for many practioners to start from scratch and learn a new system. I do not agree. Upon reflection, I think you will realize they wouldn't have to learn a new system at all. As a matter of fact, the practice of law will be very much easier. At the present time a lawyer has to learn three systems of practice in New Jersey. He must learn the practice in the law courts; the rules of the law courts are different from the rules of the Court of Chancery. He must learn the Chancery practice. I'm speaking against self-interest, but I think the Chancery practice in this State has been something of an esoteric act. Most lawyers are afraid of Chancery practice. I don't know what there is about it, but it appears to be regarded as something in the nature of a trade secret. And then there is the third system they have to learn, and that is the system of the federal courts, which is fairly easy to learn. Now, if you have a unified court, and power is given to the judges of the highest court to fashion one set of rules for all courts—making those rules dovetail, not only for the general courts, but for the court of appeals—you will really have but one system to learn, and that system would so closely resemble the federal system that for all practical purposes it would be one. Maybe there would be differences in detail, as far as the jurisdictions of the various courts are concerned, but substantially you would have a unified court system in this State, as you have a unified court system in the federal courts. Thus, when a lawyer learns one system he will know all the systems.

Now I want to deal, with your permission—what I am trying to do is to summarize all the points, *pro* and *con* . . . Let's consider the difficulties of the present system. First, I want to deal with jurisdiction. I think every lawyer who has had any practice at all will agree with me that even the best lawyers in the State have at times had qualms, had difficulty in deciding the parliament of litigation. I could give you a list of about a hundred cases in this State where litigants have been kicked out of one court into another, and then back again. And then there were the lawyers that the litigants

had to pay for their services. I have in mind one case of my own in which I made a motion to dismiss a case pending in the Court of Chancery for lack of jurisdiction. The Vice-Chancellor decided in my favor and dismissed the case, and then he reconsidered the matter and reinstated the case. I then took an appeal to the Court of Errors and Appeals, and to show you how close the question was, the Court of Errors and Appeals split six to nine on the jurisdictional question. So even the judges didn't agree.

But one of the worst cases illustrating chaos as to jurisdiction—an important case—was this one: A divorced wife made a contract with her husband for the payment of alimony. The husband fell down in his payments. She brought suit in the Court of Chancery to specifically enforce that contract. The Vice-Chancellor dismissed the case, holding that the remedy was in the law court. Thereupon the attorney for the wife sought enforcement in the law court. The law court kicked the case out because the remedy was in the Chancery Court, and then an appeal was taken to the Court of Errors and Appeals, and that court said that the remedy was in Chancery, not by a suit for specific performance but by an application for increased alimony. Now, under a unified court system you would not have that controversy over jurisdictional differences. Under a unified court system, in most instances, the question would not be one of jurisdiction, but rather whether the parties were entitled to a jury trial.

Now, another point I want to touch on is this piecemeal litigation. I am addressing myself primarily to the lay members of this Committee. Our court system today may be compared with a number of separate, large and incomplete housing units. One house has the heating plant, another has the plumbing system, the third has the roof, the fourth has the electric lights—but not one of them has all. Perhaps this is an exaggerated example, and perhaps not strictly in evidence, but I have exaggerated it primarily to illustrate to the laymen that under the present court system, with the separate and limited jurisdictions of our various courts, it is often impossible to get complete relief in one action. In the law court you can get damages, but you cannot get an injunction. In the Court of Chancery you can get an injunction, but no damages, except in special cases. In the Orphans' Court you can get probate of a will, but you cannot get an adjudication of rights in an adverse proceeding, you cannot bring an action to set aside a fraudulent conveyance made by the decedent in his lifetime, and you cannot get instructions for a testamentary trustee in connection with the execution of a trust. That you cannot do. These remedies must be sought in other courts.

There is a very interesting case just reported in this morning's issue of the *Law Journal,* involving a proceeding before the Court

of Errors and Appeals, the opinion in which was written by Chief Justice Case. The Court of Chancery decided the case on the merits. The Court of Errors and Appeals reversed. It held that since the complainant sought equitable relief relative to an easement over lands, the existence of which was in substantial dispute, the complaint should be retained by Chancery, but as to the issue of facts, it must be sent to a law court for trial. In other words, the Court of Chancery will hold the papers until the law court (with a jury) determined the factual issue, and then that determination will be sent back to the Court of Chancery to frame a decree. Under a unified court system we would not have such shuttling of cases back and forth because of jurisdictional limitations.

At present cases are frequently shunted from court to court. For instance, an executor files an accounting in the Orphans' Court; he is ready to proceed with his trial when one of the litigants brings a suit in the Court of Chancery and removes the accounting proceeding out of the Orphans' Court into the Court of Chancery. Now, as a result, much of the time and effort spent in preparing the case before the Orphans' Court is wasted, because now the case has to be tried in the Court of Chancery.

A brings an action at law in ejectment against B. B has an equitable defense. He files a suit in the Court of Chancery and gets an injunction restraining the action at law, and the case is removed from the law court to the Court of Chancery. Much of the time involved in preparing the papers, filing the action, preparing orders and arguing the question of jurisdiction is wasted effort.

I think one of the most aggravating cases illustrating the effect of shunting cases back and forth in the courts is a case in which I appeared recently—and in which I was rather fortunate, the Chief Justice deciding the case in my favor.

(Laughter)

The case is *Briscoe* v *O'Connor,* and with your permission, I should like briefly to refer to it. It is mentioned in the *Law Journal.* There the rights of one of the parties were lost in the shuffle because of the shunting of the case back and forth between the law court and Chancery.

One of the disadvantages of the existing separate system of law and equity is the fact that the advantages and miscellaneous remedies that have been adopted by the courts of other states have seldom been adopted in New Jersey.

Now, there are many reasons which have contributed to the falling off of business in the state courts and the increase of business in the federal courts. I think that one of them is our archaic judicial court system, and in back of this is our unprogressive practice and

procedure. The litigant who has a choice between the state courts and the federal courts will in all probability go into the federal courts because the practice there is simpler and because he is not shunted back and forth. As a result, he does not have to worry very much about jurisdictional problems.

I would say that our judicial system is reminiscent of the old colonial farmhouse—the roof is leaking, the plumbing isn't so good, the floors are creaking. Every time the farmer gets irritated and is about to make some substantial improvements he reminds himself that he has a big mortgage which is about to be called, and that perhaps any day the mortgage will be foreclosed and he will be put out. And then, of course, he forgets all about making the improvements.

Now, as long as I have been a member of the Bar it has seemed to me there have been undercurrents of dissatisfaction with our separate courts of law and equity, and every time somebody has gotten excited about it and begun to talk of a constitutional amendment or revision, then, of course, all other efforts at improvement were dropped. We had a rather good example of that recently when the Chancellor appointed a committee to study and make suggestions as to how to improve the Chancery practice. This committee was headed by the distinguished former Chief Justice. As soon as constitutional revision appeared, the committee folded up.

I think we now have an opportunity to modernize our court system. It is about a hundred years behind the times. Just about a hundred years ago, in 1848, David Dudley Field, a very eminent member of the New York Bar, began to teach and preach judicial reform in the State of New York. In 1848, the New York Legislature approved a merger of law and equity. Mr. Field's writings and speeches which started the New York system were of profound influence upon the English Chancery practice, with the result that in 1873 England passed the Judicature Act which brought about a merger of law and equity, such as is being discussed here today. As a result of the New York and English experiments, many of our states followed suit, and I think New Jersey and Delaware and probably one other state, are the only ones in the Union that still cling to this institutionalized thinking generated by the old High Court of Chancery in England.

VICE-CHAIRMAN: Thank you very much, Mr. Greene.

I would like to ask one question, if I may. Your talk has emphasized the cost to the litigant as a result of this moving about from court to court because of questions of jurisdiction. Is there a corresponding increase in cost to the taxpayer because of the extended litigation?

MR. GREENE: Well, that is a very interesting inquiry, and perhaps some statistics have been gathered on that. I don't know. But my feeling about this shunting back and forth is that we could probably have a small cause court where a lot of the work, particularly in the field of the concurrent jurisdiction and the auxiliary jurisdiction could be disposed of. In other words, I think that ultimately there would be less work for the equity judges to do. My thought is that the remedies which are exclusively equitable—for instance, specific performance of contracts, the administration of trusts and estates, receiverships, bills to quiet title—those things that are traditionally and fundamentally and exclusively equitable, be basically administered by the Chancery Division of the unified court. All equitable defenses and remedies which arise incidentally in regard to a case on the law side should be determined by the trial judge sitting in the Law Division. That would do away with the shunting of cases back and forth.

VICE-CHAIRMAN: Thank you very much again, Mr. Greene.

Gentlemen, if you are ready, we will call our next speaker, Samuel Kaufman, of the law firm of Bilder, Bilder & Kaufman.

MR. SAMUEL KAUFMAN: Mr. Chairman, lady and gentlemen. I have no prepared statement, but I am unqualifiedly in favor of the retention of the Court of Chancery, headed by the Chancellor, as it is today.

Many years ago I lectured in the field of equity, and for the purpose of preparing myself I undertook to read every case in the State of New Jersey, beginning with Volume I, the volume that was then current, and in so doing I attained a perspective a little different from that which a teacher gets, and a little different from that which the normal advocate gets. I think I attained a perspective both as a teacher and as an advocate, and what impressed me in that tremendous body of law that you had was the splendid judicial thought and the fine uniformity of the decisions that was maintained in the State of New Jersey.

I had undertaken, years before, an analysis of the New York procedure, special term, the equity side, and noted what I thought was a deterioration of the equity jurisprudence in New York, from the days when they had their old Court of Chancery, to the abolition of the Court of Chancery and the merger of the law and equity side under the code, which was mentioned by the previous speaker. And I tried to analyze why New Jersey maintained its high standards of equity jurisprudence and why New York had gone down. In my own way I worked it out as follows:

In New Jersey the Chancellor is the court and the Vice-Chancellors, from the earliest days, have always conformed to the views of

the Chancellor and to the equity precedents. It is only in a rare case that I found a conflict between Vice-Chancellors administering equity under the Chancellor, whereas in New York each justice of the Supreme Court is a law unto himself. There is no Chancellor to whom he is subordinate. When he administers equity, he is the court. And in my compilation of decisions in New York State I found that in almost every single case in equity you could find almost as many decisions on one side as on the other, because the justices who had administered equity felt that they were entitled to have their own views and were not bound by the precedents of others who were coordinate with them.

Now, take what you have today in the unified system in federal court. I was chosen years ago to debate with Professor Morgan and with Dean Clark, now Judge Clark of the Second Circuit, on the efficacy of the then drafted federal rules, and I was considered a rebel because I had used the Practice Act of 1912 of New Jersey as my model.

In the unification there you will find the bench and bar overburdened, not so much with substantive law, but with the varying interpretation of federal rules. I think in the few years that the federal rules are in existence there are already five large volumes of precedents. And then, there is the *Advance Reports* which comes out every week, and you just simply can't follow the interpretation by the federal judges of their own federal rules. In addition to that, just as in New York, the federal courts are not bound by the decisions of other districts, nor are their appellate divisions or separate courts of appeal bound by the other circuits. If you pick up a volume of the *United States Supreme Court Reports* any day it comes out, you will find a judge making a statement something like this: "This case comes from the Third Circuit. Because of a diversity of opinion with the Second or Ninth, we are reviewing it."

Now, if you have that sort of system established in New Jersey with a Court of Chancery abolished—and I use the term "abolished" because of Justice Colie's statement that he cannot understand the term "abolished" as applied to the Court of Chancery—you would have each judge a coordinate judge. He will not be a member of the Court of Chancery. He will be a judge in his own right—a king in his own right—and you will have a contrariety of opinions by these coordinated judges, and you will magnify the appeals that will have to be taken to the Court of Appeals on equity matters, because there are conflicts between the coordinated judges. In New York State—

MR. McGRATH: Can you give one example of that?

MR. KAUFMAN: I would say—I don't quite get you, Judge

McGrath.

MR. McGRATH: You said that because of the contrariety of jurisdiction in cases, the lower court might seek review, because of that difference of opinion.

MR. KAUFMAN: I didn't say that. I said, in the unified court system each equity judge would be a king unto himself. He would not be subordinate to a Chancellor who is the Court of Chancery. He would not be bound by the judgments of his co-judges, just as in New York in the special term. I could pick out—

MR. McGRATH: How can you say that without having any foundation for making the statement?

MR. KAUFMAN: Because I have had experience in the federal courts and in the New York special term to that effect.

Another basis for my desire to retain the Court of Chancery is that I am afraid that unless you preserve the inherent jurisdiction of the Court of Chancery, as it is today, you may run into the situation that unless the law is codified, the Court of Chancery will be without power to dip into the reservoir of this law and established precedents, and for that again I turn to New York. Unless the New York Legislature has provided in the codes specific remedies, the New York courts dealing in equity are without power to grant any remedy at all.

VICE-CHAIRMAN: Isn't that covered by a provision in the Constitution that all jurisdiction goes to the courts, subject to change by the Legislature?

MR. KAUFMAN: I am opposed to granting the Legislature power to detract from the jurisdiction of the Court of Chancery, because thereby you can destroy it in its entirety.

VICE-CHAIRMAN: Yes, but wouldn't the fear that you have —that this inherent jurisdiction would be organized into law— wouldn't that really be taken care of by legislation, so that when the Legislature did act, it would do so consciously?

MR. KAUFMAN: I would be opposed to any integration which would leave the power to the Legislature to add or detract. I might not be opposed so much if you would preserve the inherent jurisdiction in the integrated court as it exists now.

MR. McGRATH: And freeze it?

MR. KAUFMAN: And freeze it, except that you would have the right to add to the jurisdiction of the court, as has been pointed out, in matters germane to the field of equity jurisdiction.

VICE-CHAIRMAN: In other words, you oppose legislative acts such as the Norris-LaGuardia Act?

MR. KAUFMAN: I am not familiar with that.

VICE-CHAIRMAN: That is a statute which, in effect, curbs the

injunctive powers of the federal court.

MR. KAUFMAN: I am opposed to it, absolutely. That is an invasion of property rights.

MR. SMITH: Do you think the rule laid down in *Flanigan* v *Guggenheim Smelting Company,* that that should be the elasticity of principles to be preserved in the set-up?

MR. KAUFMAN: I am sorry, but I am not quite familiar with that decision at this time.

MR. SMITH: I'm sorry. I thought you were.

MR. KAUFMAN: I have read so many that I can't remember them all.

I am thinking, for instance, in terms of *Hedden* v *Hand.* In that case the Legislature vested the power to abate nuisances in the Court of Chancery. Vice-Chancellor Lane held the statute was constitutional. Mr. Justice Kalisch, for a unanimous court, reversed, and held that the Legislature was vesting the power to proceed by indictment in the Court of Chancery and they were entitled to a jury trial.

I would be opposed to the power in the Legislature to do things of that kind, to take away from the law courts their inherent jurisdiction and vest it in the Court of Chancery. Similarly, I want to apply the same rule to the Court of Chancery.

I would not be opposed to an amendment which would permit a court to finish up a case in its own court.

MR. BROGAN: We must not, I take it, continue a situation where any court feels that it is privileged to claim, even slightly, jurisdiction over another.

MR. KAUFMAN: I said, Chief Justice, that I would not be opposed to an amendment which would permit the law court to deal with equitable defenses.

MR. BROGAN: Under the Constitution the inherent jurisdiction of the Court of Chancery was the means of maintaining its power. Now, how can you remedy that?

MR. KAUFMAN: Well, if you recreate the Court of Chancery with inherent jurisdiction, except as hereinafter set forth in the Constitution, which permits the cleaning up of legal defenses, that can be done. It can't be done mechanically.

MR. McGRATH: Is there a distinction in the law between a case in a law court where a man presents a lease which the other side says is fraudulent, and in another case from the law court, where a man has a deed and brings an action in the Court of Chancery to determine that? Where is the distinction?

MR. KAUFMAN: I have no objection to an amendment which would permit the completion of a suit if it was initially started

properly at law and having the equity issue decided there, just as I would like to see it in the Court of Chancery, where a question of a legal title arose, to have the Vice-Chancellor determine that question in connection with his decision.

MR. McGRATH: What distinction do you draw between giving an Orphans' Court judge the right to give instructions to an executor but not to a trustee?

MR. KAUFMAN: I would abolish the distinction and have the Orphans' Court established as a court of probate. In other words, if a case was started there, it would be finished there.

MR. McGRATH: That, of course, would be impairing jurisdiction.

MR. KAUFMAN: You can do it by constitutional amendment.

MR. McGRATH: What do you mean by constitutional amendment?

MR. KAUFMAN: I mean by constitutional provision at the start, where you establish the jurisdiction of each court. For instance, I differ with Justice Colie with respect to prerogative writs. I believe it's more than a tempest in a teapot, and I believe that a prerogative writ, by that name, should be abolished, and the whole remedy should be clarified. I believe that the discretionary element should be abolished in connection with rules and administrative procedure. I think there are some phases of prerogative writs, with the exception of habeas corpus, that could easily be eliminated because of this situation.

I remember a case dealing with peremptory writs of mandamus. Now, everybody knows that if a justice grants a peremptory writ of mandamus right from the bench, that is not reviewable. In the case involving the establishment of the Asbury Park Beach Commission, you remember that the Legislature, during the debacle of Asbury Park, ripped out the beach from the jurisdiction of the city and established a beach commission to administer it. During the course of that litigation, Mr. Justice Perskie granted a peremptory writ of mandamus.

MR. BROGAN: He was tired of it.

MR. KAUFMAN: He was tired of the thing. He hated the statute. It may be that he was afraid that it was going to be applied to Atlantic City, but nonetheless, he granted the peremptory writ of mandamus. Counsel asked leave to mold pleadings. Justice Perskie said "No, I am giving you my verdict. I won't let you mold pleadings." Now, meanwhile, Chief Justice Brogan said "No, that's not a final judgment," whereupon counsel sued at law for a declaratory judgment as to his rights. Whereupon the Court of Errors and Appeals wrote an opinion, in which they said: "Normally, it isn't *res judi-*

cata, but because the record didn't show that counsel asked the pleadings to be molded we find that the decision is *res judicata"*—and threw them out.

Now, there was no way of putting in, over the wishes of the judge, that a demand had been made to mold the pleadings. It seems to me that the whole fantasy of peremptory writs of mandamus, certiorari, and the discretionary features thereof, should be merged into a petition, and superfluity of writs eliminated. That will enable the matter to be disposed of properly, with the right of the party to be heard.

MR. BROGAN: Now, in an action of mandamus or quo warranto, how would you handle that? Here you are, trying men holding public office. Would you go in with an application for a jury trial?

MR. KAUFMAN: I don't care whether it's by petition or by a rule to show cause, or even—

(Off-the-record discussion)

MR. BROGAN: I wondered if you had thought about it.

MR. McGRATH: Mr. Kaufman, how are you going to abolish that when you are debating between quo warranto and some other writ? How are you going to abolish that?

MR. KAUFMAN: I would abolish all of them, because I'm dealing with many courts. Now, for example, I started with certiorari, and I was moved around to quo warranto, and then I was thrown out on both—and I'm not so inexperienced either. There are a lot of people complaining about the courts, because they are inexperienced. You study these cases and you arrive at an opinion, and you conclude that your remedy is right and go in on it, and then you are thrown out. I would rather have one cause of action for all prerogative writs.

VICE-CHAIRMAN: Mr. Kaufman, why is it so offensive to you to be thrown about from writ to writ at law, and not offensive to be thrown about between law and equity?

MR. KAUFMAN: In all my experience, Mr. Jacobs—I guess I would still be rated as one of the younger members of the Bar—I have never been bumped around from law to equity, and if you read the number of cases that are reported, there aren't so many cases where you jump from law to equity. I daresay that I could match you law for equity in prerogative writs where the remedy was denied because one was chosen rather than the other—a bill in equity, when you should have been at law. It's only in recent years that the conflict has been set up, a conflict between law and equity. You won't find so many. How many do you find in the last three volumes of the *Equity Reports*—the Court of Errors and Appeals—

where the cases should have started at law rather than at equity?

MR. BROGAN: There is no percentage here. In volume 137 of the *Equity Reports,* I think, 25 per cent of the cases involved jurisdiction.

MR. KAUFMAN: If there were mistakes made in the last few years it's unusual. As a matter of fact, in the work that I have done for the Bar Association over the years, in connection with this conflict between law and equity—this isn't the first one—the main critics of the Court of Chancery have been lawyers who rarely had a case there. And there is nothing difficult about it. It's like starting a suit at law—the interpretation of the rules, applicable sections, counterclaims, and the like. The mere fact that you have merged all the actions into the one cause of action and have simplified the rules, doesn't mean you simplify the trial work at all. It's a question of personnel; it's a question of the type of case; and each one stands on its own feet.

Take the Practice Act of 1912, which abolished common law pleading. You know as well as I do, Chief Justice Brogan, that because of the way the law courts are set up you can't appeal, except after final judgment—and then they take the rule that if there is no substantial harm, we won't reverse. There haven't been so many cases interpretive of the rules, motions, or appellate work along those lines, for we know, as a matter of fact, that the number of cases that can be reversed at law are few and far between, because the duty of the trial judge is very limited to the inclusion and exclusion of evidence. And how many cases, criminal cases, have you found in the last five years that have been reversed because the judge made a mistake in the ruling on a question of evidence? Very few, because you go to the substantial error rule. On the equity side, you very rarely reverse because of the inclusion or exclusion of evidence. You review all the facts, and when you reverse you say, we are just as capable of judging these facts as the Vice-Chancellor.

MR. McGRATH: Have you any ideas on whether the Prerogative and Chancery Courts should be merged?

MR. KAUFMAN: I would put all the prerogative work into the Court of Chancery, because I think that is where it belongs. As to how it would work, I think along the lines of most people here—that a person is entitled to at least one appeal, as of right. If you are going to have an intermediate appellate division, you might clear all the appeals from the inferior courts to the appellate division and let it stay there.

With respect to appeals from the Court of Chancery and the Supreme Court, I think there should be one appeal, right to the highest court—the Court of Errors and Appeals—without any certifica-

tion. I don't believe that if we have this set-up that the Court of Appeals will be so overburdened that we need to adopt a certification system.

MR. McGRATH: Was that the proposal of the Essex County Bar?

MR. KAUFMAN: I think that was the proposal of the Essex County Bar, of which I was a minority member. They only believe in certification where there was an appeal to the appellate division, and then only in questions of statewide importance, or where a constitutional question was raised in the inferior court, the District Court, or in one of the administrative tribunals.

MR. BROGAN: Would that be likely to result in raising constitutional questions—needlessly, perhaps?

MR. KAUFMAN: I doubt whether the Bar would raise constitutional questions needlessly, Chief Justice Brogan. I think the Bar, in the main, is a bar of integrity. They don't raise questions just for the sake of taking an appeal. I think the work in the appellate division, like in New York, will be administered as it should.

MR. BROGAN: I am referring to questions of merit.

MR. KAUFMAN: Well, Chief Justice Brogan, I've taken appeals and I was thrown out on the ground that the appeal was without merit. Nonetheless, when I took the appeal I thought it was with merit, and maybe when I lose I think you were the court of errors, and when I win I think you were the court of appeals.

(Laughter)

I have always had faith in my convictions. Even though you knock me down I think maybe I was right. But that is part of our advocacy, and I think you feel the same way now that you are down among us, with the rest of us, arguing before the Court of Errors and Appeals.

VICE-CHAIRMAN: Does anyone have any further questions of Mr. Kaufman?

MR. SMITH: As I understood your argument in favor of maintaining the Court of Chancery as it now is, you seemed to see merit in the fact that the Vice-Chancellor, in effect, echoed the views of the Chancellor.

MR. KAUFMAN: "Echoed the views of the Chancellor" is a very, very nice opinion, but in the words of the court—it was Chancellor Walker and others—the opinions of the Vice-Chancellors were circulated among the Vice-Chancellors and the Chancellor in order to insure uniformity. I think that is a great thing. We have uniformity in the main, and the lawyers who have searched the law will find the remedy in those decisions. I only know of, I think, about four or five decisions, and they came only within the last ten

years, when one Vice-Chancellor dared to differ from another Vice-Chancellor.

MR. SMITH: Is that good? I, personally, have very serious objections to "yes" men in any set-up.

MR. KAUFMAN: It's not a question of "yes" men, but it's a question of having uniformity in administration, in the law. I would be opposed to having the field of partnership as it is in New York, where there are equitable questions in the distribution or liquidation of partnership affairs. Ten judges, having five opinions on one side and five on the other—you don't know which to take.

VICE-CHAIRMAN: Wouldn't it be a problem of law that is involved?

MR. KAUFMAN: It's not so much a question of law. The courts of appeal have pretty much unified the law situation.

VICE-CHAIRMAN: The court of appeals can unify any difference of opinion.

MR. KAUFMAN: You have the same thing at law, on motion between various circuit judges, and I don't like it.

VICE-CHAIRMAN: Well, the point in the first place was that you have the same problem at law as you do in equity cases.

MR. KAUFMAN: Yes, and that is one of the things that you might have to remedy, because you have no appeal on the law side today and you are stuck with the decision until the case is finally determined by a jury, and by that time all your rights may have been impaired. That is a tremendous defect on the law side, and it may be that your appellate division on the law side will have some efficacy, if you will be able to appeal from some interlocutory orders.

I will give you an example. In a law action before a certain circuit judge he commanded the plaintiff to appear before trial, before an answer filed, in violation of the statute. There was no right of appeal. You had to wait until the case was over before you could review that action. In the meanwhile he was about to go ahead and examine the people before he was entitled to do it under the statute. What was the net result? The ingenious lawyer in that case went to the Supreme Court Justice sitting in circuit and applied for a motion for reargument, and the case was settled because it was practicable to settle it in view of the situation. But you have that situation on the law side. You couldn't have than on the equity side because, on the equity side today, would a Vice-Chancellor grant such an order? You could take an appeal to the Court of Errors and Appeals and reverse him. You haven't got that on the law side. In fact, the deficiency on the law side is what very few people have realized.

MR. SMITH: I am afraid that with the Chancellor appointing the Vice-Chancellors and if, as you see it, the Vice-Chancellors are trying to conform to the views of the Chancellor, you would have more talk about that than giving justice in the cases before the Vice-Chancellors.

MR. KAUFMAN: There has been no injustice done in the Court of Chancery in history that can't be remedied. The Chancellor doesn't appoint "yes" men. He appoints men that he thinks are men of integrity, men of ability, who will follow the precedents that are already established in this State. The law is progressive and streamlined.

VICE-CHAIRMAN: Thank you very much, Mr. Kaufman.

We will now hear from Mr. E. J. Gilhooly.

MR. EDWARD J. GILHOOLY: My knowledge of what has already been presented to this Committee by eminent jurists, educators and lawyers is necessarily limited to what I have been able to gather from the public press. I sincerely trust the views which I express today will not be unduly repetitious.

Three years ago I had occasion to take an active part in public discussion of the proposed Revision of 1944. I believe I engaged in as many as 40 debates on various provisions of the Revision then proposed, and as a result of this experience I was able to gain a valuable knowledge of the opinions of many of the people of my County of Essex and elsewhere.

It was my opinion then, and it still is, that our Court of Chancery should be retained in our Constitution as an independent court. Much of that which has already been said might have been suitable and some of it might have been persuasive if we could turn back the calendar to the Convention of 1844. Whether the framers of our present Constitution and the people who voted for its adoption acted wisely or unwisely, the fact nevertheless remains that we have built up institutions in our present courts as we know and understand them. Thus the Court of Chancery has become as definitely intrenched in legal jurisprudence as has the Supreme Court. It seems to me that it would be as logical for us to say that the Supreme Court should be merged into the Court of Chancery as to say that the Court of Chancery should become a part of the Supreme Court.

I cannot find myself unduly impressed by the arguments, usually coming from the younger members of the Bar, that our court system is complex, and the further argument that the ordinary layman cannot follow the procedure in our courts. I was a professor of law for 12 years and have been a trial lawyer for over 27 years. I have had the opportunity of observing the development of the younger members of the Bar, lawyers of greater and lawyers of equal experience,

and I have concluded that the studious lawyer has no great difficulty in obtaining appropriate relief and that the careless and indifferent lawyer meets with the success which his ill-timed effort deserves. It is not to be expected members of the laity should understand court procedure, for the practice of the law is a profession. He is interested in results, just as you and I when we consult our physician.

(Adjournment for luncheon)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Thursday, July 3, 1947

(Afternoon session)

(The session began at 2:00 P. M.)

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., Smith, G. F., Sommer and Winne.

VICE-CHAIRMAN NATHAN L. JACOBS: In the absence of the hearing stenographer this afternoon, will you please speak into the microphone in order that the Soundscriber may record your testimony?

MR. EDWARD J. GILHOOLY: At the close of this morning's session, I had mentioned my experiences both at law school and at the bar. My purpose was to indicate to you, sir, that during the course of that time I have met lawyers who are coming up in the law, lawyers with greater experience than my own and those with lesser experience, and it seems to me, and I have reached the conclusion, that we as lawyers have no great difficulty in obtaining appropriate relief and that the careless and indifferent lawyer usually meets with the success that his own time and effort deserve. As far as the laity not understanding our court procedure, that's understandable because the legal profession is a profession and they're not expected to understand it. No matter how simple the system you provide, it would not be wholly understandable to one who has not made a study of the subject.

From what I have read in various reports coming from the State Bar Association and my own county bar, and remarks of learned speakers and jurists, it seems to me that it is fairly well conceded that equity should be kept distinct from law in some manner, shape or form. Also, cases in which an equity decision is involved should generally be decided by jurists who have a specialized knowledge of that subject. If both the lawyer and the judge will give the subject the proper reflection. I am sure that all would agree that the power of an equity court cannot adequately be defined nor can the limit of equity power ever be defined.

Now my objection to the law judge deciding questions of equity is this: if the law judge is permitted to make these decisions in equity, it's true he'll be familiar with the usual actions in equity; he'll understand the generally accepted principles of equity; but he will not have the experience to arrive at a true decision in a case which is doubtful and which presents a new equity. This is

so because equity is essentially a court of conscience, and the decisions of that court are rooted in conscience, and the conscience of the litigant is fully explored before the decision is reached. It has been said in our United States Supreme Court by Mr. Justice Cardozo that when rights are strong enough, equity will find a way though many a formula of inaction may bar the path.

It has been urged upon this Committee, and I have heard the argument advanced many times in the past, that the lawful rights and expectations of litigants are often delayed or defeated by this clash between the jurisdiction of the Court of Chancery and that of the court of law. It is my considered opinion that if this is so the blame can invariably be placed at the hands of the attorney for the litigants. A relief which is sought in equity is separate and distinct from that which is sought in law. I don't think one would go to a hardware store to buy a suit of clothes, or vice versa.

Let's review the particular approach to a case as it comes to the lawyer. The lawyer is given the facts, so he knows at first hand what the facts are. He's apprised of everything that's in the pleading. He knows at once whether or not there are mixed questions of law and equity involved. It's incumbent upon the lawyer at that time to give consideration to the pattern of pleadings—to which so many lawyers limit themselves at that stage of the case—to its ultimate conclusion. And he can then determine whether there are questions of law and equity involved.

Now, the Legislature has power, and it has exercised this power, to prevent a miscarriage of justice where there is a clash of jurisdiction. I don't know if this has been referred to before, but I haven't heard it mentioned. We have on our statute books an act known as the Transfer of Causes Law. It is there provided—and this is an act of the Legislature and recourse has been had to it and the courts sustained its operation—that no cause or matter pending in the Court of Chancery, Supreme Court, or Circuit Court, or Court of Common Pleas, the District Court, Court of Oyer and Terminer, Court of Quarter Sessions, or Court of Special Sessions, and that includes them all, shall be dismissed solely on the ground that such court is without jurisdiction over the subject matter, either in the original suit or on appeal; but the cause or matter shall be transferred, with the record thereof and all papers filed in the cause, to the proper court for hearing and determination The court to which the suit or matter is transferred shall thereupon proceed therein as if the same had been originally commenced therein.

As that act has been interpreted by the courts, it is applicable in those cases where the court has no jurisdiction of the whole case. In other words, if you go into equity and you have a purely

legal action, then, of course, the cause is going to be transferred under the statute, because the court has no jurisdiction of the whole case. Where the court has jurisdiction in part but not in whole, then the statute is not applicable. However, in those cases where there is an equity principle set up by way of defense—the lawyer starting the suit will certainly know whether it belongs in law or in equity, but he doesn't know what the defendant's going to plead. He may plead a legal defense and an equitable defense.

Now, in the trial of that case, you don't walk into the court, file your pleadings, and be heard the next day. You have to take your place on the list; and it has been our practice in the more populous counties that it takes from a year to two years before your case is reached for trial. Knowing that there are equitable principles involved, it is incumbent upon the astute lawyer, the lawyer who's interested in speaking only for his client and with a minimum of cost, to take steps immediately in the proper court to meet that issue. If an equitable defense is raised at law, he can file his bill in equity on that point, or if a case comes up in equity involving a question of law such as the right at law that has not been established, it's within the power of the Chancellor, and the rules so provide, that an issue can be framed at law and the case sent to the law court for determination.

In many cases the Chancellor, in order to guide his conscience, has seen fit to call upon the litigants to settle the question of fact at law, before a jury. It's not necessarily binding on him, but he can take it in an advisory capacity.

So finally, I claim that there is ample authority under our existing statutes to overcome the difficulties of which we have heard so much. I do think, however, that the Legislature can, and should, enlarge on the Transfer of Causes Act, and I think they can do so and stay within the provisions of our present Constitution, or any constitution that may be adopted by the people on your recommendation.

Now, many of the proponents of the merger—and I'll call it the so-called merger because we really don't merge law, we really have only one body of law—point to the simplified procedure in our federal courts where there's only one form of action. I just had occasion a few days ago to examine the federal rules, and they became effective in September of 1938. So far there are six volumes, each containing 400 pages of cases, interpreting the federal rules of procedure. There are any number of textbook writers who have written volume after volume on the procedure in the Federal District Court. It's most amazing. I think one author has as many as 19 volumes on federal procedure; and there are several others. And then when you delve into the maze of authorities referred to,

you still come out insecure, because you don't know what the right rule is.

I had a case the other day, and it was very important that I get this suit started properly and in the right court and under the proper procedure. It's not clear whether or not in an action under the statute known as the Tucker Act, a federal act, there is authority given by Congress to sue the United States of America directly. That point isn't clear, and I examined the authorities on it. Much to my amazement, in looking up the law I find that it's doubtful as to whether you should start your suit by way of petition or by way of bill of complaint. In the course of my examination I was astounded to find that after the federal courts had been in existence this long period of time, that because there is only one form of action, they are even to this day disputing in what cases you are entitled to a trial by jury and those cases in which you are not entitled to a trial by jury; and then the court has to determine whether the case is originally one that should have been brought in equity or in law.

Contrary to what Mr. Greene says about the transfer of cases into the federal courts, it seems to me from my observation that lawyers are very hesitant about going into the federal courts because of the obscurity of the procedure and the insecurity that is brought about by so many conflicting decisions in the various states.

The most that anybody can say for this new plan of having a single Supreme Court with an equity division is that it's going to be experimental. If the Court of Chancery is preserved in its present form, then the people of this State will retain a court that has experience of more than a century. The task of simplifying court procedure in the lower courts is sufficiently difficult without adding further complexities. I would also like to call attention to the great body of statutory law which has been enacted since 1844, in which statutory jurisdiction has been given to both the Court of Chancery and the law courts. In addition, there are many instances where the Legislature has bestowed certain statutory powers on Justices of the Supreme Court. Consequently, the Bar group can say that the proper application would be for you thoroughly and critically to examine all statutes to see what effect the changes which you are going to recommend will have.

The several parts of law and equity, except as therein otherwise provided, should continue with like powers and jurisdiction as if the Constitution had not been adopted. As a consequence of this position, by judicial interpretation and construction over the years, the Court of Chancery and the law courts had certain inherent jurisdiction. Jurisdiction which both courts had at the time of the adoption of the 1844 Constitution, being inherent in the courts,

should not be changed by any action of the Legislature, but would require constitutional amendment.

Now, the schedule which must accompany any new draft must be carefully prepared, and there is grave danger in the results which may follow if the Court of Chancery is merged with the law courts. I don't intend to go into any extensive detail, but I do think there is one example, and it won't take me long to cite it.

In 1944 the Legislature passed what has commonly been referred to as the Anti-Injunction Act in labor disputes. In the case of *Westinghouse Electric Corporation* v *United Electrical, Radio and Machine Workers of America, 138 N. J. Eq.*—and the Court of Errors and Appeals just passed on it, I think, in the December term, 1946—Vice-Chancellor Bigelow held that this act was unconstitutional as depriving injured persons of the constitutional privilege to invoke Chancery's jurisdiction to grant aid where the common law courts afforded no adequate remedy. In this ruling the learned Vice-Chancellor was reversed by our Court of Errors and Appeals, and the court held that the statute under examination was merely procedural and that therefore it was within the power of the Legislature to modify the procedure. Vice-Chancellor Bigelow conceded that; but he said it wasn't procedural. It went right to the inherent jurisdiction of the court. And here is the significant statement that was made by our Court of Errors and Appeals, and I don't think it can be said to be purely dictum, because it was essential to the decision—the court there said it was within the power of the Legislature, and the Legislature exercised that power, by stating what acts of the employees could not be restrained or enjoined.

We thus have, by judicial interpretation, a pronouncement by our highest court of the limitation on the court of equity to grant injunctive relief against certain actions committed in a labor dispute. From that it can be argued that this interpretation is a limitation on the inherent jurisdiction of the court, although it was imposed by statute. As a result thereof—of the limitation on our Court of Chancery in granting injunctions in labor disputes—it might be argued in the future, and our courts might hold, that the provisions of the Anti-Injunction Act could not be modified by any subsequent act of the Legislature if the new Constitution is adopted and an adequate safeguard against the result is provided. Conceivably, it might require further constitutional amendment if the Legislature saw fit, in its wisdom, to change the public policy of this State in treating of labor disputes.

MR. THOMAS J. BROGAN: Do I understand that you do not think that the position of the Court of Errors and Appeals is right in that case?

MR. GILHOOLY: Well, my private conviction is that Vice-

Chancellor Bigelow's opinion was sounder in law than the Court of Errors and Appeals, but the point, Mr. Justice Brogan, I am trying to make is this—the courts have set forth what the inherent jurisdiction of the Court of Chancery is in labor disputes and that you cannot, according to our interpretation of the law, grant injunctions in certain cases because the Legislature has defined the public policy of this State. Now, when you modify, if you do not preserve the jurisdiction in the Court of Chancery in these injunction cases, the right might be lost, or modified, or limited. There's grave danger, in my mind.

The next point is this: that if you should simply say there shall be one court—heretofore we've obtained injunctive relief in the Court of Chancery under existing practice—it's incumbent, then, upon the framers of the Constitution, if we're going to have one court with two branches, to say in express terms what is equity and what is law. Because if you do not do that, then for the next hundred years you're going to have interpretations by our courts determining what originally was equity, what is equity today and what is law.

I'm only going to take one more minute and conclude . . . There's been a lot of criticism of our existing practice in the Court of Chancery, and a good many members of the Bar feel that our practice in that court should be streamlined. It's already been stated, and it seems to be pretty generally known, that our new Chancellor had already appointed a committee to make recommendations to him about simplifying procedure in the Court of Chancery, and the activities of that committee were suspended as a matter of courtesy due to the fact that this Convention has been convoked. It's my opinion that if the Chancellor is given the opportunity, he can provide a new set of rules which will meet the present reasonable objections.

MR. BROGAN: He couldn't increase or decrease his jurisdiction.

MR. GILHOOLY: Oh, no, no. It's only the procedure. It's been said that it's complicated; for instance, the decree has to be enrolled—is there any necessity for enrolling decrees?—the pleadings have to be written out on the records of the court, and all those mechanical operations. He has a perfect right to modify his rules within his own jurisdiction, and that is the criticism to which I am referring—that it's too complex and that it takes too long and it's expensive.

MR. BROGAN: Well, do you have any objection to a Judicial Article, if it can be accomplished with legislative aid, which will permit the court the litigant has honestly invoked and which has jurisdiction over the main issue, let us say, of determining the thing in full?

MR. GILHOOLY: Yes, for the simple reason that if you do that and if you give the power to the Legislature—number one, you will not have a constitutionally created court, and number two, you will run the danger of having important equity decisions arrived at by law judges, and vice versa.

MR. BROGAN: Well, if they're wrong they can be corrected.

MR. GILHOOLY: Why rely on the appellate court to correct something than can be avoided in the first instance?

MR. BROGAN: Well, in most instances a decided case has one disappointed party, and that disappointed party thinks he ought to appeal, doesn't he?

MR. GILHOOLY: That brings me to the last point I'm going to make, Justice Brogan—

MR. BROGAN: I was thinking of a specific case. Suppose that X makes a will and leaves your client a particular legacy—let us say, an altar cloth or something that he couldn't buy. And suppose that the executor files an account, and your client doesn't get the specific gift and you except to the account. The matter comes up before the Orphans' Court and Y, who is a stranger, says, "Why, the testatrix gave me that before she died." And you have reason to believe that that's untrue. You contest that. The Orphans' Court is perfectly powerless in the premises, and you have to go into Chancery to have a specific legacy and the right thereto determined, since an Orphans' Court can't decide a disputed question of title to anything. Now, shouldn't something be done?

MR. GILHOOLY: If I might be permitted to make a suggestion—I think if I were representing the litigant I might seriously consider bringing an action of replevin by the party to whom this was bequeathed under the will.

MR. BROGAN: You are assuming a situation which I didn't state. Assume that this person doesn't know a thing about this until the accounting comes up, an intermediate accounting before an Orphans' Court, and then for the first time he finds out that there's an adverse claim. The court has the whole thing before it. Don't you think it ought to follow through and decide the whole question?

MR. GILHOOLY: Well, I think the Legislature could extend the powers of the Orphans' Court.

The last point I want to make is this. Some years ago I had a talk with Vice-Chancellor Backes, who was a very eminent Vice-Chancellor and very learned in equity jurisprudence. He said, if there's one criticism that can be leveled against the Court of Errors and Appeals, it is this: that the Governors do not see fit, in the selection of members of that court, to always see to it that an equity judge is represented on that court. And I seriously urge for your

consideration that when you set up the new court of appeals, irrespective of how you arrive at the jurisdiction of the various courts, that a member of that court after the terms of the present Justices have expired—I don't believe in dropping the present Justices; I think they ought automatically go on to the court of appeals until they retire or die, until the court reaches a number which is that which you finally select—but thereafter the Governor should be required, in selecting the members of that court, to have at least one, you may think it should have more, come from the equity side of the court. Then you will have a review by a man who has had equity experience. As it is now, the law judges are deciding equity questions. If we have had excellent decisions in our Court of Errors and Appeals on appeals from our Court of Chancery, I think it can be laid to the excellent groundwork in the opinions in the court below, because the court has a very lovely framework on which to work.

The best will which I ever drew in my experience was one in which I modified one drawn by Waldron Ward, of Pitney, Hardin, Ward and Brennan, and I thought that one was a masterpiece and I tried to improve it. And I say the same thing applies to our decisions in our Court of Errors and Appeals. The origin of that decision was in our Court of Chancery and all they had to do was to agree or disagree, modify or approve what was said below.

VICE-CHAIRMAN: In connection with your last remark, Mr. Gilhooly, I gather that you think that some members of this high court should come from lower equity judges, is that correct?

Shouldn't some of them come, on the same principle, from lower law judges?

MR. GILHOOLY: That would be very helpful, except—

VICE-CHAIRMAN: If that's so, then you would object, I gather, to permitting the high court to be drawn exclusively from outside the field of judges?

MR. GILHOOLY: Oh no, because if you draw from outside the members of the court you will have, undoubtedly, capable law judges, but you won't have men who have had experience in equity unless their practice has led along those lines.

VICE-CHAIRMAN: In other words, you can then get this so-called equity and law and miscellaneous man right from the Bar, assuming you pick a proper man . . . Why shouldn't all of our judges of the high court be selected from the Bar, with well-rounded experience qualifying them for the highest court?

MR. GILHOOLY: Yes, but where you can have available men who have had special experience . . .

MRS. GENE W. MILLER: Where equity decisions are written by members of the Court of Errors and Appeals who are not equity

judges, would you say then that they are equity judges really—that they have the feeling for the subject, or whatever it is that makes an equity judge?

MR. GILHOOLY: Oh yes. I think they do remarkably well with their limited experience. Don't forget that they were guided in the first instance by the opinion of the Vice-Chancellor. You know the past experience of our recent Chancellor? . . . When men are on the bench for awhile, then they know the equity side. The most notable example is Vice-Chancellor Stein, who served for many years as an able Common Pleas judge. Then he went on the equity bench and his equity decisions, at first, were too legalistic. Now, today, he is one of our really excellent equity judges because he has been tempered with his experience in equity.

VICE-CHAIRMAN: Now, to get back to my question, which was, can you tell me the experience of our recent Chancellors? To a layman they are the equity judges.

MR. GILHOOLY: So they are.

VICE-CHAIRMAN: They have come from the law side?

MR. GILHOOLY: Yes.

MR. AMOS F. DIXON: Mr. Gilhooly, your argument seems to imply the statement that it was really up to the litigant to determine, when he had a case, whether he should go to an expert equity lawyer or whether he should go to an expert law lawyer; that it was up to an expert either in one court or the other to be sure whether his case is properly handled. Now, the indication would be that it was up to the lawyer to bring his litigating client into the proper court.

MR. GILHOOLY: All right, by the same implication, if you turn that backwards, you get back to the litigant just the same to determine that. Now, how is the litigant who knows nothing about the complexities of this law, which you yourself said the layman couldn't be able to understand, now how is the litigant going to be able to determine whom he should go to with the case? He doesn't know whether his case is law or equity, even if he knows the lawyer. Secondly, he probably does not have the information which will tell him who the prominent equity lawyers are and who the prominent law lawyers are. Now, how is he going to fix his case so that he doesn't get the law expert for an equity case, and the equity expert for a law case?

MR. EDWARD A. McGRATH: If he selects a lawyer who is not fully competent, the lawyer should be liable.

MR. DIXON: I am not talking about the lawyers; I am talking about competence in different lines. If you have courts with different shadings, if you get into the wrong court you are in trouble. If you have a single court to start your case in, your lawyer is pre-

sumably around and he knows something about equity and he knows something about law, and he may know something more about one than the other. But if he gets into the court he doesn't find, after he has spent a considerable amount of money, that he is in the wrong court and has to back out and go into another court and start all over again.

MR. WALTER G. WINNE: Now, wouldn't this integrated court that you are talking against, solve that difficulty?

MR. GILHOOLY: I don't think so, because the equity case would be heard in the special term, if you call it that, or the equity branch, and the law case would be heard in the law branch.

MR. WINNE: Wait a minute. I am talking about an integrated court where, regardless of whether your case were a combination of equity and law, the case goes all the way through, and the judge decides both equity questions and law questions. As has just been pointed out here, our Chancellors in the equity courts have been law judges. They apparently are able to decide equity as well as law, and furthermore, the ultimate decision goes to the Court of Errors and Appeals. And after all, that is an integrated court—of both equity and law. Now, if we take our highest court and set it up on that basis, why shouldn't we expect to get reasonable justice and a reasonable handling from a procedural standpoint in the court that is below the higher court? What is there in the fact that it is a court down below that you have got to have experts handling only one, shall I say, narrow part of the law which that case covers, and if you get another narrow part of the law, such as a law and equity case, you have got to have another court? Do I make myself clear?

Now, where do you draw your objections to that lower court over and above the same objections you have to the higher court?

MR. GILHOOLY: Well, based on the premise which I won't concede, that you have to take the practice in the upper court, of having integration—in the first place, I don't think there should be integration in the lower courts, because you will get better administration of justice in the hands of an expert. My argument is, why take something inferior when you already have something that is better? And secondly, I think the Court of Errors and Appeals should have a man on there who has had actual equity experience.

MR. WINNE: Who hasn't? We are talking about—

MR. GILHOOLY: I meant, that we should change it to see that we do.

MR. FRANK H. SOMMER: You mean, someone who has had actual judicial experience?

MR. GILHOOLY: Yes, actual judicial experience; then you have

a source to draw on.

VICE-CHAIRMAN: If you carry it that far, you might say, let's establish two appellate courts—one composed of high equity judges, to hear all equity appeals, and one composed of high law judges, to hear all law appeals.

MR. GILHOOLY: That won't be necessary. I just want to add that we want to have somebody on that court who would expound the equity side of the question.

MR. GEORGE F. SMITH: This morning, that is before lunch, I think you mentioned the fact that if we are really going to make any radical change in this particular Court of Chancery, the really appropriate time to have done it was in 1844 instead of in 1947. In other words, that since that time there has been such a volume of equity and law built up that we would be scrapping it, so to speak, if we made any radical change. If this were the Convention of 1844 instead of 1947, and we had no body of equity law built up such as we have today, what then would be your suggestion for the ideal court system?

MR. GILHOOLY: Well, then I would still say, it is still my argument, that we would be far better off to maintain the two jurisdictions separate and distinct, because the remedy sought is different, and it is just as different today as it was in 1844.

MR. SMITH: Well, outside of minor changes the court structure as now existing, as far as Chancery goes, is correct?

MR. GILHOOLY: Yes.

MR. SMITH: You still have that feeling, Mr. Gilhooly, despite the fact that the Vice-Chancellors, at least of late, have been drawn from among those experienced in law and not experienced in equity?

MR. GILHOOLY: Yes, and I think that they improve with their experience on the bench, and that the litigants have to await the time when the Vice-Chancellor reaches his full maturity as an equity judge.

MR. SMITH: Of course, the litigant has no choice of Vice-Chancellors, and if he is unlucky enough to get one of the younger Vice-Chancellors his decision will not be so favorable, so good?

MR. SOMMER: That is a natural result, and nothing can change it.

MR. DIXON: Do you think, Mr. Gilhooly, that the British made a mistake in abandoning the Chancery Court in 1873, and that the quality of their justice deteriorated since they abandoned their Chancery Court?

MR. GILHOOLY: Judge McGrath, rather Mr. Dixon—

VICE-CHAIRMAN: You sound more like a lawyer—

(*Laughter*)

VICE-CHAIRMAN: —than a layman.

MR. BROGAN: He doesn't mind being promoted.

(*Laughter*)

MR. GILHOOLY: You know, I've heard these arguments advanced that the system in England is so splendid, and I talked to some Englishmen in 1923 about their practice, when I happened to be in England, and they didn't seem to think that it was too perfect. I talked to the president of the equity side of their court, and I talked to New York lawyers, and they don't seem to think too much of their practice there. We have not had occasion in New Jersey to refer to many equity decisions of England. Because we have had such a wealth of decisions in New Jersey on equity matters during the past 25 years, we have not had occasion to go back to the old English cases. I think that explains the many questions raised as to why we haven't gone back to the old English cases, but I can't tell you very much about the later cases decided in the equity courts in England.

MR. McGRATH: Have all those equity decisions come from the equity courts or from the Court of Errors and Appeals, which, after all, is still equity? That is what equity involves, most of the time.

MR. GILHOOLY: Well, equity is the court of final results.

MR. McGRATH: Is that where some of our equity decisions came from—the Court of Errors and Appeals?

MR. GILHOOLY: In my opinion, no. They came from the court below.

MR. McGRATH: Well, that is subject to argument, but not from a point of law.

VICE-CHAIRMAN: Thank you, Mr. Gilhooly.

We now have representatives of the Bergen County Bar Association. Mr. Milton Lasher.

MR. MILTON T. LASHER: Mr. Chairman, Mrs. Miller, and members of the Committee:

I want to thank you on behalf of the Association for the privilege of coming here. I will try to abbreviate our remarks and not go over the territory that has already been traveled.

VICE-CHAIRMAN: I doubt whether you will be able to do that.

MR. LASHER: I merely promised to try.

(*Laughter*)

MR. LASHER: The Bergen County Bar Association appointed a committee on constitutional revision, for which Mr. Wurts will speak after me, and of which he was the chairman. After considerable discussion and study, a draft was prepared of a proposed Judicial Article. We had it mimeographed and submitted to the

members of the Bar Association generally. A special meeting was called on June 30, 1947, and the matter was considered, and from that meeting evolved this plan which we are submitting here today, which is somewhat in modified form. Now, I have a sufficient number of mimeographed copies which I would like to pass around, with your permission, setting forth the provisions that were approved by the Association at its meeting. I also have here a digested form, with a diagram. We didn't have sufficient time to have it mimeographed, but I have a copy which I will leave with Mrs. Miller, and then we will send you mimeographed copies later.

"DRAFT OF JUDICIAL ARTICLE

submitted by

BERGEN COUNTY BAR ASSOCIATION

ARTICLE———

Section I

1. The judicial power shall be vested in a Supreme Court; a Court for the Trial of Impeachments; a General Court; a County Court in each of the several counties of the State; and such inferior courts as may be hereafter ordained and established by law; which inferior courts the Legislature may alter or abolish, as the public good may require.

Section II

1. The Supreme Court shall consist of a Chief Justice and six Associate Justices, or a major part of them. Five members shall constitute a quorum. The Chief Justice or, in his absence, the Associate Justice presiding as provided by law, shall designate a Judge or Judges of the General Court to serve temporarily when necessary to constitute a quorum.

2. The Supreme Court shall exercise appellate jurisdiction in the last resort in all causes to the extent designated in this Constitution, together with such original incidental jurisdiction as is hereby conferred upon it.

3. The Supreme Court shall make rules governing the administration of all the courts in this State except the Court for the Trial of Impeachments. It shall make rules as to the allowance of appeals other than those to be taken as a matter of right, and it shall have power, also, to make rules as to pleading, practice and evidence, which may be applicable to all of the courts in this State except the Court for the Trial of Impeachments, and which shall have the force of law unless changed or abrogated by law.

Section III

1. The Court for the Trial of Impeachments shall be composed of the members of the Senate, or the major part of them, and the Justices of the Supreme Court, or the major part of them. The President of the Senate shall be the Presiding Judge of the Court, except upon the trial of an impeachment against the Governor, in which event the President of the Senate shall not act as a member of the Court and the same shall be presided over by the Chief Justice of the Supreme Court.

2. The House of Assembly shall have the sole power of impeachment by a vote of a majority of all the members; and all impeachments shall be tried by the Court for the Trial of Impeachments.

3. Before the trial of an impeachment, the members of the Court shall take an oath or affirmation 'truly and impartially to try and determine

the charge in question according to evidence'; and no person shall be convicted without the concurrence of two-thirds of all members of the Court, at least fourteen of whom must be senators.

4. Judgment in cases of impeachment shall not extend farther than to removal from office, and to disqualification to hold and enjoy any office of honor, profit, or trust under this State; but the party convicted shall nevertheless be liable to indictment, trial, and punishment according to law.

5. The Court for the Trial of Impeachments shall have power to make rules governing the procedure in said Court.

Section IV

The General Court shall have and exercise throughout the State all of the original jurisdiction possessed by any court, except the Court for the Trial of Impeachments, under the Constitution of 1844, except as inconsistent with the provisions hereof; and in addition, the original and appellate jurisdiction conferred hereby. It shall be divided into an Appellate Division, a Law Division and a Chancery Division. Either the Law Division or the Chancery Division for the more efficient administration of law and equity shall have jurisdiction to determine fully in all of its aspects any case or controversy which has been properly commenced in such division, including incidental jurisdiction to try by jury any question or question as to which the right of trial by jury shall exist by constitutional provision.

Section V

1. The Appellate Division of the General Court shall consist of one or more parts of at least five judges each. The number of parts and the number of judges of the Appellate Division may be increased by the Legislature as the public good may require.

2. The Appellate Division of the General Court may, by certiorari allowed by the court or any Judge thereof, review any indictment before trial, according to law.

3. Subject to the rules of the Supreme Court, the Appellate Division of the General Court shall have jurisdiction to regulate the practice of law including the admission to practice and the disbarment, suspension, and other discipline of persons admitted.

Section VI

1. The Law Division of the General Court shall consist of a Chief Judge and — — Associate Judges. The number of Associate Judges may be increased by the Legislature as the public good may require.

2. The Law Division of the General Court shall have and exercise throughout the State all the original inherent jurisdiction possessed by the former Supreme Court of this State under the Constitution of 1844, except as inconsistent with the provisions hereof, together with such additional jurisdiction as is hereby conferred upon it.

3. The Chief Judge of the Law Division of the General Court shall have power and authority to exercise in his own name alone all the powers and functions of such Division, and each of the Associate Judges of such Division, subject to rules made by the Supreme Court, shall have power and authority to exercise in his own name alone all the powers and functions of such division.

4. Prerogative writs may be granted, subject to rules, by a single Judge of the Law Division or in case of the writ of habeas corpus, by the Chancellor or a single Vice-Chancellor of the Chancery Division.

Section VII

1. The Chancery Division of the General Court shall consist of a Chancellor, who shall be the Presiding Judge of the Chancery Division of the Court, and — — Vice-Chancellors. The number of Vice-Chancellors may be increased by the Legislature as the public good may require.

2. The Chancery Division of the General Court shall have and exercise throughout the State all the original inherent jurisdiction possessed by the former Court of Chancery and by the former Prerogative Court of this State under the Constitution of 1844, except as inconsistent with the provisions hereof, together with such additional jurisdiction as is hereby conferred upon it.

3. The Chancellor shall have power and authority to exercise in his own name alone all the powers and functions of the Chancery Division of the General Court, and each of the Vice-Chancellors, subject to rules made by the Supreme Court, shall have power and authority to exercise in his own name alone all the powers and functions of the Chancery Division of the General Court.

4. The Legislature may vest Chancery powers in the County Courts, so far as relates to the foreclosure of mortgages and sale of mortgaged premises.

Section VIII

1. An appeal to the Supreme Court from any court may be taken only:

(1) In capital cases and cases involving a question arising under the Constitution of the United States or of this State, which appeals shall be taken directly as a matter of right to the Supreme Court.

(2) As a matter of right from any final judgment, decree, or order of the Appellate Division of the General Court made upon appeal taken as a matter of right from either the Law Division or the Chancery Division of the General Court or from a County Court where at least two of the members of the Appellate Division of the General Court dissent from the decision of the Appellate Division of the General Court and assign in writing their reasons therefor, and from any other judgment, decree or order of the Appellate Division of the General Court by permission of the Supreme Court or a Justice thereof or of the Appellate Division of the General Court, or a Judge thereof, subject to rules made by the Supreme Court.

2. (1) An appeal to the Appellate Division of the General Court may be taken as a matter of right from any final judgment, decree or order of either the Law Division or the Chancery Division of the General Court, including an appeal from any order denying a prerogative writ; and from any final judgment, decree or order of a County Court.

(2) An appeal to the Appellate Division of the General Court may be taken from any other judgment, decree or order of either the Law Division or the Chancery Division of the General Court or of a County Court, and from any final judgment, decree or order of an inferior court, only as may be provided by law.

Section IX

1. There shall be a County Court in each of the several counties of this State.

2. Each such Court shall consist of one or more Judges the number of whom shall be established by law and each of whom shall be a lawyer of this State of at least — — years standing.

3. Each County Court shall have and exercise within its own County all jurisdiction heretofore exercised by the Court of Oyer and Terminer, Special Sessions, Common Pleas, Orphans' Court, Surrogate's Court and such other jurisdiction as may be conferred by law.

4. The Legislature may increase, decrease or vary the jurisdiction of the County Courts by statute and may provide for such divisions or parts as the public good may require.

Section X

1. The Governor shall nominate and appoint, by and with the advice and consent of the Senate, the Chief Justice and the Associate Justices of the Supreme Court, the Judges of the Appellate Division of the General Court, the Chief Judge and the Associate Judges of the Law Division of the General Court, the Chancellor and the Vice-Chancellors of the Chancery Division of the General Court, the Judges of the County Courts, and the judges of every court of inferior jurisdiction, except that judges of courts of inferior jurisdiction in the several counties of the State may be elected or otherwise chosen in each county when so provided by law.

2. The Chief Justice and each Associate Justice of the Supreme Court, the Judges of the Appellate Division of the General Court, the Chief Judge and each Associate Judge of the Law Division of the General Court, and the Chancellor and each Vice-Chancellor of the Chancery Division of the General Court shall, prior to his appointment, have been a lawyer of this State in good standing for at least ten years. At least two of the Justices of the Supreme Court so nominated and appointed shall, in addition to their other qualifications, have been for at least two consecutive years, members of the Chancery Division of the General Court, and at least two others of them shall have been members of the Appellate Division of the General Court or of the Law Division of the General Court, for at least two consecutive years, and these numbers shall always be maintained.

3. The Chief Justice and the Associate Justices of the Supreme Court and the Judges of the Appellate Division of the General Court shall hold their offices during good behavior for such term as may be provided by law, which term shall not be changed as to any incumbent during his incumbency.

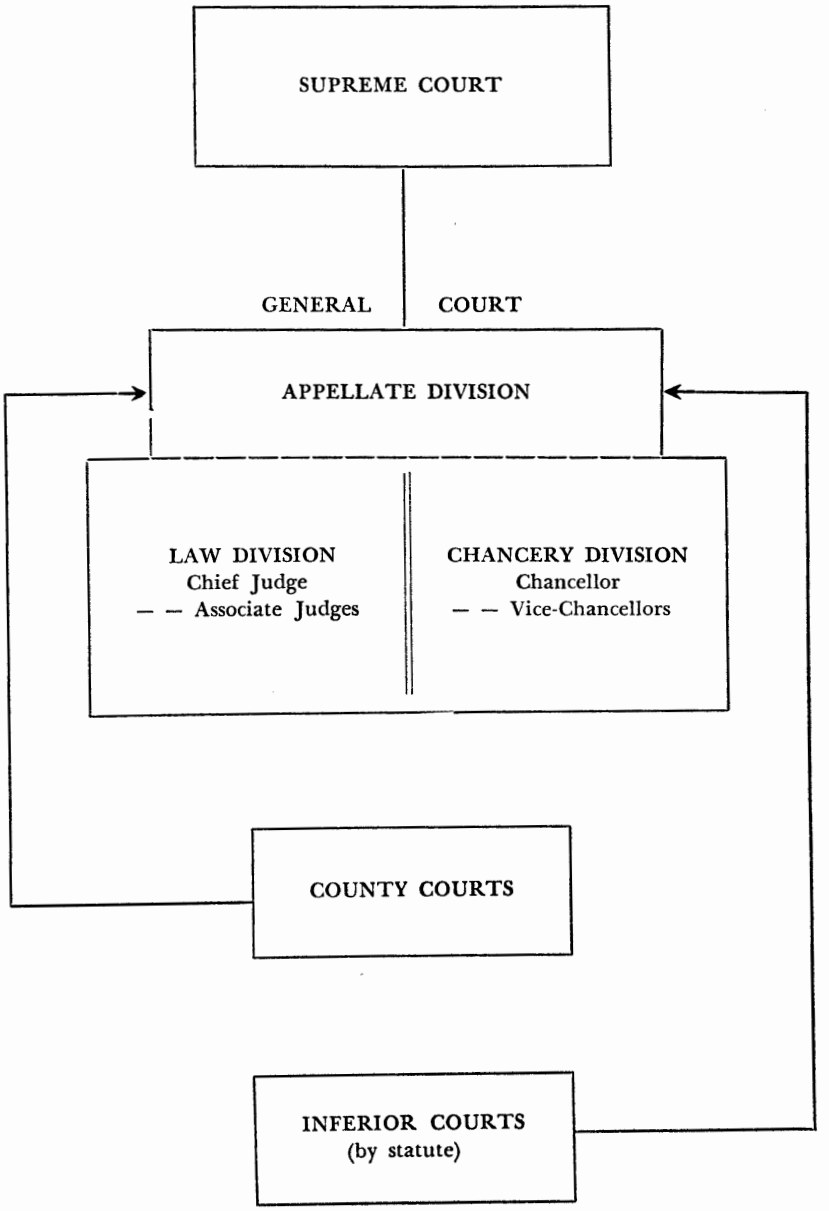
4. The Chancellor and the Vice-Chancellors of the Chancery Division of the General Court and the Chief Judge and the Associate Judges of the Law Division of the General Court, and the Judges of the County Courts shall hold their offices during good behavior for the term of seven years. The Chief Justice and the Associate Justices of the Supreme Court, the Judges of the Appellate Division of the General Court, the Chancellor and the Vice-Chancellors of the Chancery Division of the General Court, and the Chief Judge and the Associate Judges of the Law Division of the General Court, and the Judges of the County Courts shall each be liable to impeachment and trial in the Court for the Trial of Impeachments for misconduct in office during their continuance in office and for two years thereafter. Any such justice or judge, chancellor or vice-chancellor shall be suspended from office until his acquittal. Judges of inferior courts may be removed from office for misconduct therein without impeachment and in such manner as may be provided by law.

5. The Legislature shall provide by law a system for the retirement of the judicial officers whose appointment is authorized by this article.

6. The Chief Justice and the Associate Justices of the Supreme Court, the Judges of the Appellate Division of the General Court, the Chancellor and the Vice-Chancellors of the Chancery Division of the General Court, and the Chief Judge and the Associate Judges of the Law Division of the General Court, and the Judges of the County Courts shall, at stated intervals, receive for their services such salaries as may be provided by law, which shall not be diminished during the term of their appointment. They shall not hold any other public office or trust or become candidates for any elective public office, except that they shall be eligible to become candidates for and to serve as delegates to a constitutional convention if so elected. They shall not while in office engage in the practice of law."

"DIGEST OF DRAFT OF JUDICIAL ARTICLE
submitted by
BERGEN COUNTY BAR ASSOCIATION

CHART



I. SUPREME COURT

1. Chief Justice and six Associate Justices
2. Lawyers of at least ten years' standing
3. Term to be fixed by Legislature
4. Legislature to provide retirement system by statute, including age limit
5. At least two members shall have previously served in Chancery Division of General Court
6. At least two members shall have previously served in Law Division or Appellate Division of General Court
7. Chief Justice shall have power to draft from Appellate Division where quorum does not exist
8. General rule making power for administration of all courts in this State and respecting practice therein
9. Direct appeal as matter of right:
   (a) Capital cases
   (b) Constitutional questions, state and federal
   (c) Appellate Division where dissent by two judges, reasons given
10. Permissive appeal:
   (a) Certification by Supreme Court or Appellate Division
   (b) As permitted by rules of Supreme Court

II. GENERAL COURT

(Statewide Jurisdiction, Appellate and Original)

The General Court shall have and exercise throughout the State all of the original inherent jurisdiction possessed by any court under the Constitution of 1844, and in addition, the original and appellate jurisdiction conferred hereby. It shall be divided into an Appellate Division, a Law Division and a Chancery Division. Either the Law or the Chancery Division, for the more efficient administration of law and equity, shall have jurisdiction to determine fully in all of its aspects any case or controversy which has been properly commenced in such Division, including the right to determine issues of fact by jury trial where the right to trial by jury exists under this Constitution.

A. *Appellate Division*

1. Shall consist of one or more parts of at least five judges each. The number of parts and the number of judges may be increased by law.
2. Lawyers of at least ten years' standing
3. Term to be fixed by Legislature
4. Legislature to provide retirement system by statute, including age limit
5. Presiding judge of each part to be designated by the Supreme Court
6. Jurisdiction:
   (a) As a matter of right from any final order, judgment or decree of Law Division or Chancery Division, including orders or judgments on prerogative writs, and final order, judgment or decree of County Courts
   (b) From any preliminary or interlocutory order of Law or Chancery Divisions or County Courts when provided by law or by rules of the Supreme Court
   (c) As provided by law from any order or judgment of any statutory or inferior court

B. *Law Division*

1. Lawyers of at least ten years' standing
2. Term to be fixed by Legislature
3. Legislature to provide retirement system by statute, including age limit

4. Consist of Chief Judge and — — Judges, in the number designated by law
5. Jurisdiction:
   (a) All original inherent jurisdiction, both civil and criminal, heretofore exercised by Supreme Court, except as inconsistent with this Constitution
   (b) Prerogative writs may be granted by Judge of Law Division returnable before him, subject to review by Appellate Division

C. *Chancery Division*

1. Lawyers of at least ten years' standing
2. Term of seven years
3. Legislature to provide retirement system by statute, including age limit
4. Consist of Chancellor and — — Vice-Chancellors, in number designated by law
5. Jurisdiction:
   (a) All original inherent jurisdiction heretofore exercised by the Court of Chancery and the Prerogative Court, except as inconsistent with this Constitution
   (b) Chancellor and each Vice-Chancellor to have power, subject to rules, to exercise in his own name alone, all the powers and functions of the Chancery Division of the General Court
   (c) Foreclosure power may be granted to County or inferior courts by act of Legislature

III. COUNTY COURTS

1. There shall be a County Court in each of the several counties of this State
2. Each such Court shall consist of one or more judges, the number of whom shall be established by law, and each of whom shall be a lawyer of this State of at least — — years' standing
3. Each County Court shall have and exercise within its own county all jurisdiction heretofore exercised by the Court of Oyer and Terminer, Special Sessions, Common Pleas, Orphans' Court, Surrogate's Court, and such other jurisdiction as may be conferred by law
4. The Legislature may increase, decrease or vary the jurisdiction of the County Courts by statute and may provide for such divisions or parts as the public good may require

MISCELLANEOUS

1. Appointment of all specified judicial officers by Governor, with advice and consent of Senate
2. Impeachment Court to include members of Supreme Court
3. Judges to devote full time to duties
4. Removal or retirement of judges by court on the judiciary to be established by Legislature with appropriate constitutional sanction."

MR. LASHER: Now, there are one or two features that I will point out, the details of which, however, will be developed by Mr. Wurts.

VICE-CHAIRMAN: Mr. Lasher, you might now give us an outline of your court structure.

MR. LASHER: The court structure as it is now proposed, pursuant to the meeting of the Bar Association, has a top court, known as the Supreme Court, because it is the highest court in the system, consisting of six Associate Justices and a Chief Justice. Then,

below the General Court there will be an Appellate Division; a Law Division, presided over by a Chief Judge and a number of Associate Judges, to be fixed by law; and a Chancery Division, composed of the Chancellor and a number of Vice-Chancellors, to be fixed by law.

I want to make it clear that the Chancery Division is part of the General Court for the purpose of avoiding the jurisdictional problems which arise—and which, incidentally, were pointed out in a case last week in the *Advance Reports,* and which you may have read; the case of *Weber* v *L. G. Trucking Company,* where the bill had been dismissed by Vice-Chancellor Bigelow on the ground that there was lack of proof, and the case was sent back by the Court of Errors and Appeals because they said it was a legal question and should have been started in the law court, as it involved an easement and title to real estate—and we are trying to keep intact, trying to preserve as much as we can the existing Chancery system, because we think that over all it has functioned well. We think that it has built up an enviable reputation among the courts of this nation for our equity jurisprudence. We feel that the men who sit as Vice-Chancellors and as Chancellor in that Division continuously will turn out a better brand of equity jurisprudence than if we follow what they are doing in the federal system, where they hear admiralty cases one day, civil cases the next day, criminal cases the next day, and so on. We feel that the field of law is so vast that no judge or justice, regardless of his ability, can adequately understand it, because there is an entirely different type of treatment in the problems on a trial and the problems on an appeal, as you all know. I am just saying this for the benefit of the laymen of the Committee. If you are a trial judge or a Vice-Chancellor, you are sitting there hearing witnesses. You have to make snap decisions. You have to rule on evidence. You have to be a judge of human nature and character and the veracity of witnesses, and all that sort of thing. When you are in the appeal court, you have a library. You can deliberate. You have the briefs before you. You can hear the oral arguments. You don't have to rule immediately. You can exhaust the subject.

VICE-CHAIRMAN: Ruling on principles has nothing to do with the credibility of witnesses. Those are principles of law and equity. Those are things that appeal courts are for.

MR. LASHER: Mr. Jacobs, I am merely answering your question. You said that they could do it in the Court of Errors and Appeals but that they could not do it in the court down below. I mean, that's the question I am answering.

VICE-CHAIRMAN: All right. Suppose we go on to the next question. I don't know whether you see any more difference at the

trial level than at the appellate level in deciding an equity principle?

MR. LASHER: Well, where it's a problem of developing some substitute for the principles of law, I think that they are closely akin, but I would point out at this time that Pomeroy, considered one of the outstanding authorities, has indicated that to merge law and equity was to loot equity. I suppose you have heard that many times before. It would loot equity jurisprudence to its prejudice, and I think that holds true with these suggestions that are made on one side to simply abolish Chancery, and on the other side that we preserve it in its original glory, if you want to put it that way. I don't think Chancery is perfect. I think there is room for improvement.

I am getting off the chart here, I suppose, but the chart does indicate a Chancery Division—I am speaking here on behalf of the Bar Association—preserving as far as possible the existing Chancery system, not making it possible to get a suit out of court simply because of a practice question, not because of any deficiency in the lawyer's training or in his industry or in his ability to discern the question involved, but because in many cases the specific question has not been ruled on before, or, as in this case, the Vice-Chancellor's ruling on the case that just came down from the Court of Errors and Appeals—a very able Vice-Chancellor, but he didn't catch the point. I don't think lawyers can be condemned for going into court on these problems and sometimes finding out that they should have been in another court. I think that in the interests of the public that ought to be corrected in some way—that the court system should function as one of the coordinated departments of government. Not to be brought up-to-date for the sake of change, not for the sake of correcting some abuses that may have resulted from personnel, but for the purpose of giving them quick, efficient administration of justice, to preserve and strengthen the system.

MR. WINNE: Would this shift a case from one court to another, Mr. Lasher, if you found some law questions involved in a Chancrey case?

MR. LASHER: No sir, not under this plan.

MR. WINNE: If you had your case started in a court of the Chancery Division, even though a law matter came up, you would keep it in that court and have that judge make final—

MR. LASHER: One disposition of the cause. I think that with the rules of court it can be so worked out that you would only have incidental questions arise, as distinguished from a purely legal problem being brought into a law court for disposition. I think it could be so worked out, and for that reason a General Court

is submitted under this plan and given general jurisdiction.

MR. McGRATH: If you found that you needed a jury after the case was started in the Chancery Court, you would have the Chancery Court call a jury and try the law question involved in the case?

MR. LASHER: Precisely. And, may I read this one sentence that is in the plan *(reading from Summary):*

> "Either the Law or the Chancery Division, for the more efficient administration of law and equity shall have jurisdiction to determine fully in all of its aspects any case or controversy which has been properly commenced in such Division, including the right to determine issues of fact by jury trial where the right to trial by jury exists under this Constitution."

That would be in the new Constitution. That is another thing to be borne in mind, because there are certain constitutional rights under the 1844 Constitution—a jury trial—and that, I think, is one of the differences that exists between the English system—I don't know too much about it—but it has been pointed out that in England they don't have a written constitution such as we have here, and that the percentage of jury trials in England is far smaller than here. You might think it would be the reverse, but I understand that we, in our law actions, have a far greater percentage of jury trials than they do in present-day England.

And we then have, as the result of a resolution that was offered on the floor of the meeting, a provision in this draft for the establishment of a County Court in each of the several counties, which would have all the jurisdictions now possessed by the Courts of Oyer and Terminer, Special Sessions, Common Pleas, Orphans' Courts, etc.

VICE-CHAIRMAN: Do you recommend that as a constitutional court, or do you leave that to the Legislature to create?

MR. LASHER: The Committee had submitted in its draft that the County Courts and all the inferior courts should be created by statute, and regulated by statute. At the meeting the resolution was adopted by a majority vote of all those present, that a provision be inserted in the Constitution for a constitutional County Court in each of the several counties. That is one of the differences that exist.

I would like to call your attention to one other suggestion that has been made and that is embodied in the draft—

MR. McGRATH: Pardon me, Mr. Lasher, but before you leave the County Courts, may I ask this question? Is it your thought to combine the different courts, of Common Pleas—

MR. LASHER: Yes; most of them that are statutory now, but we should not have the distinction.

MR. McGRATH: You would combine them so that we wouldn't have these Quarter Sessions and Special Sessions, Oyer and Ter-

miner, the Orphans' Court, and all those courts? You would combine all of those into one court?

MR. LASHER: That's right. Now, of course, the Legislature might find it necessary to throw that system out—to create other courts by statute. Of course, this is only the framework of the judicial system.

MR. McGRATH: Well, all these County Courts that might be created, that would be covered by the statute rather than constitutionally?

MR. LASHER: No, no sir. The provision that we now have as the result of this resolution is that there shall be a County Court—

MR. McGRATH: But regardless of that resolution. You said that was an afterthought.

MR. LASHER: Well, I tried to make that clear, that the committee that prepared the original draft suggested that the County Court, all inferior courts, be regulated entirely by statute; that no mention should be made of that in the Constitution, and that there should be only two courts, the General Court and the Supreme Court. But, at the meeting a resolution was adopted requiring the insertion of the provision that there shall be a County Court in each of the several counties of the State, and you will find that in the draft when you have an opportunity to go over it. So that would be constitutional with respect to one County Court in each county.

MR. McGRATH: Constitutional, but nevertheless affected by the statute. It could be changed or affected by statute. Now, would you give the Legislature any authority?

MR. LASHER: Well, we handled it this way generally—that they could increase or decrease the jurisdiction of the court, you see. So it's purely suggestive, as I say. We can't work out all the details in the course of a Bar Association meeting, but they felt that there should be a provision that there be a County Court in each of the counties.

There is one other provision that has been inserted as part of the qualifications for judges of the Supreme Court—that two members shall have previously served in the Chancery Division of the General Court, and two in the Law Division or Appellate Division of the General Court. It was inserted and approved because they thought there should be some line of judicial promotion; that one should not be free to go entirely outside the field of the judiciary, let us say, to fill the places in the higher court. You have probably seen criticism reflected sometimes on the appointments that have been made to the United States Supreme Court; many times men having been appointed without any judicial experience whatsoever, not having served in any court.

Now, at the end, we have some suggestions and miscellaneous items which have not been worked out in detailed form, but which we thought should be brought to the attention of the Committee: the routine concerning the appointment of the judicial officers by the Governor, with the advice and consent of the Senate; the impeachment court to include members of the Supreme Court, as it does in other states, and not have it exclusively repose in the Senate; judges to devote full time to their duties; and removal or retirement of judges by a court on the judiciary, to be established by the Legislature with appropriate constitutional sanction.

There should be some means of removing and retiring judges when some question arises. There ought to be responsibility or some means of accomplishing that, because it does probably arise now and then.

Now, on the question of retirement of judges, generally the Committee recommended a retirement age of 70, but the meeting disapproved that and left it entirely to the Legislature.

MR. DIXON: Mr. Lasher, are you suggesting any definite method for the retirement of judges on account of disability?

MR. LASHER: No, sir, that would have to be taken care of by the legislative system.

MR. DIXON: We shall be very glad to receive suggestions, however, of things that might go to the Legislature.

MR. LASHER: Well, that is our position now. I think I have covered the high spots. I just don't want to keep going over things that you have probably heard a dozen times already. I have just tried to point out the things where we thought there might be some improvement. But I would like to ask Mr. Wurts, the chairman of the committee, to speak to you on such other matters as he feels are important, and I do that particularly because Mr. Wurts is a lawyer of unusual training and high standing, not only in the State of New Jersey but in the State of New York, and he has seen how the systems have worked out in law and equity both in New York and in New Jersey.

I also think that a certain amount of confusion has developed as to what we will do when we have this so-called merger, and I think, perhaps, he might be able to shed some light on it—particularly on that aspect.

I will now turn the discussion over to Mr. Wurts—Mr. William H. Wurts.

VICE-CHAIRMAN: Thank you, Mr. Lasher.

MR. WILLIAM H. WURTS: Mr. Chairman, Mrs. Miller, and members of the Committee:

I may say in supplementing what Mr. Lasher concluded with, that I am a practicing lawyer of the State of New York. I want

to correct any impression in the minds of this Committee that there has been a merger of law and equity in the courts of New York. There has been a merger of the personnel of the courts trying those cases, but the Constitution of New York provides—I am quoting this as nearly as I can from memory—this was the Constitution adopted in 1925: "The existing Supreme Court is continued with general jurisdiction in law and in equity." It recognizes it as two separate systems. It is true that both systems are administered by the same judges, but there are two systems. There is no such thing in the State of New York as one attempted homogeneous system that combines law and equity, and that is recognized further on by another re-enactment in the Constitution of 1925 of something that was put in the Constitution about a hundred years ago. It said that the manner of taking testimony in equity cases shall be the same as those in law cases, and that is in the Constitution of the State of New York, and the recognition that they have two separate systems continues as late as 1925. So much for the explanation of that.

Our committee's effort has been directed, first, towards brevity; second, towards holding fast to that which was good; and third, towards attempting only to suggest remedies for those particular matters which, according to our information, have been complained of in the operation of our courts.

We did not go into this thing with the thought in mind that our existing court system should be scrapped from top to bottom, but we simply thought that it should be simplified; that the Judicial Article should, if possible, be shortened, and that the operation of the courts should be changed, so that these alleged defects which exist could be obviated.

Now, to start at the top, the highest court, which we will call the Supreme Court, will consist of a Chief Justice and six Associate Justices, and will exercise appellate jurisdiction in the last resort, in all causes, to the extent designated in the new Constitution, together with such original incidental jurisdiction as is conferred on it by the Constitution. It will be a separate, independent court. That is to obviate the criticism which has been made of the Court of Errors and Appeals for its size, and also to obviate the criticism that the members of our highest court had too many duties. The seven members of the highest court would be men who devoted their entire time to the administration of that court and to the hearing of the most important appeals. The appeals to the highest court of the State under our plan would be screened by the Appellate Division sitting in one or more parts of the General Court, which is the court of general original jurisdiction, and the only cases which would reach the highest court would be those

which involved a matter of life or death, those in which a constitutional question was involved, cases where there had been a dissent in the Appellate Division, and in other cases by permission. We didn't want to make the matter too inelastic here, because experience has shown that, for instance, if more than one part of the Appellate Division were created, it would be perfectly possible for the two parts to reach diverse opinions on the same subject and you have two sets of law which, unless they could be appealed to the highest court, would be incapable of resolution. So, things like that are left open for action by court rules or statute.

Now, when you come to divisions, we had considerable debate on the number of men who should constitute each section of that part of the court, and it was our thought that since the decisions of the Appellate Division would be expected to be final in so many cases, that we should have at least five men. Page 2 of our draft provides: "The Appellate Division of the General Court shall consist of one or more parts with at least five judges each." We did not specify the number of judges who would be in the Law Division of the General Court, in addition to the Chief Judge, or the number of Vice-Chancellors who would be in the Chancery Division in addition to the Chancellor, but we thought that those matters should be left entirely to the discretion of those who had the benefit of more intensive research into the mechanics of the problem than we had.

Now, as Mr. Lasher has told you, we have attempted to make provision both with respect to the Law Division and the Chancery Division, which will permit of a complete decision in a controversy. The Law Division has the approximate general jurisdiction of the Supreme Court in law matters; the Chancery Division has the approximate general jurisdiction of the Chancery Court in Chancery matters. The court rules will provide the division in which, according to the nature of your cause of action, you will file your case. But if you comply with the rules of court and file your case in that one division, there you stay until the whole case is decided, no matter what come up. At least, that is our hope, and we did that to obviate the situation which has arisen frequently and which Mr. Lasher just called attention to in a recent case, where you get into the wrong court and have to go back.

Now, in the State of New York it is handled by trial terms and special terms for trials, and it depends primarily upon whether or not you are entitled to a jury and, of course, that depends upon whether you seek equitable relief or purely legal relief. Now legal relief, generally speaking, is a demand for money only. Of course, in addition to that there are actions in ejectment, or actions in replevin, which Chief Justice Brogan suggested—and I think Mr.

Gilhooly suggested replevin also—where one tries to get possession of a specific piece of personal property. But if you ask for anything beyond money, or beyond possession of real estate, or possession of a certain piece of property, in general your action lies in equity and you are not entitled to a jury. So in New York we file our notice of trial either in the trial term clerk's office, or in the office of the clerk of special term for trials. If we file our notice in the wrong office, they don't go on with the trial of the case on that side of the court. We get sent back to the other side of the court. Sometimes it takes two or three court terms before you find out your mistake. I just want to point that out as showing that even in a court where all the judges try cases either at law or in equity they are not proof against that mistake, because you still have two systems, but both being tried by the same personnel. That is why we concluded to ask for a practical carry-over of the Court of Chancery and of the present Supreme Court, side by side, giving each of them enough jurisdiction of the other court to take care of any case.

MR. McGRATH: Pardon me for interrupting you, but in New York, if you get into the wrong court, who decides whether you are in the wrong court or not? If you are in the right court you stay; otherwise you are sent over to the other court?

MR. WURTS: That is decided by the judge in whose court you were.

MR. McGRATH: What proof does he have to have before he takes a case over? Before he decides to take it over?

MR. WURTS: Well, usually speaking, if you went into the equity court and your opponent thought he was entitled to a jury trial, he would make an appropriate motion and the court would decide that you were in the right part or you weren't in the right part. And if you didn't like it, or your opponent didn't like it, you could take it up to the Appellate Division. From almost anything in New York in the way of an interlocutory motion, there is at least one appeal as a matter of right, which is one thing we don't believe in here. But over there, the question would be determined ultimately in the Appellate Division, which is like our suggested Appellate Division. It sits over both the law and equity branches of the Supreme Court, and if it is important, it would clear up the matter right there.

MR. WINNE: You start your case, however, and you keep going to that court unless you find out that you have got to transfer it to the other one?

MR. WURTS: Yes.

MR. WINNE: But you do start your case in that branch and then go over to the other branch?

MR. WURTS: If you start in the equity branch and you find you need a jury trial, you must get assigned to the trial term, as I recall it.

MR. WINNE: In New York?

MR. WURTS: Yes. Now, they may have modernized that in the last two or three years. I haven't been as active there recently as I was when I was a young man, but it used to be that if something came along in which either party was constitutionally entitled to a trial by jury, you would have to go to the other side of the court.

MR. DIXON: Don't you think that is excessively expensive, to get a case started in the courts under that practice?

MR. WURTS: Certainly I do, and that's what we have tried to avoid here. I mean, if you file your papers, issue your process and get your parties into court, the court ought to have power to deal with both parties, provided, Mr. Dixon, that you are properly in that court first. I don't think everybody ought to come running to the Court of Chancery with suits on promissory notes, nor do I think that everybody ought to run to the Supreme Court on injunctions. It depends on what your primary cause of action is. If you once get that, the other branches ought to be dealt with on the same side of the court.

Now, below the General Court level we put in, as Mr. Lasher has told you, County Courts as constitutional courts, and we provide that those should consist of one or more judges, the number of whom should be established by law, and whose qualifications should require that they be lawyers of blank years' standing. Each County Court would exercise within its own county all the jurisdiction heretofore exercised by all the county-level courts, including the Orphans' Court. Now that, of course, is something that there may be a controversy over, but it was our thought that parts would be authorized for these courts, and if necessary there could be a division of functions between the civil county courts and the criminal county courts and the probate courts. Those are the three main divisions.

MR. McGRATH: In very small counties you wouldn't suggest divisions, would you?

MR. WURTS: It wouldn't be necessary.

MR. McGRATH: You would have just one judge?

MR. WURTS: In the rural counties in New York, where they have county judges and county courts, the county judge acts as the surrogate, too. The surrogate is the judge of the Orphans' Court. He hears both matters; he hears both civil and criminal matters, but his jurisdiction is only counted as one. We thought that it would be practicable to do that, and our suggestion was that all appeals from the County Courts, whether on probate, civil or criminal mat-

ters, should go to the Appellate Division. As it is now, in the Orphans' Court you can appeal to the Prerogative Court, which consists of, practically speaking, a Vice-Chancellor, but we thought that we could probably get, as time goes on, a system developed in the County Courts where those courts could try a case, no matter what the nature of the case was—a will contest, or an accounting, or what not—and have it in sufficient formality so that you could have one appeal on the record. The way the practice is now, if you are in the Orphans' Court and then you go into the Prerogative Court, you have to try the whole thing over again. The historical reason for that was that years ago the Common Pleas judges were not necessarily lawyers. Therefore, if a person came in there because he felt aggrieved by an accounting, or anything like that, and he went up to a higher court, the higher court said, "Well, let's try this whole thing all over again." Now, we can obviate that, and I don't think there can be any possible complaint about a thing like that.

MR. DIXON: By the establishment of the county courts you will eliminate justices of the peace and small cause courts and have everything go to the County Courts?

MR. WURTS: We have said nothing about justices of the peace and by so doing we have abolished them.

(*Laughter*)

Inferior courts may be created by statute, but the Legislature which gives can also take away, as you know. And if they can create a lot of justices of the peace they can slay them at the next session, as you know.

MR. WINNE: But justice of the peace courts are constitutional courts.

MR. WURTS: They are constitutional courts, yes, sir.

VICE-CHAIRMAN: You had better hold that last question until Mr. Peterson returns.

(*Laughter*)

MR. WURTS: Is he a justice of the peace?

VICE-CHAIRMAN: No, but he is highly interested in justices of the peace.

MR. WURTS: That brings me, Mr. Jacobs and members of the Committee, to the last point. That is, that all other inferior courts may be created by statute to such extent as the Legislature may deem fit, and that it may do whatever it wants with it.

Mr. Lasher has explained about our suggestion as to a court of impeachment. I don't know whether anybody else has brought that suggestion in to you or not, but you will find that on the first page of our draft—the first and second pages—we are attempting

to make the court of impeachment something other than a purely political court, by putting members of the Court of Appeals on it. Under our present set-up, with a large quota of appeals it might not be satisfactory. We have followed the New York method of putting in members of the highest court as members of the court of impeachment. We have also suggested a proviso, however—to preserve some semblance of the present set-up—that the two-thirds who are required for conviction must consist of at least 14 Senators, so that the present set-up whereby 14 out of 21 Senators are required for conviction and impeachment would not be disturbed.

I don't know if there is anything else that I should touch on or not.

VICE-CHAIRMAN: What has the New York experience been with respect to the court of impeachment? What impeachment cases have they had that you recall?

MR. WURTS: Well, the last one that they had, Mr. Jacobs, that I recall, was the impeachment of Governor William Sulzer, and that was a long time ago. I am glad to say that I don't think that court has ever convened since. And before that they had a terrible job when they assembled that court, to get precedents for it, because there were no rules and they had to go far and wide. They had to go to the English state trials for rules. As I recall, the result of that trial was that the governor was ousted, and the court thought it was necessary to do that because the vote was unanimous.

They did have an impeachment of a state senator, I believe, a few years before that, but I don't remember what happened.

MR. WAYNE D. McMURRAY: Mr. Wurts, this recommendation regarding the County Courts going into the Constitution is one we haven't heard a great deal about. Very few of the people who have appeared before us have made such a recommendation. Do you think it a wise thing to make the County Courts constitutional courts?

MR. WURTS: I think, Mr. McMurray, that the principle of home rule would best be satisfied by putting the County Courts in the Constitution, so that people of a particular county might always be assured of local justice. We have not gone as far as some have in freezing into the Constitution the qualifications of the members of that court—that they must be residents of that county—but I assume that that will be done by legislation. And I think you will find that the sentiment, particularly in the rural counties, is for a local, county court close to the people. The sentiment is overwhelming.

MR. McMURRAY: Inasmuch as we haven't heard too much about whether that did represent an overwhelming sentiment, I

wonder if you wouldn't want to comment on that, Mr. Wurts?

MR. WURTS: Oh, yes, overwhelming. When it did come to a vote, everybody said "Aye." I mean, there was no question about it. In all other matters we had to have a rising vote, in which the vote was rather close among the members present. I would say on that phase of the matter that the Bergen County Bar Association has between 285 and 300 members—that was the number on the last census—and we have about 500 lawyers in the county. This article, this diagram, which I have here, in its original form did not contain the County Courts or the inferior courts, except the statutory. It was mailed to each and every member with a notice of a special meeting, and everybody was surprised at what we were going to do. We had, I think, about 45 at the meeting. It was a hot night after a very hot day—the hottest day of the summer. We assumed that those who didn't come agreed with us, and of those who did come there we had a very large vote in our favor. There was only one question there on which we had to have a standing vote. Does that answer your question?

MR. McMURRAY: Yes.

(*Off-the-record discussion*)

MR. WURTS: I don't believe Mr. Lasher mentioned this. Our original recommendation had suggested a seven-year term originally for the members of the highest court and the members of the Appellate Division, with a reappointive term of 14 years. Our Association took the matter out of our hands and directed us to submit a recommendation that the term be fixed by the Legislature. At the same time, I think they left in our draft the provision of seven years with a tenure for the judges of the Law Division, the Chancery Division and the County Courts. Of course, that raises the County Courts' tenure two years over what it is now.

I think that has covered everything.

MR. SMITH: Mr. Wurts, did I understand you to say in a passing remark that you did not favor a review as a matter of right in all cases?

MR. WURTS: Oh, I think that everybody ought to have one appeal, on final judgment. I don't think you ought to go up on miscellaneous motions or practice motions, except to the extent that the law permits. Now, for instance, you ought to be entitled to appeal from an order granting an injunction against you, or something like that, where a right to property is involved, or where somebody strikes out your pleadings as not presenting a proper cause of action, or refuses to strike out pleadings as not containing a cause of action—you ought to be allowed to go up to a higher court on that. You ought not to wait until the case is over on things like that. We think that everybody, except in unusual cases,

is only entitled to one appeal, and that in most cases would be to a court of five men. The unusual cases would go to a court of seven men, after having been heard once before; or a capital case where your life is in jeopardy you go right up there to begin with, or a constitutional case.

MR. McGRATH: On the question of appeal, do you think that every man should have one appeal by right, instead of being turned down by the appellate courts?

MR. WURTS: Yes, sir. We think that an appeal should lie to the Appellate Division from the refusal of a trial judge to grant a prerogative writ, as well as an appeal to the Appellate Division, as a matter of right, from the order or judgment which finally determines the proceedings, if the writ is granted. We dealt very lightly with prerogative writs, because I listened to Judge Hannoch a couple of weeks ago on this subject, and it was decided to leave it to the Committee.

VICE-CHAIRMAN: Any further questions?

(*Silence*)

VICE-CHAIRMAN: Thank you very much.

MR. WURTS: Thank you for giving me the opportunity to appear before your Committee. I just want to say in closing that if there is any way in which our committee, our Association, can be of assistance, let us know.

VICE-CHAIRMAN: Thank you again—just a minute, Mr. Wurts. Are there any further questions?

PERSON IN AUDIENCE: Can you tell me whether any member of the State Bar Association is scheduled to appear before this Committee?

VICE-CHAIRMAN: They have already been here.

(*Short recess*)

VICE-CHAIRMAN: This is our last speaker, Mr. Richard B. Eckman, who is appearing here in behalf of the Burlington County Bar. I am sorry about the hour, but we couldn't help it because our first witness didn't appear until late. Mr. Eckman. . .

MR. RICHARD B. ECKMAN: Chairman, Mrs. Miller, and members of the Committee:

I come here, of course, as a lawyer and as a citizen, speaking for myself individually, and not for the Bar Association, or any group as yet, but through interest in the matter. I have a plan, a copy of which has been produced, and it may be called the English Plan because it's an attempted adaptation of the English judicial system to our system of courts. Hearing the last witness, there doesn't seem to be so much difference between us.

"JUDICIARY ARTICLE

Proposed by RICHARD B. ECKMAN
of Burlington County

ARTICLE VI—JUDICIARY

Section I

1. The judicial power shall be vested in a court for the trial of impeachments, a Supreme Court, County Courts, and such other courts, inferior to the Supreme Court, as may be established by law, which inferior courts the Legislature may alter or abolish as the public good shall require.

Section II

1. The House of Assembly shall have the sole power of impeaching by a vote of a majority of all the members; and all impeachments shall be tried by the Senate. The members, when sitting for that purpose, to be on oath or affirmation 'truly and impartially to try and determine the charge in question according to evidence'; and no person shall be convicted without the concurrence of two-thirds of all the members of the Senate.

2. Any judicial officer impeached shall be suspended from exercising his office until his acquittal.

3. Judgment in cases of impeachment shall not extend farther than to removal from office, and to disqualification to hold and enjoy any office of honor, profit, or trust under this State; but the party convicted shall nevertheless be liable to indictment, trial, and punishment according to law.

4. The Secretary of State shall be the Clerk of this court.

Section III

1. Any judge of any of the courts of the State may be removed for disability continuing for one year, or for refusal to perform the duties of his office, by a vote of two-thirds of all the members of House of Assembly voting separately, after a hearing before both houses in joint session.

Section IV

1. The Supreme Court shall be organized in three divisions, namely, the Appeals Division, the Law Division and the Chancery Division. It shall consist of a Presiding Justice of the Appeals Division who shall be styled the Chief Justice, a Presiding Justice of the Law Division, who shall be styled the President Justice, and a Presiding Justice of the Chancery Division, who shall be styled the Chancellor, and eighteen Associate Justices, which number may be increased by law.

2. The Appeals Division shall consist of the Chief Justice, and six other Justices of the Supreme Court to be assigned by the Governor. A Justice of the Supreme Court assigned by the Governor to the Appeals Division shall serve in said division until the end of his term.

The remaining justices shall be assigned by the Supreme Court to the Law or Chancery Division, as the business of the Court may require.

3. Whenever the number of causes before the Appeals Division shall be so great that the Division cannot promptly hear and determine them, the Governor shall, when authorized by statute, temporarily assign five of the justices of the other divisions to sit in the Appeals Division, which shall thereupon sit in two divisions for the hearing and decision of causes pending at the time of such assignment.

4. Four justices shall be necessary to constitute a quorum on the final hearing of any cause in the Appeals Division, but the Supreme Court may

provide by rule for the making of interlocutory orders by a lesser number of justices or by one justice; such orders to be subject to revision by the Appeals Division.

On the hearing of a cause in the Appeals Division, no justice who has given a judicial opinion in the cause in favor of or against the judgment, order or decree under review shall sit at the hearing to review such judgment, order or decree, but the reasons for such opinion shall be assigned to the Court in writing.

5. A majority of all the members of the Supreme Court, to be presided over by the Chief Justice, shall constitute a quorum for the assignment of justices, and for the appointment of officers, and the enactment of rules.

6. The Supreme Court shall appoint one or more reporters, not exceeding three, to report the decisions of the Court, and shall by rule define his or their duties and powers. The reporters shall hold office for five years, subject, however, to removal at the discretion of the Court.

Section V

1. The Appeals Division shall have the exercise of the appellate jurisdiction heretofore possessed by the Court of Errors and Appeals, the jurisdiction heretofore possessed by the Supreme Court on writ of error, and the jurisdiction heretofore possessed by the Prerogative Court on appeal, and by the Ordinary on appeal, and such further appellate jurisdiction as may be conferred upon it by law, together with such original jurisdiction as may be incident to the complete determination of any cause on review, saving, however, the right of trial by jury.

2. The jurisdiction heretofore possessed by the Supreme Court and the Justices thereof not hereby conferred on the Appeals Division, and the jurisdiction heretofore possessed by the Circuit Courts and the judges thereof, and such further original jurisdiction not of an equitable nature, and such further appellate jurisdiction from the inferior courts as may be conferred by statute, shall be exercised by the Law Division of the Supreme Court and by the several justices thereof, in accordance with rules of practice and procedure prescribed by statute, or in the absence of statute by the Supreme Court.

3. The jurisdiction heretofore possessed by the Prerogative Court and the Ordinary, not hereby conferred on the Appeals Division, and the jurisdiction heretofore possessed by the Court of Chancery and the Chancellor, and such further original equity jurisdiction as may be conferred by statute, and such further original jurisdiction as is now conferable on the Prerogative Court shall be exercised by the Chancery Division and by the Chancellor and the several justices of said division in accordance with rules of practice and procedure prescribed by statute, or, in the absence of statute, by the Supreme Court, but the justices of that division shall be under such control and supervision by the Chancellor as shall be provided by the Supreme Court.

4. Terms of the Supreme Court presided over by a single Justice of the Law Division for the trial of issues joined in or brought to the Law Division of the Supreme Court shall be held in the several counties at times fixed by the Supreme Court. Until so fixed, such trial terms shall be held at the places and times now fixed by law for the holding of the Courts of Common Pleas in the several counties.

5. The Supreme Court may provide by rule for the transfer of any cause or issue from the Law Division to the Chancery Division, or from the Chancery Division to the Law Division of the Supreme Court, and from the County Court to the Law Division or the Chancery Division of the Supreme Court, and for the giving of complete legal and equitable relief in any cause in the court or division where it may be pending.

6. Nothing herein contained shall prevent the alteration by law of any statutory power or jurisdiction conferred upon any court or judge since the adoption of the Constitution in the year one thousand eight hundred

and forty-four, and nothing herein contained shall prevent the Legislature from conferring upon any inferior court which may hereafter be established such power or jurisdiction as was exercised by or which may now be conferred upon the inferior courts mentioned in Section I of Article VI of the Constitution of 1844.

Section VI

1. The County Courts shall have and exercise, in all cases within the county, such original common law jurisdiction concurrent with the Supreme Court, and such other jurisdiction heretofore exercised by courts inferior to the Supreme Court and the Prerogative Court as may be provided by law. The final judgments of the County Courts may be brought for review before the Supreme Court in the Appeals Division. Until otherwise provided, the jurisdiction heretofore exercised by the Courts of Common Pleas, Orphans' Courts, Court of Oyer and Terminer, Courts of Quarter Sessions, or by the judges thereof, shall be exercised by the County Courts pursuant to rules prescribed by the Supreme Court. The Justices of the Law Division of the Supreme Court shall be ex officio judges of the County Courts. All other jurisdiction or authority now vested in any court, judge or magistrate with jurisdiction inferior to the courts in this section mentioned and not superseded by this article, shall continue to be exercised by such court, judge or magistrate until the Legislature shall otherwise provide.

Section VII

1. This amendment to the Constitution shall not cause the abatement of any suit or proceeding pending when it takes effect. The Supreme Court shall make such general and special rules and orders as may be necessary for the transfer of all suits and proceedings to the appropriate division or court created by this amendment. Matters pending when this amendment takes effect shall be decided by the judge or judges to whom they were submitted, and the order, judgment or decree made or advised by said judge shall be entered as that of the division or court to which the suit or proceeding shall have been transferred.

ARTICLE VII—APPOINTING POWER AND TENURE OF OFFICE

Section I

1. The Chief Justice of the Supreme Court, the President Justice of the Law Division, the Chancellor and the Associate Justices of the Supreme Court shall be nominated by the Governor and appointed by him, with the advice and consent of the Senate. They shall not be less than thirty-five years of age, and shall have been practicing attorneys in the State for at least ten years. They shall hold office for the term of seven years; shall, at stated times, receive for their services a compensation which shall not be diminished during their term of office, and they shall hold no other office under the Government of the State, or of the United States, and shall not engage in the practice of law during their term of office. The Chancellor and the Chief Justice of the Supreme Court and the Vice-Chancellors and Associate Justices of the Supreme Court, in office when this amendment takes effect, shall be Justices of the Supreme Court until the expiration of their respective terms.

The Circuit Court Judges in office when this amendment takes effect shall be continued in office with the powers of the Justices of the Supreme Court at the circuit until the expiration of their respective terms. They may hold the County Courts, subject to assignment by the Law Division of the Supreme Court.

2. The Governor, by and with the advice and consent of the Senate, shall appoint one judge of the County Court in each county, and such additional County Judge or Judges in any county as may be authorized by law, The County Judges may hold court in any county subject to the control of the Supreme Court. The County Judges shall not be less than thirty years of age, and shall have been practicing attorneys in this

State for at least five years. They shall hold office for the term of five years; shall at stated times receive for their services such compensation, which shall not be diminished during their term of office, as the Legislature in its discretion shall fix for each county, and they shall hold no other office under the government of the State or of the United States, and shall not engage in practice of the law in the courts of the county where they hold court during their term of office. The judges of the Common Pleas in office when this amendment takes effect shall be the judges of the County Courts until the expiration of their present terms.

3. The Governor or person administering the government, and four citizens of the State appointed by the Governor, by and with the advice and consent of the Senate, shall constitute the Board of Pardons. The members of said Board, or any three of them, of whom the Governor or person administering the government shall be one, may remit fines and forfeitures, and grant reprieves, commutations, pardons and paroles, after conviction in all cases except impeachment. The four members specially appointed shall hold office for five years, and receive for their services a compensation which shall not be diminished during the term of their appointment.

4. The Legislature shall pass all laws necessary to carry into effect the provisions of the constitution and this amendment thereof."

MR. ECKMAN: What this proposes is a Supreme Court in three divisions: an Appeals Division which would have the appellate jurisdiction of the present Court of Errors and Appeals and of the Supreme Court, the Prerogative Court on appeals and the Orphans' Court on appeals. Then below that, the Law Division and the Chancery Division. The Law Division would have the jurisdiction, the original jurisdiction, of the Supreme Court and also of the present Circuit Court, while the Chancery Division would preserve the jurisdiction of the Court of Chancery and also the Prerogative Court and Ordinary in probate matters.

There is quite a lot of sentiment at the Bar for the preservation of the Court of Chancery. At a meeting of the Burlington County Bar Association the other night, the majority seemed to be in favor of preserving the present Court of Chancery, as is, as a separate court, and you, no doubt, heard a great many in favor of that, from witnesses of high standing. But personally favoring a unified system of courts, that would not be possible if we are to have a unified system of courts. I am concerned about preserving the court, however, designated as the Chancery Division, with its presiding officer retaining the rank of Chancellor, or the title of Chancellor, and a certain number of associates justices within.

That follows substantially the English Plan which, as we know, originated in the Judicature or the Reform Acts of 1873 and 1875, and then there was a further merger of certain divisions in 1881. But that court system has received a great deal of study and endorsement of high-ranking jurists as a very workable system, the courts being among the most efficient and expeditious courts in the world.

Then below the Supreme Court, so organized, I would favor pre-

serving the county courts, in which would be all the jurisdiction of all the present county courts, except the Circuit Court. That, of course, goes to the Law Division.

As the last witness said, I think there is, particularly among the rural areas and in the county from which I come, a unanimous sentiment for preserving the county courts as a separate entity, on a lower level than the superior courts, the Supreme Court.

VICE-CHAIRMAN: Wouldn't the same results be accomplished if a judge of the general court were assigned to sit there for a time?

MR. ECKMAN: Well, of course, as the last witness said—something about home rule, but there are also heard, particularly in rural counties, a lot of small matters which, it seems to me, should not occupy the time of a Supreme Court Justice. You should have one or more county judges.

VICE-CHAIRMAN: Of course, there is the argument that you may have a better brand of justice throughout the State, if you have higher type justices than you are likely to get from the rural counties.

MR. ECKMAN: Personally, my experience has been that the counties have been pretty well served by our county judges.

The plan calls for judicial power vested in a court for the trial of impeachments, a Supreme Court, County Courts, and such other courts, inferior to the Supreme Court, as may be established by law, which inferior courts the Legislature may alter or abolish as the public good shall require. This plan has an outline for practical procedure before a court of impeachment, and there is little need to have anything further said about that.

The plan would have the Chief Justice presiding over the Appeals Division with the six other Justices of the Supreme Court, to be assigned by the Governor, and then they can serve in that position until the end of the term. The remaining Justices, whatever number might be created at the outset by the proposed Constitution, would be assigned by the Supreme Court to the Law and Chancery Divisions, as may be required; and there is provision in the plan for the assigning of Justices from the other Divisions to the Appeals Division, if the appellate load is too great for that court to handle.

The plan outlines in some detail the proposed jurisdiction of the three divisions, and for the provision by rule for the transfer of causes or issues from the Law Division to the Chancery Division, or vice versa, and for the definite, complete, regular and actual relief of any cause in the court or division where it may be pending. What the preceding witness said about that, of course, I am not sure about.

This plan, of course, was submitted to the people in 1909 and failed of passage, but it seems to me to be equally applicable to pre-

sent conditions. It presents a workable system of courts, preserving the substance of the Chancery Court and of the county courts. The Chancellor and Chief Justice, the Vice-Chancellors and Associate Justices of the present Supreme Court in office, and Circuit Court Judges, of course, would remain as Supreme Court Judges until the expiration of their terms, and provision is made for holding the county courts subject to assignment to the Law Division of the Supreme Court.

Then I would like to say that the maintenance of the county courts, it seems to me, would not interfere with the provision for a unified and integrated system of courts because there will be provisions for assignment of county judges to sit in any county of the State on the order of the Supreme Court, to assist with the work in any county where the volume of business has been too great for the existing judges there to handle. I think I have covered all of the points.

VICE-CHAIRMAN: Are there any questions? . . . Thank you very much, Mr. Eckman. We appreciate your coming.

MR. ECKMAN: Thank you.

VICE-CHAIRMAN: Is there anything further to discuss this afternoon?

COMMITTEE MEMBER: May I ask one question? Have we done anything about this technical expert that we discussed for some time?

VICE-CHAIRMAN: No. I think we might as well defer it until next week. We won't be ready for any drafting until then.

(*The session adjourned at 4:15 P.M.*)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Tuesday, July 8, 1947

(Morning session)

(The session began at 11:00 A. M.)

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., Smith, G. F., Sommer and Winne.

Vice-Chairman Jacobs presided at the request of Chairman Sommer.

VICE-CHAIRMAN NATHAN L. JACOBS: On behalf of the whole Committee I want to welcome Mr. Winne back. I hope his health is really improved, and I think that for the first time we have the entire Committee present.

MR. LESTER A. DRENK: All except Mr. McMurray. I think he is attending a short committee meeting. He is here.

VICE-CHAIRMAN: We should review briefly our plan so that we will make certain not to have any omission. I think that we have reached the point where at the close of this week we can go into the preparation of our tentative draft, which in turn will be submitted for a formal public hearing before the end of the month, so that we can have our Committee Report and recommendations to the Convention by the end of the month. We have tried to cover everybody who has expressed any interest, as well as those groups that we thought would be interested. Mrs. Miller and I will review all of the correspondence again this afternoon, and those who have been unable to appear will be asked to submit their views in writing, if possible by the end of the week, so that we'll have all that before we actually conclude our tentative draft.

As far as this week is concerned, we have invited primarily the organizations which are not legal in nature, that is, bankers, manufacturers, labor, chambers of commerce, etc. Some have indicated they will appear and some have indicated that they will be unable to appear. I suggest that whenever we have spare time because of the non-appearances of these groups, we go into executive session as originally planned, so that we can continue our deliberations and thus cut short the time required after the final hearing on Thursday.

In connection with Thursday's hearings, we'll have the Chancellor, as you know, the first thing in the morning, followed by Judge Learned Hand. I think it would be helpful if we invited such other delegates as are interested and are free, because they

might like to have the benefit of the varying views of the Chancellor, Judge Hand and the Governor. Those of you who don't know Judge Hand or anything about him might take a glance at the February issue of the *Harvard Law Review,* which is devoted entirely to him. I think that if I read two sentences in Mr. Burlingham's article you will get an impression as to the type of judge he is. He ends his discussion of Judge Hand with these two sentences: "This man should have been on the Supreme Court of the United States years ago, but the stars in their courses fought against him. After 37 years on the bench he is now unquestionably first among the American judges." That's probably accurate. He is an outstanding judge, and I think that we will receive some helpful views from him.

MR. EDWARD A. McGRATH: Has his experience been mostly on equity cases?

VICE-CHAIRMAN: No, Judge Hand has been a federal judge all his life.

MR. McGRATH: General, overall?

VICE-CHAIRMAN: That's right, District Judge and the United States Circuit Court of Appeals. He was a judge at the trial level for many years, and he has been a judge at the appellate level for many years. None of us has spoken to him, but I think in the light of his general background and experience he will be of some help to us. We should be able to ask about the various issues that we have talked about; one of the embarrassing ones might be the question of the compulsory retirement age, since he is 75. I think we will get conscientious, straightforward expressions of his beliefs on the things we are interested in.

MR. McGRATH: Are you going to use this room on Thursday?

VICE-CHAIRMAN: I think so. We had Dean Pound last week, who attracted quite a few, but we seemed to accommodate all of them. If we have any overflow we can move. Since most of the other committees are busy, I don't expect that we'll have the bulk of the delegates here.

We had invited our Attorney-General last week, but he was unable to come on the date scheduled, so we asked him to come this morning and he has been good enough to attend. Unless some of the members of the Committee have further preliminaries, we'll proceed with hearing the Attorney-General. Anything further?

(*Silence*)

MR. WALTER D. VAN RIPER: I would like to say that if the Committee takes another room just to hear Judge Hand after I have to testify in this room, I shall feel very badly about it.

(*Laughter*)

Thank you very much, members of the Committee, for this oppor-

tunity, which I frankly tried to avoid, but the Chairman insisted that I be here. I notice in the papers that you have been treated to the testimony of experts, and apparently you are going to be treated to some more of a like nature—in which classification I certainly am not and don't pretend to be. I have a couple of thoughts, however, with reference to the Judicial Section that I would like to discuss with the Committee, if I may, for a few minutes.

I assume that all of us are primarily interested in bringing about the creation of a judicial system that will be fundamentally efficient and expeditious. I know of nothing that's more important to the public in general in the administration of the judicial system, outside of its honesty, which we take for granted, of course, than expedition. The present situation, where it takes so long a time to get a case tried, in both the civil and the criminal courts, and an equally long time or longer to get it finally disposed of on appeal, is simply intolerable. And that is no reflection on the trial judges or the appellate judges, because all of them, in my judgment, are now burdened down with a multiplicity of duties, most of which they ought not to have, and because they are encumbered by a system which makes it impossible to do anything else.

My suggestion is, that we start off at the top with a new top court, getting rid of this ponderous 16-judge institution which we now have. I don't care what you call the court; I don't think it makes very much difference whether you call it a Supreme Court or whether you call it a Court of Appeals, or what you call it. In my judgment it should consist of not more than seven members, certainly not less than five members. If I were doing it myself I would prefer, I think, seven members. I would start it off, however, in fairness to the judges who are now there, with the present nine Justices of the Supreme Court, allowing it to work its way down by virtue of resignations, retirements and so forth, until they reach the number that you finally decide to have.

I would then have one court beneath that which would be divided in two divisions, the Equity Division and the Law Division. If you are going to have expedition you have to have administration, and you have to have someone with administrative authority. The Chief Justice of the Supreme Court—if you call it that; you may or may not call it that; I will for the sake of argument, if you will permit me—the Chief Justice should be the chief judicial officer of the State and have supreme judicial authority. But I don't think he should be charged with the administrative responsibility of 50 or 60 or 70 or 100 judges, whatever number they may be. I don't think it is fair to attempt to build a great top court, as I am sure we would all like to see built, and to have presiding over it a great Chief Justice, in the sense that he is a great judge in that he writes great legal opinions, and at the same time charge him with

the responsibility of a multitude of administrative duties. If we are to have expedition and efficiency, we must have an administrative judge at the head of the equity section and one at the head of the law section.

I know the suggestion has been made that the Chief Justice be the administrator and that he have the appointment of a proctor, I think they call it in the federal court, or whatever you want to call it. My personal judgment is that it would make much more for efficiency if the administrative head of the court was a judge. Frankly, I don't believe the judges push around very easily. Some members of this Committee, I am sure, can testify to that with regard to their own experience, and I at one time had that same feeling myself. They don't like to be pushed around by people other than higher judges; they don't always like that either, but I think they acquiesce in it much more readily than they do if pushed around by someone who is not a judge and does not outrank them.

All cases should be started in one court, particularly on the law side. In other words, I think if you have litigation in civil matters, that it ought not to be differentiated between being the Supreme Court, Circuit Court and Court of Common Pleas. It ought to be one court, so that any judge of that court, on that side, could try it. I think that the county courts should become part of the general court system, but there should be maintained a county entity in the assignment and in the appointment of judges. As I recall it, in the 1944 draft we provided for at least one judge to be appointed to the Superior Court, which was what the trial court was then called, from each county. I believe that that is a very good provision.

All judges should give full time to their judicial work; they should not be allowed to engage in the practice of law. And they should receive adequate salaries—which they are not receiving now, in my judgment. If it be that the small counties, which are now paying Common Pleas judges a small amount of money—a good many of them practice law—do not require the full-time services of a judge in that county, he could be used in the trial of cases in other counties. Certainly that's so when you realize, as all you members of the Committee who are lawyers do, that—I know in Essex County; I can't speak factually and with certainty on other counties, but I think they are probably the same, certainly in the larger counties—in Essex County I understand from the Circuit Court judges that one is considered fortunate if a case can be tried within a year after it starts. That is a most unfortunate situation and ought not to exist.

I think that the top Court of Appeals ought not to be a court in which litigants can go as a matter of right in every case. I am

inclined to the opinion that the provision of the 1944 proposal, which limited your right in the top court to capital cases, cases where constitutionality was an issue, cases where there was a dissent in the lower court, or cases which the lower court or the top court itself certified as being willing to entertain, is a proper restriction. Our present system of appeals makes only for delay.

On the question of appeal, I think that every final judgment should be reviewable. That is, every final judgment in a trial court should be reviewable and have at least one appeal before at least three judges. There should be an Appellate Division or a lower court of appeal beneath the top court. Personally, I would favor an Appellate Division, two or three, whatever may be necessary. I would think that the constitutional provision ought to be broad enough to permit the Court of Appeals, or the Chief Justice thereof, to set up the Appellate Division, and to designate these judges from the trial courts who would comprise the Appellate Division. And, as I said before, every final judgment from a trial court should be entitled to at least one appeal.

The appellate court, or the top court, should be vested with very broad rule-making powers in order to regulate appeals, particularly in appeals in matters other than those which arise as the result of a trial before a judge in the trial court. One of the things that I have particularly in mind is the matter of appeals on questions of extradition in criminal cases. As those of you on the Committee who are members of the bar well know, a defendant is indicted in a foreign state and arrested in New Jersey, an application is made by the Governor of New York State, we'll say, where the indictment is, to the Governor of New Jersey, to extradite the defendant. The Governor of New Jersey signs the extradition warrant, and then a proceeding is started in one court after another which can result in interminable delay. I have in mind a case right now where the Governor of New Jersey signed a warrant of extradition to send a man to Michigan, who was under indictment there, in June of 1944, and in April of 1947 the Court of Errors and Appeals of this State decided that he should go. In the meantime, 17 judges had passed upon that case, and not a single one of the 17 judges found any merit in the defendant's contention that he shouldn't go. So, the issue being limited very narrowly anyhow, nearly three years elapsed between the time that the Governor of New Jersey ordered the extradition until the State of Michigan was finally able to bring that man back to trial. I don't know what the situation was out in Michigan in the meantime, but I can very well believe that there wasn't anything left to try. That's usually the situation, in criminal cases.

I think the same broad powers should be given to the Court of Appeals in reference to the matter of reviewing indictments on

certiorari. The indictments should be reviewable on certiorari, but I think they should be reviewable only by the top court, and that should be done with expedition.

Now, there is one other matter that I would like to call the attention of the Committee. I don't know that you have considered it before, and there may be those who will say that it probably doesn't belong in the Judicial Section. I'm rather inclined to believe it does, and that is the question of a Court of Pardons. As you know, at the present time we have a Court of Pardons. We call it a Court of Pardons; I don't just know where the name "Court" came from —the Constitution doesn't call it a Court of Pardons; the Constitution doesn't call it anything. It simply says that the Governor, the Chancellor and the six lay judges of the Court of Errors and Appeals may act in matters of pardon. I think that is a most important branch of the administration of criminal justice. Practically every act of the Court of Pardons amounts to a review of some act of a judge sitting in a criminal court. In other words, it is a review practically of the sentences of those judges. The action of the Court of Pardons is of immense importance to the public, and it's naturally of immense importance to the individual concerned.

It would be a mighty good thing for the community at large if the Court of Pardons had constitutional dignity and constitutional standing. It ought not to be a member of the Executive Department. I am sure no man has ever been Governor, or probably ever will be, who would want to have it in the Governor's office anyhow, because the Governor can't possibly give the time and attention that ought to be given to the careful consideration of the cases that come before the Court of Pardons. I think it should be a court; its members should be judges, not necessarily all lawyers; I think it should conduct its sessions openly; and those who are concerned, both the individual and the public, through their representatives, should have an opportunity to appear before that court and to be heard. And I think the action of the court and its conclusions and its results should be made public. I don't believe from what I have read that the Committee has had that matter under consideration. I hope that it will, in the public interest, give the question of setting up a constitutional Court of Pardons real consideration.

There is nothing further that I have to say affirmatively at this time.

VICE-CHAIRMAN: I was wondering if you could let us have specifically the reasons for the delay in the extradition case. You referred to 17 judges. Can you outline the course of the procedure involving 17 judges?

MR. VAN RIPER: Yes. An appeal was taken, a writ of habeas

corpus was secured from a Common Pleas judge, and thereupon the matter was heard before the Common Pleas judge. That was one judge. After some time it was decided that the Governor was justified in issuing this warrant and an appeal was then taken from the Common Pleas judge to the Supreme Court, and three judges there passed upon it and decided to affirm the conclusion of the Common Pleas judge and ordered the extradition. Appeal was then taken from the Supreme Court to the Court of Errors and Appeals, where 13 judges passed upon it. Now, I am not for a moment—and I don't want to be misunderstood—reflecting in any way on the action of any of those judges. It is just a fact, as we all know, that the Supreme Court judges and the Court of Errors and Appeals judges are burdened down with all this multiplicity of duties which they have. Naturally, you can't consider a thing like that in a day and decide it tomorrow, because you have other things to consider, and decide also.

MR. AMOS F. DIXON: At the present time that appeal from the Supreme Court to Errors and Appeals is taken as a matter of right?

MR. VAN RIPER: That's right.

MR. WALTER G. WINNE: Fixing proper bail might have been effective.

MR. VAN RIPER: Well, it might have been. I suppose you mean fixing bail and—

MR. WINNE: There is no sense to the appeal. A judge might have fixed the bail at $25,000, and the man might have gone back.

MR. VAN RIPER: He would rather go back to Michigan than stay in New Jersey and be in jail. Well, that's a practical way of doing it, I suppose, except that I think that it's the general policy of our courts, with which I am personally, I think, in favor, that a man should not be held in unduly high bail, especially for the purpose of depriving him of the opportunity to pursue what the law at the moment gives him to be his right.

MR. WINNE: It was pretty ridiculous, wasn't it, that this man had two appeals from a judgment which was a proper judgment?

MR. VAN RIPER: Of course, it wasn't really a judgment. The only judgment was that he should go to trial. That was the only judgment. He may be acquitted on trial.

MR. McGRATH: Mr. Van Riper, don't you think it would be a very sensible provision to put into our Constitution that the court of the highest appeal could on its own motion or on proper decision remove any case within this court for immediate consideration, if it was a question involving public interest?

MR. VAN RIPER: I do; that's what I had in mind.

MR. McGRATH: Isn't that the fault of our inflexible Court

of Errors and Appeals that it has to wait until the Supreme Court decides it?

MR. VAN RIPER: That's what I had in mind, Judge McGrath, when I talked about the broadest rule-making powers.

MR. McGRATH: In order words, when we make our Constitution we ought to look at modern problems; look at questions such as those that you have brought up.

MR. VAN RIPER: And be a little practical along with it.

MR. WINNE: Could I ask the Attorney-General a question?

VICE-CHAIRMAN: Go right ahead, Mr. Winne.

MR. WINNE: I have always been concerned, Mr. Attorney-General, about what happens in a great many cases. Is these really any reason why, after a motion to quash in the county court where the man is to be tried—the trial court; it may not be a county court, it may be your Superior Court or your Supreme Court—the defendant should then have any other remedy before conviction? Naturally, he has a chance to attack the indictment after conviction, but if there is no conviction he doesn't have to attack it. But, if he has his attempt to attack the indictment before the court in which he is to be tried, and that court finds the indictment good, why should he have any right to go to some other court on that question? That's an unusual opportunity which he has today—of having the Supreme Court say whether the grand jury found a proper bill after the county court has already had it. Why should he?

MR. VAN RIPER: I don't think he should. I am perfectly willing to admit that there are instances, but I think they are very, very rare, where a person is indicted as the result of things going on in the grand jury that shouldn't go on; and I think he ought to have the opportunity to bring that out in the open, to bring it to the attention of the trial judge, or the Supreme Court judge—I don't care, perhaps to the Superior Court Judge. But I think that once he has had the opportunity to bring that before one judge—and perhaps if you are going to limit it to one judge it ought to be to one judge of the Court of Appeals, or whatever you want to call it; there should be no question about a local judge wanting to oppose a local jury or a grand jury, or anything like that—I think that once he has had that opportunity to bring it out in the open, to tell it to the top court judge, who decides that that judgment is properly found, then he ought to go to trial on the merits of the indictment.

MR. WINNE: Now, one other thing that troubles me, Mr. Attorney-General. In all this proposed court set-up, what happens to local convictions, appeals from motor vehicle convictions? What happens to your Orphans' Court under the present system? Are they in the general court?

MR. VAN RIPER: I would assume, on the theories which I have talked about—and I understand that nobody is going to adopt it because I talk about it at all—what I had in mind was that the appeals from the Orphans' Court would probably go in the Equity Division.

MR. WINNE: Well, who is your Orphans' Court now? Is it a general trial court? Do they do criminal and Orphans' Court matters, too?

MR. VAN RIPER: Well, of course, they do now. You might have to separate them at the county court level.

MR. WINNE: That's a county court.

MR. VAN RIPER: That's right. I would think, if you are going to have an Equity Division and a Law Division, that Orphans' Court matters as we now have them certainly ought to be heard in the county, by a county judge. Under those circumstances it probably ought to be heard by a judge in the Law Division.

MR. McGRATH: Mr. Van Riper, let us take the judges of Common Pleas in Essex County—we want to call them Superior Court judges—would they still be sitting doing the same work?

MR. VAN RIPER: I imagine they would, but I think the administrative judge of that court, whoever he might be, would have an opportunity to assign them, or to assign cases. He would assign either the judge or the cases.

MR. McGRATH: Haven't we got that right today? Hasn't the Supreme Court the right to assign me to Cape May or vice versa?

MR. VAN RIPER: I am not just sure that it has. You have an authority on that sitting right here on this Committee. It doesn't work out that way. I don't believe you could under the present system. What I have in mind, Judge, is this. For instance, we have four Common Pleas judges in Essex County. We have four now, we had four when I was there. Three of us were trying criminal cases, and three criminal calendars go to pieces. You know how easy it is for calendars to go to pieces, and the three of us had nothing to do. And yet you have 25 or 30 cases on the ready calendar upstairs in the Circuit Court, and none of us can try them.

MR. McGRATH: Are you supplying the Supreme Court Justices with that same judicial power?

MR. VAN RIPER: Well, you know that works out as a practical thing. The Supreme Court Justice is the boss, so to speak, of the judicial machinery of his circuit, but in operation it just doesn't work out that way. They are not there working the calendar every day.

MR. McGRATH: What guarantee have we that it wouldn't work out that way if we call it the Supreme Court?

MR. VAN RIPER: You only have the guarantee that the man who would be the administrative judge at the head of that court

would be seeing to it, I assume, that the whole system worked as efficiently as possible.

MR. McGRATH: Why wouldn't it be simpler if you make the Supreme Court Justice the Chief Justice, and the Justice of the county courts also? Is there anything wrong with that? You would have the same effect.

MR. VAN RIPER: Let me get that again, will you please, Judge?

MR. McGRATH: Suppose the Constitution made the Chief Justice of any one of these courts the Chief Justice of all county courts; he would then have the power and authority—

MR. VAN RIPER: I don't see very much difference whether you say that the Chief Judge of the Law Division shall be the Chief Judge of each county court, or whether you simply say the Chief Judge of the Law Division shall have power to do so and so.

MR. McGRATH: What's the difference?

MR. VAN RIPER: I don't see any.

MR. McGRATH: Mr. Brogan sent me up to Warren County once—for which I never thanked him.

(Laughter)

I tried a case up there, and I have tried the Circuit Court, the Supreme Court, under our present system, if necessary.

VICE-CHAIRMAN: Attorney General, there are some items in your original study back in '42 which you haven't touched upon—tenure, power of appointment, compulsory retirement, etc. Would you care to say something about those?

MR. VAN RIPER: Well, I am perfectly willing to give you my views on them. I don't know about tenure. In the original report, as I recall it, in 1942, we recommended tenure after the first term—one term of seven years, and then tenure afterwards; and I'm not sure whether that applied to both the trial judges or the county court judges, but I think it did.

Personally, I am not sold on the idea of life tenure for judges. It may be all right, but if I were writing the Constitution myself—of course, in all these things where there are more than two of us doing it, we have to give and take a little bit; we can't all have it just the way we want it—but if I were writing it myself I do not believe I would give them life tenure. You do get some bad judges, and it's not so easy to get them out if you have life tenure. I think our practice in this State has been pretty good. We have had some great judges in this State; I don't have to tell you members of this Committee that. And we still have some great judges. We have that under a system whereby they are appointed for a term of years and they don't have to be appointed for life. Before I, personally, would be willing to go along on life tenure, I would want to have evidence of the fact that in some other states, where they

have life tenure, or even in the federal system, their judges are by and large greater judges than ours. I have no information to that effect, as of this time.

MR. FRANK H. SOMMER: If you give the judges life tenure you would have to find some method of removal other than impeachment.

MR. VAN RIPER: Yes, and I rather assumed that this Convention would put in the Constitution a method of removal of a judge other than impeachment, because I thought that it was more or less generally agreed upon among lawyers, at least, that the federal system—no, I don't know whether it is or not—New York State has a system, hasn't it, which provides for removal by the Appellate Court, by the top court?

MR. THOMAS J. BROGAN: No, they are just trying to get it in now.

MR. VAN RIPER: Oh, is that it? I am not sure. But I think, Dean, the difficulty with that situation is that a judge might be an incompetent judge, he may have eccentricities that are not at all compatible with his judicial duties, and that might not at all justify either impeachment or removal, but it might justify the appointing power in feeling that he shouldn't be reappointed.

MR. McGRATH: Do you think life tenure after seven years may be more logical, with retirement at 70?

MR. VAN RIPER: I am not ready to go along on that presently, Judge. I just don't feel, as far as I personally am concerned—unless I could have evidence of the fact that judges who are appointed for life have, by and large and as a whole, made better and greater judges than our New Jersey judges—I would not be willing to change it.

MRS. GENE W. MILLER: Attorney-General Van Riper, you spoke about the salary—that we shouldn't be so penurious, or too penurious. Would you put salaries in the Constitution?

MR. VAN RIPER: No, of course not.

MR. SOMMER: Well, Attorney-General, you would confer the rule-making power on the court?

MR. VAN RIPER: Yes sir, I would, very broadly.

MR. SOMMER: That's the question, how broadly? The '44 proposal extended the rule-making power to practice and procedure. There could be no question about that. That's all a matter of administration. I noticed it also extended the rule-making power to evidence. What do you say about that?

MR. VAN RIPER: I'm afraid of that. I don't think, if I were drawing it, I would put that in there.

MR. SOMMER: Some of the rules of evidence certainly are of a substantive nature rather than procedural.

MR. VAN RIPER: I would be inclined not to put that in.

MR. DIXON: Would you give the Legislature any part at all, or any control of, the rule-making power of the high court?

MR. VAN RIPER: Well, I would with reference to evidence, but I don't know that I would with reference to practice and procedure. I should think that that would safely and properly, and should rightfully be referred exclusively to the court itself.

VICE-CHAIRMAN: Exclusively?

MR. VAN RIPER: Yes, they are in a much better position to handle it, and I think it is exclusively a judicial function; more so than a legislative function.

VICE-CHAIRMAN: Well, it hasn't been in our history.

MR. VAN RIPER: No, but it should be.

MR. DIXON: In regard to equity in the law branch that you mentioned, is it your thought that if any case starts in either one branch or the other that it be completely tried in that branch without any transferral in case law questions came up in connection with the case?

MR. VAN RIPER: No, it isn't, but some arrangement could be worked out—and I think it could be worked out in this Committee—some constitutional provision that will permit cases to be tried and disposed of. For instance, if the case were started in the law court and an equitable question arises, it should be disposed of in the law court. If the case were started in equity and a law question arises, it should be disposed of in the equity court. But only when it arises out of the case, so to speak, and not where it was the fundamental cause of the institution of the litigation.

MR. McGRATH: Do you think, Mr. Van Riper, that it would be a popular thing for this Convention, which is supposed to add to the human rights, to propose to the people that we should take away the final right of appeal to the highest court?

MR. VAN RIPER: Judge, I guess I'm never noted for doing the popular thing.

MR. McGRATH: After all, the people have to vote on this.

MR. VAN RIPER: I don't know whether it would be a popular thing or not. I think that this matter of judicial delay by virtue of numerous appeals is very unpopular, as a matter of fact, among people who understand anything about it. What do we do when you take that away? You don't appeal to the United States Supreme Court as a matter of right.

MR. McGRATH: Yes, but the United States Supreme Court was fashioned over 150 years ago. We have gone a long way since then, and the United States Supreme Court presides over 120,000,000 people and we preside over 4,000,000 people. In one case it's absolutely impossible for the court to hear all appeals. In our case it's not impossible, because we have been doing it for 100 years.

MR. VAN RIPER: But aren't you protecting the right of the

litigant pretty well when you provide, for instance, that if you have one dissenting vote in the appellate branch he is entitled to go up to the top court, and secondly, that he could go up there whenever the appellate branch said he could go up there, and thirdly, that he could go up there whenever the Supreme Court said, "We'll take you in."

MR. McGRATH: I'm only thinking about what the public would think about it, not what we think about it.

MR. VAN RIPER: Well, of course, I can't speak for the public.

MR. WINNE: Well, they get one right of appeal in any circumstances.

MR. VAN RIPER: They always get one right of appeal by at least three judges.

MR. McGRATH: They now have an appeal to the highest court of New Jersey. Can we take that away from them, or are they going to be willing? Why should we take it away from them when under an efficient system of courts there would be much less delay. For instance, every case in the Circuit Court, one of which might involve a $200 automobile accident claim, and every case in the Chancery Court, one of which might possibly be an order to make a man pay $10 to his wife—all those things go as a matter of right to the Court of Errors and Appeals. Don't you agree that the sifting-out process should be in the Appellate Division, and that the Court of Appeals should make rules by which classes of cases would go first to this Appellate Division, so that, for instance, if a man is ordered to pay $10 a week to his wife, he shouldn't be allowed to go to the highest court for that; he should go to the appellate court. In other words, our divisions today are purely historical and arbitrary. Just because the case is in the Circuit Court, no matter how trivial it may be, it has to go to our highest court of 16 men.

MR. VAN RIPER: Well, Judge, do you think it's going to be popular if you prohibit a man who doesn't want to pay his wife alimony from going up to the Supreme Court, or to the top court? He wants to keep on appealing as long as he can.

MR. McGRATH: I would give everybody the rights they have had for a hundred years.

MR. VAN RIPER: Well, didn't you just say that you think that ought to be sifted out in the appellate—

MR. McGRATH: First to the Appellate Division and then to the highest court, if necessary.

MR. VAN RIPER: Well, who determines whether or not it's necessary.

MR. McGRATH: The rules of the highest court.

MR. VAN RIPER: Isn't that what we were just talking about?

MR. McGRATH: Isn't it far better for a citizen to feel that he has the right to go to the highest court? Wouldn't he feel more

confidence in his government if he has this right, even though it is never used?

MR. VAN RIPER: Do you think the public feel a lack of confidence in their government now because they know that they can't, as a matter of right, get into the United States Supreme Court on every question?

MR. McGRATH: I think the fact that every man knows he has the right to go to the highest court—a right he has exercised for a hundred years—is a very good thing. I think it would be a dangerous thing for us to tell the people we have decided they no longer have that right. If we move the courts all around, give them a new name, possibly create a new one, we have taken one right away from them. In other words, can't the public say, well, you have made more courts, but you took away a lot of rights?

VICE-CHAIRMAN: Any further questions of the Attorney-General?

MR. GEORGE F. SMITH: Mr. Van Riper, you apparently visualize the shifting of certain county court judges, to give relief where there is a crowded calendar. Have you visualized the same situation in the second level, that is, the present Supreme Court, the equity and law branches, if we have such a set-up?

MR. VAN RIPER: You mean a relief in cases of appeal?

MR. SMITH: No, I am thinking of cases at trial, where there might be an overcrowded calendar in the Law Division—assuming now a new unified court with an Equity Division and a Law Division. Assuming a crowded calendar in either law or equity, do you recommend shifting the judges from equity to law or from law to equity?

MR. VAN RIPER: No, I do not.

MR. SMITH: I wondered about that. You would relieve the Chief Justice of the top court of administrative responsibility?

MR. VAN RIPER: That's right.

MR. SMITH: And you would entrust the administrative responsibility for each branch to the head of that branch. And you don't see any problem in that because you don't visualize shifting judges on that level?

MR. VAN RIPER: No, I don't and if there were any problem I would think that the Chief Justice should have—if there were difficulties between the two other presiding justices—that he should have the opportunity to walk in.

MR. SMITH: So he would have some administrative—

MR. VAN RIPER: So that he would be boss, but he ought not to be burdened with it every day.

VICE-CHAIRMAN: If he is the boss, wouldn't he be in a position to relieve extended delay in one division, as against another, by transferring temporarily, judges from the Law Division to the

Equity Division, or vice versa, assuming that the needs of the court required it?

MR. VAN RIPER: I would assume that the best procedure would be assignment permanently of judges to their respective divisions, but if for the purpose of temporary relief it were necessary to call on one division for the help of a judge over in the other division, I certainly wouldn't think that was a particularly bad thing.

VICE-CHAIRMAN: And you would give that right to the Chief Justice of the Court of Appeals?

MR. VAN RIPER: I think that he would be the man to decide that.

MR. BROGAN: Did you have in mind that the Common Pleas Court in each county should remain substantially as it is, and that ths probate system remain substantially as it is, with a Surrogate and Orphans' Court, presided over by a Common Pleas judge?

MR. VAN RIPER: I had in mind, Chief Justice, that first of all, this business of Common Pleas, Court of Quarter Sessions and General Sessions, that should be eliminated, there should be one court; but that the judge in the county should do practically the same work that he does now. Yes, I had that in mind.

MR. BROGAN: Where would this court sit? For instance, suppose you got a county judge in Cape May, a Common Pleas judge, as you have. Would he do just the Cape May business and then, in order to keep busy, rely on some administrative officer assigning him where there was work for him to do?

MR. VAN RIPER: That would seem to be the only way that he could do. He would, first of all, have to do the Cape May business. Now, we all know that in those small counties they haven't enough to keep him busy. I think that he should be available to go into other counties and try other actions of law where there was a congested calendar. As a matter of fact, that happens today in most of the other counties.

MR. BROGAN: In the matter of appointments, suppose somebody died in the Court of Chancery—no one resigns, but suppose someone died—should the Governor appoint someone particularly to that vacancy in the Equity Division?

MR. VAN RIPER: I should think that whoever had the power of appointment should do that.

MR. BROGAN: Well, I assume it's the Governor; I think we all assume he will have the appointing power. Let's say that we do think that the appointing power should be in the Governor—that is tentative, nothing fixed about it. Should the Governor appoint to a particular court—

MR. VAN RIPER: I see what you mean; when appointment is made, should he appoint—

MR. BROGAN: Or as against that, to make my question fully clear, should he just appoint a judge and should the chief judge of the top court assign the men?

MR. VAN RIPER: I have to give that a moment's thought, Chief Justice, to be perfectly honest about it. I am rather inclined to think that he should appoint a judge, but the Chief Justice should have the assignment of the judges. It may be that at that particular time and in that particular division from which the judge resigned they have a surplus of judges.

MR. BROGAN: Do you think the separation of equity from law, as it substantially now is, makes for a better equity jurisprudence, or do you think that we would come up with just as good an equity jurisprudence 25 years from now?

MR. VAN RIPER: Apparently, if we are to listen to the experts, such as Dean Pound, as I read his testimony. As I say, I read it only from a newspaper account; I didn't have a transcript.

MR. BROGAN: In other words, you think that a man does become a specialist by working in a single class of jurisprudence.

MR. VAN RIPER: I don't think there is much doubt about that.

MR. DIXON: My difficulty in considering this as a layman is to look at the attorneys—and attorneys have a general practice. They don't limit themselves, I take it from what I have heard, to either equity or law. That is the general thing, and if they become rounded and step into a judgeship, why wouldn't they be expert in both lines?

MR. VAN RIPER: Sometimes it's not much of a question whether they become rounded or not. They won't admit it, but it probably is a question. However, there are plenty of practicing lawyers who specialize. There are plenty of lawyers to whom other lawyers go to handle certain litigation.

MR. DIXON: That isn't generally true though, is it? Of course, some specialize, but isn't it a general thing for attorneys to handle both law and equity—to take the cases as they come along?

MR. VAN RIPER: I think the majority of lawyers certainly do, but at the same time there are plenty of outstanding lawyers whose services are engaged by other lawyers because they happen to be proficient in a particular line—trial work or appellate work or Chancery work.

VICE-CHAIRMAN: In practice, have the appointments been based on that consideration? Have they appointed judges to a criminal court because they have been criminal lawyers?

MR. VAN RIPER: Mr. Jacobs, I think you must know that when a man, a lawyer, is a candidate for the bench he is an expert in all phases of the law. It's only after he has resigned that he confines himself to one or two activities.

MR. HENRY W. PETERSON: Do you care to comment on the advisability of writing a section concerning prerogative writs into the Constitution?

MR. BROGAN: Should they be preserved?

MR. VAN RIPER: I am inclined to think they should be.

VICE-CHAIRMAN: You mean the Constitution should preserve the writs of certiorari, quo warranto and mandamus?

MR. VAN RIPER: I think that we discussed that at considerable length in our previous drafts in 1942 and in 1944, and it was our conclusion at that time that they should be maintained, that is, the authorization of granting a writ of certiorari. Do you have something different in mind on that, Mr. Chairman?

VICE-CHAIRMAN: Yes, I don't believe the previous proposal preserved the writs as such. But forgetting the previous proposal, your present view is that the Constitution should preserve some form of distinction between quo warranto, certiorari, mandamus and other prerogative writs?

MR. VAN RIPER: Oh, I don't know that it should necessarily contain the preservative statement, but I think that it it should make possible the relief or remedy which those writs grant.

VICE-CHAIRMAN: Yes, but that's a different answer to Mr. Peterson's question. Assuming that we allow the relief in some form or other, do you still think there ought to be the procedural distinctions?

MR. VAN RIPER: I think, as a matter of fact, if you can clear up that situation you will do something that's very helpful. I don't know who has been able to clear it up yet. The Chief Justice, I know, has been tusseling with it for years and hasn't been able to clear it up yet, in the Court of Errors and Appeals and in the Supreme Court. We can eliminate a lot of distinctions, but keep the relief.

VICE-CHAIRMAN: I don't think we quarrel at all with the availability of the relief.

MR. VAN RIPER: If you have the benefit of the relief, of the court's help in that direction.

MR. DIXON: Do you agree that in every one of those cases there ought to be at least a single right of review, rather than an arbitrary writ?

MR. VAN RIPER: Yes.

MR. SMITH: Mr. Van Riper, you are proposing an ultimate seven-man top court, and you say temporarily a nine-man top court, to take care of the Chief Justice and the eight Justices. What about the Chancellor in that situation?

MR. VAN RIPER: I would assume that if you had an Equity Division, he would be the head of the Equity Division.

MR. SMITH: But not on the top court?

MR. VAN RIPER: No, for two reasons. I think that the man who is at the head of the Equity Division and the man who is at the head of the Law Division have enough to do with administrative matters right there in their own divisions, without sitting on the top court. For the same reason, I think that the Chief Justice of the top court ought to be relieved of those administrative duties.

VICE-CHAIRMAN: The reason for the question was that Chief Justice Case suggested that we take care of ten in the top court until it was reduced to seven. You suggest that we take care of nine until it is reduced to seven.

MR. SMITH: I have a supplementary thought. If the Chancellor were on the top court, it seems to me that something should be done to avoid his disqualifying himself, as is true today in all equity cases.

MR. VAN RIPER: I was just going to say, Mr. Smith, that's one of the reasons that I made you the answer that I just gave you. A Chancellor, no matter how able he is, is only able to be helpful in about half the cases, or whatever the proportion may be. The same think would be true of the judge who is the administrative head of the Law Division, I suppose, to a certain extent. If you are going to have a top court of seven men, let's have seven who will all function as judges of that court all the time, and not be disqualified for any other reason.

MR. BROGAN: In other words, the top court judge, the Chief Justice, makes the rules; the chiefs of the Law Division and of the Equity Division administer the rules.

MR. VAN RIPER: That's right. That would be my thought.

VICE-CHAIRMAN: Do you prefer that in contrast to a separate administrative director, such as we have in the federal system?

MR. VAN RIPER: I do for the reason, as I said earlier in my testimony, Mr. Chairman, that I don't think that an administrative director—I may be wrong about this, I haven't had any actual personal experience—but I don't think that an administrative director, or any other title, I don't care what you call it, other than a judge, would be as effective in administering the court as a judge would be. In other words, I know that as a Common Pleas Judge I looked up to the Chief Justice as Chief Justice. Now, it might have been the same personality and I might have been just as fond of him personally as I was before he was called administrative director or something, but I know that I wouldn't have taken orders from him as easily.

MR. PETERSON: Wouldn't the public or the litigants have the benefit of the Chancellor being a member of the top court, whatever it is called, if the judges in equity, now called Vice-Chancellors, appointed by him, wrote their own decrees?

MR. VAN RIPER: I do suppose we could change that situation

around. Of course, as you well know, in the Constitution the Court of Chancery today is the Chancellor. Now, if you change that situation around so that he, the Chancellor, was not the Court of Chancery or was not the Equity Division of the court, whatever you want to call it, you would just be adding another member there and he would still have the administrative work to do.

MR. PETERSON: A case is heard in Chancery, the decree is written by the trial judge but signed in the name of the Chancellor—

MR. VAN RIPER: Yes.

MR. PETERSON: —and, therefore, he can't review his own act. But if there were a Court of Chancery and each of the judges, each of the Vice-Chancellors, signed their own decrees, the same as you do in law, then if it goes on to appeal the Chancellor could sit as a specialist in Chancery, or in equity.

MR. VAN RIPER: My question is this—what is the necessity of having the Chancellor up there; you already have seven judges there anyhow? What's the necessity of putting another one in? The practical situation now is that you are trying to reduce it.

MR. PETERSON: In my mind it would preserve the specialization you have now.

MR. VAN RIPER: You haven't had that specialization as the result of the Chancellor being in the top court—that is the important part.

MR. PETERSON: How many equity cases go to the top court?

MR. VAN RIPER: About one-half of them.

MR. McGRATH: About half, I would say.

MR. SMITH: Mr. Van Riper, under the Revised Statutes the Judicial Council was set up to review the courts, establish their procedure and practice, make recommendations, and so forth and so on. Now, you are an ex-officio member of that Council.

MR. VAN RIPER: Yes.

MR. SMITH: It had high-sounding purposes. Whatever happened there?

MR. VAN RIPER: Well, I think we just confined it to the high-sounding purposes. You can't get into much trouble as long as you don't—

MR. SMITH: Has it been inactive over the years?

MR. VAN RIPER: Well, I think since I've been on it, and I've only been on it because of my official position—I think we've had it, well, maybe a year.

MR. McGRATH: Mr. Van Riper, getting back to the Superior Court, do you propose the same plan as in the 1944 revision—that all county judges should be members of the Superior Court?

MR. VAN RIPER: That's right.

MR. McGRATH: And all get the same salary?

MR. VAN RIPER: Yes, sir. We are in agreement on that, Judge.

MR. McGRATH: Let's get back to facts. A Cape May judge would then be getting as much as a judge in Essex County, $15,000, is that right?

MR. VAN RIPER: That's right, and he would be entitled to it if he is doing the same calibre of work.

MR. McGRATH: Wait a minute. He gets $15,000 now instead of $5,000, and the State pays him instead of the county, but you said that the Constitution should provide that there be one judge in each county.

MR. VAN RIPER: Appointed from the county, that's right.

MR. McGRATH: Well, then, if somebody said, "Go up to Essex County; they are busy," wouldn't he say, "Oh, no, the Constitution says I'm appointed to Cape May and I'm going to sit here and enjoy myself"?

MR. VAN RIPER: No, I don't think he'd do anything of the kind.

MR. McGRATH: Well, wouldn't he have a right to do it?

MR. VAN RIPER: No, I don't think he would, because I think he'd be subject to the powers of the administrative judge of that court and to the Chief Justice.

MR. McGRATH: You would send him up to Essex County to try cases there?

MR. VAN RIPER: Outside of his doing his work in Cape May, certainly. And, as far as his getting the same salary is concerned, Judge, I think it's only fair that he get the same salary if he does the same type of work. You are either going to have judges on a full-time basis or not on a full-time basis.

MR. McGRATH: Let's get back to the point under discussion. Aren't you overlooking entirely the standards and the importance and the necessity of having a judge in each county. For instance, suppose in an extradition case you came in with the man who is to be extradited; the prosecutor says, "Well, I'm sorry, but the judge has been assigned to Essex County for a whole month. You can't bother him." Or the surrogate has a question on a will where some person comes in and says, "I'd like to have this discussed," and the surrogate says, "Well, the judge is in Essex County." Or an insane person has to be sent to the lunatic asylum immediately and they say, "Well, the judge is up in Essex County today, you'll have to wait." In other words, isn't it a fact that county judges do a great deal and possibly most of their work, not in the court room but in their chambers?

MR. VAN RIPER: They do do a lot, that's true. I suppose you could conjure up a lot of those problematical situations, Judge, but I wouldn't be afraid of them as a practical thing. I can't imagine any judge who is able enough to be designated as the presiding judge of the Law Division, for instance, who couldn't envisage all

those situations and assign his judges accordingly so that the situation would be taken care of.

MR. McGRATH: But the fact remains that while the Cape May judge is in Essex County there isn't any judge in Cape May.

MR. VAN RIPER: Well, that's the same thing as now, when the judge is up in Nantucket on his vacation.

MR. McGRATH: Well, I'm not speaking of vacations, because I never take any—not as a judge.

MR. DIXON: Wouldn't it be possible under the circumstances, if an emergency case arose in Cape May, to call the court in Essex County and get an order from the judge in Essex County?

MR. VAN RIPER: Certainly.

VICE-CHAIRMAN: Any further questions of the Attorney-General?

We express our thanks to you. You have been very helpful. Thank you very much.

MR. VAN RIPER: Thank you very much.

VICE-CHAIRMAN: Mr. Sutton, President of the New Jersey Bankers Association. We have asked Mr. Sutton to appear to discuss such views as the Association may have with respect to the proposed Judicial Article.

MR. FRANK W. SUTTON, JR.: Mr. Chairman, ladies and gentlemen of the Committee:

The expressions I make today will be mine and the opinions of the majority of the members of the executive committee and past presidents of the Association whom we were able to contact after receiving your invitation to appear here today. But they will not be the opinions of the entire New Jersey Bankers Association because we were unable to poll the members as to their opinions.

The majority of the members contacted were of the opinion that no changes should be made in the present Chancery Court system. One member contacted was of the opposite opinion, and another didn't care to bind his bank by making a statement that his bank cared, but he personally did favor the retention of the Chancery Court system as it now exists.

It seems to be the unanimous opinion of those favorable to the retention of the Chancery Court as it is, that the Vice-Chancellors become specialists in the equity branch of law and are much more able to render good decisions than they would be if they were practicing in all of the law courts.

In our own banking institution our officers become specialists—not, as you might say, general practitioners in all branches of banking, but they specialize in particular parts of banking, so that we are able to render a much better service to our customers than we would if we were all trying to do all parts of banking. And we

think that the same thing is true with respect to the Vice-Chancellors. We think their opinions are much better than they would be if they were practicing in all courts.

Most all of us, at one time or another, have had cases before the Chancery Court, and we don't always get decisions favorable to us. But we think the present system gives us the best and fairest method that could be devised of passing on questions that it is necessary for us to go into the courts for.

As to the matter of appointment of the Vice-Chancellors, we feel that is a matter that should be given very serious consideration by the members of this Committee.

We think the Court of Errors and Appeals should be set up consisting of from five to seven men who are no part of either the equity or law branches of the courts, but who would act independently on appeals. And, of course, the members of that court should be selected from men who have had experience as Vice-Chancellors and Justices of the Supreme Court.

I don't know that I can make any statements that would supplement what I have said, but I would be very glad to have you ask any questions. Mr. Lester G. McDowell, Vice-President of the Fidelity Union Trust Company of Newark, and a past president of our Association, is also here and would be glad to make any statements that you might care to have him make. If you wish to ask me any questions as a layman and a banker, I would be very glad to answer them.

MR. DIXON: You spoke of keeping the Chancery Court intact as it is. Now, wouldn't you get exactly the same situation if we have this court set up with divisions, as discussed by the Attorney-General, an Equity Division and a Law Division, with cases that are predominantly equity going into equity and cases that are predominantly law going into law, and thus arrange to avoid the questions of jurisdiction which result in a case being passed back and forth from one branch to the other? Wouldn't you prefer that and still have your experts?

MR. SUTTON: Yes, we would prefer that, and retain the equity court as a completely separate unit of the law, rather than have a Vice-Chancellor sit on law matters as well as equity matters. I can see no objection to that. But as to the delay, it appears to me that if the equity court is overburdened with work, the changes that you might make—if you assign Chancery cases to your Equity Division —you will still have those delays unless you have sufficient Vice-Chancellors or judges in that particular branch to pass on them.

MR. BROGAN: Your main point is that the Court of Chancery should be preserved as a separate branch in our system of jurisprudence?

MR. SUTTON: Yes, it is.

MR. BROGAN: And the men in that court should do the work of that court, and no other work?

MR. SUTTON: Yes, they become specialists.

MR. SOMMER: Suppose we have an equity judge and we do not limit the power of assignment. Isn't it reasonable to assume, if a man is assigned to the equity section and he demonstrates unusual ability in the administration of equity, that he would be permitted to remain there?

MR. SUTTON: I think that would be the thing to do, of course. If the justice showed very great ability in equity matters, he should be retained in that branch of the court.

MR. SOMMER: And on the other hand, if he were appointed to the equity section and did not demonstrate ability, he could be moved from the equity section to the law section.

MR. SUTTON: Yes, but you would still retain your specialists.

MR. SOMMER: Yes, with unlimited power of assignment.

VICE-CHAIRMAN: When you talk about your own specialists, you have unlimited power of assigning them from time to time in accordance with their efficiency, haven't you?

MR. SUTTON: Yes, that is true. Usually a thing of that kind would be done by the board of directors, perhaps on the recommendation of the president, if he were able to present an argument that made it appear advisable.

MR. DIXON: However, when you pick out your top executives in your bank, you don't pick out specialists, very narrow specialists; you pick out men with a lot of rounded experience.

MR. SUTTON: Well, I am president of our bank and I am supposed to have a general knowledge of banking—so much so that I am supposed to be able to judge whether or not the other officers of the bank are capable of specializing in their particular branches of banking. If I found they weren't, and I weren't able to correct the difficulties, it would be a matter to be decided by the board of directors whether or not they should continue in their respective particular branches of banking.

MR. DIXON: I take it that you have demonstrated your ability to do that and take that broad view, or you wouldn't be president.

MR. SUTTON: Yes, that is correct.

MR. SMITH: I believe, Mr. Chairman, while Mr. Sutton speaks of maintaining the present situation, what has been proposed—unification with two divisions—would serve his purpose and meet his requirements. Would you explain the two systems to Mr. Sutton?

VICE-CHAIRMAN: Well, there have been several systems offered. What Mr. Smith refers to, I believe, is the suggestion that there be one court with separate divisions, so that the equity judge would be administering equity and the law judge administering law, but there will be superimposed upon that, power in a top

man—just as in the president of a bank—to change a man who doesn't qualify from one place to another.

MR. SUTTON: I don't support any banker could object to removing a man who didn't qualify in the position he was occupying and place him in some other.

VICE-CHAIRMAN: Mr. Smith's question was whether that arrangement would be the same as what you propose.

MR. SUTTON: Yes, I think that if a man doesn't qualify as, we will say, a Vice-Chancellor, we certainly don't want him there.

MR. SOMMER: Well, someone must determine the question of qualifications. That would be the presiding justice.

MR. SMITH: According to Mr. Sutton's view, he wants adjudication of equity cases by specialists in equity, and that would be true in the so-called unified court system.

MR. SUTTON: I don't think that any of us, that is the group, who have discussed this matter would want to see a Justice of the Supreme Court presiding in equity court, nor would we want to see the Vice-Chancellor presiding in the Supreme Court, unless you had some provision in your law that made it appear that someone should be removed from some branch and transferred to some other branch that could be worked out there. Of course, there should be some way of not having him at all if he isn't qualified to serve.

VICE-CHAIRMAN: Might you change your mind if you knew that this particular Justice of the Supreme Court had heard many equity cases, and had reversed the Court of Chancery on the cases he heard?

MR. SUTTON: Well, I think again, if the Chief Justice were specializing in equity cases he would become well qualified to pass on them.

VICE-CHAIRMAN: Well, I think I can give you some statistics on that. Our present Chief Justice has written at least five equity opinions during the last year and each one reversed the Court of Chancery. Do you think he might be qualified to sit in the Court of Chancery?

MR. SUTTON: I don't know that; I had better read the opinions first

VICE-CHAIRMAN: On the question of volume of work, do you, in your bank, retain complete freedom in shifting personnel in accordance with the needs of your business as it changes from time to time?

MR. SUTTON: Oh, yes, naturally.

VICE-CHAIRMAN: Then you approve of that principle.

MR. SUTTON: Yes.

VICE-CHAIRMAN: Any further questions?

MR. SUTTON: Would you like Mr. McDowell to say something? I haven't said anything about appointive power, except we

do think it very important. I think that all laymen would like to see the Vice-Chancellors so appointed that politics couldn't possibly enter into it. How to do it, I don't know, but that is something that I think should be given serious consideration.

MR. BROGAN: Of course, we could all move to heaven or something.

(*Laughter*)

VICE-CHAIRMAN: There has been one proposal called the Missouri plan, or the modified Missouri plan, which would place the power of selecting names in a commission, as distinguished from the Governor. Do you approve or disapprove of that sort of plan?

MR. SUTTON: Again, it would depend entirely on who the members of the commission were and how they were appointed.

VICE-CHAIRMAN: The commission, as originally suggested, would consist of the chief justice of the highest court of the state, three laymen and three lawyers, all to be appointed by the governor. Now, that doesn't remove the politics, but it places the selection in a different type of body. Have you any thought on that?

MR. SUTTON: No, I haven't, and I wouldn't want to pass upon the advisability of that excepting that you study the problem and the way it could be done, with politics entering into it to the least extent possible. It rather appears to me that is the way it should be done.

VICE-CHAIRMAN: I think we all agree with the goal, but the mechanics is the problem.

MR. BROGAN: Did you ever know of a judge to have been appointed except upon some political consideration?

MR. SUTTON: No, I never have.

MR. McGRATH: Do you think a man who is so dumb that he wouldn't know something about politics deserves to be appointed?

VICE-CHAIRMAN: How about the appointment of Cardozo by President Hoover—would you consider that political?

MR. BROGAN: I'm going back to the time when he was recommended by his ward leaders.

VICE-CHAIRMAN: Are there any further questions of Mr. Sutton?

Thank you very much. We appreciate your coming here.

MR. SUTTON: Thank you.

MR. SOMMER: Has Mr. McDowell anything to add?

MR. LESTER G. McDOWELL: Nothing.

MR. BROGAN: Do you agree with the former speaker?

MR. McDOWELL: I do agree with him. Specialization is very important.

VICE-CHAIRMAN: Do we have a representative of the Manufacturers Association? Have you heard from them, Mrs. Miller?

MRS. MILLER: No, I haven't.

VICE-CHAIRMAN: Is there anyone here representing the Manufacturers Association? If not—

MR. WINNE: Judge William Smith of the Federal District Court is in the room. I don't want to embarrass him, but if we could get him to speak—

VICE-CHAIRMAN: This is Judge William Smith, United States District Judge for the District of New Jersey. You know most of the members of the Committee.

JUDGE WILLIAM F. SMITH: Some I do.

MR. McGRATH: Do you believe in right of tenure subject to good behavior?

JUDGE SMITH: I do.

VICE-CHAIRMAN: Will you let us have your thoughts on that, Judge? Just a moment. Let's have the Judge present his own thoughts.

JUDGE SMITH: No, I think maybe the question system would be better because, from what I have read in the newspapers, most of the experts who have appeared here, or many of them, have pointed to the federal system as a model of a unitary court or an integrated court, whatever you want to call it, and I suppose the question system would be the better one.

MR. McGRATH: I meant that seriously.

JUDGE SMITH: On the life tenure, I think it has many advantages, not because I am a young judge who now enjoys a life tenure, because we come back to a suggestion of the previous speaker—the appointment of judges free of politics. I agree with the Chief Justice, that it is practically impossible, because any judge who has been appointed—and that includes Cardozo—was at some time in his history or career a member of one or the other political party. And I agree with Judge McGrath that if he weren't a member of one or the other political party, he would probably not be best fulfilling his function, prior to his appointment as a citizen, because he can best participate in our form of government by being a member, and that whether he's a Democrat or Republican or Socialist.

The life tenure does free the judge from the petty pressure that sometimes arises, not from important people, but from unimportant people who never approach the situation with propriety. Life tenure frees him of politics, at least from the time of his appointment and thereafter, and he does become, insofar as possible, a judge free to function independently. For that reason, I agree with life tenure and holding office during good behavior.

I don't believe the Missouri plan answers anything insofar as the appointment in the first place is concerned, because there again the commission is usually selected in the same manner as the governor

would be selected, or someone else, and they too would be drawn from the same sphere, either a Republican or Democratic group, depending upon the administration in power. And they make the recommendation, so what inherent danger is there in permitting the appointive power to remain where it is—in the Governor, with the advice of the Senate—because at least they are the elected representatives of the people and it is to be assumed that they will exercise their prerogatives conscientiously and with the people in mind? The fact that they don't do it depends upon the person, and whether it's the commission or the Governor or a Senate, its efficiency doesn't depend upon anything but the person in office. And that's true of a commission. The corruption, if any exists, would likewise depend upon the personnel—the Governor, the Senate, or a commission. So there is no magic in the method of appointment, and at least you will have in the Governor and the Senate elected representatives who are at least responsible to the people. And when the people become dissatisfied with appointees, the people can change the men who made the appointments, because therein lies the responsibility.

MR. DIXON: Can you offer a suggestion for taking care of a man who becomes either mentally or physically disabled?

JUDGE SMITH: Yes, that's easily answered, too, because once it's determined that he is incompetent mentally—I don't mean lack of knowledge, because some of us lack that when appointed, but mentally incompetent—if he realizes it himself, he can be retired. If he doesn't realize it himself, there again the power would rest—suppose your highest court is your Supreme Court; I don't know what you have in mind—why not upon the recommendation of the physicians appointed by the court to determine that he is mentally incompetent? He could be retired without embarrassment to himself.

MR. SMITH: What is the system in the federal court in that regard?

JUDGE SMITH: We can retire voluntarily, as you know, at 70—not many of us make it—we retire at full pay at 70. A physical disability after ten years of service likewise entitles us to full pay. If there is physical disability after five years of service, which doesn't occur often—in fact, there's only one that I know of—the judge retires at half pay.

Now, there again, I don't know that the occasion has ever arisen that anyone has been requested to retire because of a mental disability. It can be handled. I don't think it presents any practical problem, because very often the man himself may be the last to realize he has reached that stage where he ought to retire, but his friends will know it, or the members of his family will know it, and he can be prevailed upon to ask for retirement. Of course,

I think if he doesn't, there should be some power in the chief court that would permit them to determine—

MR. WINNE: You don't have that in the federal system?

JUDGE SMITH: We don't.

MR. WINNE: The only thing in the federal system in the case of a judge who is incompetent and he refuses to retire for old age, drunkenness or anything, is to impeach him, and that, of course, is wrong. There ought to be some method—

JUDGE SMITH: Yes.

MR. WINNE: Now, I think everybody is sympathetic with the tenure idea. Do you think there is any advantage in having a probationary period before tenure, of, say, seven years and then tenure on reappointment, to find out if the gentleman has the temperament that he needs to qualify for a judgeship? We all know of estimable lawyers who, upon being appointed, had characteristics which, had they been known, would not have resulted in his appointment.

JUDGE SMITH: Mr. Winne, I am glad you asked that question. If you are looking for judges who are free of outside influence, the worst thing to do to your court would be to put a man on the bench on the theory that he is there for a probationary period, at the end of which time he must satisfy certain people who were responsible for his appointment. If there is anything that—

MR. WINNE: He wouldn't satisfy the people who were responsible; he would satisfy the person who is responsible for his reappointment. Say, one term of seven years; there would be a different Governor, and then if he were reappointed he would have tenure.

JUDGE SMITH: And during that period of time, if the man were interested in his reappointment he would be consciously or unconsciously influenced by factors that should never influence any judge.

MR. WINNE: Not to any greater extent than today, because today every man comes up for reappointment.

JUDGE SMITH: I understand that, but this probation is definitely conducive to that sort of thing, because he knows that at the end of five or seven years he is going to have to look to certain people for his reappointment.

MR. WINNE: I am not arguing the thing with you—

JUDGE SMITH: Of course, Mr. Winne, most of our legislators are lawyers.

MR. WINNE: From your own statement, if the condition is that a man has to look for reappointment, he would make a bad judge. Then everybody in New Jersey must be a bad judge, because everybody in New Jersey has to look for reappointment.

JUDGE SMITH: No, that isn't true.

MR. WINNE: But if you give them tenure after appointment, you have some step toward the thing you think is ideal.

JUDGE SMITH: Well, let's see—the federal system has operated under life tenure since its very beginning, practically, and yet in the history of the federal system I think there have been less than five judges impeached.

MR. WINNE: No, but they try them for crimes.

JUDGE SMITH: That has only happened in two cases.

MR. WINNE: It is pretty tough when you have to try a judge for a crime—

JUDGE SMITH: That has happened in two cases.

MR. WINNE: —and send him to jail. Well, right around here—

JUDGE SMITH: That's unfortunate. I sat in one trial and I know there should be some other way.

MR. WINNE: There was Mann, Davis and a fellow in Pennsylvania since I've been around. You say two and I say there have been three.

VICE-CHAIRMAN: Judge, do you see any basis for distinguishing tenure between the top court and the lower courts?

JUDGE SMITH: Yes.

VICE-CHAIRMAN: In other words, you might recommend life tenure for a top court, and Mr. Winne's proposal for the lower courts.

JUDGE SMITH: For this reason. There is no better way to insure the members of the bench looking to a judicial career. The best judges are—that's proved also in our federal system—our best judges are those men who came to the bench with the thought that it would be their career.

I understand that Learned Hand will be here on Thursday. He is an outstanding example of a man who came into the federal system as a District Court judge many years ago. He made the judiciary his career. He has done a splendid job at it, yet he is a man who could have at any stage of his career in the private practice of law demanded probably not less than $50,000 a year, and by modern standards probably a man whose salary would have been in excess of $100,000 a year. There are large organizations in the immediate community who pay general counsel, of lesser ability than Learned Hand, salaries far in excess of that which he receives as a Circuit Court judge. The only thing that must appeal to a man like Learned Hand is the fact that he devotes his life to the judicial career.

Now, when you say top level, that's the only answer to it.

The other aspect of it is, the judge who will take the position for a period of five years, especially if he's young enough, will take the position for a short period of time with full knowledge that after

expiration of that time he will depart. And he will take to his business a prestige which he didn't have before, which will bring him business that he would never have had, had it not been for the prestige of the judicial office which he had the privilege of holding.

MR. McGRATH: Judge, the man in the higher court, however, would probably in many cases come from the lower court, where we would probably know his ability and character.

JUDGE SMITH: Well, we haven't, even in the federal system, reached that stage where judges of the lower courts are promoted. It would probably be a better thing for a judicial system.

MR. McGRATH: But they would be older men, and if they retired at 70 they would have tenure anyhow.

JUDGE SMITH: Practically. There is one thing that occurs to me, and this again is by reason of what I read in the newspapers. There are some proponents of a change who seem to contemplate that the court system will be fixed or established in the constitutional amendment. It is my observation that the present difficulty with our court system arises from the fact that in the Constitution which you are now supplanting, or hope to supplant, the system was so firmly established that many courts became recognized as constitutional courts and you found yourselves, or at least the people found themselves, in a position where they could not readily change the system, the procedure, to meet the new demand.

If the Constitutional Convention again so firmly establishes the court system from top to bottom, you may in 25 years or 50 years again find yourselves in a position, or the people may find themselves in a position, where the system will not yield to change, and necessary change, because the Constitution will prohibit it. It shouldn't be necessary, when a change is necessary, to change the entire Constitution; yet it is my opinion that there are some who are fearful that unless they do there may be no change.

They have used the federal system as a model in some respects, but there again you will find that the federal system is predicated upon a very simple constitutional provision, and throughout the years the necessary changes were made by mere acts of Congress. The jurisdiction of the courts was enlarged where it was thought necessary. We have effected other changes—the integration, for example, of equity and law has been accomplished simply by the federal rules of procedure. Jurisdiction was always there, but the unitary operation of the system has been accomplished by mere rules of procedure promulgated by the Supreme Court and adopted by Congress, so it seems unnecessary—if the federal system is the model—it seems unnecessary to freeze into a constitutional amendment at this stage all the advantages that you now perceive in other systems, when the broadest and simplest system would be the best.

Then, as change is necessary, the change could be made by simple acts of the Legislature.

MR. SOMMER: Isn't that because the Constitution sets up just one court and that is the Supreme Court?

JUDGE SMITH: Exactly.

MR. SOMMER: And its jurisdiction is prescribed by the Constitution and cannot be diminished?

JUDGE SMITH: Exactly.

MR. SOMMER: Now, it leaves to the Congress the determination as to whether there shall be any inferior courts and, if so, what their jurisdiction may be within the limits of the Constitution.

JUDGE SMITH: Exactly.

MR. SOMMER: It's worked out in that way, hasn't it?

JUDGE SMITH: Yes.

MR. SOMMER: The inferior courts are simply statutory courts?

JUDGE SMITH: They are statutory courts.

MR. SOMMER: The whole jurisdiction within the Constitution depends upon the will of Congress, as their existence depends upon the will of Congress. They could disestablish all inferior courts.

JUDGE SMITH: Abolish them tomorrow. But they haven't in their wisdom seen fit to do it. You see, there again we have a history of change. The original Circuit Court was a trial court in which one judge sat. The appeal then was by writ of error and by writ of certiorari to the United States Supreme Court, but the business of the Circuit Court, the trial court, became so large that we ultimately had the District Court, and the Circuit Court became an appellate court.

MR. SOMMER: And that again was due to the fact that the whole matter of appeals from inferior courts to the Supreme Court of the United States was left to definition by Congress.

JUDGE SMITH: Right.

MR. SOMMER: Now, may I ask you this question on tenure—isn't it true that in recent years committees of Congress have been seriously considering the question of whether a constitutional provision instead of impeachment might not be found for the removal of judges of the inferior federal courts?

JUDGE SMITH: They have.

MR. SOMMER: And it must be because a problem is presented, or a problem has arisen.

JUDGE SMITH: The problem is this—that the impeachment proceedings are cumbersome, and that has been the real problem. As a result they have been reluctant to undertake impeachment proceedings, but I can't say that they haven't succeeded without undertaking them, because judges have been removed. I mean, the mere threat of impeachment has effected the removal of some.

MR. SOMMER: Yes, but on the question of disability, haven't

we had—not in recent years—but didn't we have a very sad experience in the Legal Tender Cases because of mental disability and the persistence of a judge mentally unable to continue in office?

JUDGE SMITH: Oh, I agree some method should be set up, and definitely set up, and perhaps it should be within your court of highest jurisdiction to remove a man because of disability. It shouldn't be left to whim or fancy, but I think upon satisfactory evidence being presented, a man should be compelled to retire either because of physical or mental disability. Now, a physical disability which so incapacitated him as to prevent his carrying out his share of the work—assuming there is more than one judge, or take a busy calendar—the physical incapacity of a judge should be sufficient to remove him because his physical incapacity will very often result in an injury to litigants because of his inability to carry out his work. There again it shouldn't be mental only; it should be physical as well, because if his physical ability is such that he cannot function, that he can try only a certain number of cases in a given period of time, then he should go, because he does an injustice by the delay occasioned merely because of his physical disability.

I agree that some method should be had for removal, but here again, should the method be embodied in the Constitution, except to the extent that it would be necessary to vest in the court of highest jurisdiction such authority? In other words, an amendment itself could be worked out.

MR. WINNE: It is in there now, but only by impeachment.

JUDGE SMITH: Yes, but the means of carrying it through should be legislated. The authority to do it might well be constitutional, but there is a difference between authority to do certain things and the means of doing it. The means of doing it are merely procedural, and procedural steps in anything should have no place in a constitution, in my judgment.

VICE-CHAIRMAN: Should the rule-making power be left to the court or to the Legislature—thinking in terms of a constitution vesting in somebody the ultimate rule-making power to govern procedure? In federal practice Congress retains it, although it has delegated it to the Supreme Court. Is that system in accord with your recommendations?

JUDGE SMITH: Well, I have had some experience, not only in administering the rules, but originally in doing some work on various phases of both the civil and criminal rules as we apply them in our court.

Dr. Jacobs presents a question which has always presented itself, and it's a legal question in the first place. There were some who doubted an adequate jurisdiction or sufficient jurisdiction in the court to promulgate anything but the simplest rules, rules that wouldn't seem to effect any drastic change. I think Congress was

apprehensive, too, that the rule-making power, if vested entirely in the court, might be subject to some abuse. As the Doctor knows, and Dean Sommer too, the rule-making power is now vested in the United States Supreme Court by statute, subject, however, to the ultimate adoption of the rules by Congress. In other words, the Supreme Court, as it now stands, may write and promulgate the rules which shall bind all of us in procedural matters, and the Congress can reject any rule. But the practice now followed is: the rules are promulgated, delivered by the Atttorney-General to Congress, and in the absence of any action by Congress within a certain time they become the law.

It is interesting to note, however, that the rule-making power was carried into the statute itself, because in the Judicial Code there is this reservation of the substantive rights, so that procedure as distinguished from substance should not be affected by a rule of court.

They were particularly careful in the rules to preserve the right to trial by jury, for example. There are other things. That brings us to the question that arose here this morning on the question of writs. The rules themselves have presented a difficulty recently in that we regarded a motion to do certain things was adequate. We have now determined—at least I have—and at the moment it is judicial authority, because I have written about four opinions on the subject. We find people who have had default judgments entered against them some years ago trying desperately to get into court to open and vacate the judgment, so that a trial might be had on the merits at this stage. We have determined that the traditional historic remedy available in the court of equity, both by rule or bill of review and writ of *coram nobis,* has been preserved. It becomes necessary, in order that justice may be done. We are functioning on what we consider a model system, but we find that resort must be had to the traditional equity jurisdiction of the court in order to preserve a right which the litigant had prior to the adoption of the rule.

Now, of course, those remedies are usually discretionary with the court, but we find ourselves back in equity of many years ago.

VICE-CHAIRMAN: Any further questions of Judge Smith?

MR. McGRATH: We thank Judge Smith for presenting this.

VICE-CHAIRMAN: Thank you very much, Judge. I'm sorry we didn't know you were coming or we would have had the proper introduction.

JUDGE SMITH: You caught me off guard.

VICE-CHAIRMAN: It is now a quarter of one. We will recess until two, at which time we will have some free time so that we can go into executive session.

(Recessed for luncheon at 1:00 P. M.)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Tuesday, July 8, 1947

(Afternoon session)

(The session began at 2:00 P. M.)

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., Smith, G. F., Sommer and Winne.

Vice-Chairman Jacobs presided at the request of Chairman Sommer.

VICE-CHAIRMAN NATHAN L. JACOBS: In view of the fact that the speaker scheduled for 2:00 o'clock will be unable to appear, Judge Smith has expressed a willingness to continue with his discussion.

JUDGE WILLIAM F. SMITH: I am going to continue my discussion this afternoon concerning judicial power. For the purpose of the record I would like to direct the attention of the members of this Committee to the language of *section* 723 (c), *Volume* 28, *U.S.C.A.*, which we call the Judicial Code, and from which the rule-making power of the United States Supreme Court is now derived.

There is no suggestion by me that prior to this statute there was no rule-making power. There was a difference of opinion as to whether or not the inherent rule-making power of the Supreme Court was sufficiently broad. There is always a rule-making power in the court. However, Congress in its wisdom and in anticipation of a simplicity of procedure, adopted the statute which provides as follows: "The court may at any time [that is referring to the United States Supreme Court] unite the general duties prescribed by it for cases in equity to those in actions at law, so as to secure one form of civil action and procedure for both, provided, however, that in such union of rules, the right of trial by jury at common law and declared by the seventh amendment to the Constitution, shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney-General at the beginning of a regular session thereof and until after the close of such session."

MR. AMOS F. DIXON: That "reported to Congress," does that mean that it gives Congress the authority to change, to veto?

JUDGE SMITH: They recognized that probably some of the rules might be within the sphere of legislation, and to that extent

the failure of Congress to reject the rules is construed as an adoption of the rules. And the courts, in construing the statute, have held that the rules are statutory.

MR. DIXON: Even though it doesn't—just in that language?

JUDGE SMITH: That's right. The procedure is simple. I will explain it to you in a moment. Now, the first rule embodied in the rules of civil procedure, and this is a rule of court adopted and approved by Congress—these rules govern the procedure in the District Courts of the United States and all suits of a civil nature, whether cognizable as cases at law or in equity, with the exception of certain ones stated in Rule 81—"they [the rules] shall be construed to secure the just, speedy and inexpensive determination of every action." And that is all there is to it.

MR. GEORGE F. SMITH: We had one witness who, in talking about the rules followed in the federal courts, said that the rule-making procedure was very complicated and involved volumes and volumes, as he described it. Now, what is the fact?

JUDGE SMITH: That is not the fact. It's interesting—

MR. THOMAS J. BROGAN: Judge, I think what the witness said was that *Hughes on Federal Practice,* annotated, ran into many volumes, which is a fact.

JUDGE SMITH: Well, gentlemen, you place me in the position of passing an opinion on a set of law books. Let me say this to you about *Hughes on Federal Practice. Hughes on Federal Practice* was just as voluminous prior to the adoption of the rules as was said. *Moore's Federal Practice,* which is considered by many of the judges the leading text on the new rules, comprises three volumes. Those three volumes are annotated, and the volume is increased by reason of annotation and explanation and the opinions of the writer, which is true of all texts. *Hughes on Federal Practice* embraces the earlier practice. When the new rules came out it was allowed to embrace the new rules, and it also has many forms. A more interesting comparison—and I think the best comparison, if you are wondering about the number of volumes—we find in the rules themselves prior to the adoption of the Federal Rules of Civil Procedure. We had some rules of civil procedure. We also had separate rules which governed equity. It's interesting to note that the rules which governed equity prior to the adoption of what we now call the Federal Rules of Civil Procedure, embraced 81 rules. The equity rules are no longer followed. They are no longer in existence, and the present rules of civil procedure embrace but 86 rules. There are but five more rules.

Now, as to the thought that there is volume after volume, that's true of some texts, but that is not a fair comparison. There is one thing that is true—since the rules of civil procedure were first promulgated in 1938 (I went into practice shortly thereafter), there

were many judges who were tempted to interpret. It will be conceded, at least among judges, that some of us entertain a difference of opinion, very often, as to the application of rules in certain situations. There were many of us who were—and I'm not characterizing myself in saying "us"; I am taking the onus of those with whom I don't agree as well as the onus of those with whom I do—there were many of us who were reluctant to yield to the changes that were embraced, even though some of them were not drastic. There were those of us who were sympathetic with traditional systems because we grew up with them; we learned to like them; they had become our working companions for years, and as a result we were reluctant to accept a change.

Now, I said that has led to the judges yielding to the temptation of interpreting the rules, and despite the 20-odd volumes, I think, in use, there are actually only six volumes of reported cases. It is probably running into the seventh now—since that time. That's due, however, not so much to the judges writing, as to the fact that after the new rules were adopted the publishing company also established a separate reporting system for the Federal Rules of Civil Procedure, and that is now termed *Federal Rule Decisions.* Prior to that the rules of civil procedure, at least their interpretation as they arose in the cases—their interpretations were in *Federal Supplement,* which is a set we still have.

The writing the judges have been tempted to do is not because the Federal Rules of Civil Procedure have complicated it in any way, but frequently we write, I suppose, because the questions strike us as interesting. There are many times we shouldn't, and there are many opinions that the law book company shouldn't publish, but they insist upon publishing. We have no control over that.

MR. BROGAN: They sell them.

JUDGE SMITH: Yes, they sell them, and in saying it has produced volume after volume of reported decisions, it is well to remember that in many instances the decisions should not have been reported, and sometimes, if the judge had his way about it, they would not have been reported.

The Federal Rules of Civil Procedure have led to no complication, insofar as that is concerned. I mean, there is nothing that would strike apprehension into the heart of the average lawyer, because they are a simple body of rules.

Now, in talking about the change this morning I said it would be a mistake to freeze into the Constitution a system that was not readily subject to change. The simplicity of change is also embodied in the Federal Rules of Civil Procedure.

After an experience of more than five years, these 86 rules have been changed by a meeting of the original rules committee appointed by the Supreme Court. They are making a study, such as

this Committee is making of constitutional revision. They are making a study of the experience of the district courts throughout the country in their application of the rules, and they are recommending to the Supreme Court the needed changes—those changes that seem necessary because of mistakes that may have been made in writing the original rules, the deficiencies that became apparent from experience. And, as a result, we now have the entire 86 rules amended. The amendments will go into effect in September.

It is interesting to note that there have been very few substantive changes in the amendments. Their language has been clarified. For example, remedies which seemed in the doubtful category were also clarified, but even the amendments will present no difficulty to the presiding judge or to the practicing lawyer. So far as simplicity is concerned, I don't think the rules of civil procedure can be condemned for the lack of it.

MR. FRANK H. SOMMER: There was an appellate question because of a lack of clarity on some particular point.

JUDGE SMITH: Exactly, there were some things which were not clear and the judges expressed a difference of opinion in their writings. The committee studied those opinions, studied the experience and the application of the rules, and have come forward with a revision based upon a five-year experience in the application of the rules.

Now, had they had a constitutional amendment to deal with, they could not have done it as simply.

MR. DIXON: Has Congress ever stepped in in connection with the new rules and made any changes?

JUDGE SMITH: Not so far.

VICE-CHAIRMAN: These amendments you refer to are still on file with Congress.

MR. DIXON: The original rules, I said.

JUDGE SMITH: No, they have not been changed in any way.

VICE-CHAIRMAN: Judge, would you express any opinion as to the issues of delay and expense which have been raised by the members of our Committee from time to time? What effect, if any, have the new rules had?

JUDGE SMITH: Delay and expense in what respect?

VICE-CHAIRMAN: Has the cost to the litigant been reduced?

JUDGE SMITH: Well, I don't believe the cost to the litigant has been increased or decreased by reason of the rules. There is a simplicity of operation, which has cut down the period of time.

MR. EDWARD A. McGRATH: Appellate procedure has reduced the expense of appeals very substantially, has it not?

JUDGE SMITH: On the appellate practice there has been a reduction in cost, but that again was accomplished by the rules in permitting the aggrieved litigant to come up on a short form

of record, so that he presented to the appellate court actually only the questions involved. They have dispensed with the necessity of printing an entire record; that was the main cost of an appeal. Now the litigant may go up on the original record—in other words, the first record made in the trial court, which goes *in toto* to the appellate court. The appellant, however, reduces the issues to those he actually wants to raise. The entire record is made available to the Circuit Court of Appeals, should they care to review the entire record. That very often isn't necessary at all. It may go up to the court on one, two or three questions of law. The cost has been reduced. The expense of printing a whole record sometimes ran into thousands of pages.

MR. SOMMER: The whole burden of consideration of the rules, however, is not thrown upon the Supreme Court, because you have annual conferences with all the judges, don't you?

JUDGE SMITH: Yes. There is this about it, and I think that is a good thing to point out. The change in the rules—and this was also true of the adoption of the rules—is brought about only after a careful study by men experienced in the field.

When the rules were first contemplated, the tentative drafts were frequently submitted to the judges throughout the country and to lawyers. They were invited to make written criticism, and many judges availed themselves of that privilege, and did criticize. That was also true when we came to adopting the Federal Rules of Criminal Procedure. The judiciary was canvassed, as was the bar. When the proposed changes were recommended, the committee that worked on them likewise submitted them to the judges and to the bar in most parts of the country, so that they received study before they were finally adopted. As Dean Sommer pointed out, the rules were submitted to the annual conferences of judges throughout the country. We are required by statute to meet once a year, and at that time we discuss the many problems that confront us in the administration of justice and the remedies we suggest to overcome the deficiencies that we find in our experience. We found that those conferences have likewise been very helpful.

You see, the changes are simple enough and are given the most careful study before they are made, but it doesn't require a vote of all the people of the country to effect a change, and that would be true if it were ever embodied in the constitutional amendments. That is the reason I suggested this morning that, insofar as the Constitution is concerned, it is my considered judgment that simplicity in the Judicial Article is important.

MR. HENRY W. PETERSON: May I say on that score, that to my layman's mind and having a fairly good experience in the courts, that while the simplicity of the Judicial Article in the

Federal Constitution seems to be ideal, on the other hand, applying that simplicity in a state, in any state, seems to me not at all practical. If this thing that has been referred to as politics is to be with us on a national scope or a state scope, and it always will be, you have the protection in your federal system of the fact that you have in the United States Senate 96 Senators from 48 states; that no matter whether they are Republicans from Iowa or Republicans from New Jersey, they still have a different viewpoint, and you have a very high degree of statesmanship in the United States Senate no matter whether the predominant party is Republican or Democratic, as far as the welfare of the people is concerned. You don't have that in the state, whether that state be New Jersey or Missouri. You have in the states the possibility of one party controlling the legislature, which doesn't give the legislature too much power to do much on the judicial article, as I see it. Now, it wouldn't make any difference what party that was. Of course, today we have an enlightened public due to the press, radio and the communications, and a higher degree of intelligence. That wasn't true in 1844. And I don't think that any party would ever be in power that would write rules or regulations that would be detrimental to the greatest number of people. I can't conceive of that, but it's easier for the Federal Government to have a superfine system than it is for the State.

JUDGE SMITH: Well, we have just gone through the procedure of revising Title 28. That is our Judicial Code. I had the privilege of acting as one of the representatives of the Chief Justice —not on the committee but, I might say, as counsel there, as portecting the right of the courts as we saw it. The constitutional amendment has been, you might say, supplemented by Title 28. Most of its provisions have stood since, I think, 1789. That is a pretty fair test of Congress and, I think, any legislature. There is this about it—that changes are necessary in the administration of justice, not of substantive rules, because they seem to grow of themselves and frequently meet the needs of the times. As new problems arise the courts have sometimes been slow, but they have met the problems as they have arisen. Procedural problems, however, sometimes have not been as quickly met, and they can be more quickly met if the procedure is governed by statute rather than by Constitution. And whenever you place limitations in the Constitution that will require the submission of every change to the electorate you may run into difficulty. You may be able to persuade your legislators that a change is necessary, but it is more difficult to effect a change in the Constitution.

Now, I know exactly what you have in mind, but the provincialism that may exist in a state legislature may likewise exist in

Congress, but on a different scale. It is geographic. We have in our small states, I think, the very same situation. A man may come from an agricultural county, and he has a particular interest in preserving some particular law, or some other thing. And you will find the representative from an industrial county is equally interested in preserving something else. So I think it is always present. I mean, I don't believe you can possible eliminate it, because you will have this also to meet. This document will ultimately be presented to the electorate.

MR. PETERSON: In your federal system, if I am correct, you have the House Judiciary Committee, you have the Senate Judiciary Committee, and the ranking members are members of long standing, irrespective of party affiliation.

JUDGE SMITH: You are right.

MR. PETERSON: They are the backbone of the committees.

JUDGE SMITH: That's right.

MR. PETERSON: Of course, one of the remedies I have in mind is a longer term for our legislators, which would accomplish a little bit more toward the end we are looking for. Here you have a turn-over in the Legislature that you don't have in the Congress, because after all, to upset the Senate it takes three or four sets of elections to elect new Senators and Congressmen, and no matter what happens, no matter what political upset happens, there is always this salvage, some of the brains of the other party.

JUDGE SMITH: You are seeking a remedy within the Constitution. To every evil that may present itself, every remedy can't be within the Constitution. Now, without probably defeating the very purpose of the Constitution, a Constitution, in my judgment as a lawyer, should be limited to a statement of basic principles, by which the legislative branch, the judicial branch and the executive branch of the government are to be guided, and nothing more. When you go beyond that you may expose to defeat the very changes that you seek to make. For example, if you should embrace within the judicial amendments a fixed provision that does not meet with the approval of certain groups, which may happen, those groups will vote against it. Why? Because they are not guided by the over-all picture, but by their particular interest in a particular thing in the Constitution.

MR. PETERSON: I subscribe to that, because after all, it is toward simplicity of structure that we are striving. Yet, all the bar association representatives who have appeared here—and all are experts—have given us proposed changes which are much longer than the present Constitution. That is the considered judgment of the various representatives who have appeared here and in the briefs submitted by them, so I'm trying to convince myself from

those that I had the opportunity to listen to, as to just what is right.

JUDGE SMITH: The provincialism of which you speak exists in the federal courts more so than it does in the state courts. It is interesting that the average practioner who practices in one state will not have the experience with it to know that in many places and prior to the adoption of the Federal Rules of Civil Procedure, we had different practices prevailing in the federal courts throughout this country. The lawyers can appreciate that there was a difference in the right to open and close to a jury, the time at which a judge would instruct a jury. There are some states which prohibit the judge instructing at all, except upon request of counsel, and in the absence of the request the jury will take a case under consideration without any instructions from any impartial arbiter in the cause. And those conditions prevail because under the Conformity Act, as we called it, the judges followed the local practice and, of course, we found that to be a mistake.

Now, when they came to this, the Federal Rules of Civil Procedure, they had objections on many points, because it was a decided change. But the committee was able to reconcile all the differences of opinion and, after five years' experience, there was no clamor that these rules be abolished. There has been some clamor for change, but as Dean Sommer suggested, the change has been primarily change of language. There has been no real change of substance, except in some minor regard. If they can reconcile the practice in the many district courts of the United States and bring out one uniform practice, you can surely do it in the states without resorting to having it all in the constitution.

MR. SOMMER: All of that could be governed by the rule-making power and the power of administration vested in the courts.

JUDGE SMITH: Exactly.

MR. SOMMER: It's a complete rule-making power except on some points, not extending to changes on rules of evidence.

JUDGE SMITH: Yes.

MR. BROGAN: Do you entertain any views as to whether justice is administered better by the complete integration of judges who try law, equity and probate actions indiscriminately, or would justice be administered better by having judges sit in one branch or the other permanently? Do you have any views on that?

JUDGE SMITH: It is my opinion as a lawyer—I say a lawyer as distinguished from a judge, because I am a judge who entertains that kind of jurisdiction—it is my opinion as a lawyer that probably a court of equity as such, call it Chancery or an equity division, or anything you please to call it, judges sitting in that will, undoubtedly, become more proficient because of experience in that

particular field. They will through the years approach the problems and probably dispose of them more quickly than a judge who exercises the broadest jurisdiction, because the judges will become more proficient in one field of litigation.

This opinion, however, should be qualified to this extent,—that in my experience as a judge it has presented no practical problem to sit in equity for two months out of every six, to sit in criminal two months out of every six, and sit in civil, as we call it, two months out of every six. The work may be greater. A judge may have a more difficult problem of research. He may approach some problems a little more slowly, but other than that there would be no practical difficulty in exercising both. And when you ask me whether it would be better one way or the other, I must admit, as I think most of us must admit, that a man who practices in one field, whether he be a judge or lawyer, will become more proficient in that field and he can solve the problems more quickly, perhaps.

MR. WALTER G. WINNE: Judge Smith, you don't have probate work to any extent at all, do you?

JUDGE SMITH: Well, we don't have probate work, we don't have divorce matters, except in the District of Columbia. We may eliminate probate. We have this, though—

MR. WINNE: You don't have probate, so we can eliminate that, but you do, however, have very extensive criminal practice?

JUDGE SMITH: Yes, very extensive.

MR. WINNE: And every district court judge, in turn, handles criminal matters?

JUDGE SMITH: Exactly.

MR. WINNE: But under our present system of state courts, where criminal work is largely the work of the county judges, you get more uniform treatment in criminal cases than in the federal courts, where you have four or five, or maybe half a dozen or more judges brought in from the outside—judges hearing criminal cases, each of whom has his own slant, so that you don't know what kind of justice you are going to get before these different judges.

JUDGE SMITH: That is true, providing you confine your appraisal of the situation to a particular county. But there is a lack of uniformity. I think the Supreme Court will probably find among the various counties a uniformity in sentence, which is something that has disturbed federal judges, and a few of us in particular, over the years. It has been a tremendous problem; in my judgment it can be solved only by an indeterminate sentence act. But I will agree that if I have a case in Atlantic County of a particular character, and that type of case is brought up before the same judge week in and week out, that judge's sentence will be, to a degree, depend-

ing upon the facts in the case, uniform. But the difficulty arises when a judge from Essex sentences a man in Essex County, and that man who, we will say, is charged with robbery of a grocery store, meets the man from Atlantic County who may have received a different sentence. Those two men meet in jail. The one sentenced from Essex and the one sentenced from Atlantic for the same crime have two different sentences, and the warden of the jail has a disciplinary problem to start out with, because the man who receives a heavier sentence will always feel that he has been dealt with unjustly. But we cannot have a uniformity of sentence except under some provision, statutorily or otherwise, under which all sentences clear through the one body, so that there will not be that discrepancy. That discrepancy arises in federal sentences, as you very well know.

MR. WINNE: Before a specific judge in special cases.

JUDGE SMITH: It arises amongst our own judges; we have five in this district. I may look at a certain type of offense differently from my colleagues—but you see, each judge brings to the bench, even though he desires to be impartial, a certain background that he can't escape. You may take a man in Essex County who is charged with stealing chickens, and in Essex County I don't think stealing chickens would be a very serious crime, but give me a county like Ocean, where they are raising chickens and the theft is from a chicken farmer, the offense immediately takes on a serious aspect, and as a result two judges, sitting in the same court practically, will impose two very different sentences. Now, a lack of uniformity arises from a situation like that. But confine it to the one county, and by one judge, and I will say there will be uniformity.

MR. WINNE: My belief is that the answer to that problem would be to have a local judge in each county to try criminal matters.

JUDGE SMITH: Oh, I agree with you there. I agree that it might be better, and because of that very situation it might be better to have a local judge in each county, because there is this other factor that a local judge brings—a knowledge not only of offenses, but of offenders, which is very important in sentencing criminals. I don't think we have reached a stage yet where we have even approached justice in the handling of criminal cases, because we are now learning for the first time, or at least we are now beginning to yield to the conviction, that some offenders are prompted by mental quirks, and that some such offenders are better subjects for mental institutions than they are for jail.

MR. WINNE: Now, I think we are all agreed that the United States District Court judges under the federal system handle a

variety of matters. You have patent matters, you have admiralty matters, you have criminal matters, you have negligence cases, you have contract cases, you have tort cases. Undoubtedly, you have a greater variety of cases than any other judges, than any other court judge I know.

I am wondering whether a system might not be adopted at this Convention so that we could have a court trying equity cases, tort, contract cases, etc., at the trial court level, whatever it turns out to be. Now, should those men also have probate, criminal, compensation and all other things that now are in the county courts, or should we have in addition to the trial court, at the level I am speaking of, a county court, such as we now have, which would try probate and criminal and workmen's compensation appeal cases, drunken driving cases, etc.? That is one question we have not been able to solve.

JUDGE SMITH: It depends on how many categories—it depends on the extent of jurisdiction that you give to the courts. If the courts are to be one of original jurisdiction, you will confine it to the trial of cases, and I see no difficulty. However, the average Common Pleas judge handles probate matters as well as the trial of civil cases, and I don't see that that presents any real difficulties, because there are very few probate matters contested at that level. The greater contest occurs in equity.

MR. WINNE: I don't believe I make my point clear. Now, this judge tries a probate case—let's assume you have a county judge trying probate cases—should that judge also be a judge that tries all other cases, jury cases, etc., or should you have two separate courts, one for say, the circuit court, that tries jury cases, and another that tries civil or probate matters? Or, should we merge those into one court? Or, should we provide for county courts and probate courts?

JUDGE SMITH: It is my opinion that there is no magic in either the number of courts or the name you give them. It depends upon the jurisdiction that you vest in the men who sit there. Now, I see no objection to the Common Pleas judge entertaining jurisdiction in civil matters, criminal matters, or in any probate matters. I do see some objection, however, to giving him also appellate jurisdiction in other fields, such as workmen's compensation, drunken driving cases, and all that sort of back wash. I think that has arisen in New Jersey because when these new statutes came up—the Motor Vehicle Act and all that sort of thing—they began depositing jurisdiction in the various county courts because they had nowhere else to put it. These matters didn't seem to warrant going to the Supreme Court of the State, so as a result they found themselves in the county court with trial *de novo*. We call it appeal,

but in all those cases—I wouldn't say all, it might be too broad—but in most of those cases we find that the Common Pleas judge, although he exercises what we call appellate jurisdiction, is also acting as a trial judge. That also became necessary, I think, because in the average motor vehicle case where a man was convicted of drunken driving and he suffered the loss of his license for two years, that was a serious charge to him because it may have affected his livelihood. But notwithstanding that, we continued to try him in a court which was not a court of record of any kind; he was hailed before a magistrate who, in many instances, had no qualifications for the job that he filled, had no knowledge of the rules of evidence. As a result, it was necessary to give him a new trial before a competent tribunal.

The Legislature, and to some degree this Convention, can accomplish something if there will be some limitation upon that type of court, because there is another important factor there and, I think, one that this Committee might well consider. We are directing all our attention—at least we seem to be directing all our attention—to the courts of the highest level. You will remember that the average layman has his only experience with the courts in the lowest level, and some of them have been conducted like "monkey courts," if you will pardon the expression. He leaves that court with his only impression of justice as that of a "monkey court." Now, there again, the lower courts become just as important, from the layman's standpoint, and in that type of case of which you speak.

MR. WINNE: They would have to be statutory courts; there is no question about that.

JUDGE SMITH: They would have to be. But you see, there again, a man tried on a drunken driving charge, if he were tried in a tribunal where there was a record made of the evidence produced, and then there was an appeal to the Supreme Court, the Supreme Court would have—or whatever appellate tribunal you set up, it would not necessarily be your highest appellate court, but it would be an intermediate appellate court.

MR. McGRATH: You would try drunken driving cases in the county courts?

JUDGE SMITH: It might be a good idea to do it at first.

MR. SOMMER: Then you would try it *de novo*?

JUDGE SMITH: Exactly.

MRS. GENE W. MILLER: What do you mean by *"de novo"*?

JUDGE SMITH: Try it again as though it had never been heard before.

MR. McGRATH: Do judges of the United States District Court have any difficulty in trying all these different jurisdiction cases? Do they have any particular difficulty?

JUDGE SMITH: If you address it to me personally, I say no. And I say it with all modesty. I may, as I said before, have a more difficult research job, but I—that's part of my job. I have to expect it. This morning they pointed out that the Chief Justice had written five opinions reversing a Vice-Chancellor. Let me say that that is no criterion, even though it may have been Chief Justice Brogan, because very often those things are matters of opinion.

MR. McGRATH: Don't you agree that a judge should not necessarily be a walking encyclopedia on all phases of litigation that might come into a court? A judge is a conscientious man who informs himself of the law by research, by investigating books, and by reading briefs. Isn't that true?

JUDGE SMITH: If he pretends to be a walking encyclopedia, he's a fool.

MR. McGRATH: In other words, he is not an expert on everything, but he must make himself an expert when a certain matter comes before him?

JUDGE SMITH: That's true.

MR. McGRATH: In other words, if a patent case comes before you now, and you don't get another one until ten years from now, you would investigate the particular phase of the patent law before you, but you would not become an expert on that?

JUDGE SMITH: I think it is generally recognized among patent attorneys that some are more proficient in the handling of patent cases than are others. I think you may just as well be confronted with the very practical problem that arises. I think—

MR. McGRATH: You can keep yourself informed of the law by reading books, which after all, are the tools of every judge and lawyer.

JUDGE SMITH: There is this that occurs in the court exercising a wide jurisdiction—that among the lawyers, at least, the judges become known for some particular proficiency or lack, where there are a number of judges sitting. Lawyers know that by an application for an adjournment they come up on another man's calendar; they may avoid the judge. But I don't know what cure there is, except a judge being so severe as to deny an adjournment, and that, of course, may also affect the administration of justice, because some applications for adjournment are justly made. There are others that may come because the lawyers would rather have their cases tried before one man than another. That will arise in some places, I suppose.

MR. DIXON: I had quite a little experience in patent and incidental cases in courts, in connection with my engineering work, and I would like to say that I have been absolutely amazed to see the grasp of some judges of the most intricate and most complicated

matters. It is absolutely amazing, and I don't know how they do it, but they do.

VICE-CHAIRMAN: We have two other witnesses yet to be heard, and I wish you would conclude this discussion if you have no further specific questions to ask Judge Smith.

MR. PETERSON: I have just one question, if I may.

VICE-CHAIRMAN: All right.

MR. PETERSON: If, in your own court, you have a matter that is predominately equity but the element of law crops up, you call in a jury to hear the law portion of the case—

JUDGE SMITH: We discussed that point at lunch. Those cases do arise, and the ordinary case presents no difficulty—and I will show you why by a very simple illustration and one of the most common kind. You will find that in our rules we don't classify cases any longer as equity or civil. They are all civil, but they are jury and non-jury. A litigant must file of record a demand for trial by jury. If he fails to file it, he is presumed to have waived it. Now, we begin there. We find that a man files a demand for trial by jury. His adversary entertains the opinion that it is one in which the man had no right to this common law trial by jury. He moves to strike the demand. This may answer Dr. Jacobs' question on delay. His question as to whether or not it is law or equity is answered very quickly, and he does not have to wait until that case is tried, or even partially tried, because immediately upon the motion to strike the demand for trial by jury, the trial judge will determine at that stage of the proceedings and from the pleadings whether or not the case is one which at common law was cognizable in a court of equity or in the common law court. If he determines that it is one cognizable in the court of equity, he strikes the demand for trial by jury and immediately that case goes on the non-jury calendar and it is tried there. If he decides that it is one cognizable in the law court, at common law, he refuses to strike the demand for trial by jury and the case goes to a jury trial.

Now, a simple illustration would be where a man would sue on a life insurance policy, and under our system you can raise in the law court both your legal and equitable defenses. He raises a defense, and by way of counterclaim he asserts a right to have the policy cancelled because of fraud. Now, in the first place—

MR. SOMMER: That is an "equitable" defense.

JUDGE SMITH: Well, I mean, an equitable fraud as distinguished from a legal fraud. Sometimes we distinguish because, you see, there may be certain grounds which would give them the right to cancellation but no other relief in equity. Now, what does the trial judge do when he is confronted with that situation? The logical thing for him to do is to try the equitable issue first, because if the defendant prevails, there is no reason to try the law suit, is

there? He tries the equitable issue first, and without a jury and without anybody else. That is another thing that may occur. Right then and there, having taken jurisdiction of the matter because of his equity powers, if he decides the policy is valid and enforceable and should not be cancelled, he retains jurisdiction to assess the damage and the trial by jury becomes unnecessary. There the judge entertains his traditional equity power; having acquired jurisdiction of such a matter for equitable purposes, he retains it to do complete justice. Now, he may have to send it to a jury only if there are other matters presented, and I can't conceive of any in trying the question at issue.

MR. WINNE: He probably raises the issue that that is not the man.

JUDGE SMITH: That is a different matter.

MR. McGRATH: How would that work out?

JUDGE SMITH: Then it would go to a jury trial.

MR. McGRATH: Do you think that would be a good working system?

JUDGE SMITH: Only once did I have any difficulty with it, in one case. It required that I do this, and it has proved since that it was a sound practice. There is some evidence that you will take as a judge in trying the equitable issues, but which should not go to the jury because it might prejudice one side or the other. You take all the evidence—that which is relevant and material to the legal issues, as distinguished from the equitable issues—you take it in the presence of the jury. That which is relevant and material only to the equitable issues that are raised by the pleadings you take in the absence of the jury. In this case we assumed the equitable issues were unsound, as an assumption. We let the matter go to the jury, and the jury returned a verdict, I to retain jurisdiction to determine the equitable issues should it become necessary. In that case it wasn't necessary, because the jury returned a verdict in favor of the defendant. It wasn't necessary for the court to consider the equitable issues any longer.

Now, situations like that would occur in many cases. I mean, it is not unusual. Sometimes you will take testimony to determine whether or not it would be prejudicial, or whether or not it is relevant, because you can't determine from the question itself, so you excuse the jury.

VICE-CHAIRMAN: As a result, you always dispose of the case in its entirety, don't you?

JUDGE SMITH: Always dispose of the case in its entirety, except in that sort of situation the one judge would retain it. In the other situation, where the demand for trial by jury is stricken—that comes up on what we term the motion calendar, as a matter of administration. I would determine it on Monday. I would

either strike the demand for trial by jury, or I would refuse to strike it, but on that day I would put it on either one trial docket or the other, and there it would find itself in the usual course when the trial came up. As far as the action is concerned, it presents no practical problem insofar as efficient administration is concerned.

VICE-CHAIRMAN: Well, then, that should cut down on the time.

JUDGE SMITH: Yes, it may cut down the time, because the right to trial by jury is raised immediately, and it is apparent to the litigant then, and it can be determined on the pleadings.

VICE-CHAIRMAN: Should it also not cut down the expense if you have one trial or two trials, as distinguished from the procedure in our system of separate trials?

JUDGE SMITH: Well, the only difficulty is this. You see, under the present system in the state courts you may have two filing fees, but even under the old system you could have under our system only one, if the court exercises discretion.

MR. SOMMER: That is a situation which the Legislature could correct?

JUDGE SMITH: That the Legislature can correct, yes. That has no place in the constitutional amendment pertaining to the courts. These are purely and simply, in my judgment, procedural difficulties that should be handled by either the Legislature, or where possible, by the rule-making powers of the court.

Incidentally, in closing, I might say that the federal court has built up for itself, under its system, its own equity jurisprudence. That is the one branch of the law in which in both substance and remedy we are guided entirely by the equity precedents established by our own courts. In other matters, such as negligence and the like, we are guided by the precedents established in the state courts, but in the federal system, the equity system, we are guided by our own remedies and by our own substantive law, as established in our own equitable system. Ther is no difficulty there.

VICE-CHAIRMAN: Anything further, Judge Smith?

JUDGE SMITH: No, unless you have some further questions.

(Silence)

VICE-CHAIRMAN: Thank you once again, Judge Smith.

There will be a recess for a few minutes, and then we will reconvene for our next speaker, Dean Ormsby.

(Recess at 3:10 P. M. The session reconvened at 3:15 P. M.)

VICE-CHAIRMAN: The meeting will come to order.

Mrs. Miller and members of the Committee, this is Dean Alexander F. Ormsby, Dean of the John Marshall College. Dean Ormsby was previously invited, but was unable to appear. Dean Ormsby.

MR. ALEXANDER F. ORMSBY: First, I am grateful for the

cordial invitation given to me to express my views today concerning the proposed Judicial Article of our new Constitution. I hope and trust that the delegates will mold a Constitution that will meet the real needs of all of the people of our State.

As a member of the bar, former Assistant Attorney-General, former judge and a legal educator, and not without experience in local, state and federal public affairs, it is my sincere belief that we must afford a decent opportunity for all our citizens to obtain justice. Justice, to my mind, is giving to our citizens their just due. If justice is denied our citizens, no matter what kind of an excellent Constitution you have otherwise provided, it will be a poor one.

I am one who has always been proud of New Jersey's splendid reputation for both its courts and its judges. I am not unmindful of the historic names associated with our judicial organization. The layman has upheld these excellent traditions and the heritage of these distinguished and historic names. I therefore feel that we should not lose sight of the layman's point of view. He should have a voice in the modernization and functioning of our judicial structure. I think that any proposed new plan should not bewilder the layman. Our courts will be more effective by constitutional provisions that give to the average citizen a clear understanding of its principles and provide an efficient and yet simple manner of securing justice in each case. Good things should never be sacrificed. By that I mean, let us make sure that we do not swap a good established practice for a potential uncertainty. Therefore, with utmost respect I bespeak caution in undertaking wholesale changes merely for the sake of change.

I have observed with considerable interest several statements made by illustrious judges, deans and lawyers presented to this Committee and the press concerning this all-important matter. It is my judgment, and I concur *in toto* with the statements made by Chancellor A. Dayton Oliphant, Chief Justice Clarence E. Case and United States District Court Judge Guy L. Fake.

It is my humble opinion that in order to promote the cause of justice, costs to the litigant must be reduced. This is where the layman is most affected. Simplification of appeals must also be perfected. In this regard, costs and time are saved. I do not believe that appeals must depend upon certain technical conditions. The litigant should be allowed to take an appeal as a matter of right if he or she feels aggrieved. We should not discourage the pursuit for justice, nor should we deprive our litigants of their rights to obtain justice because of the intervention of some technicality.

In order to attract the most competent men of the bar to the bench of our State, we must provide security as to tenure, adequate salary, promotion and suitable pension and retirement rights and privileges. Many a man has spent years in establishing a lucrative

practice, and when offered a judgeship refused the honor due to the fact that he was giving up a certainty for a non-certainty. Then again, some men have been honored by appointment who have given up a fine practice, only to find that when a change in political powers came about they were not reappointed, and for no reason relating to their legal ability, personal character, or conduct. Political reprisals by a succeeding political party or officers should not be the only reason for a refusal to reappoint a judge. This rule should apply to all courts of our State. Due protection should be provided. In order to avoid any further political complications, all judicial appointments should be made immediately when a vacancy occurs. They should at all times be made on a bona fide bipartisan basis.

I favor the election of all judges. It is my feeling that if the people vote for the Governor of the State, why should they not vote for the judges of the State? If we had elective judges, even if a political organization refused an endorsement to a judge who served with a good record, he would still have the right to run independently, based on his record and work on the bench. Under an elective system the people would be the sole and final judges of his qualifications and competency.

Suitable and adequate salary should be paid all our judges. Special consideration should be given to the living conditions of the period they serve and live in.

I would recommend that judges be appointed or elected for a term of ten years.

As to retirement, I believe a judge should be given the right to retire on his own election when he becomes 65 years of age, and when he becomes 70 years of age retirement should be made compulsory.

It is my recommendation that we establish a new Court of Pardons. This court should be made up of the six lay judges, with adequate salaries and with a term certain. They could consider not only cases of parole, but also act in an advisory capacity to the Governor in capital cases when called upon by the Governor. The Governor, being a very busy man with many other state matters, should have the services of such an advisory group of men of experience. Their advice need not be binding on the Governor if he does not wish to accept their findings. In this way there will be an established court separate from the present one. Under the present system, members of the Court of Errors and Appeals hear matters in the Court of Pardons which they had previously passed upon while sitting in the Court of Errors and Appeals. It is my opinion that the body should be a separate and independent court.

Transfer of cases from a court of law to the Court of Chancery, and vice versa, should be simplified.

The safety valve of the United States has been our jury system. Therefore, let us favor jury trials in all criminal cases when requested by a defendant. This should also include the graver offenses of motor vehicle cases, especially drunken driving cases; disorderly persons and disorderly conduct cases.

County courts should be retained, but perhaps the structure and names may be modernized and streamlined. By all means, preserve the present essential processes and functions.

In closing, I further recommend that all the courts of our State should be established as constitutional courts. By such a measure greater security and protection would be afforded the incumbents.

Your task is not an easy one. I am sure the earnest and hard-working delegates without exception are all striving to do their utmost to give our posterity a Constitution that will stand like our United States Constitution, the cornerstone for "liberty and justice for all."

VICE-CHAIRMAN: I understand that you favor a Court of Pardons rather than vesting the pardoning power in the Governor?

MR. ORMSBY: I do; yes, sir.

VICE-CHAIRMAN: It is not just for the benefit of the members of the Committee, but at luncheon today the point was raised by the Executive Committee, which tentatively is proposing that the pardon power be vested exclusively in the Governor. I told them that we had not gone into that issue in detail, but that we would and, in turn, take it up with the Executive Committee before any reports were submitted.

MR. BROGAN: Do you know the number of states in which they have courts of pardon?

VICE-CHAIRMAN: I don't know it offhand, but no doubt, I can get it for you.

MR. BROGAN: The pardons power is usually in the governor.

VICE-CHAIRMAN: Traditionally and historically, the Governor has always had the appointing power as well as the pardoning power. That is true of the federal scheme as well as in many states. Many states have established a court of pardons. The Executive Committee believes that, notwithstanding the burden of work on the Governor, it should be part of the executive power.

MR. WINNE: It would be very interesting to know just how the federal pardons work. Now, I have had two or three experiences in that respect. There is the pardon of clemency from the United States Attorney-General's office, and a corresponding board which consists of the keeper of the prison, the pardoning attorney, and somebody else. While it may be that you automatically get your pardon from the President of the United States, I don't think he knows a thing about it, except to put his signature on a piece of paper. I don't think there is anything wrong with the President

having the pardoning power, and I don't think there is anything wrong with the Governor having that power.

VICE-CHAIRMAN: Of course, the decision and the responsibility is in the President, notwithstanding.

MR. WINNE: That's true, but if he doesn't exercise that power, why continue the fiction?

VICE-CHAIRMAN: That, of course, results from the magnitude of our government. There are many presidential powers. Consider the tariff power, for example, which he has had all through our history. He has always been guided by a committee or a commission which has reported to him, but the ultimate responsibility has been with the President. I assume that that is the recommendation of the Executive Committee. I assume that they would not foreclose the establishment by law of an advisory commission such as the President has in the federal scheme.

MR. WINNE: Since it is the advisory commission that does it, I think that they ought to do it and the President ought not to do it.

VICE-CHAIRMAN: Do you think that that should be part of the Judicial Article, or do you think we should leave it entirely to the Executive Committee?

MR. ORMSBY: I would think it is your function.

VICE-CHAIRMAN: In any event, your recommendation would be to continue as heretofore, but with the establishment of a Court of Pardons, composed of six lay judges, with a specified salary and term, which would report its findings to the Governor, who would not be bound to accept their findings.

MR. BROGAN: With power in the Governor to veto their recommendation.

MR. ORMSBY: That's true, and I say this, Chief Justice, that very often, as we have seen over a period of years, in capital cases when a man is about to be executed, special appeals have been made to the Governor. Very frequently the Governor, who is a very busy man—he has many, many things to look after—doesn't want to be inconsiderate with those people, and in many cases some of these people get hysterical, and he really can't calm them himself, even with his very presence there. But if he has six men from, for example, the Court of Errors and Appeals, men who have experience, men who have been acquainted with parole matters, who can listen to some of these people and then make their advice known to the Governor—it is not binding on the Governor—but it gives a greater sense of security, knowing that the Governor has had all the necessary information. And I think that makes for better justice. I think that it makes for the better common understanding of our legal jurisprudence in this State.

MR. PETERSON: Dean Ormsby, I can see a great deal of value

in it if the Governor had the exclusive power to stay an execution, because it may be at the very hour before an execution that some new evidence has been uncovered, even though the previous search had been diligent. That would require quick action on the part of one person, but you couldn't get all six men to give you quick action.

MR. ORMSBY: I think he has the power to act; he has the power to stay the execution.

MR. WINNE: It works practically that way now. They have six men in the Court of Errors and Appeals who have the right to act in that capacity. We talked two hours about that at luncheon. They know all about the things we are talking about now.

MR. BROGAN: Yes, but it is largely and exclusively a matter for the Governor. On the other hand, what the Dean said is true. Say a man is charged with theft. Say a man stole some money from a bank two years ago, and he was sentenced to five years. He has been a model prisoner and he should be let out. But he can't go to the Governor and ask for a pardon. He just can't. He has to have somebody to present the factual situation. There were extenuating circumstances; he has to have somebody to explain the situation for him. He shows signs of regeneration, so-called, and so on.

MR. DIXON: Couldn't the Governor appoint a commission?

MR. SOMMER: I suppose he could set up an advisory body.

MR. BROGAN: If he had the statutory authority to do so, I suppose he could.

MR. WINNE: It seems to me that it should be composed of a body of men trained in that field, sociologists, technologists, etc.

MR. BROGAN: Probation people.

MR. WINNE: Exactly. It should not be in the Governor at all. It should be vested in a body of men who make it their life work, sociologists, professors, etc.

(Off-the-record discussion)

MR. SOMMER: Did I understand you to say you favored an elective judiciary?

MR. WINNE: That's the way I interpreted it, and I was astounded.

MR. ORMSBY: That is true. That is what I said.

MR. SOMMER: All right, if you favor an elective judiciary, would you favor the recall of a judiciary in the same manner?

MR. ORMSBY: Just how do you mean, Dean?

MR. SOMMER: Well, on petition by a given number of citizens of the State, on the question of retention by the judge of his position, do you feel that it should be submitted to the electorate?

MR. ORMSBY: Well, we still have similar recall privileges for anybody occupying a public office.

MR. SOMMER: I merely want to get your point of view.

MR. ORMSBY: I would say that any judge sitting on the bench should stand on his record and be ready at any time to answer for any malfeasance, misfeasance or nonfeasance, whatever the case may be.

MR. SOMMER: That would a very unpopular decision.

MR. ORMSBY: I won't concede to that being an unpopular decision because—

MR. SOMMER: It would be to the ones that I know of.

(Laughter)

(Off-the-record discussion)

MR. WINNE: It's a little repulsive to the average lawyer, I think, to go about asking for people to vote for a judge on election day. I can't conceive of many states favoring such an election.

VICE-CHAIRMAN: In most states, Mr. Winne, overwhelmingly.

MR. WINNE: Well, I still find it repulsive to think of having to go around on election day and beg people to vote for him.

VICE-CHAIRMAN: I am as opposed to it as you are, although I am not so shocked by it.

MR. WINNE: I still find it difficult to think of a judge saying, "Please vote for me on election day."

VICE-CHAIRMAN: Well, they have it. I think there are 39 states, approximately, that do.

(Off-the-record discussion)

MR. ORMSBY: I think they get along quite well in New York, and they elect their judges.

MR. SMITH: Well, I was going to ask you about that. Are you not concerned about the situation of some years ago, when this judge—what was his name?

MR. ORMSBY: Judge Auiello.

MR. SMITH: Yes, Judge Auiello was found guilty, and three days later the people voted him into his judicial office.

MR. ORSMBY: After all, we are in a democracy and certainly people rule by majority rule, because you don't have democratic principles if you say that the people haven't any authority to rule by majority rule. The people voted knowing the situation. They at least had a chance to repudiate Judge Auiello, but they didn't.

MR. SMITH: Apparently you didn't understand my question.

MR. ORMSBY: Maybe I didn't.

MR. BROGAN: No, the thing was, here was a man who had the endorsement of both parties and there just simply wasn't time enough to get this thing over to the people. And even if you did

get it over to the people, the people are not interested in knowing who the judges are. They never have cases, the average man. He doesn't go into court. That's the reason he is not concerned about judges, but when he gets in there, he wants a good one.

MR. WINNE: I have heard it stated—I couldn't prove it—that nominations for judges in New York City are conditioned, in part, upon campaign contributions to the parties. Has anyone else ever heard that suggestion?

MR. BROGAN: Nobody ever heard that suggestion.

(Laughter)

VICE-CHAIRMAN: I think many of the states which have the elective system have been clamoring for the appointive system, whereas a number of states which have the appointive system have been clamoring for the elective system.

MR. ORMSBY: That statement would be hearsay, anyway.

MR. BROGAN: Yes, maybe in the Republican Party.

(Laughter)

MR. ORMSBY: I don't know what he means.

(Laughter)

MR. DIXON: Speaking of people being the sole judge, if a man is turned down by his party—imagine Bergen County, which is a Republican county, turns down a man—he would have a very hard time getting elected. Of course, if he's favored by the people, they may have to support him.

MR. WAYNE D. McMURRAY: At least he has a chance.

MR. DIXON: Or in Hudson County, vice versa, it would be very difficult for a Democrat who is turned down, to be elected.

VICE-CHAIRMAN: Dean, what do you think of the Missouri Plan?

MR. ORMSBY: The Missouri Plan?

VICE-CHAIRMAN: In Missouri, as I understand it, they have a commission which submits a list of names to the governor who, in turn, appoints one from that list. A year later that judge's name goes on the ballot which is voted on by the people "yes" or "no" —in other words, if the person is to be continued or not continued.

MR. ORMSBY: Well, I'm not entirely satisfied with that plan, Mr. Jacobs.

VICE-CHAIRMAN: That, of course, gives you a partial public electorate selection.

MR. ORMSBY: I think one of the defects in that situation is that it does give the control of the selection of the judges, in the beginning, to a certain few.

MR. DIXON: What would you think of a council formed of, let us say arbitrarily, three men chosen by the New Jersey State

Bar Association, the Chief Justice of the Supreme Court, and perhaps three laymen appointed by the Governor, or some such combination—that is not a fixed combination—who would select the list of names, maybe three, from which the Governor would be obligated to pick one name, or, as has been suggested, if he didn't find on that list any name he wanted and he wanted to select some other, he had to give a very full statement as to why he rejected the three and selected another. Do you think a plan like that might have merit in it?

MR. WINNE: Are there any suckers in the room?

(Laughter)

MR. ORMSBY: I don't think so. I think the plan would be somewhat complicated. I still maintain that, as I gather it, all authority comes from God, the authority is then vested in the people, and the people establish the sovereignty and the sovereignty establishes the government, and so on. The people should, therefore, select the judges. It is democratic. I think the people, by far and large, are one fine grand jury, and they should select the judges. You men who have sat on the bench, you sometimes, in some cases, felt that some jury verdicts might not have been the best, yet most of the time you have been impressed with the just verdicts of our juries. I think that on the appointment or selection of judges by the people, you get them more interested in their judicial system by giving them a personal selection by vote. If a judge is on the bench, and his term expires, he shouldn't be afraid to stand up there and present his record. That's my opinion.

MR. SOMMER: What you want to see is a bi-partisan judiciary?

MR. ORMSBY: That's right.

MR. SOMMER: What assurance have we that in an election we will produce a bi-partisan judiciary?

MR. ORMSBY: I think, Dean, if you recall, I said one word, "bona fide" bi-partisan. I put that word "bona fide" in there for a reason. I hoped that it would be bona fide. I think most of us are looking at the damaging results. We have got to give this proposition of the election of judges a fair trial.

I may also point out that the cost to the litigant should be reduced, for the reason that they should be encouraged to pursue justice. Maybe we are at fault that lawyers to the man are interested in the law and not in bringing to the attention of the layman some of the things they are entitled to. You have the same thing in many matters. We must consider the inertia of the people. You have got to give them something to interest themselves in, and I don't see anything finer for the judiciary than having the judges present themselves for election every ten years. I make it ten years because I think that a judge should have a term of at least ten

years, and then come and give a report to the people of what he has done. A President has to do it every four years, and he has the destiny of the nation in his hands. So why shouldn't a judicial officer be willing to stand up and give a report to the people and be voted one way or another.

JUDGE SMITH: You will pardon me if I make a personal observation on a state in which they have an elective system for the judiciary—coming back to what Dean Ormsby said about a bi-partisan bench, which, incidentally, in this state does not exist. Here in the State of New Jersey, where we have the appointive system, we have successfully maintained a bi-partisan bench in our high and low state courts. I am speaking, however, of Pennsylvania, in which they do have an elective system. I sat in Pennsylvania for two years and I observed a judicial election and, I agree with Mr. Winne, that there is nothing more repulsive to me than to see a candidate for the highest office take a political platform with men running for county commissioner and indulge in the lowest kind of campaign oratory that I have ever witnessed. It was hardly consistent with the office that the man sought. Incidentally, Judge Jones was elected. They call it a judicial preference, to avoid calling it an election. Incidentally, when Judge Jones was elected to the Supreme Court of Pennsylvania, he was the first Democrat elected under the elective system in 79 years. In the State of Pennsylvania they also have had some sad experiences in some counties, with several of which I became personally familiar, in which the political leader was actually judge of the county court under the elective system.

I think all that is hardly consistent with at least the ideas we have maintained in the State of New Jersey as to the dignity and position of the office of judge. I think it would be difficult to sell that idea of an elective system to the people of the State of New Jersey.

MR. SOMMER: I am wondering whether Judge Smith's statement might not be taken into account in connection with the provisions of the 1944 Constitution, to the effect that a judge shall not be engaged in any gainful employment. The question might also be whether being political head of a party is or was gainful employment in the county.

JUDGE SMITH: In that judge's case, it was.

MR. ORMSBY: On the other hand, there are as many instances that we can point out that would counteract the instance cited by Judge Smith, and it wouldn't prove anything at all.

JUDGE SMITH: Exceptions do not prove anything at all, because they are exceptions and do not fall in the usual pattern. They are exceptions to the general rules.

MR. PETERSON: I am of the opinion that we would get better

officers through the appointive system than through the elective system. For instance, in my own town, which is Woodbury, it is rather difficult to get the people that you want to run on the ticket, say for election to the city council, but we have no difficulty whatever in getting the highest type, the administrative type, to serve on the school board, which is an appointive job.

JUDGE SMITH: In line with that, I can give you a very good illustration. No doubt many of you here knew Judge Avis very well. Judge Avis was one of the most competent men that ever sat on the federal bench in this State, bar none. He had more judicial temperament than any man I ever saw, but I would warrant that his personality and his quiet attitude were such that he probably could never even have been elected under an elective system.

MR. PETERSON: Your conclusion is one of fact. He wouldn't even offer himself for an elective position, or he would have represented Gloucester County in the State Senate. He would have run the gamut of all those offices, if he would have offered himself on the ballot.

VICE-CHAIRMAN: Are there any other questions you want to ask Dean Ormsby while he is still here?

MR. ORMSBY: I just want to say that I don't think people are so easily fooled in these elections as some people would think they are.

MR. PETERSON: It isn't that; the people would not have the choice, because the person would not run.

MR. ORMSBY: Then your quarrel is with procedure.

MR. PETERSON: Have you ever waited on a person that you thought would make an exceptional public official and asked him to be a candidate on a ticket to run for a public office, and then receive a denial of such offer?

MR. ORMSBY: That's right.

MR. PETERSON: Would that happen when you waited on a lawyer and asked him to run on a non-partisan ballot?

MR. ORMSBY: Don't you think, on the other hand, that we should make every effort we can to get men of that kind who are willing to run, on a non-partisan ticket?

MR. PETERSON: All right, let's assume I am a lawyer in community "X". I am singularly successful in my practice of law. I am not at all attracted by the remuneration I am going to get as a judge, but the people think I will make a good judge. Now, I risk my whole reputation by running, particularly at a time where for the last 10, 12 years candidates running on somebody's coattail were elected. So what have I done? I have offered myself as a target for the abuses of people who have no qualifications or background, to seek the high office that they seek, particularly the judiciary. And what happens if I lose, if I am defeated? I have lost

my friends, my clients, my everything else. It isn't worth it. A man is making a sacrifice, in my opinion, when he accepts a judicial appointment and precludes himself from that horrible thing we call money, and he becomes a public servant because of his inherent conscientious desire to serve the public. I don't think that a judgeship could compensate him for that.

VICE-CHAIRMAN: Are there any further questions?

MR. WINNE: Dean Ormsby, you thought that every litigant should have a right of appeal. We had some discussion on that a little earlier. Now if a litigant had a right of appeal once, do you still think that he should have a second right of appeal, if there were a higher court?

MR. ORMSBY: I think we can do away with multiple appeals, but I still think that appeals should be made as a matter of right, and not be subjected to any technical objections or conditions.

VICE-CHAIRMAN: Anything further, gentlemen?

(Silence)

VICE-CHAIRMAN: Thank you very much, Dean Ormsby.

(The session adjourned at 4:00 P. M.)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Wednesday, July 9, 1947

(Morning session)

(The session began at 10:00 A. M.)

The eighth meeting of the Committee on the Judiciary convened in the Rutgers University Gymnasium.

PRESENT: Brogan, Drenk, Jacobs, McMurray, Miller, G. W., Peterson, H. W., Smith, G. F., Sommer and Winne.

Vice-Chairman Jacobs presided at the request of Chairman Sommer.

VICE-CHAIRMAN NATHAN L. JACOBS: Will the meeting please come to order?

Mr. Kerney was invited two weeks ago, but he was away. I did not know he was back until I saw him here this morning, and I thought we would take this opportunity of hearing from him.

Mr. Kerney was a member of the commission which worked on the revision and submitted its report in 1942. He was the seventh member, so selected by the remaining members of the commission.

We have already heard from several members who participated in the 1942 draft. You will recall that we heard from the chairman of the commission, and also from the Attorney-General, both of whom were lawyers. Now we will hear from a member who is not a lawyer, although he has been associated with lawyers so long that he will probably talk like one. Mr. Kerney.

MR. JAMES KERNEY, JR.: Mr. Chairman, Mrs. Miller and members of the Committee: I doubt very much whether I will talk like a lawyer. I rather hope not.

MR. THOMAS J. BROGAN: Now, isn't that terrible!

(Laughter)

MR. KERNEY: I would like to make some comments—purely from a lay viewpoint—which tend to support the principles contained in the report of the Commission on Revision in 1942. I appreciate the fact that there is a great deal of argument as to the retention or abolition of the Court of Chancery, and from the lay viewpoint, and without any attempt to be technical—which I couldn't be anyway—I cannot see any reason why we cannot have an integrated court system, such as was proposed in 1942. We can retain the equity principles of the Chancery Court without neces-

sarily retaining that court itself as a separate functioning court. It seems to me that we should retain the traditions of equity, which were great in New Jersey, but that does not, by any means, mean that we should continue the court itself. I would like to make that comment and add another comment, which is entirely a layman's comment and a layman's viewpoint, but which I believe is held by the general public to a considerable degree.

If I were to be tried on either a criminal or civil cause, I think I would prefer that the trial be in the federal courts rather than in the state courts, because I have the feeling—and a feeling which, I believe, is shared by many of the public—that I would be more likely to get impartial justice out of the federal courts. I believe one reason for the general public favoring the federal courts in preference to the state courts is that the federal judges are removed from political pressure by the tenure of the office they hold. It is unfortunate, perhaps, but very human, that economics should color the opinions of the jurists to some degree, in some cases.

When a man holds a judicial appointment for a specific term, it makes it exceedingly difficult for him to become a completely disinterested party, rather than a member of a political party. He must keep one eye cocked always on the opportunities for reappointment, because his livelihood depends on his reappointment.

In the federal courts' structure a jurist is appointed for life, during good behavior, and I feel that proposal alone would be of considerable aid in strengthening the judiciary of the State of New Jersey in the public mind. I think it would strengthen the judiciary from a practical viewpoint. It would relieve the public of the impression that the members of our courts are not free from political influence.

Those are the comments I wanted to add to what may have been said before in support of the principles of the proposed revision of the New Jersey Constitution.

VICE-CHAIRMAN: Would you apply the principles of life tenure to all judges—in the highest court as well as the lowest courts in the State?

MR. KERNEY: By all means.

VICE-CHAIRMAN: What have you to say with respect to the so-called compromise of a seven-year probationary period, and then life tenure?

MR. KERNEY: Well, that was a compromise. I prefer a life appointment myself. The Constitution Revision Commission of 1942 compromised within itself on a probationary period followed by life tenure. I see nothing particularly wrong with that, but I am inclined to favor the original life appointment, as we have it in the federal system.

MRS. GENE W. MILLER: Would you say something about the removal of judges?

MR. KERNEY: About the removal of jurists—well, that is by impeachment.

MR. GEORGE F. SMITH: It wasn't so stated in your proposed revision, Mr. Kerney. There are two methods, as I recall it. One by impeachment, conditional on good behavior; and removal mandatory on account of physical or mental disability.

MR. KERNEY: You may have a very good point there.

MR. SMITH: Was it considered?

MR. KERNEY: I don't believe so. I don't recall it.

MR. SMITH: How do you feel about it?

MR. KERNEY: I think that ought to be a logical cause for removal—any disability, physical or mental.

MR. BROGAN: How about incompetency?

MR. KERNEY: I would classify that in exactly the same category —any disability which makes a man incompetent to serve as a judge.

MR. WAYNE D. McMURRAY: By whom would that removal be made? By the Chief Justice of the highest court?

MR. KERNEY: I would prefer to see it in the jurisdiction of the courts themselves—that is, the Chief Justice and members of the proposed Supreme Court.

MR. McMURRAY: Who would remove the Chief Justice?

MR. KERNEY: There would have to be a Chief Justice. The Chief Justice could be removed for cause.

MR. FRANK H. SOMMER: You would have them all subject to impeachment—everyone of them?

MR. KERNEY: That's right.

MR. SOMMER: Then, as to the judges of the courts—the courts of last resort, we would have to provide for a readier method of removal. We would have to take a chance on the court of last resort, I suppose, pretty generally?

MR. KERNEY: We have been taking some chances on that court for some time.

MR. McMURRAY: What is your thought on age retirement?

MR. KERNEY: I feel 70 should be a proper age for retirement.

MR. WALTER G. WINNE: You mean, compulsory at 70?

MR. KERNEY: Compulsory at 70. That provision I prefer to have made part of the Constitution, but it may be a matter for the Legislature. I believe it should be a constitutional provision.

MR. BROGAN: Would you have all judges with life tenure, even in the so-called inferior courts, that is, the county courts?

MR. KERNEY: Well, we didn't propose county courts in our revision as such. If you mean traffic courts, district courts, etc.,—

MR. BROGAN: No. For instance, Common Pleas?

MR. KERNEY: Oh, yes. I believe there should be life tenure for these inferior judges. We propose that; that would come under the unified plan.

MR. BROGAN: Now, what is your thought with respect to the mechanics of it? How would it be worked out? Or is it to be on the same basis as now, that each county would have a local judge? If I recall correctly, the thought among the speakers here seemed to be that it should be something like the Common Pleas judge is now. Now, if those men were to be integrated—if that is the word—in the court of original jurisdiction, under the first plan, what would you do with a judge from one of the small counties, who now has only a day a week, or two days a week, in which he is able to do all the business that is required of him?

MR. KERNEY: I think that is the direct conflict between life tenure and the appointment of a judge in each county. I don't see the need for a judge to be appointed from each county. I feel that the effort to retain a local judge in each county is an effort to retain political control over judges. The appointment of judges for life tenure is an effort to completely remove political control over judges. I feel that the suggestion of life tenure is in direct conflict with the appointment of a local judge in each county, and I am opposed to a judge being appointed specifically from and sitting in each county.

MR. BROGAN: Mr. Kerney, couldn't you, within your own scheme of things, appoint a judge from each county, but who would function in his so-called spare time elsewhere, so that he would be busy all the time?

MR. KERNEY: If it is a practical compromise, I wouldn't have any objection to it. Most courts of general jurisdiction have at least one representative from each county, and I don't feel that he should be specifically assigned to that county necessarily. There are too many counties where there is no need for a judge.

MR. BROGAN: Those who discussed it had the basic notion that there should be a judge available for matters that do come up, you know, from time to time, which require immediate attention, and who could immediately be assigned to take care of such eventualities. I suppose that was the reason for favoring the idea that they should come from the county, but with the understanding that they are not specifically assigned to that one county; that they are subject to assignment wherever a judge is needed.

MR. KERNEY: Yes, I agree that there should be a judge available for that purpose.

MR. McMURRAY: I just want to say, Mr. Kerney, in regard to your own statement that people would rather be tried in the

federal courts than in the state courts, you are expressing my own feelings. I think that is part of the same argument that a county judge, appointed locally, is influenced by politics, but the federal judge, having life tenure, is impartial. However, I think there is a decided feeling the other way, that your federal judge—and don't get the idea that I am against tenure; on the contrary I am for it—but the federal judge is more removed from the people than a judge appointed from, say, Camden County.

MR. WINNE: I am of the opinion that criminal matters should be handled by judges from the various counties, by reason of the fact that the judges are familiar with the conditions in the community, and quite often with the defendant, and they are in a better position to pass on the charges on which the defendant is being tried. I feel that they are better qualified to pass on such matters than, say, bringing in a judge from somewhere out West, who doesn't have the faintest conception of conditions in the county where the defendant is being tried.

MR. KERNEY: That is a different view from mine, of course.

MR. BROGAN: You would be against that?

MR. KERNEY: I am against it, yes. Let me give you a specific example of what I mean. Our newspaper criticised the appointment of Judge Meaney to the federal court; yet I would have no hesitation, were I to be tried before him for any cause whatsoever. I do not believe that the criticism by our newspaper would prevent me from having a fair trial, or mean that he is not fit for the job, even though we were against his appointment.

VICE-CHAIRMAN: Mr. Kerney, I notice that your report, in dealing with the pardoning power, favors the pardoning power within the executive. Do you have any comment on that?

MR. KERNEY: Yes, we favor a Board of Pardons, but following the executive pattern—the pattern that is followed by most state governments. That is the simplest way of expressing it.

VICE-CHAIRMAN: I believe the point of discussion was that because the Governor is so busy with other state matters, he cannot give these parole matters his personal attention, and he therefore has to rely on recommendations of this board.

MR. KERNEY: That's true.

VICE-CHAIRMAN: And, therefore, since the Governor had to rely on this board to such an extent, it was the feeling of the previous speakers that this board should be given the responsibility as well, since to a very large extent the Governor was guided by the recommendations of the Board of Pardons.

MR. KERNEY: I wouldn't see any tremendous argument about that. I don't think it necessarily makes a great deal of difference, because the Board of Pardons would actually do the work. Now,

whether they are given that responsibility directly, or whether it remains with the Governor, is not too important. The point is that the work is their responsibility.

MR. HENRY W. PETERSON: Do you have any comment with respect to the appointment of judges—in whose hands should it be? Should it be in the Legislature or in the Governor?

MR. KERNEY: I prefer that all judges should be appointed by the Governor. At least, I have a strong feeling that all judges should be appointed by the Governor, which is contrary to the present procedure, particularly in the Chancery Court. I have very much an open mind on the so-called Missouri Plan. I have come to know their conclusions, and I see considerable merit in them, particularly with regard to advising the governor as to the men from among whom he should make his appointment.

MR. SOMMER: Your suggestion is that the Governor shall have that power, but limited?

MR. KERNEY: That is true. A group of three or five would be designated, from whom one is to be named. There is a limitation there. It does serve, however, a real purpose, in that you have a public body which would determine the qualifications of an individual prior to appointment. There is real merit to that.

MR. BROGAN: Isn't that open to objection, that the individuals who would comprise this board would also be subject to influence—not necessarily political influence?

MR. KERNEY: That is the main objection.

MR. BROGAN: As against that, do you not believe generally in the centralization of responsibility for the appointment of the judiciary?

MR. KERNEY: I do. I would prefer, I think, from the little I have read and seen, and from the correspondence I have had with newspapermen in Missouri, I would favor the idea of the Missouri Plan as it works in that state. In this respect, I might also add that I would prefer, I think—if the Missouri Plan is considered—to use a compromise of it, to make the Chancellor as the advisor, who would advise with the Governor on judicial appointments.

MR. BROGAN: Do you think that would prove satisfactory?

MR. KERNEY: I don't know. That is why I said my mind is open on that.

MR. SMITH: One of the obvious advantages of a board and recommendations on appointments to the Governor would be that the Governor would be relieved of pressure upon him individually, since the sole responsibility would not reside with him.

MR. KERNEY: Yes.

MR. SMITH: The Governor, under certain circumstances, could say, "I'm sorry, but I can't make a decision now. I must wait for

the board's actions and recommendations."

MR. KERNEY: It would permit the Governor to side-step, without having to commit himself.

MR. BROGAN: I don't feel that a Governor should say that. If he can't appoint a man, he should say so.

MR. KERNEY: If you leave the appointive power with the Governor, no matter what advisory group you have, the final say is with the Governor.

MR. SOMMER: Then you should centralize the responsibility?

MR. KERNEY: That's right, but there may be some merit in having an advisory group working with the Governor as to the qualifications of the appointee.

MR. BROGAN: Doesn't he have such a group now?

MR. KERNEY: The senior officer.

MR. BROGAN: But even after the governor has picked someone, he can be relieved?

MR. KERNEY: Yes.

MR. SOMMER: How about a judge during the trial period, playing up to and seeking the favor of the appointing power? You cannot prevent that entirely.

MR. BROGAN: That is what I have against that proposition.

MR. KERNEY: I am inclined to agree with you there.

VICE-CHAIRMAN: There is a provision in the 1942 draft, on page 24, reading as follows:

> "If the supreme court fails to hear any case within two months after an appeal is perfected, or fails to decide any case within two months after it has been argued or submitted, the chief justice is required to certify that fact to the governor, and the governor may appoint a special term of the supreme court from among the justices of the superior court, to act until the congestion of cases has been overcome."

Can you tell us what the advantages and disadvantages of that would be?

MR. KERNEY: I think the advantages outweigh the disadvantages. There would appear to be, on the face of it, disadvantages in having a special Supreme Court named by the Governor from an inferior court, but the advantages would appear to me to outweigh the disadvantages, because it provides for relief during any time that the schedule of the court became congested, and it also provides for disposition of a case after a certain period, and in the event that is not complied with, for report to the Governor for failure to dispose of such matter within that time.

MR. SOMMER: That is all right, but why bring the Governor into the picture if you are going to give power for the administration of the courts to some member of the judiciary? Why not trust him to act in that case?

MR. KERNEY: Well, you may be right.

MR. SOMMER: I am only raising the question, and not indicating an opinion.

MR. KERNEY: We felt that the administrative power of the Chief Justice should be such that he should be able to certify the matter to the Governor, who, incidentally, was the man making all appointments. The appointive power shall be centralized in him, and the man who originally appointed the members of the court should have power to select this special term of the Supreme Court, since that was an appointive power.

MR. SOMMER: But if the power of assignment to the courts is in, say, the Chief Justice, which is the highest power, why inject the Governor into the picture? As a matter of fact, of course, he may be the original appointive power, but this isn't an appointive division, but simply a step in the administration of the work of the judiciary.

MR. KERNEY: As a practical matter, I don't disagree with the idea that the Chief Justice should be able to make that appointment himself. As a matter of fact, I don't see how a head under such a system wouldn't appoint the very top men.

MR. SMITH: Nevertheless, we give it to the Governor, I suppose on the principle that since he had all the other appointive powers of the courts, we give him this power also.

MR. SOMMER: Mr. Kerney, wouldn't you think that the Chief Justice would be more familiar with the work of the men under him than the Governor?

MR. KERNEY: Yes, from that viewpoint there would be merit to it.

MR. SOMMER: He is the one who is supervising their work constantly.

MR. KERNEY: Of course, in that connection I might say that I can't imagine the Governor doing that without consulting with the Chief Justice, and I doubt that the Governor would make an appointment, an assignment, without consulting with the Chief Justice. I grant you that you might simplify matters by having the Chief Justice doing that. I don't disagree with you on that.

MR. SMITH: As I recall the language of the particular provision—that the delayed cases would be assigned to a newly appointed judge—did that refer to cases that were specifically assigned to that judge and had not been cleared by him within the specified time?

MR. KERNEY: That's right; that refers to cases assigned to that man specifically, a case that had been argued but had not been disposed by that judge. The purpose of it is to expedite these matters. That matter was to be left to the Chief Justice, as to the assigning of judges to hear these delayed matters and the appoint-

ment of special terms of the Supreme Court. In other words, to do that which would expedite appeals. He could assign these matters back and forth, whether it's a new case or an old case; that would make no difference.

MR. BROGAN: What would you do in a certain case which is given them for rearguing before this special tribunal?

MR. SMITH: What was the exact language of that paragraph?

VICE-CHAIRMAN *(reading)*:

> "If the supreme court fails to hear any case within two months after an appeal is perfected, or fails to decide any case within two months after it has been argued or submitted, the chief justice is required to certify that fact to the governor, and the governor may appoint a special term of the supreme court from among the justices of the superior court, to act until the congestion of cases has been overcome."

I take it to mean that this additional court does not touch cases already argued before the first court. However, by reason of new cases coming in all the time, delayed cases might be delayed even longer. To avoid prolonging these delayed matters further, they would assign them to other judges, to expedite their clearance.

MR. SOMMER: That is perfectly clear.

VICE-CHAIRMAN: We don't have to worry about the meaning of that.

MR. SOMMER: We are interested in the purpose.

VICE-CHAIRMAN: I take it, by reason of the reference to the time element, that that meant they were not to remove any particular case that was once argued. That was one of the arguments against its adoption in 1942. Otherwise, it would mean that a particular case could be taken away any time and shifted to another court or special judge.

I don't think that was the purpose at all. I think it was intended to apply to cases that were unduly delayed.

MR. PETERSON: In your proposal as to mandatory retirement at 70 years, I take it that would be effective immediately upon the adoption of the Judicial Article of the Constitution?

MR. KERNEY: The effectiveness of it would lie with the Schedule section.

MR. PETERSON: Well, in the 1942 Constitution, had it been adopted, it would have been effective the second week in January, except that the judicial section in the Schedule set it for November 15, 1945.

MR. KERNEY: Yes.

MR. PETERSON: It would not have been deferred, I take it, more than a month?

VICE-CHAIRMAN: In view of the fact that we borrowed Mr. Kerney from another Committee, may I suggest that you wind up your questions?

Mr. Kerney, may I take this opportunity to thank you for your

presentation. I hope you will allow us the privilege of calling upon you again, should we find it necessary.

MR. KERNEY: I shall be very happy to be of help in any way I can.

VICE-CHAIRMAN: We have as our next speaker, Mr. Sol D. Kapelsohn, who is appearing in behalf of the C. I. O. Mr. Kapelsohn.

MR. SOL D. KAPELSOHN: Mr. Chairman, Mrs. Miller, and members of the Committee:

The State C. I. O. feels that the present court system is inadequate or so designed as not to afford the best possible judicial system and service to the public and to litigants in the State of New Jersey. There are several defects which the C. I. O. finds in the present set-up. One of these is an unwieldy Court of Errors and Appeals. Another is the overlapping of jurisdiction in several courts. Another is the separate system of the Court of Chancery. And another is the uncertainty of procedure and justice in the inferior courts, and particularly the inferior criminal courts.

We feel that all of our judges should be persons who devote their full time to their judicial duties and that they should have no other occupation.

We believe that the overlapping of functions in jurisdiction can be eliminated by a unified, integrated court system, and that the Constitution should so provide. There is no propriety, for example—certainly no efficiency—in judges of one court also sitting as judges in another court.

We believe that there is no need for three separate superior courts of civil jurisdiction in the various counties, such as we have now.

MR. BROGAN: You mean, the Common Pleas, Circuit and Supreme Courts?

MR. KAPELSOHN: That's right. We believe that there is no need for a separation in its complete set-up of the civil courts and the courts of equity. I don't believe there is another judicial officer in the country with the personal power of the Chancellor, or another judicial officer in the country so far removed from the people.

So far as concerns the separate Court of Chancery, and to the extent that I have been made aware of what has been said in favor of its retention, I have seen nothing argued for it which doesn't seem to me to have its roots, one way or another, in what you might call a vested or existing interest of some kind.

Probably the two court systems in the country having the largest volume of business are the federal courts and the New York State courts, and they both have experienced no difficulty in theory or in practice, particularly in practice, in having the same judicial officers sitting on cases both in law and equity. There is no such difference,

no such disrelation perhaps you could say, in the types of cases that come before them, in the legal principles involved, or in the judicial functions as the judges must exercise them, as makes it cumbersome, inconvenient or particularly difficult for judges to sit on both types of cases. I suppose all of us have seen that in practice, particularly in the federal courts functioning within New Jersey. Whatever has been said for a separate Court of Chancery in New Jersey, I have heard no criticism of the unification of jurisdiction as it operates, as it is exercised, in the federal courts.

The municipal courts, the courts in our cities, particularly the criminal courts, have long suffered from the influence of local political interest. You know that our police recorders, our police judges, are to a large extent subject to the police department or to the head of that department, and we have found in experience covering no less than many hundreds of cases, in practically every county in the State of New Jersey, in our own personal practice, that to a large extent the police judges have acted as arms of the police force.

MR. BROGAN: How would you eliminate that?

MR. KAPELSOHN: First of all, we believe that there should be a uniform system of police courts, a uniform police court law.

VICE-CHAIRMAN: Is that a matter for legislation or the Constitution?

MR. KAPELSOHN: I think that it is both. I think the Constitution can and should provide that the Legislature may set up a system of uniform police courts.

MR. BROGAN: Isn't that what it does now?

MR. KAPELSOHN: It doesn't set up a system of uniform police courts.

MR. BROGAN: Not in the Constitution, but you know the provisions as well as I do.

MR. KAPELSOHN: I think that the provisions can be so worded as to have a—

MR. BROGAN: You understand, I am not disputing it, but I would like to know what your idea is in regard to eliminating this vice, as you see it? Let's conceive that it exists. How would you eliminate it?

MR. KAPELSOHN: Well, for one thing, police courts, I believe, should be so set up as to be under supervision of a chief justice or a chief magistrate in some form—the judges themselves.

MR. BROGAN: You mean, appoint a hundred, let us say, and send them around to the different places?

MR. KAPELSOHN: Well, even if they are not sent around on a rotating basis or sort of circuit. The judges should be simply appointed or simply selected in some form, and the activities of the police courts should be under the general supervision and admin-

istrative direction of a chief justice or chief magistrate, and the constitutional provisions should require that the Legislature set up uniform police courts.

Now we have police courts of different jurisdictions in different places. We have police courts in cities of different types, in cities of a particular class. We have police court laws, some of which affect only cities of a certain population within the particular class. We have separate laws relating to other police courts in other classes of cities. In some the procedure, both the initial procedure and the appellate procedure, may be found only by reference, and not statutory reference, to the practice which obtained many generations back in the courts for the trial of small causes.

MR. BROGAN: A sort of local law that nobody knows about?

MR. KAPELSOHN: It probably has been on the books for a long, long time, and it is practically impossible for the individual practioner even to determine what all the procedures are.

MR. SOMMER: How would you have a police court judge appointed?

MR. KAPELSOHN: We believe that police court judges should be appointed, first of all, not under a separate provision, but under the same provisions as are set up for the selection of other judges. In other words, whatever provision is made for the determination of the selection of other judges of other courts, the same provisions are to apply in connection with the appointment of police court judges.

MR. BROGAN: By the Governor?

MR. KAPELSOHN: Whatever provision is to be made for the determination and selection of judges in other courts, the same type of provision should apply to the appointment of judges of police courts.

Now, the C. I. O. has not taken a position for the purposes of this Convention on the question of appointment or election of judges. I am aware that on two previous occasions the C. I. O. did take a definite stand on that question, but while I have a personal opinion and belief in the matter, I am here speaking for the C. I. O. as such, and the organization has not passed a resolution on that particular question. But we do feel that whatever procedure is adopted for the selection of other judges should be applicable here.

MR. SMITH: Is that practical, considering the number of judges that there are throughout the State?

MR. KAPELSOHN: I don't see why not.

MR. SMITH: I am a layman. How many judges are you talking about?

MR. KAPELSOHN: Well, you have recorders and police courts in every municipality.

MR. BROGAN: In some you have three and four.

VICE-CHAIRMAN: I believe there are about 564 municipalities.

MR. KAPELSOHN: In some you have only one, in a very few municipalities you have more than one. In Jersey City, I believe, they have four, and in Newark, I think, they have four.

VICE-CHAIRMAN: It runs into about 2,000, that's an approximate figure.

MR. KAPELSOHN: How many municipalities are there?

VICE-CHAIRMAN: 564, that is, including townships.

MR. KAPELSOHN: 564 municipalities—well, I don't believe there are as many as 600 judges.

VICE-CHAIRMAN: Well, it's a substantial number anyway.

MR. KAPELSOHN: Most of them have only one.

MR. BROGAN: Mr. Kapelsohn, you recommend the integration of all courts of original jurisdiction? For example, law, equity, probate, whatever it may be?

MR. KAPELSOHN: That's correct.

MR. BROGAN: You make that recommendation because you think that the present system has broken down?

MR. KAPELSOHN: I don't know whether you would call it broken down.

MR. BROGAN: I mean, what is wrong with the present system? I am talking about the Court of Errors and Appeals now. Everybody says it is unwieldy, and everybody can't be wrong.

MR. KAPELSOHN: At least there is one thing on which there is agreement. . . . Well, one item I have mentioned, your three courts of civil jurisdiction in the counties. You are referring, I suppose, specifically to separation of the equity powers, to equity jurisdiction. I don't think it is operating efficiently. I think the equity judges are too far removed from the persons to whom they should be responsible. As far as the function and management of the Court of Chancery is concerned, I am not here complaining of any specific mistreatment personally—of myself or clients. I can refer the Committee to the Temple Report[1] filed a few years ago.

MR. BROGAN: That is the Temple Report. I am interested now in your ideas.

MR. KAPELSOHN: I haven't a copy of it with me, but I assume you are familiar with it. I can refer you to the Temple Report pointing out some of the gross failings of the Court of Chancery. That is in the nature of an indictment that I don't believe has ever been challenged. I doubt very much whether it can be. That relates to administration, pointing out, for example, that in over a 12-year period, beginning in 1930-1931, while the expense of operation had

[1] Temple, Ralph R. Report on the Constitutional Courts of the State of New Jersey. Submitted to the Commission on Revision of the New Jersey Constitution, July, 1942 (Trenton, 1942).

steadily climbed and although the general public, including most practicing lawyers, I imagine, were under the impression, under the strong impression, that the business of the Court of Chancery had likewise increased tremendously, it had, in fact, been cut in half.

MR. BROGAN: You have as a primary principle that these courts are too remote from those from whom they should not be remote, meaning, I daresay, the people. Would you have a judge amenable to the will of the people, to decide cases in a popular vein, or—

MR. KAPELSOHN: You mean, take a popular vote as to what the decision should be in the case?

MR. BROGAN: No, I don't mean that, but my idea was that the judge should be entirely objective, he should really have a bandage over his eyes. He should be a detached person. Your idea is directly contrary to that, if I understood it correctly.

MR. KAPELSOHN: In handling cases judges, we agree, should be objective, of course, and even in those communities where the office of the judge is an elective office, and the judges are constantly subjected to a vote of approval, in a sense, of their general conduct, as to continuing in office, even there I don't think that there has been any complaint made or heard that the judges have lost their objectivity for that reason.

MR. SOMMER: Has the C. I. O. taken any position as to the term of judges?

MR. KAPELSOHN: Yes, the C. I. O. position is that a judge should hold office for at least ten years.

MR. SOMMER: Has the C. I. O. taken any position on the question of life tenure pending good behavior?

MR. KAPELSOHN: The C. I. O. position is that a judge should not have life tenure merely by virtue of his first appointment. He should be subject to reappointment or re-selection from time to time, so that instead of sort of ignoring his conduct until something blatantly outrageous has come to light, you have an occasion, a periodic occasion, over long periods, for some sort of scrutiny of his behavior in his office.

MR. SMITH: How would you feel about it if there were provisions, Mr. Kapelsohn, whereby a judge might be removed for cause, incompetency, or misconduct, beyond his so-called good behavior period?

MR. KAPELSOHN: I think that such a provision is appropriate in any case, but it doesn't take the place of reviewing his designation after 10, 12 years, because that is something that isn't lightly done, and the actual act of removing a judge or any other public officer from his position during his term of office, is difficult to institute, and it should be difficult to institute. It doesn't take place even

when there is a general feeling of unfitness—that someone else, or anyone else would be very much better—but you can't put your finger on a specific act of misconduct. Persons who are in that position, whether judges or other public officers, should be able, despite those circumstances, to continue to hold their office.

But where you have a definite term of office, after which there is to be a re-selection or designation or appointment, a judge may be allowed to retire from that office despite the absence of a specific flagrant abuse, when he has not come up to the commonly accepted standard, or acceptable standards of fitness for the office, and there is not necessarily anything that is a reproach to his character which would result in his not being re-appointed.

MR. BROGAN: When he is just a blank?

MR. KAPELSOHN: That's right.

MR. SOMMER: Are you satisfied with the impeachment method of removal when you give a ten-year term, with good behavior? Now the quesiton is, would you be satisfied with the impeachment method of removal, as the only method of removal?

MR. KAPELSOHN: Yes, I think unquestionably that will be important, that the method of removal be difficult and cumbersome.

MR. SOMMER: What would you do in a case in which you have physical and mental disability and a failure to resign? Perhaps that is an unfair question?

MR. KAPELSOHN: That is a hard one to answer, and one which I hadn't considered, but I will try to do it.

MR. SOMMER: Would you do it?

MR. KAPELSOHN: Yes, I will be glad to.

VICE-CHAIRMAN: Would you also consider the issue of whether the top court should have disciplinary power, including the removal power?

MR. KAPELSOHN: Was it felt that a provision on that point need be inserted in the constitutional set-up of the court system?

VICE-CHAIRMAN: Well, you need either that, or leave it to the Legislature, but in the absence of that the traditional method is to make impeachment proceedings the exclusive method of removal, particularly if you have tenure.

In answer to a question by Dean Sommer, you said you would rely entirely on impeachment, whereas I want to point out specifically the probability, without expressing a view personally, that you might provide that the top court would have power to remove lower court judges.

MR. SOMMER: That would be a supplementary process.

VICE-CHAIRMAN: Yes.

MR. SOMMER: Mr. Chairman, don't you think we would be glad to receive a memorandum on that?

VICE-CHAIRMAN: Yes, not only on that, but any other material issues.

MR. KAPELSOHN: I will be very glad to do so. In fact, I was going to ask permission to do so anyway. Now, within what time is such memorandum to be submitted?

VICE-CHAIRMAN: I would like to have it within a few days, because we expect next week to go over our tentative draft.

MR. KAPELSOHN: Would next Monday be okeh?

VICE-CHAIRMAN: Yes, Monday would be fine.

MR. KAPELSOHN: I will be very glad to do that, and if any member of your Committee has in mind some other kind of tough nut to crack, if you will let me know, we can probably express our views on that, too.

(Off-the-record discussion)

VICE-CHAIRMAN: You submit whatever additional material you think would be helpful, including the material requested.

Thank you very much, Mr. Kapelsohn.

We have a written brief from the A. F. of L., which sets forth its views.[1] I call it to your attention. I recall specifically that they recommend unification of the courts, the election of judges, and that the jurisdiction of the court be subject to law. That, I think, is an issue which we have not discussed, at least as distinguished from the present notion that it is fixed by the Constitution and not subject to law.

If we can get any further material from the A. F. of L. we will be glad to receive it, but in the meantime we do have their written brief.

MRS. MILLER: I shall follow through on that.

(Off-the-record discussion)

VICE-CHAIRMAN: We had invited Mr. Gaulkin last week when he indicated a desire to appear, but then we had to change the appointment because of our heavy calendar, and we have invited him for today.

We have had some discussion with respect to insurance cases, some of which has been confusing, and I understand that Mr. Gaulkin will, at least in part, discuss some of those problems. Mr. Edward Gaulkin.

MR. EDWARD GAULKIN: Mr. Chairman, Mrs. Miller, and members of the Committee:

New Jersey lawyers generally seem to assume that the opinion of the bench and bar should decide whether or not Chancery shall be continued as a separate court. It is not surprising that lawyers should think so, but it is surprising and somewhat alarming that the public generally should seem to agree that it is largely up to the

[1] The text appears in the Appendix to these Committee Proceedings.

bench and bar to decide that question. The day following the announcement of the membership of the Judiciary Committee, the *Newark Evening News* said *(reading):*

> "Theory behind naming five laymen to the judicial committee was obviously intended to have the group function independently of the courts, but how the selection will be accepted by members of the bar became a major point of speculation as soon as the names were announced. There were many lawyers among the delegates who wanted to have a hand in drafting the judicial article."

The following day the *Newark Evening News* found it necessary to write an editorial apologizing for the presence of laymen on this committee.

Although I have the highest regard for our New Jersey bench, and for my colleagues at the bar, I respectfully submit that the Judiciary Committee and the Constitutional Convention should not arrive at its decision on the basis of a poll of the members of the bar, and solely on the testimony of judges and lawyers, no matter how eminent and eloquent. This question is much more important to the public than it is to the lawyers. The lawyers have gotten along very well with the present system for almost two centuries, and it won't hurt them one bit if it continues. That is why one cannot depend too heavily on the opinion of the lawyers. As Professor Borchard says in his *Declaratory Judgments,* a recent book (Second Edition, *page vii*) : "The simplification of procedure is not as insistently demanded by judges and practitioners as it ought to be by litigants who pay the price of obstructive technicalities."

Professor Borchard goes on to speak of "the many obstructions to the administration of justice which the current legal system incorporates and tolerates," and he says *(reading):*

> "These obstructions are cherished by many judges and lawyers as indigenous to the system and to the judicial process. They are inclined to forget that both Bench and Bar are merely servants of the people, the better to enable the administration of justice to be accomplished.
>
> This lack of social perspective accounts for the inhospitality of certain judges, if not of the system itself, to the simplification of procedure . . .
>
> New Jersey by its persistent refusal to break down the separate administration of law and equity, is a flagrant example of this denial of justice. The poor glazier in *Moresh* v *O'Regan* was in the New Jersey courts for four trials and appeals before he could establish the simple fact that he was not subject to the requirements of the insurance law."

Professor Borchard continues:

> "Procedure should be the 'handmaid of justice,' a means to an end. Instead, in all mature legal systems cultivated by a professional guild, from the earliest to the latest, procedure tends to become rigid, stereotyped, and over-technical, an end in itself, often seemingly oblivious to the practical needs of those to whose ills it is designed to minister. Litigants thus often become pawns in a game, the social cost of which is excessive and the result of which is frequently unnecessarily cumbersome and socially undesirable. Substantive rights often become the incidents of procedural fencing." *(Page xiii)*
>
> "To meet this criticism, all systems have periodically undertaken re-

> forms for the simplification and expedition of procedure. Yet when the initiative has come from practitioners or the judges, votaries of the craft, it could hardly have been as insistent or the result as effective as if the initiative had come from those who pay the price of the obstructing technicalities."

I therefore say that the public is not interested in the fascinating niceties of the law. What every client wants is a speedy decision, by an honest judge, at small expense. The question then is, which system is more likely to give this to the public? That is a question which the public—not the lawyers—should decide.

After 18 years of active practice, it seems to me that a separate Court of Chancery is not in the public interest, because it means unnecessary delay and needless expense, which would be eliminated in an integrated system such as we have in the federal court.

Our system of separate courts of law and equity often means two or more trials—with their concomitant appeals—when one trial and one appeal should suffice. It often means cases are hotly contested and thoroughly litigated at great expense of money, time and effort, only to be thrown out because the cases were in the wrong courts. It often means justice denied because long delayed or too expensive.

Permit me to give you a few examples. Some of these examples are from my own experience. The remaining cases I found by taking a very quick glance at the *New Jersey and Atlantic Digest* one evening. An exhaustive study would, undoubtedly, reveal many more cases in the reports.

Now, the first case I would like to take up is the case of *Metropolitan Life Insurance Company* v *Tarnowski,* decided by the Court of Errors and Appeals in *130 N. J. Eq. 1.* In that case a suit had been started at law on an insurance policy for about $950—started by the beneficiary, Mrs. Tarnowski having died. In the law court, the Metropolitan Life Insurance Company had filed a petition for a declaratory judgment in an effort to get the entire issue settled once and for all. The case was tried for two days and the judgment went for Mr. Tarnowski and against the insurance company. The insurance company thereupon went into the Court of Chancery to cancel the policy for reasons which the insurance company asserted the law court had been powerless to hear because they were equitable defenses. The case was tried all over again before a Vice-Chancellor, and the Vice-Chancellor cancelled the policy. Thereupon it was appealed to the Court of Errors and Appeals, which sustained the findings of the Vice-Chancellor. So, for a policy of approximately $950, you have a total of two full trials and an appeal before the Court of Errors and Appeals.

In the case of *Kelsey* v *Agricultural Insurance Company*—Clarence Kelsey was a well-known New Jersey lawyer. Now, Mr. Kelsey himself had occasion to sue the Agricultural Insurance Company

on a fire insurance policy. He sued at law and he won on the merits. The insurance company took an appeal to the Court of Errors and Appeals, and the Court of Errors and Appeals reversed the decision, *(80 N. J. Law 441)* on the ground that parol evidence had been received in law which should have been received only in the equity court. So the Court of Errors and Appeals reversed the judgment in favor of Mr. Kelsey, and Mr. Kelsey had to start all over again in the equity court. How he made out in the equity court does not appear in the reported cases.

In *Metropolitan Life Insurance Company* v *Urback,* Mrs. Urback was the beneficiary of a $2,500 life insurance policy on the life of her husband. Her husband died and in September 1938 she started suit at law on the policy. After the case was at issue at law and ready to be tried, in April 1939, some seven months later, the insurance company went into Chancery Court and asked that the policy be cancelled on grounds which were not cognizable at law. Mrs. Urback's attorney immediately made a motion to strike out the bill in the equity court, on the ground that the case was one that should stay at law, particularly in view of the fact that the case had already been started at law and was ready for trial. The Vice-Chancellor denied the motion to strike the bill and the case was appealed to the Court of Errors and Appeals. The Court of Errors and Appeals on April 25, 1940, 19 months after the original inception of the proceedings, handed down a decision *(127 N. J. Eq. 253,* at *254),* in which they said this *(reading):*

> "We conclude that the bill should be retained until a hearing is had and all the evidence presented and that the questions raised by reason of such motion to strike should not be determined until that time."

In other words, the court told Mrs. Urback for her $2,500 first to try the case on the merits, and then it would decide whether she was in the right court or not. Nineteen months of litigation and the courts could not make up their minds whether the case belonged at law or in equity.

Shortly after this decision of the Court of Errors and Appeals, the case came on for trial at law. It was tried for two days and there was a verdict for Mrs. Urback. The insurance company took an appeal to the Court of Errors and Appeals, and the Court of Errors and Appeals reversed because of an error that the trial judge had made in the charge to the jury, and sent the case back for a second trial at law. The case was tried a second time at law, and this time the judge who heard the case felt that he was compelled by the decision of the Court of Errors and Appeals to direct a verdict against Mrs. Urback, which he did. Mrs. Urback then appealed to the Court of Errors and Appeals, which again reversed and sent the case back for a third trial at law. The case was tried the third

time at law, and in November 1943 the jury found for Mrs. Urback and a judgment was entered.

The insurance company then, after five years of litigation, after three trips to the Court of Errors and Appeals, after three trials at law, after a preliminary hearing in Chancery—after five years' time the $2,500 policy was taken back to the Court of Chancery by the insurance company to have the policy cancelled on the ground of fraud. There was a hearing all over again before a Vice-Chancellor and a trial on the merits, and the Vice-Chancellor decided after hearing the case on the merits that Mrs. Urback was entitled to recover and that there had been no fraud.

The insurance company then again took the case to the Court of Errors and Appeals, and the case was heard in the Court of Errors and Appeals for the fourth time, and the Court of Errors and Appeals affirmed.

So that it took eight years, about equally divided between the two courts, to collect $2,500, three years of which was spent after the final judgment in the court of law. In other words, Mrs. Urback had to go on for three years more to collect her $2,500—which, parenthetically, she sorely needed—because it was the only policy she had. She had a six-year-old daughter when the case started, and she had to go to work to support the child.

MR. SMITH: How much did the litigation cost Mrs. Urback? How much did she have left of the $2,500 after paying all the expenses?

MR. GAULKIN: She had very little, and the little she had was by reason of the fact that the original attorney was a relative and handled it gratis, and the only one who was paid was the attorney who tried the case and took the case to the Court of Errors and Appeals. And even then, when it came down to geting paid, there just wasn't enough money in the policy to pay for the work and effort. I should judge, roughly, there was about $900 in costs alone involved, some of which was recovered from the insurance company, but the rest of which was not.

MR. PETERSON: Haven't the insurance laws—I know they haven't since 1938, I don't believe they have—haven't the insurance laws been changed so that a policy is incontestable after one or two years?

MR. GAULKIN: Yes, that's right, but these cases which I mentioned were cases in which the death happened within the contestable period—with this exception, however, that I would like to point out, since the question has been raised. A number of cases in the New Jersey Court of Errors and Appeals and in the Court of Chancery and in the Circuit Courts have made inroads on the incontestability clause. For example, it has been held in *Chuz* v

Insurance Company that the incontestability clause applies only to the original policy, but does not apply to reinstatement. In other words, if for some reason the policy lapsed and then your policy was reinstated, the insurance company could come in six years, seven years, ten years later, to cancel the policy for fraud.

Now, in another case, *Metropolitan Life Insurance Company* v *Lodzinski,* the Court of Errors and Appeals handed down an opinion which contains language which is susceptible to the interpretation that where the incontestability provision in the policy reserves the right to cancel for fraud, a bill to cancel for fraud may be brought even after the incontestability period. The word "fraud" in New Jersey at the present time includes equitable as well as legal fraud, and probably from the testimony given heretofore, and as you practicing attorneys know, in equitable fraud no moral intent to defraud is required.

So that in the situation today life insurance is extremely dangerous from point of view of the policyholder. Once he dies it's a question between the insurance company and the beneficiary.

MR. SMITH: Why did the insurance company contest the payment of the insurance policy?

MR. GAULKIN: In the *Urback* case?

MR. SMITH: Yes.

MR. GAULKIN: Well, the pleadings, as I recall it, set forth the following defense: Some 4½ years before the policy was issued Mr. Urback had had fainting spells. He went to his doctor, who sent him to a neurological clinic in New York, where he was checked for four days, five days, and they could find absolutely nothing wrong with him. On the basis of the findings of the New York Hospital, the doctor concluded that what he needed to have done was to have his tonsils taken out, which was done. The insurance company raised the defense that he had been in the hospital and had not told the insurance company; that he had had his tonsils removed and had not told the insurance company; that he had had an infected finger and had not told the insurance company, and the last one was that he had been pushing his truck out of a snow bank and bruised his ribs—he was a truck driver—and one day single-handed he lifted his truck out of a snow drift and hurt his ribs, as a result of which he went to the city hospital to see if he had cracked his ribs and they found nothing. He died at the age of 39, apparently in good health, and that was the case.

Now, I should like also to point out to the Committee a series of fours cases decided by the Court of Errors and Appeals: *Grant* v *Olsen, 104 N. J. Eq. 242; Bailey* v *B. Holding Co., 104 N. J. Eq. 241; Clark* v *Badgely, 105 N. J. Eq. 534;* and *Slomkowski* v *Levitas, 106 N. J. Eq. 266.* Those were four cases in which four separate

sets of lawyers were involved. Every one of the cases was separately litigated. Every one of those cases was separately appealed to the Court of Errors and Appeals; every one of those cases was separately thrown out by the Court of Errors and Appeals, on the ground that the case did not belong in the Court of Chancery but should have been tried at law.

Shortly after those four cases were thrown out, the Court of Errors and Appeals decided the case of *Richeimer* v *Fischbein,* in *107 N. J. Eq. 493.* Now, all of those cases involved situations where the prospective purchaser of real estate had paid a deposit on a contract to buy real estate, and the seller having failed to perform the contract, the buyer sought to impress a lien on the real estate for the return of the deposit.

In *Richeimer* v *Fischbein,* the Vice-Chancellor felt that on the basis of the four previous cases I have mentioned, he was compelled to dismiss Richeimer's bill to impress his lien. The Court of Errors and Appeals reversed, on the ground that there was certain language in the pleadings in the *Richeimer* case which did not appear in the other four cases. In other words, because of some slight difference in the language of the pleadings the four cases which had been tried and decided on the merits and appealed to the Court of Errors and Appeals, had all been thrown out, with instructions to start all over again. Incidentally, I might point out that the difference in the pleadings in those five cases was so slight that an article in the *Mercer Beasley Law Review* denied, after comparison of the pleadings in all these cases, that there was a difference, but there you have it.

Nazzaro v *Globe & Republic Insurance Company, 127 N. J. Eq. 297,* was a case involving a suit over a $1,500 fire insurance policy. The *Nazzaro* case came up for trial in June 1937, and just before the trial Nazzaro's attorneys discovered that there were certain elements in the case that Nazzaro might not be able to prove at law. Nazzaro then had to go into equity to enjoin the company from raising certain defenses, and he won in equity. The insurance company took an appeal to the Court of Errors and Appeals, and the Court of Errors and Appeals affirmed on April 25, 1940. All that was decided by that affirmance after three years of litigation, a hearing before a Vice-Chancellor and an appeal to the Court of Errors and Appeals, was that the insurance company should be enjoined from setting up certain defenses at law. As to the rest of it, as to collecting his $1,500, Nazzaro was told he would have to go back to the law courts.

I might point out at this point, that situations like this and the previous cases that I mentioned, and the cases that I will mention subsequently, could not happen in an integrated court.

To compare with the *Nazzaro* case, when these equitable questions arose in the course of the trial in the United States District Court, it meant a delay of a week or two weeks, or possibly a month, to file the amended pleading and give the adversary an opportunity to answer the pleadings. But that was all the delay involved, and we went right on with the trial. For example, in the case of *Brown* v *Metropolitan Life Insurance Company* which was brought before Judge William Smith in the United States District Court, Mr. Dill representing the insurance company and I opened to Judge Smith and the jury and explained the fact that there was an equitable counterclaim and an action at law. Judge Smith said, "All right, let's start with the jury and see how far we get." We tried the case before the jury all that day, and at the end of the day Judge Smith called counsel and said, "Gentlemen, don't you agree that this involves questions of law and of equity?" We agreed and the jury was dismissed; the case went on to the proof of the equitable and legal defenses. The whole thing was submitted to Judge Smith and he decided it. We appealed to the Circuit Court of Appeals, where it was finished, and that was the end of the case. But in the equity courts under our New Jersey system that could not happen.

I would like to cite some other cases: *Capraro* v *Propati, 126 N. J. Eq. 67,* reversed by the Court of Errors and Appeals, *127 N. J. Eq. 419; Verdi* v *Price, 125 N. J. Eq. 579,* reversed by the Court of Errors and Appeals, *129 N. J. Eq. 355; West Long Branch* v *Hock, 99 N. J. Eq. 103,* reversed by the Court of Errors and Appeals, *99 N. J. Eq. 356; Henry* v *Thompson, 78 N. J. Eq. 142,* reversed, *79 N. J. Eq. 200; Essex County Freeholders* v *Newark City National Bank, 48 N. J. Eq. 51;* reversed, *48 N. J. Eq. 627; Union Water Co.* v *Kean, 52 N. J. Eq. 111,* reversed, *52 N. J. Eq. 813; Norton* v *Sinkhorn, 61 N. J. Eq. 508,* reversed, *63 N. J. Eq. 133;* all cases involving similar situations. I won't take up your time to go into the facts, but they were all cases litigated on the merits, decided below, appealed to the Court of Errors and Appeals, reversed because started in the wrong courts, and they had to start all over again.

And against the idea that this only happens to incompetent lawyers, I call your attention to the fact that in the case of *Haskins* v *Ryan, 17 N. J. Eq. 575,* the complainant was represented by Robert H. McCarter. The case was tried and was bitterly contested. The total litigation through the lower courts and the upper courts took six years, and after all that Mr. McCarter was thrown out on the ground that he had started in the wrong court, and he had to start all over again.

Now, as I stated, these are only a few of the reported cases, selected hurriedly. There are many more reported cases, and in addition there must have been a great many more similar cases which never

reached the reports, in which litigants were thrown out of one court or the other because they were in the wrong court. To these litigants who did start all over again, it meant great delay and added expense. Undoubtedly many litigants had to give up after being thrown out of one court because of the time or the expense. It must be remembered that when a litigant is thrown out of Chancery he usually has to pay not only his own lawyer, but costs and counsel fees to the opponent.

Furthermore, because it is so essential to begin the action in the right court, lawyers must spend time deciding, not the merits of the case, but in what court to sue—time for which the client must pay and which delays a decision on the merits.

For these reasons I respectfully submit that an integrated court would mean speedier justices at smaller expense.

Now, if it were shown that separate courts of law and equity produce a higher type of justice, then perhaps it would be worth the delay and the expense. But I do not believe that our justice is superior to New York justice, or Massachusetts justice, or federal justice, or the justice of most of the 45 states which do have integrated courts. No system can guarantee honest judges or learned ones. If our brand of justice is superior, it is because our courts have laid down principles of higher ethical content or superior social validity than courts of other states. I know of no such principles.

On some subjects, the law in New Jersey, as laid down in our decided cases, does differ from the law as laid down in the courts of other states, but that proves nothing. Even in statute law such differences exist, because of physical, economic or social differences in the states.

Secondly, when our courts do differ from those of other states, they are not always on the side of the angels. In fact, our system of separate courts, made rigid by our Constitution, has often made it impossible for the Legislature to adopt useful laws, or has hampered their operation when adopted. These laws have been stricken down in whole, or in part, as unconstitutional, on the ground that they have enlarged the jurisdiction of one court at the expense of the other. For example, let us take the declaratory judgment, one of the greatest advances in judicial procedure. New Jersey was the first state to authorize it by statute, yet its use has been hampered and restricted far more in New Jersey than in any other state which has adopted the act.

Professor Borchard, again, in an article, "Declaratory Judgments in New Jersey," Volume 1, *Mercer Beasley Law Review,* No. 2, May 1932, reviewed the cases and said this *(page 26) (reading):*

> "It will be seen that the main restrictions upon declaratory relief in New Jersey arises out of the rigid distinction which courts of equity have

> maintained between equity and legal relief. Inasmuch as one of the advantages of the suit for a declaration is the conclusive determination of disputed issues, the division of prayers between separate courts constitutes a serious handicap to litigants. Whether they approach first a law court or first an equity court, they cannot have any assurance that the issue will be completely determined."

Now an example, and that is the case of *Englese* v *Hyde, 108 N. J. Eq. 403,* decided in June 1931, by Vice-Chancellor Bigelow, one of our finest Vice-Chancellors. In that case, Englese purchased a piece of property, and after purchasing the property he discovered that a man by the name of Hyde had recovered a judgment against the previous owner of the property, and now Hyde sought to sell the property in Englese's hands to satisfy the judgment. Englese was not sure that that judgment was a lien against his property, so he came into Chancery. He asked the Court of Chancery to decide whether the lien was a valid lien or not. If it was a valid lien, he wanted to pay it. If it wasn't a valid lien, he wanted it cancelled of record.

Vice-Chancellor Bigelow reviewed all the authorities and came regretfully to the conclusion that the Court of Chancery had no jurisdiction. He felt he was bound by a series of cases of which this is a sample:

In the case of *West Jersey and Seashore Railway* v *Smith, 69 N. J. Eq. 429,* the court said *(reading):*

> "The sole question is whether certain judgments are or are not valid liens against premises, title to which is claimed by complainant. If they are not liens, the sheriff's sale will do no harm to the complainant. If they are liens, the sale should not be enjoined. Whether they are or are not is a legal and not an equitable question."

In other words, what the court says is, stand by and let him sell. If it's a valid lien, you have lost your property. If it's not a valid lien, you have not been hurt. It's like telling a man to look in the barrel of a pistol and pull the trigger to see if it is loaded. If it isn't loaded, it will do no harm; and if it is loaded, it won't make much difference, he will never know the difference anyway.

(Laughter)

Vice-Chancellor Bigelow said this about that case *(reading):*

> "These cases disclosed a serious defect in our judicial system. The owner of land could not ascertain or enforce his rights in the Court of Chancery because the controversy was legal and not equitable; he could not proceed in a court of law because no form of action at law permitted an adjudication of the claims of the parties until after the lien of the judgment. If it was a lien, it had been transformed into an absolute title. It was to remedy such situations and to provide a method whereby rights and liabilities might be conclusively ascertained in order that the parties could intelligently order their affairs, that the legislature enacted the Uniform Declaratory Judgments Act. However, the Court of Chancery cannot, by force of this statute declare that the defendant's judgment is or is not a lien on complainant's land, since this is a legal question. *Paterson* v *Currier, 98 N. J. Eq. 48.*"

So after all that, Vice-Chancellor Bigelow said he was sorry, but Mr. Englese would have to go into a law court to find out where he stood.

Similarly, we have another statute which was considered of great advantage over the previous law, the Uniform Fraudulent Conveyance Act. The operation of the Uniform Fraudulent Conveyance Act has been hamstrung in New Jersey, again because of the separation of the courts. The Court of Errors and Appeals in *Gross* v *Pennsylvania Mortgage and Loan Company, 104 N. J. Eq. 439,* held that first there must be a suit at law and then after judgment is recovered a second suit may be started in equity.

Professor James A. McLaughlin, in *46 Harvard Law Review 404,* discussed the application of the Uniform Fraudulent Conveyance Act, and at page 445 he had this to say *(reading):*

> "The peculiar constitutional provision in New Jersey which prevents the employment of expeditious equitable remedies illustrates the obstacles that are occasionally to be expected in extending the application of the principle of uniform legislation over the ramification of state constitutional law."

I might also at this point quote another excerpt from Professor McLaughlin's article, which refers to one who is no longer a Vice-Chancellor. I offer his quotation without comment *(reading):*

> "As matters now stand in New Jersey, it would appear that there is only one vice-chancellor who has not been educated by the combined efforts of the legislature and the Court of Errors and Appeals. A reading of his opinions would indicate a highly diversified capacity for error."

If this Committee again freezes the law courts and the equity courts in separate constitutional compartments, it will mean that many reforms which the Legislature will enact for the public good will be struck down or crippled, not because the laws are not good ones, but because they enlarge or contract the sacred jurisdiction of one or the other of these courts.

It is further argued that our Court of Chancery is especially adept in administering equitable remedies, such as specific performance, injunction, reformation, etc., and in handling receiverships. I believe an analysis will show that the integrated courts are handing down injunctions, granting specific performance, reforming instruments and doing all of the things our Court of Chancery does, and as well. For example, one of the most important injunctions handed down in recent years—whether you agree with the injunction or not —the injunction against John L. Lewis and the United Mine Workers, was handed down by a judge of an integrated court, and affirmed by the United States Supreme Court. The United States courts handle receiverships and reorganizations of private corporations and public utility corporations involving the largest companies in America. I am quite sure that an analysis of the decisions of the courts

of the various states would demonstrate that our justice is not superior.

Finally, it is argued that assuming we do away with a separate Court of Chancery, judges should be assigned permanently at the time of their appointment to the Chancery Court, because only an expert can fully understand and dispense equity; that the Chancellor and the Vice-Chancellors and Advisory Masters are such experts, and that only by devoting their full time to Chancery matters could future judges be equally expert. It is argued that from judges who—as in the federal courts—also hear law cases, we will get a diluted, inferior type of equity.

As a practicing lawyer, I am surprised by the argument that only an expert can understand equity. In the law schools from which most of the New Jersey lawyers graduated, equity is a required subject and every practicing lawyer who went to law school, studied it. Every active practitioner in New Jersey practices in the Court of Chancery, as well as in the courts of law. I personally know of no lawyer in New Jersey whose practice is exclusively before the Court of Chancery, but there are hundreds of lawyers in New Jersey who practice with equal ease and assurance in equity and at law. If these men may be called Chancery Court experts because they practice extensively and successfully before the Courts of Chancery, they are simultaneously law experts, and they pass from court to court without difficulty.

Our Chancellor, his Vice-Chancellors and his Advisory Masters were all law judges or practicing lawyers before their appointment to the bench. Chancellor Oliphant was a Circuit Judge and then a Justice of the Supreme Court, as was Chancellor Campbell before him. Vice-Chancellor Berry was a Common Pleas Judge, as were Vice-Chancellors Stein and Egan. Vice-Chancellor Jayne was a Circuit Judge; Vice-Chancellor Kays a lay Judge of the Court of Errors and Appeals; Vice-Chancellor Bigelow, Prosecutor of Essex, and so on. Not one of the Chancellors, Vice-Chancellors or Advisory Masters practiced exclusively in Chancery before his appointment.

I shall not take up the time of this Committee with a biography of every Chancellor and Vice-Chancellor, but I would like to point out that Chancellor Oliphant is the eleventh Chancellor since the adoption of the Constitution of 1844. Of these 11, six—Green, Magie, Pitney, McGill, Campbell and Oliphant—were judges of the Supreme Court or other law courts when they were appointed Chancellors. Two of them, Williamson and Zabriskie, had been prosecutors. Of the other three, Halsted, Runyon and Walker, only Walker, who was promoted from Vice-Chancellor, could be considered unusually experienced in Chancery. According to Keasbey's work, *Courts and Lawyers of New Jersey,* page 759, Chancellor

Runyon was a "successful jury lawyer," while Chancellor Halsted was an ordinary practitioner.

It probably would be conceded that our Chancellor and his Vice-Chancellors and his Advisory Masters are not Chancery experts when appointed, but it probably will be argued that they have become, or will in due course become, such experts if their energies are not dissipated by hearing law cases as well. It is inferred also that the law judges will make better law judges if they are confined to hearing law cases.

If a lawyer can be a good equity practitioner and a good law practitioner at the same time, why cannot a judge? One of our greatest Chancellors was Henry W. Green. For 14 years he was Chief Justice. In 1860 he became Chancellor, and served until 1866. These were the formative years of the Court of Chancery and, presumably, among the most important ones. Now Mr. Keasbey in his book *Courts and Lawyers of New Jersey, (page 718),* said this about Chancellor Green *(reading):*

> "Chief Justice Green was brought up in the straitest sect of common law lawyers. He had studied out and mastered the principles of the common law; his mind delighted in the logic by which they were worked out and applied but, with his strong sense of justice and practical knowledge of affairs, he had adapted the principles of the common law to new conditions and, when he came to deal with questions of equity, he did so with the same thoroughness of research and the same accuracy of reasoning, and the equity system as worked out and applied by him in New Jersey was based upon the precedents and established principles of the English Chancery and the best equity judges in this country. It was perhaps the common law training of a mind so strong and so self-reliant as his that brought it about that his decisions as Chancellor worked out the system of equity as a logical system based upon precedents. Without it, the decisions might have been just, but they would not have rested so firmly upon established principles or have formed so safe a basis of authority for the guidance of his successors."

Chancellor Magie had been a Justice of the Supreme Court 17 years and Chief Justice three years before he became Chancellor, yet Keasbey says he was a "great equity judge." Before he became Chancellor, Mahlon Pitney had been a Justice of the Supreme Court from 1901 to 1907, and in 1912 he resigned as Chancellor to become a Justice of the United States Supreme Court. In 1877 Amzi Dodd, the first Vice-Chancellor, resigned as Vice-Chancellor to become a lay Judge of the Court of Errors and Appeals. Later, at the request of Chancellor Runyon, he came back and served again as Vice-Chancellor. Vice-Chancellor Reed became a Justice of the Supreme Court. There are, undoubtedly, similar instances of judges serving in the law courts and in the equity courts and making a good record in both.

I would like to point out that until 1871 there were no Vice-Chancellors, and from 1871 to 1899 there was only one Vice-Chancellor. All the cases were decided either by the Chancellor himself,

or else the Chancellor referred cases for decisions to Masters, Special Masters and Advisory Masters. All of those were practicing lawyers, practicing in the law and equity courts. This was the period during which the domain of equity jurisprudence in New Jersey was being worked out. The formative years are usually the most difficult and the most important. The New Jersey equity principles, of which we are so justly proud, were largely molded by men who did not spend their time exclusively in equity.

It must further be remembered that the supervision of the development of equity jurisprudence in New Jersey has been in the hands of the Court of Errors and Appeals which, on appeals from the Court of Chancery, consists entirely of law judges. Some of the most important doctrines in equity have been established by the Court of Errors and Appeals over the opposition of the Court of Chancery. For example, a leading case is that of *Vanderbilt* v *Mitchell, 71 N. J. Eq. 632,* reversed by the Court of Errors and Appeals in *72 N. J. Eq. 910*—and I have had only one course in equity, which I studied under Dean Sommer, who discussed that case—

MR. SOMMER: Did I teach equity?

(Laughter)

Mr. GAULKIN: *Vanderbilt* v *Mitchell* is one of the leading cases in equity in this country, and appears in many of the textbooks on the subject. In that case John Vanderbilt claimed that his wife had caused a birth certificate to be filed falsely, showing him to be the father of a child born to her. He demanded that so much of the birth certificate as alleged his paternity be cancelled as fraudulent. Vice-Chancellor Garrison reviewed the authorities, found no record of any such proceeding ever having been maintained, and therefore dismissed the bill, making this comment, which I quote *(reading):*

> "As Pomeroy has well said, the question nowadays to be determined by a court of equity is 'whether the circumstances and relations presented by the particular case are fairly embraced within any of the settled principles and heads of jurisdiction which are generally acknowledged as constituting the department of equity' . . .
>
> As I have before said, I know of no recognized head of equity jurisdiction under which this bill could be entertained. The demurrer must therefore be sustained."

That opinion was reversed by the Court of Errors and Appeals, in an opinion by Judge Dill, who was a lay judge of the Court of Errors and Appeals. In an excellent opinion Judge Dill had this to say as to the approach of the Court of Errors and Appeals to equity jurisdiction, as distinguished from the approach of the so-called expert *(reading):*

> "The case presented is novel in incident, but not in principle, but it is no objection to the exercise of jurisdiction that in the everchanging phases

> of social relations a new case is presented and new features of wrong are involved."

The Court of Errors and Appeals said that the birth certificate should be cancelled.

In short, a judge can be a good equity judge and a good law judge at the same time. Indeed, a good judge must be both even under our present system. In order to determine whether the remedy at law is adequate and complete the Vice-Chancellor must know the law side as well as the equity side. Many cases in equity involve legal questions which the Court of Chancery will determine. Some of the equitable maxims themselves indicate this. For example, quoting from the title "Equity" in the *New Jersey and Atlantic Digest* again, we have "Equity follows the law"; "When equity takes cognizance of the case it will give complete relief"; "If equity has jurisdiction of the case it will settle all questions legal and equitable," etc.

Certainly some judges will like equity cases better, just as other judges will prefer criminal cases, or civil trial work, or probate cases. Certainly some judges will be more proficient than others in certain types of cases. At the time of his appointment, however, it is not at all certain where the new judge will do his best work. The best use of judicial manpower will be to put each judge as far as possible on the types of cases he handles best, and inevitably that will happen in an integrated court with a capable administrative head. Furthermore, it must be remembered that not all of our Chancellors and Vice-Chancellors have been great and good.

Impeachment is an unwieldy weapon, and will never reach the indifferent or the incompetent. For the safety of the public and for the good of the court, the administrative head of the integrated court should have the power to transfer good judges to positions where they will do the most good; poor ones, where they will do the least harm.

For these reasons, it is my earnest recommendation that for the good of the public, and for the courts, that the Court of Chancery and the court of law be completely under a system similar to that which they have in the federal courts.

MR. SOMMER: Might I ask—

MR. GAULKIN: Surely.

MR. SOMMER: What is the situation in a case like this? I institute my action in the court of equity. It is finally determined that I am not entitled to equitable relief, and that any relief to which I may be entitled must be obtained from an action at law. Now, in the meantime, the statute of limitations is running and I am confronted in the action at law by a plea of the statute. The statute cannot be prevented from running by the fact that an action was instituted in equity and there determined adversely to my claim.

MR. GAULKIN: That is precisely so.

MR. SOMMER: And, therefore, I may come too late for the relief at law which may be the only relief I am entitled to.

MR. GAULKIN: Precisely so, Dean, except in those cases where there is a transfer of the cause of action, but that won't help you in your situation where the law court determines that your cause of action at law is a new action.

VICE-CHAIRMAN: And reverse the situation, so that the action is started at law and an equitable defense sought to be raised is excluded by the statute running there. Wouldn't the same thing apply there?

MR. GAULKIN: Precisely. As a matter of fact, that was one of the grounds of appeal in the *Nazzaro* case. There, however, the court held that in view of the fact that we hadn't discontinued the action at law and had simply filed a bill in Chancery to help the action at law, we were all right, but if we had discontinued the action in the *Nazzaro* case and started all over again, we would have been out of luck. There are numerous cases of that sort.

MR. SOMMER: You lost not only the opportunity, but lost the remedy.

MR. GAULKIN: Precisely, plus the additional fact that in most insurance cases the policy fixes shorter periods of time within which to sue, shorter than the statute of limitations. Fire insurance policies in New Jersey require that action be instituted within one year after the fire, and as you can see by the cases I have mentioned, you rarely get a decision from the court within that time.

MR. McMURRAY: Yes, but in your statements where you favored integration of equity and law you have referred to the federal system quite frequently. Now, if you were writing the Judicial Article in the Constitution, how far would you go in following the federal set-up?

MR. GAULKIN: Well, as to draftsmanship, I haven't given that much thought. Of course, as we all know, the federal provision is very brief and has worked out very well. Personally, I would see no objection to the same provision in our State Constitution, leaving the creation of the courts to the Legislature as occasion requires from time to time. We have had, particularly in the federal courts, situations where under stress of war we have had new types of cases arising which have created a good deal of litigation, such as the O.P.A., etc. Our Legislature should be free, I think, to establish the courts needed in such emergencies and to abolish them when the emergency is over.

MRS. MILLER: I would like to ask a question as to the number of dual actions there are where litigants have to start more than one action. Do you know how many there are, Mr. Gaulkin?

MR. GAULKIN: I couldn't answer that at this time. These cases

I selected, I selected in one evening's work in my office, and as you see, there are quite a few. In my own personal practice, which isn't tremendously extensive, I have had a great many cases involving the same problem. I have a problem on my desk now. I have withheld filing a bill in equity for a declaratory judgment on a health and accident policy. I have held it up for the past four weeks, exploring cases in New Jersey to make sure I am going to be in the right court after I start. If I could bring it in the federal court I would be delighted, but unfortunately it's a very small health and accident policy. The whole policy, in case of death, only pays $2,000, and the man's health and accident benefits are only $20 a week. So I have a very small amount involved, and I can't go into the federal courts because it isn't $3,000. And yet, I must go into court at my peril and find out whether I am in the right court.

MR. WINNE: What you have said is very interesting to me. I think that your experience is quite extensive in insurance policy work where the insurance companies contest for one reason or another—cases where there might be fraud involved, which is quite difficult and quite different. I don't believe the average practitioner runs into any difficulty at all in being in the wrong court. I have been practicing law since 1912 and I haven't had such difficulty. I don't believe I ever had such a case in our office where we had any trouble at all—of cases started at law.

MR. GAULKIN: Well, Mr. Winne, that's why I cited the case of *Richeimer* v *Fischbein,* and the other list of cases. Those cases did not involve insurance, but involved real estate transactions, which, as you know, are very much an every-day proposition. Then there are the declaratory judgment cases. If you want the terms of a will, or deed, or even a union contract—one of our most interesting cases on declaratory judgments was a situation where a labor union asked for a declaratory judgment whether their union contract was or was not in force, so that the local union would know whether to go out on strike or abide by the contract, or what. In these cases you have to figure out, at your peril, where to start the action. And then there's Mr. McCarter's case that I mentioned before, *Haskins* v *Ryan*—Mr. McCarter was an able lawyer and there's no question about his knowing the procedure; and all those cases that I mentioned simply by name and citation, which I think the stenographer took, none of those cases were insurance cases.

VICE-CHAIRMAN: Mr. Gaulkin, we had some figures submitted by the Essex County Bar Association, which indicated that the reported cases involving a jurisdictional question were about one-third in the most recent volume. Would that approximate your estimate?

MR. GAULKIN: I believe that would be a fair estimate.

VICE-CHAIRMAN: Any further questions of Mr. Gaulkin? If

there is no further question, I would like to ask you a question with respect to the remarks of our last witness. He recommended that the Constitution seek to provide some system which would centralize power at the magistrate's level. As I understand it, his plan would be to have a magistrate's court which would be composed of all the magistrates from the various counties, appointed by a central appointing power. Have you ever considered revision of the magistrate's set-up?

MR. GAULKIN: Well, that is a very, very broad field. To begin with, I do know this, that the law relating to the magistrates is statute law. The statutory law is sorely in need of overhauling and revision. I do think that all of the magistrate's courts should be governed by one or two types of legislation, perhaps one type to take care of the large municipalities, like Newark, Elizabeth, Camden, and another statute to take care of the small municipalities. As we have it now, we have different statutes relating to boroughs, cities of first class, townships, etc. Furthermore, I don't think that the Constitution should enter into the question of the magistrate's courts. We are a growing State, we have surburban and rural sections, and I think it should be left to the domain of trial and error, in the hands of the Legislature, and not frozen into the Constitution.

MR. SOMMER: What do you say to this thing? What do you think of the superior courts standing over these minor courts?

MR. GAULKIN: I think that that would be extremely helpful. Either that, or I have always had the idea that somewhere, perhaps in the State Government, in the executive, there should be a Department of Justice that would control some of the administrative features of all the courts, from top to bottom. And I do think that your Chief Justice should be the administrative head of the higher courts, in other words, the Court of Errors and Appeals, the intermediate appellate courts, and also your trial courts.

VICE-CHAIRMAN: Do you favor intermediate appellate courts, or do you prefer a system of unified courts and one appeal directly to the Court of Appeals?

MR. GAULKIN: It seems to me that with New Jersey in its present size, I think one Court of Appeals should be sufficient, with the power in the Constitution to enable the Legislature to either create appellate divisions or an independent intermediate court. I don't think the Constitution itself should provide for an intermediate court.

VICE-CHAIRMAN: You think that with the present volume of business, one court could handle all appeals from the general courts as well as appeals from the administrative agencies?

MR. GAULKIN: I do, with this proviso: I think that law cases are taken to the Court of Errors and Appeals as a matter of right

which have no business being there. I think Justice Brogan knows much better than I do how true that is. On questions as to who is at fault in intersection accidents, and a lot of the workmen's compensation work, etc., some procedure should be worked out to keep those away from the Court of Errors and Appeals.

VICE-CHAIRMAN: Then you would have some intermediate court which would hear those appeals?

MR. GAULKIN: No, I think that perhaps could be done by giving appeals in those cases only as a matter of privilege, not as a matter of law.

MR. WINNE: Don't you think that every litigant has a right to go beyond a jury trial? You wouldn't have any satisfaction with lawyers and the public if you didn't have one appeal?

MR. GAULKIN: Well, if it's a workmen's compensation case, it ought to be appealed to the Common Pleas. They should have one right of appeal.

MR. WINNE: Let's talk about the ordinary tort action. You have a verdict for or against you. Do you say we should stop without any appeal under the rule of evidence, etc.?

MR. GAULKIN: If the Court of Errors and Appeals can handle it, all right.

MR. WINNE: You have got to have the right of one appeal.

MR. GAULKIN: I agree with you there, and somewhere there should be some supervision.

MR. WINNE: I agree that you shouldn't necessarily get to the highest court except by favor, but you must allow one appeal somewhere.

MR. SOMMER: Are you opposed to multiple appeals except in the acceptable cases?

MR. GAULKIN: Precisely.

VICE-CHAIRMAN: Any further questions?

(Silence)

VICE-CHAIRMAN: May I express the thanks of the Committee for your appearance here today, your presentation and the amount of work that it entailed?

MR. GAULKIN: It was my pleasure. Thank you for inviting me.

VICE-CHAIRMAN: We will now adjourn for lunch and reconvene at 2:00 o'clock.

(Session adjourned for lunch)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Wednesday, July 9, 1947

(Afternoon session)

(The session began at 2:00 P.M.)

PRESENT: Brogan, Drenk, Jacobs, McMurray, Miller, G. W., Peterson, H. W., Smith, G. F., Sommer and Winne.

VICE-CHAIRMAN NATHAN L. JACOBS: There will be no executive session today. We have the following schedule for the rest of the afternoon: Mr. Stryker; at 2:30 the Mercer County Bar representative; and then the Surrogates', County Clerks' and Sheriffs' group at 3:30. We will meet tomorrow at 10 A.M. and we will be convened until possible 3 P.M. I suggest that we plan on spending some time after we close tomorrow in executive session preparatory to our sessions next week.

I suggested that we meet on Monday, but I understand that several members are tied up on Monday, and unless there are some other suggestions, we will meet Tuesday morning at 11 A.M. Is that convenient to everyone? Of course, the general Convention meets at 10 A.M. and we will meet in executive session at 11 A.M. prepared to draft the Article. The Chief expects us to be done by noon.

(Laughter)

We have invited Mr. Stryker, who is one of the leaders of our bar, to appear before us, and I want you to know that he has come down from Nantucket. I told him that we wanted to make certain that when he was through he would resume his vacation, and he promised me that he would. I am sure that we will all be interested in his views.

MR. JOSIAH STRYKER: Mr. Chairman and members of the Committee:

I wish to express my appreciation for this invitation to appear before you. The subject to which I wish principally to address myself is the Court of Chancery. The question as to whether that court should be abolished or preserved is one of the most important as well as one of the most controversial questions pending before this Convention. We've been told that our court system should be integrated. Some people say it should be streamlined. There is a difference of opinion among the members of the bar as to what should be done with the Court of Chancery. There are able lawyers on

both sides of the question. With great respect for those who differ with my views, I would suggest that the question should be solved by a consideration of what we may gain or what we may lose if the Court of Chancery is abandoned.

It makes no difference to the litigant whether he has his cause in an integrated court or a streamlined court. It makes a great deal of difference to the litigant whether his cause comes before a court who thoroughly understands the principles which should be applied to the decision of the cause and who understands how those principles should be applied.

There's one matter upon which I think we can all agree—that is is important that litigation should be heard and decided by the most competent tribunals that can be secured. The decisions of our Court of Chancery have for many years been very highly regarded, not only in New Jersey, but throughout this country. I think that the reason why they have been so highly regarded is because those decisions have been reached by judges who have devoted their whole time to the administration of equity jurisprudence rather than by judges who have been required to cover the whole field of law in the course of their judicial duties.

The committee of the State Bar Association, not unanimously, but by divided committee, advocated the establishment of a separate Court of Appeals and of a Supreme Court to which should be given all the jurisdiction now exercised by our present Supreme Court, by our Court of Chancery, and by our Prerogative Court. They stressed in their report the advantage of having equity questions decided by equity judges who specialize in equity, and to that end they advocated that the judges assigned to the equity division of this Supreme Court should be permanently assigned, during the whole period of their service as judges, and they suggested that if this were done, all of the advantages of a separate Court of Chancery would be secured.

Now, it seems to me that, very inconsistently with that view, they also advocated that when a question of equity might arise in a legal action, that question should not be decided by equity specialists, but should be decided by the law judge before whom the case was being heard. They present that suggestion in the rather attractive language that the judge should be able to do complete justice in every case. That's an attractive suggestion, but it isn't so attractive if you stop to analyze it. That is, what they would do is to make it obligatory upon a judge—a law judge—to decide equitable questions which might arise in the course of the lawsuit. Now, these equitable questions are just as important, so far as that particular litigation is concerned, and just as difficut of solution—sometimes much more so—than the questions which arise in ordinary equity actions.

I might illustrate. We'll assume, now, that an action is brought on the law side of the court to recover damages. The defendant pleads the statute of limitations. The plaintiff conceives that the defendant, by concealing the cause of action or by some other inequitable conduct, has estopped himself from taking advantage of the statute of limitations. Under our present system, the plaintiff would file a bill in Chancery to restrain the pleading of the statute of limitations, and the Court of Chancery would decide the issues raised by such bill. Now, that question often does—I won't say often, because this doesn't often happen—but when it does happen it is important and involves difficult questions of law and fact, just as difficult questions of equity jurisprudence as would be involved in a regular equity cause, and it is very probable that the decision of that question might govern the decision of the whole case. Under the proposed plan of the State Bar Association that question would be decided by the law judge who devotes his whole time to an entirely different branch of learning. Now, it is my thought that it is important to have these questions which arise in the course of a legal procedure, if they are equitable questions, decided by a judge who is an expert in equity—just as important to have that done as it would be to have a regular equity case decided by an equity specialist—that is before a judge who has devoted his whole time and attention, after being appointed to the equity court, to the consideration of equity questions.

I'd like to illustrate what I have in mind by a very homely illustration. We'll assume that a member of this Committee is ill. He is attended by a very competent family physician, a man who has taken a course in medicine and surgery and gone through all the educational experience that any other doctor has. But this family physician advises an operation. Now, certainly this hypothetical member of the Committee, if advised that he must have an operation, wouldn't consider it a great burden or inconvenience to have his operation performed by a surgeon who had specialized in surgery. He might have every confidence in the world in his family physician, but if the family physician had not done any surgical work, he wouldn't care what his preliminary education was, he would want to have his operation performed by a surgeon.

Now, that analogy is not so far from the situation presented with respect to equity questions arising in a lawsuit. There the litigant, particularly if he is on the right side of the case, naturally should have the right to have these equity questions decided by a judge who is thoroughly familiar with the principles and practice of equity.

There are many illustrations. Take our industries, our banks—they have special vice-presidents or officers to do particular branches of their business. They'd never think of having the man who han-

dles loans come into the trust department and take care of trusts. They conduct their business efficiently by having men who devote their lives to the particular branch of the business.

Generally, the judge who tries issues of fact before a jury is not likely to be as competent to decide these equity questions which arise in the course of a legal case as a Vice-Chancellor or Chancellor who devotes his whole time to the practice of equity. In the course of my practice which has extended over a good many years, almost 40, I have seen some Vice-Chancellors, who perhaps were not skilled as equity judges when they were appointed, but who after such appointments devoted their whole lives to equity, and who shortly became excellent Vice-Chancellors. You will not get that in the case of a judge who has equity questions arising before him only incidentally. I think you never can get that.

I think the recommendations of the State Bar Committee are sounder than some of the other plans which have been submitted. But I think that they have this serious weakness—that they make it impossible for a litigant in a law action to have important equity questions which arise in that law action determined by a man who is familiar with equity principles and practice. And I think that the interest of the litigant should be paramount. He is entitled to and should have every question which arises in his cause decided by the most competent tribunal possible.

This report of the State Bar Committee was not adopted, and following the report, which was by a divided committee, a resolution was drafted providing that a questionnaire should be sent to each member of the State Bar Association asking whether they favored the retention of the Court of Chancery or whether they favored the plan suggested by the committee. The result of that questionnaire will be tabulated and submitted to you gentlemen, and to all of the members of the Convention. I don't know what the results will be; I know the bar is divided on the subject. I wouldn't suggest that you gentlemen should be controlled by that result. I think it's worthy of consideration, but I think before you have finished your job you probably will have given more thought to this entire question than most of the members of the bar have. Nevertheless, I think the result of this questionnaire will be worthy of consideration no matter which way it may turn out.

I think that if you reach the conclusion that the Court of Chancery should be abolished, which I certainly hope you will not reach, that it is much better to have judges permanently assigned to the equity division, rather than to have them alternate as they do in other places. While it is said that the system recommended by this divided committee of the State Bar Association (three or four members of it who are members of the committee) has worked well in

England—and I think that is true—in considering that, we should consider also the difference between the English system and ours. In England the whole bar is divided into solicitors and barristers. Only the barristers are permitted to appear in court in any litigated cause. The barristers are divided into at least two grades. The highest grade, as I recall it, is the King's Counsel. The judges in England are very much better paid than our judges in New Jersey. I think our judges in New Jersey—this is a little digression—are at present very much underpaid. The judges in England are very much better paid, and I think it may be assumed that under this special practice of England, the counsel on the average, probably are able to assist the court more than counsel in New Jersey on the average assist the court.

It seems to me that it is not quite logical to say that we should model this, our equity court system, after the English courts. It would be just as logical to say that we should have solicitors and barristers, and different grades of barristers. I think it's more important to consider how the single court with both law and equity jurisdiction has worked out in the other states of this country.

Now, in the course of my practice I have often had occasion to read equity decisions of the Supreme Court of New York. They are reported in the *New York Supplement* as well as in the official reports. I think that anyone who has examined those decisions will agree with me that they do not show an appreciation, an understanding of the principles of equity, to the extent that the decisions of our Court of Chancery do. I have frequently been impressed with that fact, and I know that other lawyers have. On one occasion I was unfortunate enough to cite to a New Jersey judge a case in the *New York Supplement.* He fixed me with his eyes and said, "Mr. Stryker, I hope you'll understand that the *New York Supplement* is a pond in which any kind of fish may be caught." I think he was right. It is also true that the *Federal Reports,* which reports the law and equity decisions of the federal courts, now the *Federal Supplement,* is a pond in which any kind of a fish may be caught. If you fish long enough, you will find some case that supports your position, no matter how wrong you may be.

I think that if we would come to balance the possible gain and the possible loss of abolishing the Court of Chancery, it would shape up something like this. First, what is the gain? I can see no gain, except that litigants in law actions wouldn't be obliged to go into the Court of Chancery when some equitable defense is raised. Aside from that, I can see no gain, and I think that is not actually a gain, although it is considered as such. Now, the loss centers right there —if the plan of the committee of the State Bar Association is to be adopted—the loss is that equity questions which are of appreciably

great importance and great difficulty should be decided by a law judge who only incidentally has had anything to do with equity and who would not be as competent to decide the equity questions as a man who devotes his whole life to equity. I think it's unfair to the law judge to put that burden on him. But the greatest unfairness, as I see it, is the unfairness to the litigant, to deprive him of the benefit of having an important equity question in his case decided by a man who specializes in equity.

Now, it has been stated that a great, a considerable number of our decisions in the Court of Chancery involve the consideration of questions of jurisdiction. I haven't checked that; I believe that it's very much exaggerated. But even if you had both law and equity jurisdiction in one court, that would not destroy the distinction between legal and equitable remedies. You would still have that distinction, and if you attempted to abolish that distinction you would inflict a much greater injury upon the administration of justice than you would merely by abolishing the Court of Chancery.

Let me illustrate what I have in mind about that. About a year or two ago a case was started in the United States District Court for the District of New Jersey, a court which has jurisdiction of both law and equity, as all federal courts have, probably largely because in some districts they only have one judge, and he must necessarily decide all the cases instituted in a federal court in his district. This case was started to secure an injunction. The trial court conceived that the wrong remedy had been applied for, and that if the plaintiff had any remedy, he should have brought a suit at law, and the judge dismissed the case. The case involved a constitutional question and it went to the United States Supreme Court. The United States Supreme Court learnedly discussed the question as to whether a mistake had been made in seeking the remedy, decided that it had, and determined that the bill must be dismissed and that the plaintiff, if he was to have any remedy, must go right back to the same court and start an action at law to recover his damages.

Now, that case was brought as an equity case by counsel of exceptional ability—leading counsel; the question was a close one, but notwithstanding the fact that the District Court had both law and equitable jurisdiction, the case was dismissed and the only remedy the plaintiff had was to start over again in a law action.

I mention that merely as an illustration of the fact that there is an inherent and necessary difference between legal remedies and equitable remedies; that even though you give a court both law and equity jurisdiction, it would still be incumbent on counsel for the litigant to determine whether the case was a law cause or equity cause. We will not abolish all the inconvenience by giving that sort of jurisdiction to one court.

It seems to me that if you were to abolish the Court of Chancery, New Jersey would lose its preeminence as a State in which the principles of equity are well understood and administered. Now, I do not regard that as an idle statement. I will take the time to read to you what Professor Pomeroy said with regard to this in the preface to the first edition of his book. At the time that book was written, the legal and equitable jurisdiction had been consolidated in a number of states. That had been done in some states for 30 years. What he said in regard to that was this—

MR. FRANK H. SOMMER: When was it he made that statement, do you know?

MR. STRYKER: I don't remember the exact date, but it was a very considerable time ago. There have been three or four subsequent editions, but I think the preface to the first, as I recall it, is the only one written by Professor Pomeroy. What he said with regard to that was this *(reading):*

> "Every careful observer must admit that in all states which have adopted the reformed procedure [and what he meant by the 'reformed procedure' is giving legal and equitable jurisdiction to the same court] there has been to a greater or less degree, a weakening decrease or disregard of equitable principles in the administration of justice. I would not be misunderstood; there has not, of course, been any conscious intentional abrogation or rejection of equity on the part of the courts. The tendency, however, has plainly and steadily been toward the giving of an undue prominence and superiority to purely legal rules and the ignoring, forgetting or suppression of equitable notions. The correctness of this conclusion cannot be questioned nor doubted. The considered testimony of able lawyers who have practiced under both systems, corroborate it, and no one can study the current series of state reports without conceding and acknowledging its truth. In short, the principles, doctrines and rules of equity are certainly disappearing from the municipal law of a large number of the states. And this deterioration will go on until it is checked either by a legislative enactment or by a general revival of the study of equity throughout the ranks of the legal profession."

VICE-CHAIRMAN: Pardon me, Mr. Stryker. That was written in 1871. Did you find any similar statement at a later date?

MR. STRYKER: I find no preface written by Professor Pomeroy. In fact, I would say that my examination of the equity decisions in New York—the recent ones as well as the less recent ones—certainly confirms Professor Pomeroy's view. I haven't examined the equity decisions in all the states of the United States. And I might further state, that a comparison of the equity decisions of the Court of Chancery of New York when New York had a Court of Chancery, shows that they are infinitely superior in reasoning and learning than the decisions of the Supreme Court of New York in equity cases at the present time, or at any time since they made the change. That, I think, is something which no one who has examined those decisions would dispute.

Now, it's true that Professor Pomeroy said that he was not necessarily opposed to combining the jurisdictions. He had what he

thought was a remedy for the evil mentioned in his preface. I'll submit it to you as to whether it is or not. He said that that result might be avoided by the adoption of a provision that in all matters in which there is a conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail. He thought that if that were adopted it would cure the situation. I have a good deal of doubt about that. In the first place, I don't know what it means. In fact, when this provision was inserted in the 1944 Proposed Constitution, I appeared before the legislative committee, stated that I didn't know what that meant and that I had asked a number of lawyers if they could tell me and they said they couldn't, and I stated before the committee that I hoped that if there was anybody in the room who did know what it meant, he would enlighten me, but no one accepted the challenge.

But there's another more fundamental difficulty with the application of that rule. It says that when the principles of equity and the principles of law are in conflict, the principles of equity shall prevail. I'll ask, how can the principles of equity prevail, how can the conflict even be recognized, unless the judge before whom the cause is pending has sufficient knowledge of the principles of equity to know whether a conflict exists or whether it doesn't, and to apply the principles of equity if the conflict does exist?

There is no way in which equity can be soundly and properly administered except by a judge who knows the principles of equity and who knows how they should be applied, and there is no way, gentlemen, for a judge to know that without many years of study and practice. The field of equity is a very broad field. It includes very many different types of jurisdiction, all of them of the greatest importance. If a judge is to ably administer equity, it will require his whole time and his utmost attention.

Therefore, I submit that to abolish our Court of Chancery would result in a loss in the manner in which equity is administered in this State and that the possible gain would by no means balance that loss. I further submit that if you gentlemen, when you have considered all these divergent views, are in doubt as to whether the Court of Chancery should be abolished or retained, that the reasonable thing to do is to retain the court rather than to abolish it in the hope that some gain would be realized. I can see no substantial gain; I can see probability of great loss. It seems that if the Court of Chancery is abolished, this State will lose its preeminent position as a State in which the principles of equity are understood and correctly applied, and we will make that great sacrifice of principle merely for the satisfaction of bringing our courts in line with some of the other states, which I think is not a compensation for the sacri-

fice of that right.

It is suggested that the members of the bar who favor the retention of the Court of Chancery are so awfully conservative that they want nothing changed. I think that is not the truth. I am certain it is not the truth so far as I am concerned. For 20 years, over 20 years, I have believed that we should have a separate Court of Appeals of, I think, seven judges. I believe that the judges of the Court of Appeals should have no other judicial duties of any kind or character, but should be able to devote their whole time to their appellate work.

I believe that the provision of our Constitution which makes every case appealable ultimately to the Court of Errors and Appeals should be modified so that the Court of Errors and appeals should have discretion as to what sort of appeals they would hear. I think that is important; it is of the utmost importance that the judges of our Court of Errors and Appeals should have time to consider the cases, to reach not only a correct decision but also to embody their reasons for the decision in opinions which will be helpful to the bar for many years.

I think that our Prerogative Court and our Court of Chancery could well be consolidated. These courts have the same judges; I think they might well be consolidated.

These are the two important changes which I think would be beneficial.

It seems to me that it would be advisable not to attempt to regulate the inferior courts so as to establish them as constitutional courts. I think the provision of our present Constitution which establishes certain constitutional courts and then leaves it up to the Legislature to establish inferior courts, and to regulate, alter or abolish them, is a good provision. I think it should be retained. I doubt very much if we have any occasion for any constitutional courts other than the Court of Appeals, the Supreme Court, and the Court of Chancery with which might be consolidated the Prerogative Court. I don't know as there would be any great benefit in consolidating the Prerogative Court with the Court of Chancery, but I am quite certain it would involve no loss, and I think it would be a practical thing to do.

I just wish to add a word about the Court of Chancery, if it is to be retained, as I hope it will be. I think that the Vice-Chancellors well might be given the power to make decrees, instead of only advising them. As the members of the Committee know, under the present practice a Vice-Chancellor advises a decree and, in theory, it gets its force from the signature of the Chancellor. I think that well might be changed; that the Court of Chancery might consist of the Chancellor and the Vice-Chancellors. and that the Vice-Chan-

cellors might have power to make decrees instead of only advising them.

Now, there's been some discussion about appointments. We want an able, independent, courageous man as Chancellor, and if we haven't, we should get him. Of course, I am not speaking of the present Chancellor. We have just that kind of a Chancellor now. But, speaking of the future, if we have an able, courageous, independent man as Chancellor, then I can think of no better method for the appointment of Vice-Chancellors than the present method. The Chancellor knows much more about the members of the bar than any Governor could know. He knows about their ability, their character, their fitness for judicial position. The Chancellor would be less subject to be—I am talking about what would be possible—to be swayed by considerations of partisan politics than the Governor would. I'm not dealing with personalities; I'm not dealing with incumbents, but with the office. Everybody knows that our Governors are always closely allied with partisan politics. If they weren't, they wouldn't be Governors. That's just the way we have our Governors, and I'm not criticizing. Neither am I criticizing the appointment of active politicians to the bench, if those active politicians are otherwise qualified. The point I am making is that the kind of a Chancellor whom I have described is much less likely to be swayed by purely partisan politics than the Governor would be, and is much more competent to make appointments of Chancery judges. I think that under our present system we have—and if you go back over the years and consider to the present time, you will find that we have always had, and I say this advisedly—men on our Chancery bench of great ability, men who have done a good job. I know some of the members of the Chancery bench have been criticized; I don't suppose there is any public officer who hasn't. I don't say that everything that they have done has been perfect, but I do say that our Chancery decisions evidence knowledge of equity principles, and a desire and ability to do the right thing in making decisions.

I want to thank you gentlemen for listening to me, and I should be very happy to attempt to answer any questions which you may wish to ask.

VICE-CHAIRMAN: On you last point, would you recommend that the Chief Justice have the power to appoint the Associate Justices?

MR. STRYKER: I think I would not, Mr. Chairman. My view on that is just this. We have for many years had this method of appointment. I think, in the main, with, of course, some exceptions —there are always some exceptions—it has worked out very well. I think there is a difference between the appointment of Vice-Chan-

cellors and the appointment of Supreme Court Justices. The Vice-Chancellors control a great deal of what might be regarded—it should never be so—as patronage. They appoint receivers; they have something to say about the receiver's counsel; they appoint trustees; they make substantial allowances. Now, all of that would make them more subject to the influence of partisan politics than a Justice of the Supreme Court who doesn't have that kind of patronage —if you call it patronage; I think it shouldn't be patronage. I think that a method of appointment of Vice-Chancellors which is just as far away from the control of partisan politics as possible, is a good method. I think there isn't the same necessity for the appointment of Supreme Court Justices by the Chief Justice.

My whole view in regard to these constitutional questions is that we should change, recommend a change, in every respect where it is reasonably certain that there'll be improvement; that we should not make a change merely for the sake of change; that before any change is made there should be a sound, substantial reason for believing that the public—and I may say with regard to the courts, especially the litigants—will be benefitted by the change. Therefore, I say that I think that the method of appointing Vice-Chancellors is the best that can be devised—I think it is, I have given my reasons for thinking so—because I feel it is as far removed as it can be from political control. And I would not extend that to the appointment of Associate Justices of the Supreme Court, simply because I think that method has worked very well in our State, and that there is no occasion for changes.

VICE-CHAIRMAN: Any questions of Mr. Stryker?

MRS. GENE W. MILLER: Mr. Stryker, how long do you think it takes for a law judge to become a good equity judge?

MR. STRYKER: I think that would, of course, depend on the individual. I think that if he were spending five days a week in the trial of issues of fact and hearing motions on the sixth day of the week, unless he overworked himself, he might never become a good equity judge. That is, I don't say it would be impossible; I think there are some men who would be very conscientious, work very hard, and would probably be as capable as Vice-Chancellors in deciding these questions of equity. I don't doubt that. But my point is that human nature being what it is, a good many of them probably wouldn't work very hard to discharge the extra burden; that you will get a better administration of justice, better decision of equity cases, by having the judge devote his life to that rather than putting that burden on the law judge.

MRS. MILLER: Of course, it might be then that a law judge wouldn't ever turn into an equity judge and would be stuck there, wouldn't he?

MR. STRYKER: I think he wouldn't. He wouldn't be intended to turn into an equity judge. The State Bar committee emphasizes the great importance of having equity cases decided by members of the equity division of the Supreme Court, and then they turn right around and say it's a great advantage to have equity questions, maybe of equal importance, decided by the law judge, simply because those equity questions arise in a law case. That's a line of reasoning that I can't see. It seems to me that it's just as important to have questions of equity jurisprudence arising in a law case decided by the equity judge, as it is to have the general run of equity cases decided by an equity judge. I doubt very much if the great majority of law judges would ever become good equity judges.

VICE-CHAIRMAN: The specific question was, I think, in reference to your remark that it takes many years of study and practice to make a good equity judge. Mrs. Miller wants to know how long —in other words, is it a year, two, three, or do you have any idea of just how long it would take?

MR. STRYKER: I'll do the best I can with that. In the case of some of our Vice-Chancellors, it hasn't taken them very long, but after they've been on the bench for many years they were much better equity judges than they were after they had been on for a year or two.

MR. SOMMER: Well, I think what Mrs. Miller had in mind was the statement made by you with respect to specialists. You say that an equity judge becomes a specialist in the work in equity. Now, a great many of the equity judges have been drawn from the law courts and have had a long experience in the law courts. I think her question was, how long would it be before they become specialists so that the litigants there have the benefit of this specialization.

MR. STRYKER: Well, if that is your question, Mrs. Miller, I would say that if the man who has been a law judge devotes his full time to equity questions—no longer a law judge, but he has become an equity judge—and is a man of ability, it might not take him very long to become a good equity judge. I have seen that happen—law judges have come to the Chancery bench, and some of them have become among the best of our Vice-Chancellors. But I don't think they ever would have become able equity judges if they had continued to spend most of their time on legal questions. It's a matter of gradual development . . .

(Inaudible question by Mr. Sommer)

MR. STRYKER: But it's true, I assume, that that would be one of the imperfections in any system. None of us is perfect; no matter how hard we work, we sometimes make mistakes. But, what I'm trying to emphasize is that the man who devotes his life to equity is better qualified to determine questions of equity than the man of

equal ability who only occasionally has such a question.

It's just exactly the same way as the physician who devotes his life to surgery; he is a very much more skillful surgeon than the general practitioner who may be just as able, but who has never performed a surgicial operation. And in the same way that the trust officer in the bank, if he is intelligent, can do that job much better than the man in charge of making loans can if occasionally he has to go into the trust department.

I might say that equity questions are all the time becoming more complicated; the principles are the same but they are progressively being applied to more complicated situations. I think there's more importance now in having a separate court of equity than there was many years ago when some states made the change.

VICE-CHAIRMAN: You mentioned an equitable issue arising in a law case, but you didn't mention a law issue arising in an equity case. Would you shift that legal issue over to the law court from the equity case?

MR. STRYKER: I would. I think, perhaps, that is not as important as the other. I think I would leave it as it is.

Law judges are more competent to conduct jury trials than the ordinary prosecutor. I'm not advocating retaining the Court of Chancery because I think the Vice-Chancellors are a superior race of men to the law judges. That isn't my view at all. My view is that when they devote their lives to the study and practice of equity, they are more competent to decide equity questions than the man who only occasionally has such questions. And I would apply that same view to the conduct of a jury trial involving a legal issue. The law judges are more competent to conduct that than the equity judges. My point is that the gain in joining the two courts is greatly overbalanced by the more efficient administration of justice under our present system in which we have separate law and equity courts.

MR. WALTER G. WINNE: Mr. Stryker, you gave an illustration today which is directly contrary to what Federal Judge William Smith told us yesterday. You said a man who started an action in the United States District Court on an equitable theory, whose bill was dismissed, had no right except to appeal to the Circuit Court of Appeals and then some years later go back and start his suit all over again in law. Judge Smith said categorically yesterday that in such a case he'd hold the matter for a brief period of time, not more than a month; the pleadings would be re-drawn, and the case would be continued before the same judge. Is that because the new federal rules having changed the situation since the case you spoke of, or do you agree with what Judge Smith said to be the law in the federal court?

MR. STRYKER: I'm not disagreeing with Judge Smith, but the

case that I cited is a case that was decided not more than two years ago and long after the new set of rules were adopted. I don't recall the name of the case, but I recall the decision of the case. Under some of the wartime powers it was provided that where the licensee under a patent was making goods covered by the patent, the federal agency had the power to determine the reasonableness of the royalty and to direct the licensee to pay the stipulated royalty, in excess of what was determined to be reasonable, into the federal Treasury. In this particular case, a very valuable patent, producing large royalties, was involved. The Government fixed $50,000 a year as the royalty, and directed the licensee to pay all the rest of it into the federal Treasury. An action was brought to restrain the licensee from making that payment into the federal Treasury. The bill was dismissed on the ground, according to the Supreme Court decision —I haven't read the decision in the District Court; it was brought in the District of New Jersey—the bill was dismissed on the ground that the remedy was mistaken; that all that the licensor could do would be to sue the licensee for the full royalty. The payment into the Treasury would be no defense if the licensee was not lawfully required to pay the excess into the Treasury. An appeal was taken to the Supreme Court and the Supreme Court sustained that view, and sustained the dismissal of the bill. I'm not arguing in favor of the soundness of that decision, but I am stating what happened.

There may be cases, and there could be cases without the abolition of the Court of Chancery, where if a case was commenced wrongly in the Court of Chancery, it could be transferred to a law court—I think we have a statute of that kind now. And if it were wrongly commenced in the law court, it could be transferred to the Court of Chancery. That could be done without a constitutional amendment. It could be included in a constitutional amendment. But, so far as administering a legal remedy under pleadings applying solely for equitable relief and equitable remedies is concerned, I think that could scarcely be done. Of course, the pleadings might be changed and the case proceed although—

MR. WINNE: The argument, of course, is this. If the one judge has both equitable and legal powers to apply the rules of both branches of the civil procedure, he can retain the case, mold the pleadings and proceed, without having it go to another court and have a new suit started. That definitely was the argument of Judge Smith—

MR. STRYKER: That is the argument. That is not what was done in the case that I cited. That could be done; there would be no objection to transferring the case from one court to another. That could be done and still retain the Court of Chancery.

VICE-CHAIRMAN: Any further questions of Mr. Stryker?

I wish to express the thanks of the Committee and appreciate your having come down.

MR. STRYKER: I wish to thank the Committee for listening to me. I feel very strongly on this subject and I appreciate the opportunity to express my views.

VICE-CHAIRMAN: Thank you. . . . Mr. Collin Minton, of the Mercer County Bar.

MR. H. COLLIN MINTON, JR: Mr. Chairman, members of the Committee:

I feel that following Mr. Stryker, whom we all know, is both an advantage and a disadvantage. You may readily see why it is a disadvantage and I'll tell you why it is a great advantage. He has voiced what I feel is the general sentiment of the Mercer County Bar Association, advocating the retention of the Court of Chancery.

I have been in the practice of law in Trenton for over 25 years, and I was named as chairman of the committee to present to this Committee a resolution passed by the Mercer County Bar Association. The Hon. William A. Moore, who is not here on account of illness, Mr. Fishberg, absent, Mr. Gildea who is present, and Mr. Gold comprise that committee. With your permission, I will read the resolution *(reading):*

> "WHEREAS, the Constitutional Convention now assembled is to consider and submit to the people a new State Constitution;
>
> AND WHEREAS, the Judicial Article of the new Constitution is the concern of every inhabitant and citizen of the State of New Jersey, and particularly the members of the bar, since the system of courts is the cornerstone of our profession;
>
> AND WHEREAS, the question of the abolition of the Court of Chancery as a separate entity in the judicial system, has been advocated by some of our citizens;
>
> AND WHEREAS, the development of equity jurisprudence in New Jersey under a separate Court of Chancery is acknowledged by scholars the world over to have reached a peak unequalled under any other judicial system in this country or in England;
>
> AND WHEREAS, a growing equity jurisprudence is that organ which gives to the body of the law its mark of vitality and conscience, and in so doing gives it flexibility and power to protect the weak against the strong, and the powerful and the inalienable rights of legal form and precedent;
>
> THEREFORE BE IT RESOLVED, that the members of the Mercer County Bar Association, in meeting assembled, record as their considered judgment that in any judicial system proposed by the Constitutional Convention, the Court of Chancery be retained as a separate entity for the administration of equity jurisprudence substantially as is now provided in our present Constitution.
>
> BE IT FURTHER RESOLVED, that a copy of this resolution be sent to the Judiciary Committee, State Constitutional Convention."

This resolution was adopted by an overwhelming majority at the annual dinner meeting of the Mercer County Bar, fully attended at the Trenton Country Club on June 24. Under the constitution and by-laws of the Bar Association a special meeting may be called—and, as a matter of fact, it is the duty of the president to call a special

meeting on the petition of ten members of the bar. Pursuant to this provision, a further meeting was held on July 2, in connection with which all members of the Association were given notice that at this special meeting a vote would be taken to reconsider the resolution which had been adopted on June 24. At the meeting held on July 2 a motion was made to reconsider the resolution previously adopted, on the ground, among others, that the members of the Association had not been duly notified of the proposed action to be taken on June 24. At the meeting on July 2 a full and complete discussion was had on the merits of the resolution which I have just submitted, and by a vote of 11 to 139 the motion for reconsideration was lost.

I realize that this very Committee has heard many arguments *pro* and *con* the retention of the Court of Chancery.

After listening to Mr. Stryker, I will make only one or two remarks which have occurred to me through some conversations among lawyers in our own Bar Association in Trenton. Mr. Stryker advocates the appointment of the Vice-Chancellors by the Chancellor himself, and he gave reasons therefor. If I may be permitted, I would give another reason. It seems to me, in my short practice, to be very important. The Court of Chancery, the Chancery judges, are the disposers of law and fact. In the law courts, on the law side, *nisi prius,* the jury is the last word. As a result, the law judges' work, while burdensome, is more or less standardized. In Chancery, the results of *nisi prius* hearings are evidenced by the shelves full of Vice-Chancellors' opinions which we all have in our offices. That being the case, we feel that there should be a control of those Vice-Chancellors —there are ten of them now—and there has been that control in the past—to the end that there are not many diversified opinions, policies and administration in that court.

A striking example of what might occur in New Jersey if the Chancellor did not have that control which I mentioned of his Vice-Chancellors, by reason of appointment beholden to him, is found, of course, in our *Federal Supplement,* our federal reports. As Mr. Stryker spoke about the federal court being a forum which catches any fish, it is true that a large part of the certioraris to the Supreme Court of the United States are based upon diversified opinions in our districts and circuits. I venture to say that in our courts that has very rarely occurred; I don't know of any particular case where that has occurred by reason of diversified opinions in our Court of Chancery. That, I think, is quite an important point, and I wish to emphasize it.

Certain other plans presented previous to the one which Mr. Stryker has presented, provide for a law and Chancery division in *nisi prius.* But I believe that most all those plans suggest special judges in Chancery and special judges in law. The criticism of our

dual system is not going to be overcome, in my opinion, by an integrated court. We are still going to have, as Mr. Stryker said, questions of jurisdiction, but it may be molded as in the federal courts under the new rules, under rule 38 or 39. And of course, it's also greatly remedied by the pre-trial conferences in the federal courts. I really believe in keeping the two divisions at *nisi prius* entirely separate, with rules of court so molded as to facilitate the giving of justice in equity and in law, as previously.

In conclusion, may I suggest this, that the document which eventually is going to emanate from this Committee and from the Convention, be as simple as possible. Let it be simply a structure which would allow latitude to the Legislature and to the courts.

VICE-CHAIRMAN: Any questions of Mr. Minton?

MR. WINNE: I don't think you've distinguished about pre-trial conferences. No federal judge would decide whether the case belonged in equity or law in a pre-trial conference. He would insist that if you have any such motion that you make such a motion in open court and that a record be made and that the decision be officially received in court. You couldn't give a decision like that in a pre-trial conference.

MR. MINTON: Well, the way I understand it, Mr. Winne, you must ask for a trial by jury in a federal court; you have it as a matter of right, but must ask for it to receive it.

MR. WINNE: Yes. It could not be in a pre-trial conference. It would have to be in court.

MR. MINTON: That's true, but at least the court would mold that; the court even has—under rule 38, I believe—the discretionary right to insist upon trial by jury where it is not requested. Am I right in that?

MR. WINNE: I think you are correct. I'm very much interested in pre-trial conferences; I think we should have them in the state practice. But I didn't want the impression to go that this thing could be decided on a pre-trial conference basis.

VICE-CHAIRMAN: You differ with the wisdom of members of the same court writing opinions of diverse views. Do you want all the members of the court to write opinions along the same line, even though they have different views?

MR. MINTON: No, I don't mean that. If you take, for instance —well a few years ago we had our procedure on deficiency in foreclosure; it's a little out of my mind now, that was several years ago. But there might have been as many as five different methods of procedure on that without any rules. Do you see what I mean? I'm speaking about policies.

VICE-CHAIRMAN: I'm not talking about procedure; I'm talking about substance.

MR. MINTON: I'm speaking about policies.

VICE-CHAIRMAN: I'm talking about substantive principles of equity. Do you think it's all right for one Vice-Chancellor to express one opinion and another Vice-Chancellor another opinion and have it ultimately decided by the Court of Errors and Appeals?

MR. MINTON: No, I think that is all right. I mean, I don't say that the Chancellor should dictate the decisions, Mr. Jacobs. What I do say is that the Chancellor should have some control to dictate the policies—the general policies—of the court. I do believe that these conferences which he has with these men that he has appointed, beholden to him, are extremely important and extremely productive.

VICE-CHAIRMAN: Would you apply the same notions to the Supreme Court, namely, that the Supreme Court Justices should follow the policies, as you phrased it, which are announced by the Supreme Court?

MR. MINTON: Well, Mr. Vice-Chairman, when I speak of Supreme Court judges, I am speaking of the *nisi prius,* in other words, the trial judges. And I don't think that the same rule would apply, or that it could apply. On the Court of Appeals, that's an entirely different proposition. The Chancellor has nothing to do with the Court of Appeals.

VICE-CHAIRMAN: Thank you.

MR. MINTON: Thank you very much, gentlemen.

VICE-CHAIRMAN: Mr. Otto, Surrogate of Union County.

MR. CHARLES A. OTTO, JR.: I'm here today on behalf of the surrogates' group of the Clerks, Surrogates and Registers Association of New Jersey which is a combined group of office holders. It seems to be the consensus of opinion of the surrogates that I've had occasion to talk with about the change of the status of the surrogates, that their present status be retained, for this reason: that it is a democratic set-up, it's close to the people, the surrogate is elected by the people, and the opportunity is afforded to professional men, particularly lawyers, and the laity, to come to the office, and they even have the privilege of close personal contact with the surrogate or the deputy or the subordinates in the office. It also makes for efficiency and quick service, particularly where there are no contested cases—uncontested wills or any uncontested matter. The surrogate passes upon the proper execution of the will, and enters the decree after the proper time has elapsed; he also enters other decrees with relation to—uncontested, of course—guardianship, administration, proper bonds, and so forth. In one sense he acts as a court. He also acts as clerk to his own court and clerk to the Orphans' Court. In Union County we found—and I polled a number of members of the Bar Association—that they feel that this system, so far as the surro-

gate's status there and throughout the State is concerned, should not be changed, for the reasons I have given.

VICE-CHAIRMAN: Do you visualize that as a constitutional problem or as a legislative problem?

MR. OTTO: No, I feel this is in the hands of the Legislature. The office may be entirely abolished. We are getting away more and more from the democratic ideas about things, it seems to me, when we begin to centralize. It's just possible that they'll centralize all these offices, and eventually we'll have a virtual dictator who tells us just how to run everything.

My thought is that you have an officer whose jurisdiction is confined to the county in which the office is established. The people have a right to remove that officer after a certain term of years—he has now, under the Constitution, five years. The Constitution does not set up what his duties are. I understand that the Legislature can strip the surrogate of all his jurisdiction and authority, as they've done with coroners and as they've done with justices of the peace. It would seem to me, if anything, that it might be established as a constitutional office with certain definite duties to perform. I believe the proposed Constitution of 1944 had some set-up of that kind.

Now, I don't know what kind of courts might be established, whether you want to integrate your courts or what you are going to do. However, the people will finally decide. It would seem to me that the surrogate should be part of that judicial system, and should remain as an elective officer.

VICE-CHAIRMAN: Any further questions of Mr. Otto? . . . Thank you very much, Mr. Otto.

Mr. Nulton, representing the County Clerks' Association.

MR. HENRY G. NULTON: As Vice-President of the County Clerks, Surrogates and Registers of Deeds and Mortgages Association, and as County Clerk of Union County, it is my considered opinion that the document that you are going to write and submit to the people for their approval must look one step further, namely:

While you must and will think of it from an administrative standpoint, think of it in terms of serving the people for whom you are writing this document, something they must live under. Speaking for the county clerks—we, as you know, are clerks of all the courts in the county except the Orphans' Court—the surrogate is the clerk of the Orphans' Court. The pleadings for all cases tried in the county, except Supreme Court cases, are filed in the county. That may mean nothing when you look at it at first glance, but look at it from the standpoint of the convenience of the citizens of the county. Pleadings in the Supreme Court are not filed in the county; they are filed with the Clerk of the Supreme Court. And, if any of the citizens want to see the pleadings, it is necessary for them to go to

Trenton. Like Judge Otto, I feel that the clerks of the county should be clerks of all the trial courts in the county, no matter what courts you create or courts you continue as they now are. The clerk of the county, and all pleadings in trials—and I think that properly should be in the Constitution, not because I recommend it as a county clerk, but for the convenience of the citizens of that county, just as all property records are kept within the county.

We feel that the courts should be at all times close to the people, so that the people that the courts govern, or where they may litigate their matters of difference should be so set up that Mr. Citizen can easily get to that court—if necessary, similar to our Common Pleas judges today. Any citizen of the county may talk or speak with his county judge. We feel that has a great benefit for the citizens. We feel that the court system, whatever court system is adopted, should bear in mind the wants of the people over whom it will operate, and be so constituted that it will be operated for the convenience of the citizens of the county.

VICE-CHAIRMAN: Any questions? Thank you very much.

Mr. Campbell, representing the Sheriffs' Association.

MR. ALEX CAMPBELL: Mr. Jacobs, members of the Committee:

As president of the Sheriffs' Association of New Jersey I have the privilege to appear here today and urge upon this Committee the necessity of maintaining the sheriffs of our State as a constitutional officer. The office of sheriff is just as important as the Army and Navy is to our government in order that we may maintain law and order, criminally and otherwise. It is true we have police departments in most of our municipalities. Unfortunately, many of them are small. In times of trouble, riots, strikes, or disorders, the sheriff is the only one that can be called upon to render immediate aid and command the citizenry of the county to subdue such riots, strikes, or other acts of violence. It is also true that he is responsible for carrying out all the orders directed to him by the courts of the State and our county—duties too numerous to take the time and which I am sure many of you are familiar with. Therefore, it is my opinion, as one who has had the privilege of serving the County of Union as sheriff for the second time, that it should be continued a constitutional office.

Also, it is, in my opinion from past experience, an office that has become highly administrative in this day and age—one that has elevated itself with the growth of our counties. In former years the sheriff was an officer who was paid by the fee system. Fortunately, the legislative body saw fit to take steps that he become a salaried employee. The fees for the services rendered by the sheriff no longer are a part of his earnings, but are turned over to the county treasurer. Under the old fee system, I can readily see how possibly at

the time there was a feeling that the sheriff should have one term. But under the present set-up I believe that in order to induce the proper type of citizen into public office, the sheriff should be allowed to succeed himself in office, if it be the wish of the voters of the county that he receive the nomination and the election. The voters should have the power from their observation to determine whether or not the man or woman who may be sheriff, or any other office holder of the county, should continue. I believe that we will maintain our democratic form of government by the power to vote men or women into public office or to remove them from public office for failure to carry out the wish or the mandate of the people.

And that is my belief why, in drawing the new Constitution, this Convention should see fit and should give serious consideration to providing succession in the office of sheriff, so that the right type of men and women may seek this high and important office.

VICE-CHAIRMAN: Any questions?

MR. WINNE: I'm not in disagreement with anything you said, Sheriff. I don't know that there is any particular disagreement in the Convention about the constitutional office of sheriff and change in succeeding himself.

I don't know where the term "high peace officer" is derived from. I understand it very well. My personal experience is that the sheriff serves writs, has charge of the jail, has charge of the courts, and once in a great while he has the misfortune to be enbroiled in some strike situation and he wishes he could go up to Maine or New Hampshire to be away from it. I don't think, as a matter of fact, today, the sheriff is the high peace officer of the county except as the word appears somewhere in the books. I am a prosecutor; I have occasion to think about these things.

I wonder if the sheriffs care very much about that phase of the office? If it were—I don't know if it is going to come up in the Convention; I'm just addressing myself to you because the opportunity permits itself. The sheriff retains his position and continues to do the things that a sheriff does, namely, serve the writs and processes and subpoenas, have charge of the jail, man the courts, and so forth—the every-day work of the sheriff. Is this myth of being a peace officer important to the sheriffs, do you think, sir?

MR. CAMPBELL: I think it is, sir. I think, as I have stated before, that it is just as important as the Army and Navy is to . . .

MR. WINNE: You know a sheriff doesn't do any policing. Actually, as a fact, you never arrested anyone in your life did you?

MR. CAMPBELL: Not personally.

MR. WINNE: Of course. I submit he's elected because he's popular, but he's not really a police officer at all, except in some kind of a theory. Am I right?

MR. CAMPBELL: Having the pleasure or displeasure—what-

ever you might call it—of being called out on strike duty, I can say this: that immediately following the arrival of the sheriff law and order was maintained, where the local law enforcement agencies failed. And I believe it is on the minds of the people the minute the sheriff appears on the scene, that law and order must be maintained, the same as any military unit appearing on the scene.

MR. WINNE: Well, it's interesting to hear you say that. My experience is, we send some county police, and one man in uniform is worth 40 or 50 fellows in civilian clothes. That's my experience in big strikes in Bergen County. I'm interested in knowing that you found that your people pay more attention to the sheriff.

VICE-CHAIRMAN: We're getting a little bit off the Judicial Article, although this is very interesting. I think the problem you mentioned, Mr. Winne, properly should be considered by other committees.

MR. WINNE: Well, the Constitution at present says nothing except that the sheriff shall be elected annually and shall not succeed himself. That's all the Constitution says now. I understand that.

VICE-CHAIRMAN: Any further questions of Mr. Campbell? . . . Thank you very much. We appreciate your coming.

MR. CAMPBELL: Thank you for the opportunity.

VICE-CHAIRMAN: That's all we have for today. I assume you have no objections to recessing before 4 o'clock. We'll meet tomorrow morning.

(The session adjourned at 3:45 P. M.)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Thursday, July 10, 1947

(Morning session)

(The session began at 10:00 A. M.)

The Committee on the Judiciary met in Room 202, Rutgers University Gymnasium.

PRESENT: Brogan, Dixon, Drenk, Jacobs, McMurray, Miller, G. W., Peterson, H. W., Smith, G. F., Sommer and Winne.

Vice-Chairman Jacobs presided at the request of Chairman Sommer.

VICE-CHAIRMAN NATHAN L. JACOBS: Chancellor A. Dayton Oliphant.

CHANCELLOR A. DAYTON OLIPHANT: I appreciate your invitation to appear and state my views to you. I prefer to read in large measure, so that my views may be stated as directly and concisely as possible, after which, if there are any questions, I will be glad to endeavor to answer them.

I am profoundly conscious of the somewhat delicate position I am placed in by appearing before you in that some may attribute to it a selfish motive. I wish to assure you that such is farthest from my thoughts. I, as you, want to see this Convention evolve and produce a Judicial Article which we can all conscientiously support and which will give to this State the finest court structure and judicial procedure possible. In the attainment of that end the fate or position of any one individual is immaterial, and naturally, if need be, must be subordinated to the good of the whole people.

You undoubtedly expect me to talk with you concerning the Court of Chancery, its proper place in the contemplated court structure, and to give you my views regarding its retention or, as some say, its rejection.

Let me say right here that I will probably be asked, or the question will be in the minds of some of you, and it is a fair question—why did I publicly approve of the 1944 draft and why do I now apparently not entirely agree with it? At that time I had been on the Circuit Court bench for 18 years and I did not know the problem as I now think I do, and since having spent some time on the Supreme Court bench and as Chancellor I think I have achieved some knowledge of the practical operation of some of the courts as distinguished from theory. I did not know the problem from a higher court or appellate court viewpoint as I think I now do. I

did not know the Court of Chancery as I now do. I have a broader perspective. Then again, it was a question of taking some things that I did not approve of in order to procure others of which I was heartily in favor. And, of course, we are all entitled to change our minds, as some of the strongest advocates of change in our judicial system have done.

It might not be amiss, as this Committee is composed in large part of laymen, to tell you something of the various and multitudinous jurisdiction exercised by the Court of Chancery, which must repose somewhere in any court structure. The types of litigation handled by the court reach at times into all homes. It has jurisdiction of all matters arising out of the maritial relations: divorce, nullity, maintenance, custody of children, property actions and accounting between husband and wife, rights and value of dower and curtesy. The Chancellor is the guardian and protector of all infants, insane persons, habitual drunkards and incompetents, all of whom are his wards, and no action can be taken with respect to their personal or property rights unless he so orders after a hearing on all the facts and circumstances, and he is satisfied that it is for the best interest and welfare of the wards of the court.

The Court of Chancery has jurisdiction of all actions where a number of different persons assert a lien or a right against a specific fund of money. Thus, it handles the foreclosure of mortgages, mechanic's lien proceedings, tax foreclosures, the assets and liquidation of insolvent corporations, banks, insurance companies and building and loan associations, bills of interpleader where several persons claim rights in a sum of money, bills to quiet claims of title, bills of partition of real estate, and partnership relations and accounts and the enforcement of liens of all types.

It can prevent wrongdoers from continuing to commit wrongs for which there is no adequate remedy at law. Thus, it handles bills of peace, injunction proceedings of all types, *i.e.,* abates nuisances; bills to correct mistakes in contracts and deeds, cancels contracts and deeds where there is a mutual mistake or fraud, bills to relieve forfeiture of property or legal penalties, bills to restrain infringement of easements, boundaries, copyrights, the use of business trade names, and restrictive covenants in deeds for the protection of a neighborhood scheme.

It handles all matters where the beneficial interest is in one or more persons but the legal title in another. It handles all the actions of accountings and fiduciaries, trustees and of some executors; trust matters of all kinds, stockholders suits against corporate directors, bills to impress a constructive trust on moneys or properties, title to which was gained by fraud or deception; and it has jurisdiction of the construction of wills and the duties of executors and trustees under the terms of a will.

This is a brief resumé of the type of matters heard by the court and which comprise a large part of the legal actions heard in this State. The business of the court rose from about 8,000 cases in 1915 to 26,600 in 1932, the peak year in all courts throughout the country, and 16,300 cases in 1946, and today the load is steadily increasing. In addition to this, the court handled all the incidental orders and motions incident to each cause.

I am firmly convinced that we have in this State the finest and best system of equity jurisprudence in this country, perhaps in the whole world, and I am not alone in this view. Why change it? Change simply for the sake of change is basically unsound. Why discard that which over the years has proven good unless you can put in its place something better. Because other jurisdictions have abolished the Court of Chancery as such and merged or fused equity and law is no sound excuse for our doing so here, unless it can be shown that the experience of those jurisdictions which have made the change shows it to be better. More of this later.

I do not think the majority of us are very far apart. The method of accomplishing the desired result is the problem of this Convention.

We are nearly all agreed that there should be a separate, independent court of last resort, the members of which will have no other duties outside of the work of that court, opinion work. Our aim should be quality, not quantity. We are further pretty much agreed that in all cases there should be but one appeal as a matter of right, except in a small number of cases. Further, the objective of all of us is to see that there should be as speedy trials and final determination of all causes as possible, with each cause being heard and determined, where practical, and under rules properly promulgated, before one judge or court.

In connection with this I should say at this point that I am opposed to the provision contained in the 1944 draft which provides that "Every controversy shall be fully determined by the court or justice hearing it." *(Art. V, Sec. I, par. 2)* I am convinced it is unworkable. The word "controversy" is a generic term and encompasses nearly every conceivable situation which might develop. This means the fusing of law and equity jurisdiction by means of coming in the back door.

I am cognizant of the fact that there are law cases where equitable relief could and should be granted by the law courts, and other cases where the Court of Chancery could properly determine certain incidental legal questions which might arise, but I can envisage cases which could not be tried conveniently, expeditiously or properly in proceedings by a single judge.

I have prepared a provision which, in my judgment, will properly take care of this situation so that litigants will not be unduly

shuttled from one court to another. It reads as follows, and I am submitting it to the Committee for consideration:

> "The Courts of Law are vested with jurisdiction to hear and determine any equitable question which is an incident of the legal cause of action; the Court of Chancery is vested with jurisdiction to hear and determine any legal question which is an incident of the equitable cause of action and to empanel a jury to determine the legal issue or issues in the cause, provided the parties do not consent to waive, in writing, their respective rights to trial by jury. The Court of Appeals is vested with power to enact and promulgate rules regulating all this jurisdiction, the hearing of all causes, the entry of appropriate judgments or decrees therein and the transfer of causes when necessary."

That brings us to the problem of what courts should be constituted below the court of last resort. I would set up what I will call, names meaning little, a screening court with the jurisdiction pretty much that of our present Supreme Court. An intermediate court is, I believe, much more preferable than appellate divisions. It is very valuable to have a body of men meeting together, exchanging views, discussing common problems and working as a team rather than in separate units. I would have this court composed of at least nine judges, with power in the Legislature to increase the number if necessity demands. I would have the members of this court exercise a supervisory jurisdiction over the County Courts, each judge having a judicial district as the present members of the Supreme Court have. This has a very salutory affect and the need for such supervision has been vividly shown over the last few months.

Then there should a separate Court of Chancery, as it is constituted today, and the *nisi prius* law courts, the Chancellor presiding over and having the administration of his branch and a Chief Judge of the law courts being charged with the administration of them.

The Chancellor and the Chief Judge of the law courts would each report to the Chief Justice of the court of last resort as to the work of his court.

The right of the Chancellor to appoint his Vice-Chancellors should be preserved. With the proper type of Chancellor, given life tenure, appointments could and I believe would be made without political pressure and the highest type of judicial officer procured. To say that if this method of appointment is followed in the Chancery Court, why should it not be in the law courts, is to beg the question. It would probably be better if the same method of appointment were followed there.

The Prerogative Court should be abolished and its original jurisdiction given to the Court of Chancery. Matrimonial jurisdiction should by all means remain in the Court of Chancery. I feel free to say that we have in this State the finest system for dealing with matrimonial cases in the country. There is absolute control,

thorough supervision, uniformity of action by the trial men with the policy being dictated by the Chancellor under the statute law. It might be interesting for you to know that a plan of legislation has lately been drafted by a group of Chicago judges in an endeavor to cope with the Illinois divorce problem. It is copied after our system and provides for the appointment of Special Masters in Chancery to hear the cases, and to make investigations and recommendations on all complaints for divorce, separate maintenance and annulment and petitions relating to alimony, child custody and support. To throw this jurisdiction into the county courts, as provided for in the 1944 draft, would be the worst mistake that this Convention could make.

Unfortunately, I have discovered that many who would demolish the Court of Chancery are actuated by the desire to make divorces more expeditiously and inexpensively obtainable. They feel that marriage is nothing more than a convenient compact entered in the public records, and that the dissolution of marriages ought to be delegated somewhere other than to a court which has such strict supervision over them. The demand for proof of a legal ground for divorce has become irksome to numerous litigants, and so those who ignore the sanctity of marriage welcomes the effort to abolish the Court of Chancery.

Let me forewarn you, for whatever it is worth, that if this Convention destroys the Court of Chancery and thus extinguishes its jurisdiction over the dissolution of marriages, alimony, and particularly the custody and maintenance of the defenseless and dependent children of the disrupted marriages, it will, in my forecast, bring down upon the proposed Constitution an avalanche of opposition.

Lastly, I would create County Courts having the jurisdiction now exercised by the Common Pleas judges, being careful not to freeze some of their present jurisdiction. It would probably be wiser to have this court a statutory rather than a constitutional one.

Care should be taken so that the jurisdiction now exercised by the surrogate is preserved. It probably cannot be done by providing for the vesting of judicial power "in such inferior courts as now exist and as may be ordained or created by law." The jurisdiction of the surrogate is not exercised by him under the name of a *court.* (See *R.S. 3:6-2; 2:7-12; 3:1-2.)* The surrogate is precluded from acting as judge in the Orphan's Court. *(R.S. 2:7-17.)* The objection to any taking away of the surrogate's jurisdiction needs only to be stated to show its importance to the citizens. At present, in all cases where there is no contest over a will or the right to administration of a decedent's estate, and that means over 95 per cent of the cases, the probate of the will or procuring letters of administration can be obtained from the surrogate, with practically no delay and at

very little expense. If this jurisdiction of the surrogate is not preserved, these proceedings will have to be taken before the County Court, with more delay, increased difficulty and considerably increased expense.

With reference to appeals, of which I have said there should be one as a matter of right in most cases, those from the Court of Chancery, the *nisi prius* law courts and the County Courts should, I believe, go to the intermediate or screening court except in capital cases, which should go direct to the court of last resort. That court should take appeals from the intermediate court in cases presenting constitutional questions, questions of great public interest, cases in which there is a written dissent in the intermediate court, and on certification by the court of last resort. Under this plan, should the intermediate court become overburdened with work and the load is not too heavy in the top court, any number of cases can be brought up so that the burden may be equalized. The constitutional provision regarding appeals should be sufficiently flexible to allow legislative change. Times change and case loads vary through the years.

I am not going to review the historical background of the Court of Chancery. That has been given to you by previous witnesses, but I do want to point out it has grown and adapted its remedies and procedures to accommodate the changing and growing demands of the population who have remade the State, over the years, from a purely agricultural one to one of the greatest industrial states in the Union. To this court came the increasing and complicated affairs of those individuals and corporations who were building the new industrial economy. The court has grown with the State and has reached its present status because as a court of equity it has had the flexibility and resources to adapt its remedies to the vastly changed circumstances of the economic life of the State. True, some anachronisms exist, but these can be cured and the practice modernized and simplified. This I had hoped to accomplish when, in view of this Convention being held, it was deemed wise to postpone such work.

I do want to take a little time to tell you why I so strongly advocate a separate and distinct Court of Chancery, headed by the Chancellor and with the right of appointment of the Vice-Chancellors reposing in him.

The Court of Chancery is a court of conscience and obviously that conscience must reside in one person, the Chancellor. He must have absolute control over his Vice-Chancellors and they must be responsible to him alone. The Chancellor must make the rules for his court and have frequent conferences with his Vice-Chancellors. He must determine the policies of the court. If each Vice-Chancellor were permitted to exercise an individual discretion, in discretionary

matters, it is plain to see that there would be no uniformity of decision in such matters. There must be a central control in the court, and as I have said, one conscience to guide. There must be a uniformity of practice and decisions to the end that a Chancery judge in one part of the State will not decree a case in one way and another Chancery judge in another part of the State decree a similar case in another way. All deviations from established practice or principles must have the sanction of the Chancellor. Yet there is no inflexibility of principle or practice because the Chancellor is always free to authorize an adaptation or extension of established remedies and principles to new facts or circumstances.

I am a believer in specialization in those dispensing justice, particularly in the *nisi prius* courts or those of first instance.

There are four divisions of law inherent in any jurisdiction where the system of Anglo-American law is in force, whether they be administrated by separate courts or in a single court. The argument for specialization cannot be put better than that done by Mr. Arthur T. Vanderbilt in the report of the Judicial Council to the Legislature submitting "Proposed constitutional amendments relating to the Judiciary." It reads:[1]

> "Shall we, then, set one judge to administering all the law, civil, criminal, equity and probate, as in the federal courts, or shall we, so far as possible, recognize that there is a vast difference in the subject-matter of the four systems of law, wide variation in the weapons and machinery in each, and some predilection in every lawyer and every judge in favor of one branch of the law as against the other?
>
> No chief executive of any large business enterprise in our complicated economic and financial system today would dream of expecting every one of his associates to be an expert in every branch of the business. The scope of the law is wider than any business; it embraces not only all business, but practically every form of human activity. The law schools, moreover, recognize the principle of division of labor, for each instructor is expected to be an expert only in the one or two subjects he teaches, and not an authority on the entire body of law. If those who merely teach the law as a science find it necessary to limit their field of activity, how much greater is the need of doing so for judges who must not only know their law as a science but administer it as an art?
>
> In drafting the proposed constitutional amendments, the Judicial Council has, therefore, accepted as its first principle the division of labor among the judges in the administration of these four bodies of law, and has, so far as possible, provided for their administration by different sets of judges. It is our belief that this makes for competency and expertness, not only on the bench but at the bar, and gives the citizens of the State a better quality of justice. There is less wasted effort, less wear and tear on the human beings concerned as judges, lawyers, litigants, witnesses and jurors than would result were each of our judges required to administer all the law. Finally, this principle of division of labor in our courts and at the bar finds its ultimate justification in our experience with it for nearly three centuries."

Dean Pound, whom you had the pleasure of hearing last week, in his work on *Organization of Courts* (1941), at page 253, in considering various types of wastage of judicial man power characteris-

[1] Report of the Judicial Council of New Jersey to the Senate and General Assembly of the State of New Jersey, May 31, 1932. Trenton, 1932. Pages 45-46.

tic of the development of court organizations in many states, said:

> "Another [way of wasting judicial power] was a practice of rapid rotation among the judges whereby they sat in turn in civil jury cases, equity cases, criminal trials, and divorce proceedings. Thus, each spent valuable time in learning the art of handling special classes of judicial work, only to pass on to some other special class where it was necessary to learn a new art. Where the specialist would act with assurance and decision, one who came fresh to a special field of judicial administration, if, as was very likely, his practice at the law had been mainly in a different one, had to proceed painfully and cautiously * * *."

There has lately appeared in the *New Jersey Law Journal* a series of articles with respect to a new court structure for New Jersey. In one article it argued for a unified court of trial level. I believe I know the author of all or most of the articles, and I have the highest respect for him personally and for his ability, but it is very significant that in the article devoted to "Probate Law under a Unified Court System" he states: "By a revision of the Judicial Article, let provision be made so that the business of adjudicating upon probate disputes may be turned over to specialist full-time Justices, sitting in the Probate Part of the Chancery Division * * * of the Supreme Court * * *." [1] I agree that there should be specialized experts in handling probate work, and I likewise say that specialized experts should handle the equity and law work of our *nisi prius* courts.

A fusion of the law and equity and consequent lack of specialization would result in the deterioration of equity jurisprudence.

Professor Pomeroy has stated that the central conception of a system abolishing distinctions between law and equity was, that consolidation in one proceeding would result in all the jurisprudence becoming more equitable. But, he said, citing New York State as an example, every careful observer must admit that in all states which have adopted the reform procedure, there has been a weakening, a decrease, and disregard of equitable principles. The tendency has been to give undue prominence to purely legal rules, and to ignore equitable principles. He concluded by saying: [2]

> "The correctness of this conclusion cannot be questioned nor doubted; the consenting testimony of able lawyers who have practiced under both systems corroborates it; and no one can study the current series of state reports without perceiving and acknowledging its truth. In short, the principles, doctrines, and rules of equity are certainly disappearing from the municipal law of a large number of the states, and this deterioration will go on until it is checked either by legislative enactment, or by a general revival of the study of equity throughout the ranks of the legal profession."

Dean Pound, writing in 5 *Columbia Law Review,* at page 29, said:

> "It is remarkable that of the many codes and statutes which provide for the so-called fusion of law and equity, so few have provided for the su-

[1] *70 N. J. L. J. 149,* issue of May 8, 1947. The full text of these articles appears in the Appendix to this volume.

[2] Pomeroy, A Treatise on Equity Jurisprudence (1st ed., 1881), Preface.

> premacy of the equitable rule in case of conflict. Such a provision is contained in the English Judicature Act and the Connecticut Practice Act. Of course, we shall assume that the equitable rule must prevail in such cases, statute or no statute. But the fact remains that in practice this has not always been the result. Disappearance of equitable rules, however, has not been the only untoward event. Examination of current reports will disclose four tendencies in the amalgamated system: (1) legal rules superseding equitable rules in some cases; (2) equitable rules or portions of them disappearing; (3) equitable principles becoming hard, fast, and inflexible in their application; (4) equitable rules becoming adapted in such a way as to confuse instead of supplementing the legal rule."

These very same conclusions are reiterated by Professor McKinney in *Pomeroy's Equity Jurisprudence* (6th ed.) published in 1940, sections 355, 356, and 357, where the author states:

> "While these provisions of the new system do not absolutely take away the jurisdiction to entertain suits for the enforcement of equitable rights, and, in connection therewith, for the restraining of pending or threatened actions at law, yet they certainly modify that jurisdiction, and in a great number of instances render its exercise unnecessary, improper, and even impossible."

The purpose of the new system is, that if a cause of action is stated in the pleading, the relief should be granted whether that relief be equitable or legal. The correctness of this theory may be admitted, but the fact remains that the courts fail to carry it into practice. The reason is that the theory runs head on into the guaranty of a trial by jury on legal issues found in all state constitutions.

The relief which the law affords must be administered through a trial by jury, unless the jury be waived, and the relief which equity affords is given by the court itself. Therefore, instead of having to decide at the start of a case what issues are to be tried in equity and what issues are to be tried at law by a jury, as is done in this State, under the reform proceeding the judge must decide somewhere in the case what issues he will decide and what issues are purely legal and must be submitted to the jury. The pleadings and trial often present an even more difficult decision, and that is whether or not the pleading of equitable causes of action joined with legal causes has not turned the proceeding into an equitable cause, or vice versa. Here is the same old much-decried jurisdictional problem in a different form, and if the judge makes a mistake, there is an appeal on that point alone.

The problem is one that the best minds of the last two thousand years have not been able to solve or remove to a satisfactory degree. Equity jurisprudence is an integral and necessary part of the law and no one has suggested that it be abolished or fused and submerged in the jurisprudence of the law court. This being so, the problem arising out of the substantive difference between equity and law will still remain and cause procedural difficulties on the basic question of the right to a trial by jury on issues of law.

This is well illustrated by the decision of the Second U. S. Circuit Court of Appeals (Frank, Hand and Chase, JJ., decided May 7,

1947) in *Beveslavsky* v *Hon. Francis G. Caffey, District Judge, etc.*, which was on a petition for a writ of mandamus to compel Judge Caffey to grant plaintiff a trial by jury, which he had refused, in a suit in which money damages and an injunction were prayed for. Judge Jerome Frank said:

> "Defendant seems to suggest that the rules have completely obliterated, for all purposes, the historic differences between 'law' and 'equity'. We cannot agree. Those who favor it should have in mind that such obliteration might deprive us of the inestimably valuable flexibility and capacity for growth and adaptation to newly emerging problems which the principles of equity have supplied in our legal system. A transplanted civilian has shown us the disadvantages of a system in which 'law' and 'equity' are fused not only in form but in substance, and another writer has pointed to the danger that, if the courts are not watchful, the procedural fusion may cause a substantive hardening of equity."

A writ of mandamus was issued ordering a trial by jury on the law issues. Thus, the same result was reached as would be reached in our courts; the cause had to be tried in two parts.

The federal courts' jurisdiction in matters out of which equitable questions arise is in a sense rather limited in comparison with the broad and inclusive jurisdiction of all the courts of this State. Yet since 1938, when the new rules of procedure were adopted in those courts, so many technical questions of procedure and interpretation were raised and decided that there are presently ten large volumes of annotations on these rules. This technical litigation caused delay and expense to the litigants because you and I know the lawyers involved had to be paid, and ten volumes of such decisions represent a vast amount of legal preparation. We will be confronted with the same problems if the complete changeover is made as has been suggested and our existing system abolished. That is one of the reasons, I reiterate, that such changes as are needed can and should be made within the framework of the existing system. We should not throw away the good with the bad.

Professor Pomeroy in 1881 thought the provision of the English Judicature Act providing that where there is a conflict between law and equity, the rules of equity should prevail, would render the system perfect in theory and give equity life and prominence. It did to an extent, but in a way that would run afoul of our constitutional guarantees. We have constitutions; the English do not. Their Parliament is supreme.

When the Court of Chancery was abolished as a separate entity in England in 1873, it consisted of the Lord Chancellor as the working judge, assisted by the Master of the Rolls and a large number of masters to whom matters were referred for the taking of testimony. There were no oral trials, and this arrangement had become progressively inadequate and led to the statutory changes. Obviously, no comparison can be made between such a system and the existing Court of Chancery in New Jersey.

But after 75 years under the new Judicature Act, the system in England has again broken down. The high cost of litigation and the length of trials resulted in a series of investigations in 1924, 1928, 1930, 1932, 1934 and 1938 and a report was filed in 1936 which stated that there was still much delay in the trial of civil cases. The trials were too long, and the special priorities given to the trial of cases in the new procedure list retarded ordinary business. *This commission recommended, among other things, that the judges be kept working on one list and not change back and forth.*

R. M. Jackson, lecturer of law at the University of Cambridge, in his book *The Machinery of Justice in England* (1940), lays bare in considerable detail the failure of the Judicature Act to afford speedy and inexpensive litigation for the average litigant. He flatly states that the growth and expansion of the high court might have helped in the building of uniform law, but such uniformity was achieved at the expense of competing courts which were more suitable for small litigants and small cases. In fact, as he points out, the high court hears fewer than 100 probate matters a year in the probate division because the system is not needed by the bulk of the population, who divide their possessions among relatives without any thought of registrars or judges.

He concedes that the fusion of the administration of law and equity may be regarded as a triumph of Chancery aids in civil suits, but he points out that within a few years of the passage of the Judicature Act, the use of juries in civil cases declined drastically until, due to the shortage of man-power in 1917, there were restrictive measures on the jury trial. In 1933 less than ten per cent of the cases were tried by juries, and at that time the right to a trial by jury on a law issue was abolished. In 1937 less than five per cent of the cases were tried by juries, and in the county courts in 1936, out of 28,221 cases, there was a jury trial in only seven. So you can see that in England the fusion of law and equity has resulted in the abolition of the right to a trial by jury, for all practical purposes.

In England all motions relating to pleadings, practice, interrogatories, discovery, the admission of documents and examination of witnesses are handled by masters of the court, which masters dispose of all of the preliminary work prior to the actual trial of the case. In addition to this, there is the system of solicitors, barristers, and King's counsel, who are all *specialists* in particular phases of the work in preparing these cases for trial.

The 1942 and 1944 revisions recommended by the legislative committees are based substantially upoon the English Judicature Act, yet it is fairly clear that the theory back of that act has not worked out in practice, and could not work out in this State be-

cause here the right to a trial by jury on a law issue cannot and should never be abolished.

Many federal judges with whom I have talked decry the attempt to abolish the Court of Chancery here as a separate entity with judges devoting themselves to equity jurisprudence. I would like to read to you part of a letter written to me by Judge John Biggs, senior judge of the United States Circuit Court of Appeals, who well knows our system and that of the federal courts, which is typical and which he has given me permission to use:

> "It is true of course that the Supreme Court of the United States by rule operating in the federal courts has abolished the technical distinctions betwen suits at law and in equity. But the very fundamental differences between law and equity remain a matter which every judge recognizes. The federal courts do not employ Chancellors as separate judicial officers. Each judge of the district courts of the United States combines in his one person both the law judge and the Chancellor. This system was inaugurated by the founding fathers and, it must be conceded, has worked efficiently. But there are fundamental differences lying in the circumstances which attend suits brought in the federal courts and those in the courts of New Jersey and Delaware. The 'equity side' of the federal district courts embraces by far the smaller number of cases which come before these tribunals. Many of the heavier and more important cases are on the 'equity side' of the federal district courts but the bulk of the work of those courts is at law.
>
> It must be emphasized that the district courts of the United States must take their law and, speaking colloquially, their equity from the state courts for the Supreme Court of the United States has made the decisions of the state courts binding upon the courts of the United States wherever diversity jurisdiction is invoked. The fount of equity law at the present time lies outside of the federal courts and in the courts of the States. What you in the Court of Chancery of New Jersey decide, unless it be reversed, as it very rarely is, by the Court of Errors and Appeals of New Jersey, is as binding on the District Court of New Jersey and on the United States Circuit Court of Appeals for the Third Circuit, on which I sit, in cases coming from New Jersey, as are the decisions of the Supreme Court of the United States.
>
> The point which I am attempting to make is as follows. If the separate Courts of Chancery in New Jersey and Delaware are to be abolished (and I may state parenthetically that there seems but small indication in Delaware at the present time of any desire to abolish our Court of Chancery), I doubt very much if equity will continue to make its contributions to the growth of the law in the two states. It sounds trite and obvious to say so but the most efficient Chancellor is in fact only a Chancellor. If he is to think effectively in terms of equities he must think so at all times. Thus the stream of equity is kept clear. *In my opinion where one court undertakes to administer both law and equity the tendency is to confine equity and expand law. When this occurs there is an inclination toward rigidity and justice not infrequently fails.*
>
> The Court of Chancery of New Jersey enjoys universal esteem. There has been a succession of great Chancellors in New Jersey. They have made much sound law. It is idle to assert that courts do not make law. As one who is bound by the decisions of the New Jersey courts I am very loath to see New Jersey's separate Chancery Court abolished. I would decry the abolishment of the separate Court of Chancery in Delaware with equal vigor and I know that the Chancellor of Delaware would take a position similar to mine.
>
> I may state in conclusion that I make bold to doubt if any substantial sum of money would be saved in administering justice in the State of New Jersey by abolishing its separate Court of Chancery. The probability

> is that more judges would have to be added to take care of the work now done by the Chancellor and Vice-Chancellors. The net result would be a change of names of judicial officers and some damage to the whole system of the administration of justice.
>
> I know that the separate Chancery Courts of New Jersey and Delaware are vital, living forces for the administration of justice and the growth of the law."

I recently came upon this complimentary expression in a decision by a Justice of the Supreme Judicial Court of Maine:

> "No state court is entitled to greater consideration for the perfection of its rules of equity procedure and the force of its equity decisions than that of New Jersey. This sentiment is echoed by the majority of judges throughout the country."

The New York Supreme Court, Appellate Division, in *Guaranteed Title and Mortgage Co.* v *Scheffres, 285 N. Y. Supp. 464,* a case involving mortgage moratorium statutes, said that the doctrine of the equity of redemption should not be abandoned in view of the decisions "in the well informed courts of a sister state (New Jersey) where comprehensive knowledge of doctrines of equity is an outstanding attribute by reason of that state retaining separate equity or chancery courts."

There are just a few other matters I would like to call to your attention.

The 1944 draft contained a provision, *Art. V, Sec. VI, par. 1,* that the Chief Justice of the Supreme Court should be the administrative head of all the courts, and provided for the appointment by him of an executive director. If one of the objects to be attained by you is to see that the members of the court of last resort have no other duties than opinion work, it is destroyed by this provision.

I think I know something of the tremendous amount of work involved in court administration, the time it consumes, its heartaches and headaches. The administrative work as it relates to the Court of Chancery alone is a tremendous task. You may say that the executive director will do it, but the responsibility will be that of the Chief Justice. He cannot delegate a large portion of the work. He must make the decisions required after study and consultations. Judges, lawyers and litigants will deal in most cases with no one but the administrative head himself.

Considerable is said regarding the necessity of administrative control. I agree with that principle. I now have such complete control in the Court of Chancery with relation to administration, personnel and finances, and while I have assistants, I still must personally do a great deal of the necessary work.

My suggestion, as heretofore, is that the Chancellor be the administrative head of the Court of Chancery and that there be a Chief Judge of the *nisi prius* courts on the law side who will be the administrative head of those courts, they both to make full yearly reports to the Chief Justice of the top court.

I disagree with the wisdom of giving to the rule-making body, as provided in the 1944 draft, *Art. V, Sec. II, par. 3,* power to make rules as to evidence. Any changes in the existing laws of evidence should be made by the Legislature, not by the courts. No court should have the power to pass on what it has itself done.

I have given you in all candor my views in an endeavor to be of some help. There will probably have to be compromises between divergent and conflicting views. The final product of the Convention will not be as each of us would have it if we were individually writing it, but I am confident it will be a document we can all heartily support, whatever your final decisions may be.

VICE-CHAIRMAN: Thank you very much, Chancellor . . . Any questions?

MR. WAYNE D. McMURRAY: I should like to ask the Chancellor if he would amplify a little his reason why a Supreme Court with a Chancery Division would not be as satisfactory as a separate Chancery Court.

CHANCELLOR OLIPHANT: Well that is a matter of names. If you have a Chancery Division headed by a Chancellor, that's, in effect, the same thing as having a Court of Chancery headed by the Chancellor.

MR. AMOS F. DIXON: Your objection, then, lies in the fact that you don't think that one judge should settle both the equitable and legal questions.

CHANCELLOR OLIPHANT: That's one of my objections.

VICE-CHAIRMAN: Chancellor, you suggest that each court be given powers to dispose of issues which are incidental. Specifically, would you permit a law court, which was handling a law case, to dispose of an equitable defense, or would you compel the equitable issue to be tried in the Court of Chancery?

CHANCELLOR OLIPHANT: No, I think there are many cases, as I have said, where a law court could dispose of equitable defenses. I think it should be done under rules.

VICE-CHAIRMAN: In other words, you might have a law action where the defendant pleads equitable fraud, and you would allow the court of law to dispose of the issue of equitable fraud.

MR. HENRY W. PETERSON: On that point, just reversing Mr. Jacobs' observation, a matter of law incidental to the equity case is brought up, and I understood you to say that that should be permitted to be determined by the Vice-Chancellor hearing the case.

CHANCELLOR OLIPHANT: Under proper rules, yes.

MR. PETERSON: Under proper rules. Assume that both litigants, the counsel on both sides, agree that they'll take their cause into the Court of Chancery, even though they know before they go in that there is a law question involved. There's an accounting,

let us say. The loser, as I understand it, can still appeal, and the Court of Errors and Appeals will say that that point, that incidental law point, must go before a jury. Is that correct, sir?

CHANCELLOR OLIPHANT: Well, I don't contemplate that under a new system.

MR. PETERSON: That is the present rule. I mean that can happen today.

CHANCELLOR OLIPHANT: It happens that lawyers—I don't think it happens very often—where good lawyers, good firms, represent the client, but they get into the wrong court. No question about that.

MR. PETERSON: Well, say it is just a matter of, well, one side's wanting a delay. Now, they have already agreed to try it in Chancery and abide by the results there.

CHANCELLOR OLIPHANT: A purely legal question?

MR. PETERSON: No, just an incidental question, such as an accounting; and then the loser determines that he'll use the remedies that are in the law—

CHANCELLOR OLIPHANT: Oh, no. If he goes in and accepts the jurisdiction of that court, he would not get very far on appeal as to the jurisdiction.

VICE-CHAIRMAN: I think what Mr. Peterson may have in mind is a recent case which was decided by the Court of Errors and Appeals in which an action was brought raising the question of restraining a nuisance. The Court of Errors and Appeals held that the question of title could not be settled by the Court of Chancery.

CHANCELLOR OLIPHANT: Don't you agree to that?

VICE-CHAIRMAN: The question is whether you would permit that to be disposed of in the one action, or would you compel two separate actions in that situation?

CHANCELLOR OLIPHANT: Title to lands cannot be tried except in a law court.

VICE-CHAIRMAN: Then, in that situation, you would compel that the other case be tried by the law court?

CHANCELLOR OLIPHANT: Unless there is specific provision for it some place.

VICE-CHAIRMAN: Would you be in support of a provision which would permit the court of equity, in that situation, to try the case?

CHANCELLOR OLIPHANT: I say that where in a court of equity there is an incidental legal question which can be properly, expeditiously tried, that ought to be done. There are many cases where equitable relief could be granted in law courts, and vice versa. There are cases where it shouldn't properly be done.

VICE-CHAIRMAN: Our specific question was, would you per-

mit that to be tried in equity, where both parties consented that the equity court try it?

CHANCELLOR OLIPHANT: I don't know that you could today.

VICE-CHAIRMAN: But would you, under a new system, permit that?

CHANCELLOR OLIPHANT: If it is an incidental question and they want it tried there, I don't see any particular objection to it.

MR. PETERSON: May I ask another question, Chancellor? Is there any objection to the Vice-Chancellors issuing and signing their own decrees?

CHANCELLOR OLIPHANT: Well, Mr. Peterson, in effect they do that in the great majority of the cases today. Why, I wouldn't have anything to do but that if I had to sign all the decrees; but there are cases where I won't sign the decrees—or there have been.

MR. PETERSON: Which I can see may be good.

MR. GEORGE F. SMITH: Chancellor, I want to be sure that I understand your position. As I understand it, when you speak of amalgamation, you are opposed to what we may term the federal system, but you are not opposed to a Division of Chancery as distinguished from Law in a so-called integrated court.

CHANCELLOR OLIPHANT: The set-up which I would see as ideal is to have your court of last resort, your Supreme Court; then, in the *nisi prius* parts of the courts, your Court of Chancery headed by the Chancellor, your law courts headed by a Chief Justice, who will run those courts. The top man of the top court cannot do it. It's a physical and mental impossibility, in my judgment. And then below that, have your county courts.

MR. SMITH: In other words, you are agreeable to a division or a separate Court of Chancery, as it now is.

CHANCELLOR OLIPHANT: I'm agreeable to—I say I'm agreeable; I don't know what I am agreeable to, until I see what this Committee develops.

MR. SMITH: But you are not opposed at this moment to that idea?

CHANCELLOR OLIPHANT: I would prefer to see the courts' present set-up, to a very large extent—I mean the courts worked out within the present framework, because there are going to be any number of technical difficulties, let alone legal difficulties, in the change-over. If there is any change, we're going to have to, somebody is going to have to rewrite half of the statutes, it's going to take months to formulate new rules, and after you get the rules, you're going to spend thousand of dollars and many years in determining what they're all about. The more we can keep our present rules, the better off the litigant and the lawyer are going to be.

There are very few of these cases, when we come right down to it, where there's any great difficulty because the parties are in the wrong court. There have been, I think, since 1913 only about 70 transfers from Chancery to law, and there have been seven or eight from law to Chancery. I don't mean to say that covers the cases where lawyers come in the wrong court and have been told that their proper remedy was either at law or vice versa. But those are the actual numbers of cases which have been transferred.

MR. THOMAS J. BROGAN: Then you think, Chancellor, that it would be ideal for our purposes, the purposes of the State, in rewriting the Judicial Article, to rewrite it within the present structure?

CHANCELLOR OLIPHANT: Absolutely.

VICE-CHAIRMAN: Chancellor, you refer to the fact that in federal practice there were less jury trials. Hasn't that been the result of the fact that the parties have waived jury trials, as distinguished from a deprivation of jury trials?

CHANCELLOR OLIPHANT: Well, I haven't had much practice in the federal courts—at least I haven't had any for 20 years —but in my talks with men who have practiced in the federal courts, they have to be very careful that they don't get themselves in there without a jury.

VICE-CHAIRMAN: But if they file a demand for a jury they protect their right, and that demand is a two-sentence demand, isn't it?

CHANCELLOR OLIPHANT: I don't know. I am not particularly familiar with the federal system.

VICE-CHAIRMAN: But your suggestion was that a unified court might result in a deprivation of jury trials.

CHANCELLOR OLIPHANT: I don't think there is any question about it. There is an article by the statistical assistant to the Director or Superintendent, or whatever his name is, of the Federal Civil Rules Commission, who, in effect, says that the jury system is an anachronism, and he goes over all the states, the code states, and shows how the fusing of law and equity has drastically curtailed the right of trial by jury.

VICE-CHAIRMAN: Chancellor, I don't question that there are less jury trials. The only point I was making was that that is entirely up to the parties; and if the parties waive jury trial, that is one of the privileges they have under federal practice.

CHANCELLOR OLIPHANT: That may be, but I think any practitioner in the federal courts will tell you that you don't, unless you're mighty careful, have the right to trial by jury in the equity court, or in the federal courts, that we do here; and there is no question about that in New York State (I don't know what the federal system is), where, if you join legal and equitable causes of

action in one suit, you are deemed to have waived the jury trial on the legal issues. Now, if that isn't curtailment of the right of trial by jury, I don't know what is.

VICE-CHAIRMAN: One further subject was brought in. Do you suggest that a unified court will have any effect on the principles of divorce, or need have any effect on the principles of divorce?

CHANCELLOR OLIPHANT: Not if you keep divorce in the Court of Chancery and under a Chancellor who has absolute supervision and control of it.

VICE-CHAIRMAN: Which could be accomplished within an equity division of a unified court.

CHANCELLOR OLIPHANT: Oh, yes, there isn't any question about that.

MR. SMITH: I believe that the Chancellor should be told that of the witnesses appearing before us, there has been a minority proposing the so-called federal system—I should say of those advocating a change—and a majority proposing a Division of Chancery and a Division of Law.

There is one other question that I would like to ask you, sir, and that is something which concerns me as a layman. As I understand our present system, you, as Chancellor, although sitting in the top court, are disqualified when it comes to hearing an appeal on a case that comes out of Chancery. Have you any suggestion in that regard? Do you think that is wise, and if you do not, what remedy would you propose?

CHANCELLOR OLIPHANT: Well, I don't know that I would put the Chancellor in the top court.

MR. SMITH: He would be the head of this Chancery Division.

CHANCELLOR OLIPHANT: He has enough to do. Except for the contact that he has by sitting in the Court of Errors and Appeals, and the coordination of the whole system, he has no duties except to preside in the Court of Errors and Appeals and to do his share of the work on the law opinions.

MR. SMITH: But at the present time your position on the top court is an anomoly as it applies to the equity phases.

CHANCELLOR OLIPHANT: Oh, absolutely.

MR. DIXON: I take it you would be satisfied to give the Legislature some authority over the rule-making power of the law courts?

CHANCELLOR OLIPHANT: No, I don't think the Legislature should have the rule-making power.

MR. BROGAN: But you limit the rule-making power to procedure.

CHANCELLOR OLIPHANT: That's right.

MR. SMITH: And you would leave with the Legislature the question of rules of evidence.

CHANCELLOR OLIPHANT: Well, if we go into that, how are you going to keep your separate—

VICE-CHAIRMAN: Chancellor, would you give the Legislature any power to change the jurisdiction of the court, or would you continue the present philosophy which is to the effect that the court's jurisdiction is unalterable.

CHANCELLOR OLIPHANT: Well, I don't know that I get your question exactly.

VICE-CHAIRMAN: Well, specifically the Court of Chancery has certain inherent jurisdiction which cannot be enlarged or reduced by legislation.

MR. BROGAN: It can be enlarged.

VICE-CHAIRMAN: Well, there's *Heddon* v *Hand,* which held that it couldn't be enlarged.

CHANCELLOR OLIPHANT: I think the majority of us think that it can be enlarged, but it can't be taken away or decreased.

VICE-CHAIRMAN: Would you allow the Legislature any authority to modify it?

CHANCELLOR OLIPHANT: Well, I would allow—I think they ought to have what they have today.

VICE-CHAIRMAN: Which would certainly be no jurisdiction to cut into the authority of the court.

Any further questions?

MRS. GENE W. MILLER: Chancellor, I am interested in how long it takes a law judge to become an equity judge.

(Laughter)

CHANCELLOR OLIPHANT: Mrs. Miller, I think that all depends on the individual. A law judge, a man who has given his time to the law side and then goes into the equity branch, if he lives and breathes equity, it doesn't take him a long time to become a good equity judge.

MRS. MILLER: Have you written any opinions yet as an equity judge?

(Laughter)

CHANCELLOR OLIPHANT: Oh, yes.

MR. DIXON: You have exactly that combination when you get to your last court.

CHANCELLOR OLIPHANT: Yes, but there's a great difference in the work in the *nisi prius* courts and on the appellate court. When you are upstairs, as we call it, you have time to consult briefs, you have time to do your digging, but you don't have in the *nisi prius* court.

VICE-CHAIRMAN: Don't you have that in important equity cases—at *nisi prius?*

CHANCELLOR OLIPHANT: Oh, yes. That's one of your

difficulties that you get into in a case involving law and equity. If the law end of it has to go to the jury, and the equity end of it might take several months to decide, then the work of the jury might have been for naught.

MR. DIXON: In other words, give a man in the court of last resort enough time, although he may be an expert law judge, he may still be able to pass proper opinion on equity cases if he is given time.

CHANCELLOR OLIPHANT: Well, as the former Chief Justice knows, when you have been on the Court of Errors and Appeals for a time, you get to know something about equity. At least I hope we do.

(Laughter)

I know the Chief Justice did.

MR. FRANK H. SOMMER: That works the other way around, too, doesn't it?

CHANCELLOR OLIPHANT: No question about that.

VICE-CHAIRMAN: Anything further?

Thank you very much, Chancellor. We appreciate your coming.

Each of you has presumably read the February 1947, issue of the *Harvard Law Review,* and I need do nothing more than repeat the conclusion of Mr. Burlingham's article: "Judge Hand should have been on the Supreme Court of the United States years ago, but the stars in their courses fought against him. After thirty-seven years on the bench, he is now unquestionably first among American judges." I don't think any member of the bar will disagree with that.

It is a pleasure to present to you Judge Hand, Judge of the Circuit Court of Appeals for the Second Circuit.

MR. BROGAN: We are very happy to have you, Judge.

JUDGE LEARNED HAND: Mr. Chairman, ladies and gentlemen:

Mr. McManus, when he asked me if I would come here, said that he thought you might like to hear from me, and really, all that I think I am qualified to tell you is my own experience.

Now, for more years than I like to look back on—38 as a federal judge—as you have undoubtedly heard, and as you lawyers of course knew before, on this particular question the federal system from the very outset has had no distinction between equity and law, as far as concerns judges. We did have, until 1913, an absolute and very archaic distinction in procedure.

I came on the bench as a district judge in 1909, and until 1913, as I say, we were working under the old system and it was, as far as I know—I am not an historical scholar, but as far as I know—it was practically unmodified. The testimony was all taken out of

court and it was not taken, as they did in the ancient Chancery, without the other side present. What used to happen was this. Take a patent case where peculiarly the practice was for the lawyers to write down written interrogatories. They would put a witness on the witness stand who was generally an expert and they would then go off and play golf, and he would lecture to the typewriter. They didn't even have a stenographer, but they would go on pounding away on the keys and he would lecture on the intricacies, or whatever the facts were. Of course, that was an exception, but that was the way that the testimony was taken. Well, it was very oppressive and it was, of course, preposterous.

In President Taft's time there was a turnover and the testimony was taken in both courts alike. But even from the beginning, as you know I've already said, the same court of judges served in both capacities, both as equity judges and as law judges. And beginning with 1913—we perhaps pressed our powers more than we should but it became very flexible—we would change a case from equity to law or from law to equity pretty much as we thought justice required. Of course, I am a little biased, because when you practice under a system you are apt to think well of that system—as far as I know, there has been no complaint of the fact that we were too free procedurally. And so things went until, I think, 1938, and then after a great deal of time had been spent by the very best brains of the profession, the Supreme Court finally did give us the present federal civil rules.

Well, we haven't had a very long time under those and they have, naturally, as one would have expected, developed some weaknesses here or there. There are some amendments going into effect —I've forgotten when, but within the year. Now, in that all distinctions are ruled out, even procedural distinctions. There is but one action, and the judges give whatever remedy they think the parties are entitled to.

There are people who think that that has had a bad effect—I think more of them think it will have than think it has yet developed—because they say that it will tend to crystalize equity. which has always been free to adapt itself to the conditions of the particular case, and will tend, therefore, to give it the supposed stiffness of a legal system. Well, that may be true. Of course that rests *in futuro.* Perhaps I ought not to suggest any purely speculative considerations, because I can't prove them, but I will tell you what I think about that, because it does seem to me that the issue here is somewhat misconceived.

It, of course, was true, as probably most of you know, that this distinction between equity and law is all historical. It came very early. I am not much of an historian to tell you, and probably you've heard all of this before and you know it better than I, but

it goes back to very ancient times when, in order to get access to the court, you had to be able to bring the facts of your case within a very limited number of what they called writs. Their origin goes back to an antiquity I know nothing about, but that's all you could get. If you couldn't get that you were without any relief, although the judges sometimes made those writs, squeezed those writs to fit—blew them up—cases that they hardly were meant to fit. But they really had to, in order to avoid the most obvious miscarriages. They couldn't obviate all miscarriages, by any means, and the Chancellors of the time intervened in cases. Originally, I think, they were very largely of a *quasi*-ecclesiastical character because, as you know, they called themselves the court of conscience, and they would give relief where it was pressing enough. Under that there arose, for instance, the whole system of trusts, as you undoubtedly heard here—out of this pressure upon the courts not to allow the most obvious injustices to go unremedied.

That went on; they were ecclesiastics, I think, down to, it seems to me, the first part of the 17th Century. I think Lord Bacon was the first who wasn't a cleric, a bishop or some sort of cleric, and from then on they gave some relief. They had no jury. Finally the complaint was quite strong, by the beginning of the 19th Century, that the Chancellors, too, were getting too rigid and were not pliable enough. Well, the law courts under the influence of Lord Mansfield, those of you who are lawyers know, developed a plasticity and flexibility which greatly shocked conservatives of the last quarter of the 18th Century and which gave us things which, I think, must have startled Lord Eldon on the other side of his shadow.

I think those are fairly good illustrations that by calling a man a law judge you don't give him arteriosclerosis and by calling him an equity judge you don't make him one of the discs which people see flying around. I think it depends very largely on the quality of the individual. If you are a person who has that happy balance, which a great judge has, of not attempting to act as a reformer or to substitute your own notions of public policy—I don't mean to suggest that any judges in this country could do such a thing; why, on the other hand, is he so afraid of trying to find out what the real purpose of the law is that he hides in a dictionary—if you've got that kind of a judge, you've got a judge who is fit to serve either in what we call law or what we call equity. They have really been part of the same system always.

Of course, it is true that if you divide your judicature into two parts and confine part of it to one branch of law and another to another branch of law, neither part will have familiarity or as much familiarity as it probably could have with the other. But for the moment, I suppose, we are discussing the question of whether it is beyond the capacity of one judge to be familiar, sufficiently familiar,

with both if he administered both. Well, it's very hard, as I have already said, for a person who has been so long as I have in one system to judge of that, and if I tell you that it does not seem to me that there are difficulties there, you must take that for what astronomers call my "personal equation." And I may be wrong, but I can only give you the testimony that I have. I don't even think that under this extremely loose procedure that has now come in force under the federal rules there is any danger of that confusion, for the reason I have tried to say—if there is any danger that equity will lose its adaptability (I like that word a little better than flexibility, but they mean the same thing), I think both will.

The Chancellor, after I came in, suggested that he had heard that an objection had been made that our system deprived people of the right of trial by jury. It may be that it has resulted in fewer jury trials; I think that is possible. Of course, it is true that a person not aware of the rules and who has not claimed his jury will lose his jury. That has been known under the federal system and is the penalty of a mistake by the lawyer if he doesn't know his law. But that is his own fault. There is nothing that deprives him of it. It is rather curious that I happened to have brought here an opinion of my own court. I wasn't in it. It is very recent on that very question and shows, I think, that the criticism is not quite fair that under the federal rules you are in danger of losing your jury. I won't read it to you. Judge Frank wrote it. It was a patent case where the plaintiff wanted an injunction, and those of you who are lawyers know that he had at that time no right to a jury trial. And why was he going to get an injunction? Well, it was a case in which the Judge Advocate-General during the war sent word to the Attorney-General asking him to make representation that it would be prejudicial to the public interest to have the case tried during the war. So they didn't try it until after the war. By the time they got to it the patent had expired, so you couldn't get any injunction. All you could get then was damages. Well, the plaintiff hadn't claimed his jury, and the reason he hadn't claimed his jury was that he wasn't entitled to it. But after he found he had lost his right to an injunction, he wanted a jury trial. He claimed it and the court held that he was entitled to it, that he had not lost his right to a jury trial because at the time when the question first came up he did not have—well he didn't have a right to it.

I only instance that because I felt perhaps sensitive when I heard the Chancellor say that we might be insensitive to right of trial by jury. That, of course, must remain as a distinction between equity and law, and the reason why it must remain, as you well know, is because the Constitution requires it. We can't avoid it. Why should you not have a jury when the remedy you ask is an injunction? God only knows, there is nothing but an historical reason.

So you must to that extent keep the distinction between equity and law. I don't myself see why there need be this distinction, unless it be this proposed absence of ability of a common law judge to judge equity cases and an equity judge to judge common law cases. That, of course, will exist as long as the system does itself, but I don't think it is beyond the comprehension of a single individual of ordinary competence to be familiar with both sides.

That is all I want to say, but I will be very glad to answer any questions.

MR. DIXON: May I ask the Judge a question?

VICE-CHAIRMAN: Yes.

MR. DIXON: You spoke of the rather radical changes made, I believe, in 1913 and—

VICE-CHAIRMAN: 1938.

JUDGE HAND: 1913 was the first.

MR. DIXON: And 1938?

JUDGE HAND: Yes.

MR. DIXON: Did those changes result in chaos for a number of years and a lot of increased litigation, as has been pointed out by several witnesses here?

JUDGE HAND: I don't think so.

MR. DIXON: The fear is that if we make changes we are going to have chaos for awhile, millions of dollars worth of litigation, and an upsetting of the courts for 10 or 15 years. Would you anticipate any such thing?

JUDGE HAND: Well, of course, that is prophesy; it's a little hard to say. You have—

MR. DIXON: You have had experience with changes.

JUDGE HAND: Yes, but we didn't start with the same distinction. I think it only fair to say that if you do consolidate, you will find it will take some time to get used to it—if you will pardon my saying so. I didn't mean to take side in this matter. I should say that was one of the penalties of your long delay. I think that you ought not to underestimate the fact that if you are switching a system which has gone on now for over a hundred and fifty years, you are going to have trouble in adaptation, particularly among those who have been trained in the present system. That you have to expect. You see, we never had that, because we never had the separation between the two. That you will have to meet.

When the 1938 rules came in—we haven't found really any difficulty. Perhaps we are too arbitrary. Again and again I've said in my court when a man says so and so didn't plead this or that, I said, "Did you have an opportunity in the court below to know what he was charging you with or what was his claim?" Well, they generally say, "Yes." "Did the judge give you a chance to prepare; are you saying that this was sprung on you?" "No." As soon as he

says that I always answer, "We pay no attention to pleadings; all we want to do is to see that the party shall not be surprised and have adequate time to present what he has to say. If you have that, we don't care what you plead; we don't pay any attention to your pleading. Please don't argue that."

Now, I don't think that—of course, that's rather radical stuff—I don't know whether that has resulted in confusion, or perhaps I shouldn't know whether it had or not. I haven't observed.

MR. DIXON: Thank you.

MR. WALTER G. WINNE: Judge Hand, is there only one federal judge in many districts today?

JUDGE HAND: Yes, in a good many.

MR. WINNE: And, of course, going back to 1909, there were a great many more.

JUDGE HAND: Oh, yes—a great many less.

MR. WINNE: A great many more districts where there was only one federal judge?

JUDGE HAND: Oh, yes.

MR. WINNE: Probably New Jersey only had one federal judge in 1909.

JUDGE HAND: I think—

MR. WINNE: Well, I am not sure, but historically that may be one reason why federal judges have both equity and law jurisdiction, because he was the only one.

JUDGE HAND: I hadn't thought of it, but I think that undoubtedly was it.

MR. WINNE: And may I also suggest that in this State a great many lawyers very active in the state courts have very little experience in the federal courts, and it would not be unusual for a federal writ to come into a lawyer's office and that lawyer not know, if it were a suit, let us say, for damages in a negligence case, that he didn't get this trial by jury unless he demanded it. He would think immediately that he had a right to trial by jury—would never dream he had to demand it, unless he was familiar with the rules.

JUDGE HAND: Oh, yes.

MR. WINNE: And I imagine a great many people have lost the right, which they thought they had, to trial by jury, because they had never before had a federal case and failed to demand a jury trial.

JUDGE HAND: That might be quite so, but of course, I can't possibly answer that.

VICE-CHAIRMAN: A witness testified yesterday that a proceeding in a federal court was dismissed on the ground that the plaintiff had pursued the wrong theory of action. Is there any basis for that today in the federal court system?

JUDGE HAND: I don't know of any. It is pretty hard to answer absolutely, and it is very hard to answer what all judges under all circumstances will do. I can't imagine anyone with any sense doing that, but it might be so.

MR. DIXON: Might I ask another question, Judge, if you please? Where a man has lost his right to a trial by jury and the court makes the decision, do you feel that in those cases substantial justice is done just the same?

JUDGE HAND: Yes.

MR. DIXON: I have still another more radical question—and this doesn't mean at all that I am implying we are going to eliminate jury trials—but do you feel that if we do eliminate jury trials entirely in all cases in our country that we would have a poorer brand of justice than we have now, or a better brand?

JUDGE HAND: Well I shall have to make a Scotch answer—yes and no. In criminal cases I should be absolutely opposed to the idea of abolishing the juries, not so much because I think the jury is apt to get the facts better than a judge—many people do; again I may be biased—but in criminal prosecution other considerations come in. It's of great importance, in my judgment, to the stability of the whole administration of justice that all individuals should feel that their liberty is in the hands, in the end, not of any particular order of officials, but of 12 individuals who are responsible to no one but themselves and who will, whatever the law may be on the whole, judge according to the vague standards of what is decent, and so on. I would be, as far as criminal jurisdiction is concerned, the last to go for the end of the jury system.

When you come to criminal *versus* civil jurisdiction, I am somewhat on the fence. I am sure that the distinction between juries in law and not in equity is absurd; it's manifestly absurd, it's purely historical, it has no relation. Now, the English, who have a very practical political sense, as you all know, handle their juries in civil cases in a way that I should like to see, if constitutionally possible, done here. There are some issues which a judge will think a jury ought to decide; that is, you might say, semi-criminal kind of things and actions of somewhat the same sort—who is at fault and who isn't at fault. When they come to contest commercial cases, an English judge would never think of having a jury, and that seems to me a very wise distinction. Of course, it isn't possible always. Does that answer your question?

MR. DIXON: Yes, it does.

VICE-CHAIRMAN: Judge Hand, we have been discussing the question of whether the State should adopt the office of administrative director for the courts. Will you let us have the federal experience in that regard?

JUDGE HAND: Yes, I am very glad. That, too, is not very old,

and we have been extremely happy in our federal administrator. Do they know the system?

VICE-CHAIRMAN: I think it would be very helpful if you would outline it.

JUDGE HAND: Its origin goes back to Chief Justice Taft, and I think it possibly goes back to 1922, but it was just in its infancy during the early years. They had a Conference, what they called a Conference of Senior Circuit Judges. I don't know if you know the federal system, but they have the District Court, on which I think they have 180 judges, that is over the whole country; then they have an intermediate court of appeals, about 35 of those; and then the Supreme Court. Now the seniors of this intermediate court, the Senior Circuit Judges, began to meet with the Chief Justice to discuss any changes or go over how the work of their circuits was going, and so on and so on. Well, that was well enough in its way, but they didn't have much power and they couldn't do much because it was only once a year for three or four days. And then, finally, I think it may have been still in Chief Justice Taft's time—no, it wasn't—maybe it was—the law was passed which put a very different complexion on it.

This Conference of Senior Circuit Judges remained, but the Supreme Court was to appoint what they called an administrator —I don't know what the full title is—

MR. SMITH: Judgeship—

JUDGE HAND: No, he wasn't a judge at all—well, administrator. He has an organization, now getting to be rather large—I should hesitate to say how many, but probably 50 or more—in the Supreme Court Building in Washington. They keep track of all the work of all the District Courts and Circuit Courts of Appeal throughout the country. They prepare the requests for the appropriations.

We now have charge of our own appropriations, that is, the courts have. Mr. Chandler, the Administrator, prepares an elaborate budget which passes through the legislature and he then argues his requirements before the committee of Congress. We are entirely on our own, entirely exempt from the Attorney-General's office which used to have charge of all of our expenses—a very bad system, as he has to appear as a party in the greatest number of cases before us. So, we are quite independent.

He also recommends such changes as he thinks might be desirable to the Conference. The Conference works through committees of itself or committees appointed by the Chief Justice from the whole judicature of the country, District judges and Circuit judges, and they work through the year and make their reports to the Conference. Then the Conference makes its recommendation to Congress and leaves it to Mr. Chandler to support them before the

committees of Congress. Oftentimes the judges will go to the committees of Congress and urge them of themselves.

I did that recently in a case that might amuse you a little, because the House thought we were too extravagant in having secretaries and law clerks. We went down before the committee of the Senate and said we thought it would be a little hard not to have secretaries, and I said one of my District judges said, "My God, it's hard enough for us to understand what you say anyway, but if we had to read your writing I think . . ." Well, that is irrelevant.

(Laughter)

That really is the system. Now, we have been extremely happy in getting Mr. Chandler. There could not be any more intelligent or devoted administrator with the interest of the courts at heart, and he is so transparently honest and not out to get anything for himself, and the thing is so free from any political significance, that I am told, and I think it is true, he has established for himself an influence before the committees which is almost unique. They know when Henry Chandler asks for a thing there is no undercover about it; that they can take what he says absolutely to the letter, and he gets for us in the end all we deserve and I sometimes think he gets a little more than we deserve. I fancy the committees are very refreshed where they get a case presented that they can have that confidence in. We have found that system of administration a great step forward. Of course, it's not perfect by a long shot, and there are human obstacles—even among judges perhaps you've found that. So that I am not claiming too much, but it's the beginning, I think, of real improvement as long as we can keep Mr. Chandler or get a successor as good as he. We look to it as an immense step in advance.

MR. DIXON: Does Congress have authority over your rules of procedure and rules of evidence, and if so, do they exercise it in what you would call a wise manner?

JUDGE HAND: No, they have it but they don't take it. As far as procedure goes, there was a statute under which these federal civil rules have been promulgated. It gave to the Supreme Court the power to enact rules confined to procedure. The Supreme Court exercised its power by appointing this committee of lawyers—they were very distinguished men—and they worked for, oh, I think, probably three or four years; they did an immense amount of work on it. They then presented those to the Supreme Court, which had to pass on them. The statute read that if the Supreme Court assented to the rules which they passed, then the Attorney-General should recommend them to Congress and they should go into effect. I think it was—I can't tell you exactly—the idea was, after they had been before Congress long enough so that any objections could be voiced in Congress. In other words, the court didn't have the

power to promulgate the rules finally; it had to wait to see whether there were any objections.

And Congress has just done the same thing with criminal procedure as on the civil rules, and those went into effect about a year ago and it is too early yet to tell much about it. The others have been in force, my recollection is, since September, 1938, and we think they are very good.

Evidence—no. Congress has never suggested that; that has been a very contentious subject.

I have been on the American Law Institute for a great many years and we did get a Model Code of Evidence under the leadership of Professor Edward Morgan. Perhaps we went too far, but we pretty well eliminated the rules of evidence. We didn't get very far with it. My name is on it, and I am very much for it, but a Texas judge suggested that my cousin and I being guilty of such a thing, we should be impeached. It didn't get any farther in Congress—they haven't done it yet.

MR. DIXON: But they still reserve that right; they could do it if they wish, couldn't they? They have that right?

JUDGE HAND: Oh, yes. I have, myself, quite radical notions about the thing.

MR. BROGAN: Judge, would you care to say whether or not you think that equity, if administered separately and by judges who do nothing else, would be better administered than if administered indiscriminately by the judges, as it is in the New York Supreme Court?

JUDGE HAND: My answer would be no, but again every man is probably partial to what he has grown up with. No. I think that is very largely delusion—who can tell?

MR. PETERSON: Judge Hand, I want to come back to the trial by jury. I understand that nobody has proposed the elimination of trial by jury but—

JUDGE HAND: It wouldn't do any good, you couldn't.

MR. PETERSON: No, but in your federal criminal practice the federal authorities are not prone to make an arrest as expeditiously as we do in local police courts. They do a great deal of investigation, leave the suspect much on the loose until they pretty nearly have an airtight case against a person. I don't mean by that remark that everyone accused of a federal crime is guilty before he comes in, but usually, because of the investigation, of the fact-finding more to establish the certainty of the evidence against him and, in a way, of those things that may be in his favor, there is no question of it. But in ordinary criminal practice I would say, in most states a suspect is arrested and indicted by his neighbors. The evidence has been before the grand jury, which is the common people. He pleads not guilty; he isn't guilty. When he pleads

that, a jury trial is mandatory; you can't waive a jury trial?

JUDGE HAND: Yes.

MR. PETERSON: You can waive?

JUDGE HAND: You can.

MR. PETERSON: Then, of course, if he is innocent he should.

JUDGE HAND: That's for him and his lawyer to decide.

MR. DIXON: One of the things that brings that up in my mind—I see quite often in reading the papers that the judge on appeal had reversed the lower court because the statement was made, and this is almost verbatim, that "the finding of fact is against the weight of the evidence." Therefore, although a jury determined a man is guilty, because the judge on appeal finds that the finding of fact is against the weight of evidence the judge apparently is the final arbiter anyway of the value of the evidence. Now, if he is the final arbiter of the value of the evidence, forgetting our historical fact that we want trial by jury, after all wouldn't we have just as good justice, perhaps better, if we didn't have the trial by jury? That was the thing that brought the thing up to my mind.

JUDGE HAND: Well, I tried to tell you, perhaps I haven't been clear about it, I tried to tell you that in civil cases I think you must look at it more as—

MR. DIXON: I mean in criminal cases.

JUDGE HAND: In criminal cases, I think you must look at it in what I might call its political aspect.

Let us assume that trial by jury is by no means the ideal way, or even isn't as good a way as the judge, if you like—a good many people differ with me on that, I mean very sensible people—but let's assume for argument that a judge would be more apt, being trained in what is evidence and what isn't, to make conclusions which are justified. I should say, allowing that—assuming that it isn't as rational a means of deciding an issue as a judge—I should be for it in criminal cases, and I tried to say why before but I don't know whether I made myself clear.

VICE-CHAIRMAN: You did.

JUDGE HAND: But I call those political considerations. And, after all, when you consider an institution which started in one small island many years ago, spread all over the civilized world, even so far as Czarist Russia—the criminal jury—there must be something in it which makes it desirable in crimes. In Italy, in Germany, and wherever the English language is spoken, it has always been so. So, I should be very strong on criminal juries, regardless of how competent they were to judge evidence.

MR. DIXON: I would like to say that I am not advocating this at all, if the press is taking this down.

JUDGE HAND: I understand perfectly.

VICE-CHAIRMAN: We have been considering the problem of

tenure of office and I am wondering if you would like to express an opinion on that subject.

JUDGE HAND: Well, yes, but the other side hasn't much chance after all. When you have enjoyed life tenure and irresponsible tenure all your life, with full pay pension as long as you can breathe, I suppose you are rather in favor of that—don't you think?

I don't think I am in a very good position to give an opinion on that, but I will say this—I am serious—I think it does pay for the shortcomings, and there certainly are shortcomings. But I think that there ought to be a way of removing judges more freely than there is. Impeachment is an absurd process. Now, Judge Hatton Summers, whom you probably all have heard of, was for years chairman of the Judiciary Committee of Congress. He had a system which I thought was most admirable, by which—as he said, he had seen impeachments by Congress and he said it was absurd; it wasn't a trial or anything—by which judges could be removed by a bench of judges themselves.

I don't know how you can get rid of the bad man. If you elect him for life, there he is. That is the chance you take. I can only say this, and I am quite serious—I have been a judge for a great many years, and I don't know that I should have wanted to have had the job if I thought that my livelihood depended on whether, when my term of office came up, I could again command the approval of what amounts to the predominant party or my chances with whether my party was successful at the polls.

Perhaps this is a shameful thing to say, but I will say it. I am not confident enough of my own disinterestedness to be sure that that might not weigh with me. To me that is the overwhelming consideration which far outweighs the fact that you get a lot of incompetent men and sometimes men who are knaves, rascals, and also that they may last after they have gotten to their dotage. As to that last, of course, you can have an age limit.

MR. SOMMER: Perhaps we might ask the judge his views with respect to the age of retirement?

JUDGE HAND: No, that is too personal. I think you better make some inquiries around New York.

MR. BROGAN: No, Judge, we'll ask some older judges than you.

JUDGE HAND: Can you find any? I think there are very few.

(Laughter)

VICE-CHAIRMAN: Any further questions of Judge Hand?

There being nothing further, may we express our collective thanks to you, Judge. We appreciate your coming here.

JUDGE HAND: Thank you.

VICE-CHAIRMAN: We will recess until two o'clock.

(Recessed at 1 P. M. for luncheon)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Thursday, July 10, 1947

(Afternoon session)

(The session began at 2:00 P. M.)

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., Smith, G. F., Sommer and Winne.

Vice-Chairman Jacobs presided at the request of Chairman Sommer.

VICE-CHAIRMAN NATHAN L. JACOBS: Members of the Committee: This represents the conclusion of our preliminary hearings during which we have heard from various organizations, judges and other interested persons, including lawyers and laymen. We will now have the privilege of hearing from our Governor. I believe you all know him, and no further introduction is necessary.

GOVERNOR ALFRED E. DRISCOLL: Mr. Chairman, distinguished members of the Committee:

My appearance before this important Committee of the Constitutional Convention is in response to a specific invitation. While I would prefer to appear as an individual citizen and member of the bar, my position as the Chief Executive of New Jersey requires that I state my position on certain basic issues before giving you my views on the precise subject now under consideration by the Committee.

I should like you folks to know that I recognize that this Convention exercises a sovereign authority within the limits imposed by the enabling legislation as approved by the vote of the citizens at the recent election. Hence, the delegates to the Convention enjoy a degree of individual independence and freedom not enjoyed by either the legislative, judicial or executive branches of our government. Your Governor, for example, exercises only that authority delegated to him by the Constitution or the Legislature, and I would hope that you would believe me when I say that I am here merely to give you the benefit of my views and not in any manner to suggest that those views must be followed.

Perhaps I may with pardonable pride express at this time the joy that the conduct of the delegates to date has brought to one of the sponsors of the Constitutional Convention. Your wise application of your varied talents to the different issues that must be met has fully justified my faith in a non-partisan Convention com-

posed of our best qualified men and women.

One hundred and sixty years ago today, on July 10, 1787, George Washington, then a delegate to the Constitutional Convention assembled in Philadelphia, wrote his friend, Hamilton: "In a word, I almost despair of seeing a favorable issue to the proceedings of our convention and do, therefore, repent having had any agency in the business." Unlike George Washington, I am very proud of having had a small part in the creation of this Convention. Washington added—and you will be interested in this very human touch: "The men who oppose a strong, energetic government are, in my opinion, narrow-minded politicians or under the influence of local views. The apprehension expressed by them that the people will not accede to the form proposed is the obtensible, not the real cause of opposition."

You will remember that Washington's letter was in response to Hamilton's letter of July 3, referring to a trip he had just taken "through the Jerseys" and reporting: "The prevailing apprehension among thinking men is that the convention from a fear of shocking the popular opinion will not go far enough. "The people," Hamilton wrote, "seem to be convinced that a strong, well-maintained government will better suit the popular politic than one of a different complexion." Thus strengthened in the knowledge that others in the formative years of constitutional thinking tackled and conquered more formidable obstacles than those now barring our path to constitutional revision, we may press on to our objectives with courage and optimism.

I would like to speak, if I may, very briefly on the following subjects, and I do so very largely because of the position that I occupy: First and foremost, an independent judiciary. The separation of the judicial, legislative and executive branches of government is essential to our freedom. "With a written Constitution, the Legislature and the Governor," as Lord Bryce indicated in his review of our government, "are subject to the Constitution and cannot move a step outside the circle which the Constitution has drawn around them. If they do," Lord Bryce continued, "they transgress the law and exceed their powers. Such acts as they do in excess of the powers conferred upon them by the Constitution are void and may, and indeed, ought to be treated as void by the meanest citizen."

It is, as you know, the courts that have traditionally been the guardians of our constitutions, to whom the meanest citizen may appeal for protection against a wayward executive or a capricious legislature. Without independent courts, the whole republican system must surely fail. Our primary, our basic purpose in the drafting of a new Constitution is to secure beyond any question a strong, competent, easily functioning, but always independent, judiciary,

and, therefore, in a position to curb any tendency on the part of the other two branches of government to exceed their constitutional authority.

It was Hamilton who quoted Montesquieu: "There is no liberty if the powers of judging be not separate from the legislative and executive powers." "The complete independence of the courts of justice is peculiarly essential in a limited constitution," Hamilton added. And how may we best acquire this independent judiciary that your Governor so greatly wants and I am sure our citizens require? First and foremost, it seems to me that the members of our judiciary should be appointed for long terms, preferably given life tenure. The alternative, however, to life tenure would in my judgment be to provide for initial appointments of anywhere from seven to ten years, with a judge having life tenure following a reappointment and confirmation, of course, by the Senate in both instances. That will do more, in my judgment, to insure the independence of the judiciary than anything else.

Provision should be made for the retirement of the judges, perhaps at 70, certainly not later than 75. The particular details with respect to retirement need not in my opinion be incorporated, and I don't think should be incorporated, in the Constitution. However, this Convention might very well recommend to the Governor and the Legislature what, in its collective opinion, should be done with respect to retirement.

Some question has been raised with respect to the method of selection of the judiciary. Since our primary purpose is to maintain the division between the legislative, the executive and the judicial branches, the question of selection is merely one of technique. Presumably, we could adopt any one of a number of different methods, provided only that it would secure the best possible result. I prefer appointment by the Governor, subject to confirmation by the Senate, to election. I would certainly as a Chief Executive be very willing to accept, for example, the Missouri plan, where there is a commission composed of distinguished men whose duty it is to guide the Governor in the selection of nominees for consideration by the Senate.

But I should like to stress one point, and that is this,—that there should be uniformity with respect to the selection of judges. In other words, the same procedure should apply to all judges. If the Constitution gives the power of appointment, subject to Senate confirmation, to the Governor in some instances, it should be given to the Governor in all instances. That, in my judgment, will make for a better working relationship between all of the judges who are sitting in the State than a system which provides for appointment by one method in some cases and another method in other cases. Here in New Jersey we have tried varying methods, but I

can't too strongly stress what, in my judgment, is the desirable method, namely, a uniform method: appointment by the Governor subject to senatorial confirmation, either with or without the assistance of a selection commission.

As one considers the miracle that occurred in Philadelphia in 1787 in the light of the present great Convention, I am convinced that the framers of the federal document, if they were to return to this Convention, would be among the first to express surprise that the framework that they designed is still the framework of our political institutions. The judicial docket throughout the nation has increased a thousand-fold, and then some. Our State Constitution is in marked contrast, insofar as the Judicial Article is concerned, to the Federal Constitution. The Federal Constitution in its provisions for a judiciary is brief and very much to the point. Ours is elaborate and complicated and confusing. As Professor Powell of Harvard once pointed out, your predecessors in Philadelphia left open the way for change by what they left undone. "In framing their grants to the new national government," he said, "they contented themselves with making great outlines designating important objects, leaving to the future the dedication of minor problems." It was, he added, "a Constitution that did not create a narrow prison, and it was not prolix nor did it contain a legal code."

The second question that I would like to discuss with you following that preliminary introduction is the question of form. I do hope that within reasonable limitations we may follow the example of the Federal Constitution, and that you men and women will be known in the future as much by what you didn't put into the Constitution as by what you have put in. Accordingly, I would limit the Judicial Article to the provision for a Supreme Court—and since I understand that there is a possibility of some confusion of terms, we will call it a top court; you may ultimately designate it as a Court of Appeals—composed of not less than seven, certainly not more than nine, members—preferably seven. This court should, in my judgment, have jurisdiction comparable to that of the United States Supreme Court; it should be the court of last resort, so far as this State is concerned, in all causes.

Beneath the Supreme Court I would hope that we might provide for a great court of general jurisdiction, having jurisdiction over civil causes, criminal causes, and equity causes. The Chief Justice of this new Supreme Court of ours should be given substantial administrative authority. He should be in a position, in consultation with his fellow-members of the Supreme Court, to assign judges to hear causes and to provide for the creation of a number of appellate tribunals to which appeals from the General Court would be taken. I would prefer that the members of these intermediate courts of appeal were drawn from the General Court.

I would hope that that would give to the members of our General Court not only the unique experience that comes to a trial judge, but also the very important and entirely different type of experience that comes to a man who is called upon, in the absence of witnesses, to review a record and to make the kind of decisions that are required to be made when causes are brought from a trial court to an appellate court on appeal.

With respect to form, I cannot stress too strongly that, in my judgment, the Supreme Court should be given substantial rule-making authority. To the extent that we ascribe certain virtues to our federal court system, they may, perhaps, be found in the rule-making authority of the United States Supreme Court. I am constrained to believe that if, in the past, the members of our highest court had had greater rule-making authority and had not been burdened by the many duties that have, I am told, been described to this Committee and therefore need not now be again described, justice would have been dispensed perhaps not better but certainly more quickly.

Whether a man should be permanently assigned or temporarily assigned to hear a specific type of cause should, in the final analysis, it seems to me, be left to the judgment of the responsible head of our judicial system. He will very quickly learn to know his court—not only the several capabilities of the men with whom he serves on the top court, but, as a result of his review of appeals he will quickly come to know the varying talents of the trial judges. And he and his associates, better than anyone else, or any other group, will be in a position to determine whether a man or a woman, or men or women, should be permanently assigned to a particular division or whether they should be temporarily assigned for an experimental period.

I cannot speak of form without speaking of the need for flexibility. During the 13th and 14th Centuries, as you so well know after your current course in constitutional law, there developed a recognition that the King's Court was either not in a position or unwilling to dispense complete justice. The law courts of that day found themselves in a straightjacket, perhaps of their own making. Rules and laws, or the lack of the same, prevented them from doing complete justice, and it was for that reason, among others, that the Court of Chancery developed. Originally, the Court of Chancery was nothing more or less than the King's conscience, as you know. May I submit to you that over a period of many years, Courts of Chancery have tended to follow pretty much the same tradition that the King's Court followed prior to the inception and, in some cases, subsequent to the inception of the Court of Chancery. Their rules were formalized. They were constrained in many instances to follow precedent.

We have in America today, to a degree that many of us do not appreciate, a repetition of the tug-of-war that existed back in the 13th and 14th Centuries, and it is evidenced by the growth during the last decade of administrative agencies. Lawyers, and particularly litigants, have sought to escape from the confining requirements that have been prescribed by practice acts, by statutes, by court rules, by, above all things, repetitious appeals, and have turned to administrative agencies in the hope of finding speedy and complete justice. Now, in this trend toward administrative practice, with all of its desirable features, there are also some very dangerous features. We substitute for men trained in the law, upon occasion, men who are not trained in the law. But worse, they are confronted with not hundreds of cases that must be disposed of, but literally thousands of cases. This gives rise to the criticism that, in some instances, administrative agencies have become something less than *quasi*-judicial bodies, but rather administrative mills grinding out decisions *pro forma*.

What I have said about administrative agencies does not apply in every instance. Nonetheless, there is a possibility that unless we create here in New Jersey a flexible court to which litigants and lawyers may turn and from whom they can expect complete justice, we may expect our citizens to turn in increasing numbers to administrative procedure.

I don't believe that the top court should be compelled to hear an appeal in every cause. I am confident that if we develop the kind of flexible formula that is so badly needed, the great majority of appeals can be terminated with the appellate division, and only cases of major importance, recognized as such, involving constitutional questions, the death penalty, conflict between members of the General Court, need be taken up to the top court. I think that is a very important point. I am confident that the Chief Justice will agree with me that we have entirely too many decisions in the books and that it would be far better if we were to have a compact group of decisions dealing with fundamental questions, and not the present procedure involving repetitious decisions tending to confuse rather than enlighten.

I need not tell you that dispensing justice is not a game—Chief Justice Brogan is well aware of the seriousness of the problem. Nor should our citizens be given a brush-off, to use an expression, merely because a court is overburdened with work, as is the case today, perhaps because of the multitudinous duties that are placed upon the shoulders of our Supreme Court Justices, who are also members of the Court of Errors and Appeals, and charged with certain responsibilities in the counties. Older judges may chuckle over the perplexity of a younger lawyer as he ponders the hard choice between law and equity, or charts an uncertain course through the

labyrinth of the prerogative writs, but more mature students of government and citizens generally recognize that more basic issues are involved, including respect for the law, the republic, as well as, although frequently overlooked, the rights of litigants to a speedy, inexpensive, authoritative decision on disputed issues.

I have discussed the question of appointment because it has to do with the independence of the courts. I have discussed the question of form because of the need for flexibility and the elimination of the interminable appeals that presently harrass our lawyers and our litigants. I need only cite to this group two horrible examples. One is the procedure in workmen's compensation cases, and the other, the cases involving decedents' estates. No less than three appeals are presently possibly, each requiring a written opinion, etc.

I should like to conclude by discussing a little more than I have the question of administration. We have in New Jersey—and I say this not in criticism of the men involved—entirely too many part-time judges. First, we have part-time judges in the sense that we have judges who do not devote their full time to matters judicial. The law doesn't require them to do so, and, in some instances, the salary that is given them does not permit them to do so. Also, our Supreme Court Justices are part-time in the sense that they spend part of their time on the Supreme Court and part of their time on the Court of Errors and Appeals, and part of their time, presumably, worrying about activities in the various counties that have been assigned to them. It would be a great mistake not to eliminate the part-time feature of Jersey justice. Our judges should in every instance, in my judgment, devote full time to the job and should be paid accordingly, and they should be privileged to devote full time to the particular court to which they have been assigned, nominated or appointed.

Proper administration and proper regard for flexibility and simplicity would largely eliminate that difficult administrative problem, and it is a difficult administrative problem today, as evidenced by the fact that in a number of instances we have judges with comparatively small calendars while in other instances we have judges with staggering calendars. With limited authority on the part of the Chief Justice, there is a lag between the recognition of the need to assign a Circuit Court judge to a particular area and the actual assignment of that judge. May I give you a concrete illustration of what I have in mind. At my request the ever cooperative and always genial present Chief Justice of our Supreme Court assigned Circuit Court Joseph L. Smith to sit in Atlantic City this spring. It had been said that we needed an extra Circuit Court judge in that area. Judge Smith was in the Atlantic Circuit from May 2, 1947 until May 28, 1947, inclusive, during which time there

were 19 court days. There were 130 cases listed on the calendar, out of which 38 cases were actually disposed of, one case was placed on the military list and 91 cases were carried over to the October term either because they were not answered or by consent of counsel. Judge Smith, having completed his work in Atlantic County, was privileged to go into another county to do a similar fine job.

Somewhere along the line, the head of our judicial system should have substantial administrative authority, and accompanying that administrative authority, he should be given adequate trained assistants. One of the perplexities of our present system is evidenced by the position of my good friend, the Chancellor, elevated to the Chancellorship some time ago because of his judicial experience. He has been so engrossed in administrative detail in that important court and with his important duties on the Court of Errors and Appeals that he has had practically no time, if I am to judge correctly by the records, to sit as Chancellor in the hearing of important causes—this despite the fact that, undoubtedly, during the period he has been Chancellor, there have been some very important causes that, perhaps, merited the attention of the Chancellor. That statement is not made in criticism of the man who heads a division of government that is of equal importance with that which I head. It is made in condemnation of a system that has taken judicial talent and applied it to administrative detail.

Now, I would like to give you one other illustration in support of my contention that somewhere along the line substantial administrative authority must be given over the entire judicial system. By this time it is, of course, clear that I strongly advocate an integrated court system and in general terms follow the recommendations that were made by the Commission in 1942. Ever since the days of Aristotle mankind has thought in terms of equality before the law. Equality is not achieved in a system that is as disjointed as is our system. Let me give you three cases involving three men who were found guilty of murder in the second degree. These men had reasonably comparable minor criminal records prior to their conviction for second degree murder. The sentences imposed in these three cases were as follows: Mr. "A" received a sentence of from six to eight years; Mr. "B" received a sentence of from 15 to 25 years; Mr. "C" received a sentence of from 25 to 30 years.

Now, members of the Committee, may I make it perfectly clear that I recognize that circumstances alter cases and that trial judges confronted with one of the most serious assignments that can be given to any man or woman, namely, that of sending a convicted criminal to jail, must be given considerable latitude in determining the appropriate sentence. Nonetheless, in an integrated court system, with proper administrative authority vested in a Chief Justice,

we can come closer to achieving the degree of uniformity that is so highly desirable in a republic than is evidenced in the cases that I have just cited.

One more illustration with respect to equality of treatment which, after all, must be the aim of a proper judicial system. Let me give you some cases involving men sentenced following conviction for robbery. The sentence imposed on one of these inmates presently in the penitentiary was 18 months. Another man with a comparable record, but before an entirely different judge who took a different point of view of the seriousness of the crime, was sentenced to from 20 to 30 years. In seven other cases the sentence ranged as follows: two, 3 to 5 years; one, 5 to 7 years; one, 5 to 10 years; two, 10 to 15 years; one, 20 to 24 years.

The only stable state is the one in which men are equal before the law. Not because we have poor judges—we have fine judges in this State—but because we have in my judgment a very poor system, it has not always been possible to administer justice and to secure the degree of equality that is so important in a democracy or republic.

Mr. Chairman, I have complete confidence in this Committee. I know that you know more about this subject than I do, and yet, despite that fact, I have the temerity to suggest that I would be very happy to try to answer any questions that any of you may care to ask me.

MR. WAYNE D. McMURRAY: Governor Driscoll, I have one question. I understand you spoke favorably of the idea of life tenure for judges. That raises before the Committee the question of how could a judge who did not properly discharge his duties be removed? In our discussions and listening to previous witnesses, we have been pretty well impressed with the fact that impeachment is a rather cumbersome method. Suppose a man were to become mentally or physically incompetent, for example. How could he be removed?

GOVERNOR DRISCOLL: Mr. McMurray, that is a very important and a very interesting question. I would retain the impeachment method; despite, however, the sign from my good friend, Dean Sommer, I would go a little further.

MR. FRANK H. SOMMER: I would retain it, but I would supplement it.

GOVERNOR DRISCOLL: Good. Dean Sommer has given you advance notice of my answer. I would provide that the Chief Justice could impanel or call upon three members of the highest court whose duty it would be to consider whether or not a member of the General Court who had achieved life tenure should or should not be retired—after a hearing which, incidentally, I would permit to be in chambers because it is a matter again of administration.

I don't insist upon the latter. I recognize it is of very definite public interest to know what is going on; our citizens have a right to know, but nonetheless, in the first instance, if the court so decided, I would give it the authority to hold that hearing in chambers.

With respect to the highest court, I would suggest that this Committee might consider whether or not either the Chief Justice or the Governor, under circumstances that I will outline, should be authorized to convene a panel of not more than three judges to consider whether or not a member of the top court should be retired prior to the retirement date. In my judgment, the Chief Justice should be given the authority to convene such a panel on his own initiative.

I can't conceive of this happening, but there may arise a time when three or more members of the top court would be of the opinion that the Chief Justice should be asked to retire, and then, in that case, perhaps on their application to the Governor, acting only as the representative of all the people, he should be empowered to impanel three members of the top court. I make the latter suggestion with a great deal of hesitancy, because as far as it is humanly possibly I wish to departmentalize and completely separate the judiciary from the executive branch and the legislative branch of our government, and I recognize that the latter suggestion, while it may be a useful expedient, opens the door and has implications that may not be desirable.

MR. AMOS F. DIXON: Governor, when you spoke particularly of the separation of the judiciary, the legislative branch and the executive branch, would you be opposed to giving to the Legislature the right of review of the rules of procedure that might be established by the Supreme Court, such as, for instance, as the Congress has over the rules of procedure of the federal courts?

GOVERNOR DRISCOLL: Mr. Dixon, I would be opposed to that. In a republic we have, as Lord Bryce pointed out in his book, no real need to fear a properly staffed, independent judiciary. We have learned from experience that upon occasion we, the people, may have occasion to fear legislative excess—and I speak now as a former State Senator—and that the Governor may endeavor to seize the reins of power and to exceed his constitutional limitations. The Legislature initiates action; it controls in a large measure the purse strings. It should, and it does, and I hope it will continue to have authority to pass legislation over the Governor's veto. That is another subject. The Governor initiates action. Traditionally, in Anglo-Saxon countries and in others that have adopted all or part of our system, the courts very seldom initiate action. They are available on application by counsel to hear and dispose of causes, bi-party, tri-party, or what you will; but only in most

unique circumstances do they on their own motion—I think that the Chief Justice will bear me out in this—initiate action. Therefore, when it comes to their rules, it seems to me that they should have plenary authority within the limits of the Constitution, and not be subject to the veto power of the Legislature, lest that veto power be exercised for political rather than judicial purposes. It seems to me that we might almost say, as we have said of the power to tax—that it is the power to destroy,—the power to control the rules would constitute the power to dictate to the court. I hope that our courts will have that degree of independence and the system will contain those virtues which will lead our citizens and others throughout the country to say, well, justice is always done correctly in New Jersey. The judicial system exercises a veto power today traditionally over both the legislative branch and the executive branch, and that is as it should be. The legislative and executive branches ought not to have the authority to exercise a veto over the courts—save only to pass within constitutional limits corrective legislation.

MR. DIXON: Thank you.

MR. SOMMER: I would agree with you without question if the rule-making power were extended simply to matters of practice and procedure, but the difficulty with the 1944 draft is that that draft extends that power to evidence. Now, of course, you and I know that some of the rules of evidence have a substantive character and not merely procedural. What would be your judgment as to whether or not that rule-making power, absolutely in the courts, should extend to the law of evidence?

GOVERNOR DRISCOLL: Dean Sommer, I have a conviction on that subject. It is easier to state the conviction, however, than to draw the line.

MR. SOMMER: That is it.

GOVERNOR DRISCOLL: The top court should have, in my judgment, the power to promulgate and to enforce all rules that may be necessary to insure the conduct of the work of the court. That involves questions of procedure, it involves substantial questions of form, but, in my judgment, it should not involve questions that have to do with substance, because substance is an integral part of a cause of action, or may be. Whether "A" should be permitted to eject "B" from Blackacre or not might depend upon a rule promulgated by a court that went beyond what I believe to be the legitimate and very substantial rule-making authority of the court.

Now, I would like, if I may, Dean Sommer, to say this: I differ in a number of respects with the proposals that were made in 1944. I differ with them in the judicial branch just as I differ with those proposed in the executive and legislative branches. For

example, and this has to do with a question involving the administration of justice—I never believed that the Governor on his own *ipse dixit* should have the authority to reshuffle departments. That, it seems to me, requires partnership action on the part of the Legislature and the Governor. You may ask, well, why does that involve any question of justice? It does because our administrative practices are *quasi*-judicial procedures that have been developed over a period of many years in this State, and these administrative practices and procedures, despite the fears that I have expressed, have served a very useful purpose.

MR. McMURRAY: Governor Driscoll, you spoke of the inequality of punishment which exists today by reason of the fact that one judge will look differently on the same offense than another judge. I take it that that will exist to some degree as long as you have human beings as judges. Today it is corrected to some extent by the Court of Pardons, which will release a man sooner if it thinks the sentence was too severe. We are interested very much in how much the executive branch should have to do with the question of pardon and parole—whether it should be solely in the hands of the executive branch, whether it should be in the judicial, or whether it should be in some kind of a combination of the executive and judicial.

GOVERNOR DRISCOLL: Well, we are very fortunate in New Jersey in that we have a man in the executive branch of our government who has had considerable experience in that particular field, and I refer to Commissioner Bates. I would be inclined to follow the recommendations that he had made to, I believe, the Committee on the Executive. For my part, I believe that the Governor should not be permitted to escape the responsibility that is part and parcel of the exercise of the executive function, namely, hearing applications for pardon and, perhaps, the commutation of a sentence. We use the terms "pardon" and "parole" entirely too loosely here in New Jersey. I believe that the Governor in the exercise of his inherent—again, almost Anglo-Saxon—authority to grant pardons, should have the advice and the recommendation of an independent agency.

Parole at the expiration of minimum sentence is a matter that should be, in my judgment, left to the experts, and it is not part of the judicial function. The judicial function is completed when the judge sentences a man to eight or ten years. Presumably, the judge has taken into consideration all the available evidence and all the circumstances when the sentence is pronounced. Whether that man should be released at eight years or nine years or ten years and given time off for good behavior is a matter that requires expert knowledge by experts engaged in studying day after day the conduct of prisoners. These experts are in a position to de-

termine authoritatively that there has been some correction in the man's point of view, his outlook, and that he is, in fact, ready to go back into society. I do not approve of our present system that adds to the burdens of our special judges the very arduous task of also listening to literally hundreds of applications for licenses to be released from prison. Again, I am not criticizing men, because, as a result of my first contact during this not quite six months in the Governor's office, I am convinced that the so-called lay members of our court take their duties on the Court of Pardons very seriously. But, again, it is an unfortunate combination of duties in my judgment, and, therefore, I would be inclined to recommend, subject to correction by men and women who know more about this than I do, that the Governor be vested with the traditional power to pardon, but that that power should be exercised only after consultation and, perhaps, recommendation by an advisory board.

There are few governors who wish to assume the responsibility incident to that of determining whether or not a death sentence should be commuted, but students of government are generally agreed that that power should also be vested in the Governor. Parole, at the expiration of minimum sentence, however, as contrasted with pardon, should be a matter for the parole board or agency operating as a professional agency.

MR. WALTER G. WINNE: If I understand you, you would put more on the executive than he has today. You would put the full pardoning authority on the Governor alone?

GOVERNOR DRISCOLL: He has it substantially today, Mr. Winne. He has that responsibility today, plus the fact that he is called upon to hear innumerable requests for what are, in fact, applications for parole or licenses to be at liberty at expiration of minimum sentences.

MR. WINNE: The Governor cannot commute just by himself. He can't commute the sentence without the Court of Pardons.

GOVERNOR DRISCOLL: We are not now referring to commutations of death sentences. We are talking now about men who are sent to jail for 15 to 20 years and who wish to be released at the expiration of their minimum—that is a question of parole. Today the Governor is required to hear those applications, in fact, hundreds of them, so I would relieve him of all those applications and I would retain substantially the power that he now has with respect to pardon, which involves either a full or limited pardon, and, of course, necessarily presupposes an application by a man who, having been sentenced to 15 or 20 years, wishes to get out of jail prior to the expiration of 15 years.

MR. WINNE: And be restored to his full civil rights by pardon?

GOVERNOR DRISCOLL: Well, that is still another question. Full pardon involves a restoration. It is because of the seriousness

of those issues that I have suggested that the Governor should exercise his authority in concert with an advisory board whose advice he should either be asked to accept voluntarily or perhaps compelled to consider.

MR. WINNE: Governor, you would add to the present powers the power of commutation after consultation with others?

GOVERNOR DRISCOLL: Speaking personally, I would not. Giving you the weight of opinion around the country, I would recommend it to you for your consideration. It is certainly a power that I would not enjoy having, speaking now as Governor.

MR. WINNE: It is apparently historically in the executive; I guess it goes back to the early times when the King's benevolence enabled him to pardon people. I myself wonder if it belongs there. I wonder if it doesn't belong in the judiciary, and I am quite willing to consider it, but I wondered if you, as the executive, have any thought that it did belong in the executive.

GOVERNOR DRISCOLL: I am sure you won't think me irreverant if I say that as I thought of this Convention, I have been inclined always to say: Not my will be done, but thine. I believe, however, that it would be a mistake to burden our courts with the particular duty which we are now discussing, because it is in essence not a judicial task. For example, it seems to me that it is the duty of the executive branch of government to apprehend an alleged criminal, not the duty of the court; to see to it that that criminal is properly charged; to present the evidence to the grand jury, and to prosecute the case before the appropriate court. All those duties should be performed by the executive branch of the government in cooperation with the judicial branch, but the responsibility is with the executive branch. That is proper because the people elect men to public office for certain reasons, and among those reasons is the maintenance of law and order and the protection of domestic tranquility. Now, it becomes the duty of the court following an indictment—and the indictment is part of the judicial process, I am sure you as a prosecutor will agree with me, and not part of the executive process—to hear the evidence and to dispose of the issues, and following a conviction to sentence the man. All of those questions, hearing the evidence, ruling on motions, sentencing, are part of the judicial process, and the purpose, of course, is to do justice. No question of clemency is involved. The purpose is to do justice.

The application for a pardon, however, does not involve justice in the sense that we use that term in the judicial process. It involves justice in the sense of clemency, what is right and wrong as between human beings as apart from abstract questions of law, and I think it would be a mistake to have a system which permitted a judge to say, "Well, I will sentence this man to jail for 20 years.

That is a pretty stiff sentence. It is probably a bigger sentence than I should give him, but four or five years from now, I will be able to cut that down." What I hope is that we will develop a judicial system in New Jersey where the judges are free to concentrate on only one duty, and that is the hearing of causes and disposing of issues.

MR. EDWARD A. McGRATH: You take the modern view that the release of criminals is largely a sociological problem depending largely on their mental condition, and that there should be a sociological view rather than a strictly legal view?

GOVERNOR DRISCOLL: Yes, Judge McGrath, I do.

MR. McGRATH: I agree with you.

MR. SOMMER: May I ask just one more question, to clear up your position in my own mind? We create this court of general original jurisdiction, and it will be divided into sections, and it may prove necessary to create divisions within the sections. We come to vesting the power of assignment of judges, and we will assume we vest in somewhere and, as you suggested, vest it in the Chief Justice. Now, you would leave that power of assignment in the Chief Justice absolutely unlimited, would you not? As I understand you, you would not impose upon him any limitation which would limit the period of assignment he might make to any particular division, so that if, in experience, he determined to let a man remain in a particular division for two years, three years, that, in his judgment, being in furtherance of the interest in the administration of justice, you would put no barrier in his way?

GOVERNOR DRISCOLL: No.

MR. SOMMER: I simply wanted to get your point of view, and I wanted to get it clear before us.

GOVERNOR DRISCOLL: You have correctly stated my position, Dean Sommer. I would not give the Chief Justice authority with one hand and take it away with the other. I might say that I don't believe that we can accomplish the kind of integration that I have in mind unless the Chief Justice exercises the same kind of authority with respect to every member of our courts. In other words, his authority must apply uniformly. I have not had an opportunity to read the testimony of the previous witnesses, but I am sure they have stressed the point that justice delayed is justice denied, and I am confident that you folks are well aware of the fact that in the absence of an integrated court system and uniformity of application of rules and administrative authority, we necessarily have a divided court, jurisdictional disputes and the delays that are incident to the inquiry on the part of lawyers or litigants as to whether they should go into one division or another.

COMMITTEE MEMBER: The Chief Justice would be the Chief Justice of all the courts?

GOVERNOR DRISCOLL: Personally, I would like to see the Chief Justice one in fact as well as in name, and it is for that reason that in my own thinking the Supreme Court should be the Supreme Court in fact as well as in name. Our court system is not designed for the enjoyment of the members of the legal profession, of which I am one, but rather for the satisfaction of the needs of our citizens. Accordingly, I would make it as easy for our citizens to understand our judicial system as possible. I hold no brief for a particular name or title. You can call it a court of quarter sessions if you want, and if it accomplishes our purpose, it would be all right.

MR. GEORGE F. SMITH: Mr. Governor, you emphasize the complexities of administration and by way of example you point to the burden that the Chancellor now has. Do you visualize, when you speak of complete administrative authority in the Chief Justice, an executive assistant such as Mr. Chandler is in the federal court system, or what do you have in mind?

GOVERNOR DRISCOLL: I visualize an arrangement not unlike that. Bear this in mind, as I am sure you have: these judges very quickly come to know one another, and the Chief Justice, if he is the Chief Justice in fact as well as in name, will have the assistance not only of these administrative men to be given him, but he will have also the assistance of certain key members of the judiciary with whom he is working daily.

MR. THOMAS J. BROGAN: Governor, might I ask you a question? Would you have this appellate division—for want of a better name, we will call it that—a constitutional court or a permissive court depending on the exigencies?

GOVERNOR DRISCOLL: Mr. Chief Justice Brogan, I would personally prefer to have it a permissive court, very largely because of my concentration on simplification. There are, however, some dangers involved in limiting the constitutional courts to a Supreme Court; if the rule-making authority is not sufficiently broad, our judges, confronted with a great mass of work, might be compelled to go to a hostile Legislature or a hostile Governor in an effort to create a court that they conceive to be very necessary to relieve them of an avalanche of appeals. Accordingly, I believe there are some advantages in having two constitutional courts, in this sense: a very brief Article vesting all judicial authority in the Supreme Court, following the language in the Federal Constitution and in many state constitutions, but—and this is very important—providing for the number of the judges so that we will not run into the difficulties, not to mention recent history, that we ran into during General Grant's term as President and immediately prior to it; and providing also for an appellate division, or a court of appeals, to be constituted by the Chief Justice—and you could spell this out if you wish—either after consultation or not, as the case

may be, with the Associate Justices. That language is a little more narrow than it should be—a court of appeals or courts of appeals, as the case may be. Now, in New York the Governor designates the presiding judge of the Court of Appeals and, I understand, also designates the members of the Court of Appeals. I don't approve of that.

MR. BROGAN: The Appellate Division, you mean.

GOVERNOR DRISCOLL: The Appellate Division. I believe that that is part of the judicial process of government and rests with the courts themselves. I am afraid I haven't clearly answered your question. I would prefer not to have it a constitutional court, and yet the dangers incident to leaving it out of the Constitution are sufficiently great to lead me to the conclusion that perhaps it would be preferable from a practical point of view to spell it out in the Constitution.

MR. BROGAN: The dilemma, as I see it, is this: If there is to be a general trial, a complete final trial some place, and one appeal, if that is left to a Court of Appeals of seven men, I am afraid, and I am sure you will agree, that they would be entirely submerged if they had to take every case.

GOVERNOR DRISCOLL: I agree with you. I would not for one moment permit all appeals to go to this top court of seven men. If that were permitted, it would prevent us from doing the very think we want to do, namely, permit the top court to concentrate on top legal and factual questions.

MR. BROGAN: I want to give you the other horn of the dilemma: if you were to have a screening court and the top court—well, we call it a screeening court, appellate division, whatever you like—and the top court were to take cases on appeal in which there was a constitutional question or in which there was great public interest or on which there had been a division in the screening court, it might come about that the top court would not have enough to do. That is a question that is bothering me, and I was wondering if it had bothered you a little?

GOVERNOR DRISCOLL: Mr. Chief Justice Brogan, I have considered that question. That question did bother me, but after considering the sum total of all the cases that are being brought to issue each year in New Jersey, and running the gauntlet from workmen's compensation to cases involving serious constitutional questions, I have reached the conclusion that there would be a sufficient amount of work for our seven members of the top court. I assume that if they were given the broad rule-making authority that I believe they should be given, they themselves would be able to control that situation and to enlarge or diminish the number of cases that might be presented to the top court, very much as the

United States Supreme Court has been able to do by a method that I don't entirely approve of.

MR. McGRATH: Would you give the highest court the discretionary power to hear cases even though they had not gone to this appellate division, as in a great public emergency?

GOVERNOR DRISCOLL: I would, Judge McGrath.

MR. McGRATH: I think that would help to fill the calendar.

MR. SOMMER: If you have a top court of seven and the administrative power in one of the judges of that court, the Chief Justice, your active court in the hearing of cases and deciding them would really be made up of six, wouldn't it, because a good part of the time of the Chief Justice would be taken up in this work of administration, notwithstanding the fact that he had administrative assistants? As I understand it, the Chancellor now devotes himself almost entirely to work of administration notwithstanding the fact that he has, as he said this morning, competent administrative assistants. I am just wondering whether, in your judgment, the time of the Chief Justice would primarily under the proposed system be given up to work of administration?

GOVERNOR DRISCOLL: I don't believe so, Dean Sommer. I think, given the proper administrative assistants, given authority to delegate the performance of detail functions and controlling in conjunction with his associates the rule-making authority, we could develop a system that would function not unlike the system that now prevails in the United States Supreme Court where some of our very best decisions are handed down by the Chief Justice.

MR. BROGAN: Governor, there is one thing which you said that wasn't clear to me. It was very desirable that there be uniformity of punishment for the same crime, but how could that be worked out in a integrated court any more than it can be worked out today?

GOVERNOR DRISCOLL: In my judgment it is a problem of administration, and I believe that with the integration of the courts, you would develop a greater sense of teamwork and team participation among the various judges trying criminal causes. And with greater authority vested in the Chief Justice, I assume that his procedure would be about as follows: he personally would call together all of the judges who are hearing criminal causes and, after reviewing traditional practices and procedure in this country and England, would, in combination with those judges, develop a formula that would be applicable within broad limits—it would have to be within broad limits, because cases do vary and individuals are different and prior records are different. Having developed these policies, he would then be in a position to delegate to one of his administrative assistants the task of cooperating with the trial judges in an effort to achieve reasonable uniformity. Very frankly,

Mr. Chief Justice Brogan, I had the same problem and did not altogether solve it to my satisfaction as State Commissioner of Alcoholic Beverage Control. By statute I was authorized to hear cases. I had general policies with respect to penalties that should be imposed. The municipalities exercised concurrent jurisdiction in a certain level, subject to an appeal to the Commissioner. We found that we achieved reasonable uniformity through the process of education, backed up by the fact that the Commissioner had rule-making authority. The Commissioner could confer jurisdiction or he could take it away. He also had appellate jurisdiction.

MR. McGRATH: If the Chief Justice, then, were the judge of all the criminal courts, he would have the authority from time to time to call the judges into consultation, go over the sentences and correct any inequalities insofar as the future or insofar as an opinion would go. He could not correct the sentence.

GOVERNOR DRISCOLL: Judge McGrath, I do not think that he would have the right to change a sentence.

MR. McGRATH: No, but he could talk it over.

GOVERNOR DRISCOLL: But he would have the privilege of consulting with the trial judges and calling attention to an apparent disparity in a particular sentence.

VICE-CHAIRMAN: Any further questions of Governor Driscoll?

MR. McGRATH: I think we should give the Governor a rising vote of thanks.

VICE-CHAIRMAN: I think so. He has been very helpful.

(A rising vote of thanks was extended the Governor)

(The session adjourned at 3:40 P. M.)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Thursday, July 24, 1947

(Morning session)

(The session began at 10:00 A. M.)

The Committee on the Judiciary met in Room 202, Rutgers University Gymnasium.

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., Smith, G. F., Sommer and Winne.

Vice-Chairman Jacobs presided at the request of Chairman Sommer.

VICE-CHAIRMAN NATHAN L. JACOBS: I would like to make this announcement for the benefit of the persons who are appearing before us today. The bar associations had been invited early. Invitations, I think, were sent during our first sessions to all the bar associations. Many have appeared during the early days; some were unable to appear until this late date. In the meantime, the Committee has prepared a Tentative Article which is being distributed and which all the bar associations, including those represented today, will receive probably by tomorrow, and certainly no later than Saturday. In addition to the remarks that you make today, we would like to receive your comments on the Tentative Article.

Is Judge Kremer here?

MR. WARD KREMER: Mr. Chairman and gentlemen of the Judiciary Committee: My name is Ward Kremer, Asbury Park, New Jersey, and I appear in behalf of the Monmouth County Bar Association.

On July 11, the Monmouth County Bar Association adopted a resolution in favor of the retention of the Court of Chancery as it now stands, and the president of that organization appointed a committee to appear here today in support of the views of the Association as a whole. That committee has designed me as its spokesman to present those views. I shall endeavor in the time that is allotted to me to give our reasons why we think there should be a separate and independent Court of Chancery in the new Judiciary Article, and so far as possible to meet some of the arguments and criticisms which have been leveled at the existing court and the arguments in favor of the change and abolition of the court.

I think that the dominant idea in the minds of those who favor

retention of a separate Court of Chancery is that we in New Jersey enjoy specialization in our judiciary. We find that system works very satisfactorily, and we think, of course, that it goes without saying that the burden is upon those who advocate a change to show that the change which is advocated would be in some way preferable to what we enjoy today. I can think of no more persuasive analogy to our system of specialization than that which exists in the field of medical science. I think medicine was quicker than the law to realize the importance of specialization, and I think that the strides which medicine has made under such a system might well arouse the envy of the law. We know that the day of the country doctor has passed. We know that we go to a surgeon for a major operation; we go to an eye, ear, nose and throat man, or to an anesthetist, or to a heart man for such an ailment, or to a diagnostician, and no one would suggest that the former general practitioner could perform the functions that are performed by these specialists wth the same degree of skill that is exhibited by those in the field of medical science who have so specialized.

In New Jersey law we enjoy practically the same kind of specialization. We have a judge known as a circuit judge who sits in the trial of jury cases. He sits there year in and year out and he has the rules of evidence and the law on negligence cases and accident cases at his finger tips. Then, we have another jurist who sits in the Orphans' Court and is familiar with the proceeedings having to do with the administration of estates; and in many of the counties, particularly in those communities of lesser population, he must also be a specialist in the criminal law, because he sits in both branches. Then, we have Supreme Court justices who deal with the intricate field of prerogative writs and acquire skill and experience in those fields that are far beyond what a jurist could acquire who had to try to be a jack-of-all-trades. And, finally, we have a Vice-Chancellor who sits in the equity court and throughout his life devotes himself to the important and intricate field of equity jurisprudence.

And so it is the feeling of our Association, made up, as it is, of men who are on the firing line and in the courts day after day, that New Jersey is particularly fortunate in having a legal system in which men are not shifted about from one field to another each day or each week, but that we have the benefit of jurists who specialize in their particular fields. That we would keep.

I said I wanted to try to meet some of the arguments, and I want to try to distinguish arguments from criticisms. The argument is made that we should abolish the Court of Chancery in New Jersey because it has been abolished in other states. I believe that there is no separate court except in Mississippi, Louisiana, Delaware, and New Jersey. I think that argument has no force at all. New Jersey

is exclusive in two particulars. This is practically the only State—and if I am wrong, it is a simple matter to correct me—in which judges are appointed. The vast majority of states in the Union elect judges. No one has suggested that we should change from the system of appointive judges and proceed to elect them.

MR. FRANK H. SOMMER: One witness before us has, though, Judge.

MR. KREMER: Well, Dean Sommer, I would say there has been no avidity on the part of any force in this Convention or elsewhere that I have noticed.

MR. SOMMER: I said one.

MR. KREMER: Yes. He is a needle in a haystack, isn't he? There is no force, there is no movement in favor, I believe, of the abolition of our system by which we appoint judges instead of electing them, because we believe that we have attained a judiciary of a very high type by the appointive method. So what becomes of the argument that we simply ought to follow the crowd, as it were, and, because other states have abolished the Court of Chancery, we should do the same? If we were to be logical and consistent, then if we are going to do that, we ought to say we will follow the great majority and elect our judges. In fact, even though you may be unique, there is no reason to discard something of value simply because it is unique.

I think it may be worthy of comment to say that in the early part of the 19th Century, this republic of ours was the only republic on the face of the earth. All other governments were monarchical—I look at you for fear you might correct me, Dean; there might have been San Marino even at that time—and no one would have conceded in America that merely because other forms of government which were monarchical were more numerous that we should, therefore, abandon our republican system. So I think that this argument that we ought simply to join with those who have abolished the Court of Chancery loses its force in the light of these facts.

Now, criticism is made of the Court of Chancery. One important criticism that I have noticed in the newspapers—and I know that you gentlemen have heard more about it here and have had a better opportunity here than we could from the outside—is that there is confusion of remedy, that on occasion a case is started in the law court and equity intervenes and a question arises which must be determined in equity before you can proceed to a final determination at law, and that delay ensues. Well, that may arise on occasion. I think those occasions are so rare that they need not disturb us. I may say that I have been engaged in active practice for 32 years. I have been quite active in Chancery work, certainly, for the last 15 years, and I can say truthfully that there have been but two occasions in my experience where there has been the necessity

of departing from the legal tribunal and going into equity. I think this criticism has been unduly emphasized. I think it occurs only in isolated instances, and I am impressed by what was said by Mr. Josiah Stryker in his argument for the retention of the Court of Chancery, that the occasional inconvenience of having questions of equity which arise in a law action determined in the Court of Chancery is by no means as important as it is to have such questions determined by a judge who spends his entire time in the consideration and determination of equity cases. In other words, it would be folly, in my opinion, to wreck a system which has so many virtues simply because it may have this one defect.

Before our time is used up, I should like this Committee to hear a younger member of our bar in Monmouth County, Mr. Frederick Lombard, who had the good fortune to be legal assistant to the late Vice-Chancellor Buchanan and then to the present Vice-Chancellor Jayne, and he will be able to tell you in more detail than I how infrequent over the course of a year and a half or two years' experience in dealing with equitable problems, how infrequently did the question of the intervention of equity and the consequent delay arise.

Now, I have said that I feel that this objection is not worthy of weight as against the paramount considerations which ought to actuate us in keeping the Court of Chancery. But at this point may I venture a suggestion, and I say venture because I am frank to say that you gentlemen will determine the possibility and the legality of what I am about to suggest: If there be this criticism of the conflict of law and equity jurisprudence, particularly in questions of title, would it be feasible to provide in the Constitution that questions of title would be determined in the court of equity? There are other instances in which jurisdiction over a given type of action is transferred from one court to another. It was suggested when the Revision of 1944 was proposed that matrimonial causes should be transferred to the law court. I don't say I would approve such a suggestion. I would not. But nevertheless, it apparently could have been done, and so if our Judiciary Article were to provide that the jurisdiction of the Court of Chancery should be as heretofore, with the additional jurisdiction over matters involving title to real property, any criticism of those who say that this confusion arises and delays the course of justice would have to vanish.

Further, I feel that I should try to answer those who say, "Well, why not have a separate Equity Division; why retain an independent and separate Court of Chancery?" My reasons are these—and when I say "my," pardon me; I mean the views of our bar association are these—that the Court of Chancery is particularly, as we know, a court of conscience. It only arose in ancient days in Great Britain because of the inadequacies of the law to reach and

to accomplish substantial justice, and I don't propose to take your time to go into any history of its background. But being a court of conscience, the Chancellor must be the conscience of that court, and the equity dispensed by the Court of Chancery must be controlled by the head of the court. Otherwise, if you create an Equity Division and simply assign judges to it with the flexibility of the administration of jurisprudence and no head to that court, we might have as many brands of equity as there are equity judges, simply because equity, under its maxim that it suffers no wrong without a remedy, has a latitude in the administration of justice that is not permitted to law courts. I say, therefore, that the important thing is to preserve the control of the Chancellor over that court, and everything that militates against that control will tend to emasculate the Court of Chancery.

Another reason for the separate court, and of course the overwhelming reason, is the splendid part that it has played, not only in the development but in the administration of law in New Jersey. I think I ought to bring to the attention of the Committee the fact, if it has not already been alluded to, that the reputation which it enjoys is not confined to the limits of our State. I took the trouble, as chairman of this committee which appears here today, to write to lawyers of repute in the 48 states of the country. I picked the names at random and indiscriminately—not people whom I knew but people who stood well in the Martindale Legal Directory. I told them in these letters of the nature of the problem and stated that there was a suggestion that the Court of Chancery should be abolished in New Jersey in the new Constitution. I asked them if they would be so good as to give me their experience with opinions of our court in their states, and to answer the question whether the opinions of our court were looked upon with that degree of respect which I had been led to believe they enjoyed. I recall that, as I read from the newspapers, Dean Pound said that the equity decisions in New Jersey were a joy forever. I found that many persons who replied did not have any such experience one way or the other. Some did not reply, of course.

I have before me 16 letters from 16 different states. I shall be glad to deposit these with the Secretary if you wish me so to do. Each of these letters is to the effect that the opinions of the Court of Chancery of New Jersey are looked upon almost as gospel in those states, although the term gospel is my phrase, not theirs. One from Minnesota is typical. The writer says that "certainly no court cited in the Minnesota cases is accorded more respect and authority than the New Jersey Court of Chancery. The equity decisions of that state are commonly cited in the reports of the decisions of the

Circuit Court of our state." Now, when the body of the law has risen to such a degree of respect that it is regarded throughout the land with this type of importance, I think caution should be the watchword of any committee or any group of men which sets about trying to change the system that has produced such important results not only to us but to those in other parts of the country.

The suggestion is made that in the federal courts they have one judge who sits in law and equity. Well, they do. I think no one will deny that the field of equity is distinctly limited in the federal district courts. They deal with relatively few equity matters as compared with the legal matters that come before them. Moreover, they feel bound by the decisions of the state, so that the law of the equity courts of New Jersey is in reality the law of the federal court. Finally, they don't come in contact, because of the very nature of the fact that it is a federal court, with the problems the people meet in their daily lives to the extent that our courts do. I think, therefore, that it does not furnish any persuasive argument for the abolition of our Court of Chancery that in the federal courts they have one judge who attempts to administer both fields.

It has also been suggested that there are judges who can administer both fields—Judge Learned Hand has been mentioned during the hearings in this Committee, I believe, as a man who administers in both fields exceptionally well. Undoubtedly, that is true. We are thinking of what the average jurist can do, and no one could suggest, in my humble opinion, that the average jurist in a court of original jurisdiction could be equally able in all fields or that he could compare with the degree of expertness that we achieve under our system.

Mr. Chairman, may I ask how much more time I have?

VICE-CHAIRMAN: Go right ahead.

MR. KREMER: There are certain things that our bar association stands for. We are for a separate Court of Appeals. We feel with everyone that this duplication of effort is responsible for great delays and overburdens the court. There should be a separate Court of Appeals which, we think, should be composed of one chief and six judges, one-half of whom, three of whom, should be drawn from the field of equity when the new Constitution is set up, and three from the field of law.

We believe that the Court of Chancery should be vested with the original jurisdiction of the Prerogative Courts. We believe that the county courts should be retained and that the accumulation of names and nomenclature should be done away with—that these names, General, Quarter Sessions, Oyer and Terminer, should be abolished; that the Circuit Court, as such, no longer performs any necessary functions and that there should be one county court vested

with all the jurisdiction which now reposes in the same judge under the various titles under which he functions.

That, I think, sums up the views of our committee as to what the new Constitution should contain.

In conclusion, let me say that I think it is the opinion of our bar that most of the difficulties with our system are purely procedural. If the courts, the appellate courts, do not meet frequently enough to meet some objectors' views, that could easily be changed by the court itself; it fixes its own calendar. If prerogative writs need simplification, and I most certainly feel that they do, we need no constitutional revision to accomplish that. By and large, our system is basically too good to tamper with. I know I voice the views of these men who come here today from our Association, when I say that we have no personal interest in this; we'll manage under any system, whether it be as good as this or not, to get along somehow, but I feel that no one would be candid if he did not try to impress upon this Committee what he no doubt already realizes—the terrific importance of the problem and function which you have to perform. I think if you abolish the Court of Chancery you will do a great wrong. You will do a distinct disservice to the administration of justice in New Jersey. It matters little that that wrong may rise to haunt you in this Committee, but it matters a great deal that the lives and the fortunes of millions of people who come now and in the future to our courts for the administration of justice may find that that justice is administered in an inferior manner, compared to the manner in which it is administered today. That is why we feel, as I said, that caution is the watchword, that you should make those changes which are necessary, but not change simply for the sake of changing, and that above all you should retain the Court of Chancery in its present status. Thank you for your time.

VICE-CHAIRMAN: Any questions?

MR. HENRY W. PETERSON: I would like to ask Judge Kremer this: I may be wrong—I am a layman, and I may misinterpret what he said—but if I evaluate what you said, and I subscribe to specialization as far as preserving as much of the good as can be preserved, but if I get you right, then the people in the other 47 states are not getting justice, are they?

MR. KREMER: Well, I don't have the privilege of knowing your name.

MR. PETERSON: Peterson.

MR. KREMER: Mr. Peterson, may I say to you that in the correspondence which I received there is considerable comment to the effect—and this is by the lawyers, and after all I couldn't take your time to read all these letters into the record—that they feel that the abandonment of the separate Court of Chancery in their states has been injurious to the administration of justice. They would

like to have it back. One thing I forgot to mention before: we have another member of our committee here I would like to have you hear because he is also a member of the New York Bar. Now, I believe it to be a fact and I know that in New York equity is administered by the Supreme Court justices who perform in other respects the same functions as our Circuit Court judges. I have made inquiry about this from very reputable firms. Those judges sit nine of their ten months as law judges, just like judges in your court house hearing jury cases. In the tenth month they are assigned to equity. Now, you and I know, without bringing in any support, that a man whose mind has been functioning in one field of the law and who gets up in the morning and says, "This day I am going to be an equity judge," that the result, as you might expect, is this: In New York, as I found it, reputable firms downtown have told me that they are so careful and they have so little confidence in the ability of the average Supreme Court justice to administer equity that they wait until some three or four of the 20 to 25 Supreme Court justices in the five boroughs come into the equity court and then under a gentlemen's agreement they present their equity cases. That's a sorry picture for the Empire State, isn't it? That is what resulted because New York has abandoned the policy of having men who could administer these intricate problems, which represent the essence, in our opinion, of the law by having men who sit down at the early age of 40, perhaps, and live with those problems and who feel that their intellects are devoted to it until they die. Does that answer your question?

MR. PETERSON: Yes, sir. Another one you bring out is that in our present system of jurisprudence, the appeals from equity are determined entirely by law judges and their word is the last word.

MR. KREMER: Well, my answer to that is this: I am speaking, when I speak of equity jurisprudence, primarily of the original jurisprudence. I am thinking of the man who gets his leg broken and goes before a judge and jury. It is vital to him that that Circuit Court judge know the rules of law. When a man goes into an equity court, a court of original jurisdiction, it is vital to him that that equity judge know the rules of equity and know equity. Now then, the decision of either of those courts may be passed upon by an appellate court. When you get to the higher court you find a fine type of intellect. I think that the Chancellors we have had exhibit that. But the important thing, more important than who should pass upon the decisions of the equity jurist, is what kind of a man shall there be and what type of intellect shall there be in the original instance?

MR. PETERSON: Now, what I would like to ask you, sir, is how your bar association, or you individually, came to the conclu-

sion that the Committee recommendation would lack the Court of Chancery? I don't understand it that way at all.

MR. KREMER: I say, and I gave my reasons a while back, that anything that tends to delegate the power of the Chancellor will tend to emasculate the power of the Court of Chancery.

As I tried to say, Mr. Peterson—maybe I didn't make myself clear—there is no court in our system in which the head of the court exercises that degree of control over the other members of the court that is exercised by the Chancellor. He is the conscience of the court. If you simply had equity judges appointed from the outside, without any supervision, as it were, over them, then, as I said before, you might have as many brands of equity as you would have equity judges. But you want to look to one man. Now, this system finds its counterpart in the method of appointment in Britain. In Britain judges are chosen—I think I can name the functionary correctly—the Permanent Home Secretary chooses them from a list, they are chosen for life, and they get salaries that would seem fantastic here. A judge of the King's Bench, comparable to a county judge or a circuit judge here, receives about $32,000 a year. I don't know the figure that the Chief Justice gets, but, if I am not mistaken, it's $200,000 a year, and it is worth that, seriously, to have a type of jurist who will administer the law, who is beyond political pressure, who doesn't have to worry about reappointment, and in Britain those men are chosen by the Permanent Home Secretary from a list of men who have taken the silk, as it were, and specialized in their particular fields. They are there for life. You have only one thing to fear—they needn't fear any outside pressure, political, financial or otherwise—the public has only to fear the possibility that a judge might grow indolent. That's the only danger.

I think that is strong support for the contention that Vice-Chancellors should be chosen by the Chancellor, removed as far as possible from the field of politics or pressure of any kind.

VICE-CHAIRMAN: Any further questions?

(Silence)

VICE-CHAIRMAN: Thank you very much, Judge Kremer... Mr. Ewart, representing the Ocean County Bar.

MR. HOWARD EWART: Mr. Chairman and gentlemen: my name is Howart Ewart—

MR. PETERSON: Excuse me . . . I think, Judge Kremer, you were going to introduce another witness for a short statement.

MR. KREMER: Yes, I was.

(Discussion between Vice-Chairman and Judge Kremer)

VICE-CHAIRMAN: Go ahead, Mr. Ewart.

MR. EWART: I come from Toms River and appear as a rep-

resentative of the Ocean County Bar Association and the Ocean County Lawyers' Club, which held a joint meeting on July 10 to consider and discuss the questions relating to the proposed Judicial Article of the proposed Constitution.

At that meeting the two associations were unanimous in the opinion that we ought to have an independent Court of Appeals in this State in place of the present Court of Errors and Appeals, and that there should be adequate representation on that independent Court of Appeals, not only of the law bench but also the Chancery bench. Under the present system, as you know, the Chancellor is disqualified while sitting in the Court of Errors and Appeals whenever a case comes up from Chancery, so that Chancery appeals, in this State, are passed upon by the law judges and lay judges, with no representation whatever from the Chancery bench. We feel, therefore, that in this independent Court of Appeals the Chancery bench should be adequately represented as well as the law bench.

To go, perhaps, from the sublime to the ridiculous, we were also unanimously of the opinion that the justices of the peace ought to cease to be constitutional courts and that all references to the justices of the peace or justices' courts should be omitted from the new Constitution, and that that matter should be left to be dealt with by the Legislature.

Our group was also of the opinion that we ought to retain, under whatever name you may choose, a county court in each of the counties of this State, presided over by a local resident judge or judges, rather than to throw the jurisdiction of the county courts, as presently constituted, into the state-wide court which I believe is supposed to be called the Superior Court.

Finally, our body considered the question of the abolition or retention of the Court of Chancery, and a resolution was adopted unanimously in favor of the retention of the Court of Chancery as presently constituted. I believe a certified copy of that resolution was forwarded to each member of that Committee.[1]

At that joint meeting there were present more than 75 per cent of the practicing lawyers of Ocean County.

VICE-CHAIRMAN: How many would that be in number?

MR. EWART: There were 30-odd men present; there are something like 40 practicing lawyers in Ocean County, and there were over 30 present at the meeting. I think it is remarkable to say that the resolution for the retention of the Court of Chancery as presently constituted, was adopted without a dissenting vote. The reasons why we think a Court of Chancery such as presently constituted should be retained in the new Constitution, if I attempted

[1] The text of this resolution appears in the Appendix to these Committee Proceedings.

to give them, would be a repetition of what Judge Kremer has said.

I think it is true beyond dispute that the decisions of the Court of Chancery of this State have achieved a preeminent position in equity jurisprudence throughout the United States, and it seems odd to us that this Convention should consider the abolition of the Court of Chancery in view of that fact. No one has had the temerity to suggest or propose that equity jurisprudence or equitable principles should be abolished. That, of course, would be unthinkable.

The proposition advanced, as I understand it, is that the system of administering equity be changed about by having equity jurisprudence administered by a division of the Superior Court or the state-wide court, whatever it may be called. The chief objection we have to that is that the body of equity jurisprudence and equity law is so large that we think it impossible for a man who sits in a law court for a large part of his time and is transferred to a court of equity, to possess the knowledge or skill or learning of that subject that should be required of one qualified to administer equity generally.

This is the day of specialization, not only in law and in medicine, but in almost every field of human activity. It seems to us that if you are going to do away with the judges who sit specially as equity judges and who have no other law to administer except equity law, then you are inevitably going to weaken equity in this State and the position which has been achieved by our equity courts in this State.

It might also be said, I think, that if the Court of Chancery, as presently constituted, be abolished and the administration of equity thrown into a court that also administers law, you will have a great body of new rules and regulations to contend with. The present rules and regulations of the Court of Chancery will very largely have to be amended. That will, no doubt, give rise to lots of litigation and disputes and will be expensive and difficult for a period of some years to come.

We also favor the retention of the present system of appointing the Vice-Chancellors. I think it may be said that it is highly desirable that the appointment of any judicial officer be as far removed from political pressure as can be done. We recognize, of course, that we can have no perfect system and possibly no system under which some political consideration will not creep in, but we feel that the appointment of Vice-Chancellors by the Chancellor, to whom they are responsible and to whom they have to look for reappointment, will tend to keep the appointment of Vice-Chancellors more removed from political considerations and political influence than would be the case if Vice-Chancellors or

those who administer equity jurisprudence were appointed by the Governor with confirmation by the Senate.

Those, I think, are the views of the Ocean County group—that is, the Ocean County Bar Association and the Ocean County Lawyers' Club.

VICE-CHAIRMAN: Any questions?

MR. AMOS F. DIXON: Judge Ewart, may I ask this: If we have a general state court which you are referring to as the Superior Court, set up in divisions—equity and law divisions and appellate divisions—and if we have the rule-making power and the allocation of judges in the Supreme Court, do you think that the Supreme Court in allotting these judges would put all the law judges in the equity division and equity judges in the law division?

MR. EWART: Well, the answer to your question is obvious. I think that was unkind. But I do think it would be inevitable that in the course of time you would get judges administering law for part of the year and equity for part of the year. That is the system to which we object because we think the administration of equity as well as the administration of law requires specialists in those respective fields.

MR. DIXON: I wonder why you draw that conclusion, or try to mix these up so that law judges would be administering equity?

MR. EWART: Well, if in the Constitution you give the power to the Chief Justice of the Court of Appeals, or some administrative official, to assign these judges, I think it is to be presumed that the same system generally will be followed as is followed in other jurisdictions where they have one court with law divisions and equity divisions and probate divisions, and the judges are assigned to the different divisions as time goes on, if you give power to make such assignments.

VICE-CHAIRMAN: Any further questions?

(Silence)

VICE-CHAIRMAN: Thank you very much.

MR. THOMAS J. BROGAN: I want to ask a question. You spoke about the make-up of the court of last resort, and I take it that you meant that there should be included in that court some of the equity judges or Vice-Chancellors?

MR. EWART: Yes, we thought so.

MR. BROGAN: Do you not consider that the judges of the Court of Appeals—we will drop out the special judges for the moment—but the Supreme Court justices who become judges of the Court of Appeals by virtue of their office, do you not consider them equity specialists?

MR. EWART: I would say not, Judge Brogan. I think no one

can be an equity specialist unless he devotes substantially all his time to the field of equity.

MR. BROGAN: Well, assuming, as I think the fact is, that the appeals from the law side and the equity side are equal, don't you concede that a man who has been devoting his time to the consideration of equity appeals for a period of maybe 15 or 18 years, as well as law appeals, becomes quite expert—as expert as anyone could be?

MR. EWART: The field of equity jurisprudence is a tremendously large field. I don't believe there is any equity judge in the United States today who knows all the equity law or equity jurisprudence. Nor do I think there is any law judge who knows all the law, but I do think—

MR. BROGAN: Well, that's a matter of opinion, of course.

MR. EWART: Perhaps I can put it this way: I have yet to meet any judge who claims to know all the law.

VICE-CHAIRMAN: You should have sat in on one of our hearings.

(Laughter)

MR. PETERSON: I was just about to say that.

MR. EWART: Well, I hold that opinion. I don't think any man can be a real specialist in equity unless he devotes substantially all his time to equity jurisprudence. I don't mean to say, however—

MR. BROGAN: If you put these equity judges into the law courts, how about their deficiency, under your argument, of the knowledge of law?

MR. EWART: I think the rule works both ways, or the argument applies both ways. I think an equity judge who has sat for years on the equity bench would not be competent for some time to hold circuit court and try law cases, but in suggesting that the equity bench ought to have adequate representation on the independent court of appeals, my thought is that with the volume of—

MR. BROGAN: You get a better cross section of intelligence.

MR. EWART: Yes. My point is with the volume of—

MR. BROGAN: A better cross-section of intelligence.

MR. EWART: You ought to have some real specialists in equity on that independent Court of Appeals to assist the court with expert knowledge.

VICE-CHAIRMAN: I take it, then, that you would want the Vice-Chancellors, as distinguished from the Chancellor, to sit on the Court of Appeals?

MR. EWART: Well, under our present system, of course, every time an equity case comes up on appeal from a decision of the Vice-Chancellor, the Chancellor retires.

VICE-CHAIRMAN: That wasn't my question. I gather that

you want men who have very substantial equity experience on the Court of Appeals, and that you would want Vice-Chancellors, as distinguished from the Chancellor?

MR. EWART: I don't want to deal in personalities, but I think we ought to get the best men or the best qualified men, the most experienced men on the Court of Appeals whom we have in this State. Generally speaking, that necessarily means you would take specialists from the equity field if you were going to have equity judges, and I know of no better specialists than some of our Vice-Chancellors.

VICE-CHAIRMAN: And you would take those even if it meant the exclusion of members of the Supreme Court.

MR. EWART: I am not interested in personalities nor in any one holding office now.

VICE-CHAIRMAN: I was just thinking of how that could be worked in the Constitution. You are recommending that a certain type of man go to the top court. That would have certain consequences. I was trying to envisage just how that could be accomplished.

MR. EWART: Well, of course, our group in Ocean County does not attempt to say to this Committee or this Convention the details of how these things should be worked out. We deal with the general principle and say the Court of Appeals should have adequate representation from the Chancery bench.

MR. DIXON: Mr. Ewart, in your opinion, how long after appointment does it take a man appointed Vice-Chancellor to become an expert and able to give a reasonably good brand of equity judgment?

MR. EWART: Well, now, of course, there are so many factors that have to be considered in that question. The first factor, I think, is how much equity did he know before he went on the Chancery bench.

MR. DIXON: Presumably he practiced both equity and law, as most of our attorneys do.

MR. EWART: That's true, but there is a difference. A great many have larger equity practices than others.

MR. DIXON: Presumably we pick out those we think will do the best job. What is your opinion?

MR. EWART: I am unable to express an opinion because there are so many uncertain factors. It is like asking how long it would take a man to become a skilled carpenter.

MR. DIXON: I can tell you that, if you ask me. I happen to be an engineer.

MR. EWART: But there are so many unknown factors involved, I don't feel able to give any definite answer. I would say that the

ordinary lawyer who has some equity practice as well as some law practice would have to serve some years—

MR. DIXON: Ten or fifteen?

MR. EWART: The present term of the Vice-Chancellor is seven years. I think a Vice-Chancellor is a better equity judge at the beginning of his second term than he was at the beginning of his first; and I think he probably would be a better equity judge at the beginning of his third term than he was at the beginning of his second. It's a vast field and that's the reason we require specialization.

VICE-CHAIRMAN: Any further questions?

(Silence)

VICE-CHAIRMAN: Thank you very much, Mr. Ewart.

MR. EWART: Thank you for your time.

VICE-CHAIRMAN: We will now hear our next speaker, Mr. Harry R. Cooper.

MR. HARRY R. COOPER: Mr. Chairman, lady and gentlemen:

I only want to reiterate what Judge Kremer said as far as the broad field of equity and law is concerned. I do want to add this however: that in New York, while I was in law school and during my brief term of practice there, it came to my attention repeatedly that there is as much difference between law and equity in New York as there is in New Jersey, even though New Jersey has a separate Court of Chancery. There is one difference there that has been alluded to by Judge Kremer, and that is that the judges who sit in the equity court have only the briefest experience in equity matters, and for that reason the New York courts themselves regard the decisions in equity in New Jersey as being of the highest type, because those decisions are made and rendered by men who have spent years of practice in the equity courts.

Now, in New York the practice is probably more specialized, let us say, than in any other state, and all of the big law firms have their leading law and equity specialists who try the cases in those respective courts. I can tell you from experience that I know that the large firms in New York, if they have equity cases involving serious equity principles, will wait until they know that one of the Supreme Court judges who is best versed in equity practice is assigned to that court before they will try their case there, if they can accomplish it by a gentlemen's agreement with their opponent. The reason for that is that these men who specialize in that field feel that they want the judges who they feel are best qualified to hear that particular case, based upon equity principles.

I don't think that I need take the time of your Committee any further, except to reiterate what Judge Kremer said about the Monmouth County Bar Association—that it desires a separate

Court of Chancery to be maintained. We are also in favor of a separate Court of Appeals, on which we would like to see an equal representation, other than a chief judge, among the law and equity judges.

MR. SOMMER: Isn't it a fact that in New York the large and reputable firms, to which you refer, adopt the same practice with respect to cases at law as they do with respect to cases in equity? They may hold and attempt to put them before a particular judge, sitting at a particular time?

MR. COOPER: Let me say this--that same practice, I think, exists in this State to a certain extent. Does that answer your question?

MR. SOMMER: Both at law and in equity?

MR. COOPER: Both at law and in equity we try to use the judges who will decide a case according to the principles upon which we think it should be decided. If we are wrong, we are wrong, and if we are right, we are right.

VICE-CHAIRMAN: Any further questions?

(Silence)

VICE-CHAIRMAN: All right then, I will call the next speaker, Mr. Frederick Lombard.

MR. FREDERICK E. LOMBARD: Mr. Chairman, lady and gentlemen:

I want to speak on only two points that are relative to my fortunate experience of a year and a half with the late Vice-Chancellor Buchanan, and his successor, Vice-Chancellor Jayne.

In the discussions of the bar and the members who have appeared before this Committee, and in newspaper editorials and articles on the subject of revision, I was particularly interested in the fact that it was frequently suggested that the great delay in Chancery was due to the fact that matters came in there which were equitable in nature but in which the question of title to land had to be sent into the Supreme or Circuit Courts for trial. Well, that struck me as a rather odd and a particularly infinitesmal argument, because in the year and a half before one of the busiest Vice-Chancellors in the State of New Jersey, only once had that case arisen, and in that case by immediate stipulation of counsel the question was tried by the Vice-Chancellor himself. So that didn't seem to me to be too important.

There was a second point I made before the committee and also before the Bar Association in discussing this problem, and that is this: I do not think there is in New Jersey a more concise, consistent and cohesive body of law than that which concerns inheritance taxation, and it seems to me that that points out, more forcibly than anything else in our legal system, the advantages of

specialization. As you know, inheritance tax matters are decided by the Commissioner, and the procedure then is appeal to the Prerogative Court, the Chancellor there being Ordinary, then by certiorari to the Supreme Court, and finally by appeal to the Court of Errors and Appeals. The Chancellor very early made it a rule that the Vice-Chancellor sitting in Trenton would hear all those cases, so that that meant that Vice-Chancellor Buchanan, and then his successor, Vice-Chancellor Jayne, decided those matters. The result has been special attention by one man, very carefully, to that field, to the legislation, the changes in that legislation, and the analogy between our own and the estate taxation cases in the federal courts. It seems to me that there has never been in New Jersey a better body of law than that. It results, as I say, from specialization which, it seems to me, is the strongest argument advanced for a separate equity court and separate justices.

One third comment I would like to make. I had about six, no nine months, under Vice-Chancellor Buchanan before he suddenly died, and the balance of my year and a half under Vice-Chancellor Jayne. I was always amazed, because to a young lawyer the field of equity is so vast. It's like a will-of-the-wisp; it gets away from you. When I came in there and a case had been presented on its pleadings and heard by the Vice-Chancellor, Vice-Chancellor Buchanan would hand the papers and the file to me, and he would say this immediately: "The leading case in this field in such and such," or "The leading cases are such and such," and "That's the place from which to start your work in working on the memorandum on the conclusions to be reached in this case."

Then Vice-Chancellor Jayne came in. Now, Vice-Chancellor Jayne had been an outstanding jurist—I don't think anybody can question that—on the circuit bench for ten years. Yet his problem showed immediately how different were these two fields of our jurisprudence, because he expressed both publicly and privately the amount of study that had immediately become his lot in trying to encompass his field. It is only now, after about five or six years, that he begins to have at his finger tips again—and this I say in answer to a question which was propounded a while ago—at his finger tips, a ready knowledge without cumbersome detailed study of the branches of that field of equity jurisprudence.

Those are the three comments that I wanted to make from my own experience.

VICE-CHAIRMAN: Any questions of Mr. Lombard?

MR. BROGAN: Yes, I would like to ask a question.

VICE-CHAIRMAN: All right.

MR. BROGAN: Do you believe in the practice, for instance, in tax matters, to which you refer, there should be, as in this case, four judgments: one by the Commissioner, one by the Vice-Ordinary,

certiorari in the Supreme Court, and then appeal to the Court of Appeals?

MR. LOMBARD: No, I have discussed that before at the time that I was working on these matters, and I have discussed it as recently as today. It seems to me that there is no reason why at least one of those steps should not be eliminated; at least one, if not two.

MR. SOMMER: Do you happen to know how many opinions the Chancellor had personally rendered in that year and a half?

MR. LOMBARD: No I don't. I was asked that question by the Monmouth County Bar Association, who tried to get some idea of the volume. I went back to some papers I kept, my own memoranda, and I know that I had in my files in that year and a half, 75 memoranda. Those do not include, by any means, the number of cases that came in, but were those in which a serious memorandum was required of me.

MR. SOMMER: No, but the question I am asking is, in how many cases did the Chancellor himself render an opinion in that year and a half?

MR. LOMBARD: That I don't know.

MR. SOMMER: Do you know of any?

MR. LOMBARD: Well, while I was up there—I speak with reference to that year and a half that I was up there—I recall that at that time the Chancellor then—not the present Chancellor—rendered, if I recall correctly, exactly one opinion, in a case in which he had acted solely as an administrative officer for the court.

MR. SOMMER: So that the Chancellor becomes very largely an administrative officer?

MR. LOMBARD: The Chancellor has, yes, sir.

MR. SOMMER: And the old practice of having opinions rendered by Vice-Chancellors reviewed by the Chancellor no longer prevails, does it? As a practice?

MR. LOMBARD: As a practice, I really don't think it does.

VICE-CHAIRMAN: Any further questions?

MR. KREMER: May I interrupt for just a moment? I don't think you will want this on the record, but I just wanted to say that Mr. Harold McDermott, of Freehold, who is a former president of our Bar Association, and a member of this committee, asked me if I would be so good as to state to the Committee that because of his ill-health, he is unable to be here today, and he wanted me to express his regrets.

VICE-CHAIRMAN: The only other witness this morning is, I understand, Mr. St. Clair, who has asked to appear before the Committee. You will recall that he is the gentleman who wrote a letter to the Committee with respect to a particular proceeding and we indicated that he could appear before us today.

Mr. St. Clair, we are sitting as a Committee to facilitate construction of the Judicial Article of the Constitution and we are interested in any remarks that may bear on that issue, but not on any items that are particularly beyond our concern.

MR. LEO J. ST. CLAIR: Mr. Chairman, first I want to explain to everyone present that I am not a lawyer; I am primarily an engineer and a business man. Mr. Lombard indicated that the present Chancery Court system apparently is excellent because they specialize. I am a great believer in specialization, but am definitely not a believer in the present specialization of Chancery Courts of New Jersey, at least as exercised in regard to receivership. I have become quickly acquainted with the way receivership is conducted in New Jersey. I would really liken it to despotism and I don't believe that Hitler had anything any better.

Briefly, to bring you up to date in the situation in which I presently find myself, I am president of the General Tool and Die Company, of East Orange. This company was thrown into the hands of a receiver by Vice-Chancellor Stein about two weeks ago. It should never have been thrown into the hands of the receiver. However, it seems to be an objective on the part of a group of persons here in New Jersey who, I think, make their money too damned easily, to throw companies into the hands of receivers so that their friends, their lawyer friends, can get a nice counsel fee. The assets of this corporation were about—

VICE-CHAIRMAN: Pardon me, may I break in here a minute? Please bear in mind what I said at the start. I would like you to confine your remarks to something that will be helpful to us in connection with the Constitution.

MR. ST. CLAIR: Yes, all right. You mean a proposal of how this should be changed?

VICE-CHAIRMAN: In the Constitution. That is what we are talking about.

MR. ST. CLAIR: Well, please bear in mind, Mr. Chairman, that I am not a lawyer, but if you want my proposal as to the way receiverships and bankruptcies should be conducted, under the new Chancery Court system as has been recommended, and which I understand is being fought by a minority group, I would propose this system. That the equity division, of course, be definitely under the Supreme Court; that the Supreme Court appoint three, let us say, business advisors or arbiters who would be paid a retainer fee. First, may I qualify a successful business man? A successful business man, to me, is one who can leave his business at any time without any interference in its performance because he has trained executives to carry on for him at any time. Hence, these three arbiters or counselors, I don't know just what name to give them, would be free to serve under the Supreme Court in this capacity. They

would appoint, in turn, a number of other business men in various lines of business—that's important—in various lines of business, to act as receivers in receivership, or referees in bankruptcy. The three arbiters would also be similar to a court of appeals on the part of the unfortunates who are caught in a receivership or bankruptcy who would not be satisfied in the way a receivership was being conducted. Their decision as to whether it is or is not being properly conducted may or may not be final, but at least it gives a person a chance to be heard, and today there is no chance.

You've just told me that it's none of your business, or words to that effect. In other words, the "I am above the law" attitude in every case that I have seen so far. The business men, successful business men who would be appointed by these three arbiters would be, as I say, successful in various lines of business. Let us assume that a clothing store was put in the hands of the receiver. The arbiters would choose a business man to act as a receiver, or as a referee, a man who has had a successful record in the clothing business. I have people conducting a receivership who wouldn't even know how to begin to operate my business, and they are making the grandest mess of it that anyone could ever do. I challenge anyone to do any worse, and these people expect to be paid. Where are they going to be paid from? At the expense of my creditors, people who have had faith in me in the past and who would have faith in me in the future. I can't take that and I won't take it.

Now, these men, as I say, would act as receivers or referees in bankruptcy and would, of course, be under the jurisdiction of the three arbiters. They, in turn, would be under the jurisdiction of the Supreme Court. I believe that under that system, with the fact that a person in difficulty has a right to appeal and that the people conducting receiverships would know the business that they are conducting, your cost of receivership would probably be no more than 25 per cent of the present cost and any monies paid to these people would be honest dollars—and I say that advisedly, honest dollars.

The question of my receivership cost has been brought up and it isn't finished, and it won't be finished until the cost is equitable, and I am going to have a voice in deciding that definitely. I made a mistake in saying that it shouldn't cost over $500, before Mr. Crummy and several other lawyers. Apparently I should have instructions in decimal points. I believe I should have said $5,000. John Matthews later suggested $1,500, but that didn't set well with those present. But I would not and I would never assume an X cost basis of a receivership, and that is what was apparently what was wanted, an X cost basis, whether it's five thousand or ten thousand dollars. I don't know, but I know I'll fight every penny beyond five hundred. So that is why I would like to propose that at least the

equity division—I'm not a lawyer but I do know the procedure from my own experience, and the experience of other unfortunates—

VICE-CHAIRMAN: I would say that what you are discussing could not possibly be part of the Constitution. You don't, in the Constitution, fix procedure. That is to follow the constitutional framework, which is very general and merely sets forth the system of judicial administration. After you have established a system, then the matter of procedure is to be administered by that particular system. So I say that these things, while they might be meritorious —I haven't considered them—are not properly before us as a Committee, other than the one suggestion you just closed with, that there will be an equity division.

MR. ST. CLAIR: Yes, and definitely not a separate Chancery Court system such as exists in New Jersey today.

VICE-CHAIRMAN: Any questions you would care to ask Mr. St. Clair? . . . Thank you very much.

MR. SOMMER: The matter he has in mind could, of course, be covered by the rule-making power vested in the Chief Justice.

VICE-CHAIRMAN: Oh, yes, I haven't any doubt that these matters that you are talking about will properly be handled by a comprehensive rule-making power.

MR. ST. CLAIR: Well then, all that I can really offer is very short. I could simply say I am not in favor of the present Chancery Court system.

VICE-CHAIRMAN: And I gather that you are in favor of comprehensive rule-making powers?

MR. ST. CLAIR: An equity division under the Supreme Court.

VICE-CHAIRMAN: Any further questions? . . . Well, we have nothing further until two o'clock and then we have someone on at 2:00, at 2:30, and at 3:00 o'clock. I hope to have the printed Article and Schedule for you this afternoon. What I would like you to do is take a sufficient number of copies and go over them carefully between now and next week, for the purpose of formulating your own recommendations as to phraseology and changes. Next week we are going to have an opportunity, particularly after the hearings, to make other changes.

MR. EDWARD A. McGRATH: Well, will you tell us what we can expect next week?

VICE-CHAIRMAN: Nothing, as far as our Committee work is concerned, until Wednesday. We have a full day Wednesday. On Tuesday, the Convention itself meets at 10:00 A.M., and I thought that perhaps we might meet for a few minutes right after the Convention. We'll be meeting on Wednesday and Thursday. We might even finish up Wednesday; I don't know.

MR. McGRATH: Is it an executive meeting on Wednesday?

VICE-CHAIRMAN: No, there will be a public hearing on Wed-

nesday. No more executive meetings, except perhaps after the hearing on Wednesday, we might have a final executive meeting to draw up the final draft.

MR. BROGAN: What is the deadline for our proposal?

VICE-CHAIRMAN: Thursday night. The rules call for July 31.

MR. ST. CLAIR: Is there any possibility that the recommendations I have read in the papers will not be made?

VICE-CHAIRMAN: Oh, yes; this is a tentative draft. We are having a public hearing on Wednesday and the concluding meeting will be on Thursday.

MR. ST. CLAIR: My only interest, of course, is that I would like to attend that meeting, because I certainly want to see this thing worked out and I would do any amount of fighting.

VICE-CHAIRMAN: You are welcome on Wednesday, and I will see that Mrs. Miller sends you a copy of the proposed Article. In fact, everyone who has appeared should have one.

MR. McGRATH: The gentleman is on record and the shorthand stenographer is taking it down.

VICE-CHAIRMAN: Any further questions? We will recess until 2:00 o'clock.

(Recessed for lunch at 12:30 P. M.)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Thursday, July 24, 1947

(Afternoon session)

(The session began at 2:00 P. M.)

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., Smith, G. F., Sommer and Winne.

Vice-Chairman Jacobs presided at the request of Chairman Sommer.

VICE-CHAIRMAN NATHAN L. JACOBS: Judge Gebhardt, representing the Hunterdon County Bar Association.

MR. PHILIP R. GEBHARDT: Mr. Jacobs, members of the Committee:

It will be necessary for me to take but a few minutes of your time. We appointed a committee of the Bar Association and thereafter held a meeting of the members, and we sent in to your Committee a copy of the resolution adopted by the Association.[1] One thing we agreed on almost unanimously was the retention of the Court of Chancery. The members felt that because of its reputation and because of the trained personnel who were members of the court, it would be for the best interests of the State at large, citizens and everybody else, to retain the Court of Chancery. However, as I read the *Newark News* and see your plans with regard to the general state court, or whatever it may be called, it does appear that you recognize the benefits which may arise from what might be called a separate Court of Chancery, at least a separate division of the general state court.

We felt quite strongly, also, that the county courts as such should be retained. Now, I can speak personally from that angle because on April 1 I finished a term as Common Pleas judge of Hunterdon County, during which time I was fortunate enough to have considerable work in Warren County and also in Mercer County. I do feel that a local judge, that is, a Common Pleas judge, appointed from the county in which he resides, does have a knowledge of the whole county which is almost indispensable in the many and varied jobs which a Common Pleas judge has. He knows the geography, he knows the people, the kind of people that live in the different parts of the county, and he has a first-hand knowledge of what

[1] The text of this resolution appears in the Appendix to these Committee Proceedings.

they think, how they feel and what is good for them and everything concerned with it; and I sincerely hope that you will see fit to retain the county court system.

We also passed a resolution which requested that a provision be inserted that all judges of all courts should be attorneys-at-law. That, of course, between us, is aimed at the doing away with the justices of the peace whom we still have in our small county and whom we are not particularly proud of, and we thought that that might take care of that situation. The last revision of 1944 provided that all judges, as I recall, should be attorneys-at-law of at least ten years' standing, and I believe that we are fully in accord with that provision or something similar.

We are heartily in accord with your ideas establishing a Supreme Court that will hear nothing but appeals and important cases, and we feel that that is a reform that should, perhaps, have been instituted many years ago.

I think that that is about all I have to say, unless you have some questions you would like to ask. We appreciate the opportunity of being here and realize, of course, that you want to give the people something which is good for them but which will not be too radical. I think that was one of the troubles three years ago. The changes were so far-reaching that people, I think, honestly became afraid and just tossed the whole thing out rather than take it. I think that's one thing this Committee undoubtedly has in mind because of the high type of men and women on it. I hope that the other committees and the Convention itself will keep that in mind when it comes to putting the whole thing together. If you present something which is too—"radical" is not the word—but too much out of the ordinary, I think it may be beaten whereas—

MR. FRANK H. SOMMER: Too disorganized.

MR. GEBHARDT: That is right. If we have something that is reasonable and fair, we must take the time to educate the people and make them understand it and try to make them feel that it is their Constitution, not ours—that it will work. That is about all I have to say. I appreciate being here.

MR. THOMAS J. BROGAN: We are very thankful.

VICE-CHAIRMAN: Thank you very much, Judge. Any questions?

MRS. GENE W. MILLER: Judge Gebhardt—about the number who are in favor of this resolution which you gave us; you said that pretty near all of the members of the Association were in favor of this.

MR. GEBHARDT: The vote of the persons present was four to one for it.

VICE-CHAIRMAN: What is that in number?

MR. GEBHARDT: Eleven to three.

MR. AMOS F. DIXON: That were in favor of a separate Court of Chancery?

MR. GEBHARDT: Yes.

MR. DIXON: Would that vote be modified if you considered the equity court as a separate branch of the general court?

MR. GEBHARDT: I think that is very possible. We did not have knowledge of anything at that time. That was, I think, about a month ago, wasn't it, Mrs. Miller?

VICE-CHAIRMAN: Thank you very much, Judge.

MR. DIXON: May I ask one question?

VICE-CHAIRMAN: Sure, go ahead.

MR. DIXON: I would like to say that we are not, of course, even suggesting that we put the county courts in there, but I was very much interested in what you had to say about the county courts. Would you feel that the county court would be very much improved, from the people's standpoint, if we had a resident judge in each county and would extend his jurisdiction to all of the justice of the peace cases and small cause courts cases on the one side down, and on the other hand perhaps giving him jurisdiction over civil cases and criminal cases, the things which the Circuit Court judges to some extent now handle? Would you picture a situation of that kind as an improvement over the present county court? Understand please, not to be incorporated here—but I was just interested.

MR. GEBHARDT: I think that is possible in the rural counties where the work is not too heavy, of course.

MR. DIXON: Well, then, I might add that inasmuch as you mention these rural counties, the proposal would be to make these judges assignable in case they did not have a load and some other county had too much of a load, to help them carry some of that load at times. That would mean a transfer of a judge from Hunterdon, or Warren, or Sussex, maybe, to Essex for a few days, a day a week, something like that, to handle the same type of cases there on assignment, in order to fill his time, making him a full-time judge.

MR. GEBHARDT: I think that would be all right, except that I do believe that if he were assigned to another county he should be limited, perhaps, to the trial of civil or criminal cases and not the other general run-of-the-mill work.

MR. DIXON: I think that would be a good suggestion. Thank you very much.

VICE-CHAIRMAN: Thank you very much, Judge . . . I think we have a representative of the Camden Court Bar Association.

FROM THE FLOOR: No one here.

VICE-CHAIRMAN: Anyone here from Union County?

FROM THE FLOOR: No.

VICE-CHAIRMAN: I suggest we recess for a few minutes. We have two more scheduled. One is for 2:30, which is five minutes hence, and one at 3:00, the Union County Bar Association.

(Recess for five minutes)

VICE-CHAIRMAN: Mr. Reiners, of the Camden County Bar Association, is here. I understand Mr. Reiners wants to introduce two or more members of the Association.

MR. JOHN HENRY REINERS, JR.: Ladies and gentlemen of the Judiciary Committee:

I have with me today the Honorable Thomas M. Madden, who is our United States District Court Judge in Camden and who is a member of the Board of Managers of our Association and also a member of the Constitutional Committee of our Association, of which I have the honor of being the chairman. I have also with me today Mr. Weidner Titzck, who is a member of the bar in Camden and who is the secretary of our committee. Frank T. Lloyd, Jr., who is the present president of our Association, appointed a Constitutional Committee consisting of the Honorable Thomas M. Madden, Honorable Bartholomew Sheehan, W. Louis Bossle, Walter S. Keown, Howard R. Yocum, John A. Riggins, Bernhard G. Luethy, Leon A. Wingate, Jr., Weidner Titzck, and myself as chairman. This committee met and attempted, by its deliberations, to arrive at a report which we hoped would be of some assistance to you members of the Judiciary Committee. Mr. Titzck has acted as the chairman of this committee, and at this time I will ask him to submit to the delegates of the Judiciary Committee the report which has been adopted by the Camden County Bar Association.

VICE-CHAIRMAN: Thank you very much.

MR. WEIDNER TITZCK: The report adopted by the Camden County Bar Association on July 10, 1947—and incidentally that is the reason that we did not have the opportunity of appearing before you earlier—consists of the approval of the following committee report, with possibly one addition. This entire committee to which Mr. Reiners has referred presented these recommendations, and each member of the committee took an active part in the discussion of the various recommendations and the suggestions in support thereof. Suffice it to say, that with the exception of one or two instances there was unanimity of opinion among the committee members, and the Bar Association supported the same points by a large majority *(reading):*

> "1. That justices of the peace as now constituted under Article VI, Section VIII of the Constitution, be abolished."

MR. BROGAN: You certainly started from the bottom.

(Laughter)

MR. SOMMER: You ought to start at the foundation, anyhow.

MR. TITZCK *(continues reading):*

"2. That there should be set up in each county a court similar to our present Common Pleas court, with original law and criminal jurisdiction, and that the president judge in each county shall have jurisdiction to issue prerogative writs. There should be at least one judge in each County, and as many judges as are required to take care of the original criminal and law jurisdiction with a plan for service of process in a County other than the County in which a suit is filed, whether it be handled by a State-wide court administration or by some procedure for serving process purely under County reciprocity."

In other words, whichever method can be worked out, the county courts are strongly supported, or a court similar to that type of court. *(Continues reading):*

"3. That the present system of approximately sixteen Circuit Court judges be abolished in view of the fact that their jurisdiction and duties will be taken over by the one or more county courts previously referred to.

4. That the Court of Chancery as it is now constituted, including the appointment of Vice-Chancellor, by the Chancellor, should not be disturbed."

I might say that while the committee as a whole felt that no separate Orphans' Court should be described in the Constitution, I myself felt that the Orphans' Court should be included under the jurisdiction of the Chancery Court and that the hearing judge should be in the nature of an advisory master. My personal reason, while I am testifying, for that is that very often you have an estate matter which you are handling in the Orphans' Court, and you must go over into the Chancery Court for interpretation on some points. It seems to me that the Orphans' Court certainly is so closely allied with Chancery jurisprudence that some procedure should be set up so that those matters should be referred and held under the original jurdisdiction of the Chancery Court. *(Continues reading)*:

"5. That the Prerogative Court as now constituted under Article VI, Section IV, should be abolished.

6. That one appellate court should be set up consisting of not less than seven nor more than nine judges, with no divisions or branches, so that every litigant should have one appeal as a matter of right. That the appellate court should sit *en banc* and do nothing but hear appeals from the lower court."

One committee member, whom you will hear from later, Judge Madden, along with John A. Riggins, held a minority view on this question and feels there should be two appeals. Also, two committee members favor additional qualifications of members of the Court of Appeals so that judges should not be appointed to the Appellate Court unless they have had at least five years' experience in a judicial capacity in some other state court. *(Continues reading):*

"7. That the Court of Pardons as constituted under Article V, paragraph 10, of Constitution, should be abolished of all power to remit fines and forfeitures and grant pardons after conviction and that such power should be vested in the Governor.

8. That all judges of the constitutional courts, such as Chancellor, judges of such County Courts and appellate courts as are established shall

be appointed by the Governor by and with the advice of the Senate, shall serve during good behavior, and shall be restricted from practicing law."

At the Bar Association meeting on July 10 they added one more qualification, and that was that all judges shall be duly licensed members of the bar of the State. That briefly sets forth the result of the efforts of the committee which was adopted at the Bar Association meeting. Judge Madden or Mr. Reiners have some points they would like to bring out specifically.

VICE-CHAIRMAN: Thank you very much.

MR. DIXON: May I ask this question? Would that recommendation be changed if at the time it was passed on July 10 you had before you this picture of a general court with an equity branch, a law branch, and an appellate branch?

MR. TITZCK: Well, I can't speak for all the members, but I certainly feel that with all the knowledge members of the bar, I know of the Camden County Bar, have had of the proposal such as has been made by this Committee, they were fully aware of that possibility. I am quite sure they wouldn't change their opinion.

MR. SOMMER: What was the line of argument by which you reached the conclusion that the power of appointment of Vice-Chancellors to which you specifically referred should be retained by the Chancellor? I know you say nothing about the possibility of appointment of judges of the courts of law by the Chief Justice. If it worked out so well in Chancery, why not equally well at law?

MR. TITZCK: That, again, is a question which has been debated all over the State, I guess.

MR. SOMMER: You would say it was largely a matter of tradition?

MR. TITZCK: Not tradition, no. I think, if you want a personal view, that the administration of a court such as the Chancery Court is freer from political pressure and bias by the appointment of Vice-Chancellors by the Chancellor. He is the one responsible for the actions of that court. I think the Chancellor should be more or less in an administrative capacity. He has a large enough job to do if he administers that court. If he is primarily appointed politically, let's put it that way, nevertheless, after he is appointed, he is certainly free from political influence to such an extent that he is interested in the functions of his court and the results of his court, so that he will make appointments without political pressure or fear of any actions that would affect him personally, and I think the will of the people is the net result of such a procedure.

MR. SOMMER: Would it not be equally true with respect to the Chief Justice and law courts?

MR. TITZCK: With respect to the Chief Justice and law courts possibly your administration is a little bit different. I am not opposed personally to having a Chief Justice make the appointments.

I've watched it and it may be a great advantage, and possibly it would. It would possibly be a whole lot harder to sell the public.

VICE-CHAIRMAN: Any further questions?

MR. EDWARD A. McGRATH: I would like to ask one question. As I understand your set-up, you would have the law *nisi prius* cases tried in the county court and your equity *nisi prius* cases tried before the Chancery, abolishing the Circuit Court, as such. Now, assuming that this Committee found that the Court of Chancery, as such, was not to stand and that there was to be a general statewide court of a different character, would you then think that the law cases ought to go in that court as well as equity cases?

MR. TITZCK: Into which court?

MR. McGRATH: Into the new court of statewide *nisi prius* jurisdiction.

MR. TITZCK: We feel that only the law cases and criminal cases should go into that general court, but that Chancery should remain.

MR. McGRATH: That's what I understand. You feel that way. But I am suggesting that if this Committee or the Convention found that there should be a statewide court of original jurisdiction for the trial of equity cases—not our present Court of Chancery—would you then think that that court should have law as well as equity cases?

MR. TITZCK: It would be very difficult for us to come to that point.

MR. McGRATH: You don't want to abandon the idea of separate courts?

MR. TITZCK: Yes, but even to conjecture upon it, I would say, would be outside of my authority.

VICE-CHAIRMAN: Any further questions? Thank you very much.

MR. REINERS: I would like to answer your inquiry specifically. Mr. Titzck is at an unfortunate disadvantage because at the particular meeting that this question came up he was out of town.

MR. SOMMER: I put it for questioning.

MR. REINERS: I would like, for the benefit of this Committee, to say this: At our deliberations several of the committee members urged that the Chancellor's appointment of the Vice-Chancellors should be restricted and that they should be appointed by the Governor by and with the advice and consent of the Senate, as are our other judicial officers. We went into the rationale of the functioning of the Court of Chancery. We considered the fact that the Chancellor was the man who exercised the King's conscience and that the Vice-Chancellors, as well as the advisory masters and special masters, all acted for the Chancellor. It would be inconsis-

tent to think a man would expect a certain person to act for and in his behalf and yet have those men appointed by another agency. We didn't think that was the way it should work out and we considered that in view of that set-up, the proper way would be to have the Chancellor appointed by the Governor by and with the advice and consent of the Senate, but all subordinate officers in the court be appointed by the Chancellor to do his bidding.

VICE-CHAIRMAN: Does that answer the question?

MR. SOMMER: Yes, and it is not a question of the conscience of the Chancellor in place of the conscience of the King because you have the consciences of the Vice-Chancellors involved, since no opinion for some years has come down from the Chancellor.

MR. REINERS: Well, in substance, when a Vice-Chancellor decides a case, he advises the decree and the decree legally, as I can see it, is the decree of the Chancellor, although it is not the decree that the Chancellor has actually made, but that's merely because of the volume of litigation before the court.

VICE-CHAIRMAN: Oftentimes it may not be the Chancellor's opinion. He may disagree with it.

MR. REINERS: In theory, it is the Chancellor's.

VICE-CHAIRMAN: I know.

MR. REINERS: I'm not in a position to speculate on that. Now, gentlemen, I think it would be very interesting if you heard from Judge Madden, who has taken part in all our deliberations and who has very definite ideas, particularly on the question of the appellate procedure. His views are a minority view, joined in by Mr. Riggins, but which was not adopted. But I do think that it might be helpful to the Committee.

VICE-CHAIRMAN: Thank you very much. Judge Madden.

JUDGE THOMAS MADDEN: I would like it distinctly understood I'm not trying to supersede or throw any weight around, because there are certainly much more eminent federal judges and state judges in the district than myself. But I have two very definite ideas that I thought were worth relating.

The first is in relation to the appellate work. I feel that fundamentally you are writing here, or partly writing here, the revision of the Constitution which has lasted for a hundred years, and that it will take a considerable number of years before the decisions are solidified, you might say, as to exactly what road in the State we are travelling under the new Constitution. Now, our committee discussed whether we should have one appellate court or two levels of appellate court. It was my thought that there should be two levels of appellate court. I trust that this will be taken in the right light. The more I see of my own work as a judge, the more I think that litigants are entitled to two appeals.

Secondly, it has always struck me that if you had consideration

by two separate and distinct courts at two levels of a very important issue, such as a capital case or such as a constitutional law case, the like of which you are creating today, you would settle down to rock bottom much sooner and you would have the citizenry of the State know where they are headed through their judiciary more quickly; therefore they would not be in a legal state of flux in relation to the new Constitution.

I likewise feel that on the merits of the litigation today people are entitled to two appeals. Oftentimes, in the heat of the public clamor legislation is sometimes hurriedly passed and it, in my estimation, requires consideration of more than one body.

I am very much sold, members of the Committee, on the appellate system in the federal system. There you have two levels of appeal: the first, or the lower level, is as a matter of right; the second, in the majority of cases, is as a matter of grace, except in your certain statutory or constitutional law question cases. I therefore feel that in our new Constitution it would be to the interest of the citizenry and the State if we had two separate and distinct courts of appeal that didn't have to bother with administrative work of other counties or districts or provinces, whatever you might call them. That would be all that they would do. They wouldn't be integrated in any way and the judges themselves, in their particular court, would all consider the issues before them. The lower level would be a court of right, the appeal would be as a matter of right. The upper level would hear as a matter of right capital cases and constitutional law cases, and as a matter of grace, either by some procedure which they themselves would establish, writ of certiorari or anything else, those appeals that they, of course, felt were of such moment they should be heard and passed upon by them.

Now in relation to the other issues, one that I would like to speak about is the Court of Chancery. I don't want to repeat all of the fine things and the expressions of fine study and fine thought that have been expressed here to you Committee members by much more prominent and eminent persons than myself. But there was one thought—if it has been expressed here I haven't been able to see it in the public press—and that is this: I think the Chief Justice could now disclose that a judge is not only a judge. He's a judge out in the courtroom where he is deciding legal issues, but there is a certain mechanical process that has to be gone through to get those legal issues before him. Therefore, in the back room in a certain period of the day, in a certain part of the week, he becomes an administrator in order to establish his calendar.

Now, there is talk of abolishing the Court of Chancery, and I've heard it said that the federal system is a good system to show the dispatch of work, and so forth and so on. Wasn't it Vice-Chancellor Merritt Lane, appearing before a legislative committee one time

when the Legislature was considering a constitutional amendment to abolish the Court of Chancery, who very frankly said that while he had a great deal of love and respect for the federal judges and for the justices of the Supreme Court of New York, a search of the records and the cases had failed to disclose to him the establishment by any justices of the Supreme Court of New York or any federal judge of a fundamental principle of equity or a fundamental theory of equity?

Wasn't it Judge Biggs who stated that an examination of those states that had gone away from the separate and distinct Court of Chancery system showed that the law became predominent in the consideration of cases by the one court? Whether it was by the one judge or not, I don't know, but there must be a reason for everything and I think the reason is this: In establishing in our system our calendars, you have two cases, two types of cases for trial. You have either a jury case or you have a non-jury case, and you establish your court calendar in that fashion. You bring your juries in, maybe six, eight, or ten weeks, and you try your jury calendar, sit in criminal cases and civil jury cases. Then you go to work on the non-jury cases. In our system alone we may today try an income tax case—you list your cases in numerical order according to their age, their filing number in the clerk's office, so that, I think properly, you try to dispose of the oldest cases first; I think that justice requires that, at least you give them an opportunity to have a trial in that fashion—income tax case today; portal-to-portal pay suit tomorrow. The next day you may find right in with all of those which are fundamentally and basically law cases according to legislative enactment, you may find following that and right in with it a suit for specific performance that fundamentally should be in the Court of Chancery in New Jersey but finds it way into the United States District Court by reason of diversity of citizenship.

Gentlemen, I can't help but feel—pardon me, ladies and gentlemen—that when the world is moving more and more every day in all fields of endeavor into the idea of specialists, why in the particular realm of judicial action here in New Jersey should we move away from the specialist field and go into the general practitioner, the old-time family doctor. He was wonderful, but I think we all recognize the field of specialists in that profession. I think it is the mechanical thing which produces the effect. I think it's the mechanical thing that we can't get away from, because we are all practical people and we lead practical lives and we must conduct our courts on a practical fashion. You can't have juries today, non-juries tomorrow, juries the next day. You waste so much of the taxpayers' time and money in a system like that, it would not be practical. I think the practice that would be involved of placing

equity cases in with strictly law cases would lead to a breakdown of the credence and the dignity with which the equity court of New Jersey is looked upon through the entire English-speaking world.

I think it was Judge Fake, who was traveling in Canada and bumped into a—I don't know whether they call them a justice, judge or what, but he was one of the high judicial officers of Canada—he took Judge Fake into his library and there showed him an entire set of *New Jersey Equity Reports.* Now, I think that in itself speaks for the merit of our system. I am a member of a different system and I honestly think what New Jersey has is much better. I can use an example.

I think we all recognize that men are human and that some men like to try criminal cases, some judges like to try civil cases. Other judges, maybe with more tender feelings, hate to send people to jail. We have, I think, in the United States District Court of New Jersey one of the finest judges I've ever met. I have a very high regard for him, Judge Forman. He very frankly came to me, in a sort of joking fashion, but it did show his feeling inside—the Judge sentenced a man and I had shortly before been sworn in; he doesn't like to sentence people—and he came to me and said, "Tom, you try all of my criminal cases for me and I'll try all your patent cases for you." Now, doesn't that show, gentlemen, that the law, the same as everything else, is a specialty?

I have admiralty lawyers come into my court and argue admiralty law that the average county lawyer wouldn't know a thing about. Likewise you have some of the top labor lawyers who come in and start to argue labor relations cases and portal-to-portal pay suits that the average lawyer doesn't know anything about.

While the rest of the country is moving in that direction, I honestly feel that to go away from the specialty field would be a step in the wrong direction.

I might say this: I am somewhat apologetic for our appearance here today. We had a large committee. I may say we fought like the deuce. You can see I lost my argument on the appellate, I was outvoted ten to two on the appellate idea, but that's the way we worked. I might say that at the time we proposed coming here all of the members stated that they would be here to lend their support or their efforts to our ideas. However, gentlemen, something has happened in between and I think it's only fair that you know it.

The first thing that happened was the public story to the effect that this Committee had made up its mind. Of course, then some of our members said, "What's the use of us coming up?" Secondly, it has been stated and rumored, as we call it "by the grapevine," among the members of the Camden Bar that it didn't make much difference what the members of the Camden Bar thought, and

that the provisions so far as the judiciary was concerned would all be written the way it was then established. That was attributed—I don't know how true it is—it was attributed, however, to an official. I know that that was discouraging to some of our committee members and I know that that's the reason they are not here, and I am only offering that as an apologetic note.

MR. BROGAN: I am very glad it didn't discourage you.

JUDGE MADDEN: Well, we are of the more tenacious type, Justice.

VICE-CHAIRMAN: Any questions?

MR. WALTER G. WINNE: I would like to say something. In the first place, don't get the idea there is anything closed. There is nothing closed. There is nothing that can't be opened today, or tomorrow, or anytime. No member of any committee has closed his mind, so far as I can see, and no matter what the report, I am open to voting anyway on anything I please.

JUDGE MADDEN: I will say we are delighted to hear that. I know our members will be delighted to have us bring that home. We have ten with us on this appellate thing. I wonder if we can't get the other two?

MR. WINNE: Judge Madden, do you think there are some types of cases which are so important, such as capital cases, that there should be two appeals? Wouldn't it answer the questions in your mind and in those of the other gentlemen on the committee completely, if you provided in such cases that they should have one appeal to the highest court, so that it ended up with the best that you got?

JUDGE MADDEN: That was given to me, Prosecutor, and the best answer I can give you is this. I will give you a recent case. The only persons involved were judges, all men of high intelligence and integrity, and it wasn't any spur-of-the-moment proposition. It was cold, honest, deliberate thinking on the rights of a judge. Judge Smith went to Scranton to dispose of some ugly messes up there. A man was convicted. He applied for a new trial and urged some 54 points for a new trial. Judge Smith considered it for awhile, and turned him down. He then appealed to the Circuit Court of Appeals and the conviction was affirmed. His application to the Supreme Court on certiorari was denied. The mandate came down and the man went to jail. All this has taken a year. Judge Smith, coldly and deliberately thinking over his legal rights, determined that he should give the man a new trial and, secondly, that he had the power to give the man a new trial, and he entered an order releasing the man from jail on bail and gave him a new trail. The Government sought and obtained from the Third Circuit Court of Appeals a hearing for mandamus to put the man back in jail and to vacate the order of Judge Smith. The Circuit Court of Appeals

sent him back and there decided, three to two, that Judge Smith had the right to do what he did, and affirmed his action. It was taken to the Supreme Court and there the Supreme Court, nine to nothing, said Judge Smith didn't have the right to do what he did.

I think this, Prosecutor, that where you have important litigation, especially where you are going to have real important and closely defined litigation coming out of this Constitution, it is going to be much better for the citizenry at large to have two separate and distinct levels of courts to decide the issues. I don't think the fact that the top court decided it of itself, other than the fact that it is final, has a special import to the way we are going ahead, because we have to look at this thing on the long pull. We are affecting here not only ourselves, but our children and their children, etc., on down the line, for hundreds of years. The Supreme Court of the United States and the highest courts in every state in the Union often reverse themselves. Now, if you got one body, that might be very lively.

(Laughter)

I say this in utter humility, gentlemen, because I lost in front of the committee.

(Laughter)

MR. WINNE: I think we all understand your argument, but I can't see, however, since you agree that the nine to nothing decision and the Supreme Court settled the matter, how it could have been settled better than if you had had the nine to nothing decision without the intervention of the Circuit Court of Appeals.

MR. BROGAN: If I may say so, the nine to nothing decision decided that the judge did not have the power to do what he did. But Judge Smith, on the other hand, decided that on the merits he should have given him a new trial.

MR. WINNE: Well, we are talking about whether there should be one appeal or two appeals. We are not talking about merits, or anything else. We are talking about the fact that Judge Smith decided something. It went to the Circuit Court and it decided it one way, and then it went to the Supreme Court, and it decided it another way. That is the way it ends up. Now, then, why not go directly from Judge Smith to the top court and it ends up the same way, nine to nothing, presumably?

JUDGE MADDEN: Not necessarily so, and I will tell you why not. If it went from Judge Smith directly to the Supreme Court, the Supreme Court would be without the benefit of the majority opinion and their theory and legal reasoning, cited in their opinion, and they would also be without the theory and the legal reasoning of the dissent, all of which is of much assistance.

MR. WINNE: There is one other thing I would like to say.

Would it help your practice in the federal court if somebody, either in the court or in the clerk's office, made up an equity calendar and had someone try equity cases one right after the other instead of putting them in between law cases and statutory cases?

JUDGE MADDEN: It would be very difficult to try to do that because we have two classes of cases, either law cases or civil action cases. As you know, by the 1938 laws they were all thrown into the one pot, and they are either jury or non-jury cases.

MR. WINNE: I understand that, and some of them are equitable.

JUDGE MADDEN: That's right. Now, while we are our own bosses, if we don't dispose of cases somebody might come around and ask us why not.

MR. WINNE: Well, I said why not take all equity cases and put them on one calendar?

JUDGE MADDEN: Then if we followed that through, wouldn't you then have to establish a jury criminal, a jury civil, an O.P.A. calendar, a Fair Labor Standards calendar, an equity calendar, a patent calendar, etc.? Why, you would have more calendars than you would have months in a year, and you just can't do it.

VICE-CHAIRMAN: Judge, you referred to a specific performance suit. In what respect does the hearing on a specific performance suit differ from a hearing, insofar as the judge is concerned, in a contract action where the case goes to a jury?

JUDGE MADDEN: None, except, Mr. Jacobs, that we do try as much as it is humanly possible to follow the established equity precedents in the State of New Jersey.

VICE-CHAIRMAN: The point I make is that the judge would be doing the same thing, except that the ultimate relief would be different. Is that right?

JUDGE MADDEN: That's right.

MR. BROGAN: Judge, why do you think that there ought to be a dual right of appeal in capital cases? We don't have it now.

JUDGE MADDEN: Isn't it better to have two courts say the man was wrong and he should pay the penalty?

MR. BROGAN: Yes, I suppose, as a general proposition that is so. Is there any court that you know of in the East—I don't know anything about the West myself, maybe you do—that does give a double writ of error?

JUDGE MADDEN: I don't know, except that, in effect, we have it here by the Court of Pardons.

(Laughter)

MR. BROGAN: I never heard of that one.

(Laughter)

JUDGE MADDEN: They set it down. They take away the

province of the jury in capital cases. It is up to the jury to say whether it is first degree.

MR. BROGAN: If the issue would be clemency, if it were that only, then it would go to the Court of Pardons. Isn't that right, Judge?

JUDGE MADDEN: Well, now understand, gentlemen, I am 100 per cent with the Camden County courts, and in the Camden County courts we do away with the Court of Pardons and put all pardoning matters in the Governor, with the thought in mind that the Legislature would then have to establish a parole system to be handled by parole specialists.

MR. BROGAN: As a matter of fact, there is no great dispute about that. But would you, as a matter of right, after "X" suffered judgment in the court of original jurisdiction, have him go to an intermediate court and, say the judgment there is affirmed, would you still have him go further to a court of last resort, as a matter of right?

MR. SOMMER: In capital cases?

MR. BROGAN: No, no.

JUDGE MADDEN: I thought I had expressed that before

MR. BROGAN: I think you did. I just wanted to be sure.

JUDGE MADDEN: In the lower level, in the ordinary case it is a matter of right, in the upper level it is a matter of grace.

MR. SOMMER: Except in certain cases—in capital cases, cases involving questions relating to the Constitution of the State or the Constitution of the United States, and perhaps where there is a division of opinion in the lower appellate court.

MR. BROGAN: Or where it is a matter of great public importance.

MR. SOMMER: Yes, I suppose in that case the court of last resort would determine that question.

JUDGE MADDEN: Yes.

MR. SOMMER: I would like to ask one more question, if I may. You say we are our own bosses (referring to the federal court). Now, would there have been anything that would have stood in the way of the adoption of the arrangements suggested by Judge Forman?

JUDGE MADDEN: Nothing, except that he would have had to travel a great deal from Trenton to Camden, and I would have to travel a great deal from Camden to Trenton.

MR. SOMMER: Practical considerations might stand in the way, but there is nothing in the Constitution or the courts to prevent it?

JUDGE MADDEN: No. Also, that it wouldn't be a fair thing for the simple reason that he would be overburdened. You can dispatch criminal cases, I imagine, in our two vicinages, in the

space of about six weeks in the course of a year. He had one patent suit, a monopoly case, in which the questions were patents, which lasted 16 weeks of trial. The government brief, I think, was 800 pages, the reply brief was 600 pages; the rebuttal was 300 more pages, and the argument after that took, I think, three days. So if I don't want to kill my beloved colleague—

(Laughter)

MR. BROGAN: I'll bet you are glad you didn't get that 600-page brief case.

(Laughter)

JUDGE MADDEN: Then, unfortunately, I was disqualified in a 13-week criminal case and he had to take that over, but I handled his cases in Trenton, with dispatch, I hope. But I don't know how many errors I made.

(Laughter)

MR. DIXON: Judge, in your opinion is there any great difference between the experience and expertness that might be required between, say generally an equity case and a law case, than there would be betweeen a patent case in the federal court and a liquor case violation?

JUDGE MADDEN: If the system were such that it could be done, I think you may get better results, to be honest about it. I think you may recognize fundamentally that if you get in the way of thinking about bootleggers and O.P.A. violations, etc., your mind gets into that groove, you might say for at least 24 or 48 hours, and you don't just disassociate that and get ready to take up other involved issues in equity and law, etc. You have to go through a waiting period to clear your mind, and then you can take up different work. That is what I mean.

VICE-CHAIRMAN: Any further questions?

MR. SOMMER: That also applies to the practice of law.

JUDGE MADDEN: Yes, of course.

MR. HENRY W. PETERSON: I would like to ask a question, Judge, if I may. I would like to obtain your views, because there have been other representatives from South Jersey, because of the respect I have for yourself and the members of the Camden County Bar Association, and knowing that the Camden County Bar Association has given a lot of thought to the recommendations they made—what weight do you give to the proposal that judges in the top court would retire, let's say, at a very substantial pension and have life tenure, and other judges would have life tenure in the general courts after seven years? Don't you think that would attain the independence of the judiciary that seems to be the desire of everyone?

JUDGE MADDEN: I didn't mean by that, that our judiciary in the State did not have independence.

MR. PETERSON: No, I understand.

JUDGE MADDEN: But I say this—that the thought struck me when I read the compulsory retirement at 70, that we have many, many judges throughout the State and the country who are well above 70, who are alert, able and have over a long period of years acquired a tremendous wealth of legal thinking, wisdom and judgment. You can't buy that with dollars and cents. You can't replace it as long as they are able, as long as they are physically fit and mentally alert. I don't think it should be a hard and fast rule. I can't help but think of one of the finest judges we all know of in the country, Judge Parker down South. I think you will find he is over 70, and Judges Learned Hand and Augustus Hand of the New York Second Circuit Court of Appeals—I believe they are both over 70. Judge Learned Hand recently had a big write-up in *Life* magazine as being one of the leading justices in the country.

Now, in relation to this particular point of forcing retirement at 70, while I didn't come prepared to speak on that subject, I don't think it's a good thought. I wouldn't be in favor of it, although I don't personally hope to reach 70. I am afraid from a life standpoint it will be a lot sooner than that. But nevertheless, you can't just say to a man, stop at 70. He must forget his life work. He must go do something else or lie down and die. I think we are losing a lot of wealth.

MR. PETERSON: That may be, but I was stressing the life tenure, the security, and the pension feature, as being a step towards independence.

JUDGE MADDEN: I think, very frankly, that all judges need life tenure. In other words, you can't help but think of the proposition that a man is living on a salary, he has a wife and several children. He needs security. He comes up for appointment and for confirmation at the hands of the Senate. The State Senator of this particular county walks into court with some young lawyer. Now the young lawyer, or any lawyer, can't help but at least have in his mind wonderment whether or not he is walking into that courtroom on an equal footing with the State Senator. Very frankly, that should never even have to enter the mind of a litigant in the courtroom. Now I think that life tenure would remove that. It would certainly lend a real magnitude to the judiciary, if there is one.

VICE-CHAIRMAN: Any further questions?

(Silence)

VICE-CHAIRMAN: Thank you very much, Judge Madden. . . We will now call our next speaker, Mr. John H. Reiners, Jr.

MR. REINERS: All I have to say is this,—that we have solicited from our bar of approximately 373 members, suggestions and comments for the guidance of our committee. We received from the members of the bar several letters and comments and telephone calls which were of great help to us. I can say that there was absolute unanimity in the opinion of the bar of Camden County that they want and hope you gentlemen will say the same thing, the continuance of the present system of the Court of Chancery.

Thank you for the opportunity of being here.

VICE-CHAIRMAN: Thank you very much, Mr. Reiners. . .

We will now hear Mr. Talley of the Union County Bar Association.

MR. FAYETTE N. TALLEY: I arrived in time, gentlemen, to hear something of the statements just made, and I can tell you now I'm not going to qualify as an expert, as the last witness did. We in Union County apparently didn't start early enough in our efforts to crystalize opinions, so that I am here as a spokesman for the Association in an attempt to tell you what a few of the members think about a proposed new court system.

The letter from the Secretary of your Committee went the rounds before it reached me. I knew from experience that a special meeting of the Association would be so sparsely attended that I wouldn't attempt to get a well formulated opinion from that. So the officers of the Association decided to mail out questionnaires, thinking that we would get more replies and have a better idea of how some of the members thought about some of these controversial questions. We have 319 members in the Union County Bar Association and a questionnaire was mailed to each member. I regret to state that we received only 63 replies. About 20 per cent of the membership responded. What I'm about to say doesn't, therefore, yet represent the majority thinking, although it does represent a majority opinion of those who were sufficiently interested to reply.

There have been questions, according to the press, which have arisen since this questionnaire was formulated. These questions were not included in the questionnaire, so that I don't feel competent to speak for the Association on any of those questions.

I think, perhaps, the best way of covering the subject, if the Committee agrees, is to read the questions, since there are not many of them, and give you the breakdown of the answers that we have received. We will at once see that even those who replied are by no means unanimous, and I don't think that what I am about to tell you is going to be of much value or help to you in trying to formulate any plan.

The first question is, "Are you in favor of a small court of appeals which is to be an appellate tribunal of last resort?" The answers

were 56 yes and 2 no. That is about the only question on which there was a practically unanimous agreement.

The second question was quite evidently misunderstood, because it is subdivided, with alternates, and the main question itself wasn't intended to be answered—merely the subdivisions. "Are you in favor of a Supreme Court with original general jurisdiction in all cases?" was the beginning of it. The answer to that was 36 yes and 24 no. As I say, that wasn't intended to be answered at all. It goes on to read, "With a law section and equity and probate section, each exercising the jurisdiction of the other to fully determine each controversy, equity to prevail in the event of a conflict?"—23 yes, 39 no. They didn't want that. "An appellate section?"—22 yes, 39 no. They didn't want that. "A unified court of original jurisdiction without law and equity sections?"—16 yes and 45 no. They didn't want that. Or, "A Court of Chancery separate and apart from courts of law?"—26 yes and 36 no. They didn't want that. They wanted a court but they didn't want any subdivisions, so I can't throw any light on that. The rest of the answers, I think, are fairly intelligent:

"Are you in favor of a mandatory retirement age for judges of constitutional courts? If the answer is yes, circle the age." We had three ages: 65, 70, and 75. There were 14 who favored 65, 24 favored 70, 16 favored 75, and five of those who answered felt there was no reason for any mandatory retirement age.

"Are you in favor of removing justices of the constitutional courts for misbehavior upon impeachment by the Assembly and trial and conviction by the highest court, except for the highest court judges, where trial and conviction would be by the Senate?" The answers were 46 yes, and 8 no, in favor of judges being impeached.

"Are you in favor of having the Chief Justice assign the lower court judges to the sections and parts of the court from time to time, judges assigned to the appellate division to work there exclusively?" There were 34 who answered yes, and 24 no. Or, "Are you in favor of permanent assignment of judges to the law and equity sections, if established?" To this, 26 answered yes, and 33 no. They didn't want permanent assignments. Or, "Are you in favor of mandatory rotation of the judges at short intervals between the law and equity sections?" The replies were 16 yes, and 42 no. They do favor rotation, but not mandatory rotation.

"Are you in favor of abolishing all prerogative writs and substituting (a) an appeal as of right instead of certiorari to review determinations of statutory tribunals and inferior courts?"—47 replied yes, and 13 no. "(b) in all other cases a civil action as of right?"—44 said yes, and 18 said no. "(c) no jury in any of these courts?"—38 said yes, and 20 no.

"Are you in favor of allowing appeals as of right from all de-

terminations, final or interlocutory, of inferior courts and final determinations of statutory tribunals to an intermediate appellate court?" There were 44 yes and 16 no.

"Are you in favor of allowing appeals as of right to the highest court from all final judgments, decrees or determinations of the intermediate court exercising its original jurisdiction?"—35 said yes and 25 no. Or, "Appeals as of right only to the appellate division of an intermediate court with further appeal to be permitted to the highest court only"—under any one of these five conditions which I shall read to you: "(1) Where there is a dissent in the appellate division?"—27 said yes and 32 no. "(2) Where the intermediate court has made a judgment of reversal or modification?" —27 said yes and 33 no. "(3) On certification by the court rendering the judgment?"—27 yes and 32 no. "(4) On certification by the highest court?"—25 yes and 33 no. "(5) In such other cases as may be provided by law?"—26 yes and 30 no.

They favor the right of an intermediate appeal, according to the first part of the question, but not under any of these conditions do they favor going to the highest court.

Next, "Where constitutional questions are involved, are you in favor of taking an appeal from a statutory or inferior court direct to the highest court?"—53 yes and 8 no.

"Are you in favor of allowing the highest court to certify for direct review any final determination of an inferior court or statutory tribunal?"—46 said yes and 11 no.

"Are you in favor of giving appellate courts the power of setting aside judgments at law or determinations of statutory tribunals wholly or in part, where the finding of fact is against the weight of evidence or the verdict excessive or inadequate?"—53 said yes and 10 no.

"Are you in favor of allowing appellate courts to find the facts anew where the lower court tried the case without a jury?"—41 said yes and 11 no.

"Are you in favor of allowing the appellate courts to affirm, reverse or modify orders, judgments or decrees and make final determination thereof, unless the ends of justice, or the right of trial by jury requires a new trial or hearing?"—53 said yes and 5 no.

That is the questionnaire that was mailed out, and that's a tabulation of the answers we have received. I've had no occasion to talk to any of the persons who sent in the answers; as a matter or fact, they weren't signed in any way, so that I didn't know how they voted. There were, if I recall correctly, either 10 or 11, where remarks were invited; who remarked they approved the system of courts similar to the system in New York State.

I think that is about all I can report to you. I don't feel that I'm qualified or competent to answer any questions not covered in

the questionnaire and speak for the Association in doing so. I am here merely as a spokesman.

VICE-CHAIRMAN: Any questions you would like to ask on the questionnaire?

Thank you very much; we appreciate your comment.

MR. McGRATH: I think we should say that this method of approach has been extremely different and I think it has been quite helpful. I think this was a very good job.

MR. TALLEY: Well, of course, I read the questions rather rapidly, and I think you should read them more carefully before you can really come to any conclusions; but we were extremely handicapped in having to rush this to a mimeograph place, get it out and put a time limit on replies, because I knew right along I had to be here on a given date, and I couldn't do much else.[1]

VICE-CHAIRMAN: You have been very helpful and I thank you very much.

Mrs. Miller, will you please pass these drafts around to the various members of the Committee, and if any of you want one extra copy I think we will be able to give it to you.

We will meet again Tuesday morning at 10 o'clock, and may I suggest that we meet immediately following the Convention session which should be over at about 10:30 or 11, for a short session of probably a few minutes. We will have our public hearing on Wednesday. We will probably meet Thursday; if not, we may be able to meet right after the public hearing.

(The session adjourned at 3:48 P. M.)

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[1] The questionnaire results appear in the Appendix to these Committee Proceedings.

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Wednesday, July 30, 1947

(Morning session)

(The session began at 10:15 A. M.)

The twelfth meeting of the Committee on the Judiciary convened in the Rutgers University Gymnasium.

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., Smith, G. F., Sommer and Winne.

Vice-Chairman Jacobs presided at the request of Chairman Sommer.

VICE-CHAIRMAN NATHAN L. JACOBS: This is a public hearing on the tentative draft of the Judicial Article proposed by the Committee on the Judiciary. I have asked that all individuals who expect to speak before the Committee give their names to our Secretary, Mrs. Miller, and state the organization, if any, which they represent. When you appear, will you please state your name and the name of the organization so that our recording device will record it. You are, of course, at liberty to speak with respect to the entire Article. But if you are speaking with reference to a particular section, will you be good enough to mention the particular section so that the attention of the Committee members will be directed to it?

If any of you require that you speak this morning rather than this afternoon, will you be good enough to tell our Secretary that so that we may call you this morning?

Mr. Kerney will be heard now.

MR. JAMES KERNEY, JR.: Mrs. Miller, and gentlemen:

I represent, as most of you may know, the New Jersey Committee for Constitutional Revision. We are a lay group composed of a great many constituent organizations with divergent interests: the State Federation of Labor, the State C.I.O., the Taxpayers' Association, the Federation of Women's Clubs, the Federation of Colored Women's Clubs, the League of Women Voters, the Association of University Women, the State Council of Churches, the New Jersey League of Women Shoppers and the Consumers League.

We are a lay organization and I think I can safety say we are the only lay organization which has testified before your Committee. I know from checking over the testimony that there has been no lay group which has expressed an opinion contrary to the joint

minimum suggestions that our committee has made. We are here today in many ways in a congratulatory sense because we feel that the tentative draft which you have made meets minimum requirements for an infinitely improved court structure in New Jersey. Naturally, there are those who would prefer to see retained the present separated courts, but there are few, if any, laymen among supporters of separated courts because the public of New Jersey—certainly this considerable section of the public represented by our committee—is well aware that separated courts as we now have them constitute a delay and expense in the dispensation of justice. We, therefore, are delighted and happy that you have seen fit to integrate the top courts of the State. We are somewhat regretful that integration couldn't go further and include all of the county courts, but we appreciate the argument of those who feel that in criminal and probate jurisdiction there should be local justice given.

There is one item for change which I would like to suggest to the Committee. In the first paragraph of the Schedule in your draft you give the Governor the authority to appoint the new Supreme Court, which shall serve during good behavior. That means a lifetime appointment, and you put all the judges in the present court into the General Court for the duration of their present terms. There is bound to be criticism, whether it is wisely made or not, of the appointment of the top court by the Governor for life. It means that one man has the full appointive power of our top court. That will be subject to criticism and, as I say, we have no feeling whether it is right or wrong. We would like to see that criticism allayed, and suggest that when the Governor makes the original appointments to the new Supreme Court, those appointments be for the duration of the present terms of his appointees, so that while the Governor, since someone must do it of course, must select the new Supreme Court from the present judges, his successor or successors will have the opportunity for reappointment which then shall be for life. The full appointive power of the new court to serve as a lifetime court will then not rest in the hands of any one man. I think by the adoption of this suggestion you would allay the kind of criticism which might properly or improperly be made against your draft.

Our committee is most of all anxious to thank you for what we feel is a very considerable public service.

VICE-CHAIRMAN: Any questions by any members of the Committee?

(Silence)

VICE-CHAIRMAN: Thank you very much, Mr. Kerney.

Mr. McCarter, we will hear you now.

MR. GEORGE W. C. McCARTER: I am chairman of the Com-

mittee on Law Reform of the New Jersey State Bar Association. I realize that a few weeks ago, at the kind invitation of this Committee, we submitted some ideas, and it is not my purpose today to repeat anything that I have said except as they come in incidentally. In fact, my purpose is to approach this draft which is before us this morning as representing the view of your Committee and direct my remarks merely to matters which I feel can improve it or improve its chances of general adoption. I shall refer specifically to sections and paragraphs, although some of the things that I refer to occur here and there throughout the Constitution. My plan is to refer to them where they first come up.

One thing first comes up in Section I, paragraph 1, and that is the question of nomenclature. I feel that a more appropriate name for the court of last resort is the Court of Appeals. That is what it is and that is all it is. Furthermore, the name General Court is an anomalous name. It is used for the Legislature in certain New England states, and I find myself unable to understand why the name of the Supreme Court has not been carried over for this court of great statewide jurisdiction. In New Jersey the Supreme Court has never been the court of last resort, and what we are in effect doing in this draft is to merge Chancery and the Prerogative Court into the Supreme Court, and it seems to me that would be a better name. I might say, furthermore, that of all the persons I have spoken to, no one has had a kind word for these two names. I can't imagine myself voting against a Constitution just because I don't like the names of the courts, but I think there is going to be a certain amount of opposition and I don't see why you shouldn't make friends instead of enemies among the conservative people who don't like the abolition of the Court of Chancery. Some of them, of course, are absolute diehards and they won't give in. I think you could get some of those persons on the side of a unified court if you didn't make it difficult for them by having unusual names.

The only other question of nomenclature that I am going to bring up is to suggest that instead of using the word Equity Division you use the word Chancery Division, for the same reason that I have just given, and also because we visualize that the rules to be adopted for the assignment of business to one division or the other will assign to the Equity or Chancery Division some matters that haven't been, it is true, equitable matters but should be put in that Division. It would therefore seem more appropriate to call it the Chancery Division instead of an Equity Division.

Now turning to Section III, paragraph 2 (*reading*):

> "The General Court shall have original general jurisdiction throughout the State in all causes, excluding, unless otherwise provided by law, probate and criminal causes."

The part I criticize is the part "excluding, unless otherwise provided

by law, probate and criminal causes."

I respectfully submit that if you are going to start out to have a unified court, have one. Have a court that has jurisdiction in every cause whatsoever. Permit its jurisdiction to be shared or supplemented by that legislatively invested in inferior courts, but don't permit the Legislature to take away any part of the general jurisdiction of your unified court.

The original jurisdiction of the Prerogative Court should not be abolished. In my practice, I have found it at times helpful and convenient to the public. First, where the county in which the decedent dies is remote from, say, the witnesses to the will and all interested parties. I had a case where the testatrix died in Sussex. Nobody interested in the estate had anything to do up there. It was much more convenient for all concerned to prove the will before a Vice-Ordinary sitting in Newark and carry on from there. Why should that be abolished?

Sometimes the county official acts extremely unreasonably. I had a case about 25 years ago where I went to prove a will in Burlington. The old lady whose will I was proving had become ill in California and hadn't come back in a number of years, but there was no question of her New Jersey domicile. The Surrogate in Burlington would not take the will for probate because the house in which she used to live had burned down, so, according to him, she had no domicile in New Jersey. He said he would issue a citation. I thanked him and walked around the corner, so to speak, to the nearest Vice-Ordinary and proved the will. Why should that be taken away?

But there is an even stronger reason. Although the lay members of the Committee do not realize it, there is a real question as to just how far a probate court can go in construing a will. They say that the probate courts are not courts of construction except for very limited purposes. If, however, we merge the Prerogative Court and the Court of Chancery and the Supreme Court all into one court, whatever name you give it, there you have your court of construction and your probate court all in one. I can see, therefore, no reason in favor of and many reasons against abolishing the probate original jurisdiction of the Prerogative Court and transferring it to the county courts. Of course, the county courts should have jurisdiction as they do now, and 99 times out of 100 it would be attended to by them, but I can see no reason why the other jurisdiction should not be available for the special and emergent case when it will really facilitate the administration of justice.

Now, in the criminal courts the same way. I am old enough to remember when—I think it was back under the governorship of Woodrow Wilson—the Supreme Court Justice supervened the county

judges in a couple of the counties of the State where a machine was running rampant. I think that should be permitted to continue; the General Court should continue to have constitutionally all of the criminal jurisdiction that the present Supreme Court has so it can certiorari, or whatever other name you want to call it, indictments; so that it can handle the situation—change of venue, and all things of that nature. It should be done by the great statewide court. The supervisory powers that are part of criminal matters should remain, although, of course, the concurrent jurisdiction of the criminal courts in the county should continue.

Passing now to Section IV, paragraph 1, subparagraph (a)—that permits an appeal as of right to what is called the Supreme Court in constitutional questions. I am just wondering—I throw this out as an inquiry—do you want to permit that, no matter how threadbare or fully established the constitutional question is? The question might arise and be decided in the case of *Smith* v *Jones*—decided in favor of the constitutionality of the statute in question—and *Brown* v *Robinson* coming along a month or so later might raise the same question that has been decided. Yet, under this provision, it could go as of right to the Supreme Court. I just make that suggestion.

Now we turn to paragraph 2 of that Section. I don't feel it is clear. It says (*reading*):

> "Appeals may be taken to the Appellate Division of the General Court from the Law and Equity Divisions of the General Court and in such other causes as may be provided by law."

Does that mean that constitutionally any order whatsoever of either Division of the General Court may be taken to the Appellate Division? Or is there to be any permission for the Legislature or the rules to regulate and limit that? The concluding phrase, "and in such other causes as may be provided by law," would seem to apply to other causes than orders of the General Court. I submit there might be some clarifying language in there.

Then we come to paragraph 3 of that Section (*reading*):

> "The Supreme Court and the Appellate Division of the General Court may exercise such original jurisdiction as may be incident to the complete determination of any cause on review."

That immediately raises the question, what about questions requiring a jury trial? What about questions of fact? It is a dangerous provision. It might or might not be deemed to abolish a jury trial to that extent, but a critic of the Constitution would have a very loud talking point in saying that you are doing away with jury trial.

Paragraph 4 of the same Section IV (*reading*):

> "Prerogative writs are superseded and, in lieu thereof, review shall be afforded by the General Court as of right, except in criminal causes, in the manner provided by rules of the Supreme Court."

Of course, we all know the prerogative writ situation is in an awful mess today, but I respectfully submit that it should not be abolished. I think there are two reasons for that. In the first place, we are going very far in abolishing writs that have been in existence time out of mind, since before the settlement of New Jersey. I think what should be here instead should be a provision plainly, and in so many words, authorizing the Legislature, the rules of the court, or both of them, to provide for the relief accorded heretofore under the prerogative writs. Whether they should in every case be as of right doesn't seem so clear to me. Frequently proceedings on prerogative writs are to review municipal bodies or other public bodies. A review as of right might hold up and delay important public action because even though the attack is not a stay, nevertheless the mere fact that there is an attack sometimes has the holding effect. I think the Committee should go very slowly in putting in the Constitution, beyond the reach of legislative change, a provision making every public body subject to review as of right.

Then we come to Section V, paragraph 3—that is the question of the retirement age. I respectfully submit that 70 years is exactly five years too young. Seventy-five is young enough. When I look at the judges on the bench today who under this would be thrown out in the near future, I am horrified. When I think of some of our great judges in the past who were doing excellent work when over 75, I think we should not tie our hands and deprive ourselves of the services of men of that calibre now and in the future, particularly in view of the excellent provisions for retirement for incapacitation in paragraph 5 of the same Section.

Turning to paragraph 4 of Section V, the last sentence (*reading*):

> "The judges of the General Court shall also be subject to removal from office by the Supreme Court for such causes and in such manner as shall be provided by law."

I submit that that should be changed to permit the judges of the General Court and also of lower courts to be tried before the Supreme Court on the issue of good behavior and not for "such causes and in such manner as shall be provided by law." That would permit the statute to have a judge thrown out if he went to a certain church or voted a certain ticket. I submit that the removal should be limited to good behavior, particularly in view of the next paragraph, 5, which deals with incapacitation.

Next in Section VI, paragraph 1, it says the Chief Justice of the Supreme Court shall appoint an Administrative Director to serve at his pleasure. I question the desirability of putting the Administrative Director in the Constitution. I should think the Chief Justice would want to act primarily through the presiding judges of the Divisions of the General Court. If the Administrative Director is put in the Constitution, he might get, shall I say, delusions of

grandeur and not think he is subordinate to anybody except the Chief Justice. I think we should have an Administrative Director, but I think he should be provided for by act of the Legislature.

Now with respect to paragraph 2 of Section VI, I think it is a very serious defect that the Constitution does not provide that the judges appointed to the Equity Division shall be permanently assigned thereto. I realize that I referred to this in my remarks in the memorandum I filed with this Committee when I was before it a few weeks ago, but I cannot help pressing that now because I do not know whether this was intentionally done or whether it was sort of an oversight. There is the statement that assignments for the Appellate Division shall be for terms fixed by rules of the Supreme Court. Does that mean that assignments to the Equity or Law Divisions can be from month to month, or day to day? I think every evil of the system in New York—where judges are at one time in what they call the special term, dealing with equity cases, and at another time in a trial term like our Circuit judges—would be introduced here. Every evil of the federal system would be introduced here. I think that the great talking point of what I call the Chancery diehards is that we have equity specialists. I feel that if we provide for the assignment permanently to the Chancery Division of Chancery experts, you will take the wind out of the sails of a lot of those people in favor of a separate court and you will acquire a great many favorable votes from people who are in between. I have heard lawyers say that they would be in favor of a unified court with a Chancery (Equity) Division so long as the equity judges were assigned there permanently, subject perhaps to emergent temporary assignments elsewhere.

Turning to the Schedule, there are some things, of course, that I have already mentioned that come back again in there. Among them are the age 70, the original jurisdiction of the Prerogative Court being retained, and the original jurisdiction in criminal matters being retained. I can't understand why the Constitution in paragraph 4 takes the trouble to abolish the Orphans' Court, Court of Common Pleas, etc. That could be done by the Legislature today, and it can be done by the first Legislature after the Constitution shall have been adopted by the people. I can't see why it should be put in the Constitution.

Only one more thing, and then I'm through. Paragraph 6 of the Schedule says Advisory Masters shall continue to hear matrimonial causes. There is no way of putting in the Constitution how they shall be appointed. They are now appointed by the Chancellor. Who is to do it? I think that ought to be made plain.

Thank you.

VICE-CHAIRMAN: Thank you very much, Mr. McCarter. . . . Mrs. Henderson.

MRS. STUART HENDERSON: Members of the Judiciary Committee:

I am going to read my statement so that I may take as little of your time as possible.

It is with great pleasure that the League of Women Voters expresses approval of the first draft of the Judiciary Article in the proposed Constitution. At the same time, we would like to commend the Committee for the meticulous care exercised in securing a wide range of expert opinion and public reaction.

We feel that one of the most important changes in judiciary efficiency is achieved by the integrated management of the whole set-up of the courts. This is a step of great advance.

We are regretful that the Committee has thought best to continue the existence of the county court, but note gladly that it holds a combined jurisdiction, that it is under supervision, and that its jurisdiction may be transferred to the General Court by law. We have done some questioning of attorneys and potential lay litigants, though not enough to represent a scientifically planned poll. This convinces us that thoughtful persons would like to protect the growth of excrescent courts by forbidding the creation of inferior courts. But we realize that there are points beyond which general opinion has not been educated to go. We would not like to jeopardize the acceptance of the great gains made by this judiciary draft.

We shall watch with interest and some hope the publicizing of proposed appointments to the judgeships, if this method of appointment goes into effect.

We note that since there are no qualifications for judges of the county court, in which presumably juvenile court cases would be held, standards of personnel would be left to establishment by the Legislature. In the event that the jurisdiction of inferior courts might be transferred to the General Court, there would be no provision for special training for Juvenile Court judges. It is generally thought by sociologists that training in some form of social work, plus general background, plus knowledge of the law and its administration, are more desirable for persons presiding in Juvenile Court cases. Increase of juvenile cases indicates need for protection of the qualification standards of juvenile case justices. We might suggest that if paragraph 5 under the Schedule, which seems almost to belong under Section VI, were thus placed, such specification might be added to the last sentence.

We are grateful to the Committee for their good work.

VICE-CHAIRMAN: Thank you very much Mrs. Henderson. . . . Mrs. Heinz.

MRS. W. B. HEINZ: I am Mrs. W. B. Heinz of Somerset County. Because I have spoken to your Committee earlier on behalf of the

League of Women Voters, I wish to state that the opinions which I now express are consistent with the ideas of the League but that I am speaking as a citizen.

The Judiciary Article which you are presenting as a tentative draft is very good. I wish to speak as a resident of the small county of Somerset for the complete inclusion of the county courts in the state system. No judicial system can be better than the judges who administer it, and your Committee has obviously given great thought to the problem of assuring the selection of competent judges and removing them from the extraneous considerations which might impair their judicial judgment. Citizens who may be involved in probate and criminal cases, no less than in civil cases, would benefit by the same type of judicial competency. You have provided that judges of the state courts shall serve on a full-time basis and shall not practice law or other gainful occupation while serving on the bench. You have also provided that any judge may reasonably expect to pursue his office as a career, provided he demonstrates that he is capable of performing his function with competence and ability.

These provisions are regretably absent as regards judges of the county courts. In small counties such as mine, the case load is too small to absorb the full time of one judge. Since no county will pay for time which it does not use, it is necessary that a judge be allowed to follow some other gainful occupation, most frequently that of the law. His efforts are therefore divided between his judicial function and his private occupation. This is not in the best interest of the litigant.

In addition, no judge of a county court, at least where there is only one judge, as in the smaller counties, has any expectation that he will pursue the occupation of judge as a career. Each change in the political scene is followed by a change in judicial personnel. The office is considered a just reward for political service. This means that the advantages of experience are lost to the public. I sincerely question the merits of any system in which the prime qualification of a judge is his service to one or the other of our two major political parties.

What valid reasons can be found for the retention of the county courts, other than political considerations? Is justice a matter of geography? What is there to the argument that a citizen of Somerset County can receive fair treatment only from a judge who resides in Somerset County? Is there any logical reason to believe that he would not receive the same justice from a resident of Hunterdon or Middlesex? I submit that the quality of the justice received will depend upon the quality of the judge himself, not upon his place of residence, and I believe sincerely that the best interest

of the citizens of my county and all counties will be served by assuring them a fair trial under the best and most qualified judges. I therefore respectfully urge that you consider again the advantages of including all the functions of the county court in the state system which you have so carefully devised.

MR. HENRY W. PETERSON: May I make an observation, Mrs. Heinz, on your statement that the county judges change with the political complexion of the administration? That has been said by other speakers. It is generally accepted, when it is repeated a number of times, as being a fact. But it doesn't follow throughout the whole of the State. I don't know where it is, in any specific instance, absolutely true. The small County of Gloucester, which is predominately Republican, has a Republican history as staunch and firm as Hudson County's Democratic political complexion. The Republican leaders of Gloucester County have continued a Democrat as Common Pleas judge over the past years—not that there aren't Republican attorneys who would like the job and want to have it, or who could not do it as ably. Nevertheless, he has acquitted himself in such a manner that he is worthy of continuance. I wouldn't charge either political party with too much interference in continuing a capable, able judge if he had acquitted himself during his first appointment.

MRS. HEINZ: There may be—obviously there is—truth to what you say. Having observed my own county, I can only say that the judiciary has changed, in my experience, very regularly with the political changes within the county. I believe, as do many other citizens of both parties in my county, that unfortunately the reason for the selection of at least some individuals has been almost entirely the service rendered to the party. I think that many citizens of both parties, including the party concerned in what we have considered a failure, are agreed on this point.

VICE-CHAIRMAN: Mr. Kremer.

MR. WARD KREMER: Mr. Chairman and members of the Committee:

I appear on behalf of the Monmouth County Bar Association. As you know, we were here last week to state our views, the principal one of which was that we advocated the retention of a separate Court of Chancery. I certainly don't want to take your time to repeat the reasons we advanced at that time.

When we appeared then, however, we had not had the benefit of an examination of the Article, because it had not yet been circulated. After viewing it, I am forced to state, as representing our committee and our organization, that we think the Article, in its present form, confirms our views that it does away with the great advantages of a separate equity jurisdiction. As was pointed out by

Mr. McCarter, there is not even in Section VI, paragraph 2, any provision for permanent assignment of judges to the equity jurisdiction. We all want simplification, and I have listened attentively to what previous speakers have said. But we do not wish to see essential and important substance forfeited and lost merely to achieve simplification in form, because substance is more important than form. I venture the observation that those persons who think that they achieve economy and efficiency merely by simplifying in nomenclature the court set-up, will probably, in our firm opinion, be misled. This Article takes away even more completely than we had expected an opportunity to have Chancery jurisdiction administered by experts in that field.

Beyond that, I should merely like to allude to two paragraphs. In Section IV, paragraph 4, reference is made to the prerogative writs and it is said that they are to be superseded and in lieu thereof review shall be afforded by the General Court as of right. Now, I take it that only one prerogative writ in its essence is a writ of review, and that is the writ of certiorari. A writ of mandamus doesn't review anything and I know—perhaps lay members of the Committee may not be aware of it, but the members who are members of the bar will be—a writ of mandamus commands someone to do something, and a writ of quo warranto commands someone to show cause by what right he exercises the functions of an office. Now I'm wondering whether this clause won't leave us in midair, as it were, because you say a right of review shall be afforded by the General Court as of right. When we come to a question of mandamus or quo warranto, what is to be said about the effect of this clause on the existing state of law? Will we still have a right to a writ of mandamus? Will we still have a right to a writ of quo warranto? Will it be merely the writ of certiorari which is superseded? I think those questions all show that in the future there may be considerable confusion and debate about what the state of the law really is as a result of that clause.

I point that out merely as a suggestion that it calls for clarification. I quite agree with Mr. McCarter that the phrase that the writ of review, or whatever you are going to call it, shall be a matter of right, will certainly do away with what has been fundamental in our legal system, and that has been that the allowance of all prerogative writs is discretionary. That dates back to times even before the adoption of any constitution in New Jersey and finds its origin in the common law of England. Now, if you are going to say that everybody is entitled to what will be substituted for a writ of certiorari, whether the justice wants to give it to him or not, and that he is compelled to give it to him because of this constitutional provision, it seems to me that you are going to invite more litigation

in that field than you have at the present time.

Moreover, our organization objects to the fact that jurisdiction over such matters would be vested in the General Court. That means, as I take it, that a lawyer might go to a judge who is occupied with the trial of jury cases, or to any member of the General Court, and seek to sue out an order which will take the place of a writ which is now only to be dispensed by the Supreme Court. Again that gets away from the field of specialization that we thought was one of the great advantages of our system. I noticed that in the transfer of causes, at another point in the Article—and I guess it's in the Schedule—all prerogative writs are now to be transferred to the Appellate Division, those that are pending. It's our view that the Appellate Division should have jurisdiction over prerogative writs as a permanent matter, not that they should be allowable by any member of the General Court.

We also object to the retirement provision in Section V, paragraph 3. According to information which I have endeavored to obtain, if you make retirement compulsory at the age of 70, it means that seven members of our highest court who today are functioning, bringing the ability and skill that they have to the administration of justice, would have to retire. We think that that would be nothing short of an atrocity. We know that the history of our State shows that Chief Justice Beasley went into the 80s. His opinions are looked upon almost as gospel in the State. He was in the 80s before his judicial career was terminated. Justice Gummere, if I mistake not, was 85 or 86. So that in the light of experience, 70 is entirely too early an age, without mentioning specifically those distinguished jurists who occupy the highest places in our courts today. In my humble opinion, the Chief Justice who decorates the bench today, who brings all the experience and brilliance of his intellect to the administration of justice, who is a fit successor to the predecessors whom I have mentioned, would be out of the court in September 1947, or as soon as this Article becomes effective. We think that the retirement age should be voluntary, perhaps at 70, compulsory at 75.

VICE-CHAIRMAN: Thank you very much Judge Kremer.

Mr. Carton. Are Mr. Lawrence Carton and Mr. Robert Maida here? Mr. Jilson?

MR. WILLIAM JILSON: Ladies and gentlemen:

I would like to congratulate the Committee on the fine job it has done in giving us this Judicial Article. I'm a little sorry that I am, as you can see, a very young lawyer, and therefore what I say probably doesn't carry very much weight. However, I would like to, as I say, congratulate you on the job you have done.

May I say, after that preface, that I am also sorry that due, I am

sure, to a great deal of pressure you have been unable to go the whole way in giving us an integrated court system. I mean that, I think, in two ways. So far as Section III goes, I would advocate that all causes be put under the jurisdiction of the General Court. That would include and not exclude probate and criminal matters. I don't see any reason why they couldn't go under that part. That would include, I think, the county court for which provision has been made for a separate set-up. Other witnesses have already spoken on that and I don't suppose there is much need for laboring the point.

So far as paragraph 3 goes, I would advocate that it be amended to say that the General Court should be divided into, let's see, an Appellate Division and such other divisions as shall be established by law. The reason for that, I think, is that it's a little dangerous to tie the hands of the future by becoming too specific in a Constitution. I think you should allow for changes as experience would indicate. I have aimed, really, at this division into Law and Equity Divisions. I'm giving, I'm afraid, a viewpoint based not so much on experience as what I've learned in law school, which happened to be Yale, and I think I'll refer to that later on. Incidentally, in law school we had no study of equity as such. There was no equity course in the entire law school. We learned it as we got it, and I think that at law school, at least, you do learn a lot of equity. We learned it through the other divisions of legal knowledge presented, I think they would say, on a functional basis—based, perhaps we could say, on reason rather than on really just a matter of history, historical action or just historical growth. I think that is the only way you can find the split between law and equity.

After all, I suppose that any judge is supposed to hand out equity and justice. I think that the equity judges or the law judges do not have a corner on it. I don't see any reason why you shouldn't be able to go into a court and get full relief based on the facts, and not on the particular court into which you go.

It might be that you would want to have, in addition to the Appellate Division, a Civil Division, probably a Probate Division, a Criminal Division, and, I would say, a Domestic Relations Division as something which you would be able to lump together. The Advisory Masters are taken care of in the Schedule, I think a little awkwardly. You could lump them and Juvenile Courts and so forth based on what a sociologist would think is the best way to handle the thing, as separate divisions for these matters which are, of course, extremely important today and which deserve a great deal of attention.

Now, I refer again to this Section III. As I say, I think it's a little weak to provide for separate Law and Equity Divisions. Why not

allow, on the basis of experience, for the integration of the two, if eventually there is sufficient pressure and experience shows that it should be necessary? As it is, I'm sure that if you allowed for just a general statement we would have those same two divisions. As of the present day, we couldn't do away with them and we might just as well resign ourselves to that.

I would also say that paragraph 4, which starts out "subject to rules of the Supreme Court," is equally dangerous, because through the rule-making power, which I presume will be delegated to the Supreme Court, you come right back and have the same system which we have today. There's no reason why we shouldn't make the two separate and just do what you are trying to do, and that is say that legal and equitable relief shall be granted in any courts so that all matters and controversies between the parties may be completely determined. I think you run the risk of not getting that very desirable feature if you weaken it by saying "subject to rules of the Supreme Court."

Now, turning again to an entirely different aspect, we have the appointment of judges. I think it's very wise that in this State the judges are appointed, but I'm not sure that experience hasn't shown that we could do this better and take it completely out of politics. At the present you have what, I would say, are appointments by and with the advice and consent of the Senate. They are going to depend quite a bit on either the Governor or on senatorial courtesy. In connection with what one witness has said, not long ago a judge who did a very fine job—such a fine job that he was in demand in several counties besides his own—was not reappointed, the reason being that he was not of the political party which was making the appointment and the Senator from his county didn't recommend him. He didn't get enough of the record shown to get his reappointment, and I think he deserved it very much. Well, that is just one indication. I suppose you can undoubtedly quote, as the woman over there did, both ways. I'm sure it works both ways. If you get a good man he may be kept in, but it's a little risky. So I would say, why not establish the judicial council which has been advocated before you and with which you are very familiar, and let the appointments come through it in the form of recommendations to the Governor, and let the Governor choose? Why not break with what we've had and see if we can't get a different system and a better system? After all, good laws are made by good judges and I don't think it depends so much on the system which you give them as on the judges who are sitting on the bench. This really is more important than any other form which you would put up.

There are a few minor points. I wonder if Section VI, perhaps in paragraph 1, you couldn't provide for annual reports by the

Chief Justice of the business done during the year and to be done? In other words, just show the state of the calendar and what they are doing. It might be a good reminder for him and it would also, of course, subject the work they've done to the public view. I think that would be beneficial.

So far as the rest goes, I have very little to say. In conclusion, I just want to repeat that I think you have done a very fine job here, and I just hope you won't weaken it by taking out any of the paragraphs or sections which provide for flexibility. You've done a good job of providing for flexibility except for the one viewpoint in which you force on us Law and Equity Divisions. Other than that, I think you've done a fine job and I hate to see any of the provisions go out which would allow for change in the future as experience and working under this Article would indicate.

VICE-CHAIRMAN: Your name is Mr. Jilson?

MR. JILSON: William Jilson.

VICE-CHAIRMAN: Speaking on behalf of any organization?

MR. JILSON: Speaking personally.

VICE-CHAIRMAN: Thank you. . . . Mr. Glenn.

MR. ALFRED T. GLENN: Ladies and gentlemen of the Committee:

I am appearing and speaking for the New Jersey Magistrates' Association, representing the 2,500 magistrates of the State of New Jersey.

In setting up the constitutional courts we seem to have forgotten the lowest of the constitutional state courts, and incidentally, to the average citizen, one of the most important constitutional state courts, that of justice of the peace. The office of justice of the peace has been a constitutional office from time immemorial. Although not usually lawyers by profession, I think we may say that they have, for the most part, discharged their multifarious duties with becoming good sense and impartiality. Justices of the peace, as a rule and generally, perform, without any reward other than the dignity which they acquire by reason of holding the office, a large amount of work that is indispensable to the administration of law, including the initiatory stages of all criminal proceedings. Both sexes in all classes of the community have been represented on the magisterial bench irrespective, usually, of social status or political bias. Also, position or party influence have not generally regulated their selection or election.

The justice of the peace, as you ladies and gentlemen know, is the poor man's court, and incidentally, I think we may say, too, the small business man's court. Much time and money and vexatious litigation have been saved to litigants throughout the State, and also, I think we may truthfully say, to municipalities, counties and the

State of New Jersey, as shown by these figures. A comparison was made in one year of the cost of the operation of the District Courts in the State of New Jersey, and of the return from justices of the peace of the County of Cumberland, in which county there is no District Court, and in which the work is performed by justices of the peace. In that particular year the expenditures for District Courts were $625,952, while the receipts from litigants totaled $315,491, causing the taxpayers to pay a deficit of $310,461 for the 41 District Courts in New Jersey. Also, in one year, there was a total of 111,272 cases. The amount expended per case was $563. The amount received per case was $284, causing a deficit or arrearage of $279 per case which the taxpayers of the State had to pay. Specific deficits in that particular year were: Bayonne District Court $21,360, Jersey City Second District Court $20,539, Jersey City First District Court $19,005, Hudson County First District Court $12,509, Bergen County First District Court $12,165. Taxpayers in the following counties, and in that specific year, were compelled to pay these deficits by reason of the operation of the District Courts: Bergen County $52,898, Essex County $42,277, Hudson County $91,041. In that same year, in Cumberland County, which as I say has no District Court, and in which county the work of the District Court is handled by justices of the peace, the taxpayers received $8,000 from the justices of the peace of that county. We respectfully submit, ladies and gentlemen, by reason of these facts and by reason of the fact that the office has always been a constitutional office, that specific provision for the office of justice of the peace should be incorporated by your Committee in the Judicial Article of the proposed Constitution. Thank you.

VICE-CHAIRMAN: Thank you very much. . . . Mrs. Flink.

MRS. JULIUS FLINK: I am the immediate past president of the New Jersey Conference of the National Council of Jewish Women. I am speaking for Mrs. Harold Levin, who is our president, since she has not as yet been able to take up her duties, and I was president at the time we were considering the Constitutional Convention. We in the National Council of Jewish Women have a resolution which urges upon all of the sections to become interested in good government for their respective communities. It is for that reason that the New Jersey Conference of the National Council of Jewish Women has been included in the Committee on Constitutional Revision. We go along with the other organizations included in that committee, and are happy today to be able to commend the Judiciary Committee, particularly on the provisions that call for unification of law and equity into a General Court; that call for an administrative authority in the Chief Justice with a mandatory provision that an assistant be appointed; and

the provision that provides for the power of removing judges who are incapable of holding office, for we feel, too, that impeachment is too cumbersome and is seldom used.

We would also, at this time, like to express the fact that we are sorry the county courts have not been included in the state system, for the simple reason that we feel there is evil in having judges serve only part-time and continue their law practice at the same time. We should like to compliment the Judiciary Committee on their entire draft for the new Constitution and we have complete confidence in the legal brains that have handled the more technical aspects of this report.

VICE-CHAIRMAN: Thank you, Mrs. Flink. . . Mr. Davis?

MR. JOSEPH A. DAVIS: Gentlemen, my name is Joseph A. Davis. I am a lawyer practicing in the City of Jersey City, and have been admitted to the practice of law for 19 years. I have here the newspaper copy of the proposed Judicial Article, which I have examined and about which I should like to speak. I would like to say that although this Judicial Article has been available to me for my examination only since Friday of last week, when it appeared in the *Newark News,* and Saturday also, the subject of constitutional revision, with particular emphasis on the revision of the Judiciary Article, is a matter to which I have given a great deal of study ever since the recent movement began back about 1941. So, for what it may be worth, I should like to tell you ladies and gentlemen that these are not "weekend conclusions" which I have formed.

I desire first of all to say this. I will take up various sections and paragraphs of this Judicial Article, and I do so with the feeling that if my alternative suggestions, which I shall give in conclusion, may not prove acceptable, then if this Judicial Article, or something like it, is to be adopted and reported to the Convention, I would like to see it changed in certain respects, which I shall comment upon.

Just by way of a few prefatory remarks, I would like to touch upon one or two matters which have been mentioned here this morning which I deem important. There has been some mention by laymen appearing before this Committee, about the great expense of litigation. I think the lawyer members of this Committee, and the lawyers who have testified here this morning, will agree with me that it makes very little difference just what system of justice is adopted. The actual court costs, or litigating costs, including the cost of printing on appeal, are a rather insignificant portion of the total cost to the client. The total cost to the client is principally due to the fact that the lawyer who represents the client has to be paid, and lawyers under the 1844 Constitution, or

a possible 1947 Constitution, have to live, irrespective of what system of judicial administration is devised. The lawyers have to charge their fees. Those fees must be substantial enough, not only to cover their overhead, but also to provide for their living expenses. There isn't much that any system can do to affect the cost of litigation. I think the lawyers know that it costs something like four dollars and a few cents to file a suit in the New Jersey Supreme Court, and you get a great deal of service for that four dollars. In the Court of Chancery the fees run between $25 and $35 to start a suit. For those rather inconsequential sums you get the services of the beautiful court houses, the expensive judges, the many court attaches, and so forth. The cost of litigation today in New Jersey is not out of line. Certainly, by comparison with the cost of litigation in England, it is very very modest.

Mr. McCarter made some objections to nomenclature, which I shall touch upon. I'd like to say that generally I am in agreement with his criticisms as to the nomenclature of courts. I'll explain the reasons in more detail later. There has been some talk, I think it was Mrs. Heinz, if I have her name correctly, from Somerset County, who spoke about small county judges. She said they weren't full-time judges. She thought the county courts ought to be integrated into the state system and gave her reasons for it.

Of course, one of the primary reasons that we have the county courts is to give some recognition to the principle of home rule. I think there is hardly any room for disagreement in saying that people in particular localities should have their, let's say, ordinary troubles or difficulties, whether they be civil or criminal, determined by courts which are familiar not only with local situations but with the people involved. For example, in criminal matters many people unfortunately and unwittingly are embroiled in circumstances which lead to the commission of a crime. There may be much to be said on their behalf when it comes time to fix sentence. Now, if a judge, let us say, from Sussex County, is to sit on the bench and determine the future fate, which may very well affect the possibility of rehabilitation, of a resident citizen who is convicted of a crime in, let us say, Cape May County, the other end of the State, that judge couldn't possibly give effect to all of the factors which he should take into consideration in determining sentence. The small counties are not suffering particularly by reason of the existence of a local judge in a county court. In the small counties the Legislature has provided for a minimum of one judge. First class counties may have a maximum of four, although the Governor under the statute is not required to appoint four. The small county judges sit only part of the time and are paid in proportion.

I think, if I am correct, the lowest salary paid any Common Pleas judge today is something like $3,500, which is, I think, a fair

salary for a judge sitting only part-time in a small county; whereas, in the first class counties the salary is $15,000. This is quite a spread. If you eliminate the, shall I say, bargain price of the county judge, you are going to replace him by a judge or justice, whichever he may be, of the so-called General Court, and that judge is certainly not going to work for $3,500 a year. He will probably be provided with a salary commensurate with the duties which are cast upon him, and I may say those duties are going to be pretty heavy under this Constitution. He will be entitled to be paid more. So the taxpayers, from a strictly financial standpoint, are not going to benefit by the abolition of the small county judges.

Now, with reference to Section I, paragraph 1, the language of this paragraph does not preserve the Common Pleas Court or the county court. It doesn't name the court, nor does it prevent the Legislature from abolishing the present Court of Common Pleas. Something has been said here this morning about the present right of the Legislature to abolish the existing Common Pleas Courts. Now, as recently as last night, I examined the pertinent section of our 1844 Constitution and I read two cases. One, I think, was *Kinney* v *Huxford,* and the other, which I can't recall, was an earlier case. There is an intimation in one of those cases, purely by way of dictum, that under the 1844 Constitution the Legislature may abolish Common Pleas Courts. I think there is a great deal of doubt as to whether or not they may so abolish the courts. But that is just in passing.

The Common Pleas Court, or whatever it is to be called—in this draft it is called the County Court—is made an inferior court of limited jurisdiction and is dependent for its continuity upon the Legislature. This has been my impression from what I have read of the comments made by delegates to this Convention, and I think by some members of this Committee. It has also been my impression that there was an intention to guarantee to the county just so much home rule as is represented by the reservation and continuity of the county courts, be they retained as the present Common Pleas Courts, or be they called County Courts. I think the several counties in the State, and the people of those counties, are entitled, under the principle of home rule, to have some county court system preserved and in fact guaranteed by the Constitution, in plain, explicit language.

I now come to Section II, paragraph 1. If what is here called the Supreme Court is to be the highest appellate court then, I think, with Mr. McCarter, that it should have a name which more adequately describes it. I see no reason why we cannot retain the name "Court of Errors and Appeals," or perhaps "Court of Appeals." "Supreme" is rather a poor choice, I think. There are

tens of thousands of references to that court and to its jurisdiction as it now exists, in the some 130-odd bound volumes of the *New Jersey Law Reports.* Ever since 1798 at least, the Supreme Court of New Jersey has had a rather fixed jurisdiction. Carrying this name over to a new court which, according to this Judiciary Article, will have pretty much the same general jurisdiction, with others added to it, will, I think, result in unnecessary confusion both to the court and lawyers.

While I am talking on that, I would like to digress from my notes for a moment to say there has been a great deal said about the layman not knowing which court his case should be referred to. I submit, gentlemen, there can be no argument that this should be of any real concern of the layman. When he goes to a doctor, is the layman to prescribe the treatment or diagnosis the ailment? The choice of the court is the obligation and the function of the lawyer, and that is the purpose for going to the lawyer. The lawyer knows, or should know, the right court in which to take the case. I think that this argument is not a very sound objection to the present system.

However, there is no sound objection, I think, to reducing the size of the court of last resort, if we are going to say that that seems to be the stylish think to do. But it doesn't necessarily follow that seven men will more often be right than 16 have been in the past. Perhaps, from a purely psychological point of view, it might be very well to reduce the size of the court in order to put a stop once and for all to the uninformed layman's catch phrase that our present Court of Errors and Appeals is the largest of its kind—too large to be a jury and too small to be a mob. Perhaps, if we can amend the present Judicial Article of the 1844 Constitution and reduce the size of this court, this sort of talk will stop and we will be able to get along and pursue the ordinary tenor of our ways. My only suggestion is that perhaps nine members, like the United States Supreme Court, might be better than seven members. But in the long run, since the quality of the court is dependent on its individual members rather than upon their number, I suppose seven is probably just as good as nine.

Now, this paragraph provides that five members shall constitute a quorum. My question is, how many are necessary to a decision? In New York, the constitution specifically provides that the concurrence of four of those five shall be necessary to a decision. Now, under the draft we are discussing it is possible that three, or less than one-half of the total membership of the court, can determine the law of this State. I don't think that is intended, but who can say that it won't happen that way if this language is left unchanged?

With respect to the appointment of temporary judges, the ques-

tion in my mind is this: Under what circumstances may the power of the Chief Justice to appoint temporary judges be exercised? The indefiniteness of this language, that this is to be done "as provided by the rules of the Supreme Court," could very well mean that some time in the future an unscrupulous Chief Justice might very well pack the court in a particular case. Why not provide in this paragraph the circumstances under which such temporary judges may be appointed and how long they may function? Other states have been able to do so, and have thereby resolved any doubts as to the right of the presiding justice to exercise a power which is not, strictly speaking, a proper judicial function. It belongs, more logically, in the Executive Department.

So, too, if a judge is to be called up from a lower court to sit in an appellate court, the Constitution should, as New York and other states have done, provide that this designation to temporary judicial office doesn't create a vacancy in his permanent position, nor does it in any other way affect his right to hold his permanent appointment. The judge so temporarily promoted, I think, is most certainly entitled to be so protected. It is no answer to say, "Of course, he'll be protected," because when we say that we are just guessing; we haven't any guaranty from any of the language in this Article that he will not lose his permanent office, or that his right to resume it will not be affected by the temporary appointment.

It seems to me that the language contained in Section II, paragraph 2 is rather indefinite. Since this is a new Constitution which, in effect, is going to throw overboard a great many things that have been settled by state court decisions during the last 103 years, we have to be extremely careful with the language in order that we may today have the right to form some legitimate conclusions as to just what this new document intends to do and just exactly what it means.

Parenthetically, I might say that in yesterday's paper I read that the Attorney-General has expressed some doubt about something as recent as the statute under which this Convention is existing. I think he said something about discussing with his assistants the right to do this certain thing that was proposed, and that they examined the statute and were fairly evenly divided. Now, if trained legal minds, such as make up the present Law Department of the State of New Jersey, can't make up their minds about such a simple thing as a clause in a statute which was passed just a few months ago, and want more time to study it, I think we have to be very careful about freezing into this Constitution language the effect of which isn't too clear or too plain.

It seems to me that the highest appellate court to be created un-

der this article is intended to be, as at present, a "court of last resort in all causes as heretofore." This language was put into the 1844 Constitution and it had a very definite meaning at the time it was written. If we don't say just that, then the only alternative that is open to us is to do what the other states have done in revamping their judicial systems. They create an appellate court and they provide plainly, clearly, specifically, exactly, just what jurisdiction that appellate court has. It might be said, in answer to this point that I make, that this would be to sort of "freeze" into the Constitution matters which are more or less legislative. I don't think that is true. I think that the very nature of the situation requires great certainty.

This Constitution is going to be the basic framework by which all our future laws are to stand or fall, as the case may be. We have to know what it means. The appellate court has to know what it means. Everyone, including the lawyers, has to know. We need certainty. The people have to know where they stand. If they have a right of appeal, they should know that by reading this Constitution. It is better that we put too much in than to leave something out.

There appears to be a great deal of sentiment for a so-called easy amending clause. If it is true that such a clause is going to be put in this Constitution, we won't have any great difficulty in adding to the Judicial Article some forms of appeal which were inadvertently omitted, or taking away some forms which appear not to be practical.

Section II, paragraph 3: Under this language, if the rule-making power is to be "subject to law," as the paragraph says, there seems to be little point to mention that fact in the Constitution. The present situation is, under the 1844 Constitution, that our courts have the rule-making power by way of legislative grant. There seems to be no sound need for treating this in the Constitution now.

However, if the object of this provision is to make the Chief Justice the head man of all the courts, I repeat again, all the courts, including, let's say, the Hohokus Police Court in Bergen County—the door is opened for the invasion of the principle of local home rule. For example, this language, in my opinion, would permit the Chief Justice to constitute himself the presiding magistrate in all local police courts, and to step in and take over whenever he felt like butting in, and no one could say to him "Nay." I don't think the people want that.

In connection with the rule-making power, it must also be remembered that one of the reasons that our present Chancellor, under the 1844 Constitution, and other judges too, are supposed to be overloaded with labor, according to the proponents of revi-

sion, is the fact that he presides over and controls and makes the rules for all the present probate courts. Now, if this duty is to be given to the new Supreme Court, doesn't it follow that its members will be overloaded and that you are laying the groundwork for some more sham solicitude in the future directed to further revision of the already revised court system? Where is it all going to end?

As a practicing lawyer I have very strong objections to the final sentence of paragraph 3, of Section II, which concerns the control over the admission to practice. It seems to me that this is too indefinite. I want to know, and I think the bar generally, and in its own interests, should want to know, whether the new high court, if created, will not have the power or authority to prescribe that I, along with the majority of other lawyers, who have already been compelled to take two examinations in order to practice in the highest court of this State—a condition which doesn't obtain in any other state—would have to take a third examination before we can prosecute an appeal in that court? I don't think anybody on this Committee or in the Convention can truly guarantee to me, for example, that I won't be required to take another examination. I think this should be laid at rest. In the Schedule the lawyers of New Jersey are entitled to know what their status is going to be under the new court system.

Section III, paragraph 2: This paragraph, in combination with paragraph 4 of the Schedule, takes away all jurisdiction over contract and tort cases presently in the Common Pleas or the heretofore county courts, and puts them into the General Court. Now, the General Court, according to the Schedule, will also have all the civil business which is now before the present Supreme and Circuit Courts. It's going to have all the equity or Chancery practice; it's going to have all the probate practice now in the Prerogative Court. What is this going to do to the calendar situation? Today the calendar situation on the law side, as the lawyers know, in the greater part of the State is deplorable. Now, if you are going to add all this present jurisdiction of the Common Pleas Court in civil matters to the already overburdened calendar in the present Supreme and Circuit Courts, you are going to have chaos unless, of course, you appoint more judges to the General Court than you now have.

Where is the advantage of such a reconstruction? We must remember that the more judges, the more expense for clerks and other attaches. Where are they going to hold court? The lawyers here know that the present courthouses are already too small for the existing courts. Where, as a matter of convenience, are these judges going to sit, or are they going to have to split up the court room and now have a day shift and a night shift?

This paragraph also opens the door to the addition of original probate as well as criminal jurisdiction in the General Court. This, in my opinion, is going to result in the General Court being so large that it will not only be too big to be a jury but it will be just a little too small to be an army.

VICE-CHAIRMAN: Mr. Davis, I gather that you are reading much of your comments? We have a good many witnesses who wish to be heard today and I would like to ask that you limit your remarks directly to the issues which will be helpful to us and let us have, if possible, your extended comments in written form so that we can avoid detaining others here beyond a reasonable hour.

MR. DAVIS: Mr. Jacobs, I don't wish to detain anybody else, but I think I am entitled to the same privilege as has been extended to others here this morning, to read from notes. I am reading from my notes, and if I unconsciously here and there enlarge upon them, I shall attempt not to do so for the balance of these few pages. But to me it seems that the question is sufficiently important to warrant my having a right to be heard before this Committee in view of the fact that, not only am I an interested party as a citizen, but I am also a lawyer and I have given some effort and labor to the preparation of these notes.

VICE-CHAIRMAN: It is not our intention to curb your comments. It is our intention to avoid keeping the other witnesses here beyond reasonable hours. If any of your remarks could be given to us in written form, we would like to have them. If not, you go right ahead and read them.

MR. DAVIS: It isn't practical, sir. These notes have been corrected and changed and I can barely make them out myself. It isn't practical for me to submit a written report.

VICE-CHAIRMAN: Go ahead, but bear in mind the limitation of time.

MR. DAVIS: May I say this? I will be willing to waive my preference to any other witnesses who are here and then pick up when they are through. Is that satisfactory to you?

MR. EDWARD A. McGRATH: How much longer will you take?

MR. DAVIS: I would say probably another 20 or 25 minutes.

VICE-CHAIRMAN: Why not finish on your present point so that the other witnesses can go on? Then you can resume later this afternoon.

MR. DAVIS: Well, that concludes Section III, paragraph 2. It would be an acceptable stopping place for me, if it is to the Committee.

VICE-CHAIRMAN: All right. You will continue then on Section III, paragraph 3 when you resume this afternoon?

MR. DAVIS: Yes, sir. Thank you.

VICE-CHAIRMAN: Mr. Abbott.

(No response)

VICE-CHAIRMAN: Mr. Hunter.

MR. N. W. HUNTER: I am a layman on the law, and I am speaking for myself only.

I have noted from the tentative draft that the word "jury" has been omitted. The United States Constitution provides for unreserved right of a jury. However, I have been advised—

VICE-CHAIRMAN: Will you speak louder, please?

MR. HUNTER: Surely . . . However, some members of the bar have advised me that there are hidden clauses in our statutes that restrict and nullify the right to a jury. I recommend, if it can possibly be done through the basic law of the Constitution, that this guaranty of a jury be strengthened in our State Constitution.

Thank you.

VICE-CHAIRMAN: Thank you very much. I might point out that the problem with respect to jury trials is considered by another committee in a different article.

MR. HUNTER: I thank you.

VICE-CHAIRMAN: Mr. Wagner.

MR. EMANUEL WAGNER: I appear here for the Legislative Committee of Union County Bar Association. In common with various county bar associations, we subscribe pretty generally to the views of the State Bar Association on this Article.

However, we are particularly interested in the provision relating to the retirement of judges. Of course, it's a matter of opinion whether a man's capacity for fulfilling the duties of a judgeship are diminished at the age of 70 or 75. We all know that Justice Holmes remained on the bench of the Supreme Court until he was about 90 and did a pretty good job in his later years. But what we are mostly concerned with is the unfairness of casting out high judges before their terms expire. In other words, if I understand the provision in the Article relating to retirement, some of these judges who are now capably performing their duties would automatically be retired from office because they have reached the age of 70.

Now, it seems to me that if consideration was given by the Legislative Committee to the fact that certain persons made investments in race tracks and the voters will not be permitted to determine at this time whether that form of gambling should be continued in this State, so that the track owners in fairness may be permitted to recoup their investments, it would seem to me that judges who have invested a large part of their lives in their offices should receive like consideration.

The Constitution that we have at the present time has been in force for more than a hundred years. There has been agitation for a new Constitution for a long time. I recall 20 years ago there was similar agitation, and now we are getting a new Constitution. It seems to me that it was never so urgent that we couldn't be fair to the judges who are now in office. Any system we have in our courts certainly will not in any manner detract from or interfere with the proper administration of justice if these judges are permitted to complete their terms.

Incidentally, on the question of the county courts which this Committee intends, at least at the present time, to retain, it would seem to me that so long as we have these county courts—and when I say "so long as we have them" that doesn't mean that I don't agree with the Committee, because I do—it seems to me that they should not be deprived of their civil jurisdiction, because as you gentlemen said before, and I don't want to be repetitious, it's obvious that we who are familiar with the duties of the judges know that they have a lot of time. To take these duties away from our county judges and hand them over to the judges of the General Court would merely mean making additional work for someone else who has other work to do. I would therefore suggest that nothing would be gained by taking civil jurisdiction from competent county judges.

VICE-CHAIRMAN: Thank you very much. . . . Mr. Seiffert.

MR. MORGAN R. SEIFFERT: Mr. Chairman, and members of the Committee:

I am a member of the Law Reform Committee of the New Jersey Bar Association. I have not, however, had the pleasure of speaking before this Committee, hitherto.

I wish to state sincerely that as a member of this committee I am basically in favor of the fundamental provisions of this Article as you have drawn it, and I wish sincerely to commend the Committee on the excellent results. I do, however, join in and concur in Mr. McCarter's criticism of particular articles and particular sections, with the possible exception of one or two items I will mention.

My purpose is to speak very briefly before you this morning. Now, on the more fundamental provisions, I wish to refer to only one or two of them. I wish to emphasize Mr. McCarter's remarks with respect to Section III of Article I, paragraph 2, in which the General Court—or, if Mr. McCarter's suggestion should be followed in the final draft, the "Supreme Court"—that such court should not be restricted or excluded from jurisdiction with regard to law, probate and criminal causes. It is true that normally those matters would be handled, either by rule of the court or by legislative enact-

ment, by the county courts. But it seems that certainly the General Court—or the "Supreme Court"—should have that statewide jurisdiction in the probate and criminal branches of the law.

Now, with respect to Section IV, paragraph 1 (e), on the right of appeal, I can see the theory behind making it mandatory for our court of last resort to hear important appeals in cases involving constitutional or civil rights, or in capital cases. I feel, however, that the right of the court to review any case should not be limited by constitutional provision. In other words, if, over a period of years, this court by experience finds that there are certain classes of cases which have sufficient public interest to require a right of review by the court of last resort, the court should itself have the power, by a rule of the court, to provide a procedure for the hearing of such appeals, and not depend upon the Legislature to pass a statute for that purpose—

MR. WALTER G. WINNE: You have that in (d) haven't you, Mr. Seiffert?

MR. SEIFFERT: That would be only, as I take it—I meant to mention that—in particular cases that may come to the court's attention. So, to cover the thought that you express, as well as my own thought, I have a suggestion that in (e) we add "in such cases as may be provided by law and by general rule of the court."

Now, perhaps my next remark with respect to paragraph 4 will be slightly inconsistent. The argument has been urged, and I think well urged from my experience as a municipal attorney, that the class of cases that were formerly heard by prerogative writs are, in most instances, a review of actions of administrative tribunals and of municipalities and counties. Now, if you have the unrestricted right of review, important public improvements, emergency actions of municipalities, would often be subject to attack by any individual, disgruntled taxpayer or citizen.

I am not prepared to suggest to you just what the answer to that question should be. However, I think it is an important one. I thought, perhaps, that the words "as of right" might come out of that paragraph and some language such as this included: "A refusal to grant a review may be summarily reviewed by the Appellate Division under rule of the court or under rule of the court to be promulgated."

May I add, too, my support to the argument that judges should not necessarily be retired at 70 years. I think the Constitution or the Legislature could provide a system whereby a judge could be retired at the age of 70, but I think that certainly they should be allowed, unless otherwise incapacitated, which is provided for, to serve until they are 75 years of age. We lawyers know that some of our most renowned jurists in the State of New Jersey reached

their greatest stature after the age of 70.

There is one provision which, while it may be a minor one, particularly concerns me, and that is the provision which has been alluded to here this morning with regard to the appointment by the Chief Justice of an Administrative Director. Now, if the Chief Justice, one individual person, is to have the complete administration of all the courts, both superior and inferior in this State, I submit that he will be the most important administrative officer in the State of New Jersey, with the exception of the Governor. There will be a tremendous amount of money to be spent—taxpayers' money; a tremendous amount of procedure, a great amount of administration to be undertaken by that one man, although, of course, he could appoint his assistants.

Let's assume, for example, that this age was increased to 75 years of age. We may some time in the remote future have a Chief Justice who is not entirely physically capable of having that full responsibility of administration. Therefore, I wonder whether it shouldn't be the Supreme Court itself that should have this power, rather than the one man, or whether his actions should not be subject to the right of review by the Supreme Court or the Court of Appeals, whatever it may finally be determined that it shall be called. I also wonder whether it should be mandatory that this particular system be set up by constitutional enactment, to wit, that an Administrative Director shall be appointed. I should think that the Supreme Court might perhaps, through experience, itself devise some other system which might, as time goes on, be more conducive to good administration.

Now, that, ladies and gentlemen, concludes my remarks on the particular provisions. As I said before, I have not had the pleasure of appearing before you before. I have been chagrined and disappointed by the actions of a number of our local bar associations, county bar associations, which have appeared before this Committee and spoken against an integrated court and for an entirely separate Court of Chancery. I know of my own knowledge that in some cases, at least, this decision was made by a close vote of the members of the bar in that county, and in a number of cases without any meeting, without any chance for discussion and comment by those who might have thought otherwise.

It amuses me, sometimes, when I hear this constant plea for the retention of an old system which experience has now shown should be changed, merely because a certain renown has grown up over a period of years and the decisions in our Chancery Court have received such commendation in years gone by in other jurisdictions. I say this because, in my humble opinion, any renown that the New Jersey courts and jurists have received during the

last century and the first part of this century, is due just as much, if not more, to the great and able jurists that we had in the law end of our jurisprudence. May I in conclusion just mention a few of them, because we seem to have had it accentuated so much on the other side of the fence: namely, Mercer Beasley, Chief Justice Hornblower, Justice Depue, Justice Dixon, William S. Gummere, Charles W. Parker, and Francis J. Swayze. Some of these men, and many of our most famous Chancellors, came originally out of the law courts.

While this is only a draft of the Constitution at the present time, this Committee's work may be subject to attack later in this hearing or on the Convention floor, and I want to add my little word in commendation of the work you have done in making an integrated court.

Thank you.

VICE-CHAIRMAN: Thank you very much. . . . Mrs. Rubin.

MRS. GUSSIE RUBIN: To the Honorable Judiciary Committee of the New Jersey Constitutional Convention:

Gentlemen, I am Mrs. Rubin from Long Branch, Monmouth County, New Jersey. May I state that from the newspapers I have learned that the delegates are imbued with one thought—a State Constitution for all the people, which means a true democratic government for Jersey justice. Therefore, gentlemen, may I ask you a constitutional question?

Under the constitutional law for the State of New Jersey, does the law not permit a person to represent himself, in his own behalf, whether it's a Chancery Court, or the Appellate Court, or the Supreme Court, or the future Supreme Court, or the Court of Errors and Appeals?

I filed an appeal with the Secretary of State in 1946. But, while I appreciate the Chancery Court's kindness to appoint counsel for me, I would rather have represented myself, for the reason that I personally think that the attorney appointed is not capable of representing me properly in this unfortunate foreclosure case of mine which happened in 1941, although I had no knowledge of it until 1944. Therefore, my personal opinion would be if this said attorney would represent me, act in my behalf, I personally would consider it a mock trial.

I appeal to you gentlemen, in the name of justice. I hope that according to governmental rules I will be able to represent myself, as I have stated, and as I have begged the court. Although I have no legal experience, I would not stoop so low as to make any untruthful statements to the court for my own personal benefit. Now it's in the Chancery Court, where I do not care to be represented by just any counsel. I do not wish that counsel to represent me, for

the reason that I know that counsel could not do anything for me. The counsel who holds the solution of my problem of the foreclosure case refused to represent me. Therefore, I had to try to study my own case and be my own lawyer up to the present time. I decided, as I read in the paper that this Judiciary Committee was inviting people to come and ask questions and give opinions, that I would come here today to ask this legal question.

VICE-CHAIRMAN: I might say, Mrs. Rubin, that your question is not properly addressed to us since we are considering merely the provisions of the Judicial Article of the Constitution. Further, however, your problem is subject to answer within the Civil Rights Committee. There is a good body of law which guarantees to an individual the right to appear as lawyer *pro se,* within the due process clause. However, I don't think that this Committee wants to go into that subject further. If you have any desire to discuss the subject individually, I am sure that many lawyers of the Committee will be glad to talk to you after our hearing is through.

MRS. RUBIN: Well, pardon me, but how about this question? Under the constitutional law of the State of New Jersey, does the law not permit a person to represent himself in his own behalf, or has the court a right to refuse?

VICE-CHAIRMAN: My personal opinion is that, within the due process clause, you have a right to appear for yourself. I say it is not the province of our Committee to go into questions of that kind because that particular item would not come within our Judicial Article in any event. Does that answer your question?

MRS. RUBIN: Well, I do not quite understand. I'll be frank about it.

MR. McGRATH: Every person has a right to appear for himself in this State in any court, and we have not done anything to change that in this Committee, as far as I understand. Is that what you want to know?

MRS. RUBIN: Yes, sir. Thank you.

VICE-CHAIRMAN: Mr. Carton.

MR. LAWRENCE A. CARTON, JR.: Mr. Chairman and members of the Committee:

My name is Lawrence A. Carton, Jr. I am a member of the New Jersey Bar, a member of the Monmouth County Bar Association and a member of the law firm of Roberts, Pillsbury, Carton and Sorenson, of Atlantic Highlands. I come here as an individual, and not as representing any group, but merely in the interests of expressing what I think may represent the viewpoint of some of the younger or intermediately younger lawyers in our area.

In the first place, I want to commend the Committee on what I think is an outstanding job. The document that you have pro-

posed here in the main seems to meet all the qualifications which any constitutional provision should prescribe, and that is to have it simple. I think every clause is sufficiently broad in scope to take care of all the exigencies which may arise. I will confine my specific comments to two or three small points which I think might be considered further.

I agree with Mr. McCarter's suggestion with reference to Section III, paragraph 2, which pertains to the jurisdiction of the General Court. It is my impression that that jurisdiction should be enlarged to include the power of control over the probate jurisdiction by rule of court or by some other mechanics. It seems to me that some confusion may arise because of the definition of what constitutes equity jurisdiction, probate jurisdiction, prerogative court jurisdiction, and so on. Many of those terms have been held to be rigid terms, and, therefore, restrictions have been placed upon the powers of the courts in the past by virtue of such definition. I think that the grant of jurisdiction should be sufficiently general in order that all phases of a matter, whether probate, equity or whatever the nature, may be taken care of in one controversy.

The other point that I think is perhaps too broad, or rather too specific, is Section IV, paragraph 4, which has been referred to by several previous speakers. That provision is to the effect that a review may be had as a matter of right in the cases where prerogative writs were formerly employed. As a member of a firm which handles a great many municipal matters, our experience has been similar to that of one or two speakers before, in that there are a great many public matters where a review is not desirable in the sense of a full review, since the taking of testimony and similar time-consuming activities may unnecessarily delay completion of a needed public project.

Now, it is my suggestion that that particular provision be amended by eliminating the words, "by the General Court as of right except in criminal causes." The reason I make that suggestion is this. Any lawyer who has appeared before the Supreme Court usually must prepare the case rather thoroughly on his application for a writ of certiorari or some other preliminary writ. In effect, the action of the Justice who acts in that particular application constitutes a review, and, therefore, it is not necessary for every case to be reviewed in full by a court or by the full taking of testimony. I think that the language employed here in this provision in its present form tends to indicate that such a review is necessary. I think that if you eliminate the words just referred to, the court could, by rule of court, prescribe and define the nature of the review necessary to safeguard the rights of all parties. It could define a review to mean in certain cases only the considera-

tion of the application by the first court to whom the application is made. In this way, I think you can save a great deal of comment from lawyers who use prerogative writ practice.

There is only one other minor point which I would like to mention, and that is the nomenclature. I agree with the Committee that the title of Supreme Court is proper, and I disagree with those who think otherwise. I believe that most people, laymen particularly, and, in fact, some lawyers, feel that Supreme Court means "supreme" and should be so in its actual functions. The use, however, of the words "General Court" somehow strikes an unresponsive chord in my own ideas. I haven't given much thought to what another term might be, but somehow the word "General" is not the one which seems at all proper to some lawyers.

With those comments I wish again to commend your Committee on the outstanding job you have done and to thank you for the privilege of being able to appear before you.

MR. GEORGE F. SMITH: Mr. Carton, you are a member of the Monmouth County Bar Association?

MR. CARTON: That is right.

MR. SMITH: You apparently don't agree with the conclusions of the Bar Association as reported this morning?

MR. CARTON: I have no criticism of their right to their opinion.

MR. SMITH: Were you present at their meeting?

MR. CARTON: I was not. Unfortunately, I was unable to be be there. I had intended to be there. However, I don't wish to be in a position of criticizing the presentation here by some other member of the bar of the opinion of those for whom he speaks.

MR. SMITH: Do you know what proportion of the membership was present at the meeting?

MR. CARTON: I do not. I could find out, but I think that should be left to your own private investigation.

VICE-CHAIRMAN: Thank you, sir. . . . Mr. Maida.

MR. ROBERT H. MAIDA: Mr. Chairman and members of the Committee:

I am Robert H. Maida, of Red Bank. I am a member of the Monmouth County Bar and of the State Bar Associations. I am a member of the firm of Parsons, Labrecque, Canzona & Combs. I speak individually and also for the other members of my firm.

In response to a question addressed to Mr. Carton by one of your Committee members, I can tell you that the Monmouth County Bar Association meeting, at which the resolution favoring the separate Court of Chancery was passed, was attended by something less than one-third of our county association membership. I can also tell you, as Mr. Carton has said, that the younger members of

the bar, at least, seem to be overwhelmingly in favor of the unified court that your Committee is considering. Our views are generally in accordance with those of Mr. McCarter and Mr. Seiffert.

With reference to Section III, paragraph 2, we concur in the belief that the General Court, or whatever it is to be called, should have statewide jurisdiction in probate matters and in criminal matters. The reasons have been advanced by other speakers, and I will be brief.

As to Section IV, paragraph 4, we also agree that the relief there provided for the prerogative writ should not be a matter of right. Again, the reasons have already been advanced by other speakers.

We feel that the word "review" is somewhat indefinite, and we agree with Mr. McCarter that it may be phrased somewhat in this way: "That the relief heretofore granted by prerogative writs shall be granted, etc."

Now, there are just two additional points which we would urge. First, we believe that passage or acceptance of the final draft of the Constitution will be facilitated if it provides for the permanent assignment of judges to the Equity Division of the court. Finally, I agree with the suggestions of the first speaker regarding the appointment of judges. That is my personal feeling; I do not know the reaction of the other men of our firm. Whether the appointment of the first judges on the Supreme Court shall be for the duration of their present unexpired terms or for a staggered period of years is a question which merits your very serious consideration.

In closing, I want to say that it is apparent, from your tentative draft, that you have kept your eye on the point that you are writing a document which will be fundamental law, and not a statute. There has been some criticism of lack of detail, but I think such criticism is unjustified in view of what you are trying to accomplish. I want to thank you for the opportunity of being here.

VICE-CHAIRMAN: Thank you very much. . . . Mr. Ewart.

MR. HOWARD EWART: Mr. Chairman and members of the Committee:

My name is Howard Ewart. I am a member of the New Jersey Bar, and I appear not in an individual capacity but as a representative of the Ocean County Bar Association and the Ocean County Lawyers' Club which held a joint meeting on July 10 to discuss and debate the questions relating to the Judiciary Article of the proposed new Constitution.

One of the former speakers said, or rather intimated, that the action of many of the county bar associations was taken without a proper opportunity for discussion, that discussion was suppressed, and that a bare majority, perhaps, of those voting in favor of certain propositions was all that was had. It seems to me that such an

intimation or general statement is unfair and unjustified.

Speaking for the Ocean County group, I would like to repeat the statement that I made here on July 24, that more than 75 per cent of the practicing lawyers of Ocean County attended our joint meeting on July 10, and that our action in adopting a resolution favoring the retention of the Court of Chancery, as presently constituted, a certified copy of which was sent to each of you members, was by a unanimous vote without a single dissent. I can't speak for any other particular county bar association, but I am told that the action of the Camden County Bar Association was by a very heavy majority along the same line with but few dissents, so that I think that rather than take the general statement of any speaker, you inquire particularly on that subject.

I want to confine my remarks to as brief a space as I can and reiterate for the record, if I may, the points I endeavored to make here on July 24. The Ocean County group—and I am expressing the views of the group and not my own, although they are both in harmony—favors leaving the justice of the peace court out of the present proposed Constitution, and let that subject be dealt with by the Legislature. I think there are few practicing lawyers in this State who would not agree with the statement that the handling of small cause courts by justices of the peace is and has been entirely unsatisfactory. It constitutes a waste of time, a waste of money, a waste of effort, and in many sections of the State—I say this particularly for the members of the Committee who are not members of the bar—the practice when you are employed by a man to defend his rights before a justice of the peace, the practice of many of the lawyers is to say, "Well, why waste your time and money in going to trial? Let them take a judgment and we will take the appeal and have it heard by the Common Pleas Court." So much for justices of the peace.

There is a strong feeling in Ocean County that we should retain our county courts having, generally, criminal and probate jurisdiction and jurisdiction in domestic relations and things of that sort. I think I may fairly state that there is no opposition in Ocean County to depriving the Common Pleas Court of the jurisdiction that has heretofore been exercised in civil cases. There is also no objection to putting that jurisdiction into the General Court, if that is to be the name of the new statewide court.

Our group also was unanimously in favor of an independent court of appeals, which we think is badly needed in this State, composed of a comparatively small number—the number of seven, I think, is suggested in this draft, and we are in agreement with that. We do feel, however, that there should be adequate representation of the Chancery bench on that independent court of ap-

peals which we do not have at the present time in the Court of Errors and Appeals, whose functions will be taken over by this Supreme Court under the tentative draft.

The fourth point that our group favored, and I have mentioned it briefly before, is the retention of an independent Court of Chancery in this State, as presently constituted, with the provision to continue in the Chancellor the power to appoint Vice-Chancellors rather than to transfer that power to the Governor, subject to confirmation by the Senate. I don't want to take much time on it except to repeat what was said before, that this is the day of specialization.

There is a tremendous body of equity law or equity jurisprudence directly and vitally affecting the individual and property rights of the people in this State. We think and feel strongly the fact that we need specialists to administer equity law and equity jurisprudence in this State, as we have had in the past, under which system our equity decisions rank very high throughout the United States. It has been said repeatedly, and I think truly, that the decisions of our New Jersey equity courts have attained a preeminent position in equity jurisprudence throughout the United States, and why that system of specialization in the administration of equity jurisprudence should be abolished when it has proved so successful, we can't understand.

There are a couple of items in the proposed draft of which I would like to speak, and I may say that from here on I am expressing my individual views rather than the views of the group I came here to represent. This draft proposes—I have forgotten the section—an independent court of appeals, to be called the Supreme Court. There shall be seven judges, five of whom shall be a quorum. One of the previous speakers suggested to you that, under that provision it would be possible to get a decision by a majority of a quorum, namely, three. Now, the decisions of the new Supreme Court are going to make law in this State, and if a majority of a quorum, namely three, can hand down the final law in this State, then you have the law being laid down by a minority of your new Supreme Court. My objection is not the point that five should constitute a quorum. I think that is all right. But I think there ought to be some further provision that it would take more than three to render final decisions on important questions in this State.

Another point that I would like to mention briefly is the mandatory provision contained somewhere in this draft for the retirement of judges at the age of 70. A number of lawyers with whom I have spoken think that would be a mistake. The age at which a man becomes incapacitated to fulfill the functions of a judicial office varies, of course, with the individual. Some men are old at 60; some

men are comparatively young, in their mind, at least, at 70. It seems to me that if you insert a mandatory provision that a judge automatically retires at 70, you are going to put out of office some judges who have just reached the height of their judicial powers.

Mention was made of Justice Holmes, who served on the United States Supreme Court until he was nearly 90. Of course, I think that is an exception, but I think we have many judges who are in full possession of their physical and mental powers after they have passed the age of 70, and that it would be a mistake to deprive the State, by law, of the services of those men, most of whom have spent years in acquiring the knowledge and the experience which make their services valuable to the State. It has been suggested that an alternative provision making it permissive for a judge to retire at, say, 65 and mandatory that he retire at 75, would perhaps be a more desirable provision.

Some of the speakers immediately preceding me have objected to the provision somewhere herein contained—I have read it but I have forgotten the section—which gives a review as a matter of right of those matters heretofore reviewed by prerogative writ. I want to say that I agree with the previous speakers that such a review should not be a matter of right. For example, some important ordinance is passed in a municipality, or some much needed public improvement is provided for; then, if every one of those decisions can be reviewed as a matter of right, it will tie up municipal improvements, sometimes for long periods. Where you review such a matter as that, you don't apply today and get a hearing tomorrow. Sometimes it takes weeks or months to get a hearing. Testimony has to be taken, a record has to be made, and municipal improvements can be very badly tied up under such a provision.

Under the statutes now existing, if someone objects, for example, to a municipal improvement that would ordinarily in certain time be reviewed by writ of certiorari, we don't get a writ of certiorari as a matter of right. We apply to a Supreme Court Justice, on affidavit, by verified petition, stating sufficient facts. We try to indicate that something is wrong with the action of which we complain, and ask for a writ of certiorari to review the matter. We don't get it automatically. It is a matter directly within the discretion of the court and I think it should continue to rest in the discretion of the court. Otherwise, you are liable to have the court flooded with these reviews, many of which would be entirely unjustified. I don't want to deprive the people of the right to review in a proper case, but I think it should still rest in the discretion of the court or, if authorized, with a single justice to whom the application might be made.

There is one other point that has caused some confusion in the

minds of the Ocean County group. There is a provision in here that this proposed Judicial Article shall take effect January 1, 1949. Section I of your Schedule provides that:

> "Immediately after the adoption of this constitution, the Governor shall nominate and appoint, with the advice and consent of the Senate, a chief justice and six associate justices of the Supreme Court."

We wonder why you want these judges appointed immediately, assuming the Constitution will be adopted this fall, when they are not to take office until January 1, 1949. It seems to me that the elimination of the word "immediately" in paragraph 1 of the Schedule might overcome that objection.

In conclusion, I would like to say that we in Ocean County feel very strongly on the subject of the retention of an independent Court of Chancery in this State. We would like the power to appoint the Vice-Chancellors to continue to abide in the Chancellor, because we think it removes it further from political consideration than would be the case where the Vice-Chancellor is appointed by the Governor, subject to confirmation by the Senate.

We think we need a new Constitution in New Jersey in many respects, particularly with respect to an independent court of appeals, which you designate here as the Supreme Court. But I want to say to the members of the Committee that it is entirely possible that the Ocean County lawyers will go out as a group and endeavor to prevent the adoption of this Constitution if the abolition of the Court of Chancery is rammed down their throats, so to speak, and they have no choice but to adopt the Constitution with that in it or else reject it in order to avoid the abolition of the Court of Chancery.

Thank you for your time.

VICE-CHAIRMAN: Thank you. . . . Mr. Burdell?

(Silence)

VICE-CHAIRMAN: Mr. Walsh?

May I remind you that we have asked that those who want to speak give their names to our Secretary, Mrs. Miller. If you haven't done so, will you please do so before we recess for lunch at 1:00 o'clock?

MR. JOSEPH F. WALSH: Mr. Chairman, members of the Committee:

My name is Joseph F. Walsh, member of the Essex County Bar Association, speaking here today as an individual. I will be very brief. Most of the remarks here today concerning age limitations have been intended to determine an age at which judges should retire. I direct the Committee's attention to Section V, paragraph 2, where limitation is placed on the age at which they can be appointed. I objected to this when my county bar association

adopted a similar proposal and I promised myself that I would object to it if it were presented here. Here are my reasons:

Today, a man who is admitted to the bar is usually 27 or 28 years of age; add to that his three or four years' war experience and you have a man coming to the bar who is 30 or 31 years of age; add to that the limitation you have placed there that he be admitted to the highest court before he can be considered for an appointment, ten years' admission rather, and you have a man who is about 44 or 45 years of age. Certainly, if you are protecting against an over-aged judiciary, by this Article you are creating one.

I say that if your proposal had been in operation at the time of the coming to the bench of such men as Judge Learned Hand, Judge Knox and Associate Justice of the United States Supreme Court Joseph Story, we would have been denied the benefit of their judicial experience. I submit to this Committee in the form of a recommendation that this limitation of ten years' admission to the highest court be deleted from the report to the Convention. I claim that it is not a limitation on immaturity, it is one on ability.

VICE-CHAIRMAN: Thank you. . . . Judge Gebhardt.

MR. PHILIP R. GEBHARDT: Mr. Chairman and members of the Committee:

I will take just a few moments of your time. You will recall that I appeared here last week and gave you the views of the Association with regard to the retention of the Court of Chancery. Of course, under this draft which you have proposed, the Court of Chancery, as such, would be a part of the integrated court. I would just like to call your attention to the fact that we still feel it ought to be a separate division. I think, too, that there might be a place for the Chancellor as a member of the Court of Appeals or Supreme Court, whichever it may be called, along with the Chief Justice, each to run his own court. Even if they were integrated, I think this might be a good idea.

However, the main reason I am here today is to speak with regard to the abolition of the civil practice, or civil jurisdiction, rather, of the Court of Common Pleas. In a poll taken of the Hunterdon County Bar Association on Monday and Tuesday, it developed that in contacting every member of that Association, with one exception they felt that the the civil jurisdiction should be retained by the Common Pleas Court, or the County Court, as it would be called. They could see no advantage whatsoever in taking that away from the County Court. They felt that we might have it, as we always had, along with the General Court, or whatever it may be called. I cannot emphasize too strongly the fact that the members of our Association feel that the civil jurisdiction should be retained, along with the criminal and Orphans' Court jurisdiction. I think that is

all I have to say as a representative of the Association.

I would like to add a personal note and address this to you, not as members of this Committee, but as members of the Convention. I think, as I suggested the other day, that we must be very careful about this whole matter, particularly in regard to the publicity which goes out from this Convention. I realize that you have nothing to do with that, perhaps, but I do think that it is a matter that ought to be given some thought. I am referring to the bulletin which was released by the New Jersey Committee for Constitutional Revision. The writer of the bulletin intimates very strongly —in fact, he makes it almost as a statement—that various members of our highest courts in the State appeared here merely to protect their own rights and that is the only reason they fought a change. I am sure that that is not true of, certainly, some members of this Committee, and I hope when the time comes that the Convention actually goes to work and takes hold of this matter and all of the other matters involved in the new Constitution, that it will make every effort to be very careful of the publicity which goes out. If incorrect, it may do a great deal of harm to the whole movement. Thank you very much.

VICE-CHAIRMAN: Thank you. . . . Is Mr. Hannoch here?

(*Silence*)

VICE-CHAIRMAN: Mr. LeDuc?

MR. LOUIS B. LeDUC: Mr. Chairman, ladies and gentlemen:

I am here to speak for the New Jersey Committee for Constitutional Revision. You have already heard our chairman earlier this morning, so I shall speak as a lawyer rather than as a layman. You know the composition of our committee. I am sure that what this committee wants is criticism, rather than praise, but I must say that the great objectives which have been set by our committee have been realized in the first draft. We cannot, therefore, but approve the work that has been done.

We find in your draft that you have established the central principle of integration in bringing our courts together under one responsible head, charged with the duty and implemented with the power to see that justice is administered practically and efficiently throughout the State. We recognize, further, that the New Jersey judge must henceforth devote himself wholly to the duties of his office and may not be distracted by pursuits of profit from his task. Supporting the matter, however, is the assurance of continuing in office if he performs his duties well, and of a pension when he is compelled to retire.

We feel that you have built the essentials of a system of justice that will meet the long-felt requirements of the public of this State. Essentially, the effort back of this Constitutional Convention

is the effort of laymen, not of lawyers, and I think we should recognize that the lay world has risen against the obstacles to progress that have prevailed under the old Constitution and which now block what is needed to give expression to the public will and to establish the requirements which the people feel are necessary.

You are only repeating history in integrating our courts. New York in 1852, I think it was, and England in 1873, did exactly, almost exactly, what you are now proposing to do. Yet, the vote in England, particularly, was that of the laity against the lawyers. The English Bar was almost unanimously opposed to the notion of getting rid of their ancient courts of Exchequer, Common Pleas, Queen's Bench and Chancery. Yet today, no outstanding English barrister would admit that the change forced on the legal profession by the public was not a change for the better. So I think you will find that, though the voices of many county bar associations are raised against the proposal to integrate the Court of Chancery in your General Court, your court of statewide original jurisdiction, the public at large supports that great improvement. Also, may I add that many lawyers who favor this change have not been as vocal as those who have appeared here in opposition?

After all, let me say a word in defense of those who do oppose. Lawyers are by nature and training conservatives. Those who come before you and urge the retention of the Court of Chancery, like my friend Mr. Ewart, are responding almost automatically to an affection that has been bred through years of practice in the Court of Chancery. But I think the point where the lawyer fails is in perspective. He is used to these forms and practices which the lay world knows about only in terms of disastrous result. It doesn't affect him as a lawyer to have to go from the Court of Chancery to one of the law courts and from one of the law courts to the Court of Chancery in conducting litigation to its ultimate end. It does affect the litigant. The lawyer is not so intent, and can't be in the nature of things, on the evil consequences of these vagaries of practice which have resulted in so many injustices. Only outside the profession can you see those consequencies. Therefore, I say, this is a lay revolution against the lawyers.

I notice that Mr. Ewart brought out the point which I think should be met right now, that we are risking the loss of our equity jurisprudence. Ladies and gentlemen, we are doing nothing of the sort. The Equity Division of your General Court will be constituted by the same able judges who administer equity throughout our State today, Vice-Chancellors and Advisory Masters. They will follow the same procedures to which they have been used, with certain added powers given them for the benefit of the litigant. The same volumes of *Equity Reports* will continue to be published

in the same sequence of equity jurisprudence, and this, of course, of necessity will continue. It is essential to any civilized state. No modern state can do without equity. We'll lose neither the precedents of the past nor the progress of the future in this court. And yet, these gentlemen who urge retention of the court cannot see that the court would go on, under the Equity Division, doing the same work it has done. To them, any change in title or name is to abolish it. A separate Court of Chancery is like an island anchored in the river of time, unchangeable and unchanging. Against that positivist attitude, you, ladies and gentlemen, have set your voices and with excellent result, because the product will be applauded by the public.

Now, may I go to some suggestions in the nature of criticism, which our committee has felt proper to bring before your body. First of all, Mr. Kerney referred to one—the practical suggestion that the Governor should be limited in his nomination of the Justices of the Supreme Court in the same way in which you have limited him in your Schedule, Section I, paragraph 1, to appointment to terms of office presently in existence, that is, to terms that will expire in accordance with existing law. We feel quite strongly that effective criticism can be brought against the proposed Constitution, and it may be urged and spoken of in terms of the political situation as it will be presented. Those loyal Democrats who fear the power of a Republican Governor might forcibly argue that to give to Governor Driscoll the power to fill our highest court with young Republicans growing from our Circuit bench, from our Chancery bench, gives him the power to constitute for decades a court wholly Republican in sympathy.

I don't believe for a minute that any such thing would happen. Not for a minute. I am a Republican, but I am speaking purely objectively here when I urge for the Committee that such a power does give a weapon to enemies of the proposed Constitution. We, therefore, suggest your careful, practical consideration of the results that may follow in thus empowering the Governor. Our practical suggestion, of course, is to add to the second sentence, Section I of the Schedule—or it's the third sentence, where you say "the judges of the General Court so designated shall hold office each for the period of his term which remains unexpired"—that you insert after General Court, or in front of it, in the place of dignity, "the Supreme Court and the General Court," so that same limitation will be imposed on the Governor's power with regard to the highest court as will be imposed on his appointment of judges to the General Court.

Now, secondly, I note one limitation upon a long-term objective of our committee, which was to have integration complete in its inclusion of the county judges. We would prefer to see a complete

inclusion. Nevertheless, I recognize that forceful arguments may be made in favor of what I may call county sovereignty, in favor of the local judge who knows his county institutions, who is familiar with county conditions, and I recognize that you have given effect to those arguments by allowing the continuance of the criminal and probate functions of the county judge. I also note, however, that in time those powers are subject to the superior power given by your draft to the Legislature to integrate the criminal and probate functions of the County Court. I take it that what you have in mind is a period of experimentation in leaving to the county judges their existing powers except for the civil suits formerly brought in the Court of Common Pleas.

We recognize your approach to a difficult problem. We still say, however, that our advocacy is of a complete integration.

Now, I go to a third point where I propose a suggestion which has the approval of our committee. It is a suggestion made informally, and yet form may be quite important. It is with regard to the name or title you have given to your court of original jurisdiction, the General Court. I think it is a good name. The adjective "General" is apt. It is somewhat original. Of course, it is true that the Massachusetts Legislature when that was a court, I believe, was called the General Court. But I propose for your consideration another title which may appeal to you more. I am avoiding the title given in the 1944 Constitution, "Superior Court." I think we do well to drop the comparative and superlative adjectives. I don't like "Supreme Court," incidentally and while I am speaking on the subject, any more than I do "Superior Court," and I think that George McCarter is right in proposing "Court of Appeals." I think the term "General Court" is an apt description of what the court does.

But, to come back to the General Court, my suggestion is perhaps a bit nostalgic but it has appropriateness. In 1682, there was consolidated and unified in New Jersey all of the law courts, or the jurisdiction of the law courts, from the system in England, and one court was established which embraced all those law courts. That court existed for 20 years, until 1702, when it was known as the "Court of Common Right," a title which has, it seems to me, certain elements of its own and a certain appropriateness, because we offer to its suitors a common right given by all of our jurisprudences and under the jurisdictions of all of the courts which we are now merging. Perhaps that may appeal to you.

Maybe you would rather adjourn, Mr. Chairman, and let me continue briefly after the recess.

VICE-CHAIRMAN: If you don't mind. . . . We will recess until 2:15.

(The session adjourned for luncheon at 1:00 P. M.)

STATE OF NEW JERSEY

CONSTITUTIONAL CONVENTION OF 1947

COMMITTEE ON THE JUDICIARY

Wednesday, July 30, 1947

(Afternoon session)

(The session began at 2:15 P. M.)

PRESENT: Brogan, Dixon, Drenk, Jacobs, McGrath, McMurray, Miller, G. W., Peterson, H. W., Smith, G. F., Sommer and Winne.

VICE-CHAIRMAN NATHAN L. JACOBS: The meeting will come to order. Mr. LeDuc was speaking when we adjourned.

MR. LOUIS B. LeDUC: In the matter of nomenclature I have some support—it is the suggestion of George McCarter—that instead of Equity Division we use the phrase Chancery Division. Admittedly, Chancery is not antithetical to law, but nonetheless, it denotes something that is dear to a certain group. It suggests that the judges who sit in the Chancery Division—

MRS. GENE W. MILLER: Mr. LeDuc, will you speak into the microphone?

MR. LeDUC: I'll try. It suggests that the judges who sit in those positions will be called Vice-Chancellors and that the presiding judge will be a Chancellor, and I think that the use of the word is amply justified by tradition and custom.

I proceed with one further suggestion. The speakers who have gone before me have urged a later age limit on retiring judges. Personally, I favor it myself. But may I not suggest that particular injustice is done to present incumbents who are eligible to office on the highest courts except for the fact that they will be precluded by the overtaking hand of age? One of our more distinguished judges will be over 70. May I not suggest that, at least in that particular, the age limit should be 75? I think it's not only a compromise but a matter of principle, because we followed throughout the idea that the adoption of this Constitution is not going to disturb the present terms of our judicial officers.

Now, in the little time that I propose to take, may I refer to the insistence of Mr. Ewart upon the reservation in the Chancellor of the power to select his own Vice-Chancellors? Of course, that's part of the argument for a separate Court of Chancery. I get it particularly in the addresses before you of Judge Kremer and of our distinguished Chancellor, that a Court of Chancery is a court of conscience; that the conscience of the court resides in the Chancellor; and that in choosing the assistants who will help him in

making conscientious decisions, he should have the sole say.

The Chancellor, particularly, insisted that this Court of Chancery was a court of conscience and that we should not meddle with its conscientious functions. May I say, because I don't think the point has been answered, that all that is pure nonsense? The phraseology is drawn from the Middle Ages. It's a disfigured remainder of what was said about the court in the 14th and 15th Centuries when it was, in fact, a Court of Chancery and a court of conscience. That is, the conscientious dictates of the Chancellor determined the decisions, rather than any settled body of principle or custom. I wonder what the advocates of a retained and isolated Court of Chancery, who insist that we must preserve the principle of specialization, would say if asked how they justify specialization in terms of conscience? Manifestly, one's conscience is not a matter of specialization. The whole thing falls to pieces on analysis. If the Court of Chancery were a court of conscience, then each succeeding Chancellor would decide matters before him as his conscience told him to and we would have no body of equity jurisprudence whatsoever, because jurisprudence is a science fixed by rules and principles.

A publicist of the 17th Century, John Selden, I think, illustrated it very aptly in a few words. As I recall it, what he said was this: "Equity is a roguish thing. For law we have a measure, but in equity the only measure is the conscience of him who is Chancellor, and as that conscience is large or narrow, so is equity. It's all as if we called the measure a Chancellor's foot." Now, that's not modern equity. Modern equity began with the introduction to the Court of Chancery of a well-known institution, the court stenographer. Under Lord Nottingham, in the latter part of the 17th Century, Chancery had its first court reporter. After that, under a series of able Chancellors, they developed the foundation of our modern equity which is administered here in New Jersey by our Court of Chancery,—a jurisprudence based on principle and precedent recorded in these reported opinions of the Chancellors. Oh, that's a far cry from the medieval conception of a Chancellor sitting as the conscience of the court and administering what he conceives to be the conscientious necessities of the case brought before him.

I go back into the historic background actually to show the absurdity of the claim, and I close with a practical illustration, because it doesn't require very much imagination, after all, to discover that a court of conscience isn't a practical thing. The title has a certain invidious application to the Vice-Chancellors and Advisory Masters. Apparently they are not supposed to have consciences, but only the Chancellor. I would recall now, and I think it is well to repeat them to this body, the words in which that grand old man of the bar, Bob McCarter, replied to our most brilliant advocate, Merritt Lane. Mr. Lane was arguing before our State Bar the very

point that the Chancellor is the court of conscience. When he finished McCarter said: "Have you ever seen the conscience of the court at work? I have; I saw it the other day. I came down to the Chancery office a little early and there in the office outside the Chancellor's office was a beautiful blonde lady and she had piled up on one side about that high (*indicating*) all the orders sent in in the mail by the Vice-Chancellors, the Advisory Masters and the Special Masters, all ready for the Chancellor's signature. The Chancellor's signature was supplied by a great big rubber stamp and a right hand. She was going this way (*indicating the use of a hand stamp*), right through that pile of letters. There, gentlemen," he said, "is the conscience of the court at work."

(*Laughter*)

That illustrates the folly of trying to say that the conscience of the court resides in the Chancellor. After all, how many is it—22,000 cases that come up a year? It's perfectly obvious that the conscience of the court—that is, the Chancellor—doesn't operate in determining those causes. It is the individual consciences of the Vice-Chancellors, Advisory Masters and Special Masters, regulated by precedent and principle written into our equity decisions and our *Equity Reports,* that move the court's decisions. There's no such thing, ladies and gentlemen, as a court of conscience, anymore than a law court is a court of conscience.

I close with this observation. Law and equity are closely related jurisprudences. They are not hostile; they are friendly. The prime objective of equity is to aid law, to supply remedies where law is deficient. They work together, they should work together, and what this Committee has done in its draft is to bring them closer together in harmony. It's comparable to the act of bringing together under one roof separated but married spouses who have lived apart and to join them in a life of tangible happiness and fidelity. It's a very proper union which you have promoted in this draft and one which I trust will stand the stresses and strains of debate from the floor. Thank you very much.

VICE-CHAIRMAN: Thank you, Mr. LeDuc. . . . Mr. Baker?

MR. HORACE E. BAKER: Mr. Chairman and members of the Committee:

My name is Horace E. Baker. I am from Westfield, New Jersey. I wish to commend you and congratulate you on the magnificent effort which you have made in this draft of our Judiciary Article of the proposed charter. I think you are proceeding on very firm ground.

This is no reckless venture into unchartered seas, as you well know. About 100 years ago, the State of New York faced the same problem which we are facing now. The same arguments were

then urged which we are hearing today in favor of retention of the separate Court of Chancery. The bolder men of that day, however, went ahead and consolidated equity with law in one court, and by the test of time it has proved successful. Therefore, I think you may well conclude that the same result would be achieved in New Jersey if the citizens of the State approve this new charter next fall.

I am vitally interested in this draft of yours, even though I do not represent any particular organization. As a lifelong resident of New Jersey, I have tried to support all the movements and programs for better government. New Jersey has progressed substantially in many ways in the last 50 years. I think that our judiciary, however, and our court system have lagged behind the times, as you well know.

As a member of the New York Bar for 15 years, I have had an opportunity to observe the consolidated court in action. I certainly don't pretend to be an expert on court systems, but I think it has great advantages over our present system in New Jersey. I say that after having studied the New Jersey system sufficiently to pass the bar exam in April. I think in that connection I could state that the younger men who were candidates for the bar of New Jersey in April are almost unanimous in their support of an integrated system. They have considered it very carefully, they have had the benefits of better law schools today than ever before, and many of them are veterans who have been around. Some of them are members of the bars of other states who now live here and want to become a member of this bar.

I think some of the county bar associations are inclined to preserve the *status quo* and retain the separate character of such a court. That is more or less natural in the legal profession. However, as one witness said, the situation today is simply a revolution of the people against the profession, and I think if we are to preserve the law and our government of laws as an American institution we must simplify it everywhere, and New Jersey is no exception. The people today want more simplification in our court systems all over the land, and particularly in New Jersey.

I wish to thank you very much for this opportunity, and I want to congratulate you on your splendid effort.

VICE-CHAIRMAN: Thank you, Mr. Baker. . . . Mr. Danzig?

MR. CHARLES DANZIG: Mr. Chairman and members of the Judiciary Committee:

I am from Newark. I earn my living practicing law. I do not belong to any county bar association or any state bar association. I am here representing only myself, and talking as a practicing lawyer.

The proposed Judicial Article in this tentative draft would per-

mit the Chief Justice to assign judges of the General Court indiscriminately to the Chancery Division or the Law Division. It may be that in the beginning a judge, once assigned to the Chancery Division, would remain there, but there is nothing in the Constitution to prevent a continuous flow of personnel from one court to the other.

Now, the proposed Article does not abolish equity. I don't think it was the intention of anybody to abolish equity as a system of jurisprudence, as distinguished from law, and we are going to have equity administered in this State whether or not we have the integrated court proposed or whether we have a separate Court of Chancery. The only question is whether or not the public of this State will be so well served by the integrated court as they would be served by a separate court. So far as I am concerned, it will make no difference. I will go on earning my living practicing law in the same way at the same stand, but I think the public will be injured if the separate Court of Chancery is abolished.

My reasons for that belief are simple. I have discussed this question a number of times with laymen. I find it difficult to convey my thoughts to them on the subject, because to understand the difference between law and equity requires an understanding of the two systems; because, without it, the type of thinking that is required in a Chancery case as distinguished from a law case is so different that by my merely stating it I feel that when I talk to these laymen I don't get the idea across. I tell them that when a man sits on an equity case the type of thinking, the type of philosophy, the type of experience which he brings to that case is something that can come to him only after years of dealing in the subject of equity to the exclusion of law, if you please.

It is the same as if we listen to the music of the Orient. It is expressed in a different idiom. The composers have something to say, but to our western ear it means nothing. It is the same as when we look at a picture painted in the classical tradition. We understand it. We look at the modern artists. They have something to say. They have a different idiom of expression to us, or to many of us, or to me at least. I can't understand them. So it is with law and equity. While the demarcation isn't so sharp as between western music and eastern music, or between modern art and classical art, yet the demarcation is there. The thinking and the experience and the philosophy that are necessary and inherent in equity as distinguished from law are so different that you must deal with equity all the time in order to express it properly.

Now, I've been here since 12 o'clock and I've heard some remarks made about the great benefits that have come to other states as a result of the merger of law and equity. I wonder if those statements can be supported? I recall that when I first came into

the bar, which wasn't many years ago, this country was in the depths of the depression. Legislatures were meeting in every state to relieve people who were distressed by mortgage foreclosures. Statutes were passed giving owners of property relief. It took years before those statutes passed through the judicial process, and in many instances those statutes were declared unconstitutional. Where, but in New Jersey, was relief given to the people who were seeking, clamoring for relief from their legislatures? Where, but in New Jersey, was such relief obtained in a court without legislative aid? It was in the Court of Chancery. I venture to say it would not have been obtained there were it not for the fact that we had men who live in equity, think in terms of equity every day of their judicial careers. It was by judicial opinion coming from the Court of Chancery, coming from men who dealt with equity all the time, that owners of real estate in this State obtained relief. New York couldn't give it to them at first, because no court in New York was able to evolve the equitable theory that was evolved by our Vice-Chancellors, to give relief to the people who needed it—and that, sirs and lady, could only come from the court that was dealing and had personnel that were dealing day in and day out with matters that concern equity.

There is no human mind, possibly with the exception of brilliant men like Dean Pound and perhaps a few others, which can possibly sit down and in the span of a judicial career encompass, absorb, and understand the two systems that are so easily referred to as law on the one hand, and equity on the other. I know I've been trying to understand equity for over 15 years, and I still have a good deal to learn. Now, to expect the average mortal to be able to understand in the course of a judicial career, despite lack of previous experience, the full meaning of law, not only on the substantive side but also on the adjective and procedural side, and the full meaning of equity in those two aspects is more than we should expect. The only way to preserve this benefit that has come to this State is by keeping your personnel permanently attached to a court that administers equity or administers law with no shifting and no interchanging personnel from the others. The best way to accomplish that, it would seem to me, would be to retain the present Court of Chancery.

Now, it doesn't follow that because I am for the retention of the present Court of Chancery, that I also believe that it must be retained in its present form. To me as a practicing lawyer, it makes no difference at all whether the Governor, the Chancellor or the joint session of the Legislature appoints Vice-Chancellors, but the important thing is that there should be a recognition by this Committee of this Convention of those advantages that we have enjoyed, and an appreciation of the limitations on the human mind, whether

it be judicial, professional, or lay, to understand everything.

Equity in this State has been a growing, living thing. In other states it has atrophied and in some instances died. The example I have given you about the relief given to distressed owners of real estate by the Court of Chancery administering equitable principles, is the best illustration of the statement that in another state equity has died as a result of the merger, although lip service is given to it as a system. There is no extension of equitable principle. For a man to be creative, for a man to do something that isn't covered by precedent, he must know his tool, and he can't know his tool when he has twice the tools that any man can be expected to master in the space of one short life.

Now, I note that in this proposed Article there is a provision concerning compulsory retirement at 70. I don't think that in a fundamental charter any age should be mentioned. That matter should be left to the Legislature to deal with, depending upon changing circumstances. We should not lay down a prohibition that may seem silly in years to come when it may be possible that human life, by the use of some medicine or chemistry, may be prolonged.

There is another provision here which appears in the Schedule. I refer to paragraph 7 of the Schedule, wherein the various causes presently pending are transferred to other courts. A provision like that should not be included as it has been. The last part of paragraph 7 reads (*reading*):

> "Causes shall be deemed to be pending for the purposes of this and the next paragraph, notwithstanding that an adjudication has been entered therein, until the time limited for review has expired."

I want to call the Committee's attention to the fact that in the Court of Chancery numerous, hundreds and perhaps thousands of decrees have been filed which grant what we lawyers call final relief with respect to the subject matter that was then brought before the court. But at the foot of the decree there is reserved the right to the party to come back in that cause for further relief as occasion may require. I wonder what the effect of this provision would be if it is left in its present form, because the time for appeal has expired in those cases with respect to the subject matter that the decree dealt with, but nevertheless the parties have the right to come back into that cause. It would seem to me that that class of cases would be left floating around with nobody knowing where they belonged and with a serious question open whether there was the right to institute a new suit in the new court, by whatever name it may be called.

Thank you for your attention.

VICE-CHAIRMAN: Thank you Mr. Danzig. . . . Mr. Hannoch.

MR. HERBERT J. HANNOCH: Mr. Chairman, and gentle-

men of the Committee:

I address myself very briefly to the results of your endeavors with respect to prerogative writs. Since the publication of your tentative draft, I have been receiving numerous phone calls and visits relating to particular phraseology, and a large amount of it relates to the one word which you have in the draft called "review." May I make a few comments with respect to it?

I think I understand what your desires are, and I hope that I have tried to carry them out with a slightly different change of verbiage. You are desirous, I take it, that anybody who feels that he has a cause of action should, as a matter of right, be permitted to present that cause of action to a court and have an adjudication upon it.

I also take it that by the word "review" you intended every sort of relief that is implied within the phrase encompassed by the prerogative writs.

Now, it seems to me that the word "review" is ill-chosen. Prerogative writs cover two classes of matters. One class consists of matters in which you review or effect an appeal from the action of a lower tribunal. But there are many actions which are actions of original jurisdiction, such as mandamus and quo warranto. They are not matters of review. They are entirely new actions. I therefore suggested the word "relief."

I understand that phraseology, "review" or "relief," has been the subject of much discussion before your Committee. I understand that one of the difficulties you found was that your desire to say that a party is entitled to something as of right might mean, if you used the word "relief," that all he had to do was to walk into court and say, "I want so and so, and under the Constitution and as a matter of right I am entitled to it." I think the difficulty you have gotten into, if I may be so bold as to say it, is that you are trying to say too much in too few words. Perhaps the longest way home is the shortest way home. I am, therefore, suggesting this to you. If you have your own draft before you, you will see the very slight changes that I have made (*reading*):

> "Prerogative writs are superseded and in lieu thereof relief shall be afforded by the General Court in the manner provided by rules of the Supreme Court. The prosecution of the action for relief shall be as of right except in criminal cases."

I think that by inserting the phraseology "as of right" in a separate sentence you accomplish what you are trying to accomplish and you can use the word "relief," which I think is sufficiently broad to include "review."

That's my story.

MR. WALTER G. WINNE: You think it should be "as of right."

MR. HANNOCH: Let me put it this way: In the original draft that I submitted in behalf of the State Bar Association, we did not so provide. We provided that the question as to whether or not the review should be of right should be a matter left to the Legislature, because there is a difference of opinion as to whether certain matters, particularly municipal matters, are matters of right. We felt that the matter should be left to the Legislature. However, you have seen fit to say that their right to prosecute the action is a matter of right, and frankly I don't see an awful lot of objection to it.

I recognize that in municipalities a municipal official may say, "Well, if I just awarded a garbage contract and a man can go ahead and review it, everything is tied up." Well, everything is tied up a lot of times. You merge a corporation or you try to recapitalize a corporation. Somebody files a bill in Chancery. Nobody can stop that. The mere fact that a man starts his action to review the award of a garbage contract does not carry with it a stay. The proceedings go on just the same. It seems to me that in our philosophy of democracy, a man ought to have at least one shot for his white alley. That is the thing that he is entitled to have.

I think this phraseology will meet the situation. You have it, and if you will give permission, I shall leave a copy of it here.

VICE-CHAIRMAN: Thank you.

MR. HANNOCH: May I ask you just one other question which was brought to my attention the other day? I have not been able to get the answer to it, and some question may come up about it. I am referring to Section III on page 6, or Section IV, in which you say (*reading*):

> "The Supreme Court and the appellate division of the General Court may exercise such original jurisdiction as may be incident to a complete determination of any cause on review."

Does that mean that if a case is in the Supreme Court and it develops that some additional testimony ought to be taken, perhaps on a subject on which no trial was had, that the Supreme Court by the exercise of original jurisdiction can meet that problem?

VICE-CHAIRMAN: We expect so, subject to the right to trial by jury, and that, of course, would be a matter of judicial determination.

MR. HANNOCH: All right; we didn't know.

VICE-CHAIRMAN: Mr. Laddie

MR. JOHN D. LADDIE: Mr. Chairman, and members of the Committee:

My name is John D. Laddie. I am from Newark, a member of the Essex Bar since 1911, member of the Essex County Bar Association, State Bar Association, and American Bar Association. By way of indicating that I have given more than ordinary thought to this

subject, I might say I am an unsuccessful candidate for this Convention.

Now, my point is very brief. I am referring to the retirement of judges. It should be borne in mind that there are two ages: the chronological age and the biological age. We all know that people who have the chronological age of 70 very often have the biological age of 55. Now, to retire a judge who has 70 years of chronological age to his credit at 55 would be an unconscionable economic waste. We also know of people who at the chronological age of 55 have the biological age of 70 and 75. Therefore, I propose that the retirement of judges be made subject to a question of fact. Have a provision providing for a fact-finding commission to inquire into the capacity and competency of a judge who desired to continue after he has attained the age of 70 years.

We have a similar thing in the Court of Chancery whereby a commission, consisting of a lawyer, a physician, and a gentleman inquires into mental competency, and you might well have some similar fact-finding commission in connection with this matter.

That is all I have to say.

VICE-CHAIRMAN: Thank you very much. . . . Mr. Summerill.

MR. CHARLES SUMMERILL: Mr. Chairman, ladies and gentlemen of the Committee:

I am Charles Summerill and I represent the Hunterdon County Bar Association, myself, and the other members of small county bar associations who want to go along on my statement.

What are you trying to do to the small counties in taking their county courts from them? Now, as small counties we can take as a definition those which probably have only one Assemblyman. I believe there are nine of them. You are forcing the lawyers in those counties to go to a Circuit Court judge for the things for which we normally go to our county judge: change of name, mortgage cancellation, motion to pleadings. Now, in the large county there is no problem at all. You are going to have a resident Circuit Court judge who will probably have enough business to keep him there the whole time. In our small counties you are going to have a Circuit Court judge or a General Court judge three times a year. That means we have got to go out of the county to get this normal every-day garden type of relief.

I think you are penalizing us when you are taking away the civil jurisdiction of the county courts. It is the intimation of newspapers that the county courts are ultimately going to be eliminated altogether. At present, you are taking civil jurisdiction away. Now, we may be overly-anxious in our fears that you are going to take it all away, but that is what we have been led to believe by the newspapers. If you are going to take it all away, I know you are going to have a fight from the members of the bar of Hunterdon

County, and you may have the same fight from other smaller counties. After all, there are nine of those counties. I think you should give due consideration to the fact that our normal every-day procedure in our county courts is going to be, let's say, emasculated.

Speaking for myself alone, and anyone else who wants to join me, about the justice of the peace angle, we know in the larger counties the justice of the peace is a non-existent problem. In the small counties—that is where our small cause cases are tried—we have to live with them. We have to put up with them, and it has been my suggestion—and I don't know whether or not our bar association went along with it or had nerve enough to come out and say they were against them; the matter was pigeonholed—but I think it would be wise to eliminate the justice of the peace in his present status. If you want to have a justice of the peace in the small counties, let us have one with qualifications of being a lawyer. For instance, yesterday I found that in my county the age of minority is now 18 and not 21 just because the justice of the peace decided that that was what he was going to rule in that particular case.

Now, look at it from this angle. For one person who is touched by our highest courts, there are thousands who are touched by our justices of the peace. If you want to give some real relief, there's the place to do it.

Thank you very much.

VICE-CHAIRMAN: Thank you, sir.

Is there anyone in addition to Mr. Davis who wants to be heard this afternoon?

MEMBER OF AUDIENCE: Mr. Carey wanted to be heard. Let me see if I can find him.

VICE-CHAIRMAN: Anyone other than Mr. Davis? If there is no one else, we will devote the rest of the afternoon to Mr. Davis.

MR. JOSEPH A. DAVIS: Mr. Chairman, if Judge Carey is expected, I prefer to wait.

VICE-CHAIRMAN: We'll see. I don't think he wants to come. Apparently they are trying to persuade him.

MRS. MILLER: I have a copy of his statement.

MR. DAVIS: I defer to Judge Carey with pleasure.

VICE-CHAIRMAN: Judge Carey.

MR. ROBERT CAREY: Mr. Chairman, and members of the Committee:

I have just been invited at the door to say a few words to fill the gap that at present exists in the conference of eloquence that you folks have been feasting upon. Now, I only want to say one word that I think ought to be considered by you gentlemen and you lady member of the Committee.

I didn't come here to discuss your problems. I haven't given

them consideration enough to discuss them. I have been busy with the business of the Rights Committee for the entire session of the Convention to date. But this morning I left a message with you. I note that one of your problems which you think you have solved is the fixing of the date in life when members of the judiciary will have to retire to privacy, and you fixed the age, I believe, at 70.

Not expecting to have the pleasure of speaking here, I left a memorandum here this morning saying that I thought that was a tremendous blunder, and I can speak without any personal flavor in what I say. Whether you make the age limit 75 or 70, in neither event will the figures affect me. You finish your work about the 12th of September. About the 16th of September the Governor will finish examining the records that are filed with him, and on that very day I will have the joy of being in the midst of the celebration of my 75th birthday, so you see I am speaking here without any personal flavor in what I am saying.

Now, I have been practicing law over 50 years. The ablest lawyer in our State today is over 70. He sits as the Chairman of your Committee, he has the respect of everybody in this State, and he was born the same week I was. Most of the *great men* of the State who are living now were born about that time. The whole State admires him, they know his tremendous ability, and know what his value is in the legal world and in the judicial world. He is doing work now that is practically judicial. I refer, of course, to Frank Sommer.

Now, all through the State we find pictures like that. The Chief Justice of our State, Chief Justice Case, was born in my town and is now over 70 years of age. He is not only Chief Justice, but one of the ablest lawyers in the State, by long odds. He lends character and gives character to our courts today. To say to him, immediately upon the adoption of this new Constitution, that he must go into the back lots and sit down because the march of time has rolled a little too far to warrant his being kept in activity, will be sort of saddening to me.

I can't figure it out. I expect to practice law for the next 25 years. I have a busy office now. I leave here to go back to my office where I have several men employed by me. They'd hate to see me leave because the firm might end, or other things like that might happen. There are a number of fine men in this Convention who are over 70 years of age. I won't name them all. There are even women here who may be, but I never talk about women's years. To me they are all just fine young women, but that isn't the point. The point I make is that if you adopt that rule and stick to it, you are doing one of the saddest things that's been done in the court life of this State.

Some of the greatest judges of New Jersey have been over 70 years of age—Justice Gummere, Justice Knapp, Justice Dixon, Justice Collins, and all the other great judges of the past. Justice Parker —he must be nearly 90 now and is still on the job and keeping everybody busy. In the Chancery Court, Vice-Chancellors are reaching the age of 70. Justice Hughes, over 80, was one of the ablest judges we had in the United States Supreme Court and we all were sorry when he left the bench recently. Oh, if he were only back there, and a few more like him, today, what a different picture we would have. Well, we won't talk about that. You are not concerned with that. But the picture is all there. Oliver Wendell Holmes! You and I read his opinions. Yet, Oliver Wendell Holmes was over 90 years of age when he signed his last opinion as a United States Supreme Court Justice.

Why, most men don't get high judicial positions until after they are 58 or 60, and they are 70 before they know it. To put them on the shelf then, or to make them law loafers of the State, what a mistake that would be! I'd say 75 at the lowest, and after 75 retire them. And then put them on the inactive list subject to the call of the Chief Justice, whoever he may be, at all times.

One other matter and I'll quit. This just comes to me; I didn't mention it in my note to you this morning. I have been talking to Mr. Justice Black of the Supreme Court. He is retired now. He is the oldest alumnus of Princeton University. Now, he must be about 88. His mind is clear. He is a neighbor of mine, also born in Jersey City—no, born in South Jersey but spent all his life in my town. He has one of the ablest minds in the State. What do you think he said to me the other day? He said, "I don't care what you do. I like the way you are going to set up the courts down there" —he meant the system that you are advocating now, in a general way—"but if you set them up that way, don't call the Equity Division, so-called, the Equity Division. That won't mean anything on God's earth. Call it the Chancery Division. Keep it the Chancery Division. Make the head of that Court the Chancellor."

The Chancellor is known all over the world. The Chancery Court is known from one end of the world to the other, and everybody respects it and respects its status and opinions.

Now, as a member of the Rights Committee, but speaking only for myself, I sincerely hope that you will do your full duty. Not less than 75, first; second, preserve the name of Chancery, if you can. It will please even the Chancellor and the Vice-Chancellors, and if they are pleased, then nobody will be displeased when your work is finished.

That's the whole picture, and I leave it with you.

I want to thank you for letting me say these casual words.

VICE-CHAIRMAN: Thank you very much, Judge.

Anyone else other than Mr. Davis?

MR. DAVIS: I may say now that the speakers who have intervened between my first round and second round have said a great many things that I will be able to skip, and thus shorten my contemplated time before you.

Section III, paragraph 3, is where we left off. This language practically amounts to a merger of the Court of Chancery with the law court, a system which, as other speakers have pointed out, while it works doesn't work well by reason of the fact that in the course of the amalgamation the equity jurisprudence in its true sense is stifled and its growth restricted and strangled. That has been the experience in the other states, and that's the reason why they so frequently must refer to New Jersey citations in support of an equitable principle—because we have been able continually to develop, whereas they have grown stagnant in many instances. That stagnation of equity jurisprudence, incidentally, unquestionably does work a great damage to the whole system of justice.

Section III, paragraph 4: You have here language which provides that each division of the General Court may exercise the powers and functions of the other when the ends of justice so require. It seems to me that some clarification is necessary, because "the ends of justice" may become a phrase which is as flexible and as subject to criticism as the old phrase, "Equity is as long as the Chancellor's foot." In England, ever since the Supreme Court of Judicature Act in 1873 and the numerous amendments to that act, the British have tried to reach what I believe to be an unattainable ideal of merging law and equity. The British courts and lawyers and public, incidentally, are today still having a great deal of trouble in trying to find out what the comparable language in the Supreme Court of Judicature Act and its various amendments really means. They are still litigating the question. This language, too, I suggest, may conflict with other provisions in the Constitution with reference to the right of trial by jury.

One more word on the specialization of equity judges. Of course, it is true that equity judges are not born. They are made, and that is true also of law judges, and the fact that we have had the specialization both on the law side and on the equity side is the reason why our decisions, both law and equity, are looked up to with great respect by other jurisdictions. We have specialists on the law side as well as the equity side. This provision which would merge the two would undoubtedly hurt both systems, for the reasons stated by some of the previous speakers.

Section IV, paragraph 1: As I said before, the appellate jurisdiction of the highest court, the court of last resort, ought to be set out with great particularity so that there be no question or possibility of question arising as to when matters may be appealed and

what matters may be appealed. As I said this morning, other states have treated that by particularly specifying just what matters can go up to the highest court, and under what circumstances. It would not require a very lengthy article. I think the New York judicial article takes about two average size pages in the average size law book, and provides fully and completely all the times and the circumstances under which an appeal may go to the highest court. I think we ought to do that in the interest of certainty.

Section IV, paragraph 3 contains the expression that the appellate tribunals may exercise such original jurisdiction as may be incident to the complete determination of any cause on review. I think the choice of the word "incident" is an unhappy one. Its dictionary definition doesn't fit in this expression and doesn't to my mind take us to the goal which the language in my opinion intends to take us. It seems that there is a bit too much flexibility here with reference to this provision, because it would be almost impossible for counsel to anticipate in advance when the court might take jurisdiction and when it might not. In other words, it, in effect, creates some right, the exercise of which may be at the whim of the appellate court. I think that such a situation should not be permitted to develop. So, too, I think that this language, or whatever language may be substituted for it, should be accompanied by a phrase which, according to my research, was annexed to a comparable proposed amendment to the Judicial Article in 1909. That is the clause or the paragraph which closed with these words, "saving, however, the right of trial by jury." I think some consideration should be given to that. The reasons which prompted its inclusion in 1909 are, I think, still good today.

In Section IV, paragraph 4, we come to the prerogative writs. I think we have heard this afternoon from a man, Mr. Hannoch, who, in my humble opinion, is probably the best versed on the subject of these troublesome writs among the entire bar of the State of New Jersey. I think that what he has said is entitled to be given great weight by this Committee.

There is just one suggestion which I would offer with reference to this paragraph. I think the choice of the words "prerogative writs" is a bad one. I assume that the evil sought to be cured is the great uncertainty and the unsatisfactory situation with reference to the writs of certiorari, quo warranto and mandamus. However, the term "prerogative writs" also include those two practically nonexistent and apparently never granted writs, in the State of New Jersey at least, of procedendo and prohibition. We may, perhaps, forget about those because they are practically extinct. However, there is not a law dictionary or an encyclopedia which does not define the term "prerogative writs" to include the five writs I have just mentioned, as well as the writ of habeas corpus. Now, by keep-

ing this language "prerogative writs," you might cause a conflict with some other provision of the Constitution respecting the writ of habeas corpus. I think any question or any doubt which the use of this language may lead to should now be resolved in writing. We talk of the writ of habeas corpus. Although it is a prerogative writ, it has so many incidental and, I might say, ancillary uses not comparable to any of the other writs that we must be very careful not to confuse the right to the writ of habeas corpus.

Section V, paragraph 1, provides a seven-day notice to the public of the intention of the Governor to appoint a jurist. I doubt, first of all, whether such a provision belongs in the Constitution, and secondly, what benefit, if any, may flow therefrom. I think, to be practical, we have to assume that the average Governor, in appointing the average jurist, does not send in to the Senate the name of the lucky candidate unless he feels quite certain that he has enough votes in the Senate for confirmation. Public notice under those circumstances, it seems to me, would just be a vain gesture. I think it also assumes something which we have no right to assume. I dare say that in the last 20 years, which is as far back as my recollection goes, I don't know of any Governor who has had the temerity to submit to the State Senate the name of a judge for confirmation—that is, a judge of the upper courts—where the man nominated was not qualified to be confirmed and to hold the office. I think we might forget all about this public notice matter and leave it to our Governors who thus far have, I think, made very excellent choices.

Section V, paragraph 2, provides that the Justices of the Supreme and the General Courts shall, before appointment, have been admitted to practice before the highest court of this State. I think "the highest court of this State" is an unnecessary expression. Eventually, let us say in about 10 years, it will definitely be settled that the highest court in this State is the new Supreme Court. Why not say that, and in order to serve the purpose which I think this particular paragraph is intended to serve, namely, to permit, at the present time and until the new Supreme Court is a ten-year-old court, the appointment of men who are now admitted to practice before the Court of Errors and Appeals and who, I assume, will be admitted to practice before the new Supreme Court by reason of that fact. Permit them to tack their years of admission before the Court of Errors and Appeals to the years of admission before the new Supreme Court. In 1959 this phrase will be ambiguous, and I think it ought to come out. You can straighten out your difficulty in the Schedule.

Section V, paragraph 3: It seems to me that there ought to be some objection, I think, on the part of the bar generally and the public as well—and the judges, too—to a constitutional provision

which permits a judge to be appointed to the highest court of this State and then obtain what amounts, in effect, to life tenure or tenure during good behavior, whereas a judge in the General Court must first serve an apprenticeship of seven years, with no guarantee of being reappointed, before he may have the benefit of the life tenure provision. The public generally laughs when lawyers say that a man is making a great sacrifice by assuming a judicial office. That, of course, isn't funny at all and it isn't untrue. The majority of our judges, I am quite sure, if they remained in the private practice rather than ascending the bench, could certainly make as much money in the private practice as they receive from the State and, in my judgment, a great deal more. They are making a sacrifice when they give up their private practice. We want the best lawyers to become our judges. If we are to give life tenure —if that is to be the decision—I think it should apply not only to the judges of the highest court but also to the judges in the court of statewide jurisdiction. I think that the principle that is to be applied in the highest court should be applied to the intermediate court.

Enough has been said about the retirement of judges at the age of 70 to permit me to omit the comment I intended to make. However, it seems to me that we are placing a little too much faith in our future Legislatures by leaving to them the matter of judicial pension. I think that is one of the things a man is entitled to. When he is asked to make the choice of giving up his practice and taking judicial office, he not only has a right to feel that he is going to stay on the bench but he also has a right to know that after having given those years of service to the State, at a very real financial sacrifice to himself and his family, he will not in his old age be exposed to the whims of the then-existing Legislature as to what his pension will be. I think the Constitution should provide for half-pay, or something like that.

Section V, paragraph 4: Personally, I am opposed to any method of removal except by way of impeachment. However, the world is moving along and there seems to be a firm body of opinion in the profession, as well as out of it, that impeachment is too cumbersome and impractical in many cases and that some other system should be tried. Well, if that is so, I suppose the federal system which has been in practice for some years on the issue of good behavior and which has been adopted by other states, might be the thing for us to adopt.

In connection with that, we come to Section V, paragraph 5, which to my mind contains a provision which could be deleted *in toto*. It seems to me that the Governor should not be permitted to have any hand in the removal of a judge, particularly by way of a commission appointed by the Governor. To get practical

again, it is quite apparent, let us say, that if for political reasons a judge becomes distasteful to a Governor—and it isn't too long ago when we read in the public prints of a Governor criticizing rather vehemently the decision handed down by our highest court —under such a circumstance it would be a simple matter for an unscrupulous Governor, for unscrupulous he would have to be and very well could be, to appoint three commissioners who, I think we have a right to assume, would bring about the result the Governor desires. They would report the judge as being incapable of continuing in his office, and he would be out. I think that the method of trying him on the issue of good behavior is much more preferable to this system. In fact I think this system is very vicious and very dangerous and that no judge should be subject to being ousted under such a set-up.

Section V, paragraph 6, says that no judge may practice law or engage in any other "gainful pursuit." Well now, "gainful pursuit" is rather vague. I think that we mean to say that after appointment to the bench, he may not hold any office, position or employment, either public or private. I think that if we said that there would be no room for doubt as to what we meant. The principle, of course, is a highly salutary one.

Section V, paragraph 7: I think this paragraph could be improved by adding to it a proviso that a judge shall not become disqualified from holding a judicial office by reason of his having been a delegate to a constitutional convention, be that a state or federal convention. I think that we all have to admit that this particular Convention would have been greatly benefited if it weren't felt necessary for the Chief Justice, the Chancellor, Mr. Justice Heher, as well as many other judges of the other courts, feeling that they were ineligible to serve. If I may, I would like again to refer to New York which has clearly stated in its constitution that a judge may serve as a constitutional delegate. I think we should say so, too.

Section VI, paragraph 1: I think this is something I have mentioned before. I think you are putting additional duties upon the shoulders of judges who shouldn't have them. I don't think, either, that our courts need an Administrative Director. I don't know what real function he could perform except, perhaps, to compile statistics. Now, statistics with relation to lawsuits don't prove very much, because there are cases which take but an exceedingly short time to try and require hours and days, if not weeks, of intense effort on the part of the judge to decide. The contrary is also true. One case is not comparable to another, and the mere compilation of statistics wouldn't serve any useful purpose.

If we are to have an Administrative Director, however, the questions that are raised in my mind are: Should he be required to be

a lawyer? Offhand, I would say yes. If so, should he also be required to have a background of experience, for example, ten years of admission to practice before the highest court as we require of our judges? If he isn't to be a lawyer, just how much authority or what authority should he have over judicial officers?

Section VI, paragraph 2: It seems to me that the untrammelled power of assignment over the judges would really destroy what I believe to be the purpose of Section III, paragraph 3, which is to keep separate, as separate divisions, the Chancery Division and the Law Division. I don't think there is anything I need add to what has already been said here by other witnesses before your Committee about the necessity for specialization and the advantages of specialization. I think the untrammelled power of transfer should not be in the Constitution.

Section VI, paragraph 4, provides that the clerks of the two principal courts should be appointed by those courts. I think that that is not a good idea. Those clerks are ministerial officers. The heads of the court or the members of the court don't place upon those clerks any great reliance or personal responsibility in connection with the judicial side of the operation of the courts. They are functionaries. I think the spirit of our present Constitution and of the new one will be to separate the powers between the departments, and if the appointive power is essentially an executive power, I think the appointive power should not be put in the hands of the courts as you have done in paragraph 4.

Now, coming to the Schedule,—I don't believe that any great benefit can be had from a present discussion of the Schedule since, after hearing the many suggestions which have been advanced here, this Committee undoubtedly will make some changes in the body of the Article. Depending on those changes, accompanying changes will be required in the Schedule.

There is only one word of caution, and I think, perhaps, that it may be unnecessary. Insofar as the Schedule is concerned, the greatest of care will have to be taken in the transfer of the jurisdictions of the existing courts to those new courts which are to be created under this Article. If the proper attention is given to that, the other matters of the Schedule are more or less items of mechanics.

Just a concluding word on the Schedule. I do want to voice my approval of the stand taken by many other witnesses here that the Schedule should not arbitrarily compel the retirement of any present judges who have already, or who by January 1, 1949, will have passed the retirement age. I think that at the very least, as was suggested, they should be permitted to serve out their present terms. I don't know whether or not this Committee has done so, but I think if it hasn't it should give some consideration to the

pension rights of the presently serving judges who may be affected by the age limitation set in the Schedule. I think in justice to that group, and their identity is rather easily ascertainable, none of them should have their pension rights jeopardized by reason of an arbitrary removal on January 1, 1949. Some consideration should be given to that.

Now, and for just a few minutes more, I should like to give to the Committee my views for an alternate revision of the Judicial Article. It seems to me that there is no reason why we, or rather why this Committee and this Convention, cannot create a worthwhile judicial system merely by affecting a sensible modernization of the existing judicial structure. I would advance a proposal which, in the interest of both the bench and the bar, would preserve all that is worthwhile and time-tested.

This plan would obviate the necessity for both the judges and lawyers sort of going back to school to relearn the profession and redeveloping. It would, I think, simplify the court structure so that the ideal of helping a layman to understand it could be achieved. It would, in addition, preserve the physical value of our valuable precedents as they are now embodied in almost 300 printed volumes, and I think it would certainly obviate the need for a wholesale redrafting of our statute law. We all know, as was pointed out the other day by Dean Vanderbilt, that the 1937 revision of our statutes was the result of 12 years' intense effort and cost the State well over a million dollars. I don't think we have the time or the money to do that again. A simple revision of our present Judicial Article, I think, somewhat along these lines would obviate the necessity for all these objectionable features.

First, I believe that we are all agreed that the present Court of Errors and Appeals could be reduced in size and could be made a separate appellate court, the judges of which would have no other duty. Such a court could consist of a chief judge and six associate judges, all of whom, of course, would have to be lawyers ten years or twenty years, or whatever the limitation would be—experienced lawyers. And I think that the court should retain its present jurisdiction. Additional jurisdiction might be given, or some reasonable limitation might be placed upon the present jurisdiction.

Secondly, I think that the Court of Chancery should be retained as a separate court, presided over by the Chancellor, to the jurisdiction of which there should be added the present jurisdiction of the Prerogative Court. As to the method of appointing Vice-Chancellors, there is much to be said on both sides and I think that nothing that I could say would convince anybody. Everybody is quite partisan about it. That would be something which the Committee and Convention would have to decide, and the decision

would be made for all of us, lawyers as well as the public.

Thirdly, I think we could in this plan consolidate the present Supreme and Circuit Courts, making them one court which, in effect, they pretty much are today. We could permit this new court to divide itself into two parts, one of which would exercise the present appellate jurisdiction of the Supreme Court and thus give you your intermediate appellate court; and the other part could exercise the *nisi prius* jurisdiction of the present Supreme and Circuit Courts, including the granting of what we have loosely been calling prerogative writs. The Chief Justice of that court, which might very well continue to use the name Supreme Court, should have the power to determine who and how many of his Associate Justices are to sit in either part and for how long a time, and the arrangement would be quite flexible. I think it would give all the flexibility that could be desired.

Fourthly, I think we should consolidate the alleged separate courts of Common Pleas, Oyer and Terminer, Quarter Sessions, Special Sessions and Orphans' Court into what they really and actually are, one court. Whether we call it the Common Pleas Court of "X" County or the "X" County Court doesn't make very much difference. But that court, so unified, would exercise all of its present jurisdiction and such other jurisdiction, of course, as the Legislature might from time to time give to it.

It seems to me that such a plan, given here, of course, in broad outline, would retain not only the names but the jurisdictions generally as they now exist. From a practical standpoint, all of the *Law* and *Equity Reports* would still be adequate; they would be dealing with courts the names of which, the jurisdictions of which, the powers of which, the authority of which, are all very well settled today.

The lawyers and the judges, too, wouldn't have to learn this new system of jurisprudence all over again. Most important, I think, the public, who are the clients, wouldn't suffer any injuries to its general rights and property during the period of transition—and it will be a long one—while the bench and bar are attempting to find out what this completely new court system is and how it will function. A plan of this kind, I think, should satisfy everybody,—those who are looking for a change and those who are seeking to preserve so much of the *status quo* as can be preserved. It would effect a combination of the Chancery Court and the Prerogative Court, the Supreme Court and the Circuit, the Common Pleas and its assorted departments. My plan eliminates six courts. This plan would also provide for the carrying over of practically all the present judges, with perhaps the exception of the lay judges, and I think there is only one in that category now who is not a lawyer.

I want to thank you, lady and gentlemen, for your kindness. Be-

lieve me, I have attempted in all sincerity to point out what I believe are weaknesses in this Article and to suggest for your consideration some improvements.

VICE-CHAIRMAN: Thank you, Mr. Davis.

Anyone further who cares to be heard?

(Silence)

VICE-CHAIRMAN: I call this meeting closed.

(Adjournment)

APPENDIX

TO

PROCEEDINGS

OF THE

COMMITTEE

ON THE

JUDICIARY

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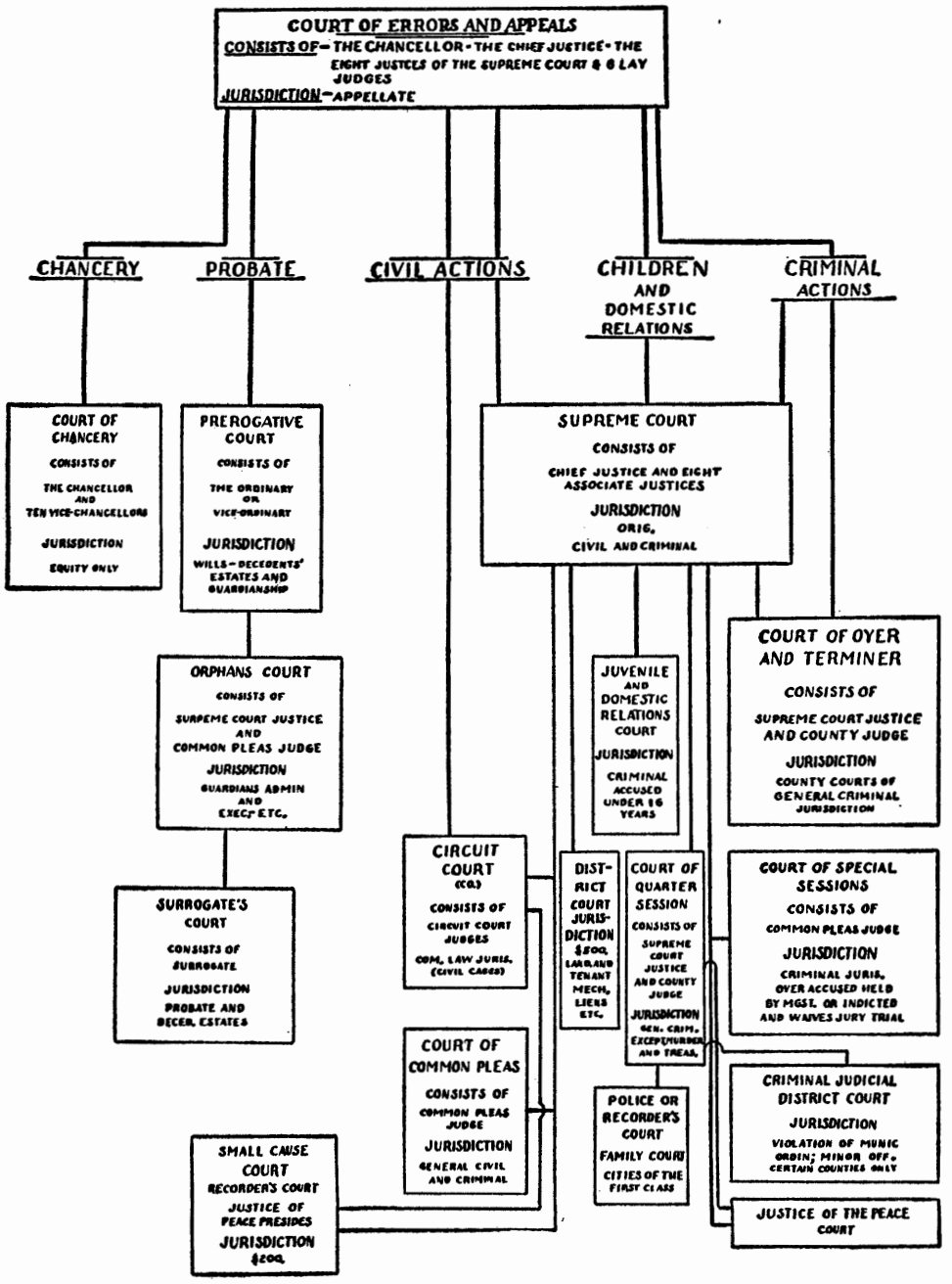

REPORT OF THE COMMISSION ON REVISION OF THE NEW JERSEY CONSTITUTION

(Submitted to the Governor, the Legislature and the People of New Jersey, May, 1942)

(EXCERPTS RELATING TO THE JUDICIAL ARTICLE)

SUMMARY AND EXPLANATION

* * * *

ARTICLE V

JUDICIAL

Summary:

1. The highest court in New Jersey shall be a Supreme Court, to be the appellate court of last resort and to replace the present Court of Errors and Appeals. The Supreme Court shall also make rules as to pleading, practice and evidence in all the courts.

2. The Supreme Court shall consist of a Chief Justice and six associate justices, to be appointed by the Governor with the advice and consent of the Senate.

3. There shall be a State-wide trial court of general jurisdiction in law and equity, to be known as the Superior Court. This court shall replace the present Supreme Court, Court of Chancery, Prerogative Court, Circuit Courts, orphans' courts, common pleas courts, courts of oyer and terminer, courts of special sessions and courts of quarter sessions.

4. The Superior Court shall have a total membership of not less than twenty-five justices, and shall hold sessions in each county.

5. Appeals shall be heard by appellate divisions of the Superior Court. Further appeals to the Supreme Court shall be taken in certain specified classes of cases.

6. Every controversy shall be completely determined by any justice before whom it is heard, and upon appeal the appellate court shall exercise all jurisdiction necessary to do full justice.

7. The Chief Justice shall be the responsible supervisory head of all the courts, and shall enforce rules of administration to be adopted by the Supreme Court.

8. The Chief Justice shall appoint an executive director of the courts who shall handle the business affairs of the courts.

9. The Chief Justice shall annually prepare a public report on the work of the courts.

10. The justices of the Supreme Court shall in the first instance be appointed by the Governor with the advice and consent of the Senate from among the Chief Justice, the Chancellor, the justices

of the Supreme Court, judges of the Court of Errors and Appeals who are counsellors-at-law of at least ten years' standing, Circuit Court judges and Vice-Chancellors. All of the foregoing members of the judiciary who are not appointed to the Supreme Court shall be justices of the Superior Court, each for the balance of his unexpired term. No member of the judiciary shall receive any increase or decrease in his salary by virtue of his transfer to the Superior Court.

11. All justices of the Superior Court shall be appointed for a term of seven years and, if reappointed, shall have tenure during good behavior.

12. All justices of the Supreme Court shall be chosen from among the justices of the Superior Court and shall have tenure during good behavior.

13. All members of the judiciary shall retire upon reaching the age of seventy years.

Explanation:

New Jersey has the most complicated scheme of courts existing in any English speaking state. These courts were modeled after the chief English courts of the period before the American Revolution. They were continued here first under the Constitution of 1776 and then under the Constitution of 1844. Indeed, the jurisdiction of these courts can only be ascertained even today by an historical inquiry into the jurisdiction before the Revolution of their predecessor courts in England. In England three-quarters of a century ago, and in nearly every other American State as well, the court structure was simplified into a simple system consisting generally of (1) a Supreme Court with appellate jurisdiction only, (2) a trial court of general jurisdiction with appellate divisions, and (3) lower courts of limited jurisdiction created by the Legislature with local or special jurisdiction. Of all the common law jurisdictions New Jersey alone has lagged, due to the difficulties of amendment under the present constitution, in simplifying its judicial system.

Due also to the same cause, New Jersey is the only common law State except Delaware in which the highest judges have a multiplicity of duties in different courts. Thus, the Chancellor is not only the Court of Chancery, and the Ordinary or Surrogate General, but he also is a member of and part of the time the presiding judge in the Court of Errors and Appeals, as well as a member of the Court of Pardons, as it is popularly called. The nine Supreme Court Justices are not only members of the Court of Errors and Appeals, but they also sit in the appellate terms of the Supreme Court three terms a year, and in addition thereto they have responsibilities of presiding justices in the courts of the twenty-one counties. The special judges of the Court of Errors and Appeals, popularly called "lay

judges," are not only judges of that court but members of the Court of Pardons, and in addition, they are permitted to practice law or engage in private business. That such multiplicity of function is unbusinesslike and results not only in diminution of judicial efficiency but delay in the disposition of the business of the courts is too obvious to require argument. Not only is a simplification of the judicial system essential; a simplification of the functions of each judge is needed.

The courts of New Jersey also suffer through the lack of a single responsible head. Thus, while the Chancellor is designated as the president judge of the Court of Errors and Appeals, because he is the Court of Chancery he cannot sit on appeals from his court. In such appeals, which comprise a substantial part of the work of that court, the court is presided over by the Chief Justice. Again, while the Chancellor has limited rights of supervision over the Vice-Chancellors and his Advisory Masters, he has no jurisdiction whatsoever over the numerous judges of the law courts. Neither has the Chief Justice, or even the entire Supreme Court for that matter, any substantial power of direction as to the work of the judges of the law courts. What is needed, therefore, to effect a businesslike administration of the courts is a single responsible executive head with competent administrative assistance. In this field the Federal courts with a Director of the Administrative Office of the United States Courts have set an example which the several States would do well to emulate.

Another matter in which the courts of New Jersey have lagged has been in the tradition of separate courts of law and equity, resulting frequently in resorting to two trial courts to dispose of a single controversy. Law and equity have long since been merged in every State except New Jersey and Delaware. In the United States courts under the Federal rules of civil procedure legal and equitable controversies are disposed of in a single case. A merger of law and equity in this State would tend to bring our practice in line with that of the Federal courts and other American jurisdictions.

A citizen when obliged to litigate is entitled to have his right to a speedy disposition of his case guaranteed by the constitution. The present constitution sets up no standards as to what constitutes a reasonable time within which to try a case or dispose of an appeal. There is no provision under the present constitution making it easy to send the judges where they are most necessary to relieve any congestion in litigation. Nor is there any provision for setting up temporarily appellate and trial courts when the work of either system of courts falls in arrears. Without the power in the Chief Justice to assign judges to areas where litigation is congested, and without any provision for setting up temporary special courts to meet emergen-

cies, a citizen's right to a speedy disposition of his case becomes recognized only in the breach.

The chief requirement of any judicial system is honest, independent, capable judges. The existence of such a bench depends in the first instance upon the appointing and confirming powers and more indirectly upon an alert and courageous bar and enlightened public opinion. Constitutional provisions with respect to the appointment and terms of judges may either help or hinder in the attainment of these paramount objectives. The elimination of short terms with the consequent fear of failure of reappointment would make judges more independent. The requirement of previous judicial experience for appointment to the high court will insure not only great care in the selection of trial judges, but will also guarantee the recognition of meritorious service on the bench.

The proposed constitution seeks to overcome these defects with reference to the judicial system by fundamental changes which have stood the test of time in other jurisdictions:

For a most complicated scheme of courts there is substituted (1) a Supreme Court of seven justices selected from among the judges of the Superior Court and appointed during good behavior with appellate jurisdiction only in capital cases and in cases involving the constitutionality of statutes, ordinances or administrative rulings, and cases that may be certified by an appellate division of the Superior Court to it, or certified by it from an appellate division, (2) a Superior Court of general trial jurisdiction with judges appointed first for a term of seven years and if reappointed with tenure during good behavior, this court being divided into a law section with civil, criminal and matrimonial jurisdiction, and an equity and probate section exercising all other jurisdictions, each section having an appellate division of three justices to which an appeal from any decision may be taken as of right, and (3) lower courts of limited jurisdiction such as the district courts and the recorder's courts, which continue to be within the control of the Legislature but which may be integrated with the Superior Court by appropriate legislation.

The Chief Justice is given the power to assign the justices of the Superior Court annually to the end that each judge may be delegated to the type of work for which he is best fitted by temperament and training. In this manner all of the advantages of judges with specialized training are retained without the disadvantages of a cumbersome scheme of courts. Each judge will function in but one court at one time.

The Supreme Court is given complete power (and responsibility) with respect to making rules as to administration, pleading, practice and evidence in all of the courts of the State.

The Chief Justice is made the administrative head of all of the

courts and empowered to supervise their work. He is authorized to appoint an executive director of the courts to serve at his pleasure. This executive director shall assist the Chief Justice in all matters of the administration and personnel of the courts, publishing annually a statistical record of judicial services prescribing reports and audits for all the courts.

If the Supreme Court fails to hear any case within two months after an appeal is perfected, or fails to decide any case within two months after it has been argued or submitted, the Chief Justice is required to certify that fact to the Governor and the Governor may appoint a special term of the Supreme Court from among the justices of the Superior Court to act until the congestion of cases has been overcome. Under the same conditions the Chief Justice may request the Governor to appoint a special term of the Superior Court for temporary service not to exceed one year.

On December 1st of each year the Chief Justice shall file with the Governor and Legislature a report of the work of the courts for the preceding court year. This public document will be the accounting of the courts to the people of the State.

No effort has been spared to simplify the judicial system, to avoid conflicting judicial duties, to provide a responsible head, to insure the selection of experienced and independent judges, and to provide for speedy trials and prompt appeals.

TEXT OF PROPOSED REVISED CONSTITUTION

* * * *

ARTICLE V

JUDICIAL

SECTION 1

Judicial Power

1. The judicial power shall be vested in a Supreme Court and a Superior Court, and in inferior courts of original jurisdiction which may from time to time be established, altered and abolished by law. Such inferior courts may be integrated with the Superior Court in any manner and to any extent, not inconsistent with this constitution, as may be provided by law.

2. In all matters in which there is any conflict or variance between equity and common law, equity shall prevail, and subject to rules of the Supreme Court every controversy shall be fully determined by the justice hearing it.

3. The Supreme Court shall sit at the State Capitol and the Superior Court shall sit in each county. The Supreme Court and appellate divisions of the Superior Court shall hold at least ten monthly

terms each year, and all trial courts shall hold such terms as may be fixed by rules of the Supreme Court.

SECTION II

Supreme Court

1. The Supreme Court shall consist of a Chief Justice and six associate justices. Five members of the court shall constitute a quorum. The presiding justice of the court shall designate a justice of the Superior Court to serve temporarily when necessary to constitute a quorum.

2. The Supreme Court shall exercise appellate jurisdiction in the last resort in all causes subject to the limitations imposed by this constitution. The court may, upon leave granted by a justice thereof, review any indictment before trial by certiorari. The court shall also have jurisdiction of the admission and discipline of attorneys and counsellors.

3. The Supreme Court shall make rules as to the administration of all of the courts, and, subject to law, as to pleading, practice and evidence in all the courts.

SECTION III

Superior Court

1. The Superior Court shall consist of such number of justices as may be authorized by law, but not less than twenty-five, each of whom may exercise the powers of the court, subject to rules of the Supreme Court. The Superior Court shall have original general jurisdiction throughout the State in all cases.

2. The Superior Court shall be divided into a law section, to exercise civil, criminal, and matrimonial jurisdiction, and an equity and probate section, to exercise all other jurisdiction of the court, each section having such parts as may be provided by rules of the Supreme Court.

3. Any justice of the Superior Court may grant prerogative writs, returnable in an appellate division which shall otherwise have original jurisdiction relating thereto, and shall determine in such manner as the rules of the Supreme Court may prescribe, and without a jury, questions of fact arising therein; or the hearing may be in the first instance before a single justice, whose decision, both as to law and fact, shall be reviewable by the appellate division.

SECTION IV

Appeals and Appellate Divisions

1. There shall be established in the Superior Court at least two appellate divisions. Each appellate division shall consist of three justices of the Superior Court designated by rules of the Supreme Court who shall hear appeals from designated sections of the Su-

perior Court and such additional appeals from inferior courts as may be provided by law. Such justices shall be annually assigned for that purpose by the Chief Justice of the Supreme Court.

2. An appeal to an appellate division may be taken as a matter of right from any order of the Superior Court. Appeals in cases involving restraints or the appointment of receivers shall, in whatever court pending, be preferred as to argument and disposition.

3. Judgments and orders of an appellate division shall be final, subject to an appeal to the Supreme Court. Appeals to the Supreme Court may be taken only:

(1) In capital cases and cases involving a constitutional question, which appeals shall be taken directly to the Supreme Court and shall be preferred as to argument and disposition;

(2) In the event of a dissenting opinion in an appellate division;

(3) On certification of an appellate division; or,

(4) On certification by the Supreme Court to any court.

4. The appellate courts, in addition to considering questions of law, may also set aside judgments, wholly or in part, where the finding of fact is against the weight of the evidence, or the verdict is excessive or inadequate. The appellate courts may exercise such original jurisdiction as may be incident to the complete determination of the controversy.

SECTION V

Judicial Officers

1. The Governor shall nominate and appoint, by and with the advice and consent of the Senate, the Chief Justice and associate justices of the Supreme Court, the justices of the Superior Court, and the judges of any inferior court with jurisdiction extending to more than one municipality. The Legislature shall provide by law for a uniform method of appointment of all other judges.

2. Each justice of the Supreme Court shall, prior to his appointment, have been a justice of the Superior Court for at least one year. Justices of the Superior Court shall, prior to their appointment have been counsellors at law in good standing for at least ten years.

3. The Chief Justice and associate justices of the Supreme Court shall be appointed to hold office during good behavior. Justices of the Superior Court shall hold office for a term of seven years and if reappointed shall thereafter hold office during good behavior. The issue of good behavior shall, with respect to justices of the Supreme Court, be triable by the Senate, and with respect to all other justices or judges of any court shall be triable by the Supreme Court. No justice or judge of any court shall continue in office after he has attained the age of seventy years.

4. Justices and judges of every court shall, at stated times, receive for their services such salary as may be provided by law, which shall not be diminished during the term of their appointment. They shall hold no other office or position of profit in the government of this State, or of the United States, nor of any instrumentality or political subdivision of either of them.

5. Any judge or justice of any court in this State who shall become a candidate for an elective office under authority of this State or of the United States shall thereby vacate his judicial office. The justices of the Supreme Court, of the Superior Court and such other judicial officers as may be provided by law shall not during their continuance in office engage in the practice of law or other gainful occupation.

6. A justice of the Superior Court may exercise the powers of a judge of any court established by law in the county or counties to which he may be assigned, and may hold any such court with like jurisdiction, powers and duties as a judge thereof.

SECTION VI

Administration

1. The Chief Justice of the Supreme Court shall be the administrative head of all the courts, and shall supervise their work. He shall appoint an executive director of the courts to serve at his pleasure. The executive director shall:

(1) Assist the Chief Justice in all matters related to the administration, finance and personnel of the courts;

(2) Publish annually a statistical record of the judicial services of all the courts, justices and judges in the State, and of the costs thereof;

(3) Prescribe records, reports and audits for the inferior courts;

(4) Have such other duties as may be delegated by the Chief Justice.

2. The Supreme Court shall appoint a court reporter and a clerk of the court, each of whom shall hold office at the pleasure of the court. Within each county, respectively, the county clerks and, as to probate matters, the surrogates, shall be clerks of the Superior Court.

3. The Chief Justice of the Supreme Court shall annually assign justices of the Superior Court to counties, divisions, sections or parts thereof, and may from time to time transfer justices from one assignment to another as need appears.

4. Whenever the Supreme Court fails to hear any case within two months after an appeal therein is perfected or fails to decide any case within two months after it has been argued or submitted, the Chief Justice shall certify that fact to the Governor. The Governor may thereupon appoint a special term of the Supreme Court, from

among the justices of the Superior Court, to exercise concurrently the jurisdiction of the court until the delay is cured.

5. Special judges may, upon request of the Chief Justice, be nominated and appointed by the Governor, by and with the advice and consent of the Senate, for temporary service not exceeding one year whenever and so long as any court fails to try or hear any case within two months after notice of trial has been filed or an appeal therein perfected, or fails to decide any case within two months after it has been argued or submitted. Such special judges may exercise all the powers and shall have all of the duties of a justice or judge of the court to which they are appointed.

6. On or before December first in each year the Chief Justice shall file with the Governor and the Legislature a report of the work of the courts during the year ending September first next preceding.

ARTICLE XI

SCHEDULE

* * * *

SECTION IV

Judicial

1. Immediately after the adoption of this constitution, the Governor shall nominate and appoint, by and with the advice and consent of the Senate, from the persons then holding the offices of Chancellor, Chief Justice, justices of the Supreme Court, such judges of the Court of Errors and Appeals as are counsellors at law of ten years' standing, vice-chancellors and Circuit Court judges, a Chief Justice and six associate justices of the new Supreme Court.

The remaining judicial officers above enumerated and the judges of the courts of common pleas shall constitute the justices of the new Superior Court, each for the unexpired period of his original term. If reappointed thereafter, any such justice shall have tenure during good behavior as provided in this constitution. Nothing in this section shall be construed, however, to permit any justice to continue in office after attaining the age of seventy years.

2. The compensation of any judicial officer as fixed by law immediately prior to his transfer by this constitution to either the new Supreme or Superior Courts shall not be increased or diminished during the term for which he was originally appointed. Common pleas judges shall be justices of the Superior Court for the remainder of the term for which they were originally appointed, at the same salary, with the same privileges, and assigned to the county from which they were appointed, and shall be eligible for reappointment on the same basis as all other Superior Court justices.

3. All causes pending in the Court of Errors and Appeals shall be transferred to the new Supreme Court. All other causes pending on

appeal and all pending causes involving prerogative writs shall be transferred to the appellate division of the Superior Court. All causes pending in any other county or State courts, which are superseded, shall be transferred to the Superior Court.

4. All property, funds, records, files, books, papers and documents of the Court of Errors and Appeals, of the Prerogative Court, of the Court of Chancery and of the Supreme Court or in custody of any of these courts, shall be turned over by their respective clerks to the clerk of the new Supreme Court, who shall dispose of them as the court may by rule direct.

5. The circuit courts, courts of common pleas, oyer and terminer, quarter sessions, special sessions and the orphans' courts are superseded, and all their jurisdiction, functions, powers and duties are transferred to the Superior Court. Causes pending in such superseded courts shall be heard in the Superior Court sitting in the same county. All property, funds, records, files, books, papers and documents of the orphans' courts, or in custody thereof, shall be turned over by their respective clerks to the clerk of the Superior Court in their respective counties.

6. All the functions, powers and duties conferred by statute or rule upon justices and judges of courts superseded by this constitution, to the extent that such functions, powers and duties are not inconsistent herewith, are hereby transferred to and may be exercised by justices of the Superior Court until otherwise provided by law or rule of court.

7. Appropriations made by law for judicial expenditures during the fiscal year 1942-1943 may be transferred to similar objects and purposes required by the judicial article. Restrictions upon supplemental appropriations contained in this constitution shall not apply to any appropriations which may be required to finance the new judicial system prior to the fiscal year 1943-1944.

8. Article V shall take effect on the first day of July, one thousand nine hundred and forty-three, except that any provision of this constitution which may require any act to be done prior thereto or in preparation therefor shall take effect immediately upon its adoption.

PROPOSED REVISED CONSTITUTION OF 1944

(Agreed upon by the 168th Legislature and submitted to the electorate on November 7, 1944, and defeated)

(EXCERPTS RELATING TO THE JUDICIAL ARTICLE)

* * * *

ARTICLE V

JUDICIAL

SECTION I

1. The judicial power shall be vested in a Supreme Court and in a Superior Court and in inferior courts of original limited jurisdiction, which inferior courts may from time to time be established, altered and abolished by law. Such inferior courts may be integrated with the Superior Court in any manner and to any extent, not inconsistent with this Constitution, as may be provided by law.

2. In all matters in which there is any conflict or variance between equity and common law, equity shall prevail and, subject to rules of the Supreme Court, every controversy shall be fully determined by the court or justice hearing it.

3. The Supreme Court shall sit at the seat of the State Government and the Superior Court shall sit in each county except the appellate divisions thereof which shall sit at the seat of the State Government and at such other places as the Chief Justice of the Supreme Court may designate.

4. The Supreme Court and the appellate divisions of the Superior Court shall hold continuous yearly terms, and the sections of the Superior Court shall hold such terms as may be fixed by rules of the Supreme Court.

SECTION II

1. The Supreme Court shall consist of seven justices, namely: one Chief Justice and six Associate Justices. Five members of the court shall constitute a quorum. The Chief Justice or, in his absence, the justice of the court presiding as provided by law shall designate a justice or justices of the Superior Court to serve temporarily when necessary to constitute a quorum.

2. The Supreme Court shall exercise appellate jurisdiction in the last resort in all cases designated in this Constitution. The court may, by certiorari allowed by the court or any justice thereof, review any indictment, before trial, according to law. The court shall also have jurisdiction of the admission to the practice of law and the discipline of persons admitted.

3. The Supreme Court shall make rules governing the administration of all of the courts in this State. It shall have power, also, to make rules as to pleading, practice and evidence, which may be

applicable to all of the courts in this State, and which shall have the force of law unless changed or abrogated by law.

SECTION III

1. The Superior Court shall consist of such number of justices as may be authorized by law, but not less than twenty-seven, each of whom may exercise the original jurisdiction of the court subject to rules of the Supreme Court. There shall be at least one Resident Justice of the Superior Court for each county who shall be appointed from the residents of the county and who shall reside in, and shall annually be assigned by the Chief Justice to sit in the law section of the Superior Court in said county, but who shall be subject to assignment, from time to time, to sit without the county, only, if and when his duties within the county shall not require his presence there.

2. The Superior Court shall have original general jurisdiction throughout the State in all cases.

3. The Superior Court shall be divided into

(1) a law section, to exercise civil and criminal jurisdiction at law; and matrimonial jurisdiction and jurisdiction in cases involving the allowance of alimony and maintenance and the custody of children, without jury trial; and

(2) an equity and probate section, to exercise all other jurisdiction of the court,

but either section shall exercise the jurisdiction of the other when the ends of justice so require. Each section of the Superior Court shall have such parts as may be provided by rules of the Supreme Court.

4. Any Justice of the Superior Court or an appellate division thereof may allow prerogative writs returnable in an appellate division which shall determine, in such manner as the rules of the Supreme Court may prescribe, and without a jury, questions of fact arising therein; or, when so prescribed by rules of the Supreme Court, the hearing may be in the first instance before a single justice, whose determination, both as to law and fact, shall be reviewable by an appellate division. On an application for any prerogative writ, the appellate division or the Justice of the Superior Court shall allow such writ as the case shall warrant.

SECTION IV

1. There shall be established in the Superior Court two or more appellate divisions as prescribed by rules of the Supreme Court. Each such appellate division shall consist of three Justices of the Superior Court who shall be assigned for that purpose by the Chief Justice of the Supreme Court and shall sit therein, solely, for three years. There may be established in the Superior Court, by rules of the Supreme Court, temporary appellate divisions as need appears.

Each appellate division shall hear appeals from sections of the Superior Court designated by the rules of the Supreme Court. Appeals from the inferior courts shall be heard by an appellate division or in one of the sections of the Superior Court, as may be provided by law.

2. An appeal to an appellate division may be taken from any final order, judgment or decree of the Superior Court as a matter of right and from any preliminary or interlocutory order of the Superior Court when so provided by law. Appeals in cases involving restraints or the appointment of receivers shall, in whatever court pending, be preferred as to argument and disposition.

3. Appeals to the Supreme Court from any court may be taken only:

(1) In capital cases and cases involving a question arising under the Constitution of the United States or of this State, which appeals shall be taken directly to the Supreme Court and shall be preferred as to argument and disposition;

(2) In the event of a dissent in an appellate division;

(3) On certification by an appellate division; or

(4) On certification by the Supreme Court to any court.

In all other cases judgments and orders of an appellate division shall be final.

4. The Supreme Court and the appellate divisions of the Superior Court, in addition to their other powers, may set aside judgments at law, wholly or in part, where the finding of fact is against the weight of evidence or the verdict excessive or inadequate, and may affirm, reverse or modify orders, judgments or decrees in all cases and make final determination thereof, and exercise such original jurisdiction as may be incident to the final determination thereof, unless the ends of justice or the right of trial by jury shall require that a new trial or hearing be ordered.

SECTION V

1. The Governor shall nominate and appoint, by and with the advice and consent of the Senate, the Chief Justice and Associate Justices of the Supreme Court, the Justices of the Superior Court and the judges of every court of inferior jurisdiction, except that judges of inferior courts of civil and criminal jurisdiction may be elected in, or appointed by the governing body of, any county or municipality of the State when so provided by law.

2. The Chief Justice and each Associate Justice of the Supreme Court and each Justice of the Superior Court shall, prior to his appointment, have been an attorney-at-law of this State in good standing for at least ten years.

3. The Justices of the Supreme Court shall be appointed to hold office during good behavior without limited terms except as to age

as provided in this Constitution. The Justices of the Superior Court shall hold office during good behavior for terms of seven years and if reappointed shall thereafter hold office during good behavior without limited terms except as to age as provided in this Constitution.

4. The Justices of the Supreme Court and the Justices of the Superior Court shall be liable to impeachment for misconduct in office during their continuance in office and for two years thereafter. The General Assembly shall have the sole power of impeaching a Justice of the Supreme Court or a Justice of the Superior Court by a vote of a majority of all the members. All such impeachments shall be tried by the Senate, and members, when sitting for that purpose, shall be on oath or affirmation "truly and impartially to try and determine the charge in question according to evidence;" and no person shall be convicted without the concurrence of a majority of all the members of the Senate. Any Justice of the Supreme Court or any Justice of the Superior Court impeached shall be suspended from exercising his office until his acquittal. Judgment in case of impeachment shall not extend further than to removal from office, and to disqualification to hold and enjoy any public office of honor, profit or trust in this State; but the person convicted shall nevertheless be liable to indictment, trial and punishment according to law.

5. No Justice of the Supreme Court or of the Superior Court shall continue in office after he has attained the age of seventy years; but, subject to law, he may be assigned by the Chief Justice to temporary service in the Supreme Court or in the Superior Court, as need appears.

6. The Chief Justice and the Associate Justices of the Supreme Court and the Justices of the Superior Court shall, at stated intervals, receive for their services such salaries as may be provided by law which shall not be diminished during the term of their appointment. They shall hold no other office, or position, of profit under the government of this State or of the United States or of any instrumentality or political subdivision of either of them. Any justice or judge of any court in this State who shall become a candidate for an elective public office shall thereby forfeit his judicial office. The Justices of the Supreme Court and of the Superior Court shall not, while in office, engage in the practice of law or other gainful occupation.

7. A Justice of the Superior Court may exercise the powers of a judge of any court established by law in the county or counties to which he may be assigned and may hold any such court with like jurisdiction, powers and duties as a judge therein.

8. Judges of inferior courts may be removed from office without impeachment and in such manner as may be provided by law.

SECTION VI

1. The Chief Justice of the Supreme Court shall be the administrative head of all of the courts in this State, and shall supervise their work. He shall appoint an executive director of the courts to serve at his pleasure.

2. The executive director shall:

(1) Assist the Chief Justice in all matters related to the administration, finance and personnel of the courts;

(2) Publish a statistical record of the judicial services of all the courts, justices and judges in the State, and of the cost thereof, at such times as shall be required by law;

(3) Prescribe records, reports and audits for the inferior courts;

(4) Have such other duties as may be delegated by the Chief Justice.

3. The Supreme Court shall appoint a Court Reporter, a Clerk of the Supreme Court, and a State Clerk of the Superior Court, each of whom shall hold office at the pleasure of the Supreme Court. The appointment of the Clerk of the Supreme Court and of the State Clerk of the Superior Court shall be made with the approval of the Governor.

4. The State Clerk of the Superior Court shall act as clerk of the appellate divisions and he, the county clerks and surrogates shall be the clerks of the Superior Court and shall perform such duties as may be prescribed by rules of the Supreme Court subject to law.

5. Judgments may be docketed and notices of pendency of actions and other papers or documents may be filed or recorded in such offices, with such effect, and in such manner, as may be prescribed by law.

6. The Chief Justice, subject to the provisions of this Constitution, shall annually assign the Justices of the Superior Court to the counties and to the sections and the parts of the Superior Court, and may from time to time transfer Justices from one assignment to another, and make temporary assignments to the appellate divisions, as need appears.

7. Prior to each legislative session the Chief Justice shall file with the Governor and the Legislature a report of the work of the courts as provided by law.

* * * *

ARTICLE XI

SCHEDULE

* * * *

SECTION IV

1. On or before June first, one thousand nine hundred and forty-five, the Governor shall nominate and appoint, by and with the

advice and consent of the Senate, a Chief Justice and six Associate Justices of the new Supreme Court from among the persons then being the Chancellor, the Chief Justice, the Justices of the Supreme Court, such Judges of the Court of Errors and Appeals as are attorneys-at-law of this State of ten years' standing, the Vice-Chancellors, and the Circuit Court Judges. The remaining judicial officers above enumerated and the Judges of the Courts of Common Pleas in office when the Judicial Article of this Constitution takes effect shall constitute the Justices of the new Superior Court. The Chief Justice and each Associate Justice of the new Supreme Court so appointed and each Justice of the new Superior Court so constituted shall serve during good behavior for the period of his term as Chancellor, Chief Justice, Justice of the Supreme Court, Judge of the Court of Errors and Appeals, Vice-Chancellor, Circuit Court Judge, or Judge of the Court of Common Pleas, as the case may be, which remains unexpired at the time the Judicial Article of this Constitution takes effect notwithstanding that he may then have attained or may attain the age of seventy-five years within said period. The Chief Justice and each Associate Justice of the new Supreme Court, if he has not attained the age of seventy-five years at the time of the expiration of his said term, shall continue to serve during good behavior after the expiration of his said term without limited term, except that his term as Chief Justice or Associate Justice of the new Supreme Court shall terminate when he attains the age of seventy-five years. Any Justice of the Superior Court so constituted may be reappointed at the expiration of his said term if, then, he shall have been an attorney-at-law of this State in good standing for at least ten years and shall not have attained the age of seventy-five years, and, if reappointed, such Justice shall hold office during good behavior for a term of seven years, except as hereinafter provided. At the expiration of said term of seven years any such Justice of the Superior Court may again be reappointed if, then, he shall not have attained the age of seventy-five years, and, if so reappointed, such Justice shall hold office during good behavior without limited term except as to age as hereinafter provided. No such Justice of the Superior Court who has been reappointed shall continue in office after he has attained the age of seventy-five years.

2. The compensation of any of the judicial officers named in the preceding paragraph, who is transferred to the new Superior Court pursuant to this Article, as fixed by law immediately prior to his said transfer, shall not be increased or diminished while he is serving out the term for which he was appointed as such judicial officer, except that the compensation of any Judge of the Court of Errors and Appeals or of any Common Pleas Judge, who was not required by law to devote his entire time to his judicial duties, who is trans-

ferred to the Superior Court, may be increased, as may be provided by law.

3. The Chief Justice shall annually assign a Common Pleas Judge, who is transferred to the Superior Court in accordance with this Article, to act as Resident Justice of the Superior Court, in the manner required by this Constitution, for the county of which he was Common Pleas Judge, so long as there shall be a Justice of the Superior Court in office who, prior to the taking effect of the Judicial Article of this Constitution, was a Common Pleas Judge of said county or until another Justice of the Superior Court is designated as Resident Justice of the Superior Court for said county.

4. When the Judicial Article of this Constitution takes effect:

(a) All causes pending in the Court of Errors and Appeals shall be transferred to the new Supreme Court for determination;

(b) All causes pending on appeal in the present Supreme Court and in the Prerogative Court and all causes involving the Prerogative Writs shall be transferred to an appellate division of the Superior Court, to be designated by the Chief Justice;

(c) All causes pending in the present Supreme Court sitting at circuit shall be transferred to the law section of the Superior Court of the appropriate county; and all causes pending in the Court of Chancery and all other causes pending in the Prerogative Court shall be transferred to the equity and probate section of the Superior Court of the appropriate county; but all pleadings, papers and documents filed and to be filed and all orders, judgments and decrees made and entered and to be made and entered in any such cause shall be filed, and entered in, the office of the State Clerk of the Superior Court and shall have the same effect as though filed and entered in the office of the Clerk of the Court in which such cause was instituted; and

(d) All causes pending in any other county or State Courts, which are superseded by the taking effect of the Judicial Article of this Constitution, shall be transferred to the Superior Court.

(e) Causes shall be deemed to be pending for the purposes of this paragraph notwithstanding that a judgment or decree has been entered therein until the time limited for review has expired.

5. The files of all causes pending in the Court of Errors and Appeals shall be delivered by the Secretary of State to the Clerk of the new Supreme Court and the files of all causes pending in the present Supreme Court, in the Court of Chancery and the Prerogative Court shall be delivered by the Clerk of the Supreme Court, the Clerk in Chancery and the Register of the Prerogative Court, respectively, to the State Clerk of the Superior Court, and all other files, books, papers, records and documents and all property of the Court of Errors and Appeals, of the present Supreme Court, of the

Prerogative Court and of the Court of Chancery or in the custody of said Courts shall be disposed of as shall be provided by law.

6. The Court of Errors and Appeals, the present Supreme Court, the Court of Chancery and the Prerogative Court shall be abolished when the Judicial Article of this Constitution takes effect and all their jurisdiction, functions, powers and duties shall be transferred to and divided between the new Supreme Court and the Superior Court according as jurisdiction is vested in each of them under this Constitution.

7. The Circuit Courts, Courts of Common Pleas, Courts of Oyer and Terminer, Courts of Quarter Sessions, Courts of Special Sessions and the Orphans' Courts shall be abolished when the Judicial Article of this Constitution takes effect, and all their jurisdiction, functions, powers and duties shall be transferred to the Superior Court. Causes pending in such superseded Courts shall be heard in the Superior Court sitting in the same county.

8. From and after the taking effect of the Judicial Article of this Constitution, all the functions, powers and duties conferred by statute or rule upon the Chancellor, the Ordinary and the Justices and Judges of Courts abolished by this Constitution, to the extent that such functions, powers and duties are not inconsistent with this Constitution, shall be transferred to and may be exercised by Justices of the Superior Court until otherwise provided by law or rule of the Supreme Court; excepting that such statutory powers not related to the administration of justice as are then vested in any such judicial officers shall, after the Judicial Article of this Constitution takes effect and until otherwise provided by law, be transferred to and shall be exercised by the Chief Justice of the Supreme Court.

9. Upon the taking effect of the Judicial Article of this Constitution, the Clerk of the Supreme Court shall become the Clerk of the new Supreme Court and shall serve as such Clerk until the expiration of the term for which he was appointed as Clerk of the Supreme Court, and all employees of the Supreme Court as previously constituted, of the Clerk thereof and of the Chief Justice and the Justices thereof and of the Court of Errors and Appeals shall be transferred to appropriate similar positions with similar compensation and civil service status under the Clerk of the Supreme Court or the Supreme Court which shall be provided by law.

10. Upon the taking effect of the Judicial Article of this Constitution, the Clerk in Chancery shall become the State Clerk of the Superior Court and shall serve as such Clerk until the expiration of the term for which he was appointed as Clerk in Chancery, and all employees of the Clerk in Chancery, the Court of Chancery, the Chancellor and the several Vice-Chancellors shall be transferred to appropriate similar positions with similar compensation and civil

service status under the State Clerk of the Superior Court or the Superior Court which shall be provided by law.

11. Appropriations made by law for judicial expenditures during the fiscal year 1945-1946 may be transferred to similar objects and purposes required by the Judicial Article. Restrictions upon supplemental appropriations contained in this Constitution shall not apply to any appropriations which may be required to finance the new judicial system prior to the fiscal year 1946-1947.

12. The Judicial Article of this Constitution shall take effect on the first day of November, one thousand nine hundred and forty-five, except that any provision of this Constitution which may require any act to be done prior thereto or in preparation therefor shall take effect immediately upon its adoption.

NEW JERSEY COMMITTEE FOR CONSTITUTIONAL REVISION

Explanation of Draft of Proposed Judicial Article Recommended by the Committee[1]

This draft was prepared with a view to carrying out the recommendations of the New Jersey Committee for Constitutional Revision—particularly the recommendation that the unified constitutional court system should be made comprehensive by replacing all existing courts except municipal courts of strictly limited jurisdiction.

Since the Committee for Constitutional Revision has not undertaken to pass specifically on all of the details of a complete Judicial Article, it was necessary for us to use our own judgment in filling in the outline. This is a thorough revision of the draft that we submitted in 1944 which was an outgrowth of the Judiciary Articles in the draft proposed by the 1942 Commission on Revision of the New Jersey Constitution and in the draft submitted to public hearings by the Joint Committee of the 1944 Legislature. We have taken advantage of recommendations of the State Bar Association and other bodies. We have also, after a review of the literature and consultation with a number of lawyers and other students of the judicial process, written some additional features into the draft which we feel are consistent with the principles and objectives of the Committee for Constitutional Revision. This 1947 draft has benefitted greatly from the criticism and detailed suggestions of a number of persons, including Mr. Joseph Harrison and Mr. Harold Fisher of the New Jersey Bar, Professor Bennett Rich of Rutgers University and Mr. Frederick W. Killian of the New York Bar and the University of Pennsylvania, who have gone over the whole draft, and of Mr. Donald Howard of the Russell Sage Foundation who has given valuable advice on specific provisions.

As we see it, the distinctive features of this draft are as follows:

1. It provides for complete unification of the courts which are responsible for the application of state law.
2. It provides for a maximum of convenience to litigants and lawyers.
3. It provides for flexibility in organization and procedure needed to insure that the constitutional court system shall facilitate, not hinder judicial progress.
4. It makes for the maximum of independence on the part of the Judicial Department consistent with due responsibility of the members of that department to the public.
5. It is brief, seeking to safeguard essential features of a responsible Judicial Department without prescribing details better left to legislation, rule and custom.

[1] See page 26 for draft of Judicial Article proposed.

We shall now discuss briefly the reasoning behind the provisions designed to obtain these objectives:

1. *Complete Unification*

Any plan for the establishment of a unified court system fails of its full purpose if it fails to include the inferior courts. These courts conduct the great bulk of our judicial business, and some are notorious for the maladministration of justice. They represent a heterogeneous collection of minor tribunals, each functioning independently of any other court, each a law unto itself as to its conduct and procedure, each dispensing a different measure of justice, and each contributing to the general confusion of our judicial system. There is much more need for unification in our lower courts than in our upper courts. In the attached plan, there is an integrated Judicial Department consisting of a Supreme Court and a General Court, the inferior courts to be merged into appropriate sections of the General Court. (*Sec. I, par. 1*)

Unification of the criminal courts was recommended by the Judicial Council in its 1938 report. The special committee appointed by the Judicial Council, after an exhaustive study, suggested one criminal court for the State, pointing out that the collapse of our lower criminal courts is primarily due to the fact that they are not "independent judicial tribunals but a part of the police system" and as such they become political instrumentalities. The report discloses the crying need for a single state control over criminal matters.

Although the proposed general state court is given exclusive jurisdiction of all matters rising directly under state law, municipal home rule is preserved by providing that the Legislature may authorize municipalities to establish municipal tribunals with jurisdiction limited to matters involving local ordinances. Municipal courts would, however, be subject to supervision by the Chief Justice and the Supreme Court and any case could be transferred automatically to the General Court at the request of either party. (*Sec. III, par. 5*)

2. *Convenience*

In order to make the General Court readily available to all litigants in all parts of the State, the Chief Justice is empowered to set up offices of the court for the issuance, receiving and filing of papers. In order to provide speedy justice for accused persons, the clerks of these offices are empowered to receive complaints and admit to bail as allowed by rules of the Supreme Court. (*Sec. VI, par. 4*)

In order to provide a mobile court and an efficient court, the Chief Justice is empowered to assign judges to any part of the State where court session is needed. Thus the General Court can be made

more accessible to litigants, in many cases, than the various district and local courts now are. (*Sec. VI, par. 5*)

There is no reason why convenient sittings of the General Court for the trial of small causes and minor infractions of law cannot be held under such conditions and rules as to make what the English call the "low justice" even more accessible and less expensive than it is today. Cheap justice is all too often no justice at all. In some ways, the quality of justice dispensed in so-called minor matters is more important to society than that in the much smaller number of causes involving large sums or spectacular issues. The proposed draft is based on the proposition that the small case should be tried near at home, but that it is entitled to the services of just as competent a judge as any million-dollar action.

3. *Flexibility*

The division of the General Court into sections, departments, and special tribunals permits of specialization, expansion and contraction, while at the same time maintaining a singleness of responsibility and a consistency of procedure essential to efficiency and the proper administration of justice. For example, separate civil, criminal, juvenile and domestic relations, or other sections or departments may be set up, as many as necessary to carry on the judicial business of the State. When other sections are found to be necessary, the Supreme Court or the Legislature is given the power to create them.

In establishing these sections and determining the number of departments each section should have, the plans can be elastic enough to handle the heavy load of litigation in the larger urban centers, yet adjustable to the more simple demands of the sparsely populated districts. We have deliberately avoided any provision requiring the primary assignment of a single judge to a particular county to the extent that the business of the General Court will occupy his time, because we see no reason why the smaller counties should be deprived of the benefit of the specialized service that would be available in the larger counties.

Neither probate nor matrimonial jurisdiction is specifically mentioned, on the theory that it is undesirable to freeze any allocation or definition of these jurisdictions into the Constitution; but the equity section is made the residuary legatee of all jurisdiction that may at any time not be allocated to any other section. (*Sec. III, par. 3*)

In the matter of juvenile delinquency, the recognized treatment is by specially trained persons in a tribunal with jurisdiction limited to that field. The proposed draft makes it clear that the Supreme Court or the Legislature may provide for specially trained referees to assist the General Court. This plan of specialized training may

be applied to any section of the court, and to other matters: for example, to administrative adjudications. (*Sec. III, par. 4*)

It would be difficult to insure the presence on the bench of the General Court at all times of the right number of specialists in some of the newer fields. If it is considered certain that the Legislature and/or the court have the inherent power to provide for referees and fix their qualifications, this paragraph may be omitted; but there should be no doubt about it.

One of the advantages of the proposed system is that it may facilitate experiment to determine the better locus for certain administrative tribunals as between the Executive and Judicial Departments. Perhaps one reason why these tribunals have generally been located in the Executive rather than in the Judicial Department is the relative rigidity of the latter as to procedures, forms of action and qualifications and tenure of personnel, at the same time that there is not even the semblance of integration or responsible headship. Rigid traditional concepts of the nature and extent of "judicial power" naturally make one wonder if a new administrative "court" in the old system would be capable of the kind of growth and flexibility required for the development of a sound system of administrative law in action.

The proposed integrated court system, which permits a maximum of flexibility in the use of manpower and procedures, and provides for leadership and administrative responsibility through the Chief Justice and the executive director should enable the Judicial Department to play a much more creative role than it has in many years. Such judicial statesmanship would have a stimulating effect on the tone of the whole governmental system.

4. *Independence and Responsibility of the Judges*

The independence, responsibility and efficiency of the judicial branch depend on several constitutional factors, including the organization, administration, and powers of the courts; and the provisions concerning the selection, terms, retirement, removal, and compensation of the judges.

The necessary provisions for a real Judicial Department, with unified structure, adequate powers and provisions for administrative responsibility in the Chief Justice and the Supreme Court have already been discussed. We still have to consider the provisions concerning selection, tenure and removal. In the proper setting, either life tenure or long fixed terms following relatively short trial terms promote responsibility and efficiency, as well as independence.

The "proper setting" depends mainly on the manner of selecting and the procedure for removing judges. To provide this setting we propose a Judicial Council to assist the Governor in selecting judges, and alternative methods of removal.

(a) *Concerning the Selection of Judges.* Such a Judicial Council to assist the Governor in the selection of judicial nominees would go far toward removing judicial nominations from the close political control that now exists. At the present time, the selection of a jurist is in the hands of two partisan branches of the government, the legislative and the executive. We often hear complaints of the political complexion of some of our courts. A Judicial Council consisting of not more than nine members and representing the judiciary, the lay public and probably the organized bar would certainly include responsible and less partisan persons, peculiarly well qualified to pass upon desirable judicial material. (*Sec. V, par. 1*). We have purposely left some details of composition and organization of the Council to legislation, feeling that there should be leeway for experimentation.

Similar plans to mitigate partisanship in the selection of judges are in operation or under serious consideration in a number of states. The most noteworthy example is in Missouri, which adopted the so-called "non-partisan court plan" for nomination by a commission composed of representatives of the bench, bar and public in 1940, and defeated a partisan attempt to overthrow the system two years later. The St. Louis Bar Association received the American Bar Association award for its part in promoting this plan, which was based on proposals long under study by the American Judicature Society, the American Bar Association and the National Municipal League.

We propose initial terms of five years to enable a new appointee to demonstrate his fitness for a judicial career before he is given a long term as judge or justice. Whether short terms are followed by life tenure, or by long fixed terms, it is felt that reappointment of good judges on their records should definitely be the rule. We have therefore provided that the Judicial Council may, after public hearing, recommend reappointment of a justice or judge without submitting additional names. This procedure should have a salutary effect on the court and put a premium on merit rather than politics as the consideration for reappointment.

In order to place ultimate responsibility and to avoid protracted deadlocks, the Governor would be permitted in the last resort to nominate without regard to the proposals of the Judicial Council, provided he conveyed his own reasons and the comments of the Council to the Senate. We believe this would happen rarely, if ever. (*Sec. V, par. 2*)

(b) *Concerning Methods of Removal and Retirement* (*Sec. V, pars. 4 and 5*). Necessary concomitants of long terms are feasible removal and retirement procedures.

The failure of impeachment to serve its purpose is widely recog-

nized and has resulted in various schemes in different states. We propose alternative methods both for presenting charges and for trying them. Judges could be removed either by two-thirds of the Senate or by the Supreme Court. Proceedings could be initiated in either body on charges brought either by the Chief Justice, by the General Assembly, by the Judicial Council, or by the Governor, and the Senate would also be able to initiate charges in the Supreme Court.

The principal sources of these proposals are the present New York Constitution and a current proposal to amend the New York Constitution by providing for a Special Court on the Judiciary. (See concurrent resolution introduced by Mr. Reoux in the Assembly, Number 313, January 14, 1947.) We understand from the New York Citizens Union, one of the sponsors of the New York amendment, that they would have preferred to give the removal power to the Court of Appeals itself, but that the provision for the special court composed of the Chief Justice and the senior Associate Justice of the Court of Appeals and one Justice of the Appellate Division in each department was a compromise.

The present Constitution of New York provides both for impeachment and for removal of members of the Court of Appeals and of the Supreme Court by resolution of both houses concurred in by two-thirds of all members. Other judicial officers may be removed by two-thirds of the Senate on recommendation of the Governor.

Our provision for the preferring of charges by the Governor as well as by the legislative houses and the Judicial Council or the Chief Justice seems appropriate in view of the responsibility of the Governor for law enforcement and the knowledge that the Executive Department would have concerning the conduct of judges.

We see no reason for an elaborate statement of the grounds for removal in the Constitution. The New York Constitution simply states that removal shall be "for cause." We think the general expression, "conduct unbecoming a judge," may be better. It is certainly undesirable to use language that suggests that the judge must be guilty of something that would be recognized in an ordinary court of law as a crime.

The proposed provision for retirement of a justice or judge who has become incapacitated is based on the proposed New York amendment cited above. This is especially important if judges are to be given long terms. The same consideration requires inclusion of a provision for mandatory retirement at age 70, which we propose subject to possible recall to temporary service as need may appear.

5. *Form of the Judiciary Article*

We have tried to confine the proposed Article to fundamental matter needed to establish a truly independent Judicial Department

on a firm basis, without binding either the department or the Legislature so as to hamper adaptation of the judicial system to changing needs and concepts. We rejected the simple expedient of following the Federal Constitution in establishing only a Supreme Court and leaving the inferior courts to legislation. Experience in this and other states makes it very doubtful if a state legislature can be counted on to develop and maintain an integrated judicial structure comparable to that in the Federal Government. In a government based upon the separation of powers principle, we see no reason why the essential features of all three departments should not be laid down in the Constitution. To fail to do this invites the Legislature so to weaken the other two departments as to vitiate the principle of balance which alone makes the separation of powers system workable. If the Legislature is left free to create inferior courts outside the General Court, it will be subject to all sorts of local political demands for the creation of unnecessary courts not properly integrated with the judicial structure as a whole. We doubt very much if a real Judicial Department would ever be developed on the basis of law alone.

Admittedly, there are a few details in the proposed draft which are not absolutely necessary to the establishment of the kind of Judicial Department that we have in mind. For example, it is probably unnecessary to spell out in as much detail as we have the administrative provisions in Section 6. We think it best to do so, however, because the concept of responsible administration in an integrated Judical Department is novel in New Jersey and it is important that the Constitution itself should give some indication of its essential principles and workability.

The Bearing of These Proposals on the Balance of Power in the State Government as a Whole

We have already suggested that we anticipate that these proposals would have a salutary effect on the balance of power in the State Government as a whole.

One of the things about the proposed revision that, rightly or wrongly, disturbs many people is the probable enhancement of the power of the Governor. It is pointed out that the New Jersey Governor is unusual in having the power to nominate all judges. The power has been confided to the Governor, not because it is necessary to the discharge of his responsibilities as Chief Executive; but because we have felt that popular election, or appointment by the Legislature or by a self-perpetuating Judicial Department itself, would be worse. There can be no question, however, of the desirability on many grounds, of cutting down the possibilities for patronage and personal politics inherent in the power of the Governor and Senate to appoint judges. This would be accom-

plished in the proposed draft through the reduction in the *number* of *separate* appointments and the increase in the independence of appointees resulting from complete unification of the courts, with all judges appointed for full-time, long-term service; and through the check of the Judicial Council on any tendency of a Governor to nominate judges on a purely political or personal basis.

Note on the Schedule

We have not attempted to write a Schedule applying to the Judicial Department because that would depend in part upon decisions made on the rest of the Constitution, and a good deal of detail in the Schedule would flow necessarily from the content of the Article itself. We merely want to call attention to two points which we think it is important to bear in mind in writing the Schedule:

(1) It is important to avoid language such as is found in the Schedule of the present New Jersey Constitution which might be held to freeze existing jurisdictional concepts into the new court system. Presumably the Schedule would transfer the jurisdiction of the existing courts in toto to the Judicial Department, subject to immediate assignment according to the provisions of the Constitution and law or rule, and subject in general to future legislation.

(2) Care must be taken in providing for the placing of existing judges in the new court system to avoid any unnecessary political repercussions. This probably means that some place should be found for every judge to fill out his present term, with the possible exception of non-lawyer members of the Court of Errors and Appeals, who might be taken care of in some other way if necessary.

It is especially important to avoid the political error made in 1944 of providing that the Governor in office when the new Constitution takes effect shall name all of the members of the new Supreme Court for life terms. The 1944 draft was open to the charge that it gave the Governor a chance to "pack" the Supreme Court for years to come. Perhaps a still more serious objection to such a provision is that unless the Governor were careful to appoint men of a variety of ages, it might automatically result in a Supreme Court composed of men who would all retire about the same time, thus giving an occasional Governor many appointments and intervening Governors few or none. Of course, the partisan objections would be greatly mitigated by establishment of the Judicial Council, but the political objection of a higher order would still remain. The undesirability of bunching the appointment of a majority of the members of the Supreme Court of the United States in a short period has been demonstrated by recent history. We suggest, therefore, that no matter what terms may be given to Supreme Court Justices in the future, all initial appointments to the Supreme Court shall be to fill the unexpired terms of the persons appointed.

It should probably be observed at this point that the desirability of having a system which will more or less automatically result in fairly regular rather than bunched appointments argues strongly for two other provisions in our proposed draft: (1) the provision for retirement at age 70, and (2) the provision for fixed terms of 12 years rather than appointment for life.

—EVELYN SEUFERT
JOHN BEBOUT

July 3, 1947.

MEMORANDUM OF G. W. C. McCARTER, Esq.

To the Honorable, The Constitutional Convention:

Pursuant to the leave given by the Judiciary Committee the enclosed draft of a judiciary article is submitted with explanatory notes. The draft is in *italic* and the notes in plain type. The draft was prepared by a committee of the State Bar Association in 1944 and has been slightly modified by a majority of the Committee on Law Reform. The notes are in the language of the undersigned.

Respectfully submitted,

— G. W. C. McCarter

* * * * *

REVISED JUDICIAL ARTICLE NEW JERSEY CONSTITUTION AS PROPOSED IN 1944 BY STATE BAR ASSOCIATION COMMITTEE

SECTION I

General

1. The judicial power shall be vested in a Court of Appeals (1)[1]*, a Court for the Trial of Impeachments, a Supreme Court, and such courts inferior to the Supreme Court 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 (2).*

(1) For New Jersey this is a better name for the court of last resort than Supreme Court, which in this State has never been the highest court. So to name that court now would cause confusion between the "old" Supreme Court and the new one. To call the court of last resort the Supreme Court, instead of simplifying practice will complicate it. In citing decisions as authority it will be necessary to distinguish between decisions of the old Supreme Court and the new—and with no countervailing benefit to litigants. No confusion would result if the name of the court of last resort were shortened to "Court of Appeals," its name in the Constitution of 1776.

The suggestion that the inferior courts be described as of "limited jurisdiction" would be to invite litigation over whether or not a particular inferior court is of limited jurisdiction.

(2) The 1944 draft merged the county courts with the statewide court of general jurisdiction, called in that draft the Superior Court, which we hope will be called the Supreme Court. We feel

[1] The numbered references are to the notes in regular type following the italic type.

this should not be done by the Constitution, but should be left to the discretion of the Legislature to do or not to do, as in the view of the Legislature the public good shall from time to time require. The Constitution should not go into too much detail. The Convention should not try to play God. The difficulty in amending the Constitution of 1844 teaches us this. When the Constitution has established a court of last resort and a court of general jurisdiction it has done all it should by way of directly establishing courts. We do not see the necessity of continuing the Circuit Courts and the Courts of Common Pleas as separate tribunals, but the Legislature can deal with that. Needs change with the times. Indeed, they vary in different parts of the State. Those who live or practice law in the populous counties often do not know what is done in or best for the smaller counties, and vice versa. There is much to be said in favor of having important probate litigation handled by experts therein who would, so to speak, ride the circuit. There is also, however, much to be said in favor of having the run-of-mine probate litigation conducted by a judge who is always on hand in the county. Many duties, some quasi-administrative in nature, are imposed by law on the Courts of Common Pleas. We feel it should be for the Legislature to say whether those county courts should continue or whether such duties should be transferred to the new Supreme Court. We feel it should also be for the Legislature to say whether in some counties the local judge should be a part-time judge as at present. If all this is left fluid, the Legislature can deal with it as it sees fit from time to time. In each county there should be a local county judge, familiar with local personalities and conditions, with whom the Justice of the Supreme Court holding the circuit including that county can consult. The abortive 1944 draft tried to accomplish this by providing for a resident justice of the Superior Court (as it was therein called) in each county. In many counties either he would have too little to do to justify the salary of a Supreme Court Justice, or, if assigned to duties elsewhere, would in effect cease to be a resident judge. If there are advantages (not now apparent to us) in merging the county courts in the new Supreme Court, such advantages can be attained after the adoption of the new Constitution by legislative abolition of the county courts and the transfer of some or all of their jurisdiction to the new Supreme Court. If, after a try, that should prove unsatisfactory, the present system could, by action of the Legislature, be again restored. Consequently, the Common Pleas judges should not be frozen into the new Supreme Court.

SECTION II

The Court of Appeals

1. The Court of Appeals shall consist of the Chancellor, the

Chief Justice of the Supreme Court and five Justices of Appeal, or a major part of them.

2. The Court of Appeals shall be vested with all jurisdiction and power heretofore vested in the Court of Errors and Appeals, and such additional appellate jurisdiction as the Legislature may by general prospective act provide (3). The Legislature may by general prospective act empower the Court of Appeals to provide by rule that appeals be taken only by its leave (4). The Court of Appeals may by rule designate one or more of its members to pass on application for leave to appeal, applications to continue or dissolve restraints, or other interlocutory matters (5).

3. The Secretary of State shall be clerk of this court (6).

4. No member of the Court of Appeals who has given a judicial opinion in the cause in favor of or against any matter complained of shall sit as a member or have a voice on the hearing or for its affirmance or reversal, but the reasons for such opinion shall be assigned to the court in writing.

5. Whenever by reason of disability, disqualification or absence a majority of the Court of Appeals shall not be available, the Court of Appeals may temporarily assign one or more Justices of the Supreme Court to the Court of Appeals (7).

(3) This would enable the Legislature to make any order, judgment or decree appealable, both on the law and facts, and would forever abolish the present doctrine that some action of the Supreme Court is necessarily final and not subject to review, *e.g.*, decisions on the weight of the evidence and refusal of certain prerogative writs. The words "general prospective act" will prevent the conferring of special favor or short circuiting the Supreme Court in special cases.

(4) What is visualized here is a review by the Supreme Court of an inferior tribunal, judicial or administrative, on its record. In such a case why should the defeated litigant have the right in all cases to go further? The inclusion of the Legislature is to prevent the Court of Appeals from being so restrictive as to give its members a sinecure, and to give the elected representatives of the people a say as to what cases shall be considered by the court of last resort.

(5) This is to take care of situations arising in vacation.

(6) Maybe this does not belong in the Constitution.

(7) The assigning of a special judge to the Court of Appeals might cause the decision of that court to go one way or the other, depending upon who might be selected. That assignment job should therefore go to the whole court rather than to its presiding officer.

SECTION III

Court for the Trial of Impeachment

(as now)

SECTION IV

The Supreme Court

1. The Supreme Court shall consist of the Chancellor, the Chief Justice of the Supreme Court and thirty Associate Justices (8). The number of Associate Justices may be increased or decreased by law but shall never be less than twenty (9).

2. The Supreme Court shall be vested with all the jurisdiction and power heretofore vested by the Constitution in the Court of Chancery, the Chancellor, the Prerogative Court, the Ordinary or Surrogate General, the Supreme Court, and the Justices thereof (10).

3. For the more convenient dispatch of business the Supreme Court shall be organized in two divisions, the Chancery Division and the Law Division (11).

4. The Chancery Division shall, subject to the provisions hereof, exercise the jurisdiction heretofore vested in or capable of being exercised by the Court of Chancery, the Chancellor, the Prerogative Court and the Ordinary or Surrogate General. The Law Division shall exercise all the remaining jurisdiction of the Supreme Court as herein constituted (11).

5. The Chancery Division shall consist of the Chancellor and such number (12) of Associate Justices as shall be assigned thereto. The Law Division shall consist of the Chief Justice and such Associate Justices as shall not be assigned to the Chancery Division.

6. In both the Chancery and Law Divisions all appeals from inferior tribunals and such other matters as, subject to law, the rules of the Supreme Court may provide, shall be heard before three Justices sitting together, which bench of three Justices shall be called an Appellate Court. Subject to law, rules of the Supreme Court may provide that any judgment, decree or order of a single Justice may be reviewed by an Appellate Court (13).

7. Without prejudice to the provisions of this Constitution relating to the distribution of business in the Supreme Court, all jurisdiction vested in the Supreme Court shall belong to each division alike, and subject to the provisions hereof relative to Appellate Courts, may be exercised by a single Justice (11).

8. Subject to rules of the Supreme Court every controversy shall be fully determined by the Justice hearing it (11).

9. The Chancellor and the Chief Justice shall be appointed as such. Associate Justices of the Supreme Court shall be appointed to either the Chancery or Law Division and, subject to liability

to temporary assignment, shall remain for their terms of office assigned to the division to which they shall have been appointed. The Chancellor, the Chief Justice, and the Senior Justice of Appeal, or a majority of them, may temporarily assign Justices to a division other than that to which they have been appointed and, from time to time, re-assign them as the business of the court may require (14).

10. There shall be a Rules Commission, consisting of the Chancellor, the Chief Justice, the Senior Justice of Appeal, four Justices of the Supreme Court, two appointed by the Chancellor and two by the Chief Justice, and two counsellors-at-law appointed by the Governor (15). All such appointments shall be at the pleasure of the appointing power. The Rules Commission shall be convened and presided over by the Chancellor, or, in his absence or failure for any reason to act, by the Chief Justice. The Rules Commission shall makes rules for the assignment of any cause to the Chancery Division or the Law Division, the transfer of any cause or issue from the Law Division to the Chancery Division, from the Chancery Division to the Law Division, and from an inferior court to the Supreme Court and the appropriate division thereof; rules as to the administration of all the courts, and subject to law, as to pleading, practice and evidence in all causes, and rules as to all matters as to which by this Constitution rules of the Supreme Court may be made (16).

11. The Supreme Court shall appoint and remove the Clerk of the Supreme Court who shall hold office during its pleasure. Such Clerk shall succeed to the duties heretofore performed by the Clerk of the Supreme Court, Clerk in Chancery and Register of the Prerogative Court.

12. The Chancellor shall be administrative head of the Chancery Division, and the Chief Justice of the Law Division. As such they shall have power to assign the Justices of their respective divisions to specific duties and causes, and to prescribe records and reports from them and from inferior courts and judicial officers (17).

(8) The presence of both the Chancellor and Chief Justice on the Supreme Court as well as the Court of Appeals is because of their administrative functions. In the 1944 draft, where the Chief Justice had all the administrative power, he was called a member of the court of last resort only. Nevertheless he was in effect a member of every court in the State, given as he was such power and control over every court. Where the administrative responsibility is given it is well to confer the right to observe the workings of the court from the inside by occasionally sitting as a member thereof if desired. For a discussion on the retention of the Chancellor see note (14).

(9) The numbers of 30 and 20 are more or less arbitrary. The Chancellor, Vice-Chancellors, Chief Justice, Justices of the Supreme Court, specially appointed Judges of the Court of Errors, who now are counsellors-at-law of ten years' standing, and Circuit Court Judges, when all places are filled, total 31. It is not contemplated to freeze any Common Pleas judges into the Supreme Court. When the new court gets going the Legislature may, if it appears desirable, provide for the appointment of more Supreme Court Justices, and a reduction in the number of Common Pleas judges in counties having more than one.

(10) We would not seriously object to inserting in the first line of paragraph 2, right after "Court" the words "shall have general jurisdiction throughout the State in all cases, and." Certainly the words vesting the jurisdiction of the constituent courts should be in. Their jurisdiction has become well established and known to the law. To take a complete fresh start would invite litigation. Why take the chance? Surely the words in paragraph 2 as written leaves no jurisdiction whatsoever out. No jurisdictional gap exists. So why add the words above quoted?

(11) Paragraphs 3, 4, 7 and 8 of Section IV present different phases of the same problem which will be all dealt with together in this note.

The problem is to establish a unified court which can do full justice in any one cause and at the same time to provide that certain classes of cases shall be assigned to specialists. The problem is to divide litigation between the divisions on sensible functional grounds based on convenience rather than history, and yet to make sure that each Justice of the Supreme Court before whom a case comes has jurisdiction and power to decide the whole controversy. The problem is substantially the same as that which confronted the draftsmen of the English Judicature Acts. They succeeded so well that their language has been used as guide. By paragraph 3 the Supreme Court is divided into a Chancery Division and a Law Division. Note the words: "For the more convenient dispatch of business." They are taken from the English act, and show the purpose of the paragraph to be convenience rather than jurisdictional. Paragraph 4 says that the Chancery Division "shall exercise" the jurisdiction of the Court of Chancery and of the Prerogative Court, and the Law Division all the remaining jurisdiction of the new Supreme Court. It contains, however, the words, "subject to the provisions hereof." The language is not that the Chancery Division shall "have only" or "be vested with" the jurisdiction of present Chancery and the Prerogative Court, and the Law Division the rest. It is that "shall, subject to the provisions hereof, exercise" the jurisdiction. *Prima facie* a case which would now go to

Chancery or the Prerogative Court will go to the Chancery Division. If we turn to paragraph 7 we find that "Without prejudice to the provisions of this Constitution relative to the distribution of business in the Supreme Court, all jurisdiction vested in the Supreme Court shall belong to each division alike." That of course means that if in an ordinary action at law in the Law Division the defendant wishes to raise an equitable defense, which today he could raise only by filing a bill in Chancery for an injunction, he can present that defense as a defense in the Law Division where the trial judge would determine the whole controversy. Conversely, if in a cause assigned to the Chancery Division there arose a matter now determinable only upon a prerogative writ, the judge of the Chancery Division could decide that question along with the other questions in the cause and grant full relief.

(12) It might be well to provide here for a minimum number, say ten, the present number of Vice-Chancellors, in the Chancery Division.

(13) When you read this in connection with Section II, paragraph 2, as discussed in notes (3) and (4), you find appeals from tribunals inferior to the Supreme Court going before three Justices of the Supreme Court. By appeals we mean to include certiorari and writs of error. You also find that the Legislature may empower the Court of Appeals to review decisions of those appellate courts only by its leave. The Legislature may also provide for appeals from inferior tribunals direct to the Court of Appeals in such cases as it chooses. There will not have to be double appeals as of right, the way there are at present. The reviewability by an appellate court, as distinguished from the Court of Appeals, of any decision of a single Justice of the Supreme Court is left fluid, in the Legislature's hands.

(14) The permanent appointment of Justices to the Chancery Division and *vice versa* will assure specialists in each. A rotation of Justices between divisions has nothing to recommend it. Some judges excel in the kind of litigation to be expected in the Chancery Division and would not be much good presiding over a jury trial. On the other hand, any lawyer of experience has known judges who are conspicuously successful in handling juries, more so than some of their more scholarly colleagues. The field in either division is broad enough to prevent a judge assigned to either from becoming narrow-minded. The expertness needed is that in the day-to-day handling of cases under trial. The ultimate content of the law will be settled by the Court of Appeals.

Pressure of business of one division, or some other cause not now apparent, might make it advisable for a judge belonging to

one division to be assigned to the other temporarily—hence the provision to that end.

Essentially, the Chancellor is retained with the powers given because we believe that a more efficient administration of the courts can be had if not all administrative power is concentrated in one man as in the 1944 draft. The present Chancellor can tell you of the extent of his administrative labors which cover only Chancery and the Prerogative Court. The present Chief Justice can do the same. And the duties contemplated by the new Constitution will exceed the sum of the duties now imposed on both the Chancellor and Chief Justice. So we feel all administrative duties had better not be concentrated in one man. When we turn to paragraph 12 of the draft, we shall see that power and responsibility are sufficiently concentrated. If the Chancellor and Chief Justice cannot agree upon the temporary assignment of a Justice from one division to the other—probably the only matter when they might be expected to disagree—the senior Justice of Appeal is provided as an umpire.

(15) The Rules Commission here proposed is better than the Court of Appeals for that purpose. The judges of the court of last resort are apt to be off in an ivory tower and not as well qualified to deal with matters of procedure as a tribunal containing some members of the great court of original jurisdiction. On this ask any trial judge in equity or law. The inclusion of the two counsellors-at-law is designed to give the practicing bar, which must make the rules work for the benefit of their lay clients, something to say. All interests are represented. Nine do not make too large a quasi-legislature body.

(16) Something should be added here to make sure that the rules to be adopted shall supersede any existing practice, whether rule of court, statute or construction of the Constitution of 1844, *e.g.*, the prerogative writ problem.

(17) This has been so fully discussed in note (14) that all we shall say is that while an administrative director of the courts is desirable, he need not be a constitutional officer. All that need be in the Constitution is sufficient authority to compel reports, etc., from the constitutional judges. That is found in paragraph 12 of the draft.

SECTION V

Appointment, Tenure and Removal

1. The Chancellor, the Chief Justice, Justices of Appeal, and Justices of the Supreme Court shall be counsellors-at-law of ten years' standing. They shall be appointed by the Governor by and with the advice and consent of the Senate. The Justices of Appeal shall be chosen from the Justices of the Supreme Court who have

been such for at least a year (18), and when so chosen shall, except as to those first to be appointed, create a vacancy in the Supreme Court.

2. The Chancellor, the Chief Justice and the Justices of the Supreme Court shall, when first appointed, hold office for seven years, and if re-appointed shall thereafter hold office during good behavior. The Justices of Appeal shall hold office during good behavior.

3. All judicial officers shall be subject to impeachment. All judicial officers except the Chancellor, the Chief Justice, and the Justices of Appeal may be removed from office by the Court of Appeals after notice and hearing upon the issue of good behavior (19).

4. Anything herein contained to the contrary notwithstanding, the term of office of any judge shall end on the first day of January next after he shall have attained the age of seventy-five years (20).

5. Justices and judges of every court shall, at stated times, receive for their services such salary as may be provided by law, which shall not be diminished during their term of appointment. They shall hold no other office or position of profit in the government of this State, or of the United States, or of any instrumentality or political subdivision of either of them. No member of the Court of Appeals, of the Supreme Court, nor such other judicial office as may be provided by law, shall during his continuance in office engage in the practice of law or other gainful occupation.

6. Judges of inferior courts, other than justices of peace, police judges, recorders, magistrates, and the like shall be appointed by the Governor by and with the advice and consent of the Senate. They shall hold their offices for such terms as may be fixed by law. The Legislature shall provide by general law for the appointment of all other judges.

(18) The purpose of this is to ensure that the Court of Appeals be not filled up with men without court experience as counsellors or judges. Of course, the Chancellor and Chief Justice can be appointed from the bar.

(19) Note that any judge may be impeached, but an alternative is provided for.

(20) 75 is young enough, 70 is too young.

SECTION VI

1. The Chancellor and Chief Justice now in office shall continue in office for the term for which they were appointed. If re-appointed they shall hold office during good behavior. The Justices of Appeal first to be appointed shall be selected by the Governor,

by and with the advice and consent of the Senate, from among the Justices of the Supreme Court, Vice-Chancellors and Circuit Court Judges now in office, and shall be so selected that no more than four members of the Court of Appeals as originally constituted shall be members of one political party. The Justices of the Supreme Court, Vice-Chancellors and Circuit Court Judges, and such of the Judges of the Court of Errors and Appeals as are counsellors-at-law of ten years' standing, shall become Justices of the Supreme Court as newly constituted and shall continue in office for the terms for which they severally were appointed. If reappointed they shall hold office during good behavior.

2. This amendment to the Constitution shall not cause the abatement of any suit or proceeding pending when it takes effect. All causes then pending in the Court of Errors and Appeals shall be transferred to the Court of Appeals. All causes then pending in the Court of Chancery and the Prerogative Court shall be transferred to the Chancery Division of the Supreme Court; all causes then pending in the Supreme Court as heretofore constituted shall be transferred to the Law Division of the Supreme Court. Matters argued or submitted but undecided when this amendment takes effect shall be decided by the judge or judges to whom they were submitted, and the appropriate order, judgment or decree shall be entered as that of the division or court to whom the cause shall have been transferred.

3. The various inferior courts now in existence shall continue in existence with their jurisdiction unimpaired until the Legislature shall otherwise provide.

PROPOSAL OF THE NEW JERSEY STATE BAR ASSOCIATION RESPECTING PREROGATIVE WRITS

(Presented June 24, 1947)

The New Jersey State Bar Association proposes that a provision in substantially the following form be inserted in the 1947 Constitution:

> "Any relief or remedy now afforded by the writs of certiorari, mandamus, quo warranto, prohibition and proceedings in the nature thereof, shall be afforded in such action, in such courts, under such practice and procedure, and subject to such rights, limitations and other provisions respecting trial by jury, appeals, and other matters as may be established by law. Any such relief or remedy may be made a matter of right, when so provided by law."

A more detailed memorandum in support of the foregoing will be presented.

Respectfully submitted,

HERBERT J. HANNOCH, *Chairman*
For the Prerogative Writ Committee.

RECOMMENDATIONS OF THE LEAGUE OF WOMEN VOTERS OF NEW JERSEY

(Excerpted from the League's brochure on recommended constitutional changes, submitted to the Constitutional Convention in June, 1947)

* * * *

No part of the present New Jersey Constitution is more in need of complete revision than that pertaining to the Judiciary. The present antiquated court system is characterized by a multiplicity of courts, overlapping functions of judges, and lack of unified administrative direction. Jurisdictional confusion, delayed decisions and excessive cost to litigants have been the inevitable result.

The Judiciary Article which follows is designed to remedy these evils. It has been carefully drafted with the aid of expert legal advice to present, in language appropriate to a Constitution, a complete judicial system, and it is presented as a whole. Its purpose is to establish a simple, efficient and unified court system administered by judges of the highest calibre in which justice may be obtained within a reasonable period of time, and at a reasonable cost.

THE JUDICIARY ARTICLE

I
Judicial Power

1. The judicial power shall be vested in a Court of Justice, consisting of a Supreme Court and a General Court. The Legislature may create municipal courts, with jurisdiction over municipal law, from which appeal may be taken to the General Court.

2. In all matters in which there is any conflict or variance between equity and common law, equity shall prevail, and subject to the rules of the Supreme Court every controversy shall be fully determined by the justice hearing it.

3. The Supreme Court shall sit in continuous session. All other courts shall hold such terms as may be fixed by rules of the Supreme Court.

II
Supreme Court

1. The Supreme Court shall exercise appellate jurisdiction in the last resort in all causes subject to the limitations imposed by this constitution. It shall consist of a Chief Justice and six associate justices. Five members of the court shall constitute a quorum. The presiding justice of the court shall designate a justice of the General Court to serve temporarily when necessary to constitute a quorum.

2. The Supreme Court shall make rules as to the administration of all the courts, and subject to law, as to pleading, practice and evidence in all the courts. The Court shall also have jurisdiction over the admission to the practice of the law and the discipline of persons admitted.

III
General Court

1. The General Court shall consist of such number of justices as may be authorized by law, but not less than fifty, each of whom shall exercise

the powers of the Court. The General Court shall have original jurisdiction throughout the State in all cases, subject to rules of the Supreme Court.

2. The General Court shall be divided into a law section, to exercise civil, criminal and matrimonial jurisdiction, and an equity and probate section, to exercise all other jurisdiction of the court, each section having such parts as may be provided by rules of the Supreme Court.

IV
Appeals and Appellate Divisions

1. There shall be established in the General Court at least two appellate divisions. Each appellate division shall consist of three justices of the General Court designated by rules of the Supreme Court who shall hear appeals from designated sections of the General Court and from the Municipal Courts. Such justices shall be annually assigned for that purpose by the Chief Justice of the Supreme Court.

2. An appeal to the appellate division may be taken as a matter of right from any order of the General Court. Judgments and orders of an appellate division shall be final subject to an appeal to the Supreme Court.

3. The appellate courts, in addition to considering questions of law, may also set aside judgments, wholly or in part, where the finding of fact is against the weight of the evidence, or the verdict is excessive or inadequate. The appellate courts may exercise such original jurisdiction as may be incident to the complete determination of the controversy.

4. Appeals to the Supreme Court may be taken only:

(1) In capital cases and cases involving a constitutional question, which appeals shall be taken directly to the Supreme Court, and shall be preferred as to argument and disposition;

(2) In the event of a dissenting opinion in an appellate division;

(3) On certification of an appellate division; or,

(4) On certification by the Supreme Court to any court.

V
Judicial Officers

1. A Commission on Judicial Appointments shall be established to recommend a list of qualified candidates for judicial office as prescribed by law. This Commission shall be composed of the Chief Justice, three members of the Bar selected by the State Bar Association and three lay persons selected by the Governor.

2. The Governor shall appoint from the list submitted by Commission on Judicial Appointments, with the consent of the Senate, all judges of the Supreme Court and of the General Court.

3. Each justice of the Supreme Court shall, prior to his appointment, have completed a term as justice in the General Court, having served at least three years. Justices of the General Court shall, prior to their appointment, have been practicing attorneys in good standing for at least ten years.

4. The Chief Justice and associate justices of the Supreme Court shall be appointed to hold office during good behaviour. Justices of the General Court shall hold office for a term of seven years. At the end of this time, the Commission on Judicial Appointments shall hold a public hearing on the question of reappointing such justices. The Commission may thereupon recommend reappointment of the justice; or advise against his reappointment; or submit his name to the Governor, together with a list of other names deemed qualified for such appointment. If reappointed the justice shall hold office during good behaviour. The issue of good behaviour shall, with respect to justices of the Supreme Court, be triable by the Senate, and with respect to all other justices shall be triable by the Supreme Court. No justice shall continue in office after he has attained the age of seventy years.

5. The Supreme Court by rule not inconsistent with law, or the Legislature by law may provide for appointment by Commission on Judicial

Appointments of specially qualified referees to serve in special tribunals (such as Juvenile Courts).

6. Justices and judges of every court shall, at stated times, receive for their services such salary as may be provided by law, which shall not be diminished during the term of their appointment. They shall hold no other position of profit in this state, the United States, nor any instrumentality or political subdivision of either of them. They shall not during their continuance in office engage in the practice of law or other gainful occupation. Any judge or justice, who shall become a candidate for an elective office in this state or the United States shall thereby vacate his judicial office.

VI

Administration

1. The Chief Justice of the Supreme Court shall be the administrative head of all the courts, and shall supervise their work. He shall appoint an executive director of the courts to serve at his pleasure. The executive director shall:

(1) Assist the Chief Justice in all matters related to the administration, finance and personnel of the courts;

(2) Publish annually a statistical record of the judicial services of all the courts, justices and judges in the State, and of the costs thereof;

(3) Prescribe records, reports and audits for the municipal courts;

(4) Have such other duties as may be delegated by the Chief Justice.

2. The Supreme Court shall appoint a Court Reporter, a Clerk of the Supreme Court, and a State Clerk of the General Court, with the approval of the Governor, to serve at pleasure of court. The Supreme Court shall prescribe qualifications and duties of these persons, and such others as they deem necessary subject to law.

3. The Chief Justice of the Supreme Court shall annually assign justices of the General Court to divisions, sections or parts thereof and may from time to time, transfer justices from one assignment to another as need appears.

4. Whenever the Supreme Court or any Court fails to hear any case within two months after an appeal therein is perfected or fails to decide any case within two months after it has been argued or submitted, the Chief Justice shall certify that fact to the Governor. At the request of the Chief Justice, the Governor may appoint special judges from the General Court to sit in the Supreme Court or special judges to serve in the General Court from list of candidates presented by the Commission on Judicial Appointments with the consent of the Senate to serve for not more than one year. Such special judges may exercise all the powers of a justice of the court to which they are appointed.

5. On or before December first in each year the Chief Justice shall file with the Governor and the Legislature a report of the work of the courts during the year ending September first next preceding.

(*Judicial Schedule of change to follow 1942 Revision suggestion subject to consistency with these Articles.*)

EXPLANATION

The judicial system here recommended provides for two courts, the Supreme Court and the General Court. The title, Supreme Court, follows the nomenclature of most states and of the United States and is designed to be, in truth, the supreme court, the court of highest appeal. It is composed of seven justices. The number is small enough to make possible decisions with reasonable speed and judicial wisdom.

The General Court is designed to replace all present state courts

except the highest. It consists of three divisions—Law, Equity and Appellate—to accommodate all varieties of cases. The purpose of this arrangement is to avoid the faults of a separate Chancery Court while retaining what has proved valuable in New Jersey's special store of equity decisions. The number of General Court judges is placed at a minimum of fifty since there are at least fifty-five comparable judgeships under the present system.

The method of selecting judges is designed to avoid the faults inherent in both executive appointment and direct election of judges. Although the Governor is empowered to make the actual appointment he is limited in his choice to a list of qualified individuals recommended by the proposed Commission on Judicial Appointments. This Commission is to be composed of both legal and lay members since both the professional ability and general standing of judges are important.

The original seven-year term provided for judges of the General Court is recommended as long enough to insure freedom of decision. The provision that, at the end of this term the Commission on Judicial Appointments consider reappointment after holding a public hearing is designed to make removal possible in case of unsatisfactory performance. An opportunity for the public to express its opinion is desirable.

The qualifications required of judges are presented as a reasonable minimum. Since it is proposed that Supreme Court Justices serve during good behavior, the phraseology is designed to prevent the elevation of any General Court judge to the highest court prior to his reconsideration by the Commission on Judicial Appointments, as described above. It is possible for this review to take place after less than seven years of service if the judge has filled an unexpired term. Provision is made for the appointment of specially qualified referees to serve on special tribunals, since in some cases, such as Juvenile Courts, different qualifications than those required of judges are desirable.

The administrative section is designed to make possible a business-like administration of the courts under a single responsible executive, the Chief Justice, with competent assistance. The provision for annual assignment of General Court judges makes possible the delegation of each judge to the type of work for which he is best fitted. The provision for transfer of judges from one assignment to another, and for the appointment of special judges makes possible the relief of temporary court congestion. The omission of many details of administrative procedure is intentional. It is done in the belief that such matters can best be determined by the Supreme Court or by legislation.

The entire Judicial Article is presented in the belief that it makes possible a rapid, effective and economical system of justice.

REPORT OF THE SPECIAL COMMITTEE OF ESSEX COUNTY BAR ASSOCIATION CONCERNING CONSTITUTIONAL REVISION OF THE JUDICIAL ARTICLE

(Submitted June 5, 1947)

In accordance with the resolution of the Essex County Bar Association adopted March 18, 1947, the undersigned were constituted a Committee of the Association to study the subject of revision of the Judicial Article of the Constitution and to submit a report on its research to the Association by way of information and education together with specific recommendations where deemed desirable. The present report is the result of the Committee's deliberations and research conducted pursuant thereto.

The primary object of the Committee has been to assemble such information and data, within the limited time available, as bears upon the essentials of a judicial article and to set forth objectively all pertinent considerations advanced by the members of the Committee, as well as others. The work has been necessarily confined to fundamentals, and it does not purport to embrace every subject which might conceivably be appropriate to a judicial article, nor does it undertake to deal with the details of transition from the existing to a new Constitution.

The report is divided into two major sections, one of which states summarily, and without pretense of employment of constitutional language, a series of recommendations, each of which was adopted by a majority of the Committee voting thereon, while the other consists of information and presentation of general points of view. Appended as part of the first section is a summary of the extent of unanimity of the Committee on each proposition and the major alternative proposals submitted by various minorities of the Committee.

PART I

SUMMARY OF RECOMMENDATIONS AS TO JUDICIAL ARTICLE

A majority of the Committee subscribes to each of the following propositions:

1. The judicial power is to vest in a Court of Appeals, a Supreme Court, and in inferior courts of limited jurisdiction which may be established, altered and abolished by law.

2. The Court of Appeals is to be the appellate tribunal of last resort. It is to consist of seven justices, six associate justices and one Chief Justice, five of its members constituting a quorum. It shall

have power to make general rules of pleading, practice and procedure for all the courts, subject to law. The court shall hold continuous yearly terms.

3. The Supreme Court will have original general jurisdiction in all cases and will consist of such number of judges as may be provided by law. It is to be divided into a Law Section, exercising original civil and criminal jurisdiction at law, an Equity and Probate Section, exercising all other original jurisdiction, and an Appellate Section, exercising appellate jurisdiction. The Court of Appeals, by rule, may provide for parts in each section. Each of the sections of original jurisdiction will be required to exercise the jurisdiction of the other, in order that every controversy be fully determined by the judge hearing it. Equity is to prevail in the event of a conflict or variance between equity and common law.

4. The justices of the Court of Appeals and the judges of the Supreme Court will be appointed by the Governor, with the advice and consent of the Senate, for terms of seven years, and if reappointed, to hold office during good behavior. Appointees shall be required to have ten years' standing as an attorney at law. Members of both courts are to devote full time to their duties.

5. All members of the Court of Appeals and of the Supreme Court shall retire at or prior to the age of 75 years. Any justice or judge, having tenure, who retires at or after the age of 70 years is to receive a pension in an amount to be fixed by law, but not less than two-thirds of salary.

6. Justices of the Court of Appeals are to be removable for misbehavior upon impeachment by the Assembly and trial and conviction by the Senate, by a two-thirds vote of the members sitting, fifteen to be a quorum and a minimum of eleven required for conviction. Judges of all other courts, except those appointed or elected locally, are to be removable for misbehavior upon impeachment by the Assembly and trial by the Court of Appeals, with five votes necessary for conviction.

7. The Chief Justice is to assign the judges of the Supreme Court to the sections and parts of the court from time to time, but assignment of the appellate section shall be for terms of three years, the judges to be assigned for exclusive duty therein.

8. All prerogative writs are abolished. An appeal as of right is substituted for the remedy heretofore afforded by certiorari to review determinations of statutory tribunals and inferior courts. All other relief heretofore available by any of the prerogative writs is to be afforded by a civil action as of right. Issues of fact arising in any such proceeding are to be triable without a jury.

9. All determinations, final or interlocutory, of inferior courts, and final determinations of statutory tribunals, are to be appealable as of right to the Supreme Court, to be heard in the Appellate

Section, except in such cases as the law may provide for hearing by a single judge.

10. All final judgments, decrees or determinations of the Supreme Court in exercise of its original jurisdiction, are to be appealable as of right to the Court of Appeals. Interlocutory orders and determinations of the Supreme Court in exercise of its original jurisdiction, are to be appealable to the Appellate Section of the Supreme Court, or, if certified by the Court of Appeals, directly to the Court of Appeals. Additional provisions may be made by law for appeal of interlocutory determinations directly to the Court of Appeals.

11. Appeals from judgments of the Supreme Court, in exercise of its appellate jurisdiction, are to be allowed to the Court of Appeals:

(a) Where the Supreme Court has made a judgment of reversal or modification;

(b) Where there is a dissent in an Appellate Section;

(c) On certification by the judge or Appellate Section rendering the judgment;

(d) On certification by the Court of Appeals;

(e) In such other cases as may be provided by law.

12. Appeals may be taken directly to the Court of Appeals from judgments of inferior courts or statutory tribunals, whenever a question of constitutionality is raised and in effect is decided. The Court of Appeals may certify for direct review any final determination of an inferior court or statutory tribunal.

13. The Court of Appeals and the Supreme Court acting in its appellate jurisdiction, in addition to their other powers, shall have the power to set aside judgments at law or determinations of statutory tribunals, wholly or in part, where the finding of fact is against the weight of evidence or the verdict excessive or inadequate; and in cases in equity, and at law where tried by the court without a jury, the appellate court may find the facts anew. In all cases the appellate court may affirm, reverse or modify orders, judgments or decrees and make final determination thereof, unless the ends of justice or the right of trial by jury shall require that a new trial or hearing be ordered.

The Committee Action on the Foregoing Propositions

The division of opinion among the members of the Committee with respect to the foregoing propositions and the principal alternative proposals by minorities of the Committee were as follows:

1. Unanimous.

2. Unanimous.

3. Four members of the Committee voted for the creation of a court of chancery to exercise equity jurisdiction separate and apart

from the court or courts of law; that the court of chancery should be constituted in such manner as might be provided by law; and that the court of chancery should grant legal relief and the courts of law equitable relief whenever necessary to completely determine any controversy.

A minority of four recommended a unified court of original jurisdiction for all cases without separate law and equity sections.

4. A minority of one recommended popular election of the judiciary. A minority of two voted for seven-year terms of office, without tenure.

5. Four members of the Committee voted for a mandatory retirement age of 70.

6. Three members of the Committee voted that as to judges other than the Court of Appeals impeachment should be by the Senate rather than the Assembly.

7. Four members of the Committee voted for permanent assignment of judges to the Law and Equity Sections of the Supreme Court, assignments to be made at the time of a vacancy, to the section in which the vacancy arose, subject to temporary transfer from one section to the other where need arose. A minority of two voted for mandatory rotation of the judges by short periodic transfers between the Equity and Law Sections.

8. Two members of the Committee dissented. They would have it provided that the Legislature have power to regulate and prescribe the practice and procedure relating to the prerogative writs, and to provide for the elimination of trial by jury, or to substitute a single all-embracive form of action in lieu of the present forms of writs.

9. Unanimous.

10. Two members of the Committee dissented from the proposition that all final judgments of the Supreme Court in its original jurisdiction be appealable as of right, to the Court of Appeals. They would limit appeals of right to the Court of Appeals to such cases as are specified in paragraph 12. They recommended that in all other cases appeals in the first instance be allowed only to the Appellate Section of the Supreme Court, with further appeal to be permitted to the Court of Appeals in such cases as are specified in paragraph 11.

11. Unanimous except as to sub-paragraph (c), two members of the Committee voting for the elimination thereof.

12. A minority of three dissented from the first sentence of this paragraph, recommending that direct appeal be allowed to the Court of Appeals from final judgments of inferior courts and statutory tribunals where the only question raised on the appeal is one as to constitutionality.

13. Action on this paragraph was unanimous except with respect

to review of facts in appeals from statutory tribunals, as to which three members of the Committee voted that the scope of review of facts should be as provided by law.

PART II

1. ORGANIZATION OF TRIAL COURTS

New Jersey's Systems of Courts

The number and diversity of our courts and the overlapping boundaries of their jurisdiction are the salient features of New Jersey's present system for the administration of justice. The organization of courts, as revised by the 1844 Constitution, has persisted to date with only minor change. In its ultimate origin, the court system has its roots in English feudal history and in the events of New Jersey's colonial development. This connection has not been severed in theory or practice. In consequence, judges still find it necessary to discover the authoritative limits of their jurisdiction by antiquarian research in the fragmentary collection of 12th and 13th Century decisions in the Year Books.

The business which the courts transact is roughly divided into criminal cases, civil controversies, either in the law courts or in the Court of Chancery, and the administration of decedents' estates. The courts which administer the criminal law include Justices of the Peace, Municipal Recorders and Police Magistrates' Courts, Judicial District Criminal Courts, the Courts of Oyer and Terminer, Quarter Sessions and Special Sessions, all of which are trial courts. The Court of Quarter Sessions, like the Court of Common Pleas, also has limited appellate jurisdiction. The Supreme Court has a combination of trial, appellate and supervisory jurisdiction over criminal cases. The Court of Chancery has a perfunctory function in connection with appeals in capital cases. The Court of Errors and Appeals is the appellate tribunal of last resort.

The courts of law which deal with civil controveries include the Justice of the Peace, Small Cause Courts, District Courts, the Courts of Common Pleas and the Circuit Courts, all of which are trial courts having a more or less limited jurisdiction according to geography, subject matter and the sum in controversy, the Supreme Court, which is both a trial and appellate court, and the Court of Errors and Appeals, the appellate court of last resort.

Those features of civil controversies which invoke principles of equity and are not exclusively reserved to the courts of law, are heard in the Court of Chancery, or, to a very limited degree, in the Circuit Court. Proceedings for divorce and annulment of marriages, maintenance of deserted wives and custody of children, as well as some civil controversies between spouses, are also remitted to the Court of Chancery. Appeals go to the Court of Errors and Appeals.

The work of administering decedents' estates is performed by the Surrogate, the Orphans' Court, the Prerogative Court and the Court of Chancery. Appellate jurisdiction is variously exercised by the Orphans' Court, the Prerogative Court and the Court of Errors and Appeals.

This enumeration does not exhaust the list of courts. The Juvenile and Domestic Relations Court, for example, exercises a special type of criminal and civil jurisdiction.

The multiplicity of courts is matched by the variety of the functions of judges. The Chancellor, who conducts the Court of Chancery with the aid of the Vice-Chancellors, Advisory Masters and Special Masters, whom he appoints, is also the Ordinary and Surrogate General of the State. In his role as Chancellor, he presides over the Court of Errors and Appeals whenever appeals from the courts of law are to be heard, yielding his position to the Chief Justice of the Supreme Court, whenever cases coming from the Court of Chancery or the Prerogative Court are before the court. He is also a member of the Court of Pardons. This enumeration merely exhausts the catalogue of his constitutional offices and does not include the special functions conferred upon him by the Legislature.

The Chief Justice and his eight associate justices of the Supreme Court conduct the appellate terms of the Supreme Court and are also members of the Court of Errors and Appeals. Each justice presides over a circuit assigned to him, which may include one or more counties. In that capacity, he hears a variety of special and routine matters, charges grand juries, supervises lower court judges, occasionally tries capital offenses and dispatches all other business which may require his attention.

Judges of the Court of Common Pleas also hold the Orphans' Court and the Courts of Oyer and Terminer, Special Sessions and Quarter Sessions. Judges of the Circuit Court double as Supreme Court Commissioners. The Surrogate, when not presiding over the probate of wills, is the Clerk of the Orphans' Court. Except in Essex County, judges of the District Court may and do practice as lawyers, but not in their own courts. That is also true of the Common Pleas judges in smaller counties. Judges of the Court of Errors and Appeals who happen to be lawyers may practice law, but not in any court.

This diffuse and unintegrated court structure has been criticized by advocates of efficiency in governmental organization. It must be remembered, however, that judges and lawyers, who become familiar with the system, do not find it as confusing as laymen do. Moreover all proposals for change, from 1876 to 1944, have been defeated by the voters at the polls. Few, if any other states in the Union have preserved their judicial systems intact for more than

a century. However, any contention that the prestige of New Jersey's courts has become diminished solely by reason of an outmoded court structure does not appear to be well founded. Judges of great distinction have attracted national attention while serving in New Jersey. Able and disinterested judges in other states have reflected credit upon the administration of justice, however organized. It is true that the benefits of centralized administration of justice have only been partially realized in New Jersey. In consequence, there is a pressing need for centralized supervision of the work of the courts to the end that cases be heard and decided expeditiously. Moreover, no system has been devised whereby judicial officers are readily available for transfer according to the condition of local judicial calendars. The multiplicity of functions assigned to appellate judges has retarded and affected the work of their courts. On the other hand there has been evidence of judicial concern with these deficiencies in the court structure. To the extent that they persist, they merely reflect shortcomings familiar in any governmental structure which must adapt itself to the vastly altered circumstances of 1947 as compared with 1844.

Merger of Law Courts

Most proposals for constitutional revision of New Jersey's judicial structure contemplate merger of the law courts into a single tribunal of statewide jurisdiction. In its several branches, the court thus constituted would try cases and also serve as an appellate tribunal for certain of its own determinations as well as for all decisions of inferior courts and administrative agencies created by the Legislature.

In criminal matters, the new court would hear all cases now brought in the Courts of Special Sessions, Quarter Sessions, Oyer and Terminer and Supreme Court. Civil actions now commenced in the Courts of Common Pleas, Circuit Court and Supreme Court would also be brought in the new court. In the same way, this court would amalgamate the functions of the Surrogate and Orphans' Court in the administration of decedents' estates.

The merger of law courts would not eradicate the inherent variety and complexity of matters which are brought into litigation. Nor would the creation of a single forum obliterate the differences, for example, between an indictment for assault and battery and an application of executors to sell real estate in order to pay estate taxes. However, the existence of confusion engendered by the variety of courts, many hearing the same general type of case, would be eliminated. Moreover, as members of a single court having equal rank among themselves, the entire body of judges would be available for assignment as needed. Minimum standards of accomplishment in the dispatch of judicial business could be

established, and the comparison invited by the example of able and efficient judges would tend to improve the standards of the entire membership of this court. The great variety of special procedures which are now encountered, according to the court in which the action is brought and the subject matter of the proceeding, could be replaced by uniform sets of rules governing all practice and procedure.

In effecting these improvements it would not be necessary to blaze new trails. The system of federal courts and those of most other states having a comparable volume of judicial business have long since been revised in the interests of simplicity, uniformity and efficiency in the conduct of litigation. The improvements desired in New Jersey can be accomplished by a selective choice from among alternatives which have been tried and proved successful in other jurisdictions.

Merger of Law and Equity Courts

1. *Origin and Development of the Court of Chancery in England.*

The existence of two independent court systems for the disposition of civil controversies has its ancient origin in English feudal history. Following the Norman conquest of Britain, it became the policy of the Crown to encourage resort to the royal courts in preference to the local tribunals which owed primary allegiance to the nobility. Actions were commenced in the ordinary course by purchasing a writ, (in effect, a summons and complaint) from the clerk of the King's Chancery at Westminster. At the outset, the writs were varied, according to the facts of the particular case. To curb rigidity in the development of the law, the Statute of Westminster II, passed in 1285, directed the clerks to frame new writs as the need arose, ". . . lest it happen in the future that the Court of Our Lord the King be deficient in doing justice to the suitors." Nevertheless, the anticipated evil did come to pass. In time the number and varieties of the writs became completely standardized. The result was that a suitor was deprived of resort to the royal courts unless he could tailor his case to one of the stock writs.

Throughout this development, the King, or the King in Council, continued to dispense royal justice, in executive fashion, upon special application for intercession. While the King was unable to attend to those petitions in person, an ordinance adopted in the reign of Edward III referred all matters of grace to the King's Chancellor. He was not intended to administer a different law than that which prevailed in the conventional courts, but rather to mete out justice according to the same law, in a superior way. For example, David Usque, in applying to the Chancellor, did so because ". . . the said William is so rich and so strong in friends

in the country where he dwelleth, that the said David will never recover from him at common law, if he have not aid from your most gracious lordship."

In time the volume of business was so expanded, that by the 14th and 15th Centuries the Chancellor was performing the functions of a court and by the end of that period was recognized as the head of an independent court.

The feudal scheme of land tenure facilitated the development of a Court of Chancery. All land was held under the King, subject to the rendition of feudal dues, originally in military service and later in money. Real property could not be disposed of by will against the chain of succession, and, upon coming into his estate, a fine, or money payment, was due from the heir. As a means of avoiding both the restriction and the payment, the device of conveying land to a trusted friend "to the use of" the intended beneficiary became common. The law courts placed the legal title in the nominal owner and disregarded the interest of the beneficiary. The Chancellor, however, was ready to enforce the fiduciary obligations of the holder of legal title, on the ground that in equity the beneficiary was the true owner. The disruption of feudal tenures and other abuses led to the adoption of the Statute of Uses by Parliament in 1535. It attempted to abolish the device of the "use" by fixing legal title in the beneficiary for whom the land was held. The attempt proved futile. By a simple refinement of the device, land was given to one trusted friend, "to the use of" another trusted friend, "to the use of" the intended beneficiary. The law courts, following the statute, placed legal title in the second of the series of trusted friends. They went no further on the ground that a "use" could not be superimposed upon a "use." The Chancellor thought differently, and continued, as before, to make the holder of the legal title responsible to the ultimate beneficiary. By this means, the Chancellor fixed his jurisdiction over what was then the primary source of wealth and developed the law of trusts, the supervision of which remains a large part of the present day jurisdiction of the court.

The existence of parallel and rival systems for administration of justice gave rise to antagonisms which culminated in statutes, during the reigns of Henry IV and Henry V, excluding the Court of Chancery from jurisdiction over cases adequately dealt with in the courts of law. However, there remained a large group of cases in which legal remedies were deficient. For example, a court of law could award damages for breach of a contract to convey property, but only the Court of Chancery would undertake to compel the party in default to make the conveyance, under pain of imprisonment for contempt. Similarly, the law court would hear and decide a controversy upon the basis of such testimony as the parties could

offer. The Court of Chancery, however, would summon an adversary party and compel him to disclose pertinent facts and documents under oath. While the more efficient procedures were theoretically available to the courts of law, the doctrines from which they derived came from the Roman and Canon law, both of which were proscribed by the common law courts after Henry VIII divorced England from allegiance to the Pope.

The contest for supremacy between the Court of Chancery and the courts of law reached an historic climax in 1614 during the reign of James I, who solemnly decreed the preeminence of Chancery. According to Professor Pomeroy, whose treatise on equity jurisprudence is the standard work on the subject, "This controversy between the law and equity courts, with respect to the line which separates their jurisdictions, has in fact never been completely settled; and perhaps it must necessarily continue until the two jurisdictions are blended into one, or at least are administered by the same judges in the same proceeding." The final solution, in England, in 1873, was the merger of all trial courts in a single, Supreme Court of Judicature, having three separate divisions for Chancery, Law and Probate cases, with the qualification that equitable principles of decision are to prevail over common law rules and that judges, while originally appointed to a single division, are available for temporary or permanent assignment to any other division.

2. *The Court of Chancery in New Jersey.*

At the outset of its Colonial history, both law and equity were administered in New Jersey by a single Court of Common Right created under the Act of 1682. However, a separation of function was made by the Act of 1698 which prohibited the judges of the Court of Common Right from functioning as a high Court of Chancery and, indeed, withdrew from the Colonial Assembly the right to constitute or to regulate the high Court of Chancery.

When New Jersey became a crown colony in 1702, Queen Anne, in commissioning Lord Cornbury as governor, gave him and the Council the power to create all necessary Colonial courts. By an ordinance adopted in 1705, a high Court of Chancery was created, comprised of the Governor and his Council. Beginning in 1718, the Governors of New Jersey sat alone, as Chancellor, and were sustained in this action by the Crown. Governor Franklin, by an ordinance adopted in 1770, reaffirmed his status as Chancellor. This association of functions, reminiscent of the court's ancient origin in the King's personal dispensation of royal justice, was continued in New Jersey's Constitution of 1776. The distribution of power among the legislative, executive and judicial branches of government, and the maintenance of an equilibrium by a system of

checks and balances, which was the outstanding feature of the Federal Constitution, was not adopted in New Jersey until the 1844 Constitution. By that document, an independent Court of Chancery was created in the person of a Chancellor, to be appointed by the Governor and confirmed by the Senate for a seven-year term. The increased business of the court later resulted in the creation of vice-chancellors and advisory masters, appointed by the Chancellor, who, in effect, serve as trial court judges. In that form, the Court of Chancery has persisted to date.

3. *The Court of Chancery in Other Judicial Systems.*

An independent Court of Chancery, having a separate body of judges exercising equity jurisdiction solely, has disappeared everywhere except in New Jersey, Delaware, Arkansas, Mississippi, and the British Dominion of New South Wales. In the few other states where the court persists by name, it is conducted by the same judges who preside over the law courts. For example, the Tennessee Court of Chancery has an independent body of judges called Chancellors, but the jurisdiction of the court includes contract actions at law as well as all equity matters. Elsewhere, there have been three courses of development. Where a Court of Chancery was omitted from the judicial structure at the very outset of its organization, the body of maxims, principles and precedents, referred to as equity, is applied by the law court judges in the ordinary course of their work. Other systems have merged their Courts of Chancery into a single court of general jurisdiction, where equity is administered either by a Chancery division, staffed by judges specially assigned, or by the entire body of judges, without differentiation, who apply both law and equity with decision of all cases.

Of the American colonies, Pennsylvania was the only one which never had a court exercising equity powers and only five of the thirteen original colonies had independent Courts of Chancery. When organizing as states, Pennsylvania, Massachusetts and New Hampshire excluded a Court of Chancery from their respective judicial structures, and more than a half-century elapsed before the Massachusetts legislature explicitly confirmed the power, which the courts had exercised, to apply equitable remedies. While the courts asserted their inherent power to do equity, legislation in all three states expanded the scope of this jurisdiction. In consequence, a single body of judges, without differentiation according to function, disposed of the entire mass of litigation by administering both law and equity, in each case, as applicable.

When the Federal Constitution was drafted in 1787, the creation of courts inferior to the United States Supreme Court was left to Congress. The judicial system, created in 1789, did not provide for

an independent Court of Chancery and, while the structure has been revised many times, there has been no change in that respect. From the outset the same District Court judges heard both law and equity cases although, until recently, there were separate calendars and trial terms for each variety of litigation and separate sets of rules of court. In 1934, Congress authorized a unified procedure for all litigation, whether legal or equitable in character. New rules of court promulgated in 1938 now govern both classes of cases. All litigation is commenced by a single form of complaint and cases are listed for trial either on the jury calendar or non-jury calendar without other differentiation as to character.

Most of the states, in framing their first constitutions, either created a Court of Chancery or continued the equivalent colonial tribunal. Two years after New Jersey's constitution of 1844 had set up an independent Court of Chancery for the first time, New York held a Constitutional Convention and provided for a merger of its law and equity courts into a single tribunal to exercise both types of jurisdiction. The Field Code, adopted in 1848, abolished differentiation in the functions of trial court judges, and made it possible for each controversy to be heard and completely decided by the judge before whom it came, regardless of whether legal or equitable principles were involved. In its essentials, this system has continued to date.

New York's Field Code became the model for the revision of other judicial systems. Between 1848 and 1887, twenty-two states and territories adopted codes of practice which explicity abolished the distinction between actions at law and suits in equity.

In the meantime, a movement for reform of the English court structure culminated in the adoption of the Judicature Act of 1873. By its provisions, the existing law and equity courts were merged into a Supreme Court of Judicature, which included an appellate section and a trial section, the latter being subdivided, originally into five divisions, one for each of the merged courts, and later into the three present divisions of the court, namely King's Bench, Chancery and Probate. All controversies were to be determined according to a single body of law, equity to prevail over the common law in the event of a conflict. While the judges were assigned to the various divisions, "for the more convenient dispatch of business," they were required to sit in other divisions, as the need arose. With minor variations, the English Judicature Act became the model for revision of the judicial systems of the British Dominions, so that the New South Wales High Court of Chancery is now the only example of an independent Court of Chancery which remains in the British Empire.

In the United States, the merger of law and equity in the court structure and in the body of principles governing decision of

cases, continued to gain adherents. Illinois, the last of the large and populous states, besides New Jersey, which had retained a separation of law and equity, abolished the system in 1933 in favor of a single form of procedure. In final result, New Jersey, Arkansas, Mississippi and Delaware remained the only states which still have an independent Court of Chancery with a separate body of judges administering equity exclusively.

A significant feature in this pattern of merger of courts is that no judicial system, once revised to unite law and equity, has ever been altered to separate the systems. It is also notable that the volume of judicial business transacted by courts and judges who exercised both law and equity powers is many times greater than the quantity of litigation still retained by the independent Courts of Chancery in New Jersey, Arkansas, Mississippi and Delaware. Finally, wherever the Court of Chancery still survives, it functions in opposition to the example of the federal courts which, in the same state and often in the same type of litigation, deal with law and equity as a single body of principles governing the decision of all cases.

Argument for the Merger of Law and Equity Courts

The advocates of a merger of the law and equity courts submit the considerations which follow, to which the proponents of a contrary view do not necessarily subscribe:

If our court system were to be organized according to the principles of business efficiency, the paramount consideration would be speedy, fair and economical determination of all controversies. The model for such action might be Elihu Root's suggestion to the American Bar Association thirty years ago, when he said:

> "The law is made not for lawyers but for their clients, and it ought to be administered, so far as possible, along the lines of laymen's understanding and mental processes. The best practice comes the nearest to what happens when two men agree to take a neighbor's decision in a dispute, and go to him and tell their stories and accept his judgment."

New Jersey's existing system of independent and rival courts of law and equity is precisely the reverse of this ideal. The average layman must surely find it difficult to understand why both a judge and vice-chancellor must pass on his case, "bit by bit," before it can be decided finally. Why, if one lawyer can handle the entire case, the law will not permit one judge or vice-chancellor to do as much. Least of all is the layman likely to comprehend why each court is more concerned with its jurisdiction than with the merits of the cause. Even the lawyers, not to mention the laymen, will not be able to explain how justice is advanced when the Court of Errors and Appeals reverses the judge and the vice-chancellor because the correct decision was reached in the wrong court.

The lawyer will explain, of course, that 800 years ago, the royal law courts in England were limited in granting relief by the existing forms of action. He will add that the King deputized his Chancellor to do justice where the law courts were then deficient. The lawyer will admit that as early as 1285, Parliament liberalized the forms of action and that neither court is inherently incapable of giving complete relief. The explanation will conclude, however, that the Court of Chancery, once created, has stayed with us ever since.

An historical expedient, the immediate need for which vanished hundreds of years ago, will hardly seem to the layman to be a sufficient reason for a divided system of courts today. The lawyer will say that while the Court of Chancery may be an historical accident it serves a modern function by affording a type of relief which the law courts do not give, *e.g.,* injunctions, specific performance of contracts and appointment of receivers.

"Is it true," the layman might ask, "that both courts deal with the same case, except that they do it in different ways?" When this is admitted, the layman will have reached the crucial question when he asks, "Why can't one court do the job for both?"

It is not possible to find a satisfying answer either in history or in practical considerations. Until 103 years ago, New Jersey's high Court of Chancery was merely an appendage of the Governor's office. As for practical considerations, the example of almost all American states and all the British Empire except the Dominion of New South Wales demonstrates conclusively the feasibility of a merger of law and equity. Moreover, it must be admitted that the union of law and equity has worked well.

More than thirty years ago Lord Chancellor Loreburn described the conditions in England before and after the unification, as follows:

> "Further, courts of law were supposed to know nothing of and ignored equitable doctrines, and on the other hand the court of chancery was unable to grant relief in cases within the competence of the common-law courts. And, once again, the court of chancery granted relief of a nature unknown to the common law and refused to grant relief appropriate to actions at law. The result of this was that the litigant really entitled to relief too often failed to obtain it because he instituted proceedings by an inappropriate form of action or in the wrong court, and that a litigant too often could not obtain full relief without instituting proceedings both at common law and in the court of chancery. A person entitled to land might fail to recover it at law because his interest was equitable, or in equity because his interest was legal, or might be unable to recover it at law without first obtaining discovery of his opponents' documents, which he could only do by suit in equity. And, again, a sufferer from nuisance might have to go to law for damages and to equity for an injunction. All this involved uncertainty, useless expense, and great delay. From time to time various mitigations of this really intolerable evil were introduced by statute, but they were partial and left the grievance in the main unredressed. At last by the Judicature Act of 1873 a complete remedy was provided by the simple enactment that all

> the judges of the High Court should have jurisdiction both in law and equity. If an action is commenced at law which is really appropriate to be tried in a court accustomed to administer equity, it can be transferred and proceed as if it had been commenced in equity and *vice versa*. And in any case, if any point emerges, the judge has full jurisdiction to apply either principles as the justice of the case requires. No one has ever doubted the wisdom of this change, and its practical benefit is simply that a litigant can no longer be tossed about from one of the king's courts to another, at great cost, and with needless delay, upon grounds which have no justification of utility or public policy. It used to be just as if a surgeon, when called in to a patient, were forbidden to give any medicine or afford any relief except it were surgical."

The evils of a divided system of courts, long since corrected in almost every other English-speaking jurisdiction, still afflict New Jersey justice.

Consider a few of the most familiar examples: A pedestrian, run down by an automobile, is induced by a claim agent, immediately after the accident, and through fraudulent means, to settle his case and give a release for a wholly inadequate consideration. The victim of the accident and the fraud must try his case in Chancery in order to get the release cancelled. If he succeeds, he must try his case again in the law courts in order to collect damages for his personal injuries.

A home-buyer, who finds that the seller is unwilling to perform his contract, asks the Court of Chancery to compel delivery of a deed. The vice-chancellor decides that while the contract is valid, it lacks mutuality and is, therefore, not eligible for specific performance. Although the contract has been judicially tested and approved, the buyer must start all over again in the law court in order to collect damages from the seller.

A neighborhood is continuously disturbed by noise, soot and odors from a factory, recently erected in the vicinity. To protect health and conserve property values, a group of residents applies to the Court of Chancery and obtains an injunction against the nuisance. However, the case must be carried into a law court before damage can be recovered.

A widow sues a life insurance company in a law court to collect a policy on her husband's life. The company defends on the ground that the husband lied about his health when he applied for the policy. Moreover, the company asks the Court of Chancery to cancel the policy and restrain the widow's law suit. It does this because any material misstatement, no matter how innocently made, is sufficient for the Court of Chancery to act, while the law court requires that the misstatement be made intentionally. The Court of Chancery postpones the case and permits the issues to be completely tried in the law court, where the jury brings in a verdict for the widow. Thereupon the Court of Chancery conducts its own trial, with the same witnesses and documents, and decides that

the insurance company was right all along and nullifies the judgment of the law court.

These illustrations are such commonplace examples of the work of a divided court structure that they will excite only laymen.

Other less familiar instances of the same evils are equally instructive:

In *Red Oaks, Inc.,* v *Dorez, Inc.,* the Court of Chancery enjoined a landlord from enforcing a judgment for possession which a District Court had handed down. 118 *N. J. Eq.* 198. After more than two years, while the tenant continued in possession, the Court of Errors and Appeals decided that the Court of Chancery had no right to interfere with the District Court's judgment. 120 *N. J. Eq.* 282. Although the Chancellor has been sitting as a court for 800 years, it still requires protracted litigation, long delay and much expense, to determine the correct boundary of each court's sphere of action.

In *Kenlee Corporation* v *Isolantile, Inc.,* 137 *N. J. Eq.* 459, a landlord applied to the Court of Chancery for relief against a tenant who was damaging the property. The landlord based its case on a statute, passed in 1795, which provided that:

> "Any person may have a writ of waste out of chancery against any person holding by dower, curtesy, or otherwise, for life, for a term of years, or other term, as well as against guardians; and whoever shall be convicted of waste shall lose the thing or place wasted, and shall be liable in thrice the damages assessed against him by a jury."

The Vice-Chancellor ascertained that this statute was copied from a medieval British enactment at a time when the Chancellor was referred to in his executive capacity as the clerk of the law court, rather than in his other role as the chief of the Court of Chancery. The Chancellor has never been a clerk of the law courts in the State of New Jersey, although during Colonial times the office of the Governor, who was also Chancellor *ex officio,* apparently functioned in a clerical capacity as well. Nevertheless, in 1946, the Court of Chancery proceeded to carry out New Jersey's statute by issuing a writ, in medieval fashion, directing the case to be tried in a law court. Just as the Court of Chancery took jurisdiction of a tenancy case which the Legislature had committed to the District Court, the Court of Chancery renounced, in favor of the law court, an item of jurisdiction which the Legislature specifically conferred upon the Court of Chancery. It is apparent, therefore, that neither legislation nor centuries of practice have yet succeeded in marking out the boundaries of each court's jurisdiction.

In ancient times, each party tried his case in the law court with such evidence as he could muster. By contrast, the Court of Chancery's practice was to compel a defendant to discover to the complainant, *i.e.* to disclose, all pertinent information. The law courts

have now provided a similar remedy for many years. Nevertheless, in *Warren* v *Hague,* when, after three years in a law court, the case was about to be tried, the Court of Chancery enjoined further proceedings until the plaintiff made discovery in Chancery. 137 *N. J. Eq.* 117. The vice-chancellor acknowledged that the law court had ample power to grant the desired relief, but was not deterred by that fact.

Just about the same time, a widow applied to another vice-chancellor for discovery by the employer of her deceased husband. To collect workmen's compensation it was necessary for her to prove the circumstances of the accident which resulted in her husband's death. What she wanted was a list of the names and addresses of her husband's fellow employees from whom the facts might be ascertained. This time the Court of Chancery denied relief. The ground was that the court would compel discovery of evidence but not the names of employees from whom the evidence could be obtained. *Pattyn* v *Wright Aeronautical Corp.,* 137 *N. J. Eq.* 142. Thus the Court of Chancery, which had its origin in the need to supplement the stratified jurisdiction of the 12th Century law courts, now discovers, in the centuries of its own precedents, insurmountable barriers to its own further growth and expansion of jurisdiction, even in the face of most urgent needs and appealing circumstances.

For those who may feel that these cited cases are extreme examples of rare conflicts engendered by a divided court structure, a perusal of the latest bound volume of *New Jersey Equity Reports* (Vol. 137) will be illuminating. The report, covering nine months of Chancery decisions, contains 119 opinions, of which 102 were vice-chancellors' decisions. Of that number 14 dealt with the right of Chancery to take jurisdiction in preference to the law courts, 2 considered the right of the Court of Chancery to remove administration of two estates from the Orphans' Court and 20 involved the removal of fiduciaries and instructions to them, where the estates in other respects were being administered by the Orphans' Court. Thus, one out of every three of these reported cases illustrates the persistent, recurring and ineradicable conflict between the Court of Chancery and the various law courts.

The layman endeavoring to make order out of the confusing welter of courts and jurisdictions must certainly wonder what possible merit survives in a court which has outlived its usefulness and disappeared almost everywhere else. The advocates of a separate Court of Chancery would say that it administers a unique body of law for which its vice-chancellors, by experience, have become specially trained and that the merger of law and equity would dilute both jurisdictions without a benefit to litigants or the public.

The argument for specialization deserves careful examination. The Court of Chancery deals almost exclusively with civil controversies. The subject matter is the same as that daily and regularly presented to the law courts. The two judicial systems are differentiated not by the type of material with which they deal, but rather by the remedies which they afford. Where the law court, once the facts are found, will enter a judgment for damages, the Court of Chancery awards an injunction or a decree for specific performance. Where the law court supervises assignments for the benefit of creditors, the Court of Chancery will administer insolvent estates by appointment of receivers. While the Orphans' Court administers an estate when the will is offered for probate in common form, the personnel of the Court of Chancery, sitting as the Prerogative Court, performs the same functions so long as the will is there offered for probate in solemn form. The art of presiding over a trial may be difficult to acquire, and, in its highest form, is developed only by experience. But that art is required of both law judges and vice-chancellors in equal degree, and in precisely the same type of case. With the facts determined and the merits of the controversy decided, the application of the correct remedy should not be difficult. Yet the argument for specialization comes to this: that the ability of vice-chancellors to be effective as judicial officers would be seriously impaired if, in a contract case, they had power to award damages as well as specific performance, or, in a nuisance case, an injunction as well as damages. It may be true that vice-chancellors know more now about injunctions than law judges. But if their specialization is restricted to the practice of this knowledge, it is surely a narrow and sterile premise upon which to erect an elaborate dual court structure.

The argument that vice-chancellors should specialize assumes that they function in isolation from the law courts. Yet the premise upon which the court of equity acts is that it will take cases only where the remedy at law is inadequate. These very words are a standard and indispensable feature of every petition and bill of complaint filed in the Court of Chancery. Thus, before a vice-chancellor can determine whether the jurisdiction of his court is properly invoked, he must ascertain and decide just what a law court is capable of doing for the litigants. It is manifest, therefore, that a vice-chancellor specializing in equity, can become proficient in this work only by mastering the domain of the law courts as thoroughly as the province of the Court of Chancery. For that matter, law judges function under a comparable obligation. If specialization there be, it consists not in disregarding what the other courts do but in learning their work so competently that no mistakes are made in ascertaining what they have the capacity and authority to ac-

complish. Limiting a judge or a vice-chancellor, necessarily learned in the entire field of law and equity, to practice only one segment of his art, is as stultifying as the use of only an arm or a leg by a person functionally sound in all his members.

Advocates of specialization do not completely overlook the waste and extravagance in money and time which are entailed by multiple litigation of the same case in separate courts. They concede that the first court hearing a case, whether it be a law court or an equity court, should decide the controversy in all its legal and equitable aspects. If there is any merit in the argument for specialization and the superior judicial ability which it professedly develops, it would follow that a vice-chancellor's decision of a case in its legal aspects would be a second-rate piece of work as compared with a performance in his own field, a conclusion which these advocates would not accept. Yet, if only to qualify for a superior level of performance in all issues presented for decision, it would be both logical and necessary, according to the tenets of specialization, to expose both judges and vice-chancellors to all types of judicial work.

There is another inconsistency in the argument for specialization. Those who discern its merits when practised in a separate Court of Chancery have voiced no objection to the much broader scope of a law judge's work which may, in the ordinary course of a week's business, cover the vastly different fields of criminal law, all civil law, probate law and miscellaneous jurisdiction and include presiding over equity appeals as well. The argument for specialization is as applicable to the law courts as to a Chancery Court which deals primarily with civil law. If specialization of function were to be adopted as the central principle for the organization of courts, the dividing line of jurisdiction ought, surely, to be drawn between criminal law, civil law, and probate law, rather than between the equity phases of civil law and all other judicial business.

The final argument of those who see merit in specialization is that specialists develop a great body of equitable principles and doctrines. Paradoxically, however, the facts of New Jersey's judicial history make this the weakest of all arguments. During 103 years of the Chancery Court's history as a separate tribunal, its decisions have been reviewed and the law of equity declared by the Court of Errors and Appeals, which consisted of the Chief Justice and the associate justices of the Supreme Court, a law court, and six lay judges, some of whom were laymen and others lawyers. The Chancellor, who presided over and participated in appeals from the law courts, was disqualified from sitting when equity law was to be declared. Whatever credit attaches to New Jersey's contribution to the body of equitable principles must be shared with, if not

relinquished to, a court which is an outstanding example of lack of specialization.

Moreover, the advocates for a separate Chancery Court do not call for a separate court of appeals from its decisions. They are willing that the court of last resort be empowered to pass on the entire body of law, regardless of character or historical origin. This tribunal, whose field of specialization would be the entire domain of the law, would become the source of the development of equity for the future.

The greatest individual contribution to the development of the law of equity in the United States was made by Joseph Story after he became a justice of the United States Supreme Court and began to sit in equity cases in the Federal Circuit Court in 1811. It must be disappointing to the advocates of specialization to acknowledge the magnitude of the contributions of a judge whose work was in both law and equity. Similarly, it was after James Kent had functioned so brilliantly as Chancellor, that New York replaced its dual court structure by a single court whose judges sit in both law and equity. There is neither statistical nor scholarly verification for the claim that New Jersey's Chancery Court has made more distinguished contributions to the law of equity than those of the United States Supreme Court, the New York Court of Appeals or the Massachusetts Supreme Judicial Court. Yet two of these courts function in systems which never had a separate Court of Chancery and the third abolished that court 99 years ago.

Ten years ago Professor Simpson of the Harvard Law School reviewed "Fifty Years of American Equity" and then gave thought (50 *Harvard Law Review,* p. 248) to the future of equity in the following words:

> "From a purely procedural standpoint, it seems reasonable certain that equity as a separate system will have practically disappeared from the United States within another fifty years. The last great stronghold of separate equity practice fell on June 3, 1935, when the Supreme Court determined to promulgate rules for a unified civil procedure in the federal district courts. The influence of these rules is likely to be large in those states which still have separate procedure at law and in equity; the intrinsic advantages of a unified practice are substantial; the main obstacles to complete procedural fusion will be legislative inertia and, in a few states, constitutional barriers. But such procedural fusion will by no means abolish equity. It will continue to exist in substance as an important part of American judicature and as an agency for growth in American law."

The Argument for a Separate Court of Chancery

Proponents of the retention of a separate tribunal for the administration of equity jurisdiction are not unanimous with respect to the organization, administrative control, and degree of exclusiveness of equity jurisdiction to be vested in the court. There are those who would maintain the existing Court of Chancery of New Jersey

exactly as now constituted, *i.e.,* a Chancellor, acting on advice of judicial personnel appointed by him, and with no right in the law courts to apply equitable principles of relief under any circumstances. But most others would maintain a separate court with independent judges selected in the same way as the law judges, but subject to the overriding principle that the court should be required to grant legal relief wherever necessary to the complete determination of a controversy, and that the jurisdiction over equitable relief be extended to the law courts whenever necessary to the full determination of a suit instituted in these courts.

The common approach taken by all who advocate the maintenance of a separate court for the administration of equity is stress upon the advantages inherent in the specialized competence and technique in that field which is developed by judges whose regular duties are confined to administration of equity jurisprudence in the first instance.

The position taken is that from a functional standpoint competence in any branch of jurisprudence is naturally attainable more rapidly if the time, research, and experience of the judge is not divided between that field and others. It is regarded as of particular importance that judges of first-instance jurisdiction become proficient as soon as possible after their ascension to the bench, both in the principles of law they are called upon to administer, and in the practical technique commonly needed in trial of cases and disposition of motions and other duties incident to the judicial process. It is pointed out that while appellate judges have the time and opportunity to deliberate upon briefs of law, judges of first-instance jurisdiction must proceed with much greater dispatch and are necessarily required to make many determinations almost immediately upon confrontation with judicial problems, in the handling of hearings and crowded motion calendars. The contention is that it is only logical to expect the development of an acceptable degree of competence sooner, and more completely, where the duties of the judge are confined to a branch of the law, rather than extended throughout the entire body of law and equity jurisprudence.

The undesirable consequence of rotating judges in all of the diverse fields encompassed by law and equity as a whole have been adverted to by Dean Roscoe Pound, in his work on *Organization of Courts* (1941), at *p.* 253, where, in considering various types of wastage of judicial manpower charasteristic of the development of court organizations in many states, he says:

> "Another (way of wasting judicial power) was a practice of rapid rotation among the judges whereby they sat in turn in civil jury cases, equity cases, criminal trials, and divorce proceedings. Thus, each spent valuable time in learning the art of handling special classes of judicial work, only to pass on to some other special class where it was necessary to learn a new art. Where the specialist would act with assurance and decision, one who

> came fresh to a special field of judicial administration, if, as was very likely, his practice at the law had been mainly in a different one, had to proceed painfully and cautiously. . . ."

In response to the contention by adherents of a unified court for all jurisdiction that the judicial process is essentially similar whether the subject matter administered is law or equity, it is pointed out that actually many clear lines of demarcation characterize equity and distinguish it from law, and that, if the principle of functional efficiency consequent upon specialization is conceded, the existing dichotomy between legal and equitable jurisdiction is as serviceable as any other for purposes of convenient division of judicial subject matter for separate administration. In support of the view that equity jurisdiction is essentially different in fundamentals from that administered by the law courts, reference may be made to S. P. Simpson's article, "Fifty Years of American Equity," 50 *Harv. L. R.* 169 wherein, after advocating unification of law and equity procedure, the author nevertheless says (*pp.* 180, 181):

> "but it would be idle to suppose that such fusion of legal and equitable procedure is equivalent to a complete merger of law and equity. In New York, after seventy-eight years of unified procedure, the highest court of the state constantly refers to 'actions in equity', 'equitable relief', etc. In Illinois, a rule of court requires that every complaint be endorsed 'at law' or 'in chancery'. In England, sixty-one years after the Judicature Acts, the necessity for the study of equity as a separate subject has recently been emphasized. Moreover, there are differences between specific and substitutional relief, between a discretionary and a rigid application of remedies, between controversies suitable to determination by a jury and those not suitable, whether by reason or complexity or otherwise, which will survive any changes in procedural forms. Equity continues to exist though separate equity practice disappears."

In attacking the continuation of a separate administration of equity, proponents of a united court place heavy emphasis upon the frustration and delay of justice asserted to be inherent in that system, because of the inability of the law courts to entertain equitable defenses and grant equitable relief, and the general refusal of courts of equity to apply certain types of legal relief where necessary to complete the disposition of a controversy. An example of the latter situation is the refusal of the Court of Chancery to try the legal title to land where that is raised as a defense to an action to enjoin a trespass. But most adherents of a separate Chancery Court are perfectly willing, and many insistent, that the Court of Chancery should grant legal relief, even to the extent, where necessary, of calling in a jury, if such relief is incident to and necessary for the complete determination of a controversy instituted in equity. They likewise would require that courts of law entertain equitable relief where incident to the complete determination of a controversy at law. It is true that in these peripheral cases the principal of specialization would, to a minor degree, bow to the paramount consideration that litigants should obtain a complete determination

of all issues conveniently triable together arising out of a single controversy, regardless of whether legal, equitable or mixed issues are involved. It is not believed by those who take this point of view that the equity judges, on the one hand, and the law judges, on the other, would tend to perpetuate existing exclusiveness of jurisdictions, as feared by proponents of a united court, if the Constitution, in mandatory terms, required that both the law and equity courts should exercise the jurisdiction of the other where necessary for the complete determination of any controversy.

Many uncertainties in the application of appropriate equitable or legal relief arise in consequence of the constitutional right to jury trial of factual issues at law, but these difficulties, it is pointed out, will exist regardless of the degree of unification of the courts, so long as the Constitution continues the right of trial by jury in law cases and denies it in equity matters. It is therefore not believed that the confusion attendant upon the necessity for determining whether or not jury trials shall be afforded in a particular case can be eliminated by mere unification of courts. Confusion stemming from this source has recently cropped up in the federal courts in a number of cases, notwithstanding the unification of law and equity procedure under the Federal Rules of 1938.

Nor does any justifiable criticism of existing archiac practice in Chancery logically support the argument for integration of law and equity in one court. There is no reason inherent in the preservation of a separate court for equity why the forms of practice and procedure in equity cannot be modernized and simplified, to the extent deemed necessary by the Legislature. Efficient administration of equity jurisprudence by a specialized group of equity judges would be promoted, not impeded, by reform and simplification, where necessary, of equity practice and procedure.

A question may be raised as to whether the creation of a single court of original jurisdiction, with separate law and equity divisions, would not adequately preserve the benefits both of specialized administration of equity and unified control of the court system as a whole. This question was adverted to by a special committee of the New Jersey State Bar Association appointed in 1944 to consider a first committee draft of the judicial provisions of the proposed 1944 Constitution. That draft provided for separate law, and equity and probate, sections of a unified court of original jurisdiction, and for annual assignments of judges to these sections by the Chief Justice of the court of last resort. That committee commented as follows:

> "This provides for annual assignments to sections. We are strongly of opinion that in order the better to preserve the proven benefits of New Jersey's administration of equity, assignment of judges to the equity section should be substantially permanent. This is not to prevent the temporary assignment of a justice as emergency might require. There is no

> sense, however, in having an equity section unless the judges are assigned to it permanently, in order that they may become and remain specialists in their field. The system prevailing in the Federal Courts of rotation of duty has little to recommend it as against one in which a judge becomes a specialist. We feel, however, that to insert in the constitution a provision that assignment to the equity section shall be permanent would be inadvisable, as too rigid. We believe that the chief justice can be trusted to assign and repeat the assignment to the equity and probate section of judges experienced in equity."

Those who today agree with that committee as to the desirability of preserving "the proven benefits of New Jersey's administration of equity" do not agree that that objective is sufficiently safeguarded by the mere creation of law and equity divisions whose personnel would be subject to annual assignment by a single judicial officer. That officer might entertain the same views as those, not few in number or influence, who today are strong adherents of a system of mandatory periodic rotation of all of the judges between legal and equitable assignments. There seems to be no safe and assured way of preserving the "proven benefits of New Jersey's administration of equity" short of the establishment of a separate tribunal for the administration of equity. New Jersey has been distinguished in the past for the equity law which it established and interpreted. Its decisions have been the subject of praise and comment by teachers of law and by courts of other jurisdictions. This heritage should be preserved in the interests of the public.

Finally, it is contended that no logical basis appears for the support of a united law and equity court based upon objections to the existing unlimited power of appointment of equity judges in a single Chancellor. Considerations appropriate to the subject of selection of judicial personnel seem to have no necessary relationship to the arguments *pro* and *contra* the retention of a separate Chancery Court. A former Chancellor publicly advocated constitutional appointment of Chancery judges in the same manner as law judges are appointed. *In re Appointment of Vice-Chancellors,* 105 *N. J. Eq.* 759, 770. Much could be said, however, in favor of the continued appointment of judges in Chancery by a chief Chancery judge if, as may eventuate in the proposed Judicial Article, the chief judge is granted tenure during good behavior, and thus possibly relieved of political influence in the selection of subordinate judiciary, although that point of view would be equally applicable to the selection of the law judges by a chief justice having tenure. But it is submitted that the entire subject of selection of the judiciary is unrelated to the merits of the controversy as to whether law and equity should be administered by separate courts or a single tribunal.

The Prerogative Writs and Original Jurisdiction

The original jurisdiction of the Supreme Court exercised under our present Constitution through the prerogative writs is a pressing

subject for consideration in revision of the Judicial Article. Any discussion of constitutional problems involved in the prerogative writs, however, must take into account the functional distinction between the nature of the writs as a procedure for review or appeal of judicial or quasi-judicial action, and as in the nature of original actions *inter partes*. Certiorari, in its historical function of review of the actions of bodies and "inferior tribunals not proceeding according to the course of the common law" (*Traphagen* v *West Hoboken,* 39 *N. J. L.* 232, 234), is essentially an appeal mechanism. Other uses of that writ, as well as the characteristic applications of mandamus, quo warranto and prohibition, are more assimilable to the class of original actions, notwithstanding the defendant may be a judicial or statutory officer or body.

We have elsewhere in this report, under the heading of "Organization of Appellate Courts," discussed appropriate disposition of the writ of certiorari as a means for review of judicial or quasi-judicial action, *i. e.,* cases in which controversies were decided after a hearing as between adverse contenders. But we shall here treat existing constitutional aspects of the writs necessarily affecting their status both as procedures for review and for original relief.

In a report entitled "Proposed Revision of Rules of the Supreme Court relating to the Prerogative Writs," submitted in 1946 to the Supreme Court by the Prerogative Writ Committee of the New Jersey State Bar Association and the Committee on Practice and Procedure in Courts of Appellate and Superior Jurisdiction of the Essex County Bar Association, it was stated as follows:

> "In recent years, widespread dissatisfaction has been expressed by the Bar with respect to certain phases of the existing practice governing prerogative writs. It has been widely felt that the ancient procedural structure of each of the writs, preserved substantially intact today, does not serve modern conceptions of certainty, simplicity, and dispatch in the administration of justice in the very broad fields encompassed by the prerogative writs in New Jersey.
>
> A comprehensive revision of the practice to accomplish the desired simplicity and effectiveness of procedure is impossible because of constitutional limitations. See *Dufford* v. *DeCue,* 31 N. J. L. 302; *Flanigan* v. *Guggenheim Smelting Co.,* 63 N. J. L. 647; *Green* v. *Heritage,* 64 N. J. L. 567."

The object of the present discussion is to outline the "constitutional limitations" referred to in the foregoing excerpt and to suggest how, in the proposed revised Judiciary Article, they may be obviated.

The Need for Revision and Simplification of Prerogative Writ Practice

The general agitation at the bar which culminated in the proposed revision of Supreme Court Rules by the State Bar and Essex County Bar Committees, was induced by two broad considerations (the recommendations for revision of rules contained in the said report were approved by the Judicial Council of New Jersey in

January 6, 1947): (a) the erratic course of justice in prerogative writ proceedings because of practical difficulties in selection of appropriate remedies in specific situations and the existence of archaic, fictional, and duplicitous procedures, frequently leading to frustration or delay in effectuation of appropriate remedies, and (b) the absence of an absolute right of judicial review of proceedings of the many statutory quasi-judicial and administrative tribunals, whose determinations are not reviewable other than by the discretionary writ of certiorari.

As to (a), full exposition of the undesirable situation presently existing has been made in the report of the State and Essex County Bar Committees hereinabove referred to, which was published in full in 69 *N. J. L. J.*, at *p.* 409, December 19, 1946 (see also "Essex Bar Report on Proposed Supreme Court Rules Revision," 69 *N. J. L. J.*, 273, August 22, 1946), and may be summarized as follows:

Frequently, after application for or allowance of a particular prerogative writ, and extended hearings on the facts and law, it is finally determined the writ is inappropriate, notwithstanding the merits of the application, and an entirely new proceeding under a different writ is required to be brought. This involves considerable waste of time, effort and money, and serious delay, if not complete frustration of justice. It is largely due to preservation of archaic distinctions pertaining to remedies appropriate to narrowly differentiated factual situations, in many of which neither lawyers nor judges have been able to achieve unanimity of view as to the writ properly applicable. See *Murphy* v *Ellenstein,* 119 *N. J. L.* 159, 163; *Di Mona* v *Mariano,* 123 *N. J. L.* 75; *Nickerson* v *Wildwood,* 111 *N. J. L.* 169; *Gallo* v *Moffet,* 8 *N. J. Misc.* 39; *Wentzell* v *Steelman,* 8 *N. J. Misc.* 503; *Martin* v *Freeholders of Essex,* 85 *N. J. L.* 151; *Randolph* v *City of Rahway,* 106 *N. J. L.* 296; *Briggs* v *Stanton,* 8 *N. J. Misc.* 363.

Numerous other deficiencies in achieving the ideal of swift, certain and simple disposition of prerogative writ proceedings, with attendant right of appeal, as in other civil cases, have been cited. Lengthy litigations are frequently conducted under rules to show cause which may culminate, after full hearing on the facts and the law, in the mere issuance of a writ, without a determination on the merits. This requires relitigation of the merits in the proceedings under the writ, without the benefit of the factual proofs developed under the rule to show cause, such testimony having been fully exhausted by the issuance of the writ. *Peer* v *Bloxham,* 82 *N. J. L.* 288. In certiorari proceedings, the argument of a rule to show cause may culminate with the denial of a writ, from which no appeal lies. In effect, the court determines the appealability of its determination, since it can make denial of the relief appealable by providing for the issuance of a writ and its simultaneous dismissal.

The same situation holds true in mandamus proceedings where, after hearing of a rule to show cause, the court can decide against the applicant and deny appeal by refusing to issue an alternative writ, since appeal ordinarily lies from the denial or grant of a writ of mandamus only where there is a judgment on an alternative writ during the pendency of the proceedings. Yet there is reserved to the court the power to permit an appeal in any mandamus proceeding by directing a fictitious moulding of pleadings. Thus the appealability of rulings in most prerogative writ proceedings is, in practice, at the absolute discretion of the court, rather than a matter of right in the party. It will appear from the discussion *infra,* that there is serious question whether the Legislature has any constitutional power to control this situation, notwithstanding it has asserted itself in one aspect of the subject. *R. S.* 2:83-15.

Attempts to draft rules which would permit the court finally to issue such relief as the facts and the law might warrant, notwithstanding the inception of the proceedings under an inappropriate writ in the first instance, have been impeded by the constitutional right of a jury trial in mandamus and quo warranto cases. Despite the full development and hearing of the facts, on depositions before the court, in a proceeding commenced by a writ of certiorari, should the court ultimately decide that the matter was properly reviewable only in mandamus or quo warranto, the court could not proceed to a final determination on the merits, against the objection of a party who might choose to relitigate the factual issues before a jury. See "Proposed Revision of Rules of the Supreme Court," etc., *p.* 11, referred to above. In almost all prerogative writ proceedings, the public interest is directly involved and factual disputes are generally closely interwoven with legal issues. It is generally felt, therefore, that no substantial invasion of the principle of trial by jury of legal disputes involving private rights would ensue from rendering all issues in prerogative writ proceedings triable by the court. This view was incorporated in the revision of the Judiciary Article contained within the proposed revised Constitution of 1944, wherein, in Article V, Section VII, paragraph 4, it was expressly provided that determinations of questions of fact arising in prerogative writ proceedings might be made by the court without a jury.

These illustrations are suggestive, but certainly not all-inclusive, of the existing shortcomings when our prerogative writ practice is judged by the standards of modern simplified procedure. Action by the Supreme Court on the proposed rules relating to the prerogative writs submitted by the State Bar and Essex County Bar committees, and approved by the Judicial Council, has been held in abeyance pending the outcome of the current movement for constitutional revision.

The State Bar Association Prerogative Writ Committee secured the introduction in the 1946 Legislature of a bill designed to unify, modernize and streamline the procedure in prerogative writ proceedings, Senate Bill No. 238. But several provisions saving the applicability of existing practices and procedures had to be incorporated to protect the bill against the taint of unconstitutionality. While no action was taken on the proposal by the Legislature, the submission of the bill served the salutary purpose of stimulating interest of both the bench and bar in the reform of the prerogative writs.

The need for constitutional reform is also pointed up by the promotion of prerogative writ practice elsewhere, under conditions of freedom from constitutional strangulation. A pertinent instance is the creation in New York of a single form of action for securing the relief previously afforded by the writs of certiorari to review the determinations of a body or officer, mandamus and prohibition. *P. L.* 1938, *c.* 526, abolishing the former Article 78 of the Civil Practice Act and substituting a new Article 78 entitled "Proceedings against a body or officer," Civil Practice Act, *secs.* 1283, *et seq.* The substantive law governing the right to relief was not changed, the only object being to achieve uniformity of procedure and "to make the procedure correspond largely to the procedure in actions in general." *Nichols' Cahill,* Annot. New York Civil Practice Acts (1939). *Vol.* 10, *pp.* 474, 476. The purpose has been stated to be to "wipe out technical distinctions which had been a snare for suitors," *Newbrand* v *Yonkers,* 285 *N. Y.* 164, 33 *N. E.* (2d) 75. This enactment, which appears to have been the inspiration for New Jersey Senate Bill No. 238 (1946) aforementioned, provides a simple, unified procedure, with provisions for striking out frivolous petitions or defenses on motion, and for expeditious determination of issues of fact and law by the court. In proceedings for review of determination of boards or bodies, parties interested in sustaining the action sought to be reviewed are permitted to become parties and to be heard on all issues of fact and law. The procedure is a matter of right in any party having an interest.

Aspects of the Present Constitution Which Require Revision In Respect of Prerogative Writ Practice

It is generally agreed that it will be necessary for the new Judiciary Article to vest in the new constitutional courts the powers and jurisdiction of the courts supplanted. See Article X, the Schedule of the 1844 Constitution, and Article XI of the proposed 1944 Constitution, Sec. IV, par. 6.

The prospect of incorporation in the presently proposed Judiciary Article of such a provision immediately evokes the thought that the transfer of the "jurisdiction" of the present Supreme Court

to the new court of original unlimited jurisdiction may, unless qualified by other language, freeze into the new Constitution beyond the power of legislative interference, aspects of the existing prerogative writs hitherto determined by the courts to constitute an inherent segment of the jurisdiction of the Supreme Court, or arguably in that category because of judicial dicta.

Since *Dufford* v *Decue,* 31 *N. J. L.* 302, decided in 1865, it has been fundamental that jurisdiction over the prerogative writs is exclusively vested in the Supreme Court, and in other cases it has been held that all essential attributes of such writs, as well as all other jurisdiction of the court as it existed when the Constitution was adopted in 1844, are preserved by that Constitution beyond the purview of legislative interference. *Green* v *Heritage,* 64 *N. J. L.* 567; *Flanagan* v *Plainfield,* 44 *N. J. L.* 118; *Harris* v *Vanderveer's Executors,* 21 *N. J. Eq.* 424; *Traphagen* v *West Hoboken,* 39 *N. J. L.* 232.

In *Flanagan* v *Plainfield, supra,* it was held that an act of the Legislature making convictions in the city court of Plainfield reviewable by certiorari issued out of the Circuit Court was unconstitutional, "its effect being to enable the suitor to deprive this court (Supreme Court) of a portion of its constitutional power." (44 *N. J. L.,* at *p.* 122)

In its opinion the court states (44 *N. J. L.,* at *pp.* 123, 124):

> "The distinguishing feature of the King's Bench was the authority which it alone exercised by means of the writs of *certiorari, mandamus* and *quo warranto.*
>
> That our constitution was framed to perpetuate in our Supreme Court the same ample and exclusive power, is clearly shown by the opinion of the Chief Justice in *State, Dufford, pros.,* v *Decue,* 2 *Vroom* 302."
>
> * * *
>
> "There can be no contraction of the sphere within which the Supreme Court may dispense its prerogative writs except by extinguishing the tribunals to which they may be sent. A law is equally without authority whether it in express terms, or by its operation and effect, takes away or diminishes the inherent power of the court."

In *Traphagen* v *West Hoboken, supra,* the court said (39 *N. J. L.,* at *p.* 235):

> "By force of Section 1 of Article VI of the new constitution, the nature of the Supreme Court can be altered only by a modification of the constitution itself. Under this constitutional guarantee, the powers which inhered in the court at the formation of the constitution, must be unassailable by legislation.
>
> Asserting its power by means of its prerogative writs, that power would be impaired to the extent that it is restrained in the use of its appropriate process."

In *Green* v *Heritage, supra,* the Court of Errors and Appeals held unconstitutional, as impairing the exclusive jurisdiction of the Supreme Court in respect of the writ of certiorari, an act whereby

an appeal might be taken from a determination of a District Court to the Circuit Court.

The extent to which the idea of "inherent jurisdiction" of a constitutional court has been carried in blocking legislative efforts to revise practice and procedure is indicated by such cases as *Flanigan* v *Guggenheim Smelting Co.,* 63 *N. J. L.* 647, discussed below under "Organization of Appellate Courts," and *National Surety Corp.* v *Clement,* 133 *N. J. L.* 22, holding that a legislative practice provision concerning striking of pleadings could not control the action of a constitutional court.

The effect of the authorities is that notwithstanding the subordination of the courts to the legislative power prior to 1844, even to the extent of power of abolition of prerogative writs, (*Ackerman* v *Taylor,* 8 *N. J. L.* 305, 306), nevertheless, the intent and effect of the grant of constitutional status to the Supreme Court in the 1844 Constitution rendered its prerogative writ jurisdiction immutable by the Legislature with respect to any "inherent" aspect of that jurisdiction.

Although the courts have been at pains to concede legislative power in respect of regulation of "remedies" (*Traphagen* v *West Hoboken,* 39 *N. J. L.,* at *p.* 237), it certainly cannot be stated with any degree of assurance, in the light of the existing authorities, that the Legislature could today abolish the prerogative writs, or any of them, and substitute in place thereof a simple action at law for the same relief; or make a writ of certiorari, or substituted procedure, available as of right to review the determinations of statutory tribunals; or render the denial of prerogative writ relief appealable as a matter of right. Notwithstanding that some color of authority might be marshalled in support of the thesis that the Legislature can constitutionally command the issuance by the Supreme Court of certiorari in specified classes of cases, (*State* v *Mayor of Paterson,* 37 *N. J. L.* 380, 384; *Crawford* v *Hendee,* 95 *N. J. L.* 372, 373), such doubt attends this, as well as the other questions referred to, as to render it prudent, if not imperative, either that the prerogative writs be expressly revised in the Constitution, or that adequate assurances of the authority of the Legislature in this, as well as the other respects noted, be expressly written into the document.

As to the absolute right to jury trial in quo warranto and mandamus cases under the existing Constitution, there can be no doubt whatever. Such right was expressly granted by statute prior to 1844 in such cases and was therefore secured in the 1844 Constitution, both under the doctrine of preservation of the inherent nature of the prerogative writs as they then stood, and under Article I, paragraph 7, providing that "the right of trial by jury shall remain inviolate."

Proposals for Specific Constitutional Language Respecting Prerogative Writs

Those who agree as to the necessity for constitutional reform in this respect divide as to the nature of the appropriate treatment of the problem in a Constitution. On the one hand it is urged that the Constitution should forthrightly abolish the writs and dictate the substitution of appeals as of right, and relief by a single civil action as of right, respectively, for the appellate and original jurisdictional functions now served by the several writs, with jury trial abolished in such cases. This point of view stresses the consideration that legislative inertia, coupled with the wide influences of the forces of reaction in the field of procedure, are likely to combine to defeat any progress toward reform, notwithstanding that constitutional *impedimenta* are removed from the Legislature in this regard. They conceive that a constitutional provision such as that advocated would result in the adoption of adequate implementing legislation and rules of court in the interim between approval of the Constitution and its effective date.

An opposition viewpoint is that the Constitution should not do more than create an appeal as of right in the place of certiorari to review judicial and quasi-judicial action, abolish jury trial, and then simply provide that the Legislature be free to create, control and regulate remedies for granting relief in substitution of relief heretofore available by any of the prerogative writs. This view contemplates that the Legislature should be vested with the domain of determining in what situations the discretionary nature of prerogative writ relief should be retained and where it should be made a matter of right. It also avers that the study and solution of the detailed procedural problems involved should not be necessarily compressed into the period between approval and operative effect of the new Constitution.

In the event of the adoption of either of the alternative viewpoints suggested above, there would seem to be no more need for any other reference to prerogative writs in the Judiciary Article than to any other specific judicial remedies now obtaining. Such express regulation of the practice in prerogative writs as was contained in Article V, Section III, paragraph 4, of the proposed 1944 Constitution, therefore appears undesirable, although the provision therein eliminating jury trial would be necessary were it not adopted in some other form, such as in either of the solutions discussed hereinabove. The other matter contained in the proposed paragraph 4, seems more appropriately a proper subject for legislation or rules of court than for constitutional specification.

To the extent that the Convention may be interested in our reaction to the said paragraph 4 in the 1944 proposal upon the hy-

pothesis of its constituting the sole reference to prerogative writs in the Judiciary Article, our views are these:

(a) Any unqualified reference to "prerogative" writs in a Constitution lays the basis for later contentions that the prerogative nature of the writs was intended to be preserved, notwithstanding subsequent legislative policy that such writs should be matters of right, rather than issuable solely in the discretion of the court.

(b) Paragraph 4 leaves ambiguous the question as to whether it is intended that there shall be an absolute right of appeal from the determination of an Appellate Division which hears a prerogative writ matter returned before it. It might well be contended, on the basis of Section IV, paragraph 3, that no appeal would lie as of right in such case, so that the incidence of appeal from an original determination in a prerogative writ matter would depend upon whether it was returnable in the first instance before a single judge or before a division of three judges, a result which does not appear either logical or intended.

(c) The location of the phrase "and without a jury" in paragraph 4 raises the doubt as to whether it applies solely in hearings before an Appellate Division, or whether it is also applicable in hearings before a single justice. If paragraph 4 is retained in the Judiciary Article, it should be redrafted so as to leave no doubt that elimination of trial by jury is made applicable in both cases.

2. ORGANIZATION OF APPELLATE COURTS

A common feature of most judicial systems is the allowance of at least one appeal from the decisions of trial courts. Of equal importance is the speed, efficiency and economy of the appellate process.

In projecting constitutional revision of the appellate judicial process, it is accordingly pertinent to analyze the existing New Jersey appeal mechanism for (a) extent of certainty in the availability of review; and (b) the degree of efficiency and dispatch in the execution of appeals. A fair appraisal of these problems compels the conclusions that, in a substantial segment of New Jersey's judicial business, there is no assurance of adequate appellate review, and that, where review is available, the machinery therefore is characteristically inefficient, unwieldly, often needlessly duplicitous, inexcusably slow and costly to litigants, and in conflict with the public policy for expeditious final settlement of both public and private controversies.

The Existing Appellate Framework in New Jersey

We have, in Section 1 of this Part of the Report, outlined the various trial courts and their jurisdiction.

With respect to all of them, at least one appeal as of right is pro-

vided. But much judicial and quasi-judicial business is handled in the first instance by special statutory tribunals and statutory administrative agencies. As will be seen hereinafter, there is no certain review made available for most of the forty or more bodies exercising original jurisdiction in that category. This class comprehends a very substantial, important, and constantly growing body of litigation. Where appeal is available, there is a welter of concurrent, overlapping and unnecessarily duplicitous appellate functions, both with respect to courts and judicial personnel in the courts.

A few examples will establish the utter lack of logic, system or efficiency in the existing appeal machinery. Workmen's compensation cases are triable by a deputy labor commissioner and are then subject to three appeals, in turn, to the Court of Common Pleas, the Supreme Court and the Court of Errors and Appeals. Transfer inheritance tax assessments made by the Commission of Taxation and Finance are reviewable, in turn, by the Prerogative Court, the Supreme Court and the Court of Errors and Appeals. Cases originally determined by the Supreme Court or the Court of Chancery are appealable only once to the Court of Errors and Appeals. While a $50.00 District Court suit may be appealed as of right to the Supreme Court and then to the Court of Errors and Appeals, the determination of the Division of Tax Appeals, upon a tax assessment of millions of dollars, may, by the denial of the discretionary writ of certiorari in the Supreme Court, be completely removed from the appellate judicial process.

By institution of a law action, either in the Circuit Court or the Court of Common Pleas, rather than in the Supreme Court, a litigant may assure himself of two reviews, one to the Supreme Court and another to the Court of Errors and Appeals, whereas such an action originally instituted in the Supreme Court would be susceptible of only one appeal. In certain types of controversy, the Court of Chancery, the Prerogative Court and the Orphans' Court exercise overlapping jurisdictions. If the litigant chooses the Orphans' Court, there may be an appeal in turn to the Prerogative Court and the Court of Errors and Appeals. If he chooses the Prerogative Court or the Chancery Court, there is only one appeal.

The dual status of Supreme Court justices, as members of that court, vested with both original and appellate functions therein and as members of the Court of Errors and Appeals exercising appellate functions in the last resort, frequently leads to poor administration of justice, both because of the inordinate burden of labor thus foisted upon the justices and because of the inappropriateness of justices of coordinate rank interchangeably sitting in review of each other's determinations. The latter situation comes about because the Supreme Court commonly acts either through individual jus-

tices, or by three-justice parts. A justice participating in a Supreme Court determination is not qualified to sit in the Court of Errors and Appeals, but his colleagues are. Thus, decisions rendered by Supreme Court Justices A and B at the May Term may be reviewed on appeal by the Court of Errors and Appeals at the October Term, with Justice B sitting in review of the decision of Justice A, and Justice A sitting in review of the decision of Justice B. Moreover, the Chancellor sits as presiding officer of the Court of Errors and Appeals in review of decisions of Supreme Court justices, while they sit in the same court to review his rulings in Chancery. Judges of coordinate rank ought not to be placed in the position of reviewing each other's determinations.

Efficient consideration of oral argument upon appeals requires that the judges shall have time and opportunity prior to hearings to examine the records and briefs of counsel. That system now obtains in the federal appellate courts and in many state courts of appeal. But such procedure is rendered difficult, if not impossible, under our organization of the Supreme Court and the Court of Errors and Appeals. In any event, it does not exist. Almost invariably the first contact of the Supreme Court and the Court of Errors and Appeals with the records and briefs is had at the very moment of the commencement of an oral argument on appeal. The Supreme Court and the Court of Errors and Appeals each hold three yearly terms, with that of the Court of Errors and Appeals following that of the Supreme Court by two weeks, necessitating each court at each term, hearing continuously all of the cases listed for oral argument, within the time allotted, thus losing the benefit of conference within a reasonable time after the hearing. Moreover, the members of the Supreme Court, all of whom are engaged in the hearing of appeals at its term of court, are not able to give advance consideration to the appeals scheduled to be heard by them in the Court of Errors and Appeals, even if the records and briefs were filed prior to the opening day of the term of court. The necessity for separate conferences, with respect to Supreme Court matters and Court of Errors and Appeals cases, precludes adequate consideration of every case in both courts by the Supreme Court justices.

Divided duties also impair the usefulness, in the Court of Errors and Appeals, of its other members, the Chancellor and the six judges. The Chancellor is the Court of Chancery and the Ordinary of the Prerogative Court, as well as a member of the Court of Pardons. The six judges, who need not be lawyers, are also members of the Court of Pardons, and are not required to devote themselves exclusively to their judicial duties.

A startling instance may be cited to demonstrate the inefficiency which is the natural fruit of the situation outlined. On May 13,

1943 the Court of Errors and Appeals, in each case by a divided court, affirmed two judgments of the Supreme Court on the basis of the respective opinions in the Supreme Court. Both cases involved the rule as to the constitutionality of statutory exemptions from taxation under Article IV, Section VII, paragraph 12 of the State Constitution. But while the decisions are technically distinguishable on the facts, the opinions thus affirmed are flatly conflicting as to one of the tests laid down for constitutionality of tax exemption. *Schwartz* v *Essex County Board of Taxation,* 129 *N. J. L.* 129, aff'd. 130 *N. J. L.* 177; *The Rutgers Chapter, &c.* v *City of New Brunswick,* 129 *N. J. L.* 238, aff'd. 130 *N. J. L.* 216. Thus, instead of having a single dispositive rule with respect to this very important subject laid down by our highest appellate court, we have today two inconsistent rulings on the subject made by that court on the same day. Moreover, there have been instances of failure by the court to dispose of all issues involved in a particular appeal, thus necessitating further appeals. Under the jumbled appellate hierachy found in New Jersey, one wonders not so much at the occurrence of such results as at the fact that they do not occur more frequently.

As in the cases just noted, far too many of the decisions of the Court of Errors and Appeals are *per curiam* affirmances on the basis of lower court opinions. In a recent six-month period there were twenty-five such instances, as against fifty decisions on original opinions, as compared with thirteen *per curiam* affirmances on opinion below and ninety-five original opinions by the Supreme Court of Pennsylvania, and forty-one opinions with no *per curiams* for the Supreme Court of Errors of Connecticut, during the same period. The New Jersey ratio has prevailed for many years, depriving the people of a consistent, cohesive and comprehensive body of law enunciated by its highest court. Moreover, the burden of work makes dissenting opinions by our courts almost non-existent.

The existing system is necessarily productive of unwarranted delay in final appellate determinations. Cases are to be found in which the period of time between submission and final decision of an appeal has been a matter of years.

So much as to functional inefficiency. One of the *desiderata* of an acceptable appellate system is the availability of appeal from every judicial or quasi-judicial adjudication. We have noted that New Jersey does not provide an assurance of review in a substantial portion of the controversies decided in the first instance by quasi-judicial statutory tribunals. With isolated exceptions, determinations of such statutory agencies are reviewable only through the prerogative writ of certiorari, issuing out of the Supreme Court in the absolute discretion of that tribunal, without appeal if denied. This

lack of an absolute right of judicial review in tax assessment matters in New Jersey was recently pointed out by the United States Supreme Court in *Hillsborough* v *Cromwell,* 326 *U. S.* 620, as a basis for the conclusion that no adequate remedy for the protection of federal constitutional rights in respect of tax assessments existed in the courts of New Jersey. As we pointed out at length, in considering prerogative writ original jurisdiction, the writ of certiorari is part of the inherent jurisdiction of the Supreme Court which has been held constitutionally beyond legislative inference. (See cases cited in Section 1 of this Part of the Report). In the opinion of some lawyers (with dissent, however, by others) the Legislature cannot, under the existing Constitution, compel the Supreme Court to issue a writ of certiorari to review specified categories of statutory agencies and tribunals performing judicial functions, or to diminish the scope of the writ by providing an alternate mode of review as of right. This situation today precludes appeal as of right to the courts from determinations of agencies having initial jurisdiction over such subject-matter as taxation, banking and insurance, public utilities, alcoholic beverage control, milk control, aviation, civil service, motor vehicles, unemployment compensation, numerous professions, etc.

Basic Considerations in Revision of Appellate Framework

In undertaking constitutional revision of the appellate framework, certain fundamental propositions find general acceptance. There should be at least one assured judicial review of all judicial actions and determinations, whether by courts or statutory tribunals. Multiple appeals should ordinarily be rendered impossible. Appellate judges should be relieved of original jurisdiction whereever possible, and this principle should apply unqualifiedly to the appellate court of last resort. The relationship between intermediate and final appellate tribunals should be fixed and permanent, with no occasion for interchange of personnel. Specified classes of appellate business should be required to be taken in the first instance to intermediate appellate courts. The distribution of appellate work should be such that no court, and particularly the court of last resort, should be so over-burdened as to prevent its members from giving full deliberative attention to each matter coming before it.

Various interstitial matters arise, however, which are more debatable, some as to whether they are at all the appropriate subject matter for constitutional rather than statutory provision, and others as to what constitutes desirable constitutional disposition. Most states having the population and judicial business approximating or exceeding that of New Jersey provide for intermediate appellate courts. N. Y. Const. 1895, Art. VI, Sec. 2; Ill. Const. 1870, Art. VI,

Sec. 11; Tex. Const., Amend. to Art. V, Sec. 6 (with provision for separate court of criminal as well as civil appeals); Ohio Const., Amend. to Art. IV, adopted 1912; Mo. Const. 1945, Art. V; La. Const. 1921, Art. VII, Secs. 19, 20, 30, 76 (but with limit of jurisdiction to $2,000.00); Col. Const. 1879, Art. VI, Sec. 4 (a); Ind. (various statutes); Pa. Laws of 1895, No. 198, p. 212, as amended (with limited pecuniary jurisdiction); Tenn. Acts of 1925, Ch. 100; Ga. Const. 1945, Art. VI, Sec. II, par. VIII; Ala. Const. 1901, Art. VI, Sec. 139, Acts of 1911, 95, 319 (jurisdiction final up to $1,000.00).

Kentucky and Kansas adopted intermediate appellate courts but later discarded them.

But once the proposition for the creation of intermediate appellate courts is accepted, the question as to the extent to which their jurisdiction should be made exclusive in appeals of first instance, particularly with respect to final judgments and decrees of courts of original unlimited jurisdiction, becomes a matter for debate. One point of view is that unsuccessful parties in an action in a court of original unlimited jurisdiction are entitled to a review by the highest appellate court and should not be put to the necessity of a preliminary intermediate appeal. This seems a desirable objective, at least where it will not unduly burden the court of last resort. But another point of view is that aside from such extraordinary matters as capital cases, constitutional questions and matters of extraordinary public importance, the highest appellate court should be relieved until after a first appeal to an intermediate appellate court, with provision for further appeal only in exceptional matters or where certification for further appeal is granted by the highest court, the intermediate court, or by either of them. The latter solution was made by the framers of the proposed 1944 New Jersey Constitution. It is also in accord with the general appellate scheme provided in New York. Some who espouse this viewpoint would eliminate certification by the intermediate appellate court, in order to reduce the number of applications for appeal which the successful party below is required to meet and answer.

Proponents of the plan for direct appeal to the highest court from all final determinations of courts of original unlimited jurisdiction, however, call attention to the difference between the fourteen million population of the State of New York and the four million population of New Jersey, and to the concentration of an extraordinary volume of judicial business in New York. They make the further point that a new and independent Court of Appeals for New Jersey should, with its members freed from the obligation of other duties, be able to handle adequately all such

appeals, together with limited classifications of appeal from intermediate appellate determinations.

Choice between these alternatives largely devolves upon an estimate as to the amount of business which may be expected to come before an integrated court of last resort. Statistics available for purposes of comparison are set forth herewith, with the reservation that many imponderable factors make dangerous any attempt at conclusions from such figures. The following statistics pertaining to the business of the New Jersey Court of Errors and Appeals, the New Jersey Supreme Court, and the highest state appellate courts of New York, Connecticut and Pennsylvania were assembled in the Temple "Report on the Constitutional Courts of the State of New Jersey," July, 1942, printed as Appendix V in *Proceedings Before New Jersey Joint Legislative Committee of* 1942, *pp.* 1057-1124.

TABLE OF CASES DISPOSED OF BY HIGHEST APPELLATE COURT

	Cases Disposed of			
STATE	1938	1939	1940	1941
New Jersey	295	305	253	273
New York	677	623	616	...
Connecticut	152	127	134	...
Pennsylvania	...	...	...	306

The cases shown as disposed of by the New York Court of Appeals include an unspecified number of applications for certification of appeal, in which the court does not consider the case on the merits, but only whether it should permit an appeal.

In considering the burden of the Supreme Court justices serving on the New Jersey Court of Errors and Appeals, there should be added the cases which they dispose of each year in the Supreme Court. For the years 1938 to 1941 inclusive, the appeals and prerogative writ proceedings determined were:

1938	1939	1940	1941
913	675	585	513

Practically all of these cases, however, engaged only three or one of the justices, since the court acts in parts of three or by a single justice.

The latest years for which comparable statistics for the United States Supreme Court have been published are 1932 to 1936 inclusive. It is thought, however, that these figures will roughly correspond to the period 1938 to 1941, as well. The source is "The Business of the Supreme Court at the October Terms 1935 and 1936," by Frankfurter and Fisher, 51 *Harv. L. R.* 577, 581.

	1932	1933	1934	1935	1936
Total matters decided	906	1021	926	986	941
Petitions for certiorari decided	649	732	670	717	671

The petitions for certiorari do not represent consideration and adjudication of cases, but only a determination from filed petitions and accompanying records as to whether an appeal should be entertained by the court. The differences between the figures for total matters decided and petitions for certiorari decided, indicate the total adjudications on the merits by the court each year, and, of those, approximately two-thirds are accompanied by the rendition of full opinions, frequently with concurring or dissenting opinions.

The members of the United States Supreme Court and the highest appellate courts of New York, Connecticut and Pennsylvania do not, as in the case of the New Jersey Court of Errors and Appeals, serve in any other court (Delaware is the only other state whose highest appellate judges serve also in another court).

A second fundamental subject for consideration in the appellate process is the extent to which there should be revision of the existing constitutional scheme for the review of facts, or matters pertaining to facts, such as the weight of evidence supporting a factual determination. In this respect, the basic right to trial by jury of factual disputes at law must control to the extent that appellate processes cannot be made, in effect, to supersede the fact-finding function of the jury. But there is open for consideration the question as to whether appellate tribunals shall be permitted to review determinations as to the weight of evidence supporting a jury verdict and as to the adequacy or insufficiency of such verdicts. It has been held that the constitutional jurisdiction of the Supreme Court of New Jersey is such that the Legislature may not permit review as to the weight of the evidence in a case determined in the Supreme Court, *Flanigan* v *Guggenheim Co.,* 63 *N. J. L.* 647, the decision being based upon the ground that judgments of the Supreme Court on issues of fact were non-reviewable when the Constitution was adopted in 1844, and that the consequent quality of finality in such judgments to that extent was an inherent feature of the jurisdiction of the Supreme Court which might not be impaired by legislation. Cf. *State* v *Knight,* 96 *N. J. L.* 461; *Central Railroad Co.* v *Tunison,* 55 *N. J. L.* 561. There would, seem to be no justifiable reason today for impairing legislative freedom, at least to determine the extent of review in such cases. The extent to which a guarantee of the right of review as to such questions should be written into the Constitution may, however, be a matter for difference of opinion. It is not believed that any constitutional impediment against a legislative grant of review in such cases is to be found in any other state.

A further consideration arises as to whether review of facts in law cases decided by a judge without a jury should not be as broad in scope as the full review now obtaining on appeal from factual

determinations in equity. Some believe that there is no logical basis for applying a narrower scope of review of factual determinations in the former instance.

Of major weight in the determination of the scope of appellate review of facts is the question as to the effect of any extension thereof upon the burden of the appellate courts, and particularly that of the court of last resort. There would seem to be little dispute that the primary job of the appellate court of last resort is to fix and settle questions of law. Yet, this consideration must be balanced against the view that the ultimate and overriding responsibility of the judiciary is to see to the accomplishment of justice, and that justice is as susceptible to perversion through errors in determinations of fact as by erroneous conclusions of law. The general tendency throughout the country has been to commit the extent of factual review to the legislature, free of constitutional restriction. A qualified example of this point of view is afforded by the Constitution of New York, where most determinations of courts of original unlimited jurisdiction are required to be first appealed to an Appellate Division of the Supreme Court. The Appellate Divisions are granted by the Constitution such jurisdiction as may be provided by law, Article VI, Section 2, but the Court of Appeals, the highest appellate court of New York, is expressly limited to the review of questions of law, except where the judgment is of death, or where the Appellate Division, on reversing or modifying a judgment or order, finds new facts, Article VI, Section 7.

Of equal importance is the problem of fixing the scope of appellate review of facts upon appeal from the determinations of special statutory tribunals. We can here make but passing reference to the legitimately wide differences of opinion which have obtained on this subject during the past generation of rapid expansion of the jurisdiction of such bodies. The disposition of this problem by the Missouri Constitutional Convention of 1943-1944 may be suggestive of a suitable solution. It is provided in the new Missouri Constitution, Article V, Section 22, that all final decisions of any judicial or quasi-judicial administrative officer or body affecting private rights should be subject to direct review by the courts, which review is to include a determination as to whether the decision is authorized by law, and in cases in which a hearing is required by law, whether the same is supported by competent and substantial evidence upon the whole record. This would appear to be tantamount to the New Jersey criterion for setting aside a jury verdict at law as against the weight of the evidence, but is narrower than the full and unlimited factual review over such bodies which it is held inheres in the New Jersey Supreme Court through exercise of certiorari and is beyond

contraction by the Legislature. *Public Service Gas Co.* v *Public Utility Commission,* 84 *N. J. L.* 463.

The Missouri disposition of the problem may arguably not satisfy the minimum requirements for re-determination of facts needed to comply with the Federal Constitution. In *Crowell* v *Benson,* 285 *U. S.* 22, the United States Supreme Court decided that where the order of a statutory tribunal was attacked as contravening a constitutional limitation, the court not only has the power to make an independent judgment as to the facts upon the issue of constitutionality, but also the power to take new evidence with respect to the fact if it deems that necessary. This rule applies notwithstanding there has been a hearing before the administrative tribunal. See also *Baltimore & Ohio Railroad Co.* v *U. S.,* 298 *U. S.* 349, at *p.* 364; *Ohio Valley Water Co.* v *Ben Avon Borough,* 253 *U. S.* 287; *Lehigh Valley R. R. Co.* v *Public Utility Com.,* 278 *U. S.* 24.

Passing minimum constitutional requirements for review of facts, we arrive at the much more controversial issue as to the extent to which constitutional power should be vested in the courts for complete redetermination of administrative action on appeal. This raises the subsidiary question as to the desirability for the creation of a general administrative court to provide for a complete appeal on the facts from all quasi-judicial decisions, as distinguished from quasi-legislative determinations such as rate orders or rules applicable to future conduct. Such a court was suggested in the 1936 report of the Special Committee on Administrative Law of the American Bar Association, 61 *A. B. A. Reports* 720 (1936), but in its 1937 recommendations the Committee abandoned the idea and suggested instead that there be set up in each department an appeal board to review quasi-judicial decisions made in the department. These are, of course, suggestions for review within the administrative process, rather than for an enlargement of judicial review by the courts. See *Problems Relating to Judicial Administration and Organization,* by New York State Constitutional Convention Committee (1938), *p.* 810 *et seq.* A strong feeling among many New Jersey lawyers obtains, however, in favor of the assurance of review by a constitutional court of factual determinations made in a quasi-judicial capacity by any statutory tribunal, both as to constitutional and meritorious questions.

Another subject relative to appeals which has provoked discussion is the lack of uniformity respecting appealability of interlocutory orders or judgments. Preliminary and intermediate orders in Chancery are now appealable as of right to the Court of Errors and Appeals, but in the law courts such orders are not appealable until after final judgment. There seems to be no logic for the distinction. There is as much reason and justice in allowing an appeal from an

order for discovery in an action at law as is presently allowed in connection with a similar order in Chancery. All such orders might be made appealable to an intermediate appellate court or section. It is conceived, however, that preliminary or intermediate orders might be of great substantive importance, such as injunctions, appointments of receivers, etc., and that the Constitution should be sufficiently flexible to permit the Legislature to provide for appeals in such cases directly to the court of last resort.

In this connection, it has further been urged that orders subsequent to final judgment or decree, such as orders dealing with discovery in aid of execution, should be appealable of right at least to an intermediate appellate court or section. Presently such an order at law is reviewed only by the discretionary writ of certiorari. *Oetjen* v *Hintemann,* 91 *N. J. L.* 429. An order on an application to set aside or modify a final judgment or decree is more in the nature of a final judgment and may be thought of sufficient importance to be reviewable immediately by the Supreme Court.

It may be urged, however, that the subject of appeal in interlocutory matters is properly legislative rather than constitutional, but constitutional obstacles have been held to impede legislative reform in the matter of enlarging the subject matter of appeal from a constitutional court, *Flanagan* v *Guggenheim Smelting Co.,* 63 *N. J. L.* 647, and if the objective of an appeal from interlocutory determinations is regarded as basically important, it may be wise to provide minimum assurances thereof in the Constitution, with legislative freedom in respect of extension.

In concluding this section of the present report, we are by no means to be understood as suggesting that the foregoing is a comprehensive discussion of all the problems pertinent to a constitutional revision of the subject of appellate review. There are unquestionably others that will require thoughtful consideration, first from the standpoint of whether the disposition thereof should be constitutional or statutory, and secondly, if determined properly to appertain to the Constitution, as to their precise content. It is earnestly submitted, however, that constitutional provisions dealing with the operation of the appellate machinery must, to be serviceable, be sparing of detail and language, and in case of doubt, be resolved in favor of legislative latitude, so that procedural reform and improvement through legislation and rules of court can be constantly feasible.

3. SELECTION, TENURE, RETIREMENT AND REMOVAL OF JUDGES

Methods of Selection

The methods fixed by the various state constitutions for the selection of judges of the highest appellate court are in a substantial

number of cases the same for the judges of intermediate appellate courts and courts of original unlimited jurisdiction. Methods of selection of the judiciary fixed in constitutions seem to become a matter of imbedded tradition and are rarely changed, even when general judicial constitutional changes are effected. The differences in methods of selection of the judiciary now obtaining throughout the country are roughly correlative with the location of the state and the antiquity of the constitution. The northeastern states, whose constitutions are the oldest, generally provide for gubernatorial appointments of the high judiciary, while the other states almost uniformly choose judges by popular election.

Thirty-six of the states provide for popular election of judges, six provide for nomination by the governor, with the consent of Senate or Council, four provide for election by the legislature, one has recently adopted the method of selection by the governor from a list of three designated by a judicial council, and one provides for nomination by the governor, confirmation by a commission, and ratification by the people at an election.

The six which provide for nomination by the governor with the advice or consent of a branch of the legislature, are as follows (dates given are those of last revision of constitution) : Conn. 1818; Del. 1897; Maine 1820; Mass. 1790; N. H. 1784; N. J. 1844.

The following provide for election by the legislature: R. I. 1843; S. C. 1895; Vt. 1793; Va. 1902.

The following provide for election by the people: Ala. 1901; Ark. 1874; Colo. 1876; Fla. 1887; Ga. 1945; Ida. 1890; Ill. 1870; Ind. 1851; Ia. 1857; Kans. 1861; Ky. 1891; La. 1921; Md. 1867; Mich. 1909; Ariz. 1901; Minn. 1857; Miss. 1890; Mont. 1889; Neb. 1875; Nev. 1864; N. M. 1912; N. Y. 1938; N. C. 1876; N. D. 1889; Ohio 1851; Okla. 1907; Ore. 1859; Pa. 1874; S. D. 1889; Tenn. 1870; Tex. 1876; Utah 1895; Wash. 1889; W. Va. 1872; Wisc. 1848; Wyo. 1889.

Missouri revised its constitution in 1945 and provided for filling vacancies in its highest court, the Supreme Court, by the governor, from among three nominees recommended by a Judicial Commission which is composed of the Chief Justice of the Supreme Court, three lawyers elected by the bar of the state, and three laymen appointed by the governor from the several appeals districts. At the expiration of a judicial term of office the question as to the retention of the judge for another term is submitted to the people for determination at an election. Similar local Judicial Commissions are provided for the appointment of the members of courts of original and intermediate appellate jurisdiction.

In California the governor fills vacancies by ad interim appointment until the next general election, appointments being subject to approval by a Commission on Qualifications, consisting of the Chief

or Acting Chief Justice of the Supreme Court, a presiding judge of a district court of appeals and the Attorney General. At the expiration of any regular or ad interim term the judge's redesignation for another term is submitted to the people at an election.

It will be noted that except for Missouri, California, South Carolina and Delaware, every state whose most recent constitutional revision dates since the Civil War, has provided for popular election of the judiciary. Gubernatorial appointment is substantially limited to certain of the northeastern states which early inherited the tradition of the governor, standing in the position of nominee of the Crown, selecting the judiciary. Most of such states have never revised their judiciary articles since pre-Civil War days. The State of New York is a conspicuous example of a northeastern state which broke away from that tradition in favor of returning to the people the selection of the members of the judicial branch of the government, consistently with the popular election of the executive and legislative branches.

Numerous attempts have been made in New York to modify the provision for an elective judiciary which was first made by its Constitution of 1846, but no change was ever effectuated. The closest approach to a change was the decision of the Constitutional Convention of 1867 to submit at a referendum of the people in 1873 the question as to whether election should be supplanted by gubernatorial appointment. At the election the people voted to retain the elective system, by a vote of three to one (see *Studies of New York State Constitutional Convention Committee of 1938, Vol.* IX, *p.* 113).

Notwithstanding the predominance of popular election as a method for the selection of the judiciary, advocates of gubernatorial appointment assert the view that popular election almost always necessarily means political control. They further point to such cases as the recent instance in New York where a justice of the Supreme Court was elected notwithstanding public disclosure, prior to the election, of his admission of allegiance and obligation for his nomination to persons of unsavory reputation. There is moreover, a recent instance of a distinguished midwestern judge who was defeated for reelection. This viewpoint further asserts that governors occasionally make independent appointments of exceptionally qualified and politically unaffiliated lawyers to judicial office, men of a type who may not care for the rough and tumble of popular election campaigns.

On the other hand, the system of Senate confirmation of appointments has been criticized as productive of such evils as failure to act indefinitely on appointments at the instigation of the home-county senator, the frequent delegation, in effect, of the appointing

power by the governor to the senator, and the use of the confirming power as a bargaining lever in legislation and otherwise.

Terms of Judicial Office

The terms of office fixed for judges of the highest appellate courts are as follows:

Two years: Vermont;

Six years: Ala., Fla., Ga., Ida., Ind., Iowa, Kans., Minn., Mont., Neb., Nev., N. J., Ohio, Okla., Ore., S. D., Tex., Utah and Wash.;

Seven years: Maine;

Eight years: Ark., Conn. (changed from during good behavior in 1856), Ky., Miss., N. M., N. C., Tenn., Wyo.;

Nine years: Ill.;

Ten years: Colo., N. D., S. C., Wis.;

Twelve years: Cal., Del., Mo., Va., W. Va.;

Fourteen years: La., N. Y.;

Fifteen years: Md.;

Twenty-one years: Pa. (but not eligible for re-election).

In Michigan the term is subject to designation by the legislature; in Rhode Island each judge holds at the will of the legislature; in Massachusetts and in New Hampshire the term is during good behavior. Federal judges are also appointed during good behavior.

Advocates of appointment for limited terms are influenced by the desirability of continuous responsibility for good judicial performance to the appointing power. Proponents of judicial tenure during good behavior, on the other hand, maintain that such responsibility may be converted, in actual practice, into a sense of insecurity and to the coloration of judicial decisions by their potential effect upon reappointment.

Mandatory Retirement Ages

The viewpoint that a reasonable mandatory retirement age should be fixed for judicial officers is coming to be widely accepted. Such a provision would appear appropriate for inclusion in the Constitution if it provides for tenure of judges during good behavior. The fact that most states do not in their constitution provide for mandatory retirement ages may be due to the general absence of life tenure.

The only state constitutions which presently provide for a mandatory retirement age are New York, Connecticut, New Hampshire, and Maryland, in all of which the age is 70, and Louisiana, where the age is 80.

Constitutional Provision for Pensioning Judges

We have been able to find no state constitution, other than that of Louisiana, which makes any provision for mandatory pensioning

of judges upon retirement. Legislative provision is made in twenty-five states, but such legislation is of the widest variety. The Constitution of Louisiana, Article VII, Sec. 8, provides that any Supreme Court, Court of Appeals, or District Court judge may retire at the age of 70 on two-thirds pay if he has served continuously for 20 years prior to retirement (retirement is mandatory at 80).

Constitutional provision for pensioning of judges would seem a desirable concomitant for a compulsory retirement age. The constant emphasis is, or at least should be, to make judicial careers sufficiently attractive to lawyers of outstanding ability so that they will not only be amenable to appointment, but will remain on the bench. Exceptionally qualified judges sometimes retire to re-enter law practice because of the inadequacy of existing provisions for pension upon retirement.

Removal of Judges

The great majority of American states provide in their constitutions for the removal of judges for misconduct by the traditional method of impeachment by the popular branch of the legislature and conviction by the Senate. The present New Jersey Constitution so provides. Article VI, Section III. However, the requirement of "concurrence of two-thirds of all of the members of the Senate" has been practically construed to require fourteen votes to convict, regardless of vacancies in the office of Senators. It resulted, for example, in the 1934 impeachment proceedings against a former State Comptroller and a judge for respectively receiving and giving a bribe to secure the appointment of the judge, that the judge was convicted while the Comptroller was acquitted. In the case against the Comptroller a vote of thirteen to two against the defendant was insufficient to convict. Only fifteen voted since there were, at the time, three vacancies, and of the remaining eighteen Senators, three were absent. As a remedy for such a situation, it has been suggested that if the Senate is to continue to try impeachments, conviction should be obtainable by a two-thirds vote of the members sitting, with fifteen to be a quorum but a minimum of eleven (majority of twenty-one) required for conviction.

The further view has been advanced that salutary results might be expected if trial of impeachment charges against judges of courts other than the highest court of appeal (except judges elected or appointed locally) were to be tried by that body instead of by the Senate, with five votes necessary for conviction if the court were a seven-man tribunal. Under this plan only the judges of the highest court would continue to be subject to impeachment by the Assembly and conviction by the Senate, subject to the modification indicated.

In concluding this report, the Committee wishes to acknowledge the great cooperation of Miss Catherine A. Stonaker, Association Librarian, both in providing research material and facilitating meetings of the Committee. It also acknowledges research assistance by Mr. Harry J. Stevens, Jr., of the Essex County Bar.

Respectfully submitted,

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EDWARD N. LIPPINCOTT
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CHARLES E. MCCRAITH, JR.
JAMES F. X. O'BRIEN
MORRIS M. SCHNITZER
AUGUSTUS C. STUDER, JR.
HARRY SCHAFFER, *Secretary*
MILTON B. CONFORD, *Chairman*

June 5, 1947.

RESOLUTION OF HUDSON COUNTY BAR ASSOCIATION

WHEREAS, the Constitutional Convention, now assembled, is to consider and submit to the people of this State either a new State Constitution or amendments to the existing Constitution; and

WHEREAS, the Judicial Article of this Constitution is the concern of every inhabitant and citizen of the State of New Jersey because it is the hub from which the legal effects of a Constitution rotate; and

WHEREAS, the Judicial Article of the Constitution is a matter of vital and special concern to members of the legal profession, since it is the cornerstone of our profession; and

WHEREAS, the practice of the law has been looked upon since the founding of this State as a learned and dignified profession; and whereas the Bar feels a moral obligation and duty to make its view known to the Convention and the citizens of this Sovereign State; and

WHEREAS, certain necessary and required changes in our judicial system can be effected within the existing framework of said system without destroying the good with the bad; and

WHEREAS, since there are a great number of types of action which cannot be effectively tried together as part of one action under our guarantee of a trial by jury in law actions, such a proposed system of courts and procedure cannot and will not remove this problem, but will merely cause the identical jurisdictional questions to be raised in a different form and decided at a different time; and

WHEREAS, it is the considered opinion of jurists, lawyers and scholars that there has been a complete deterioration of equity jurisprudence in the states of this Union where the one-court system has been adopted, and, in fact, in England, in 1937, it became necessary to abolish the system of trial by jury on law issues as a matter of right, as the only means of relieving the congested calendars; and

WHEREAS, our present Constitution was probably a hundred years ahead of its time in providing for trial judges who were specialists in their respective fields and in our complex economic system today the trend to specialization is irresistible in the fields of military, engineering, banking, investments, medicine and education, this Bar considers it absolutely necessary that trial judges who are called upon to make a multitude of instantaneous decisions must be specialists in their field and no system can operate efficiently or practically without such specialization; and

WHEREAS, the delays in appellate procedure can be fully corrected by the creation of a completely independent court of last

resort and an intermediate appellate court in which will be allowed a full review of law and facts; and

WHEREAS, as the supervisory and visitorial power of the present Supreme Court is one of the bulwarks of our present system and has been used with salutory and compelling results, it is our opinion that such power should be conferred unimpaired on the intermediate appellate court; and

WHEREAS, a determined effort is being made to abolish the Court of Chancery based upon arguments that lack validity or fairness; and

WHEREAS, the development of equity jurisprudence in New Jersey under a separate Court of Chancery is acknowledged by jurists, lawyers and scholars the world over to have reached a peak of advanced thinking and justice unequaled by any other judicial system in this country and England and whose decisions are cited with approval by practically every court in our country; and

WHEREAS, a virile and growing equity jurisprudence is that organ which gives to the body of the law its moral vitality and conscience and in so doing gives to law the power, remedies and flexibility required to protect the weak against the strong and all rights, inalienable, real, personal, and mixed, against the rigidities of legal form and precedent; and

WHEREAS, the tremendous increase in actions for divorce and nullity presents serious moral, social and special procedural problems that have been met and tried with strictness and due regard to the public policy of this State, under the Advisory Master system of the Court of Chancery, with its control centered in the Chancellor, and any attempt to remove this control and to leave questions of policy to each individual trial judge, would lead to possibilities of grave danger from loose procedure; and

WHEREAS, it is of vital concern to many of the litigants of this State that certain civil, probate and criminal matters be tried before county judges who are familiar with local customs and practices, therefore

BE IT RESOLVED, that the members of the Hudson County Bar Association, in Special Meeting assembled, have determined and record as their considered judgment that any judicial system proposed by the Constitutional Convention should be constituted as follows:

1. There should be an independent Court of Appeals consisting of at least seven members.

2. There should be an intermediate appellate court to hear appeals in the first instance, which court shall be vested with all jurisdiction heretofore vested in the Supreme Court, except jurisdiction of actions at law *inter partes.*

3. There shall be one appeal as a matter of right, and by leave under certain conditions to the Court of Appeals.

4. The Court of Chancery should be retained without change and should be vested with the original jurisdiction of the Prerogative Court as recommended by the Judicial Council in 1935.

5. A County Court should be established to be vested with the jurisdiction heretofore vested in the Court of Common Pleas, Court of Oyer and Terminer, Court of Quarter Sessions, Court of Special Sessions and Orphans' Court.

6. The principle of bi-partisan membership of all courts should be provided for in the Constitution.

7. Because they are an essential part of our judicial system, the appointment of jury commissioners should be on a bi-partisan basis and placed under the control of the Court of Appeals.

8. Judges should be removable by impeachment alone for any misdemeanor committed during his tenure of office. Any provision authorizing the Governor or the Legislature, or either house thereof, to remove a judicial officer after an investigation or trial by either is completely foreign to the system of checks and balances and the principle of separation of powers under our republican form of government.

A free and untrammelled judiciary is the final protection of the weak and the poor among our citizens against the excesses of a temporary power-hungry majority, for ours is a representative republican form of government. It is not a democracy in the pure or absolute use of the term, and

BE IT FURTHER RESOLVED, that a copy of this resolution be sent to the Judiciary Committee of the State Constitutional Convention.

This is to certify that the foregoing is a true copy of the resolution adopted by the Hudson County Bar Association at its Special Meeting held on July 2, 1947.

LOUIS P. BRENNER, *Secretary*

STATEMENT OF THE GLOUCESTER COUNTY BAR ASSOCIATION

1. The Gloucester County Bar Association is grateful to the Committee for the opportunity to present its views on the Judiciary Section of the new draft of a Constitution.

2. In principle, the Gloucester County Bar Association approves the Judiciary Section (Article V) of the 1944 draft Constitution subject to the following reservations:

(a) *Section IV, paragraph 4.* It is felt that this paragraph might be interpreted as a substitute for the present practice of making a motion for a new trial before the trial court judge, but that it should not be so interpreted. To avoid the possibility of misinterpretation, it is suggested that the following clause be inserted at the beginning of paragraph 4, Section V:

> "Notwithstanding a motion for a new trial before the trial court," etc., etc.

(b) *Section V, paragraph 3.* It is believed that the Chief Justice and the Associate Justices of the Supreme Court should enjoy the same tenure as Justices of the Superior Court and hold office without limited term only on reappointment after an initial seven-year term.

(c) *Section V, paragraph 4.* It is believed that a concurrence of two-thirds of the members of the Senate, rather than a majority should be required for conviction upon impeachment.

Dated: June 25, 1947.

Respectfully submitted,

GLOUCESTER COUNTY BAR ASSOCIATION

WILLIAM B. KRAMER, *President*

GUY LEE, JR., *Secretary*

MEMORANDUM OF JUDGE RICHARD HARTSHORNE

(Submitted July 1, 1947)

DOUBLE LITIGATION

"The law was made for man, not man for the law." So runs the ancient adage.

However, a multitude of cases reported in our upper courts raise the question whether our present Constitution has not forced our courts to reverse this adage, and give rise to real hardship to our citizens. This matter is one far different from the question as to the relative ease of administration of our courts as separate or joint institutions, or as to the appropriate term by which they should be called. "A rose by any other name would smell as sweet." The question we are now considering is not a technical one, of interest primarily to the legal profession, but the very practical and important one, of interest to every single citizen of the State, of insuring to him swift, sure and simple justice.

In a little book written more than 40 years ago, and, obviously, free from present political partisanship, by a careful writer and student of the law, the chairman, in fact, of the committee which drafted the present Practice Act, our court system was called "the most antiquated and intricate that exists in any considerable community of English-speaking people." (*Courts and Procedure in England and New Jersey,* Charles H. Hartshorne, 1905). This conclusion was reached not after a comparison of our system with that of the rest of the 48 States of the Union alone, nor with that of England which previously had our present system, but long ago abolished it as faulty, but after a comparison as well with the courts of Canada, Australia, New Zealand and South Africa, if not elsewhere. The author there cited a host of decisions existing, even then, in both our courts of law and equity, which proved that our legal intricacies, forced upon our courts, despite their efforts, by our present Constitution, had continuously resulted in double litigation, with the consequent great loss of time and money to all our citizens when they resorted to our courts to obtain justice. Indeed, as will hereafter appear, this double litigation has repeatedly been extended into triple, quadruple, quintuple, sextuple and even septuple litigation lasting over several years, and, in certain instances, leaving the parties, at the end of these seven court proceedings, exactly where they were when they started.

Now to the cases. Be it said at the outset that since no attempt has been made to search the official reports exhaustively, the cases cited below, numerous as they are, by no means include all that

exist in the official reports, though it might be interpolated here, as Senator Hendrickson has already advised the Judiciary Committee, that out of 119 recent Chancery opinions, one-third were decided on questions of jurisdiction, the very difficulty here alluded to. Furthermore, they, of course, include none of the many cases which have not been officially reported at all. Finally, since the cases cited by the learned author, above, are all available in his book, we will only allude to certain of our more recent decisions.

Since it would make "confusion worse confounded" to attempt to set forth the complicated procedural steps required to be taken, first in one court, then in another, in these various cases, we will but cite them, that they may be verified by every interested person, and will content ourselves now, and conserve your patience, by setting forth the three main categories into which they fall, and alluding to certain instances of particular importance.

(1) The first class of cases of double litigation is that where the party bringing suit is found to have misjudged the character of his own suit, and to have brought it in the court which our Constitution says has not jurisdiction over that kind of proceeding. Thereupon, in many cases at least, his cause cannot be transferred to the right court, under the Transfer of Causes Act, but he must start his proceedings all over again in another court. Of this character are *San Giacomo* v *Oraton Investment Co.,* 103 *N. J. Eq.* 273; *Glaser* v *Columbia Laboratories, Inc.,* 11 *N. J. Mis.* 707, 112 *N. J. L.* 91; *Market Holding Co.* v *North Camden Trust Co.,* 123 *N. J. Eq.* 328; *Springdale Corp.* v *Fidelity Union Trust Co.,* 121 *N. J. L.* 536; *Weiss* v *Levine,* 133 *N. J. Eq.* 441; *Bauer* v *Trustees of First M. E. Church,* 124 *N. J. Eq.* 247; *Scott* v *Cholmondeley,* 129 *N. J. Eq.* 152; *Verdi* v *Price,* 129 *N. J. Eq.* 355.

Nor is this loss of time and money to our citizens curable simply by obtaining capable lawyers. Not only the capability of the counsel involved in the above cases proves this, but the additional case of *Richeimer* v *Fishbein,* 107 *N. J. Eq.* 493, where the mistake as to jurisdiction was made by that extraordinarily able Chancery jurist, the late Vice-Chancellor Backes. Nor is the citizen saved this loss of time and money by the Transfer of Causes Act (*R. S.* 2:26-60). For, in the first place, the very fact that the cause has to be formally transferred, and that it takes two courts at least to complete justice, proves that the evil of double litigation exists. And here we need hardly allude to the many classes of cases to which our courts have held that the Transfer of Causes Act is unavailable at all. Indeed, the niceties of distinction which must be made in determining the exact extent of the differing jurisdictions of the courts of law and equity, in the single situation where fraud exists, are well set forth in the case of *Pridmore* v *Steneck,* 122 *N. J. Eq.* 35, a line so fine that even the most skilled practitioner might well cause his client

the harassment and expense of double litigation.

(2) The second class of cases of double litigation is that where one of the parties has a just claim or defense, of which the original court has no jurisdiction, even though such court does have jurisdiction of the principal suit itself. In such a situation, the best the parties can do is to stay the proceedings in the first court and then institute ancillary proceedings in a different court in order to handle the particular claim or defense over which the first court lacks jurisdiction, and, thereafter, return to the first court to complete the procedure. The following cases are instances of these difficulties, and also show the futility of any legislative attempts to cure the situation: *Adams* v *Camden Safe Deposit and Trust Co.,* 121 *N. J. L.* 389; *Falcon B. & L. Ass'n.* v *Schwartz,* 121 *N. J. Eq.* 27; *Metropolitan Life Ins. Co.* v *Tarnowski,* 130 *N. J. Eq.* 1; *Teas* v *Third National Bank and Trust Co.,* 125 *N. J. Eq.* 224; *Peters* v *Public Service Corp. of N. J.,* 132 *N. J. Eq.* 500; *Freeman* v *Conover,* 95 *N. J. L.* 89; *Weinstein* v *Blanchard,* 9 *N. J. Mis.* 113, 109 *N. J. L.* 332.

(3) The third category into which these cases of double litigation fall is that where one court can only do partial justice, and resort to another court is necessary to do complete justice. The following cases are instances of this situation: *Hayes* v *Smith,* 104 *N. J. Eq.* 146; *Richman* v *Schwartz,* 130 *N. J. Eq.* 495; *Miller* v *Bond & Mortgage Guaranty Co.,* 121 *N. J. Eq.* 197; *Palisade Gardens, Inc.* v *Grosch,* 121 *N. J. Eq.* 240.

Perhaps the best way to make the real situation clear is to give two instances with which our courts have recently had to deal, in one of which our citizens have been forced to go before different courts seven different times in order to obtain justice, and in the other after they had gone through these five different courts, neither side had obtained justice, but the parties had been left exactly where they started in the beginning. In considering these cases, we must further bear in mind that the facts and the legal proceedings are being reduced to their lowest possible terms in order to simplify the discussion.

Example A: One Wemple and others agreed with the Goodrich Company for the latter to transfer certain judgments to them. To enforce this agreement, under our present court system, Wemple, therefore,

(1) Filed a bill in Chancery to compel such transfer, which Chancery decreed.

(2) However, on appeal, our highest court reversed Chancery, and ordered the bill dismissed because it found jurisdiction in such a situation to lie not in Chancery but in the common law courts.

(3) On the matter being returned to Chancery, the bill was accordingly dismissed.
(4) But, thereafter, Chancery reversed itself, and transferred the cause to the law courts.
(5) On appeal from this order of transfer, this Chancery order was affirmed by our highest court.
(6) Wemple then started his suit at law and obtained judgment.
(7) On appeal, our highest court sustained this judgment.

Thus, recently, our citizens were compelled to have seven separate court hearings to obtain justice in a single situation. *Wemple* v *B. F. Goodrich Co.,* 126 *N. J. Eq.* 220; 127 *N.J. Eq.* 333; 126 *N. J. L.* 465.

Example B:

(1) The New York Sash and Door Company sued the National House and Farms Association at law.
(2) On appeal our highest court held that the New York Company had sued in the wrong court since Chancery had jurisdiction over that kind of an action.
(3) Meanwhile, the National Company had already instituted proceedings in Chancery to restrain the New York Company's suit at law, and to obtain reformation of the contract between the two. Here, the National Company's motion for injunction was denied, and the New York Company's motion to dismiss the bill in Chancery was held until final hearing.
(4) After the trial at law had occurred, the New York Company again moved to dismiss the bill in Chancery and this motion was denied.
(5) The New York Company appealed from this decision to our highest court which affirmed the decision in Chancery. The net result of all these proceedings in these two courts was *absolutely nothing.* For, the question still had to be determined in one court—
(6) Chancery, whether the contract had to be reformed. Thereafter,
(7) In another court, that of common law, the question still had to be determined whether the contract, whether or not reformed in Chancery, had been broken.

New York Sash and Door Co. v *National House and Farms Ass'n.,* 131 *N. J. L.* 466, 135 *N. J. Eq.* 150.

Obviously, instead of our citizens being forced, by our present Constitution, to take seven separate court proceedings in different courts to obtain justice, they should have been able, if the law were made for man, not man for the law, to obtain justice in one court, and at one time.

Nor should this in the slightest prevent the handling of matters, which are mainly equitable, by courts and judges generally accustomed thereto, or the handling of matters, mainly of common law character, by courts and judges generally accustomed thereto. This can be accomplished by mere rule of court, as in New York, if these law and equity judges are assigned to different divisions of the same over-all court. What is essential for the benefit of our citizens is that our Constitution should vest our courts with power to do complete justice in each situation. Then, if the Constitution vests each of the appropriate branches of this over-all court with full power to settle all merely incidental questions, regardless of the mere accident of their origin, "the law will be made for man, not man for the law."

In taking this practical step to save the time and money of all the citizens of New Jersey, it should give assurance to know that, in doing so, New Jersey is not embarking on some untried experiment, but is, in fact, following in the footsteps of almost everyone of our sister states, and of England, which, though the mother of our present system, has long since discarded such system as ineffective and wasteful.

Nay, more, New Jersey in its present Constitution, has already taken this step itself, in a limited proceeding, but to an extent far greater than is necessary to cure the hardship to our citizens presently alluded to. For, under the present Constitution (*Art. IV, Sec. VII, par. 10*), "the legislature may vest in the Circuit Courts or the Courts of Common Pleas within the several counties of this State Chancery powers so far as relates to the foreclosure of mortgages, and sale of mortgaged premises." The Legislature has so enacted (*R. S.* 2:65-35), and the heavens have not yet fallen. Note, too, that this transfers full Chancery powers in such matters. No such broad action would seem essential for the welfare of our citizens. It may well be desirable to retain matters, mainly of an equitable nature, in the hands of equity judges, and vice versa. What is needed is to supplement the powers of an equity court, or an equity branch of a court, with law powers, as to merely incidental matters, and vice versa. Thus, and thus alone, will our citizens be able to obtain justice in one court, and at one time.

PROPOSALS OF THE EDITORS OF THE NEW JERSEY LAW JOURNAL

Editorials from the New Jersey Law Journal, April 17 to June 12, 1950

A CONSTITUTIONAL CONVENTION AND REVISION OF OUR JUDICIAL SYSTEM

(New Jersey Law Journal, April 17, 1947)

The prospective Constitutional Convention, an event yet to be approved by the electorate, will afford an opportunity for the revision of New Jersey's antiquated judicial system, which if not grasped wholeheartedly, may not present itself for many years to come. The court system we have today is based on the conditions and needs of 1844—over 103 years ago. It is further rooted in the hodge-podge of English courts that prevailed in pre-colonial days and which were held over in New Jersey during its colonial and early statehood era.

While England has long since done away with its former conglomerate court system and practically all the states have adopted more efficient judicial systems, New Jersey continues to muddle along with a system that is still modeled after that which England has discarded.

The continuance of our inefficient and wasteful court system is entirely indefensible. There is no rational excuse for a court of last resort of 16 judges. Ours is unique, certainly in the English-speaking world. There is no justification for a court system whose high court judges have such multifarious duties and functions as do the Chancellor, the Supreme Court justices and the lay judges. The Chancellor is not the Court of Chancery today that he was in 1844, when the State had a population totalling 373,306 and its largest city 17,290. Today he administers a court consisting of himself, 10 vice-chancellors and 13 advisory masters. He presides over the Court of Errors and Appeals and is a member of the Court of Pardons. The nine justices of the Supreme Court sit as members of the Court of Errors and Appeals, in addition to their numerous duties in the Supreme Court in matters of appeal, prerogative writs, charging grand juries, riding circuit and, in some instances (fortunately rare), even presiding over murder trials. Small wonder that one eminent member of that court, Mr. Justice Colie, recently felt impelled to acquaint the bar with the details of the excessive burdens borne by the members of that court. (See "Appellate Court Work in New Jersey," 70 *N. J. L. J.* 53, February 13, 1947).

The six lay judges of the Court of Errors and Appeals are also members of the Court of Pardons and in addition may carry on their profession or private callings, though they may not practice law in the courts of the State.

Let it be noted parenthetically that no standards or qualifications of any sort are provided for the constitutional judges.

The Circuit Courts function with civil law jurisdiction which overlaps that of both the Supreme Court and the County Courts of Common Pleas. The overlaps of jurisdiction in probate matters among the Chancery, Prerogative, Orphans' and Surrogates' Courts, and the division of jurisdiction in domestic relations matters among the Chancery, Orphans', Juvenile and Domestic Relations and local Family Courts are indeed difficult to explain or defend as part of a judicial system in this year of grace 1947. The inadequacies of New Jersey's court system are apparent to all who have any knowledge of it.

Thus it is that Chancellor Oliphant (then a Circuit Court judge), in supporting the 1944 proposed revised Constitution, said: "The bench and bar for years have realized the need for overhauling our judicial system."

Of late years, others in addition to the bench and bar—civic organizations, civic-minded individuals, students of government and leaders from every walk of life—have also come to realize the need for changes in our judicial structure. Indeed, the public as a whole would loudly articulate its demand for such changes were it generally aware of the incredible overlappings of jurisdictions in some instances and the impossibility of complete relief in others. For example, to settle one family's domestic difficulties might well require piecemeal relief in five different courts—Chancery, Orphans' Court, Domestic Relations Court and the local Family Court, and any one of the other law courts. How much more insistent would be the public demand for a modern court system if it were aware, as are the bench and bar, of the inefficient use of manpower and unequal distribution of work that inhere in our present system. How can we defend the resulting excessive costs for delayed justice and, sometimes, diluted justice, to the public?

Unfortunately, too often ignored has been the fact that our court system should be primarily designed to serve the interests of the public and not the special interests of lawyers, judges or political leaders. If this fact is brought home to the public together with an exposition of New Jersey's present court system, a thorough-going revision of our judicial structure will inevitably be one of the results of a 1947 Constitutional Convention.

While there have been numerous efforts since 1844 to amend the Judiciary Article of the Constitution, most of them concerned minor changes. Several proposals have been advanced for the merger of

the Court of Chancery with the law courts. However, plans for completely revamping our court system were offered in 1909 by Governors John W. Griggs and Franklin Murphy, Justice Bennet Van Syckel and Messrs. Charles L. Corbin and John R. Hardin, and in the proposed revision of 1944 prepared by the Legislature. Both plans, while differing in some details, envisaged a unified court of original jurisdiction with one section for equity and probate cases and another section for cases at law. Separate, simplified appellate courts were provided in each plan. Here were the blueprints of a judicial system designed to meet the needs and conditions of today.

Dean Pound, addressing a New Jersey audience of lawyers in 1941 (for the full address, see page 2 of this issue), made the following pertinent observations:

> "In this process of making over and simplifying the organization of courts, the controlling ideas should be unification, flexibility, conservation of judicial power and responsibility.
>
> Unification is called for in order to concentrate the machinery of justice upon its tasks. Flexibility is called for to enable it to meet speedily and efficiently the continually varying demands made upon it. Responsibility is called for in order that some one may always be held and clearly stand out as the official to be held if the judicial organization is not functioning the most efficiently that the law and the nature of its tasks permit. Conservation of judicial power is a *sine qua non* of efficiency under the circumstances of the time. There are so many demands pressing upon our state governments for expenditures of public money that so costly a mechanism as the system of courts cannot justify needless and expensive duplications and archaic business methods."

The proposed 1944 revision embodied the essentials of the court system suggested by the eminent Harvard authority. It was supported by all those genuinely concerned with a modern, efficient court system. The case for the 1944 revision was most eloquently stated by the present Chancellor on May 9th, 1944, as follows:

> "Many have seen the desirability of merging, in some respects, the law and equity branches of the courts, at the same time retaining the benefits of both systems with the opportunity to maintain judicial experts in each branch.
>
> There has been a crying need for the benefits which would result from having a really responsible head for all courts of the State.
>
> The revision, which we will have the opportunity to adopt and which I hope we will adopt, will create a court system which eliminates the undesirable features of the present system and substitutes a coordinated, unified, cohesive, workable system operating under a chief justice responsible for the proper functioning of the entire system. The judges will be allocated to those branches where they will have an opportunity to use their best talents.
>
> The plan presents an opportunity for greater efficiency in our judicial system and we should make sure that there is no question about its adoption."

The defeat of the 1909 amendments was, as Chancellor Walker frankly stated, "due to political conditions and not the amendments themselves." As to the 1944 proposal, the tactics and forces employed for its defeat are still fresh in the memories of most of us

and the less said about them the better. It suffices to say that in neither instance was the best interest of the public at large a primary consideration of those opposed to the changes.

Our court system has the same defects now that it had in 1944. Justice Colie gave ample evidence of some of its shortcomings just about two months ago. Yet, it is said that the Judiciary Article will be the most controversial item on the agenda of the Convention. Who are likely to oppose real changes that would benefit all the people of the State? The obvious answer would seem to be those who profit by or are content with the *status quo*—the Chancery lawyer who enjoys a friendly relationship with members of the court; the practitioner who, conscientious though he may be, is incapable of adjusting to anything new regardless of its merits and identifies that which he has long known with revered, albeit indefensible, tradition; possibly some members of the judiciary who are not in the over-brudened portion of the court system; certainly, the political leader who is content with things judicial as they are; and a small minority of members of the bench and bar who sincerely approve of the present system.

On the other hand, many members of the bench and bar, the progressive political leaders of both parties, and the informed members of the public will be eager to grasp the opportunity to thoroughly reorganize the court system on a rational, modern basis.

Whether the opportunity for sorely needed court revision is grasped at the Convention will depend on the intelligence, objectivity and courage of the delegates and of certain leaders of the bench and bar and in public life. The influence of the latter, including such men as Governor Driscoll, former Governor Edison, Chancellor Oliphant and Arthur T. Vanderbilt, who will not be delegates, may be the ultimate determinant as to whether New Jersey goes forward with a modern, efficient court system or remains saddled with a system rooted in the dark ages of the English judiciary. Upon the integrity, selflessness and foresight of these delegates and leaders will depend the sorely needed improvement in the state administration of justice. Acknowledging the force of human frailties, it may fairly be stated that the true measure of their stature in the history of New Jersey will be judged by the extent of their contribution to judicial reform in the Constitutional Convention of 1947.

DO WE NEED APPELLATE DIVISIONS?

(New Jersey Law Journal, April 24, 1947)

In this series of front page editorials, running for the next two months, the *Journal* proposes to discuss the principal questions which the Constitutional Convention will be obliged to answer this summer when it comes to consider our court system. The edi-

torials will deal first with our appellate courts and then with our superior courts of original jurisdiction. The views advanced in this series are presented argumentatively for the purpose of stimulating thought; they do not indicate convictions to which we are immutably attached. On the contrary, we reserve the right to amend our views. Moreover, by stating the questions controversially, we hope particularly to draw out thoughtful comment from the bar.

Happily the bench and bar are nearly of one mind on a very important matter, namely that our highest court should be reconstituted as a court of either five or seven members. But from this point on, almost every proposal for the improvement of the system is involved in controversy.

The critical question raised by the subject at hand is whether the proposed highest court, call it the Court of Appeals if you wish, can adequately attend to so much of the appellate business of the State as to render it necessary to set up Appellate Divisions. In order to compare the work now performed by the Chancellor and the Justices of the present Supreme Court with that to be performed by the Justices of the new Court of Appeals, one must consider their respective functions. Doubtless in keeping with the best views of the times, the Chief Justice of the new Court of Appeals will be constituted the administrative head of the courts of the State and, hence, will find himself much engaged with his administrative duties. Doubtless, too, in keeping with those views, the remaining Justices of the Court of Appeals will be obliged to give time to the making of rules governing the practice of the courts of the State. On the other hand, it must be borne in mind that during the last ten years the Chancellor has devoted himself largely to administrative tasks in his own court and has had to attend also to the work of the Court of Pardons. Moreover, Justices of the Supreme Court have heard proceedings on prerogative writs and motions at the circuit and from time to time have charged grand juries; these are functions which properly should not devolve upon members of the new Court of Appeals.

Besides, the new Court of Appeals will be more efficient than the Court of Errors and Appeals. By the mere reduction of the personnel from 16 to five or seven, there will be reduced proportionately the number of repetitious conference memoranda written by the members of the court for each other's benefit, memoranda which the opinion writer should be obliged to examine. Indeed, our present bench is so unwieldly as a deliberate body that in order to pass adequately on each cause before it, it sits first in part conferences and then in a general conference of the whole court. There are other efficiencies to be secured from the new Court of Appeals. If it should hold monthly terms, study briefs in advance of argu-

ment and then arrange conferences of the court during the week of the argument so as to secure the full benefit of counsel's oral remarks, not only would decisions be rendered within a month or two after the case is submitted and their present quality perhaps improved, but much time of the court would be saved.

We come back then to the question, would the new Court of Appeals be overburdened if it had to undertake the appellate business of the State without the aid of Appellate Divisions? In the October Term of 1946, interestingly analyzed by Justice Frederic R. Colie in an address reprinted in 70 *N.J.L.J.* 53, there were 76 cases on the list. Apparently nine of them were settled or disposed of without taking the time of the court, leaving 67 cases submitted on briefs or oral arguments. Besides this, there were the causes heard by the Supreme Court at Trenton. When account is taken of affirmances on opinion and brief opinions *per curiam,* each Justice of the new Court of Appeals would be called upon to write but few more than 25 or 30 opinions a year which, as Justice Colie remarks in the above cited address, a Justice of the Supreme Court now writes (the Justice was counting opinions in both the Court of Errors and Appeals and the Supreme Court) ; and besides he would have much more time to write them than the Justices now have. If this be so, then why need we set up Appellate Divisions now on the mere speculation that judicial business will have increased so much 20 years hence as to warrant them then?

The United States Supreme Court has now, for a considerable number of years, annually entertained over 1,000 cases, including almost 200 cases dealt with in full opinions and over 600 applications for certiorari summarily disposed of. Many of the 200 cases mentioned more profoundly affect the welfare of the nation than most of the cases which reach our highest court, and therefore are more demanding on the time of the court. Surely the proposed Court of Appeals would not be nearly as busy as the United States Supreme Court.

The practice before the United States Supreme Court on certiorari and the system of discretionary appeals devised for the Court of Appeals of New York serve to screen out unimportant cases and allow the members of the court more time to devote to the profound consideration of causes which concern the nation, the state and the people at large, as well as the litigants themselves. But New York, with its four Appellate Divisions and over 300 Superior Court judges, has more than three times the judicial business that New Jersey has; and the federal courts with ten Circuit Courts of Appeals and Court of Appeals for the District of Columbia, and over 250 active judges, also have a volume of judicial business over three times that in New Jersey. Do we need to copy the federal and New

York appellate systems? Only 11 states in the Union, outside of New Jersey, have appellate divisions or intermediate courts of appeal.

If Appellate Divisions are not provided for, then what branch of the new court system is to hear proceedings on prerogative writs, appeals from District Courts and the Workmen's Compensation Bureau, and other appeals heard on the record below? Such matters, it is submitted, could be attended to by Appellate Parts of the Law Division of the court which we may here call the Supreme Court (it was called the Superior Court under the 1944 proposed Constitution). Those Parts should consist perhaps of two panels, each of three judges, perhaps one sitting in Newark and the other in Trenton. The Appellate Parts would not entertain appeals from the Law or Chancery Divisions, but only review the proceedings of lower tribunals as above indicated.

In cases heard by an Appellate Part, as where an appeal is taken from a District Court or the Workmen's Compensation Bureau, there should be no appeal, as of right, to the Court of Appeals, except perhaps in cases involving constitutional questions or where there is a dissent in the Appellate Part or the matter is certified by the Appellate Part to the Court of Appeals. (These are questions which will be dealt with in the next editorial.) Litigants are entitled to a full and adequate consideration by one appellate court; further than that, it is submitted, their rights do not go. Appeals from an Appellate Part, except in the cases mentioned, should therefore be cognizable by the Court of Appeals, only with leave of that court.

Furthermore, such appeals as those coming up from the petty criminal courts, which are tried *de novo* by a judge in the Law Division of the Supreme Court, should (except for cases involving constitutional questions and perhaps other cases) only be heard by the Court of Appeals with its leave.

The contentions which are easiest to upset on paper and yet will doubtless prove most insidious in the councils of the Convention, are those advanced *ad hominem*. Thus, in dealing with the instant subject, it will be said that we have 85 judges (counting 33 Common Pleas judges) who will be looking for places in our system of superior and appellate courts. If upper court judges are all to become full-time judges (and that is certainly a most desirable objective) and if the 85 judges are to be continued in the new system at least for the balance of their present terms with reasonable prospects of reappointment (and that too is much to be desired), then it is said we have an added argument for the establishment of Appellate Divisions to attend not only to the business of the Appellate Part, above stated, but also to hear appeals from causes in the Chancery and Law Divisions. For the politicians will be quick to see that thereby dignified positions are provided for more men.

Nearly all the cases that go to the Court of Appeals will have to be first heard in an Appellate Division.

Wastage of judicial personnel, loss of time and money, resulting from the injection of an extra appeal in all causes which are heard both by an Appellate Division as well as the Court of Appeals, and incidentally multiplication of second-rate opinions reported by Appellate Divisions (because every judge on an Appellate Division will feel bound to hand down opinions for the reports), all these evils we will bring down upon ourselves, will we not, if Appellate Divisions are established?

SOME QUESTIONS AS TO APPEALS IN A NEW COURT SYSTEM

(New Jersey Law Journal, May 1, 1947)

This is the third in a series of editorials advocating a revision of the Judiciary Article of the State Constitution. Last week's editorial arguing that the volume of appellate business did not require the setting up of Appellate Divisions, necessarily took into account some of the matters herein dealt with. Thus if (as proposed by the Hendrickson Commission) an appeal is to be allowed as a matter of right from all interlocutory orders at law and if (also as proposed by that Commission) appellate courts are to pass upon the weight of the evidence in actions at law, then Appellate Divisions may have to be established. For in such a case the Court of Appeals could not itself adequately attend to all the business that would be brought up on appeal from the Chancery and Law Divisions of the court of general original jurisdiction which we called last week the Supreme Court.

However, we deem it inadvisable to render every interlocutory order at law an appealable matter. To be sure, there are some such orders as to which there perhaps should be a right of review. For example, where there is a denial of a motion to strike a complaint, perhaps an interlocutory appeal should be allowed. So, too, where a party objects to the jurisdiction of the court over his person, and the trial court overrules the objection, the matter perhaps should be immediately appealable. In either case, if an interlocutory appeal were allowed and the lower court reversed, it might be unnecessary to try the case. Such appeals will go from the Chancery and Law Divisions to the Court of Appeals and under the new court system they will be heard expeditiously and with a tolerance that many appeals do not now receive. The policy that we have built up toward discouraging even one appeal is born of the delays and expense attendant upon our present appellate system. Why should this matter not be dealt with, then, by allowing appeals from preliminary or interlocutory orders at law or equity, only when permitted by

rule of court? Such a rule, as we conceive it, would not greatly increase the business which the Court of Appeals otherwise would be obliged to attend to.

The Constitution drafted by the Hendrickson Commission authorized appellate courts to set aside judgments at law, in whole or in part, where the finding of fact was against the weight of the evidence. This raises a question somewhat like that which was much debated by the bar several years ago, namely, whether motions for a new trial in the Supreme Court should be heard by the Supreme Court at Trenton or by the Circuit Court judge who heard the case. Of course the rule, ultimately promulgated, was motivated in large part by the desire of the Supreme Court to relieve itself (and justifiably so) of a heavy burden. But there was another motive for the rule, namely, that a trial judge can deal with the weight of the evidence far more competently and efficiently than an appellate court reading a record. Do we need also to have his decision on this matter reviewed? It might be observed parenthetically that in at least four of the 11 states of the Union which have appellate divisions or intermediate courts of appeal, those courts are given the power to review such a decision; whereas the highest courts in those states have no such power.

In any event, we adhere to the view urged in the last editorial, namely, that the volume of appellate business will not so overburden the Court of Appeals as to require the establishment of Appellate Divisions. In fact, we suspect that if Appellate Divisions are set up, there will either be on the one hand double appeals in most all cases at law and in equity—and that is most undesirable; or, on the other hand, so little business in the Court of Appeals as to constitute the Justices of that court pensioners of distinction.

We urged last week the establishment of Appellate Parts (call it another name, if you wish to) of the Supreme Court to hear not only proceedings on prerogative writs (we hope that such proceedings will all come to be known and treated as appeals), but also appeals from District Courts and the Workmen's Compensation Bureau and all appeals heard on the record below. Such Appellate Parts would be very busy; there are perhaps in this State 500 or more appeals a year in workmen's compensation matters, now heard by the Common Pleas Courts. In all cases heard by an Appellate Part there should be no appeal as of right to the Court of Appeals except where the proceeding involves the constitutional validity of statutes, the constitutional rights of individuals, the interpretation of statutes affecting large classes of people, questions of jurisdiction and any doubtful questions of general law of wide application. These cases will perhaps be adequately provided for (as we urged last week) by permitting appeals from an Appellate

Part to the highest court, only in cases involving a question under the United States or the State Constitution, and cases which are heard by the Court of Appeals on certification by the Appellate Part or by the Court of Appeals. The denial of a prerogative remedy should not preclude an appeal. On the other hand, should such a case be appealable if it does not fall within one of the categories stated?

By entertaining appeals (within the limits stated) from the Appellate Parts, the Court of Appeals will retain ultimate control over all litigation in the State, thereby insuring a uniformity of decisions throughout the State. It may be satisfactory to leave it to rule of court to determine what limitations should be made on appeals from Appellate Parts. But limitations there should be. As Chief Justice Hughes once said: "Hosts of litigants will take appeals so long as there is a tribunal accessible. In protracted litigation, the advantage is with those who command a long purse. Unmeritorious appeals cause intolerable delays. Such appeals clog the calendar and get in the way of those that have merit."

There are two other matters which should be dealt with here. The 1944 proposed Constitution contained a provision which was designed to confer upon the appellate court authority to reverse and enter final judgment in favor of an appellant in an action at law where the facts were such as would have authorized the trial court to direct a verdict in his favor. Unfortunately the language of the provision was drawn in large part from Article VI, Section 8 of the New York Constitution which has been narrowly construed to permit the appellate court to enter final judgment on reversal, only where the facts are either conceded, found by the trial court, or incontrovertibly established by record or otherwise. Do we need to embody such a provision as this in the Constitution? If the appellate court were given the power to enter a final judgment where the trial court would have been authorized to direct a verdict, the right of trial by jury would be in no way violated. In framing a rule of court on the subject, attention should be paid to the Illinois and Massachusetts statutes which have been construed to have a more liberal effect than the New York constitutional provision.

Finally, do we need to include in the Constitution such a provision as that proposed by the Hendrickson Commission, namely, one expressly authorizing the Court of Appeals to exercise such original jurisdiction as may be incident to the complete determination of the controversy? Can we not leave this matter also to rule of court, trusting that the appellate court can be prevailed upon to promulgate such a rule and to exercise such original jurisdiction in the limited number of situations where the exercise becomes a

valuable service to the cause of justice? This perhaps is arguable.

In any event, in drafting a Constitution sight must not be lost of the fact that it is but a body of principles giving general direction to the processes of government and that it cannot be made to supply an exact answer to all the perplexities confronting the State in the next century. As Dean Pound has said: "Certainly a constitution is not the place for details which, if they work badly, can only be removed or improved by the slow and sometimes painful process of constitutional amendment."

PROBATE LAW UNDER A MODIFIED COURT SYSTEM

(New Jersey Law Journal, May 8, 1947)

Mothered by the ecclesiastical courts, grandsired by obsolete concessions to the church and the landed gentry, father unknown—none of the little accidents, given the good name of Jersey Justice, were conceived with such indifference as our present system for the trial of probate disputes. A small piece of the contentious probate business of this State devolves upon ten vice-ordinaries; another, a larger piece, is attended to by 33 Orphans' Court judges; and a little piece has even been turned over to the surrogates. The vice-ordinaries and Common Pleas judges, each devoting perhaps less than ten per cent of his time to this business, will, no matter how competent, have small chance to lay by a stock of information on the subject, so necessary for a thorough and efficient dispatch of the business. Induced somewhat by the very circumstances alluded to, the Orphans' Courts have come to refer the largest part of the contentious probate business of this State—perhaps 60 per cent, perhaps 75 per cent of it—to masters to report or *ad hoc* advisory masters, many of whom, having had but few cases of the sort, must be compensated to prepare themselves on rudiments. Could any system of courts be worse than that under which judicial business is turned over by the bench to the bar for hearing, with the judicial services of the bar paid for on a fee basis? The Court of Errors and Appeals has put it too mildly: "The practice of referring Orphans' Court matters to a master should not be encouraged."

The concessions made centuries ago to the church, written into the State Constitution, have long since lost any utility whatsoever to society. Such concessions led, for example, to the granting to the probate court of an exclusive jurisdiction over the removal of an executor or administrator, with the result that an injunction in Chancery restraining him from exercising his functions must be temporary in character, necessitating a further proceeding in the probate court, and a rehearsal of the proof, in order to have him removed. Likewise, because of the exclusiveness of the probate court's jurisdiction over the grant of probate, Chancery cannot con-

trol probate decrees (as it controls a judgment at law) in case of mistake or fraud. A dozen other such illustrations could be cited. But much more serious than these matters are the large overlaps of Chancery and probate jurisdiction not only as to the settlement of accounts and the distributions of estates but especially as to proceedings for discovery and relief, proceedings to secure the advice and direction of the court and proceedings for the construction of wills. Perhaps one-third of the difficult controversies in the probate courts as to those latter proceedings—many hundreds of matters annually—are over the question whether the court has the jurisdiction to entertain the cause, a question utterly of no moment to the litigant.

What then is to be done about the matter? A couple of years ago there appeared a brilliant article in the *Michigan Law Review* on the "Organization of the Probate Court in America," written by Simes and Basye. It closed with a chapter on "An Ideal Probate Court"; and at the end thereof extolled as "scientific and comprehensive" the proposal envisaged in the ill-fated 1944 Constitution of New Jersey. That in substance is the proposal made here.

By a revision of the Judicial Article, let provision be made so that the business of adjudicating upon probate disputes may be turned over to specialist full-time justices, sitting in the Probate Part of the Chancery Division (in the 1944 draft it was called the Equity and Probate Section) of the Supreme Court (in 1944, called the Superior Court). Upon this court should be conferred original jurisdiction throughout the State in all cases; and each justice of the court should, if the ends of justice require it, have authority to exercise all of its powers. Such a Part should, in the usual course, pass upon all causes dealing with the construction of wills and *inter vivos* trusts and the instruction of fiduciaries, as well as upon will contests and accounts. Because there would not be enough business for such a specialist in each county, one justice would be assigned to several counties with a weekly, or in the small counties a less frequent, motion day in each county, the justice sitting on circuit, traveling to the litigant and not vice versa. All contentious probate business would come before that justice and in him would be vested the full powers of the Ordinary and the Chancellor.

The clerk of the probate court should be a specialist too—the present surrogate. He would be acting for the Part and in its name as to the non-contentious business the surrogate now attends to (much as the Supreme Court Clerk now acts on a judgment by default), with a power residing in the parties to appear before the justice in any litigated matter, including a power within a limited time to open up the surrogate's common probate decree. Besides, the surrogate himself or the parties should be authorized to certify

or lay before the justice any non-contentious matter raising difficulties.

It is to be remarked that of all the gains offered by the so-called unified court system, that to be secured among the probate courts, though deserving of much attention, has received no notice whatsoever. What a fortunate catharsis of our probate and estate system of justice, with all its present jurisdictional aches, to set up a Part of the Chancery Division, as proposed, wherein the business of the Prerogative Court, the Orphans' Courts and the contentious business of the surrogates are amalgamated with Chancery's cognate jurisdiction. Thus there would be offered the specialization making up the genius of the New York surrogates, with their jurisdiction (taken from the Chancellor) over the construction of wills, but added thereto, a jurisdiction over *inter vivos trusts.* Besides, there would be secured a flexibility for improvement and administration, efficiencies which can only be achieved in a unified court.

From our three and one-half story system of probate courts (if one will indulge Orphans' Court masters with a half-story) one steps into a three-story system of law courts (which will be dealt with in an editorial shortly) viz., the Common Pleas Courts, the Circuit Courts and the Supreme Court, not to speak of the adjoining apartments in our criminal courts. When one comes to look at this rambling house of justice, which so betokens the irrepressibility of the human imagination when vagrant, one may be allowed to quote part, and paraphrase another part, of an address which Lord Coleridge, Lord Chief Justice of England once made, wherein he must have been referring to New Jersey: "I am told," he said, "there is a state in this progressive United States in which the ancient courts of England are at this moment as alive as ever and I venture, therefore, upon this subject to make you a practical suggestion." (Then, after referring to the reservation of the great national park in the United States, he went on): "Could it not be arranged that, with the sanction of the state itself, that state could be preserved as a kind of judicial park, in which the glories of useless controversies over the jurisdiction of the courts and all the other weird and fanciful advantages of trying a single cause piecemeal in separate courts might be preserved for future ages to gratify the respectful curiosity of your descendants; and that our good old English judges, if ever they revisit the glimpses of the moon, might have a place where their souls might find some rest?"

CHANCERY AS A DIVISION IN A UNIFIED COURT

(New Jersey Law Journal, May 15, 1947)

Shall our Court of Chancery remain a separate court, or be constituted as part of a unified court system? This question promises

to be one of the most controversial issues before the forthcoming Constitutional Convention.

New Jersey, Delaware, and Tennessee are the only states in the Union with separate courts of equity. The tidal wave of court reform which started in the 19th Century and resulted in the adoption of the English Judicature Act of 1873, also swept into the discard most separate equity systems of our country. Illinois, the last great stronghold, fell in 1942.

Why is it that the old English High Court of Chancery, the mother of our equity court, and most of her progeny, have repudiated Chancery as a separate system, in favor of the unified court? The reasons are known to every experienced practitioner. The maintenance of a separate equity system results, in many instances, in delay, piecemeal litigation, jurisdictional disputes, and duplication of effort and expense. It also encourages shunting cases from court to court until the parties are exhausted; and sometimes, the rights of the parties are lost in the shuffle.

A recent case highlights a serious defect in our present system. A's right of action against B to recover a mortgage deficiency was interfered with by a Chancery injunction obtained by B. After the dissolution of the injunction, A brought an action at law to recover his deficiency, to which B pleaded (1) that the action was not commenced within three months after the confirmation of sale, and (2) that no notice of intention to sue had been filed within that period. This compelled A to go back into Chancery for an injunction to restrain these defenses. Chancery restrained the first defense, but denied the relief against the second, on the ground that the filing of the notice to sue was a condition upon the right, and not the remedy. Thus, Chancery admitted its impotence to remedy a situation caused by its original erroneous injunction.

In another case, Chancery dismissed an action by a divorced wife for specific performance of a contract by her former husband to pay alimony, on the ground that the remedy was at law. She thereupon brought suit in the District Court on the contract. But the District Court held that the remedy was in Chancery and dismissed the action. The Court of Errors and Appeals finally held that the remedy was in Chancery by petition for an increase in alimony.

These are not isolated cases. Numerous examples can be cited to prove that even experienced lawyers have difficulty, at times, in determining the proper forum.

The maintenance of separate courts of law and equity has also stunted the development of miscellaneous remedies. Although New Jersey gave birth to the modern movement for declaratory judgments, our dual judicial system has resulted in narrowly limiting the relief permissible under the statute. Likewise, the legislative

purpose of the Uniform Fraudulent Conveyance Act has been frustrated in cases where the fraudulent conveyance is made before the complainant's claim is reduced to judgment. Under the new Rules of Civil Procedure, the federal courts have found no difficulty in entertaining such an action before judgment. This division in judicial power also handicaps the law courts in enforcing their own processes, as in the case of executions against shares of stock which cannot be seized.

Now, if we have a unified court modeled on the modern English system, many of the deficiencies of our present Chancery set-up will be eliminated, and yet the prestige of our equity law will be preserved.

Under a consolidated system, the traditional equitable remedies involved in the administration of trusts, abatement of nuisances, actions for injunctions, foreclosure of mortgages, specific performance, and receiverships, etc., will be handled by the Chancery Division. But ordinary equitable defenses arising incidentally in common law actions will be adjudicated by the trial judge sitting as Chancellor. A few examples will illustrate the merits and efficiency of such system.

1. A is in possession of a factory under an agreement to obtain a lease. The landlord brings an action in ejectment against A because of an alleged breach of the agreement. Under the present system A is compelled to file suit in Chancery for specific performance of the contract to give him a lease. He cannot defend at law on the ground that he is in possession under an agreement to give a lease. Under a unified system, the trial judge, as Chancellor, would eye the situation through equitable principles and treat A as the tenant under the lease.

2. A has a claim against a decedent's estate. The executor carries on settlement negotiations with A until the statute of limitations runs, and then disallows the claim. In an action on the claim, the executor pleads the statute of limitations. Under the present system, A is compelled to bring suit in Chancery to restrain this defense. But under a unified court, the trial judge could relieve the plaintiff of this defense on the ground of equitable estoppel.

3. In an action at law, A obtains a judgment against B and wants to levy on B's stock in a New Jersey corporation, which B has concealed. To make the levy effective, A must obtain an injunction from Chancery restraining B's transfer of his stock. Under a unified court, the trial judge, as Chancellor, could issue such a restraint in aid of the execution.

4. A brings an action against C to recover on a bond signed by B and C. C wishes to defend on the ground that he was not a principal, that he signed as a surety for B, to A's knowledge, and that

B was discharged by A; hence C was likewise discharged. Under the present system, the law court has no jurisdiction to entertain such a defense. C must therefore sue in Chancery where he can prove that he was a surety and not a principal. Under a unified court, that defense could be entertained by the trial judge sitting as Chancellor.

5. A brings an action to abate a nuisance against B. Under the present system Chancery can only grant an injunction. It cannot award damages. That remedy must be sought at law. Under a unified system, the court could award the damages as part of complainant's relief.

In all these cases the trial judge sitting in the Law Division would dispose of all issues, sending the legal issues to the jury and deciding the equitable questions himself, and thus avoid piecemeal trials which prevail under the present court set-up.

The number of illustrations can be multiplied *ad infinitum*. The result of an integrated court will be to eliminate jurisdictional disputes, piecemeal litigation and duplication of effort and expense and to preserve our equity jurisprudence free of its present handicaps. Such being the aim and purpose of a unified court, it is deserving of the support of all those who are interested in the improvement of the administration of justice.

A COMMON LAW COURT DIVISION OF A UNIFIED COURT

(New Jersey Law Journal, May 22, 1947)

For more than half a century it has been felt that our system of courts is antiquated and not designed to function at a maximum degree of efficiency in a highly complex, industrial society. The remedies from time to time suggested have not always followed a consistent pattern, but the fact that so many solutions have been offered, although up to now never accepted, serves to emphasize the need for a thorough revision of our entire judicial system.

Certainly one of the most glaring faults with our present system lies in the fact that we have three separate courts, Supreme, Circuit and Common Pleas—with practically identical jurisdiction over common law actions. We doubt if there is a sovereign state anywhere in the world that maintains so many different courts with original jurisdiction over the same subject matter. Where, outside of New Jersey, is a litigant given the opportunity of instituting an action for damages for breach of contract, or to recover damages for personal injuries, for two illustrations, in any one of three courts?

Our present system is cumbersome and must be practically incomprehensible to the lay mind. Furthermore, it presents a means for unnecessarily protracting litigation. A common law action can be instituted in the Court of Common Pleas or in the County Cir-

cuit Court, and from an adverse judgment an appeal may be taken as a matter of right to the Supreme Court. From the judgment of the Supreme Court a further appeal as a matter of right may be taken to the Court of Errors and Appeals. Two possible appeals in an ordinary common law action if the plaintiff should prefer to institute his action in either the Circuit Court or the Court of Common Pleas. Yet if the same plaintiff had chosen to institute the same action in the Supreme Court, which he now has a right to do, there is only one appeal to the Court of Errors and Appeals.

The incongruity of the situation is further emphasized by the fact that original common law actions are not tried by members of the Supreme Court at all but are tried in the same court room, and before the same judge and jury, as are actions commenced in the County Circuit Courts.

Because the jurisdiction of the Courts of Common Pleas and the Circuit Courts extends only to the boundaries of the county, the processes of these courts are likewise limited and the judgments of these courts are liens only on real estate within the county, while a judgment obtained in the Supreme Court in an identical action is a lien on real estate throughout the State. True, the judgments of the Circuit and Common Pleas Courts may be docketed in the Supreme Court and thus become a lien throughout the State, but that increases the costs.

Without multiplying instances, it seems clear that our present system could be greatly improved. A unified court system in which the present courts exercising original jurisdiction in common law actions are consolidated into one division of a state-wide court of original jurisdiction sitting in each county of the State would be highly desirable. Under the unified court system the judges of this court of original jurisdiction could be assigned to sit for the trial of cases in the various counties by the chief judicial officer of the state, presumably the chief judge of the court of last resort by whatever name it is called. Thus the court structure for the handling of common law actions would be greatly simplified to the advantage of the people of the State, without loss of any substantial rights.

CONSTITUTIONAL REVISION—A NOTE ON THE APPOINTIVE POWER

(New Jersey Law Journal, May 29, 1947)

The forthcoming Constitutional Convention will undoubtedly be requested to adopt a provision vesting in the Governor the exclusive power of appointment to state office subject to confirmation by the Senate. The proponents of this change refer to the abuses which have accompanied joint session appointments and urge that our present hopes for effective government depend largely upon

the centralization of authority and responsibility in proper hands. It is our purpose here to examine the occurrences of the past in order that they may be of some guidance towards proper action for the future.

Although New Jersey's first Constitution, adopted in 1776, vested in the Governor the "supreme executive power," the power of appointment was in the main granted to the Council and Assembly.[1] When the constitution of 1844 was under consideration many delegates recommended that the appointive power of the Council and Assembly be reduced, and indeed, some delegates sought to have it placed exclusively in the Governor.[2] Although the Constitution, as adopted, did reduce the appointive power of the Legislature and increased the appointive power of the Governor, it did not vest an exclusive appointive power in the Governor. On the contrary, its terms have been construed to provide that apart from the specific offices which must be filled by the Governor, all other offices may be filled in such manner as may be provided for from time to time by the Legislature. The leading decision to this effect is *Ross* v *Freeholders of Essex County*[3], which has been followed consistently.[4]

Legislative appointment sanctioned by the *Ross* case is by no means a unique New Jersey practice. Prior to the Federal Constitution the appointive power was not a necessary incidence of the executive office and many state constitutions expressly placed the executive power in the Governor and the appointive power in the Legislature.[5] The Confederation which called the Federal Convention vested the appointive power in Congress[6] and in the Constitutional Convention itself there was violent disagreement concerning the proper body to exercise the power of appointment.[7] A reading of the Federal Constitution fails to establish any intent to vest the exclusive power in the President, despite the general

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[1] *N. J. Const.* (1776), *Article* XII.

[2] See the remarks of Mr. Field on June 12, 1844 (*Proceedings of the New Jersey Constitutional Convention of* 1844, *page* 357):

> "I am in favor of giving the appointing power to the Governor because it is an *Executive* power—the *great* Executive power. If this is not an Executive, I beg leave to ask what is an Executive power? You may call your Governor the Executive, but if you deprive him of the appointing power, he is the Executive only in name. There are two great departments in the government, the Legislature and the Executive. The Legislature makes the laws and the Executive is to see that they are carried into execution. But he cannot do this himself. It must be done through the instrumentality of others. Then he must appoint those who are to be the instruments for carrying the laws into execution, or else he is not the Executive. But will you allow the *Legislature* to appoint officers to carry into effect, *their own laws?* If you do, you create a despotism. You may tell us if you please, that the Legislature is the representative of the people, but give them executive as well as legislative power and they constitute a tyrannical government, call it what you will."

[3] 69 *N. J. L.* 291 (1903).

[4] *N. J. Zinc Co.* v *Sussex Co. Bd. of Equalization of Taxes,* 70 *N. J. L.* 186 (1903); *Hoboken* v *O'Neill,* 74 *N. J. L.* 57 (1906); *Bumsted* v *Henry,* 74 *N. J. L.* 162 (1906) (law held unconstitutional on other grounds); *State* v *Wildwood,* 83 *N. J. L.* 188 (1912); *Driscoll* v *Sakin,* 121 *N. J. L.* 225 (1938). But compare *In re Application of Cleveland, Mayor,* 51 *N. J. L.* 311 (1889) in which Chief Justice Beasley, by way of dictum, said that the power to appoint was executive in nature and could not be exercised by the judiciary.

[5] Thorpe, *Federal and State Constitutions* (1909), *passim.*

[6] *Articles of Confederation, Article* IX.

[7] Cf. Farrand, *Records of the Federal Convention* (1911), *Vol.* I, *p.* 20; *Vol.* III, *p.* 595.

holding in *Springer* v *The Government of the Phillipine Islands*[8] to the effect that the appointive power is an executive function. Indeed, Congress has on innumerable occasions either exercised directly the power of appointment or has vested the power in a person other than the President.[9] Similarly, in many states there has been consistent legislative practice exercising the appointive power notwithstanding recognition of the general doctrine of separation of powers and the vesting of general executive power in the Governor.[10]

In the light of the foregoing the proponents of an exclusive gubernatorial appointive power must look elsewhere than to constitutional precedents. They undoubtedly will find more fruitful arguments when they refer to our actual legislative practices. It has been said of our early 19th Century legislators that they spent more time dispensing patronage than they did legislating.[11] And might not the same thing be said of many of our current legislators! In recent times we have had numerous instances of action being withheld on important pending legislation until unholy "deals" have been completed for the distribution of patronage, and on occasion legislative appointments have been preceeded by many months of public bickering.[12] It may be true that a number of the ultimate legislative appointees were of high character, as witness, Commissioner D. Frederick Burnett, Director Carl Erdman, and others.[13] But it should be borne in mind that the concomitant loss of public respect and confidence, and the interference with proper legislative functions may well constitute too high a price for the public ad-

[8] 277 *U. S.* 189 (1928).

[9] See the numerous statutory references collected in 42 *Harvard Law Review* 426, *at* 430 (1929).

[10] Cf. *Fox* v *McDonald,* 101 *Ala.* 51 (1893); *Cox* v *State,* 72 *Ark.* 94, 78 *S. W.* 756 (1904).

[11] See the following remarks made by Mr. Vroom during the 1844 Convention while recommending that the Legislature be deprived of the power of appointment (*Proceedings of the New Jersey Constitutional Convention of* 1844, *pages* 135-136, May 28, 1844):

> "There are too, long lists of nominations brought in—and crowds of hungry expectants of office who must be attended to—and days and nights are employed in this kind of business. Now this can't be avoided. It grows out of the old Constitution. * * * But what will be the great incentive to agitation in an annual election? What will be the duties which our representatives will have to perform? To appoint magistrates, Justices of the Peace and multitudes of officers from those who throng your halls of legislation? who are active at the polls, and at Conventions to secure their own selfish ends? No, sir, no, and if you take the appointing power from the Legislature, there will be no incentive to this kind of agitation. To come to the Legislature will be like filling an office of honor or trust—they will come to make laws and not Justices of the Peace! They will come to meet the wants and wishes of the people—and not to fill the benches of your County Courts with supernumerary Judges! The Treasurer may be appointed by the Legislature, and some other small offices immediately appertaining to the government may be filled by them—but with these exceptions, I hope the appointing power will have no place in our halls of legislation but will be fixed by the Constitution in another place; and that the election of our representatives will be as they used to be—which I and others here as old as I, can well remember—when the people voted for the *best man*—for men who understood the wishes of the people and would make the best laws for them."

[12] After the death of D. Frederick Burnett, Commissioner of Alcoholic Beverage Control, his successor was not appointed for a period of approximately 15 months. During that period many political "deals" were announced, and several of these were presumably thwarted with the aid of public resentment expressed in the newspapers and otherwise.

[13] For example, William L. Dill, State Motor Vehicle Commissioner; Alfred E. Driscoll, State Commissioner of Alcoholic Beverage Control; Homer Zink, State Comptroller; and Robert Hendrickson, State Treasurer.

vantages, if any, which may be incident to legislative appointments. It is our belief that many of the abuses will be eliminated by vesting in the Governor an exclusive power of appointment to state office, subject to confirmation by the Senate.[14] We are fully aware of the danger which may result from placing such power in the hands of an unworthy Governor although, in this connection, the power of confirmation remains as an important restraint. On the other hand, when the State does have a conscientious Governor, he will be less disabled than at present from effectuating significant governmental reforms.

Other state constitutions which vest generally the appointive power in the Governor specifically exclude individual offices. It has been suggested that legislative appointive power of the State Comptroller and the State Treasurer be retained, and to this there would be no vital objection. It has further been suggested, however, that the Governor's appointive power of the judiciary should be restricted so as to compel the selection of judges of the court of last resort from the inferior courts. This restriction would be most unfortunate. In the first place, serious doubt may be expressed as to whether it would in any substantial sense attain the

[14] It is interesting to note that most of the arguments urged during the debates at the 1844 Convention are not only still pertinent, but have been reinforced by recent occurrences within our legislative chambers. Compare the following remarks by Mr. Zabriskie on June 12, 1844 (*Proceedings of the New Jersey Constitutional Convention of* 1844, *pages* 351-352):

> "The honorable gentleman from Cumberland (Mr. Ewing) has moved to strike out that portion of the section conferring the appointment on the Governor and Senate, and substituting a provision referring that power to the joint meeting. That gentleman objects to the provision as reported, because he insists it is an aristocratic and dangerous power which ought not to be engrafted on this Constitution. He likens the Governor in the exercise of this power, to a King exercising royal prerogatives, and the Senate to a 'Star Chamber' doing its iniquitous work with closed doors and in secret. This is certainly a strange argument to be presented to the members of this Convention, in this day of political enlightenment. In the joint meeting for which the gentleman contends, there exists *no responsibility whatever*, and all power that is independent is *absolute* also. No *individual* member of the legislature ever considered himself responsible for the acts of joint meeting. The individual was merged in the mass. * * * If you confer the power of appointment upon joint meeting, you violate one of the great principles upon which our institutions are based, to wit, the separation of the different departments of the Government. You connect the power of appointment with the legislative department. This is certainly one of the most dangerous combinations that could possibly be created. Let us examine for a moment the effect of this feature in the past history of the State, and from the experience thus presented let us gather counsel to direct us in the future. In the first place the deleterious and corrupting influences of this joint meeting system, is first visible in the primary action of the people. Individuals in the different counties who desire appointments seek by all the influences at their command to secure the nomination of candidates favorable to their pretentions. This influence is excited secretly, and without a knowledge of the people. Thus in many instances are the people cheated out of an honest representative by this sort of political legerdemain. But the evil does not stop here. The representative thus elected proceeds to Trenton, takes his seat in the legislature *solely intent* on discharging his obligations to his principal. To attain his object he directs all his efforts to induce members to pledge their votes for his friend, at the same time promising his vote and influence in their behalf for the attainment of any object they may have in view. Thus is the influence of appointments made to control the legislation of the State, regardless of honest principle or the interests of the people. The lamentable effects that have been produced by this sort of influence upon appointments, legislation and the public morals cannot be estimated. One word as to the mode by which the appointments are determined and I will close my remarks. The gentleman from Cumberland fears the action of a 'Star Chamber' and yet advocates joint meeting. Mr. Chairman, it is known to that gentleman as well as all who hear me that all the appointments made by joint meeting are previously determined upon in caucus. Members sit there with *closed* doors and by ballot determine all the appointments of the State. Here, sir, you have a true representation of a *'Star Chamber'*. Members deliberating in secret—voting in secret and precipitating upon their devoted constituents a host of officers without the least responsibility."

desirable end sought, to wit, the elimination of political appointments to the court of last resort. In the second place, it would practically exclude the occasional appointments of outstanding members of the bar who had reached the heights of their professional careers. If the suggested restriction had heretofore been in force, many of the more eminent members of our court of last resort would never have held judicial office, and if there had been a comparable limitation in the federal sphere, the Supreme Court would never have had Holmes, Brandeis, Cardozo, Hughes, Stone, and ever so many others without whom the court would never have attained its splendid traditions and stature.

It is to be hoped that the revised Constitution will ultimately vest with the Governor the power of appointment to state office, subject to Senate confirmation, untrammeled by restrictions and excluding only the isolated specific offices which may be filled by the Legislature under expressly defined constitutional authority.

CONSTITUTIONAL PROVISIONS FOR JUDICIAL APPOINTMENTS

(New Jersey Law Journal, June 5, 1947)

The *Law Journal* is on record advocating the unified court and simplification of the entire judicial system in New Jersey. It is felt that much of the present constitutional provisions, in so far as they relate to our judicial system, command respect more because of historic origin than for intrinsic merits. With respect to appointment and tenure of the judiciary, it is difficult to discern the principle or the pattern existing in the present Constitution.

The question arises as to what extent it is necessary for a state constitution to provide for detailed structure of the courts and, particularly, for tenure and appointment of the judges. To provide by constitutional provisions in detail for the tenure, appointment, rights and privileges of the judiciary is to take the power away from the Legislature subsequently to modify such provisions. As a rule it is recognized that the scope of modern constitutions is much greater than that of merely providing for the form of government, and that modern constitutions include, besides the frame of government and the usual Bill of Rights, numerous administrative provisions. The principal distinction between such constitutional provisions and ordinary legislative action covering the same items is in the formal mode by which they may be changed. With these general principles in mind it is suggested that if the proposed Constitution is to provide for tenure, appointment, rights and privileges of the judiciary, there should be developed a consistent pattern.

Under the existing Constitution the Chancellor is the Court of Chancery. Article VI, Section IV, so provides. It follows that vice-chancellors, although exercising judicial powers greater than those

of the Circuit Courts, do so in the name of the Chancellor, and as his advisors. Accordingly, their appointment has been recognized as the exclusive property of the Chancellor. Although appointed by the Chancellor, their office is a creation of the Legislature and they are, nevertheless, held to be constitutional officers of the State. (105 *N. J. Eq.* 759; 114 *N. J. Eq.* 261; 54 *N. J. Eq.* 255).

The present Constitution also provides that the Chancellor is the Ordinary and Surrogate-General. It would seem that following the reasoning applied with respect to the vice-chancellors, the surrogates should be appointed by the Chancellor. In fact, prior to the adoption of the present Constitution the power of Chancellors to appoint the surrogates was not questioned (4 *N. J. Eq.* 408). Under the 1776 Constitution, the Governor constituted the "Ordinary or Surrogate-General," and in him was recognized the power to appoint deputies or surrogates. Then, in 1822 the appointment of the surrogates was turned over to the joint meeting of the Council and Assembly. Article VII, Section II, of the present Constitution provides that the surrogates be elected by the people of the respective counties.

Giving the Chancellor the power to appoint vice-chancellors was not altogether illogical. By the same token the Chief Justice of the Supreme Court could have been designated to be the Supreme Court, giving him the power to appoint the justices, to advise him and to act in his name and on his behalf. The differences, then, are found due not to reasoning or planning, nor to the needs of our form of organized society, but simply to historic explanations of the origin of the various courts.

To state the various provisions for appointment and tenure of the judicial officers in New Jersey under the present Constitution is to describe a "crazy quilt." The Chancellor, Supreme Court justices, and the six lay judges of the Court of Errors and Appeals are appointed by the Governor, with the advice and consent of the Senate. The judges of the Inferior Court of Common Pleas are, by force of the amendment of 1875, appointed by the Governor. Article VII, Section II, paragraph 2 of the 1844 Constitution, providing for appointment of the judges of the Court of Common Pleas by the Senate and General Assembly, has thus been superseded, except for the provision of the five-year term. As to the Circuit Courts, although mentioned in the Constitution and therefore constitutional courts, with their jurisdiction defined in Article VI, Section V, paragraph 2, the appointment of these judges is not provided for, and such appointments must come under the general power given to the Governor, holding their office "for the time prescribed by law." The Constitution providing for the Circuit Court but not for the Circuit Court judges, their appointment, the

terms and tenure of their office is provided for by statutes (*N.J.S.A.* 2:5-4).

Obviously, a more uniform and consistent pattern for the appointment and tenure of the judiciary is necessary. Revisions proposed in 1942 and 1944 provide for the appointment of all the judiciary in courts whose jurisdiction extends to more than one municipality, by the Governor, with the advice and consent of the Senate, leaving it to the Legislature to provide for all other judicial appointments and tenure by uniform laws.

Under the 1944 proposed revision, an appellate court is to be established, known as the Supreme Court, the justices of this court being chosen from the justices of the Superior Court, these latter being required to be attorneys-at-law of at least ten years' standing. The Chief Justice and the justices of the Supreme Court (appellate court) are to hold office during good behavior; justices of the Superior Court (court of original jurisdiction) are to hold office for seven years on the first appointment and on reappointment for good behavior—the question of good behavior of the Supreme Court justices being triable by the Senate and that of the justices of the Superior Court being triable by the Supreme Court. The proposed revisions (1942 and 1944) provided that judges shall not engage in the practice of law or other gainful occupation during their continuance in office. (Obviously, the phrase "gainful occupation" can be a source of difficulty since it may cover activities which may not be at all in conflict with judicial duties.)

With respect to age limitations for members of the judicial system, during the 19th Century an age limit of 60 was often suggested and embodied in state constitutions. With the increased longevity of the American people an age limit of 70 is now customary. Provision for pension after the age of 70 may be made directly by the Constitution or such power may be left to the Legislature. The New York Constitution, for instance, provides for age limit at 70 and by legislative action provision is made for compensation after retirement.

The revision proposed in 1944 provides for age limit of 70, giving the Chief Justice the power to assign retiring justices to temporary service as need may appear.

If the Constitutional Convention were to sit for many, many months it may never be able to develop a formula for the appointment, tenure, powers, privileges and retirement of justices that could meet all criticism. However, with the present Constitution lacking any consistent pattern, it is suggested that the proposed revisions of 1942 and 1944 point to a more uniform and coherent method of appointment, tenure and retirement.

A MODERN COURT STRUCTURE FOR NEW JERSEY

(New Jersey Law Journal, June 12, 1947)

For the past few months the *Law Journal* has endeavored to turn an objective eye toward the tangled skein of the New Jersey courts and their many overlapping jurisdictional images. At this time, with the Convention opening today, it seems appropriate to review and condense the suggestions contained in the series of editorials in the hope that the members of the bar generally will be stimulated into active contemplation of the century-old horse-and-buggy court structure that is ours.

The editorials began with the prayerfully expressed aspiration that the delegates themselves would become so spiritedly sensitive to the creaking antiquity of the courts that sheer pride in their State and in the opportunity of a lifetime for real service would impel them to put prejudices and politics completely aside and create a Judicial Article in the new Constitution which would forever be a monument to their intellectual integrity. A prayer was breathed also that those non-delegates who for years had been in the forefront of the campaign for revision and whose utterances might be expected to have some influence on the thinking of the delegates would strive mightily in the interest of a finished document which would represent the best in modern methods of administering justice.

I

The Court of Last Resort

It isn't often that unanimity of opinion is found among judges and lawyers. On the subject of the present Court of Errors and Appeals, however, to a man they appear to be in complete accord that the unwieldly court should be relegated to a place among the things that were. So it seems reasonable to assume that the real problem remaining is as to the size of a new Court of Appeals. In the previous articles the view was advanced that it should be composed of either five or seven members. No specific position was taken as to whether the smaller or the larger number was preferable. The answer probably depends upon the structure of an Appellate Division, if one is in fact established. If such a Division is created and endowed with full intermediate appellate power, that is, one which will hear all law and Chancery appeals and have jurisdiction over the prerogative writs as well, then five judges in the Court of Appeals ought to be adequate. This conclusion stems from the modern thought that one full review as a matter of right is all that a litigant is entitled to expect. So it follows that with an Appellate Division having plenary review jurisdiction, there ought to be and will be a definite limitation upon the number of cases that

can reach the Court of Appeals. Five judges ought to be able to handle the thus curtailed volume.

If, on the other hand, an Appellate Division is devised which will have a more limited field of operation, and if (as will be discussed hereinafter) direct appeals from the Law and Chancery Divisions to the Court of Appeals are to be ordered, then a seven-member court would seem more advisable.

II

Appellate Divisions

Here again practically no dissention exists among informed members of the bar about the necessity for Appellate Divisions. The real problem centers about the form that such divisions shall take and the extent of their review jurisdiction. The question agitated is whether they should have intermediate appellate jurisdiction in all causes or whether certain causes, such as appeals from the Law and Chancery Sections of the Supreme Court, should be excluded.

The primary objective here is *one* appeal for a litigant *as a matter of right.* The secondary objective is to make certain that the Court of Appeals, because of restriction, by the Constitution and its own rules, on the causes which may be presented to it from the Appellate Divisions, does not become a court without a calendar. The safest and most practicable solution is that set forth generally in the *Journal* editorial of April 24, 1947.[1] There it was proposed, *first,* that appeals from the Law and Chancery Divisions of the Supreme Court go directly to the Court of Appeals. This would assure a constant source of review work for the court. *Second,* that all other matters of appeal or review (as by the prerogative writs) be assigned to Appellate Parts or Divisions. Such jurisdiction would encompass District Court appeals, workmen's compensation appeals, review of the action of administrative agencies, review of the action of municipalities and like branches of government, review of police court convictions, regulation of the admission to the bar, etc. (As an aside in this connection, an aim to be sought is the making of the prerogative writs issuable as of right, or the refusal of the writ reviewable, or the granting to the Legislature of power to create remedies which will operate concurrently with such writs).

No one need doubt that such Appellate Parts or Divisions would have enough to do. There are literally hundreds of workmen's compensation appeals annually, to say nothing of the other review burdens referred to above. The number of parts and the composition thereof necessary to handle the task must be a matter for thorough study by the Convention.

Appeals from these Parts should not be permitted as a matter of right except where the proceedings involve the constitutionality

[1] See pages 658 to 662, *supra.*

of statutes, the constitutional rights of individuals, the interpretation of statutes involving a large number of persons, questions of jurisdiction, a doubtful question of general law of wide application, or perhaps where there is a dissent in a Part or a certification of a question by a Part to the Court.

III

A Unified Court at the Trial Level

The proposed revision of 1944 provided for a unified court system of state-wide jurisdiction at the trial level. The proposal grew out of a comprehensive study of our trial courts of original jurisdiction. The archaic character of these courts was responsible for the plan for a single court, then called the Superior Court (but preferably called the Supreme Court), divided into Law and Chancery Divisions. The Law Section was to have jurisdiction in all civil and criminal matters at law, and the Chancery Section to have jurisdiction in equity and probate causes. The reasons for such a court are as pressing now as they were then.

In the *Journal* editorials of May 8, 15 and 22[1] the basic reasons for such a unified court mechanism were outlined and reiterated. The only phase of such a system which may be met with objection at the Convention is the absorption of the Court of Chancery and its elimination as a separate and independent tribunal. But emotions and prejudices aside, there is no real reason for the perpetuation of its individuality. In a modern judicial system, where the objective is to provide for full, adequate and expeditious justice for all litigants, its jurisdictional idiosyncrasies and limitations should be ended. The historical accident which gave birth to the court should not now be made a blight on the path of progress.

In the editorial of May 15 a series of deficiencies in the present jurisdiction of the court were alluded to. These deficiencies are not matters of argument, they are matters of established fact and unanswerable, except through the establishment of an equity branch of a unified court.

All probate matters are peculiarly related to the work of a Chancery Division. At present the vice-ordinaries and the Orphans' Court judges have much concurrent and some conflicting jurisdiction over such matters. In the suggested Probate Division there will be one tribunal of state-wide jurisdiction presided over by judges who will be or become specialists in that field, and everyone will know where to go and how to obtain the desired relief.

On the law side of the unified court, civil and criminal causes would be entertained. The disposition of criminal causes presents no particular problem. No one seriously objects to a blending of Oyer and Terminer, Quarter Sessions, General Sessions and Special

[1] See pages 665 to 667, 667 to 670, and 670 to 671, *supra.*

Sessions into one court. In dealing with common law actions the need for elimination of three courts in whose domain they are now cognizable is more patent. Now the Supreme Court, the Circuit or the Common Pleas Court may entertain these actions. Where service of process can be made within the county, any one of the three may be chosen as his forum by the litigant. This labyrinthine house of justice has forever been a mystery to the lay mind. Plainly, a unified court system in which these courts are consolidated into one division of a state-wide court of original jurisdiction sitting in each county is most desirable.

* * * * *

To sum up the sense of the series of editorials, the *Journal* earnestly recommends to the Convention:

(1) A separate Court of Appeals consisting of five or seven judges with appeals from the Law and Chancery Divisions of the Supreme Court going directly to it. No other appeal should be permitted as a matter of right, except where constitutional problems, important issues involving interpretation of statutes, doubtful questions of general law of wide application are involved, or where there is a dissent in the Appellate Division or a certification of a question by a Division.

(2) The establishment of Appellate Parts or Divisions of the Supreme Court to have appellate jurisdiction over all causes except appeals from the Law and Chancery Divisions.

(3) The creation of a state-wide court of original jurisdiction separated into Law and Chancery Divisions.

RESOLUTION OF THE MERCER COUNTY BAR ASSOCIATION

WHEREAS the Constitutional Convention now assembled is to consider and submit to the people a "new State Constitution," and

WHEREAS the Judicial Article of that new Constitution is the concern of every inhabitant and citizen of the State of New Jersey, and particularly the members of the bar, since the system of courts is the cornerstone of our profession, and

WHEREAS the question of the abolition of the Court of Chancery as a separate entity in the judicial system is advocated by some of our citizens, and

WHEREAS the development of equity jurisprudence in New Jersey under a separate Court of Chancery is acknowledged by scholars the world over to have reached a peak unequaled under any other judicial system in this country or in England, and

WHEREAS a virile and growing equity jurisprudence is that organ which gives to the body of the law its moral vitality and conscience and in so doing gives it flexibility and power to protect the weak against the strong and powerful, and the inalienable rights from the rigidities of legal form and precedent, therefore

BE IT RESOLVED that the members of the Mercer County Bar Association in meeting assembled record as their considered judgment that in any judicial system proposed by the Constitutional Convention, the Court of Chancery be retained as a separate entity for the administration of equity jurisprudence, substantially as is now provided in our present Constitution, and

BE IT FURTHER RESOLVED that a copy of this resolution be sent to the Judiciary Committee of the State Constitutional Convention.

This is to certify that the foregoing is a true copy of the resolution adopted by the Mercer County Bar Association at its annual meeting held on June 24, 1947.

MAURICE E. GOLD, *Secretary*

LETTER OF JUDGE GUY L. FAKE

(Copy of letter sent to President Robert C. Clothier by Augustus C. Studer, Jr., Esq., June 16, 1947, and referred to the Committee on the Judiciary.)

April 8, 1947

Chancellor A. Dayton Oliphant,
State House Annex,
Trenton, N. J.

Dear Chancellor Oliphant:

As you of course know, we who sit in the federal courts follow the decisions of our state courts in cases where diversity of citizenship is at the base of our jurisdiction. In the performance of our judicial duties we sit at times as law judges in the cold atmosphere of the law and at others as chancellors in the warm humanities of the equity jurisdiction. When we sit in equity we are therefore, of necessity, brought in direct association with the decisions of the New Jersey Court of Chancery.

It has been a matter of deep satisfaction with me to note that some of our leading lawyers and judges who, a few years ago, were rather inclined toward a mingling of the Court of Chancery with the law courts have, after more mature deliberation, changed their minds. Research into the subject of equity jurisprudence and a consideration of the history of its development as it has emerged over the centuries, leads I think, to a firm conviction that beneficial evolution in this field to meet modern conditions will be seriously retarded by a failure to maintain the separate judicial forum in which it has functioned over the years here in this State. Administrative improvements may well be in order but never the destruction of the Court of Chancery itself as a separate entity. I feel very deeply on this subject and it has seemed to me to be within the proprieties to express my views to you in the hope that they may be helpful in any way you may see fit to use them.

When I came to this bench some seventeen years ago it was not long before I discovered that a serious conflict existed between the Court of Chancery and the Federal Bankruptcy Court. A conflict which required the exercise of great moderation on the part of the vice-chancellors on the one side, and the federal judges on the other to avoid a very mean situation. It arose in this way: the vice-chancellors claimed jurisdiction to fix fees and allowances in receivership cases after petitions in bankruptcy had been filed in this court. We claimed that bankruptcy was supreme and that instantly on the filing of the petition the title to the estates in Chancery became vested in the federal courts. A situation soon arose where the

vice-chancellors felt they were in a position to hold the federal judges and their officers in contempt. We, on the other side, were equally as certain that we were empowered to hold them in contempt. The situation thus presented was serious not only because of the conflict of jurisdiction it raised but also because titles to property were left in great jeopardy.

As long as I live I shall remember with gratitude the fine spirit of moderation and tolerance which was manifested by each of the vice-chancellors. To them, as to us, the importance of the impasse and the duty of maintaining the dignity and the jurisdiction of our respective courts were impelling. This resulted in numerous conferences with the vice-chancellors and the settting up of an open forum to receive the views of members of the bar. Vice-Chancellor Backes wrote me in longhand an exhaustive scholarly letter on the subject at did several others of the vice-chancellors. There never was any doubt in my mind but that the vice-chancellors were right in principle and I so held. The difficulty was I was called upon to give full effect to a statute, the Bankruptcy Act, which had been so construed as to result in a contrary conclusion to that of the vice-chancellors. By mutual effort and forebearance and in the absence of any acrimony whatever, we finally had the issue so framed as to go to the United States Supreme Court and we each stayed our hands to await results. The Supreme Court decision sustained the position I had taken but that is not my point. What I want to emphasize is this: So well reasoned were the written opinions of the vice-chancellors that shortly thereafter the Congress of the United States amended the Bankruptcy Act to conform with their views and Chancery evolved with a victory. This, in my opinion, would never have happened in the absence of thought which was free to germinate in the minds of men who were experts in equity and the end result is perfect.

Some years ago it was my good fortune to be associated with some of the leading members of the Canadian Bar. Visiting Montreal on one occasion, Hon. C. H. Cahan, E. C., late Secretary of State for Canada, pointed out to me, in his law office, a complete set of our *New Jersey Equity Reports.* He told me that not only in Canada but throughout the entire British Empire, the *New Jersey Equity Reports* were considered of invaluable service in considering modern problems in equity. I can see him now as he stood before the stack and said, "You in New Jersey have certainly perfected yourselves in equity far beyond any of the rest of us."

The question of the continuance of our Court of Chancery as a separate entity in our judicial system is, it seems to me, of greater importance than any of the other questions to be considered in our proposed constitutional revision. I say this because the dynamics underlying the urge to destroy this court and wipe out the dignity

it has attained over the centuries presents the only real serious danger confronting us at this time. To lay violent hands on the Court of Chancery is at once to weaken us in maintaining our constitutional liberties, our property rights, our freedom of speech and of the press, and our religious freedom as well. It is only by the maintenance of an undiluted stream of equity that these rights can properly be evaluated and efficiently protected. Once that stream is unreasonably weakened by impact with the rigidities of the law, its virtue and its strength are to that extent enervated and dissipated. To maintain that peculiarly nice balance of reason which is so often required in equity, demands the best thought which can be evolved in each age. The court of equity must, and is intended to reach out into the entire field of human knowledge and human experience in its deliberations and yet withal it must stay its own hand where there is an adequate remedy at law. This limitation is of tremendous import and requires the careful thought of experts to the end that the constitutional right of trial by jury may be maintained in its proper sphere. Indeed, to follow this equitable maxim requires the seasoned approach of men extremely well skilled in the niceties involved. The chancellors of old were the keepers of the King's conscience, the modern Chancellor is the keeper of the consciences of all of us and that of the government as well. So it is that the court of equity today, in the exercise of its injunctive and prerogative powers, may say to the rich and to the poor, to the strong and to the weak and as well to the government itself, so far you may go and no farther. Its jurisdiction now over the many delicate and perplexing problems which had their origin in the Revealed Law as it was developed in the ancient ecclesiastical courts, ranging as it does over the entire field of family relations, emphasizes further the necessities of specialization.

It was discovered at an early date that the rigorous and rigid application of the rules evolved in courts of law were, in many instances, inadequate to render justice in its fuller sense. To cast these subjects into the hands of law judges who today are specializing in the legalistic atmosphere of contracts, torts, and criminal law is to weaken the purity and brilliance of equity and put a brake upon its progress in the myriad and everchanging problems of our daily lives. Do not misunderstand me in this. I am not contending the law judges can not and may not make excellent chancellors. I am urging however and I hope with some emphasis, that once a law judge is authorized to function in the court of equity he should remain there continuously to perfect himself in the reasoning which pertains to that court. Nor am I contending that the equity court is of more importance in our jurisprudence than the law courts. They are equally important in their respective spheres and, right here in New Jersey, working separately until

they meet in the appellate court, they have spelled out the best that can be found anywhere in the English speaking world.

As I understand it, no one today advocates or desires to destroy equity as a specialized subject on the theory that it is outmoded. No one would for a moment advocate that it should not be maintained as a definitely separate study in our law schools or that its maxims so well known to our lawyers should be ignored and forgotten. The fact is, it is evolving today as ever, in the correction of "that wherein the law by reason of its universality is deficient," and one may well devote a lifetime within its precincts, ever striving in progressive attempts to fathom that infinite concept we speak of as Justice. The Chancellor and his vice-chancellors live and labor within their sphere in full realization that the perfection of reason is not yet attained but toward that goal they must direct their intellectual efforts with all the integrity of thought and brilliance of expression they are capable of exercising. I know of no branch of the law wherein the jurist is left so free to meet the ever-changing conditions of our technological development. To order a judge, who sits day in and day out in the trial of law cases, to gather up his gown and his bag and move over to the consideration of cases in the highly specialized sphere of equity doesn't seem to me to be at all reasonable. Nor is it reasonable to expect that one steeped in equity can, with alacrity move over into the trial of jury cases. In each such instance, the judge's little black book of citations and the notes of his daily experience become useless to him. Reading the opinions of some of the outside judges who have had their training in jurisdictions where law and equity are not dealt with in separate courts, we are often confused in the language they use, and a study of semantics is necessary to get at the gist of the matter. More often than not the difficulty is that the writer has had a confused notion of what equity really is and cannot express himself with that clarity which flows from a special knowledge of it. For example: A day or two ago a case was cited here from the Supreme Court of a state where equity is not specialized in. The judge there says: "A court of law is a dangerous place for masquerade, for law looks beneath the apparent and beholds the real." How true and how much more satisfactory it would have been, had the judge worded it in the language of our late Chancellor Magill when he said in the *Stockton* case, "Equity looks at the substance, not merely the outward form." The foreign judge apparently did not understand that he was dealing with a maxim in equity. There is no such maxim in law. Chancellor Walker following on later said in the *Earle* case, "Now an appeal is made to a court of equity, which penetrates all disguises of form and, disregarding the shadow grasps the substance." In this same case he further said: "The principles of equity will be applied to new cases as they are presented, and

relief will not be withheld merely on the ground that no precedent can be found." And then further on in the same case he rules: "The legislature may make public policy but not the courts." There are some very high courts in our land which may have forgotten that axiom in their confused fears. To leave all this sort of thing to unskilled hands is quite unthinkable.

Here in our federal court we are compelled to sit in a wide range of cases. It has been my experience in the course of a single day to sit in the capacity of a committing magistrate in a petty criminal case in the morning and run through the whole gamut of our extensive duties, leaving the bench in the evening clothed with all the majesty of a Lord Chancellor or a Lord of the Admiralty. Only an extreme egotist can go home after a hectic day thus spent and not have some misgivings as to his fitness in dealing with the diversities that have confronted him. Pride of opinion and personal vanities prevent us at times from pointing out our own shortcomings, but intellectual integrity does demand that conclusion that one's life is all too short to permit extended explorations into the history of the topics embraced in the wide field of equity and render opinions meeting modern requirements unless he has specialized in that subject. Much which is ignorantly thought to be new, has had the thought of the best scholars in years past and reading into their opinions we find that the equity jurists of New Jersey have announced their opinions evidencing greater erudition and clearer terminology than I, sitting spasmodically in equity, can ever hope to attain. The reason for this is found in the fact that they have labored in a specialized sphere and for the most part have had the time and the inclination to explore the entire range of reason in an atmosphere of quiet, thoughtful approach. Such men often secretly examine themselves for their own shortcomings. So great were the works of Lord Chancellor Bacon, that for all practical purposes the evil that was in the man was actually "interred with his bones." So clear was his intellect and so objective and disinterested was his thought, that he could sit in judgment on himself and condemn himself out of his own mouth. Only one who can thus examine and pass judgment upon himself can reach the heights in the sphere of equity jurisprudence.

Nor has our modern Court of Chancery here in New Jersey been without its great fearless scholars and thinkers. One has but to browse through the opinions in our Equity Reports to find that brilliance of expression and purity of logic which gladdens the hearts of all of us. For example, one of the advances in modern equity is found in the *Howard* case wherein the principle of an estoppel *in pais* was developed as applied to the rigidity of the Statute of Limitations as theretofore viewed in the strictness and rigidity of the law, and again in those cases such as the *Gates* case wherein the

responsibility of trustees was developed. I might go on interminably and point to many other highly civilized approaches to the perfection of reason which have emanated from that court. Surely it is extremely doubtful if a jurist functioning in the forensic tensities of suits at law could move over into what may be termed an equity branch of his law court and there strip himself suddenly of its restrictions and at once orient himself into that cloistered mental atmosphere so essential to satisfactory work in equity.

There are so many reasons why our court of equity should forever maintain its separate entity that one might go on and on in a recital. To take the opposite position, it seems to me, is to deny the principles involved in the division of labor in industry and to deny the efficiency of specialization in medicine, surgery, art, literature, and music and to force our jurisprudence down to those lower standards which obtain in jurisdictions where they know not equity in all its fullness. To lay our Court of Chancery open to the weakness of a union with our law courts would constitute an unforgivable sin against reason and result in a blight on human progress. Not only would Jerseymen suffer under such an ill-advised change, but the blight will also fall wherever a man is thinking out a better and saner way of life. It is no exaggeration to say that its emasculation will be regretted wherever Anglo-Saxon traditions obtain.

Oh yes! I know, lawyers and others have claimed they have been browbeaten at times in the equity court; they have suffered interminable delays; politics and favoritism have played a part in its work and outside corruption has approached to its portals. However, the Court of Chancery cannot be singled out as standing alone with such evils occasionally found in its fabric. These unfortunate and wicked frailties leak through into all human endeavor. In business, in the professions and even in ecclesiastical society.

It is sometime erroneously stated that New Jersey is the only state wherein a separate Court of Chancery is still functioning. As I understand it there are at least five states maintaining such separate courts, New Jersey and Delaware being the leaders among them. Our senior Circuit Court Judge, John Biggs, Jr., is a Delaware lawyer; it would be indeed interesting if you could obtain his views concerning the Court of Chancery in his state.

Many centuries ago a great letterwritter who was concerned with eternal truths, wrote to the Thessalonians expressing a thought forever modern. Said he: *"Prove all things; hold fast that which is good."*

"YOUR ORATOR WILL EVER PRAY ETC."

Sincerely,

GUY L. FAKE

RESOLUTION OF THE LAWYERS' CLUB OF OCEAN COUNTY

WHEREAS the Constitutional Convention, now assembled at New Brunswick, New Jersey, is to consider and submit to the people a new State Constitution; and

WHEREAS the Judicial Article of the new Constitution is the concern of every citizen of the State of New Jersey, and particularly the members of the Bar, since the system of courts is the cornerstone of our profession; and

WHEREAS the question of the abolition of the Court of Chancery as a separate entity in our judicial system is advocated by some of our citizens; and

WHEREAS the development of equity jurisprudence in New Jersey by a separate Court of Chancery, under the able leadership of our Chancellor and the Vice-Chancellors, is acknowledged by the courts of other states and by leading scholars, to have reached a peak unequalled under any other judicial system in this country; and

WHEREAS the function of equity jurisprudence is to give to the body of the law its moral vitality and conscience and in so doing give it flexibility and power to protect the weak against the strong and powerful and our inalienable rights from strict legal forms and precedents;

THEREFORE BE IT RESOLVED that the members of the Lawyers' Club of Ocean County and the Ocean County Bar Association, in joint meeting assembled, record as their considered judgment that in any judicial system proposed by the Constitutional Convention, the Court of Chancery be retained as a separate entity for the administration of equity jurisprudence as heretofore exercised by said Court; and

BE IT FURTHER RESOLVED that a copy of this Resolution be sent to the Judiciary Committee of the State Constitutional Convention and to each of the members of said Committee.

CERTIFICATE

IT IS HEREBY CERTIFIED that the foregoing Resolution was unanimously adopted at a joint meeting of the Lawyers' Club of Ocean County and the Ocean County Bar Association, held on July 10, 1947.

THE LAWYERS' CLUB OF OCEAN COUNTY
By: JOHN LLOYD OLSON, *Secretary Pro Tem*
OCEAN COUNTY BAR ASSOCIATION
By: WILLIAM T. HIERING, *Secretary*

RESOLUTION OF THE HUNTERDON COUNTY BAR ASSOCIATION

(Submitted July 21, 1947)

WHEREAS, the Constitutional Convention now assembled is to consider and submit to the people a "new State Constitution"; and

WHEREAS, the Judicial Article of that new Constitution is the concern of every inhabitant and citizen of the State of New Jersey, and particularly the members of the bar, since the system of courts is the cornerstone of our profession and one of the bulwarks of our modern civilization; and

WHEREAS, the development of equity jurisprudence in New Jersey under a separate Court of Chancery is acknowledged by scholars the world over, to have reached a peak unequaled under any other judicial system in this country, or in England; and

WHEREAS, a virile and growing equity jurisprudence is that organ which gives to the body of the law its moral vitality and conscience and in so doing gives it flexibility and power to protect the weak against the strong and powerful, and the inalienable rights from the rigidities of legal form and precedent;

THEREFORE, BE IT RESOLVED that the members of the Hunterdon County Bar Association in meeting assembled record as their considered judgment that in any judicial system proposed by the Constitutional Convention, the Court of Chancery should be retained as a separate entity for the administration of equity jurisprudence; and

BE IT FURTHER RESOLVED that copies of this Resolution be forwarded to the Honorable Wesley L. Lance and John F. Schenck, the Hunterdon County Delegates to the Constitutional Convention.

BE IT FURTHER RESOLVED that a copy of this Resolution be sent to the Judiciary Committee of the State Constitutional Convention.

BE IT FURTHER RESOLVED that the Hunterdon County Bar Association recommends to the Judiciary Committee of the Constitutional Convention, the insertion of an article in the new Constitution providing that judges of any and all courts in the State of New Jersey hereafter be attorneys at law, duly admitted to practice in the State of New Jersey.

REPORT OF THE CONSTITUTIONAL REVISION COMMITTEE OF THE CAMDEN COUNTY BAR ASSOCIATION

To the Association:

The President of the Association, having appointed a Committee consisting of John Henry Reiners, Jr., Chairman, Hon. Thomas M. Madden, Hon. Bartholomew Sheehan, W. Louis Bossle, Walter S. Keown, Howard R. Yocum, John A. Riggins, Bernhard G. Luethy, Leon A. Wingate, Jr., and Weidner Titzck, the latter being Secretary of the Committee; and the said Committee having met on June 10th, 24th and 26th, 1947, and having broken up into three sub-committees to consider the law court, chancery court and appellate court problems, and the entire Committee having carefully discussed the sub-committees' suggestions, and circularizing members of the Camden County Bar Association for individual members' suggestions, of which five were received at this writing.

Now THEREFORE, the entire Committee hereby presents the following recommendations for consideration and approval of the Camden County Bar Association as a whole before submission to the Judiciary Committee of the New Jersey Constitutional Convention.

Each member of the Committee took an active part in the discussion of the various recommendations, and the suggestions in support thereof, but suffice it to say that with the exception of one or two minor instances, there was unanimity of opinion among the Committee members.

Recommendations

1. That the Justices of the Peace as now constituted under Article VI, Section VIII of the Constitution, be abolished.

2. That there should be set up in each County a court similar to our present Common Pleas Court, with original law and criminal jurisdiction, and the president judge in each County shall have jurisdiction to issue prerogative writs. There should be at least one judge in each County, and as many judges as are required to take care of the original criminal and law jurisdiction with a plan for service of process in a County other than the County in which it is filed, whether it be handled by a State-wide court administration, or by some procedure for serving process purely under County reciprocity.

3. That the present system of approximately sixteen Circuit Court judges be abolished in view of the fact that their jurisdiction and duties will be taken over by the one or more County courts previously referred to.

4. That the Court of Chancery as it is now constituted, including

the appointment of Vice-Chancellors by the Chancellor, should not be disturbed. (While the Committee as a whole felt no separate Orphans' Court should be described in the Constitution, Committee Member Weidner Titzck felt that the Orphans' Court should be included under the jurisdiction of the Chancery Court, and the hearing judge be in the nature of an advisory master.)

5. That the Prerogative Court as now constituted under Article VI, Section IV, should be abolished.

6. That one appellate court should be set up consisting of not less than seven nor more than nine judges, with no divisions or branches, so that every litigant should have one appeal as a matter of right. That the appellate court should sit en banc and do nothing but hear appeals from the lower court. (One Committeeman, Judge Madden, holding a minority, disagreed and thought that there should be two appeals. Committeeman John A. Riggins for other reasons did not favor the one appeals court.) (Also, Committeemen Walter S. Keown and Weidner Titzck favored additional qualification for members of the court of appeals, that said judges should not be appointed to serve on the appellate court unless they had at least five years' experience in the judicial capacity in some other State court.)

7. That the Court of Pardons as constituted under Article V, Paragraph X of Constitution, should be abolished of all power to remit fines and forfeitures and grant pardons after conviction, and that such power should be vested in the Governor.

8. That all judges of the constitutional courts such as Chancellor, judges of such County Courts and appellate courts as are established shall be appointed by the Governor by and with the advice of the Senate, shall serve during good behavior, and shall be restricted from practicing law.

Respectfully submitted,

WEIDNER TITZCK, *Secretary*

RECOMMENDATIONS OF THE CAMDEN COUNTY BAR ASSOCIATION

CAMDEN COUNTY BAR ASSOCIATION
Office of the Secretary
225 North Sixth Street
Camden, N. J.

July 11, 1947

John Henry Reiners, Jr., Esq., Chairman
Constitutional Revision Committee
Camden County Bar Association
Camden, New Jersey

Dear Mr. Reiners:

At a special meeting of the Camden County Bar Association held July 10, 1947, the following recommendations were adopted:

1. Abolition of Justices of the Peace.
2. A County Court with original civil law and criminal jurisdiction with plan for service of process state-wide.
3. Abolition of the Circuit Court.
4. Continuation of the Court of Chancery as now constituted with all of its present appointive powers.
5. Abolition of the Prerogative Court.
6. Setting up of one Appellate Court of not less than seven and not more than nine judges giving every litigant one appeal as a matter of right.
7. Abolition of the Court of Pardons, vesting such power in the Governor.
8. All judges of the Constitutional Courts be appointed by the Governor with the advice and consent of the Senate, serve during good behavior and be restricted from practicing law.
9. All judges shall be duly licensed members of the Bar of this State.

Respectfully certified,

RAYMOND J. JUBANYIK, *Secretary,*
Camden County Bar Association

REPORT OF THE UNION COUNTY BAR ASSOCIATION

(Submitted July 24, 1947)

In order to guide the representative of the Union County Bar Association in presenting the views of its members to the Judiciary Committee of the Constitutional Convention, questionnaires were mailed out to all the members. There were 319 questionnaires mailed out and 63 answers received.

The following are the questions asked and a recapitulation of the answers thereto:

	YES	NO
1. Are you in favor of a small court of appeals which is to be an appellate tribunal of last resort?	56	2
2. Are you in favor of a Supreme Court with original general jurisdiction in all cases?	36	24
(a) with a law section and equity and probate section each exercising the jurisdiction of the other to fully determine each controversy, equity to prevail in the event of a conflict?	23	39
(b) an appellate section?	22	39
or		
(c) a unified court of original jurisdiction without law and equity sections?	16	45
or		
(d) a court of chancery separate and apart from courts of law?	26	36

3. Are you in favor of a mandatory retirement age for judges of constitutional courts? If answer is yes, circle the age. 65 70 75

(65)	14
(70)	24
(75)	16
No age limit	5

4. Are you in favor of removing justices of the constitutional courts for misbehavior upon impeachment by the Assembly and trial and conviction by the highest court, except for the highest court judges, where trial and conviction would be by the Senate?	46	8
5. Are you in favor of having the Chief Justice assign the lower court judges to the sections and parts of the court from time to time, judges assigned to the appellate division to work there exclusively?	34	24

	YES	NO
(or) Are you in favor of permanent assignment of judges to the law and equity sections, if established?	26	33
(or) Are you in favor of mandatory rotation of the judges at short intervals between the law and equity sections?	16	42
6. Are you in favor of abolishing all prerogative writs and substituting		
(a) an appeal as of right instead of certiorari to review determinations of statutory tribunals and inferior courts?	47	13
(b) in all other cases a civil action as of right?	44	18
(c) no jury in any of these courts?	38	20
7. Are you in favor of allowing appeals as of right from all determinations, final or interlocutory, of inferior courts and final determinations of statutory tribunals to an intermediate appellate court?	44	16
8. (a) Are you in favor of allowing appeals as of right to the highest court from all final judgments, decrees or determinations of the intermediate court exercising its original jurisdiction?	35	25
or		
(b) Appeals as of right only to the appellate division of an intermediate court with further appeal to be permitted to the highest court only		
(1) where there is a dissent in the appellate division?	27	32
(2) where the intermediate court has made a judgment of reversal or modification?	27	33
(3) on certification by the court rendering the judgment?	27	32
(4) on certification by the highest court?	25	33
(5) in such other cases as may be provided by law?	26	30
9. Where constitutional questions are involved, are you in favor of taking an appeal from a statutory or inferior court direct to the highest court?	53	8
10. Are you in favor of allowing the highest court to certify for direct review any final determination of an inferior court or statutory tribunal?	46	11

	YES	NO
11. Are you in favor of giving appellate courts the power of setting aside judgments at law or determinations of statutory tribunals wholly or in part, where the finding of fact is against the weight of evidence or the verdict excessive or inadequate?	53	10
12. Are you in favor of allowing appellate courts to find the fact anew where the lower court tried the case without a jury?	41	11
13. Are you in favor of allowing the appellate courts to affirm, reverse or modify orders, judgments or decrees and make final determination thereof, unless the ends of justice, or the rights of trial by jury requires a new trial or hearing be had?	53	5

Several attorneys recommended as an alternative that the New Jersey courts be organized along the lines of the New York courts.

LETTER OF NEW JERSEY COMMITTEE FOR CONSTITUTIONAL REVISION

NEW JERSEY COMMITTEE FOR CONSTITUTIONAL REVISION
James Kerney, Jr., President

July 11, 1947

Dean Frank H. Sommer, Chairman
Judiciary Committee
Constitutional Convention
New Brunswick, New Jersey

My Dear Dean Sommer:

The New Jersey Committee for Constitutional Revision has carefully studied testimony of witnesses before the Judiciary Committee of the Constitutional Convention. This study has convinced us that there is no weighty nor even adequate evidence in opposition to the creation of a single court of original general jurisdiction and a single court of appeals. Beyond that, there has been absolute unanimity among the witnesses on the merits of life tenure for the members of our courts. These two phases of revision appear to our committee as being among the most important aspects of the constitutional question in New Jersey.

There have been some witnesses who spoke in behalf of retention of the Chancery Court. They have produced no evidence that equity jurisprudence cannot be maintained in an integrated court. The Committee for Constitutional Revision deeply regrets that some advocates of the Chancery Court saw fit to raise issues which are not germane to the discussions of an integrated court. No one has testified to the need for any change in the principles or practices of our divorce courts except advocates of the Chancery Court who charged that an integrated court was proposed as an effort to "liberalize" divorces. To the best of our knowledge, none of the advocates of an integrated court system propose anything but complete retention of the present divorce practices in the new court structure. We are confident that you and the members of your Committee will not be swayed by any effort to raise religious questions for demagogic purposes.

It is the impression of all of the members of our organization that you and the members of the Judiciary Committee have conducted the hearings in an exemplary manner, and we are confident that the report you draft will bring a better court system to New Jersey.

Faithfully yours,

JAMES KERNEY, JR.

SUPPLEMENTARY STATEMENT OF LEAGUE OF WOMEN VOTERS OF NEW JERSEY

(Submitted July 18, 1947)

In following the news accounts of hearings before the Judiciary Committee, we have noted the emphasis of some witnesses regarding the appointment of judges that it be left "with the Governor as at present."

We would like to call to your attention what I am sure you all realize is true, that the appointment of judges is a power of the Governor in name only. The fact seems to be that the appointment is made in conference between the Senator of the county concerned and the Governor. The choice is influenced by political considerations, advice from organization leaders and, we trust, some thought as to candidate's ability. But the power of veto lies in the hands of the State Senator as far as he wishes to use it. The practice is indeed to make a fairly realistic bargain. The Senate, exercising Senatorial courtesy, uniformly acknowledges the power of the individual senator, concurs, and "consents" to the appointment.

What improvement would occur with appointment by the Governor from a list submitted to him from the Commission on Judicial Appointment? One cannot do away with all vestige of the tradition of Senatorial courtesy,—habitual performance is not reformed by legislation or changes in constitutional framework. But the suggested plan would do away with the secret bargaining in part. The Commission on Judicial Appointment would have at stake their own reputations for ability to judge professional excellence and character. The list would therefore presumptively meet qualifications in each name presented. We would in this way be more likely to avoid the appointment of men whose selection actually shocks the public conscience. This happens more often than rarely.

We recognize that this plan lessens both the power of the Governor and of the State Senator. The Governor's appointment could less often be for favors received for himself or the political party. The State Senator would be unlikely to veto a choice so openly arrived at and with so many persons involved.

Thank you for allowing us to remind you of the advantage of this plan of appointment, greater likelihood of improved personnel.

GERTRUDE M. HENDERSON
For the Committee of the League of
Women Voters on Judiciary Proposals

LETTER OF NEW JERSEY MAGISTRATES ASSOCIATION

Dear Delegate:

In setting up constitutional courts, please do not forget the lowest of the constitutional state courts, and incidentally, to the average citizen, the most important state constitutional court, that of justice of the peace.

Justice of the peace has always been a constitutional office, and although justices of the peace have not usually been lawyers by profession, they have for the most part discharged their multifarious duties with becoming good sense and impartiality.

Justices of the peace perform, without any other reward than the dignity they acquire from their office, a very large amount of work indispensable to the administration of law, including the initiatory stages of all criminal proceedings.

Both sexes and all classes of the community have been represented on the magisterial bench, irrespective of social status or political bias, and creed, position or party influence have not generally regulated their selection and election.

The justice of the peace is the poor man's court, and also, the small business man's court, and much time and money and vexatious litigation has been saved to litigants, and also to municipality, county and State, through the constitutional office of justice of the peace.

In view of the above, we respectfully submit that specific provision for the constitutional office of justice of the peace should be incorporated in the Judicial Article of the proposed Constitution.

Respectfully yours,

CHARLES S. ABOTT
CHARLES ABOTT, *President*
New Jersey Magistrates Assoc.

STATEMENT OF NEW JERSEY STATE FEDERATION OF LABOR

(Excerpt of recommendations relating to the Judicial Article)

JUDICIARY

ARTICLE VI

1. *Election of Judges*

All judges, except municipal magistrates, should be elected by the people. The experience in New York with the election of judges has produced a judicial calibre equal to or better than that found in any other state. Above all, it will reduce the degree of political subservience of judges to the appointing authority.

2. *Court of Chancery*

We recommend the elimination of the Court of Chancery as such, and the merger of its functions with the court of general jurisdiction.

3. *Simplification and Unification of Court Structure*

We support the unification of our courts and the simplification of judicial procedure. Highly technical matters of procedure and jurisdiction should not be permitted to defeat a litigant whose cause of action is just.

4. *Constitutional Jurisdiction of the Courts*

The Constitution should not, as it has in the past, vest in the courts a jurisdictional power which cannot be removed by the Legislature. It should be specifically provided that the courts shall have such jurisdiction as may be vested in them by act of the Legislature. Without such a provision, the basic theory of checks and balances would be destroyed. The only irrevocable power which should be vested in the courts is the power to enforce, interpret and apply the provisions of the Constitution and of legislative enactments in the light of the Constitution.

LETTER OF N. W. HUNTER, Esq.

P. O. Box 104,
Glen Rock, N. J.
July 11, 1947

Judiciary Committee
New Jersey State Constitutional Convention
Rutgers University
New Brunswick, New Jersey

Gentlemen:

I respectfully submit three proposals for you to consider in order to reform New Jersey's court processes. As a layman I consider these suggestions basic, and they are a result of my own experience and extensive inquiries with representative members of the Bar. If these reforms should be enacted they cannot possibly cause me any personal gain that I can foresee, but I am taking an intense personal interest in the principles involved.

I propose:

1. Judges of local courts, such as the District Courts, should have their behavior readily supervised by the higher courts. I understand this has been previously recommended to the Convention.

2. The United States Constitution unequivocally guarantees a jury. I recommend that this be reaffirmed in the New Jersey State Constitution, existing partly hidden, restricting and nullifying statutes notwithstanding.

3. In all civil actions of any account, an appeal to review the facts, should be allowed the defendant, as permitted in divorce actions. This somewhat revolutionary reform for New Jersey will eliminate the Star-chamber proceedings, with proof substituted by prejudice, that now exist for a considerable minority of actions. Jury decisions are, of course, excepted from this proposal.

I enclose newspaper clippings of letters written by myself, which the Northern New Jersey Press has kindly published. My purpose was to ventilate to the public—to a very limited extent of course—the unfair proceedings that often occur. I tried to inculcate by repetition. My version of the case *Roy* v *Hunter,* is included as an example of this. I am also sending a copy of a *Newark Evening News* editorial which is only slightly relevant to this letter, but shows an incident that occurred in a District Court, that was the very acme of indecency.

As I stated I am a layman with only slight court experience. Besides the case of *Roy* v *Hunter* I have been several times a juror, a technical witness in criminal arson cases a few times, and that is all. However I do think I have some slight competence to attack

the judicial concept of being qualified to render judgment for the plaintiff, without corroborating evidence. I studied engineering at M.I.T., and for twenty-four years have been a technical investigator, including anti-sabotage work during the second World War. I have heard a thousand and more diametrically opposite statements. There just isn't any way to learn from which side the truth comes, without evidence. Again, I wish to be vitriolic in my attack on that concept.

I wish to thank you for your indulgence in reading this long correspondence. Probably I have said enough—perhaps too much—but if I could be of any use to you, I will be glad to appear before the Committee.

Yours very truly,

N. W. HUNTER

REPORT OF THE NEW JERSEY STATE BAR ASSOCIATION

NEW JERSEY STATE BAR ASSOCIATION
Office of the Secretary
Broad Street Bank Building
Trenton 8, N. J.

July 11, 1947

To the Delegates of the 1947 Constitutional Convention:

Ladies and Gentlemen:

Pursuant to a resolution of the New Jersey State Bar Association adopted at its Annual Meeting on June 14, 1947, a referendum of the membership was taken on two questions pertaining to any proposed Judiciary Article. The ballot read as follows:

"1. Shall the Court of Chancery be retained, with or without change in the powers of the Vice-Chancellors?

Yes..... No.....

OR

2. Shall a Court be established with the jurisdiction of the Supreme Court, the Court of Chancery and the Prerogative Court with law and equity divisions to which judges shall be permanently assigned, with power in the judges of each division to decide all legal and equitable questions arising in any cause pending therein?

Yes..... No....."

The results were tabulated on July 10th and I certify them as follows:

Number of ballots sent		1715
Answers to the 1st Question:		
"Yes"	200	
"Yes" with "No" on 2nd Question	113	
"Yes" with "without change" designated	143	
"Yes" with "No" on 2nd Question, "without change" designated	66	
"Yes" with "change" designated	51	
"Yes" with "No" on 2nd Question, with "change" designated	10	
		583
Answers to the 2nd Question:		
"Yes"	266	
"Yes" with "No" on 2nd Question	283	
		549

Miscellaneous:		
"No" on 1st Question, nothing on 2nd	3	
"No" on 2nd Question only	1	
"Yes" on 2nd Question only with a notation of objection to proposition that the specialized judges shall be subject to possible temporary assignments elsewhere	1	
Nothing on the 1st Question with the words "with law and equity divisions" . . . "of each division" deleted in the 2nd Question	1	
Nothing on the 1st Question and "Yes" on the 2nd Question with the same deletion	1	
Nothing on the 1st Question and "Yes" on the 2nd Question with the comment "Don't fix assignments by Constitutional provision."	1	
"No" on the 1st Question and "Yes" on 2nd Question with a preference stating that "legal and equitable questions should be decided by the same judge—no separate court sections needed."	1	
"No" on the 1st Question with the words "to which judges shall be permanently assigned" deleted from the 2nd Question	4	
Nothing on the 1st Question and the words "with law and equity divisions to which judges shall be permanently assigned" . . . "of each division" on the 2nd Question deleted, with the comment, "The decision etc., should be left to the Court not fixed by Constitution"	1	
"No" on the 1st Question and "Yes" on the 2nd Question with the same deletions	3	
"No" on the 1st Question and nothing on the 2nd	5	
"No" to both questions	11	
"Yes" on both questions	6	
		39
Number of ballots returned		1170

Enclosed is a copy of the leaflet which was sent out with the ballots.

We respectfully submit the above information with the hope that it may assist you in your deliberations.

Sincerely yours,

EMMA E. DILLON, *Secretary*

RESOLUTION OF THE BURLINGTON COUNTY BAR ASSOCIATION

BE IT RESOLVED by the Bar Association of Burlington County that this Bar Association has faith and confidence in the Court of Chancery of New Jersey as now constituted.

BE IT FURTHER RESOLVED that it is the opinion of this Association that all questions of equity should be decided by judges who devote their lives to equity jurisprudence.

BE IT FURTHER RESOLVED that our Court of Chancery should be retained as a separate court to the end that New Jersey in the future as in the past may be pre-eminent as a State in which the principles of equity are soundly determined and applied.

BE IT FURTHER RESOLVED that copies of this Resolution be forwarded to the Judiciary Committee at the Constitutional Convention now in session at New Brunswick, New Jersey.

RECOMMENDATIONS OF THE MORRIS COUNTY BAR ASSOCIATION

Law Offices of
SCERBO, PORZIO & KENNELLY
Park Square Building
Morristown, N. J.
MOrristown 4-4220-4221

July 9, 1947

Mrs. Richard L. Miller
152 Beekman Road
Summit, N. J.

Dear Madam:

Honorable David Young, 3rd has appointed a special Committee of the Morris County Bar Association to obtain an expression of the views of our Morris County Bar Association concerning the Judiciary articles of the Constitution. This Committee has met and has just concluded a canvass of the membership and respectfully submits the following report:

1. We recommend a separate Court of Appeals of last resort with a permanent membership of not more than seven, highly competent, and to dedicate full time to their duties as such.

2. We recommend one Supreme Court vested with all the jurisdiction now found in the Court of Chancery, Prerogative Court and the present Supreme Court, divided into a Chancery Division and a Law Division, but with power to do full justice in any one cause.

3. We recommend that the present County courts remain as they are.

Respectfully submitted,

FRANK C. SCERBO, *Chairman*
C. STANLEY SMITH
GERALD FOWLER
BERTRAM M. BERLA
RAYMOND C. MATTHEWS
FRANK J. VALGENTI, JR.
OSCAR F. LAURIE
The Committee

LETTER OF SHERWOOD K. PLATT, Esq.

(Copy of letter sent to Governor Alfred E. Driscoll and referred to the Committee on the Judiciary)

MAYER, MEYER, AUSTRIAN & PLATT
Continental Illinois Bank Building
Chicago 4

May 17, 1947

Mr. Ward J. Herbert
11 Commerce Street
Newark, New Jersey

Dear Ward:

In connection with your recent letter relative to the revision of the judiciary in New Jersey, I would state that generally we have found that the changes we made by means of our Practice Act of 1933 are satisfactory and assist in the disposition of legal proceedings. Of course, during the transition period there have been many cases endeavoring to interpret the changes effected by that act, and there seems to be a somewhat general tendency, in spite of radical changes in the statute, to construe some of the provisions along the lines of former practice. In general, the act simplified procedure and eliminated cumbersome pre-existing forms of action and technical distinctions and errors of pleading, so that the courts now proceed to permit counsel to try the merits of the case regardless of technical deficiencies in pleading, and to a considerable extent assist the plaintiff in making necessary amendments and revisions to properly try any proper cause of action which he may have.

With respect to the distinctions between law and equity, these still very definitely exist, and here in Cook County we have approximately one-half of the judges sitting as chancery judges and others presiding over law cases. Where the law question is purely incidental, the Chancellor often disposes of the same by his decree and the trial of the law issue is unnecessary. Where the two issues are definitely distinct, the Chancellor disposes of the equity questions, and if this does not dispose of the suit the case is then transferred to the law side.

Juries are available in both courts in Cook County but very seldom are they used on the chancery side. If the case is tried on the chancery side, ordinarily a jury is waived, but if a jury is definitely demanded, either the Chancellor transfers the case to the law side or somewhat reluctantly calls in a jury to his own court.

Actually in personal practice, most of my cases have been on

the chancery side and I have not run into anything drastic in the way of change of procedure. Of course, demurrers are non-existent, as we now make motions to strike, but the procedure is identical and the old law dealing with demurrers is 99% applicable.

I think you will find that the entire bar of this city approves of procedure under the new Practice Act and that the same does greatly expedite the disposition of cases. Believing that it would be more helpful to you to secure the views of one of the judges, I enclose herewith a letter which I wrote to Judge Lupe of our Superior Court and his reply thereto, in which I believe you will find that he has quite definitely answered your questions of procedure in detail.

Sincerely yours,

SHERWOOD K. PLATT

Mr. Platt's questions to Judge Lupe:

(1) Do you favor a completely separate Court of Chancery, or do you find that the abolition of the technical distinctions is satisfactory and successful?

(2) Has the practice under the Illinois Practice Act of 1933 worked out better than prior thereto and has it expedited the handling of cases both from the standpoint of the bar and of the judiciary?

(3) In practice has the consolidation eliminated the necessity of separate suits or separate trials where law and equity questions are involved in a single case?

(4) When you have situations in which questions historically legal and questions historically equitable are mixed, do you try them all in the same trial before the same judge?

(5) If you do try a mixture of legal and equitable questions in a single trial, what about the constitutional right of jury trial in law issues?

(6) Do you send all the fact questions to the jury or does the judge decide those which are historically equitable?

(7) Do you have some judges available at all times for ordinary jury trials and other judges available for nonjury trials?

(8) Do these judges shift from one type of work to another, according to some sort of regular schedule, or do they specialize?

(9) In country counties where there is only one judge, does he try both the historically legal and historically equitable issues?

(10) If so, what does he do about juries? Does he have a jury available for a period and during another period concentrate on his nonjury work?

Judge Lupe's reply:

SUPERIOR COURT OF COOK COUNTY
Judge John J. Lupe
In Chambers
Chicago

May 5, 1947

Mr. Sherwood K. Platt
Attorney at Law,
Continental Illinois Bank Bldg.
Chicago, Illinois

Dear Sherwood:

Your letter of May 2nd is received, relative to my opinion in regard to the chancery and law practice in this State.

The answers to your numbered questions are as follows:

No. 1—The Circuit and Superior Judges Association of Illinois, at their last Conference held in Chicago in February of this year, decided that it would be better to abolish the technical distinction between chancery and law; however, I personally believe there should be a distinction between law and equity because the rules of procedure as they now stand in Illinois are somewhat different with reference to each branch and until they are changed there should be a distinction between them.

No. 2—Yes.

No. 3—In this State a person may file one or more counts in law as well as in equity in the same complaint. After issue is joined on both the law and equity counts it is our practice to first try the chancery matters with the view to probably eliminating the need of trying the law matters; however, if it is felt the trial of the law matters first will accomplish the same result, they are tried first. Law and equity matters are not tried at the same time.

No. 5—I believe this question answers the reason why both law and equity cannot be tried at the same time. In law cases one is entitled to a jury trial and in equity there is no trial by jury, except as provided by statute in particular types of equity cases such as divorce cases and will contests.

No. 6—If law counts are being tried by a jury all questions of fact are submitted to the jury. In equity matters where jury trials are permitted all questions of fact under the equitable counts are submitted to the jury.

No. 7—In Cook County there are twenty (20) Circuit Judges and twenty-eight (28) Superior Court Judges. In the beginning of the court year in September certain judges are assigned to common law jury calendars, one judge is assigned to the nonjury calendar, and

other judges are assigned to chancery calendars. Equity suits filed are assigned to a chancellor, law jury cases are assigned to a law jury calendar, and law nonjury cases are assigned to the common law nonjury calendar.

No. 8—Judges in the Circuit and Superior Courts of Cook County shift from one type of work to another. We do not specialize in any particular type of work.

No. 9—Yes.

No. 10—In country counties the judge makes up a call of his jury cases and the lawyers are notified when he will make his call. This is done with nonjury and equity cases as well. In the case of jury cases a date is set for trial. Juries are called for the dates set for trial and are then available for the trial of the case. At the time of the trial parties involved may waive trial by jury even though a jury has been demanded. The court then hears the matter without jury.

In conclusion may I say that our present Practice Act has done much to simplify pleadings as well as the trial of issues by pre-trial conferences, summary judgment, or declaratory judgment. I could never subscribe to the old common law pleadings. It was most repetitious in regard to various counts of a pleading and the technicalities often deprived a person of a good law suit. Under the present Practice Act all a person has to do is to tell the other person what he is suing him for and if he makes a mistake in the manner of stating his case he can always re-state it and file a better complaint, either before or after the time of trial, permitting the plaintiff to amend his complaint to conform with the proof and thereby receive what he is justly entitled to.

There are many advantages under the Practice Act which simplify procedure and save time for the practicing attorney, which should always be considered in the trial of a case.

I hope and trust these answers to your questions are what you want.

With kind personal regards I beg to remain,

Sincerely yours,

JOHN J. LUPE

LETTER OF MORRIS ROSENBERG, Esq.

(Referred to the Committee on the Judiciary by Governor Alfred E. Driscoll)

MORRIS ROSENBERG
Counsellor at Law
17 Academy Street
Newark 2, N. J.

June 11, 1947

Hon. Alfred E. Driscoll
State House
Trenton, New Jersey

Dear Governor Driscoll:

As a member of the Bar of this State and of New York, in behalf of your proposal for reformation of the judiciary, I am taking the liberty of citing the abolition of the Chancery Courts as such in New York State and in the federal courts.

The Chancery Court, as you know, had founded its inception in England as the result of the existent primitive formalism of the day—when a man could find relief only if his claim was within the purview of specified writs. He could sue his neighbor for smashing a window, but had to appeal to the King to enjoin the continued smashing of his window by his neighbor. And thus the court of equity, with its jurisdiction for injunctive relief and matrimonial problems, foreclosure of mortgages, accounting matters, etc., crept into the judicial system in England and shipped to our shores in the days of Lord Berkeley and Lord Carteret.

If the business man, for one, is to have confidence in the dispensation of justice, the courts must have simplicity of operation, be expeditious, and economical to use. To have a suit instituted in a court of law and then when the defendant raises a question "equitable" in nature, to have the issue be referred to a Court of Chancery for determination, then re-referred to the court of law for completion of the suit at law, is a satire. Similarly, if the suit were brought in Chancery, a "law" issue is to be referred to a court of law, particularly if triable before a jury, there being no juries in Chancery. Why all the courtroom doors to the same hall—of justice! Why, it may be added, should a suit at law cost $10.00 to institute and a claim in Chancery $25.00, when fundamentally equity is the root of Chancery! The average divorce case requires approximately $100.00 in disbursements. Countless persons in need of matrimonial relief as divorces cannot collect the necessary sum to finance solution of their marital difficulties. In New York the

cost of instituting suit, regardless of the relief sought, is the same. The expense of a divorce suit in New York is approximately one-half of what it costs on this side of the Hudson.

The simplification of the judicial system does not per se require a diminution of present personnel—which depends upon the existent needs. The machinery of the courts must be as appropriate to our day as the law which it seeks to move.

Respectfully yours,

MORRIS ROSENBERG

LETTER OF J. SEYMOUR MONTGOMERY, JR., Esq.

J. Seymour Montgomery, Jr.
Attorney at Law
First National Bank Building
Princeton, New Jersey

June 23, 1947

Chairman, Judicial Committee
New Jersey State Constitutional Convention
Rutgers University
New Brunswick, New Jersey

Re: Unified Court of Original Jurisdiction

Dear Sir:

May I respectfully urge you and your Committee to favor the creation by the new Constitution of a unified court of original jurisdiction. There is no need for me to add to the valuable work that has been done on this subject by the State Bar Association and the Essex County Bar Association and possible others. Also, the New Jersey Law Journal has been in the forefront in publishing material on the subject, particularly in their issues of May 8th, 15th and 22nd and June 5th and 12th.

I would like, however, to say a word with respect to the article by Mr. Semel published in the New Jersey Law News of June 1, 1947. Mr. Semel's two main points seem to be that litigation will not be expedited by the change and that the merger of the equity and law courts would reflect adversely upon the powers and prerogatives of the former. It seems to me that the answer to Mr. Semel's first point as to expediting litigation is that while expedition is desirable, more important is that litigants should not be altogether denied relief or justice in deserving cases, as would certainly appear to be the result under the present system, in cases such as those referred to in the editorial in the New Jersey Law Journal commencing on page one of the issue of May 15th. It seems to be criticism enough in itself that under the present system the results there described could occur. As to Mr. Semel's second point, powers and prerogatives are not valuable in themselves but only in so far as they lead to just disposition of a controversy.

Respectfully yours,
J. Seymour Montgomery, Jr.

LETTER OF THEODORE McC. MARSH, Esq.

RIKER, MARSH & SCHERER
Counsellors at Law
744 Broad Street
Newark 2, New Jersey
MArket 3-1900

July 1, 1947

Mrs. Richard L. Miller
152 Beekman Road
Summit, New Jersey

Dear Mrs. Miller:

This will acknowledge your courteous invitation to appear before the Judiciary Committee on July 3, 1947. I am leaving on July 2nd for a month's vacation in Wyoming so I shall be unable to take advantage of the opportunity extended me.

I think, however, that I can express my views in this letter perhaps more clearly and concisely than through a personal appearance.

1. The ultimate aim and goal of all judicial procedure should be a speedy and just determination of litigation.

2. To accomplish this, procedural and jurisdictional questions should be eliminated as far as possible.

3. So long as separate constitutional courts exist, jurisdictional questions will be present in some of the causes. Many examples of delays and even of ultimate failure to attain a decision on the merits are to be found in the reports due to the fact the litigant or his counsel inadvertently select the wrong court in which to institute his action.

4. By setting up a single court with all-inclusive jurisdiction these questions will be eliminated and we will more nearly attain our goal. At the same time we will achieve the desired objective of reducing the cost of litigation.

5. The argument against a single court is based upon the premise that by having a Court of Chancery set apart by the Constitution the litigant will get a wiser and more just decision from a judge trained in the specialty. In answer to this I would urge:

a. Equity is not an occult science or similar to specialty in medicine. Practically all lawyers in New Jersey practice both at law and in Chancery with no feeling or consciousness of any shortcomings in so doing.

b. The ultimate dispenser of equity causes in the Court of Errors and Appeals and the judges have almost never been specialists in

Chancery matters. In fact few, if any, of the members of the Chancery Court had extensive equity experience prior to appointment.

c. A good Chancery judge is a person with an eminently fair approach to the problems involved and one who is not limited by a legalistic mentality.

d. By a proper and intelligent assignment of the justices between the Law and Chancery Divisions, the same benefits can be secured to the litigant as by separate courts. A judge who shows a talent for equity can be assigned to that Division and kept there. A judge who fails to demonstrate such ability can be reassigned to another Division where his talents can be best utilized.

For these reasons above stated, I am definitely in favor of having the new Constitution provide for a single court with appropriate Divisions.

Very truly yours,

THEODORE MCC. MARSH

LETTER OF ARCHIBALD N. JORDAN, Esq.

July 2, 1947

Chairman,
Judiciary Committee,
State Constitutional Convention,
Rutgers University,
New Brunswick, N. J.

Appeal on Original Record and Exhibits—
No printing of Record and Exhibits required.

Dear Sir:

In view of Judge Roscoe Pound's suggestions and recommendation for reducing the cost of litigation, may I call your Committee's attention to the practice in the English Courts of taking up an appeal on the record of the court below, together with the original exhibits used in the court of original jurisdiction. The minutes taken in the court below and the exhibits used therein are sent up. No printing of the record of the court of original jurisdiction is required and no copies of the exhibits are required to be printed by the appellants.

This greatly reducing the costs to the litigants, is an aid to justice to the small business man, who in the State conducts his business as a small corporation. 90% of our business in this State and elsewhere is done by small corporations owned by a few stockholders and with small capital.

A poor man may take advantage of the "poor person law" and have the printing of the record waived, but a small company doing business under the corporation form cannot take advantage of this poor person's act as a corporation is not a person and the act does not apply to the small corporation, while the large corporation can afford the cost of printing the record.

This proviso should go into the Constitution, for relief will not be granted by the Legislature or by court rules adopted under its authority. The small business man should be enabled to do business under modern methods so should have relief from the high costs of appeal, and thus placed in a position of equality before the courts, and so should the individual.

Respectfully,

Archibald N. Jordan

229 Larch Avenue, Teaneck, New Jersey.

LETTER OF CHARLES C. BLACK, Esq.

July 5, 1947

To the Chairman of the Judiciary Committee
of the Constitutional Convention:

I have been requested to express my views of the Court of Chancery of New Jersey for the consideration of the Committee.

First: I think the Court of Chancery should be maintained as a separate tribunal with permanent judges of definite terms to administer the court.

The Court of Chancery of New Jersey, through long years of existence, has gained a unique and well deserved high standard throughout the jurisprudence of the United States, and has won the confidence of the people of New Jersey. If it is omitted in the proposed constitution the man on the street, before he votes, may ask why, and it will be difficult to give a satisfactory and convincing reason, and that is the way I will feel about its omission.

Second: A more substantial reason for its retention, viz., I was admitted to the bar of New Jersey in June, 1881 and since that date by contact and experiences with and observation of the Court of Chancery during the past sixty-six years, I have reached the firm conclusion the best and most effective results are obtained from courts, which are administered by a special designated permanent class of judges, who became experts in their jurisdictions, as contrasted with the system of courts which is divided into departments, where judges are shifted from one department to another.

I may add by way of closing a separate and independent Court of Appeals should be created in lieu of the present Court of Errors and Appeals which is too cumbersome.

Respectfully submitted,

CHARLES C. BLACK

LETTER OF FRANK BOSCAINO, Esq.

(Referred to the Committee on the Judiciary by Governor Alfred E. Driscoll)

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174 N. 10th Street
Newark 7, N. J.

July 10, 1947

Hon. Alfred Driscoll
Trenton, N. J.

Dear Governor:

I would like to submit a few suggestions for your consideration.

1—Courts.

I am not a lawyer, therefore don't know whether we need Chancery or any particular branch of our judiciary. Personally, I feel it is a mistake to create all courts thru the Constitution. Personally, I like the federal method. As you know, the Federal Constitution provides for a Supreme Court and leaves to Congress the responsibility of creating other courts. I think that is the perfect plan for our State to adopt.

I respectfully suggest that you propose that the new Constitution provide that the State shall maintain all courts. This to include all present county and municipal courts. The State to take over these courts, personnel, equipment, etc. The State to rent courtrooms or courthouses from counties and rent municipal courtrooms. Later the State could purchase these buildings or erect new ones. If the State ever does erect court buildings, I suggest that extra courtrooms be provided and that the Federal Government be invited to use same as federal courts. It seems to me all courts should be in one building to save lawyers and others a great deal of time.

I could never understand why we should have county and municipal courts. Except for parking and other municipal ordinances, these courts deal with state laws. Why should the counties maintain courts which deal justice to violators of state laws? If the State were to take over all the courts it would make for efficiency and economy.

2—Penal and Correctional Institutions.

I suggest you propose that the Constitution provide that the State shall maintain all penal and correctional institutions. Again I say, why should the counties and the local governments pay to house and guard persons who have violated state laws? If the State were to take over these institutions it would make for a great deal of economy and efficiency. As you know, each county now main-

tains a county jail. Perhaps that was necessary in the horse and buggy days but it isn't necessary today with modern roads and modern automobiles. Perhaps a half-dozen jails would suffice for the entire State.

3—ELECTIONS.

I believe I have written previously on this matter. The present setup is costly and inefficient and makes for frauds. I respectfully suggest that you propose that the new Constitution provide that the State shall conduct all elections. I feel that when state or federal officials are elected, the State should pay the entire cost of elections; and when a special municipal election is held, the State should bill that municipality. The municipal and county governments should not be billed for cost if their officials are elected at the same time as state and federal officials. As I pointed out to you previously, and recently to Senator Van Alstyne, I think we can save a great deal of money by eliminating half the statewise primaries and elections. Under the present setup we have primaries and elections each year. We cannot escape the holding of elections in even-numbered years as Presidents, U. S. Senators and Congressmen are elected in those years. But we can arrange the terms of our Governor, Assemblymen, State Senators, Freeholders and others so that they will be elected in even-numbered years.

The new Constitution could automatically extend your term a year so that the next gubernatorial election would fall in an even-numbered year. The term to be made four years. The new Constitution could provide the terms of all incumbent State Senators shall expire Jan. 1949, so that all Senators could be elected in 1948. The Constitution should provide that the terms of Assemblymen shall be two years, beginning Jan. 1949. Personally, I feel that a two-year term is better for State Senators but I think the sentiment is for a four-year term, therefore, starting Jan. 1949, the term could be four years.

The Legislature could arrange to make terms of all county elected officials four years, starting 1949, and providing that all shall be elected at the same time. I suggest that the new Constitution provide that all county and state elections shall be held in even-numbered years, starting in 1948. Compel the Legislature to act.

4—TAX ASSESSMENTS.

Suggest that the Constitution provide that the State shall fix the value for tax purposes of all real estate. As you know the present system is costly and unfair. Duplication of work costs money. The State can provide both the assessment and the appeals machinery. As you know, local assessing officials can be reached easier than state officials. Also, as you know, some municipalities

assess very low to beat the county out of taxes. The State would assess in a uniform manner. If necessary to meet the costs of these four proposals the State could levy a real estate tax. These functions now paid out of real estate tax receipts.

Sincerely,

FRANK BOSCAINO

LETTER OF GERALD T. FOLEY, Esq.

GERALD T. FOLEY
Counsellor at Law
Raymond Commerce Building
Newark 2, New Jersey

July 11, 1947

Convention on Constitutional Revision
Judiciary Committee
Trenton, New Jersey

Attention: Nathan L. Jacobs, Esq.

Gentlemen:

I have been reading with great interest the reports of the hearings before the Judiciary Committee. I have not observed that any testimony was given in connection with the subject of this letter although it may well be that there was such testimony and that it escaped my attention.

As I understand it, many advocate the creation of a single statewide court which would embrace all present members of the judiciary including common pleas judges and in which thereafter the present county court jurisdiction would be vested.

I firmly believe that such a change would be hurtful to the administration of justice.

First of all, I believe there is reason to question seriously the judicial stature of some of the incumbents of this office in various parts of the state. By this I do not mean to reflect upon anyone in his present position, rather, I mean that in some instances in the smaller counties the position is presently one which does not require the same degree of experience, talent and intellectual ability as will be required of one who becomes a full time judge of a State court. In these counties, the incumbents are part time judges and have neither the volume nor diversity of work which would confront them if they became full time judges of the new Court. I think we are all practical enough to realize that it is seldom indeed that the part time county judges have been selected from top flight lawyers in these counties. Almost always it seems, that the appointees are young men who have served politically and have a measure of ability sufficient to meet the rather simple demands of the office. Appointment is often considered a "nice start" for an energetic and ambitious young lawyer. With this I have no quarrel. On the contrary, I think it is a good thing and I know that in many instances the training and experience obtained by the rural county judge has in later years served him well in his advancement in his profession or on the bench. But the point is

the incumbents of this day received their appointments upon the basis of the qualification to fulfill the demands of a part-time county judgeship and not those of the full-time judgeship in the court, the proper administration of which will be so vital to the strengthening of our judicial system.

Secondly, I believe that the varied duties of the common pleas judge may best be performed by judges who are residents of the county in which they sit and who by reason of their residency, have become familiar with the problems of the county, its political subdivisions and employees thereof, officials of the county and municipalities, and the local bar. It seems to me that with such a background they must have a better sense of public opinion and a greater appreciation of the significance of matters before them (especially criminal and election matters) than any judge from a distant county however conscientious and capable. Again, the practical consideration enters the picture. I am sure that many times in the exercise of their discretion in the countless cases in which discretion is almost unlimited, our county judges are guided by the long time knowledge they may have of the integrity (or lack of it) of officials, members of the bar, and others who are before them. Moreover, there are many cases which become perennials and oftentimes a county judge is better able to work out a solution to a given problem because of his acquaintance with what has gone before. This assistance he would not have if the train of events leading to the case before him had flowed from the action of several judges who had from time to time been assigned to the circuit.

To put it briefly, I believe that there is no substitute for the judicial taking of the public pulse on local matters by one who is a part of the community.

Lastly, I feel that the elevation of all county judges to the level of the State Court will be unnecessarily expensive. Surely, we may anticipate that the members of the State Court will receive salaries no smaller than those of our present circuit judges. As a matter of fact, I believe that they should be substantially higher. If all the common pleas judges are made State Court judges at the salaries which such office requires, will not the tax burden to the people be increased? And with what justification? Do we require that many more full time judges? I doubt it greatly. But if we do, certainly they should be selected from the ranks of our most capable lawyers.

I, therefore, respectfully submit that entity of the common pleas court should be preserved.

Respectfully yours,

GERALD T. FOLEY

LETTER OF SAMUEL W. BOARDMAN, JR., ESQ.

SAMUEL W. BOARDMAN, JR.
Counsellor at Law
Cedar Grove, New Jersey

July 21, 1947

Nathan Jacobs, Esq.
Constitutional Convention
Rutgers Campus
New Brunswick, N. J.

Dear Mr. Jacobs:

Although my present blindness prevents my coming personally to New Brunswick, I trust that my views expressed in writing may have effect.

First, we should have a distinct and independent court at the top of our judicial system, which court should be called "The Court of Appeals." I believe that the man on the street and the civics pupils in the schools can understand that name, while they cannot see why "Errors" should appear in the name of our highest court. The Court of Appeals should consist of five or six jurists, two of whom, in my opinion, should be specialists in equity jurisprudence.

As to another high court, I urge a change of name. Lawyers of course understand that the New Jersey Supreme Court is the highest court in which an action at law can be instituted, but the ordinary citizen cannot conceive why we should call a court "Supreme" when its decisions can be appealed from and sometimes reversed. Let the highest law court whose decisions can be reversed by the Court of Appeals be called "The Superior Court" instead of "The Supreme Court." Another advantage of the change will be to avoid confusion with our highest federal court. At present it is impossible to tell whether the United States Supreme Court or the State Supreme Court is meant.

The Court of Chancery should be preserved as it is. The Chancellor, to be sure, will no longer preside over our court of last resort, but no part of our judicial system functions more admirably than does our Court of Chancery. New Jersey's equity administration is recognized as superior to that of many states which have abolished the court of chancery. There is and should be a separate jurisprudence distinguishing equity where conscience rules and the main aim is to achieve results which are just and equitable in particular cases; in contrast to the law system where decisions must be made

in accordance with rules which the ordinary citizen is supposed to know beforehand. A Chancery division is a poor substitute and will gradually if not at once tend to destroy this valuable distinction.

Yours with high esteem,

SAMUEL W. BOARDMAN, JR.

LETTER OF ARCHIBALD N. JORDAN, Esq.

ARCHIBALD N. JORDAN
Attorney and Counsellor at Law
55 Front Street
New York 4, N. Y.

July 27, 1947

Hon. Mrs. Gene W. Miller
Secretary, Judiciary Committee
Convention Hall, Rutgers University
New Brunswick, New Jersey

Dear Mrs. Secretary:

Taking advantage of the cordial and gracious invitation of July 24, to forward any comments on the tentative draft of the Judicial Article of the Committee on the Judiciary, State of New Jersey Constitution Convention of 1947, which you so kindly forwarded to me, I respectfully submit the following for submission to the public hearing on the Article to be held July 30th, 1947, at Convention Hall.

SECTION III:

Add clause: All courts having appellate jurisdiction shall have power to decide questions of fact as well as questions of law;

Add clause: All appeals may be taken up on the original record and exhibits of the court of original jurisdiction, and the record and exhibits shall not be required to be printed.

SECTION IV:

Add clause: 8. All causes shall have the right of appeal, and shall not require the consent of the court of original jurisdiction, or of intermediate appellate courts or of the Supreme Court to appeal in any cause or proceeding from the court below.

SECTION V:

Add clause 8 (p. 8):

No person who is, or has been, active in party politics, or is, or has been, serving or elected to the office of national, state, or county committeeman of any political party, shall be qualified to hold the office of justice, judge, recorder, or justice of the peace, or any other judicial office, of any of the courts of this State, superior or inferior, or of any administrative bureau, or commission, exercising judicial powers.

Add clause 9 (p. 8):

No judge, justice, recorder, or justice of the peace, shall sit, or take any part in any court hearing in any cause wherein he or any firm of which he is or has been a member, has represented in

any way, or been associated with in business, with any party to the cause being heard, or has been interested therein, or owns any stocks, bonds, securities, or other interests therein, or is obligated thereto, which disqualification may not be waived by consent of parties to the cause.

Respectfully submitted,

ARCHIBALD N. JORDAN

229 Larch Ave.
Teaneck, N. J.

LETTER OF JOSIAH STRYKER, Esq.

STRYKER, TAMS & HORNER
(Lindabury, DePue & Faulks)
National Newark Building
744 Broad Street, Newark 2, N. J.

July 28, 1947

Mrs. Gene W. Miller, Secretary
Committee on the Judiciary
Convention Hall
Rutgers University
New Brunswick, New Jersey

Dear Mrs. Miller:

I have read with much interest the tentative draft of the Judicial Article of the proposed new Constitution. I shall be unable to appear at the public hearing as I can not leave Nantucket until Friday, next.

I have heretofore expressed to the Committee my views with reference to the retention of the Court of Chancery. I regret that the Committee has ignored the opinions expressed by the Chief Justice in behalf of the Supreme Court, of the Chancellor, of numerous bar associations and of many experienced lawyers in favor of the retention of the Court of Chancery. I also regret that the Committee, since it recommends the abolition of the Court of Chancery, has not seen fit to recommend the permanent assignment of judges to the Equity Division. In my opinion, the administration of equity will be seriously and adversely affected if the Article as drafted by the Committee should be adopted.

With respect to some other provisions of the tentative draft

1. Paragraph 4 of Section IV abolishes the prerogative writs and provides that in lieu thereof review shall be afforded by the General Court as of right, except in criminal cases. In our present practice the prerogative writs serve many purposes other than the mere review of decisions; *e.g.,* the writ of quo warranto is used to oust persons in office who are not or who have ceased to be *de jure* officers; it is also used to terminate franchises of corporations upon the ground that franchises once lawfully held have been forfeited and also on the ground that the franchises exercised have never been lawfully acquired.

Our writ of mandamus is used to compel the performance of administrative functions.

Our writ of certiorari is used to remove indictments into the Supreme Court in order that a motion for a foreign jury may be

made. Our writ of prohibition, although rarely used in present practice, is not used for the purpose of a review of a determination already reached.

The above are but illustrations of uses of some of the prerogative writs for purposes other than review of a decision.

Furthermore, the discretion now vested in the court with respect to granting a prerogative writ serves a very useful purpose. I have never known of a case where such discretion has been abused.

It seems to me to be obvious that the prerogative writs should not be abolished. The chief difficulty with the practice under the prerogative writs is that occasionally the wrong writ is applied for and granted and, because of this mistake, the action fails although the litigant would have been entitled to relief if the proper writ had been applied for and allowed.

It is not necessary to abolish the prerogative writs to remedy this difficulty. Provision might be made for adequate relief in litigation under the prerogative writs if it appears that the litigant would be entitled to such relief if the correct writ had been allowed.

2. Paragraph 1 of the Schedule provides that appointments shall be made by the Governor "immediately after the *adoption* of this constitution." The Judicial Article, however, does not take effect until January 1, 1949. Paragraph 13 of the Schedule provides that the Governor shall have the power to fill vacancies arising prior to January 1, 1949 in the Supreme Court and the General Court. It is my understanding that the Supreme Court and the General Court which the Article proposes to establish will not exist until January 1, 1949 and it seems to me that vacancies can not occur therein prior to that time.
3. The Article seems not to definitely provide for appeals from the county courts to the General Court except as such appeals may be provided by legislation or by Section IV of Article IV. This would probably not be a serious omission if adequate legislation were adopted prior to the taking effect of the Article.
4. The provision for a court of last resort consisting of seven judges, none of whom have any other official duties, seems to me to be a good provision.

I am sending this letter after reading the text of the Article which was not received until this afternoon, in the hope that it may be of some help to the Committee in the performance of its important and difficult duties.

Sincerely,

JOSIAH STRYKER

LETTER OF ARTHUR T. VANDERBILT, Esq.

North Harpswell, Maine

July 29, 1947

To the Committee on the Judiciary
Constitutional Convention
New Brunswick, N. J.

Attention: Mrs. Gene W. Miller, Secretary

Gentlemen:

I wish that it were possible for me to appear at the public hearing tomorrow, but unfortunately I cannot. I am therefore taking advantage of your request for comment in writing.

First of all, may I compliment your Committee on the many splendid features of your tentative draft of the Judicial Article. The suggestions that I am about to make are the result of ten years' service as chairman of the Judicial Council and of two years' work as a member of the Constitution Revision Commission.

1. The rule-making power by Section II, paragraph 3, is made subject to legislative control by the words "subject to law." The trend throughout the United States has been to confide the rule-making power to the highest court and to hold that court responsible for results. I therefore suggest the deletion of the phrase "subject to law."

2. While Section III, paragraph 2, is a long step forward in the right direction, I cannot but regret the failure to incorporate probate and criminal jurisdiction in the General Court.

3. Section III, paragraph 3, does not place any limitation, either minimum or maximum, on the number of judges who shall sit together in a part of the Appellate Division. I respectfully suggest that we should follow the federal practice of appeals before three judges, neither more nor less.

4. By Section IV, paragraph 1, clause (a), questions of constitutionality must go through the Appellate Division. This would be quite satisfactory if time limits were placed upon handing down opinions in the proposed appellate courts, but there is none. Is not a prompt decision on questions of constitutionality important enough to provide for direct appeal to the Supreme Court? It may be objected that to by-pass the Appellate Division will lead to the assertion of constitutional questions frivolously but every lawyer realizes that the court knows how to take care of frivolous appeals.

5. By Section IV, paragraph 4, the jurisdiction to review criminal indictments by certiorari seems to have been abolished. This would be a great misfortune to the private citizen, as has been demon-

strated in this State in the not too distant past. If it be said that the jurisdiction has been abused, the abuse has been in the length of time that it has taken to decide certain of these cases but not in the jurisdiction itself. The jurisdiction is as ancient as common law itself and to abolish it is to deprive the citizen of a right potentially as important as habeas corpus and the provisions of the Bill of Rights.

6. Section V, paragraph 1, would give the Legislature the right to take away from the Governor the power to appoint judges of county courts. One can never forsee when quarrels are likely to occur between the Governor and the Legislature. It would be a great mistake if county judges were appointed otherwise than by the Governor.

7. Section V, paragraph 3, provides an initial term of seven years for the trial judges, and upon reappointment tenure during good behavior, but singularly enough no such initial term of seven years is provided for justices of the Supreme Court. Appointments to the Supreme Court must come either from the Bar or from among the trial judges and in neither case have we definite assurance of the appointee's fitness for a life appointment without a seven-year trial term. It is respectfully submitted that the same reasons that dictate an initial term of seven years in one court also require it in the Supreme Court.

8. By Section VI, paragraph 1, the Chief Justice of the Supreme Court is made the administrative head of all the courts "subject to its rules" (*i.e.* of the Supreme Court). The quoted words show that the six Associate Justices of the Supreme Court might strip the Chief Justice of his administrative powers. In these circumstances, while the responsibility is cast upon the Chief Justice the grant of power might well prove illusory. I respectfully suggest that the words "subject to its rules" should be deleted.

9. Section VI, paragraph 3, providing for three presiding judges, is unfortunate in its entirety. In the first place there may and probably will be more than one part in the Appellate Division. Shall the presiding judge sit in each of these parts? Obviously, he cannot. It would be much better to follow the federal practice and let the senior judge preside in each part of the Appellate Division as they now do in the Federal Circuit Court of Appeals. There is no need for a presiding judge of the Law Division or a presiding judge of the Equity Division for these trial judges will always sit alone. To have a presiding judge in either of these divisions is to weaken the administrative authority of the Chief Justice.

10. Paragraph 6 of the Schedule provides that "the advisory masters appointed to hear matrimonial proceedings shall continue so to do" * * * "unless otherwise provided by law." I cannot believe that it is intended to leave to the Legislature the question of

whether or not the advisory masters shall have life tenure.

11. Paragraph 13 of the Schedule, unless it be a misprint, provides that the Judicial Article is to take effect on January 1, 1949, while the judges of the new court by paragraph 1 of the Schedule are to be appointed immediately after the adoption of the Constitution. This would mean that for nearly fourteen months a judge would be a judge of an old court and designated as a judge of a new court. One has only to think of the resulting complications in terms of personalities to see how unfortunate this might be. I respectfully urge that the Judicial Article be made effective on January 1, 1948, even if the rules of court have to be amended at a later date, as they undoubtedly will in any event to take care of unanticipated contingencies.

12. There is a serious omission in the tentative draft in failing to provide for the relief of litigants when the appellate courts, either by reason of pressure of business or otherwise, do not hand down decisions within a reasonable time. Various devices have been suggested, such as withholding salaries when opinions are not handed down sixty days after argument, etc., but the most effective method of obtaining prompt judgment is to provide that the Governor or the Chief Justice shall convene a special term of the Appellate Division or of the Supreme Court from among the judges of the General Court whenever the work of the appellate courts is more than sixty days in arrears.

Very truly yours,

ARTHUR T. VANDERBILT

LETTER OF CHARLES E. McCRAITH, JR., ESQ.

CHARLES E. McCRAITH, JR.
Counsellor at Law
Kinney Building
790 Broad Street
Newark 2, N. J.
Telephone MArket 2-5198

June 30, 1947.

My dear Delegate:

As a member of the Essex County Bar Association Committee On Revision of the Judiciary Article, I disagree with the proposal that prerogative writs be abolished and that "a civil action" be substituted in place of quo warranto, mandamus and certiorari.

Every lawyer who is conversant with prerogative writ practice appreciates that each of the writs serves its own peculiar, essential and beneficial function.

Reported criticism by the Bar of certain features of the practice under the writs is not attributable to any deficiencies inherent in the writs; more properly, it is the ultimate result of statutory phraseology, judicial construction thereof and constitutional restriction against legislative improvement which might encroach upon the prerogatives of the Supreme Court.

The remedies of quo warranto, mandamus and certiorari serve entirely distinct functions and, in my opinion, a statutory substitute intended to provide a single form of procedure in their place, would be functionally unworkable. I seriously question, for example, whether any "civil action" would provide the salutary and immediate relief now obtainable through a peremptory writ of mandamus.

The complaints directed against dismissal of certiorari proceedings in instances where the courts have held the post in question to possess the attributes of an "office" in contrast to those of a "position," are more properly ascribable to the language of the quo warranto statute.

I subscribe to the opinion that certiorari, in most instances, should issue as a matter of right; however, that result might readily be obtained if the constitution were to obliterate the existing impediment against legislative interference with the prerogatives of the Supreme Court.

I further subscribe to the majority opinion that issues of fact in quo warranto and mandamus proceedings should be determined by the court without a jury. Modernization in that particular has been recognized as desirable by the State Bar Association, the Judicial

Council and the drafters of the proposed 1944 Constitution. The archaic requirement for jury trial is possible of correction by amendment of the respective statutes to conform with the method of procedure now applicable to certiorari proceedings; supplemented by appropriate rules of court.

It is my suggestion that quo warranto, mandamus and certiorari be designated specifically instead of by usage of the general term "prerogative writs," and that the pertinent section simply provide legislative freedom to enact laws regulating the practice and procedure governing those writs, including authority to proscribe trial by jury in quo warranto and mandamus proceedings.

A quarter of a century's experience in prerogative writ practice impels the conclusion that many of the "difficulties" asserted to have been experienced by members of the Bar may be attributed to unwillingness to study the precedents and rules which control and regulate prerogative writ procedure.

The irrevocable extinguishment of the writs through constitutional mandate would constitute a retrogressive blunder. I respectfully suggest that the preferable solution is to commit the subject of quo warranto, mandamus and certiorari to the Legislature through general but concise language, authorizing it to enact laws regulating the subject matter, unrestrained by inherent prerogatives now residing in the Supreme Court.

Very sincerely yours,

CHARLES E. MCCRAITH, JR.,
Member, Committee on Revision of the
Judiciary Article,
Essex County Bar Association.

LETTER OF DRURY W. COOPER, Esq.

(Excerpt from letter to President Robert C. Clothier, referred to the Committee on the Judiciary)

July 28, 1947

* * *

1. *The tenure of the Supreme Court judges*

I think that should be for "good behavior" (*i.e.,* for life), instead of to terminate at the age of 70. There are two outstanding illustrations: first, in New York State all judicial terms expire at the age of 70 of the incumbents. The only real advantage of that is that it gives place to new men, but as against that there is the great disadvantage of terminating an incumbency generally at the height of the man's experience and capacity, and supplanting him with one who may have had little or no experience. On the other hand, the federal judiciary holds during good behavior, that is, for life, and that has with very few exceptions worked remarkably well, —an outstanding example perhaps being that of Justice Holmes, who was about 60 when appointed, and whose work after he was 70 was by far the most valuable of any man of his time, in many people's estimation. At any rate he showed no diminution of power whatever up to the time of his voluntary relinquishment. Then, too, if the judge is put out of office at the age of 70 he must try to find something to do in most cases. He has been out of practice for years, and his efforts to resume practice usually come to very little. Then, too, it makes for continuity in the court, to have the judges serve as long as they are able. The United States Supreme Court has had but 85 members in the 160 years of its existence. Some have served more than 30 years, and for more than two-thirds of its life the senior member has had 20 years or more of service. All this tends to give stability to the court. It seems to me that everything tends to support the view that the man of experience should be retained in judicial office as long as he is willing to serve. Usually those in poor health, or otherwise disqualified by advancing age, are content to retire voluntarily.

Sincerely,

DRURY W. COOPER

MEMORANDUM OF WILLIAM ABBOTTS, Esq.

The undersigned, presently holding the office of Law Reporter, begs to submit the following memorandum concerning that office:

In the present Constitution the office of law reporter is provided for under Section II, "Civil Officers," of Article VII, by paragraph 4:

> "4. Law reporter; appointment; term.
>
> The law reporter shall be appointed by the justices of the supreme court, or a majority of them; and the chancery reporter shall be appointed by the chancellor.
>
> They shall hold their offices for five years. *As amended, election Sept.* 7, 1875. *Proclamation* Sept. 28, 1875."

I note from the newspaper copy of the new Judicial Article that no mention of the office of law reporter is made therein, and while some provision may be made elsewhere in the draft of the new Constitution, such provision has not come to my attention.

In the draft of the proposed Constitution submitted to the people a few years ago, the office of law reporter was continued as a constitutional office, but the term of such office was made one year.

I believe that the office of the law reporter is of sufficient importance to be continued as a constitutional office and that the work of the law reporter being a continuous operation, I submit that limiting the term of such office to a period less than five years would tend to disrupt the efficiency of the work of the reporter and the promptness of getting out the reports. The reporter first gets the copies of the opinions from the office of the clerk of the court, then prepares headnotes, checks citations and reads proof as the pages of the volume are built up, finally completing the index and the delivery of the volume. The reports average about eight in five years and it is the objective of the reporter to get the volumes delivered to the State just as soon after the final pages are completed as possible. It would seem to me that if the reporter were subject to a term of one year it would interfere considerably with the continuous flow of material for the publication of his volume.

With the constitutional office as a basis, the preparation and printing of the law reports and the compensation to be received by the reporter are the subject of statute found in Title II, Chapter 18, Sections 1 to 5 of the Revised Statutes.

Respectfully submitted,

William Abbotts,
Law Reporter

LETTER OF SOL KANTOR, Esq.

SOL KANTOR
Attorney at Law
Perth Amboy National Bank Bldg.
Perth Amboy, N. J.

June 19, 1947

Dr. Robert C. Clothier, President
The Constitutional Convention
Rutgers University
New Brunswick, N. J.

Dear Sir:

I called at your office on Friday morning, the 13th instant, and left with your Secretary a copy of a petition that I had filed with Gov. Driscoll.

Will you kindly present this petition to the delegates to the Convention, as a whole, for the information that it contains. I doubt very much if the average layman and, perhaps, many attorneys as well, really know the true conditions in our courts to-day. The allegations and proofs, contained in the petition, will enlighten them no end.

I would also like to make the following suggestions, which I feel should be embodied in the new Constitution that the Convention is to draw up. These suggestions are made after long and bitter experiences before the courts.

There should be a Court of Errors and Appeals. The name should be retained, if for no other reason than historical. The court should consist of seven members, which should be the court of last resort in all cases. Appeals should be allowed as a matter of right. This court shall only hear appeals and the judges shall not be a member of or sit in any other court.

There shall be a Supreme Court, which shall have state-wide jurisdiction, both in law and equity. Each county shall at all times have at least one resident justice.

The number of justices may be increased by appropriate legislation, as the public good may require. There shall also be an Appellate Division within this court, the members thereof to be chosen by the several justices who shall sit in this Division for one year, the justices to be rotated in this Division, from year to year, so as to give all of them equal opportunity of service and experience. No justice shall be permitted to sit in the county wherein he resides, so as to avoid the possibility of creating a strong political machine, which is now the case in our State; and these justices shall be rotated, from time to time, to different counties, for the

express purpose of avoiding such a possibility. The justices shall be assigned, from time to time, by the judges of the Court of Errors and Appeals, in an effort to avoid the possibility of building up a strong political machine which, unfortunately, is the present deplorable situation in our courts to-day, both as to the Democratic Party and likewise in the Republican Party. Let us have a good house cleaning.

There should be a Circuit Court, which shall have criminal jurisdiction in all cases and in civil cases, up to the sum of $1,000.00, in order to relieve the Supreme Court of considerable work. Where all the parties to the suit reside in the same county the papers in the cause shall be filed in that particular county, but there shall be a master index in the main office in Trenton, so that litigants and their attorneys may know where papers are filed. No judge of this court shall sit in the city or county in which he resides and he shall be assigned by the justices of the Supreme Court and shall be rotated from county to county. The purpose of rotation, as to all judges, is to avoid the political possibility I spoke of above. No judges in the Circuit and Supreme Court shall sit in any one county more than three months and he shall not be permitted to sit in any one county more than once a year.

The office of justice of the peace shall not be continued; under present conditions such office is no longer necessary.

All attorneys shall be permitted to practice before all the courts; there shall be no distinction.

No judge shall be appointed unless he shall have first been a resident and member of the bar for at least ten years. There shall be no distinction as to race, sex, religion or previous condition of servitude. No judge shall be permitted to practice law, directly or indirectly, and in violation thereof shall be dismissed from the bench for all time, disbarred from practice, denied the right to ever hold any public office at any time, and shall forever forfeit his right to vote. A judge should be like Caesar's wife—above reproach; which unfortunately is not the case to-day.

A judge may be appointed for five years and, if qualified, reappointed for another five years. No judge shall at any time hold more than two appointments, that is to say, he shall not hold judicial office for more than ten years, whether it be two consecutive terms or different separate terms. The continuous reappointment of judges only tends to build up a strong political machine, as witness our present and past experiences.

None of the present judges shall be subject, at any time, to appointment to the new judicial system. If we are to have a new Constitution, then let us also have a new list of judges whose hands will not be tied, we hope, who can act with a clear mind and an

honest heart. We should start with new, clean, fresh linen and not pick up our half-soiled wash.

A commission should be created, with two members from the New Jersey State Bar Association, farmers' group, labor, industry and so on, each group to select its own members and no two members shall be from the county. It shall be the duty of this commission to submit to the Governor five or six names, from which selection the Governor must pick his choice and submit that choice to the House and Senate. Each branch of the Legislature shall meet in separate session and two-thirds of the membership of each branch must vote for confirmation. This commission shall hear public charges of misconduct or inefficiency against any judge, and shall make its recommendation to the Governor, who in turn must turn over the matter to the Legislature, who shall in joint session publicly hear and determine the same and publicly make its findings.

The Governor shall be elected for a period of three years and shall not be permitted to ever hold that office again.

The members of the Senate shall be elected for a period of three years and shall be permitted to hold another term of office, but at no time shall he hold office more than six years. An Assemblyman shall be elected for two years and may be re-elected for another two terms, but at no time shall he hold office for more than six years. Once a Senator or Assemblyman has held office for six years, he shall not be qualified to hold that office again, or serve again in any branch of the Legislature.

The same limitations upon holding office, shall apply to all state, county and city officers, in order to prevent the building up of a powerful political machine, Democratic or Republican. There should truly be representation by the people, for the people and of the people, and not by the political machine for the political machine.

If we are to do this job of framing a new Constitution, let us do it right, or not at all. A half-way job is no job at all.

I have presented these views, based upon long and bitter experiences, in an honest and patriotic desire to be of some small help. I trust, that the members of the Constitutional Convention will receive and act upon it in that spirit.

Yours very respectfully,

SOL KANTOR

RESOLUTION OF NEW JERSEY ASSOCIATION OF CHOSEN FREEHOLDERS

WHEREAS, the court system of the several counties of the State of New Jersey have served the citizens well with justice and equity, a fair sense of jurisprudence and just treatment, and

WHEREAS, the present constitution of the several courts of Juvenile, Orphans', Common Pleas, Oyer & Terminer and Probate act wisely in providing just claim and redress to public cases, and

WHEREAS, the Common Pleas Judges of the several counties have ably administered the affairs of these courts, now

BE IT THEREFORE RESOLVED, that the present system of County Courts be and hereinafter continued, guaranteed and extended into the new State Constitution currently being drafted by Convention at New Brunswick, and

BE IT FURTHER RESOLVED, that the several Boards of Freeholders express a desire for a single responsible judge assigned to and kept within the boundaries of each county for legal service.

(Adopted August 4, 1947)

Respectfully submitted,

ROBERT L. ADAMS, *President,*
N. J. Assoc. Chosen Freeholders
CHAS. R. STOUT, *Secretary*
ANDREW MCINTYRE, *Asst. Secretary*

LETTER OF THE NEW JERSEY STATE CHAMBER OF COMMERCE

NEW JERSEY STATE CHAMBER OF COMMERCE
605 Broad Street
Newark 2, New Jersey

The New Jersey State Chamber of Commerce, pursuant to action taken by its Executive Committee, announces its position on the principal proposals for revision of the State Constitution, now under consideration by the Standing Committees of the State Constitional Convention in New Brunswick. * * *

Committee on the Judiciary

The Chamber recognizes the need for a revision of the State court system and recommends a modernization which would assure more efficient and expeditious handling of judicial services.

LETTER OF THE NEWTON CHAMBER OF COMMERCE

NEWTON CHAMBER OF COMMERCE
Newton, New Jersey

July 25, 1947

The Newton Chamber of Commerce, pursuant to action taken by its Executive Committee, announces its position on the principal proposals for revision of the State Constitution, now under consideration by the Standing Committees of the State Constitutional Convention in New Brunswick.* * *

Committee on the Judiciary

The Chamber recognizes the need for a revision of the State court system and recommends a modernization which would assure more efficient and expeditious handling of judicial services.

RESOLUTION OF THE UNION COUNTY REPUBLICAN COMMITTEE

WHEREAS, it is our firm belief that the government of this State belongs to the people who created it, and,

WHEREAS, we firmly believe that the government should be kept as close to the people as possible, and,

WHEREAS, any attempt upon the part of the Constitutional Convention now assembled in New Brunswick, New Jersey, to centralize or integrate the county courts as they are at presently constituted, into a unified court system would be in opposition to the welfare of the people of the State and in violation of the intent of our forefathers as expressed in the above principles,

NOW THEREFORE, BE IT RESOLVED by the Union County Republican Committee in special session assembled this 21st day of July, 1947, that said Committee petition the Constitutional Convention to refrain and desist from any action that would destroy or impair the county court systems as presently constituted as in our opinion this would be a backward step and in opposition to the intention of the founders of this State, and,

BE IT FURTHER RESOLVED that we call upon the delegates of the County of Union to use their influence to carry out the intent of this resolution, and,

BE IT FURTHER RESOLVED that a copy of this resolution be submitted, immediately, to the delegates to the Constitutional Convention from the County of Union; to the Chairman of the Convention; to the Governor of the State of New Jersey and to the other members of the Judicial Committee of the Constitutional Convention.

I, ROBERT J. MCNAIR, Secretary of the Union County Republican Committee, hereby certify that the above is a true copy of a Resolution unanimously adopted by the Union County Republican Committee at a Special Meeting held at the Elizabeth Carteret Hotel on July 21, 1947 at 8:15 P.M.

ROBERT J. MCNAIR, *Secretary*
Union County Republican Committee

MEMORANDUM OF SAMUEL J. MARANTZ

(Submitted July 21, 1947)

SHALL WE END THE UNANIMITY RULE FOR VERDICTS IN CIVIL CASES?

With a Constitutional Convention in momentous session, the time is opportune for amending Article I, Section 7 of our 103-year-old Constitution (which guarantees the right to trial by jury) by including the following:

> "The Legislature may also authorize by law, that a verdict in any civil case may be rendered by not less than three-fourths of the jurors."

The adoption of such a provision would pave the way for the Legislature to do away with the necessity of unanimity in verdicts in civil cases—a requirement which stems from circumstances of the dim past and has no rational basis in a democracy which recognizes the right of a majority rule. Under our judicial system, the decisions of the United States Supreme Court and our own appellate courts are rendered by a vote of a bare majority. Aside from the purely historical basis of the rule, there exists no rationale for this relic of medieval times which requires twelve jurors, with varied backgrounds, coming from all walks of life, to unanimously agree to the facts and issues which confront them in a controverted judicial trial.

"The law contemplates," Mr. Justice Heher declares,[1] "that juries shall, by discussion, harmonize their views, *if possible,*" [2] (revealing an acute awareness of the difficulties of such an assignment). The court further cautions juries not to "compromise, divide or yield for the mere purpose of harmony." Yet judges and trial lawyers would readily agree that viewed realistically, many of the verdicts rendered—though not so indicated to the court—are the result of "compromise and yielding," because the very requirement of *unanimity* makes it often necessary, if the jury is to return a verdict without reporting back a disagreement.

The right of trial by jury—"frequently called the bulwark of our liberties" [3]—has been preserved by the Federal and State Constitutions. The right of a jury trial thus guaranteed is the right as it existed at common law at the time of the adoption of such constitutional provisions.[4] "Trial by jury" imports a trial by a jury of twelve men, impartially selected, who must unanimously concur in the verdict.[5]

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[1] *Juliano* v *Abels,* (Sup. Ct. 1935) 114 *N. J. L.* 510, 513.
[2] Italics here and elsewhere ours.
[3] *State* v *Dolbow,* (E. & A. 1936) 117 *N. J. L.* 560, 564.
[4] 53 Am. Jur. 697, sec. 1006.
[5] *State* v *Brown,* (E. & A. 1898) 62 *N. J. L.* 666, 678.

While our courts have zealously guarded the right of trial by jury, it is noteworthy that they have repeatedly recognized that a jury trial was an instrument of justice which could and should be moulded to fit the ever-changing needs of a progressive society. Thus, while the right of trial by jury must remain "inviolate," it does not mean that it is "unalterable" [6] and that it "in no sense imports immunity from all regulation." [7] The statute[8] which permitted women to qualify as jurors was recognized as a "radical departure." [9]

In bringing our Constitution up to date, therefore, it is high time that we realize that while unanimity of twelve jurors was an essential attribute at common law, our times require a change. Our Legislature cannot enact legislation permitting verdicts concurred in by less than all the jurors, because at the time of its adoption, the common law rule requiring unanimity was in force. Constitutional guaranties of right to trial by jury, where not qualified by any other constitutional provision, are implied limitations upon the power of the Legislature to provide for less than a unanimous verdict.[10]

Attempts to do away with the necessity of unanimity in a verdict by the Legislature (without a constitutional amendment permitting such legislation) have repeatedly been held unconstitutional in other states.[11]

Aside from the repugnance which the unanimity rule bears to the majority rule in our form of government, five compelling reasons exist which favor the adoption of the proposed amendment.

1. From available statistics, the requirements for a unanimous verdict results in reported disagreements of four per cent of jury trials. (The Judicial Council of New York reported 283 disagreements out of 6,517 trials before the Supreme Court of New York, 1939-1941). Understandably, but none the less unfortunately, such disagreements usually occur in long, complicated trials. They entail further expense in costly retrials, loss of time and inconvenience to contestants and witnesses.

2. As previously indicated, the requirement for unanimity has led to many unjust compromise verdicts which, while not reported as such, have all the earmarks of compromise and the inability of the jurors to concur with each other upon the issues before them.

3. One recalcitrant or dishonest juror has the power under our present system to hold up the whole judicial process. Even where an honest juror refuses to surrender a conscientious conviction he

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[6] *Clayton* v *Clark*, (Sup Ct.) 55 *N. J. L.* 539, 540.
[7] *Humphrey* v *Eakeley*, (Sup. Ct.) 72 *N. J. L.* 424, 426.
[8] *P. L.* 1921, *chapter* 28, *page* 50.
[9] *State* v *Dolbow*, supra, at page 567.
[10] 53 Am. Jur. 697, sec. 1006.
[11] New Hampshire—*Opinion of the Justices*, 41 *N. H.* 550; Indiana—*Ewing* v *Duncan*, (Ind. Sup. 1935) 197 *N. E.* 901; Arizona—4 *Ariz.* 158, 36 *Pac.* 499; Montana—*Kleinschmidt* v *Dunphy*, 1 *Mont.* 118; reversed on other grounds, *Dunphy* v *Kleinschmidt*, 79 *U. S.* 610.

holds, and a disagreement follows, the verdict becomes that of *one* juror. Yet under our system of democracy, we would consider it reasonable and logical to have permitted a verdict of 11 jurors —if we were not bounden down by the common law precedent.

4. Jury tampering and jury fixing would receive a serious blow by the adoption of the amendment, since under the amendment, and supporting legislative enactment, it would require reaching four members of the jury (if a three-fourths rule were adopted by the Legislature), or three corrupt jurors (in the case of a five-sixths rule).

5. The necessity that deliberations of the jury continue until a *unanimous* verdict is reached, results in a contest in the jury room between the strong and the weak, as to who best can endure the discomforts of confinement to the jury room, until final submission is made. Here, too, we have an historical relic which comes from the times when jurors could not separate until after the verdict, and to hasten their deliberations it was the law that they could neither eat nor drink till they had given their verdict,[12] to which Lord Cockburn noted in *Winsor* v *Queen,* 6 *Best & S.* 143, 171:

> "Our ancestors insisted on unanimity as of the essence of a verdict, but were unscrupulous as to how that unanimity was obtained. Whether the majority, or the reverse, appeared to them a matter of indifference, it was a contest between the strong and the weak, the able-bodied and the infirm, as to who best could bear hunger and thirst and all the discomfort incident to confinement."

In many jurisdictions in which a verdict may be rendered by less than all the jurors, such a verdict is permitted only if the jury had deliberated for the period of time prescribed by statute. Thus, under the Constitution of Nebraska, where it is provided that the legislature may authorize a verdict in civil cases by not less than five-sixths of the jury, the legislature enacted a statute permitting five-sixths verdicts

> "provided that a verdict concurred in by less than all members of the jury shall not be rendered until the jury shall have had an opportunity for deliberation of the case for a period of not less than *six hours* after the same is submitted to said jury."

The intent and object of such an act is "to prevent delay and mistrials, and defeat justice." [13]

The proposed amendment is not novel in the history of our country's judicial systems. Verdicts by less than the entire number of jurors (allowed by constitutional provision) are now permitted in more than a third of the states. As early as 1878, the California Constitution provided: "The right to trial by jury shall be secured to all and remain inviolate, but in civil cases three-fourths of a jury may render a verdict." The following year, the Constitution of Louisiana provided that the General Assembly might provide by law

[12] Holdsworth, 1 *History of English Law* 318.
[13] *Curtis & Gartside Co.* v *Pigg,* (Okla.) 134 *Pac.* 1125.

for a verdict by less than the whole number of jurors in civil cases, and in 1880, the legislature of that state passed an act which provided that nine out of twelve jurors might render a verdict in civil cases. More recently, in 1935, New York adopted an amendment to its constitution permitting the legislature to provide that a verdict in civil cases may be rendered by a vote of five-sixths of the jurors, and a statute enacted pursuant to this constitutional provision has been in operation since September 1, 1937.[14]

Besides California, 11 states permit a verdict in civil cases by *three-fourths* of the jury: Arizona, Connecticut, Idaho, Louisiana, Mississippi, Missouri, Nevada, Ohio, Oklahoma and Utah. Beside New York, five states allow a *five-sixths* verdict in civil cases: Minnesota, Nebraska, South Dakota, Washington and Wisconsin. Four states—Idaho, Louisiana, Montana and Oklahoma—permit a verdict by less than the entire jury in certain criminal cases. Under the Montana Constitution (Article 3 of the Declaration of Rights) it is provided that in civil actions, and in all criminal cases not amounting to a felony, *two-thirds* in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all the jury concurred therein.

While the proposed amendment empowers the Legislature to permit a verdict by not less than three-fourths of the jury (as has been adopted by the majority of states which have cast aside the unanimity rule), it is to be observed that the Legislature may pass an act which would require either a three-fourths or a five-sixths rule.

At a time when so much thought and effort is being given to the reform of our judicial system so that the administration of justice will be speeded, advanced and geared to our times, the adoption of the proposed amendment would permit our Legislature to strengthen our jury system, avert unjust verdicts and costly retrials and avoid congestion in our court calendars.

[14] C. P. A. section 463 (a).

SUMMARY OF PROPOSALS FOR REVISION OF JUDICIAL ARTICLE

(Prepared for the Committee on the Judiciary by Joseph Jacobs)

I. THE CREATION OF AN INDEPENDENT COURT OF APPEALS COMPRISED OF A CHIEF JUSTICE AND ASSOCIATE JUSTICES HAVING NO OTHER JUDICIAL FUNCTIONS.

1942 Constitutional Revision Commission:

The highest court of appeal is called the "Supreme Court." It was to have seven members.

1944 Proposed Constitution:

Ditto.

1947 Recommendations of League of Women Voters:

Ditto, except that the Supreme Court is a part of a "Court of Justice."

State Bar Association Committee:

The court of last resort is called "Court of Appeals." It is to have not more than seven members.

Essex County Bar Association Committee:

A "Court of Appeals" comprised of a Chief Justice and six associate justices is to be the court of last resort.

II. MERGER OF ALL EXISTING COURTS INTO A SINGLE, STATEWIDE COURT HAVING BOTH TRIAL AND APPELLATE JURISDICTION, THE LEGISLATURE BEING EMPOWERED TO CREATE ADDITIONAL INFERIOR COURTS.

1942 Constitutional Revision Commission:

Creates a "Superior Court." Inferior courts created by the Legislature must be courts of "original" jurisdiction, that is, trial courts without appellate jurisdiction. The Legislature is given the power to integrate inferior courts with the Superior Court.

1944 Proposed Constitution:

Ditto, except that courts created by the Legislature must have "original limited jurisdiction," which means trial courts, without appellate jurisdiction and some other limitation upon jurisdiction, *e. g.,* subject matter, territory, etc.

1947 Recommendations of League of Women Voters:

The new court is called "General Court" and is a "Court of Justice." The Legislature is given the power to create municipal courts "with jurisdiction over municipal law, from which appeal may be taken to the General Court."

State Bar Association Committee:

The new court is to acquire the present jurisdiction of

the Supreme Court, the Court of Chancery and the Prerogative Court, the present county courts being retained as now organized, subject to the power of the Legislature to make changes and to create new inferior courts.

Essex County Bar Association Committee:

The name of the new court is "Supreme Court." The Legislature is given power to create inferior courts of limited jurisdiction, which might mean trial courts or appellate courts, *e. g.,* to review the decisions of administrative agencies.

III. THE CREATION OF SEPARATE LAW AND EQUITY SECTIONS IN THE NEW, MERGED COURT.

1942 Constitutional Revision Commission:

Creates a Law Section, to exercise civil, criminal and matrimonial jurisdiction, and an Equity and Probate Section to exercise all other jurisdiction, each section, in turn, being divided into such parts as may be provided by rules of the highest appellate court.

1944 Proposed Constitution:

Ditto.

1947 Recommendations of League of Women Voters:

Ditto, with the further, possibly inconsistent, requirement that each justice "shall exercise the powers of the court."

State Bar Association Committee:

The new Supreme Court, which is a merger of the present state courts only, is to have a Chancery Division and a Law Division.

Essex County Bar Association Committee:

The new Supreme Court is to have a Law Section exercising original civil and criminal jurisdiction in law, and an Equity and Probate Section exercising all other original jurisdiction. Each section to be divided, in turn, into such parts as the rules of the Court of Appeals provide.

IV. THE ELIMINATION OF FRAGMENTARY OR MULTIPLE LITIGATION OF SINGLE CONTROVERSIES.

1942 Constitutional Revision Commission:

Equity prevails in any conflict with common law and, subject to the rules of the highest appellate court, every controversy is to be determined fully by the justice hearing it.

1944 Proposed Constitution:

Ditto.

1947 Recommendations of League of Women Voters:

Ditto.

State Bar Association Committee:

Ditto (to the extent that the jurisdiction of the new

Supreme Court, limited as it is to the jurisdiction now exercised by the present state courts, suffices for the purpose).

Essex County Bar Association Committee:

Ditto, except that each section is to be required specifically to exercise the jurisdiction of the other, so that every controversy shall be determined fully by the judge who hears the case.

V. APPOINTMENT AND TENURE OF JUDGES.

1942 Constitutional Revision Commission:

All judges to be appointed by the Governor by and with the advice and consent of the Senate, except in the case of inferior courts created by the Legislature with jurisdiction limited to one municipality, where another "uniform method of appointment" may be provided. Justices of the highest court of appeals must have served for a year or more on the new merged statewide court and all judges of constitutional courts must have been counsellors-at-law for at least ten years prior to appointment. The Chief Justice and associate justices of the highest appellate court, once appointed, hold office for life. Justices of the new merged court are appointed for a term of seven years, and, if reappointed, hold office for life. All judges must retire at the age of 70. Judges are not merely disqualified from accepting any other governmental office but are also removed upon becoming candidate for any elective office, state or federal. A justice of the new merged court may sit as the judge of any inferior court within the counties to which he is assigned.

1944 Proposed Constitution:

Ditto, except that the qualifications for appointment are changed to ten years as an attorney rather than as a counsellor. Furthermore, appointments to the highest appellate tribunal are not limited to incumbent or former judges of the new merged court. The Legislature, in providing alternative methods of judicial appointment, must specify either election of judges of inferior courts or appointment by the governing body of the county or municipality in which the court functions. Finally, retired judges over the age of 70 may be assigned by the Chief Justice to temporary service as the need arises.

1947 Recommendations of League of Women Voters:

Creates a Commission on Judicial Appointment composed of the Chief Justice, three lawyers selected by the State Bar Association, and three laymen appointed by the

Governor. All judges of constitutional courts are to be appointed by the Governor, by and with the advice and consent of the Senate, from lists submitted by the commission. Every judge of the highest appellate court must have served three years on the new merged court. The qualification for judicial appointment is ten years' standing as a practicing attorney. The Chief Justice and associate justices of the highest appellate court hold office for life. Other judges are appointed for seven years. Thereafter the commission holds a public hearing on the question of reappointment and may recommend for or against reappointment or submit a panel of names including the incumbent. Judges, once reappointed, hold office for life. The commission may also recommend referees, etc., for appointment by the courts themselves. Judges must retire at the age of 70.

State Bar Association Committee:

No recommendation on the subject.

Essex County Bar Association Committee:

Members of the highest appellate court and the new merged court are to be appointed by the Governor by and with the advice and consent of the Senate for seven-year terms, and, if reappointed, to hold office for life. The qualification is ten years' standing as an attorney-at-law. Retirement is compulsory at the age of 75, but any judge who has acquired tenure may retire at any time after 70 and in that case receive a pension to be fixed by law, but not less than two-thirds of his salary.

VI. REMOVAL OF JUDGES.

1942 Constitutional Revision Commission:

Charges against members of the highest appellate court are to be tried by the Senate and, in the case of all other judges, by the highest appellate court itself.

1944 Proposed Constitution:

Judges may be impeached by the Assembly and tried by the Senate.

1947 Recommendations of League of Women Voters:

Same as 1942 Constitutional Revision Commission.

State Bar Association Committee:

No recommendation on subject.

Essex County Bar Association Committee:

Justices of the highest appellate court may be impeached by the Assembly and tried by the Senate. Conviction requires the vote of two-thirds of the members sitting, 15 to be a quorum, of which not less than 11 must concur. All other judges, except those appointed or elected locally,

may be impeached by the Assembly and tried by the highest appellate court, five votes being necessary for a conviction.

VII. APPELLATE JURISDICTION OF THE NEW MERGED COURT.

1942 Constitutional Revision Commission:

There are to be at least two Appellate Divisions of three judges each, appointed annually by the Chief Justice to hear appeals from designated sections of the new court, and also from inferior courts, as provided by law. All decisions of the new merged court may be appealed to an Appellate Division within that court.

1944 Proposed Constitution:

Ditto, except that assignments to an Appellate Division made by the Chief Justice must be for a period of three years and for exclusive duty on appellate work. Further, only final judgments are appealable as of right, and preliminary and interlocutory orders only when so provided by law.

1947 Recommendations of League of Women Voters:

Same as 1942 Constitutional Revision Commission.

State Bar Association Committee:

No recommendation on the subject.

Essex County Bar Association Committee:

The new merged court is to have an Appellate Section. The Chief Justice is to assign judges to that section for three-year terms. All intermediate or interlocutory decisions of the new merged court, as well as all decisions of inferior courts and final decisions of administrative agencies, are to be appealable as of right to the Appellate Section, except that the Legislature may provide that some of such appeals shall be heard by a single appellate judge.

VIII. JURISDICTION OF HIGHEST APPELLATE COURT.

1942 Constitutional Revision Commission:

Decisions of an Appellate Division of the new court may be appealed further only if there was a dissenting opinion, or if either the Appellate Division or the highest appellate court itself decides that there should be a further appeal. Capital cases and constitutional cases may be appealed directly to the highest court.

1944 Proposed Constitution:

Ditto.

1947 Recommendations of League of Women Voters:

Ditto.

State Bar Association Committee:

No recommendation.

Essex County Bar Association Committee:

All final decisions of the new, merged court may be appealed as of right to the highest appellate court. The decision of the Appellate Division may be further appealed when there has been a reversal or modification of the original decision, or the decision is not unanimous, or either the Appellate Division or the highest appellate court decides that there should be another appeal. Any final decision of any court which passes upon a constitutional question may be appealed directly to the highest appellate court, which shall also have such additional jurisdiction as may be provided by law.

IX. NUMBER AND ASSIGNMENT OF TRIAL JUDGES.

1942 Constitutional Revision Commission:

Number to be fixed by the Legislature, but not less than 25. Judges to be assigned to counties, divisions and sections by the Chief Justice annually, with power to make temporary or permanent changes in the assignments.

1944 Proposed Constitution:

Ditto, except that the number is 27 and each county must have at least one native resident judge who must be assigned to conduct the Law Section of the court in his county.

1947 Recommendations of League of Women Voters:

Ditto, except that number is fifty. No provision for resident judges in each county.

State Bar Association Committee:

Assignments to the Chancery Section of the new merged court are to be permanent.

Essex County Bar Association Committee:

The Chief Justice is to assign the judges to the various sections and parts of the new merged court from time to time.

X. SCOPE OF DECISION ON APPEAL.

1942 Constitutional Revision Commission:

All appellate courts are given such power as may be necessary to decide the case completely, including the power to set aside findings of fact which are against the weight of the evidence, or verdicts which are excessive or inadequate.

1944 Proposed Constitution:

Ditto, except that appellate courts are specifically given the power to modify, as well as to reverse or affirm, unless

otherwise required by "the ends of justice or the right of trial by jury."

1947 Recommendations of League of Women Voters:

Ditto, as in 1942 Constitutional Revision Commission.

State Bar Association Committee:

No recommendation.

Essex County Bar Association Committee:

Same as 1944 Proposed Constitution, except that in cases tried without a jury, the appellate court may determine the facts for itself, from the record developed in the trial court.

XI. PLEADING, PRACTICE AND EVIDENCE.

1942 Constitutional Revision Commission:

Pleading, practice and evidence are to be governed by rules of the highest appellate court, subject to the power of the Legislature to legislate on the subject.

1944 Proposed Constitution:

Ditto, differently stated.

1947 Recommendations of League of Women Voters:

Ditto.

State Bar Association Committee:

No recommendation.

Essex County Bar Association Committee:

Ditto, limited to pleading, practice and procedure.

XII. PREROGATIVE WRITS.

1942 Constitutional Revision Commission:

The highest appellate court is given the power to review indictments, before trial, by certiorari. Procedure in the case of prerogative writs is to be determined by rules of the highest appellate court, except that writs may be allowed by a single judge of the new merged court, and the case may be heard, without a jury, either by the single judge or by an Appellate Section. In the case of a hearing by a single judge, an appeal on both the law and the facts may be taken to an Appellate Section of the merged court.

1944 Proposed Constitution:

Ditto, with the further provision that the correct writ shall be allowed, regardless whether it is the writ specified when the application is made.

1947 Recommendations of League of Women Voters:

No recommendation.

State Bar Association Committee:

No recommendation.

Essex County Bar Association Committee:

Prerogative writs are abolished. Where a writ, now allowable in the discretion of the court, is the means of reviewing decisions of inferior courts or administrative agencies, an appeal as of right is guaranteed, *e.g.,* decisions of District Courts, decisions of the State Alcoholic Beverage Commissioner revoking or suspending a license, and the like. In all other cases where the writs are now used, the relief which they make possible shall be granted as of right, not discretion, in a single form of action and without trial by jury, *e.g.,* in a contest between two claimants for a particular municipal job it will no longer be important to decide whether the request should be for a writ of certiorari or quo warranto, nor will the court hold a special preliminary hearing to decide whether it wishes to listen to the case, but instead will proceed with the complaint as it would in every conventional type of civil litigation.

XIII. ADMINISTRATIVE PROVISIONS.

1942 Constitutional Revision Commission:

The courts are to be administered according to rules of the highest appellate court. The Chief Justice is to be the administrative head of all the courts, assisted by an executive director in matters of finance, personnel and administrative detail, publication of statistical records of judicial services of the courts and judges and costs thereof, prescription of records, reports and audits for inferior courts, and other duties. On December 1, a report of all work, through the preceding September, is to be filed with the Governor and Legislature.

1944 Proposed Constitution:

Ditto, except as to omission of dates.

1947 Recommendations of League of Women Voters:

Same as 1942 Constitutional Revision Commission.

State Bar Association Committee:

No recommendation.

Essex County Bar Association Committee:

No recommendation.

XIV. APPOINTMENT OF CLERICAL OFFICIALS.

1942 Constitutional Revision Commission:

The highest appellate court is to appoint its own court reporter and clerk. The elected county clerks and surrogates in each county are to be clerks of the new merged court.

1944 Proposed Constitution:
The highest appellate court is to appoint its own reporter and also the clerks of both its own court and the new merged court, subject to the approval of the Governor, the appointments to be for the pleasure of the court. County clerks and surrogates are to continue their clerical functions, subject to rules of the highest appellate court.
1947 Recommendations of League of Women Voters:
Ditto.
State Bar Association Committee:
No recommendation.
Essex County Bar Association Committee:
No recommendation.

XV. MISCELLANEOUS.

1942 Constitutional Revision Commission:
If the highest appellate court fails to hear a case within two months after the appeal is perfected, or fails to decide the case within two months after it is argued, the Chief Justice must certify that fact to the Governor, who may constitute another high court of appeals from among the justices of the new merged court, who shall function until the arrearages in the court's work has been corrected. If any judge of the new merged court falls behind a similar schedule, special judges may be appointed by the Governor, with the advice and consent of the Senate, for a term of one year, upon the request of the Chief Justice.
1944 Proposed Constitution:
Docketing of judgments and decrees and the effect thereof to be governed by rules of the highest appellate court.
1947 Recommendations of League of Women Voters:
Same as 1942 Constitutional Revision Commission, except that appointments are to be made from panels submitted by Commission on Judicial Appointment.
State Bar Association Committee:
No recommendation.
Essex County Bar Association Committee:
No recommendation.

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