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for the

NEW JERSEY CONSTITUTIONAL CONVENTION

SHOULD THERE BE A CONSTITUTIONAL PROVISION LIMITING OR FORBIDDING MANDATORY LEGISLATION REGARDING LOCAL SPENDING?

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SHOULD THERE BE A CONSTITUTIONAL PROVISION LIMITING OR FORBIDDING MANDATORY LEGISLATION REGARDING LOCAL SPENDING?

State legislation requiring local governing units to make certain expenditures has been questioned by many. Some believe that local governments should have the final word in matters of expenditure, while others hold that the legislature, representing state authority over its component parts, must definitely assume some oversight of municipal expenditure. In any event, it seems to be generally admitted that local governments have not acted with wisdom or efficiency in managing local finances.

Mandatory local spending laws have appeared in state legislatures in increasing numbers. However, over the years, it has been seen that not all spending laws show a desire on the part of the State to deal oppressively with its local units.

In New Jersey the expansion of industry led to concentration of industrial power in the north, while South Jersey has remained largely agricultural. This has resulted in great differences in the financial strength of municipalities in each region. Where necessary, the State has helped municipalities in financial difficulties, and curbed the extravagances of those with surpluses. In general, the State has allowed local governments to rule on matters of local concern except where they had obviously bungled their tasks. It has interfered only in matters of a more general nature and of obvious public importance.

This does not mean that there has been a disregard of the principles of home rule. Mandatory spending legislation does not reflect a desire for further centralization of government. It is, rather, a

means of correcting the faults of previously lax local administrations and of bringing some uniformity in functions of statewide concern. Laws governing local spending are often corrective measures to make amends for the failure of many local governments to observe good business judgment.

There are several forms that mandatory local spending legislation may take. The primary form is that of requiring municipalities to make certain expenditures that they might not otherwise make. State grants-in-aid may also be used as mandatory legislation in that they often stipulate minimum administrative requirements for municipalities before the requested grant is made effective. The most common mandatory spending laws require municipalities to pay stated minimum salaries, to establish tenure of office, to create new positions, and to maintain welfare funds.

The effect of such legislation has at times been to contribute to poor government. This may be true, for example, when the stipulated minima for educational salaries makes for a greater total than the amount allocated in the budget will permit. In consequence, a smaller number of teachers is hired. Similarly, in police and fire protection the number of persons that can be retained may prove to be insufficient for the municipality. In general, the overall effect of mandatory spending laws has been to decrease the amount remaining for locally determined purposes.

Local spending laws are more common in certain fields than in others. Welfare activities, which were once almost entirely local, are more extensively coming under the control of state administrative agencies. The nature of our school system has forced us to consider

uniform standards of education as of greater state concern than local independence in education matters. In the field of police and fire protection, the municipalities must help maintain pension funds. There are other governmental areas in which laws have been enacted, but it has been in the field of education that legislative intervention has been the most comprehensive.

Municipalities have, of course, repeatedly objected to mandatory spending laws and for various reasons. One of their reasons is that such laws ignore differences in financial ability of communities in different parts of the State. A second objection is that the laws, although seemingly applicable to all cities, are often aimed at one. State legislation has sometimes been enacted despite objections by local governments on the grounds of insufficient need and inability to pay. The majority of the members of the Legislature voting on the issue are usually not familiar with the municipality at which the legislation is aimed. A third objection comes from considerations of the financial status of a municipality. Increased expenses necessitate increased revenue. The rates of property taxes, from which cities receive the greatest portion of their revenue, are, it is claimed, close to their maximum limit.

The result of municipal objection to legislative regulation has led in some cases to proposals for constitutional amendments limiting the fields in which the legislature may act. The reasons for such amendments may be summarized as follows:

1. The legislators would be protected from the pressure of groups seeking special legislation, while at the same time the taxpayers would be shielded from unjust taxation.

2. The reckless expenditures arising from separate tax levying and revenue spending powers would be avoided.

3. Local governments would be encouraged to provide better government and in so doing to seek new sources of revenue.

Reasons against such amendments may in turn be summarized as follows:

1. The present state-local governmental relations would become so confused that an entirely new system would, in effect, have to be developed.

2. The right of the legislature to control its own creatures would be curtailed.

3. Municipalities, even under home rule principles, must be subject to the greater control of state government.

4. The expenditures which are placed upon municipalities are not large enough to call for special state funds.

5. The progress toward uniform minimum standards for municipalities would be impeded.

In conclusion, it is said by those who are against constitutional regulation that a proper administrative advisory body would be of more help toward eliminating inefficiency in local governments.

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ORGANIZATION OF COURTS

by
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State of New Jersey
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ORGANIZATION OF COURTS*

If one were called on to set up a system of courts de novo, with only a problem of how to make the administration of justice achieve its purposes efficiently, he would, one may be reasonably assured, think of three types of tribunal for which he must provide. Beginning at the bottom, he would seek to set up an efficient tribunal for small causes, the causes with respect to which after all the law comes most frequently in contact with the most people and from which the mass of the people are likely to derive their idea of the judicial administration of justice. Moreover, he would seek to provide for a speedy and inexpensive review of the decisions of this tribunal, since no one can be suffered to wield the force of politically organized society at the expense of his fellow men without the check of a reasonable possibility of review. Second, he would seek to set up a system of tribunals of general jurisdiction of first instance, with a branch in which a bench of judges sit to review the action of single judges for the reason already given. Third, he would seek to set up an ultimate court of review, needed to keep the benches of judges in the court of general jurisdiction to a sound and uniform course of decision, and to pass upon public questions of great importance as to which the public will not be satisfied unless assured that the best talent of the legal system is applied to their solution.

It is true in the system of tribunals of general jurisdiction of first instance there might have to be some differentiation. One type of case requires jury trial, and the tribunal which tries cases to juries has problems of its own calling, if not for specialists, at least for judges of much experience of jury trials and what they involve. Another type of case calls for trial to a court without a jury and involves more complicated transactions, more discretion in the application of remedies and

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often certain quasi-administrative functions. Here a different kind of experience is needed. A third type of case involves even more of the administrative, yet less of the discretionary, namely probate, administration of estates, guardianship and the like. The English, when they reorganized their courts in 1873, saw how to deal with this matter. They set up the King's Bench Division of the High Court for the first type, the Chancery Division for the second type, and the Probate Division for the third. Each had its particular work to do, but they were all divisions of one court.

How did it happen that the actual organization of courts in this country departs so far from the simple system which I venture to think would be set up as a matter of course by the reflecting lawyer if he had a free hand and a full acquaintance with the problems of judicial administration of justice? The answer is, of course, historical.

It would not be too much to call the 19th Century the century of history. History for a time was to teach us everything. It was to solve all problems. In the last half of the century, under the name of evolution, it explained how everything came into being and grew to be what we knew it. Today, by way of reaction, in the fashionable thought of the time, history is discredited or ignored. But institutions are no more made of whole cloth than something is made of nothing. History does not point us to a duty by showing us the course of development of institutions in the past. But it does tell us what men have found at hand to work with. What institutions are, as we know them, is apt to be what has been handed down from the past, shaped by the exigencies of the present and handed down again. We are not morally bound to hew to historical lines of development. Conformity is rather what Terence Mulvaney called a "superfluous and impertinent necessity."

What we had immediately at hand to build to in setting up courts in America was the system of courts in 17th Century England as described in

Coke's Fourth Institute, and later the 18th Century English courts as described by Blackstone. It would be hard to find a more unfortunate model for a system of courts for a publically organized society in the new world than the system of English courts at the time of colonization. It had grown up by setting up a new tribunal for every new task between the 13th and the 17th Century. It had been built by imposing one group of tribunals upon another as old ones became unsatisfactory and new ones took over their work or part of it . There were tribunals harking back to Anglo-Saxon times and tribunals deriving from the feudal organization between William the Conqueror and the Tudors. There were the King's Courts which grew up from the time of Henry II to the Puritan Revolution.. There were the administrative tribunals of the Tudors and Stuarts. There were ecclesiastical courts, speaking from before the Reformation but still functioning as courts to the middle of the 19th Century and ridiculed by Dickens. There was a hopelessly heterogeneous mass of inferior courts, borough courts and courts of special jurisdiction of first instance, created at all sorts of times and for every sort of special situation. All these went on, often with ill-defined limits of jurisdiction, often concurrent in their jurisdiction, and only held to some general accord in the exercise of their powers by the general superintending powers of the King's Bench, which, however, by no means extended to all of them.

Multiplying of tribunals is a characteristic of the beginning of judicial organization. When some new type of controversy or some new kind of situation arises and presses for treatment, a new tribunal is set up to deal with it. So it was at Rome, where praetors, or judicial magistrates, were multiplied as the litigation of aliens and the invention of testamentary trusts called for judicial treatment. So it was in England from the 12th to the 16th

Century and even to some extent to the 19th Century. In the same way in the United States we have multiplied administrative tribunals in the present century, with no system, with no uniform provisions for or practice as to review, and not infrequently with no clear definition as between one and another. The reason in each case is the same. Every new condition is met at first by a special act; and so for every new problem there is likely to be a new court or at least a new administrative tribunal.

Those who settled the colonies were likely to have had more experience of the inferior courts of limited jurisdiction than with the King's Court at Westminster. At any rate, in our earlier colonial history we copied the inferior courts very generally and some, such as the Hustings Court in Virginia, have survived into the present century.

Some of the colonies sought radical simplifications, such as we have been coming to gradually in the present century. Some, particularly in New England, succeeded to a certain extent in having their own way. But in general the veto power of the Privy Council, exercised, as Mr. Docley would have put it, with no gentlemanly restraint, enforced adherence to the main lines of the English organization. Pennsylvania was kept out of a valid organization of her courts for 22 years because the legislature objected to setting up a system with a court of equity and the analogue of the ecclesiastical courts and endeavored to begin a much needed work of unification.

There was, it is true, a certain system discernable in the English organization of courts in the 18th Century. One could conceive of a unit made up of the magistrates and the many varieties of petty courts, although they are wholly unorganized. Each of these courts was independent of the others. Many of them had no records and so were not subject to review by writ of error from the King's Bench. As they did proceed according to the

course of the common law, they could only be reached by certiorari. There was little real superintending power over them. Blackstone made the three superior courts of the common law look like a system of courts of general jurisdiction of first instance. But they had concurrent jurisdiction and had to be eked out by the courts in which the judges sat at circuit, by the court of chancery for the half of the legal system which we call equity, and by the ecclesiastical court for probate and kindred subjects. In all of this, too, there was more or less overlapping.

In practice the tendency was to take the King's Bench to furnish a type and adapt the type to American conditions. In the same way the appellate jurisdiction of the King's Bench over the Common Pleas, and of the Exchequer Chamber over the King's Bench and Exchequer, could be made to look something like a system of intermediate appellate tribunals. Finally the House of Lords as to courts of law and equity, the Privy Council as to some other tribunals, and the Delegates of the King as to the ecclesiastical courts, could be made to look like a system of ultimate courts of review. In America we largely took this appearance, as Blackstone had created it, as giving us a model, and you in New Jersey have kept pretty close to it. Indeed it could be made to serve as the plan of what became the characteristic American organization of courts.

In the formative era of our institutions, from independence to the Civil War, much happened to the original colonial model as successive new states set up organizations on the general lines of those of their older neighbors. Under the pioneer, rural conditions of the forepart of the last century there was a general demand for decentralizing the administration of justice which has had a bad effect upon our system of courts in many parts of the country. In a country of long distances, in states of large territorial extent, in a line of slow communication and expensive travel, central courts of law and equity of first instance involved intolerable expense. There was an increasing

tendency to set up a local court of general jurisdiction, generally a one-judge court, at every man's door. In New Jersey you were fortunate in escaping the worst features of this tendency. With the central organization of your courts of first instance you are in a better position to unify the system than in states which have lost or never had any centralization below the ultimate court of review. Indeed some states, by a system of Supreme Court Districts went far toward decentralizing even that court.

In the present century, when improved conditions of transportation have reduced distances so that one can go from Cambridge to Philadelphia by rail in as many hours as it took days for Washington to make that journey on horseback in 1775, and if one goes by air, less than half as many hours as Washington had to take days, the need of extreme localizing has gone by. A tendency to return to a centralized system is manifest everywhere. The English unified their inferior courts by the county court system replacing the complete lack of system which had come down to the nineteenth century. The Municipal Court of Chicago (1906) was a long step toward unification. A very good example is the California Municipal Court Act of 1925. Unified and responsible administrative control of the courts has been growing in recent years. Connecticut in 1937 authorized the judges to appoint an Executive Secretary to the Judicial Department of the State Government. About the same time Pennsylvania took a similar step under the rule-making power then newly conferred upon the Supreme Court. The federal courts have been provided for in the same way. Sooner or later what we have been doing piecemeal for parts of the judicial system must be done thoroughly for the whole. 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.

Looking at the country as a whole, although much improvement has been made in the past forty years, the conspicuous defects involved in the organization of courts as it came down to us from the last century are waste of judicial power, wasting the time of courts, not to speak of the time and money of litigants, in piecemeal handling of single controversies simultaneously in different courts, and general want of cooperation between court and court, and at times and in some places between judge and judge in the same court, for want of any real administrative head. In the federal system much has been done toward providing effective administrative machinery. But in the states, even in those which had inherited courts of central organization, the conditions of the fore part of the last century did not require efficient heads of judicial tribunals and administrative headship did not develop or was generally suffered to lapse. Moreover, it nowhere extended to the whole system, and the inferior and small cause courts, where it has been conspicuously needed, have always been without it.

Waste in the treatment of cases in bits, part in one court or proceeding and part in another, with no power to refer all the proceedings to one tribunal, is illustrated by a saying which used to be current at sessions of the National

Conference of Social Work. It was said that in almost any one of our cities at one and the same time a juvenile court, passing on the delinquent children, a court of equity and divorce jurisdiction entertaining a suit for divorce, alimony and custody of children, a court of law entertaining an action for necessaries furnished by a grocer to an abandoned wife, and a criminal court or domestic relations court, in a prosecution for desertion of wife and children, might all be dealing piecemeal, at the same time or successively, with different phases of the same difficulties of the same family. This situation grew out of historical lines of development of different branches of the law in different courts and rigid jurisdictional lines arising from that development. But we are not bound to keep fast to those historical lines at the expense of public time, the energy of judges, and the time and pocketbooks of litigants. Granting that the different proceedings growing out of the difficulties of the one family, if we had only one of them to look at, could very well be assigned to different courts, when more than one is brought there is waste in going over the same matter in different courts and settling the result in each with no necessary relation to that in the other. Each court in order to deal intelligently with the phase before it will have to be advised as to the difficulty as a whole, and so it will be thrashed out more than once. The remedy for such things lies in organization of judicial business and responsible headship of the organizations.

Waste of judicial power impairs the ability of courts to give to individual cases the thorough-going consideration which every case ought to have at their hands. The work of our appellate courts has increased enormously. A computation which I made twenty years ago showed that judges of our highest courts had five times as much work to do as judges of the same courts had had to do one hundred years before. Six years ago I made a com-

putation for the larger of our states which told the same story. Conservation of judicial power is obviously indicated under such a condition. But throughout the country we habitually waste judicial power, for example, in the number of judges who sit on appeals. Three ought to be enough in intermediate appellate courts and five, or at most seven, in cases of unusual difficulty or public importance, in the ultimate court of review. Indeed three sit regularly in the Circuit Court of Appeals in the intermediate appellate courts in California, Georgia, Indiana and Tennessee, and in the Supreme Court as in effect an intermediate appellate court here in New Jersey.

For the most part, the feeling of lawyers in the United States that five or more judges make up a court of review is simply traditional from the courts of our formative era where there was no great press of work. In England until the last third of the 19th Century three lords sat habitually on writs of error and appeals in the House of Lords and three members of the Judicial Committee of the Privy Council have commonly sat in the ultimate court of review for the British colonies and dominions. In exceptionally grave constitutional cases five have sometimes sat. Five commonly sit in appeals in the House of Lords today, three sit in appeals in the Court of Appeal and three in even the most serious criminal cases in the Court of Criminal Appeals. Down to the Judicature Act, three sat in the old Court of Appeal in Chancery. Down to 1830, four justices of the King's Bench heard writs of error to the Common Pleas. There is a serious waste of judicial power in the large benches habitually sitting on ordinary appeals in our courts.

It is not necessary to have a large bench sitting on each case in order to prevent conflict of decision or impairment of the uniform course of decision. It is true there has been some conflict of decision between separate intermediate appellate courts in Ohio and in Texas, between the Supreme Court and the Court of Criminal Appeals in Texas, and at times between Federal Circuit Courts of

Appeals. But in these cases there was no common head over the distinct tribunals to scrutinize their work as it went on and insure uniformity of decision. Where a head of the judicial organization is empowered to take care of this matter by directing a hearing in which the conflict can be resolved, and is responsible to the public and to the profession for exercising his power, there is little reason to apprehend such conflict. In England, where the Court of Appeals sits in divisions of three, they are unknown. Eleven to sixteen judges, which the reports show as sitting habitually in your Court of Errors and Appeals, is sheer waste.

We should avoid too rigid an organization. It should be flexible enough to take care of new tasks as they arise without perpetual reference to the legislative deus ex machina. Courts set up for one thing become conspicuous examples of waste of judicial power when the class of work for which the judges were provided ceases to require them. But there is always work enough for them somewhere else in a modern flexible organization with a responsible administrative head of the organization responsible for turning them to the right places. The principle cannot be too often repeated. A modern organization calls not for specialized courts but for specialist judges, dealing with their special subjects when the work of the courts is such as to permit, but available for other work when the exigencies of the work of the courts require it. The idea must be, specialist judges in a unified court, sitting habitually in a special division dealing with a special type of case, but whenever the center of gravity of the dockets shifts, liable to be assigned for a time somewhere else.

My proposition, then, is that the whole judicial power of the state should be concentrated in one court. This court should be set up in three chief branches. To begin at the top, there should be a single ultimate court of appeal. A second branch should be a superior court of general jurisdiction

of first instance for all cases above the grade of small causes and petty offences and violations of municipal ordinances. It should have numerous local offices where papers may be filed, and rules of court should arrange that these local offices being offices for the whole court may function for all branches, or one or more, as the exigencies of business demand. Different jurisdictions, with different procedural traditions, would no doubt feel differently about the internal organization of this branch. You in New Jersey, as the lawyers did in England, would no doubt feel that this branch should be organized in three divisions, one for actions at law and other matters requiring a jury or of that type, one for equity causes, and one for probate, administration, guardianship and the like. But however this branch is organized, all the judges should be judges of the whole court. If they are chosen primarily for one or the other branch, and assigned to this or that division in some appropriate way by the administrative head, yet they should be eligible to sit in any other branch or division or locality when called upon to do so, and it should be the duty of the administrative head to call upon them to go where work awaits to be done whenever the general state of the business of the whole court makes that course advisable.

No doubt it will appear startling to some of you when I suggest including the tribunals for the disposition of causes of lesser magnitude in the plan for unification of the judicial system. It was too startling for the British legislator when Lord Selborne proposed it in the plan of the Judicature Act. But no tribunals are more in need of precisely this treatment. Even small causes call for a high type of judge if they are to be determined justly as well as expeditiously. A judge dignified with the position and title of Judge of the Court of Justice of the State assigned to the County Courts is none too good for cases which are of enough importance to the parties to bring to court. Such cases ought to be important,

also,to a state of a democratic policy seeking to do justice to all. It is perfectly feasible, as the experience of the County Courts has shown in England, to administer a very much higher grade of justice than what we have dispensed through justices of the peace and magistrates of that type, without resorting to the more expensive methods of the courts of general jurisdiction of first instance. The judges who are assigned to small causes should be of such caliber that they can be trusted and will command the respect and confidence of the public. If they are,there will cease to be need of retrial of cases in appeal. Review can be confined to ascertaining that the law was properly ascertained and applied. The further we get away from the old justice-of-the-peace idea for small causes, the better.

While the head of the judicial system might well sit in the first branch, the ultimate court of review, as the Lord Chancellor in England sits in the House of Lords as judge of the court, this branch should have its own immediate head charged primarily with the proper functioning of this part of the court. The head of the whole court, whether he is called Chancellor or Chief Justice or President, as the head of the highest court is called in Virginia, will have much to do in exercising a supervising administrative control over the whole system. In accordance with rules of court under his authority and perhaps in conference with the heads of the two main branches, judges may be called from one to sit in the other as the state of the dockets may require. It should be possible for the appellate branch to sit in divisions, if necessary to the prompt dispatch of business. Especially when dockets are swollen,three judges ought to be enough for all but the most difficult and important cases. Thus there would be more time for oral argument and more time and opportunity for consultation among the judges and consideration of the merits of cases.

If a simple, speedy, inexpensive procedure could be developed for admin-

istrative appeals, one which insured due process of law, adherence to the law of the land and action upon evidence of rational probative force, without substituting the discretion of the court for that of the administrative commission or board or bureau or agency, such appeals would be likely to become a large part of the work of the ultimate appellate tribunal. If this type of work should increase, it might become advisable to set up a division to deal with it. There should be a flexible organization and full rule making power adequate to finding and meeting such situations as they arise.

The second branch, the court of general jurisdiction of first instance, whatever name is given it, should be organized under a chief justice responsible to the head of the judicial system. Rules of court would determine the times and places of sittings in the several counties, and all the judges, being judges of the same court, would be subject to be assigned where the demands of judicial business make it advisable. Rules should provide for regional or local appellate terms according to the requirements of the dockets. Thus there would be no need of an intermediate appellate court. The procedure at these terms could be as simple as at the hearings en banc at Westminster a hundred years ago, after a trial at circuit. Three judges assigned to hold the term would pass on a motion for a new trial, or for judgment on or notwithstanding a verdict, or for modification, or setting aside of findings and judgment accordingly, or for modification or setting aside of a decree or order. If it proved advisable to limit the cases which could go thence to the highest branch of the court, rules could restrict review to cases which the reviewing court, after petitions, selected for review as intrinsically entitled thereto.

You in New Jersey have the foundation of a modern system already. You have much less decentralization to undo than is true of the country generally.

Also you have less to do in simplifying review of what is done in courts of first instance than is the case in most of the states. The ideal is to hear motions for new trial or to set aside findings, or to render judgment upon or notwithstanding verdicts or findings, or to modify or set aside decrees or orders, before a bench of three judges of the court of general jurisdiction at appellate terms or in an appellate division, as the exigencies of business require, with no more formal or technical procedure than is involved in such motions made in a trial court today. This would provide a simple, speedy, relatively inexpensive means of reviewing the great bulk of the litigation in the court of general jurisdiction of first instance. Even more, it would help rid us of the burdensome multiplication of reports which has come with the development of intermediate appellate courts. Such courts have tended to imitate the ultimate appellate courts. If only as a matter of dignity, it is felt that appellate courts must write opinions, and if written they must be published. Indeed, statutes sometimes require them to be written in all appellate courts. But if there is no appellate court, short of the ultimate court of review, a written opinion on every motion in the court of general jurisdiction will not seem to be required in the nature of things. It is true there is a real and important function of an opinion as a check upon the bench. But that purpose and the purpose of advising the reviewing court, if the cause goes to the ultimate court of review, as to the reasons and basis of the decision, would be served sufficiently by a memorandum of the questions decided and the grounds of decision. Much time and energy are spent in writing opinions in cases which involve no new questions or new phases of old questions. This is a prime source of waste of judicial power in our higher courts. A short statement of points and reasons will suffice both as a check and as an aid to the higher court. A qualified and responsible reporter, having no interest

except to make the reports useful to the public and the profession, could select occasional memoranda worth publishing. Even at appellate terms of the lowest branch of the court, the court for small causes and magistrate's cases, it might well be at times that questions come up and be decided which will deserve publication of the grounds of decision. An energetic head of the judicial system and energetic chiefs in the two lower branches, with the help of the Judicial Council, could devise rules to govern these things. Then, if the courts and the bar were given control of reporting, as the bar has long had control in England, one of the hard problems of the law and of the profession in America, the multiplication of reports, would be solved.

As to the lowest branch of the unified court, I should be inclined to call it by the historic common law named of "County Court," a name that goes back to Anglo-Saxon times and is older than the name given to any of the higher courts. But there is little in a name. Any name that the history of the courts in New Jersey suggests to the draftsmen of a constitutional provision will do well enough. The great point is to have a unified court, not an aggregate of independent one-judge tribunals. This branch, too, should be organized under the headship of a chief. Municipal courts in large cities should constitute a division of this branch, and there should be power to set up juvenile courts and family and domestic relations courts and courts for petty causes, as divisions or as sections of municipal courts as they may be needed. There should be appellate terms and causes could go direct to the ultimate appellate court on petition for leave to appeal and showing of a case calling for review.

There are peculiar needs in metropolitan cities which may make municipal court divisions desirable. If they are set up, each should have an administrative head subject to the superintendence of the head of the branch court.

There should be such complete flexibility of organization that judges could be assigned from a municipal court to a rural locality where work was pressing,or from the rural locality to a municipal court where dockets were becoming congested, or could be taken from the court of general jurisdiction of first instance to relieve congestion or vice versa. Rules could be worked out for appellate terms for petty cases in cities, with a simple, direct procedure so that the public might be persuaded that causes too small to justify retaining a lawyer were not for that reason ignored by the law or neglected by the state.

Supervision of the administration of judicial business of the whole court should be committed to the head of the court, who should be made responsible for effective use of the whole judicial power of the state. Under rules of court, he should have authority to make re-assignments or temporary assignments of judges to particular branches or divisions or localities, according to the amount of work to be done and the judges at hand to do it. Disqualification, illness, or disability of particular judges, or vacancies in office, could be speedily provided for in this way. He should have authority, under rules of court, to assign or transfer cases for hearing and disposition as circumstances may require. Moreover, each branch and each division should have an administrative head who should each be responsible for efficient dispatch of the work of his organization. Such things are too big for clerks, although clerks under proper direction and control may do not a little. They call for strong, well-trained lawyers, with experience of tribunals and knowledge of what they can do and what not, with clear responsibility laid upon them to preclude their falling into perfunctory routine or allowing abuses to grow up through their inertia.

Perhaps you will have felt that I have laid too much stress upon the organization and functioning of what I have pictured as the third branch of

the unified court. But it is here that the great mass of an urban population, whose experience of law is not unlikely to have been experience only of the arbitrary discretion of the police, might be made to feel that the law is a living force for securing their individual as well as their collective interests. Nor should petty criminal prosecutions be left out of account in this connection. The humbler inhabitants of our great cities have deserved better provision for a feature of government that touches some of their dearest interests than our judicial organization, as it was shaped for rural,agricultural America of the formative era, made for them. It takes a strong and experienced and learned judge to deal properly with cases involving wide discretion and free scope for judicial action. The judge who decides petty causes is in the position of the King administering justice in person. When we are setting up courts for such cases we need to remember that we are setting up a tribunal to do the work of St. Louis under the oak at Vincennes, or Henry II in the royal court.

Unification would result in a real judicial department as a department of government. The federal Department of Justice, under the headship of the Attorney General, has acquired not a little administrative power with respect to the courts and has given the general government some things in the line of what is proposed. But I should hate to see the attorney general become the administrative head of the judicial system. I should deprecate such executive supervision of the judiciary growing up in the states. It is out of accord with the genius of our institutions that one who practices in the courts, especially one who represents so powerful an adversary as against private litigants, should be in any way the head, either in theory or in practice, of a department of government charged with superintendence or supervision of the courts. But some such superintendence and supervision is urgently called for. The rise of administrative tribunals of every kind

and on every hand, with few or no checks upon them and with wide and far from clearly defined powers over the liberty, property and fortune of the citizens is threatening our inherited conception of the supremacy of the law and the separation of power, born of experience of the undifferentiated powers of the Privy Council and Royal Governor and Council, and put at the foundations of the constitutions adopted by the newly freed colonies on the morrow of the Declaration of Independence. That this turning over of adjudication to administrative agencies has gone so far in a country which even a generation ago was jealous of administration, is due chiefly to the ineffectiveness of the law under an archaic organization of courts and the archaic appellate procedure which obtained until the recent turning over of procedure to rules of court, and still obtains in too many of our states.

You may conceivably think that the plan of unified organization I have outlined is too ambitious and far reaching; that each of the three branches I have indicated, organized as a unified court in the way suggested, would be a thoroughgoing improvement on the present system, would not disturb settled traditions of the bar, and would achieve the more significant features of what is proposed. This is what English legislators felt when they cut off the highest court of review at the top and the county courts at the bottom of Lord Selborne's plan of unification. But much has happened since 1873. Efficient administrative organization has come to be as well understood today as it was ignored two generations ago. It is easy to make branches of a single court cooperate toward the ends of justice. It is not so easy to make independent courts work together smoothly, speedily and effectively. Cooperation enforced by appeals and prerogative writs is a different thing from the harmonious operation of a unified system under a responsible head.

Unification of courts will not do everything. There must be judges equal to their tasks and unafraid to do them. There must be an able, intelligent, well-trained body of honorable men filled with a true professional spirit to practice before them. But things are done by the combined working of men and machinery and in that combination machinery is no negligible item. Our American judiciary, as we look back at five generations of our legal and political experience, has by far the best record of our three departments of government. Let us give it the modern organization which will enable it to maintain that record.