

PUBLIC HEARING

New Jersey Legislature. before

ASSEMBLY, JUDICIARY, LAW, PUBLIC SAFETY AND DEFENSE COMMITTEE,

on

ACK

ASSEMBLY CONCURRENT RESOLUTION 66 (OCR) ...

(Proposed Constitutional Amendment
to merge the Superior Court and
the County Courts.).

Held:

May 19, 1977

Freeholders Chambers

Hudson County Administration Building

Jersey City, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman William O. Perkins, Jr. (Chairman)

Assemblyman William J. Bate

Assemblyman Francis X. McDermott

ALSO:

John J. Tumulty, Research Associate

Legislative Services Agency

Aide, Assembly Judiciary, Law, Public Safety
and Defense Committee

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ASSEMBLY CONCURRENT RESOLUTION No. 66

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1976 SESSION

By Assemblyman BATE

A CONCURRENT RESOLUTION proposing to amend Article VI, Sections I, III, V, VI, and VII, and Article XI, and to repeal Article VI, Section IV, of the Constitution of the State of New Jersey.

1 BE IT RESOLVED by the General Assembly of the State of New
2 Jersey (the Senate concurring):

1 1. The following proposed amendment to the Constitution of
2 the State of New Jersey is hereby agreed to:

PROPOSED AMENDMENT

3 a. Article VI, Section I, paragraph 1, be amended to read as
4 follows:

5 1. The judicial power shall be vested in a Supreme Court, a
6 Superior Court, [County Courts] and inferior courts of limited
7 jurisdiction. The inferior courts and their jurisdiction may from
8 time to time be established, altered or abolished by law.

9 b. Article VI, Section III, paragraphs 1, 2 and 3, be amended to
10 read as follows:

11 1. The Superior Court shall consist of such number of judges as
12 may be authorized by law, [but not less than 24,] each of whom
13 shall exercise the powers of the court subject to rules of the
14 Supreme Court. **[There shall at all times be Superior Court judges*
15 *resident of each county equal in number to at least that number of*
16 *judges of the county court authorized to be appointed for each*
17 *county court as of July 1, 1976 with the county of residence of a*
18 *judge being determined as of the time of his appointment.]* **The*
18A *Superior Court shall at all times have at least two judges resident*
18B *in each of the counties of this State, who are resident therein at the*
18C *time of appointment.**

19 2. The Superior Court shall have original general jurisdiction
20 throughout the State in all causes**[, all the jurisdiction heretofore*
21 *exercised by the County Courts and such other jurisdiction con-*
22 *sistent with this Constitution as may be conferred by law]*.*

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill
is not enacted and is intended to be omitted in the law.

23 c. Article VI, Section III, paragraph 3 be amended to read as
24 follows:

25 3. The Superior Court shall be divided into an Appellate Division,
26 a Law Division, and a Chancery Division. Each division shall have
27 such parts, consist of such number of judges, and hear such causes,
28 as may be provided by rules of the Supreme Court. **[There shall
29 be at all times at least one part of the Superior Court in each
30 county with at least one judge who at the time of his assignment
31 to sit therein is a resident of the county.]** *At least one judge of
31a the Superior Court shall at all times be assigned to sit in each of
31b the counties of the State, who at the time of his appointment was
31c a resident of the county.*

32 d. Article VI, Section IV, be repealed.

33 e. Article VI, Section V, paragraphs 1 and 2 be amended to read
34 as follows:

35 1. Appeals may be taken to the Supreme Court:

36 (a) In causes determined by the appellate division of the
37 Superior Court involving a question arising under the Constitution
38 of the United States or this State;

39 (b) In causes where there is a dissent in the Appellate Division
40 of the Superior Court;

41 (c) In capital causes;

42 (d) On certification by the Supreme Court to the Superior Court
43 and, where provided by rules of the Supreme Court, to the [County
44 Courts and the] inferior courts; and

45 (e) In such causes as may be provided by law.

46 2. Appeals may be taken to the appellate division of the
47 Superior Court from the law and chancery divisions of the
48 Superior Court, the County Courts and in such other causes as
49-50 may be provided by law.

51 e. Article VI, Section VI, paragraphs 1, 2, 4, 5 and 7 be
52 amended to read as follows:

53 1. The Governor shall nominate and appoint, with the advice
54 and consent of the Senate, the Chief Justice and associate justices
55 of the supreme court, the judges of the superior court, [the
56 judges of the county courts] and the judges of the inferior courts
57 with jurisdiction extending to more than one municipality. No
58 nomination to such an office shall be sent to the Senate for confirma-
59 tion until after 7 days' public notice by the Governor.

60 2. The justices of the supreme court[,] and the judges of the
61 superior court [and the judges of the county courts] shall each
62 prior to his appointment have been admitted to the practice of law
63 in this State for at least 10 years.

64 4. The justices of the supreme court[,] and the judges of the
 65 superior court [and the judges of the county courts] shall be
 66 subject to impeachment, and any judicial officer impeached shall not
 67 exercise his office until acquitted. The judges of the superior court
 68 [and the judges of the county courts] shall also be subject to
 69 removal from office by the Supreme Court for such causes and in
 70 such manner as shall be provided by law.

71 5. Whenever the Supreme Court shall certify to the Governor
 72 that it appears that any justice of the supreme court[,] or judge
 73 of the superior court [or judge of the county court] is so in-
 74 capacitated as substantially to prevent him from performing his
 75 judicial duties, the Governor shall appoint a commission of three
 76 persons to inquire into the circumstances; and, on their recommen-
 77 dation, the Governor may retire the justice or judge from office, on
 78 pension as may be provided by law.

79 7. The justices of the supreme court[,] and the judges of the
 80 superior court [and the judges of the county courts] shall hold
 81 no other office or position, of profit, under this State or the United
 82 States. Any such justice or judge who shall become a candidate for
 83 an elective public office shall thereby forfeit his judicial office.

84 f. Article XI be amended by adding thereto Section VI as follows:

SECTION VI

85 *["When the amendment to the Judicial Article of this Constitu-
 86 tion]" *When this amendment to the Constitution* providing for
 86A the abolition of the County Courts takes effect:

87 *["(a) The jurisdiction of the County Courts, as well as all mat-
 88 ters pending therein, shall be transferred to the Superior Court;

89 (b) The judges of the county courts shall become judges of the
 90 superior court. All such judges who had acquired tenure on the
 91 County Court shall have tenure on the Superior Court without the
 92 necessity of further appointment. All other such judges shall
 93 hold office as judges of the superior court, each for the period of
 94 his term as judge of the county court which remains unexpired
 95 as of the effective date of this amendment and upon subsequent
 96 appointment to the Superior Court shall acquire tenure.]"

96A *(a) All the jurisdiction, functions, powers and duties of the
 96B County Court of each county, the judicial officers, clerks, employees
 96C thereof, and the causes pending therein, and their files, shall be
 96D transferred to the Superior Court. Until otherwise provided by
 96E law, the judicial officers, surrogates and clerks of the County Courts
 96F and the employees of said officers, clerks, surrogates and courts,
 96G shall continue in the exercise of their duties as if this amendment

96H *had not been adopted. For the purposes of this paragraph, a cause*
 96I *shall be deemed to be pending notwithstanding that an adjudication*
 96J *has been entered therein, provided the time limited for appeal has*
 96K *not expired or the adjudication reserves any party the right to*
 96L *apply for further relief.*

96M (b) *All the functions, powers and duties conferred by the statute,*
 96N *rules or otherwise, upon the judges of the County Courts, shall be*
 96O *transferred to and may be exercised by judges of the Superior*
 96P *Court until otherwise provided by law or rules of the Supreme*
 96Q *Court.**

97 (c) *Until otherwise provided by law, all county clerks shall*
 98 *become clerks of the Law Division of the Superior Court and all*
 99 *surrogates shall become clerks of the Chancery Division (Probate*
 100 *Part) of the Superior Court for their respective counties and shall*
 101 *perform such duties and maintain such files and records on behalf*
 102 *of the Clerk of the Superior Court as may be required by law and*
 103 *rule of court; and all fees payable to the county clerks and*
 104 *surrogates prior to the effective date of this amendment shall con-*
 105 *tinue to be so payable and be received for the use of their respective*
 106 *counties until otherwise provided by law.*

107 *(d) *The judges of the County Courts in office on the effective*
 108 *date of this amendment shall be judges of the Superior Court. All*
 109 *such judges who had acquired tenure on a County Court shall hold*
 110 *office as a judge of the Superior Court during good behavior, with*
 111 *all rights, and subject to all the provisions of the Constitution*
 112 *affecting a judge of the Superior Court, as though they were*
 113 *initially appointed to the Superior Court. All other judges of the*
 114 *County Courts shall hold office as judges of the Superior Court,*
 115 *each for the period of his term which remains unexpired on the*
 116 *effective date of this amendment; and if reappointed, he shall hold*
 117 *office during good behavior, with all the rights and subject to all*
 118 *the provisions of the Constitution affecting a judge of the Superior*
 119 *Court as though he were initially appointed to the Superior Court.**

1 2. *When this proposed amendment to the Constitution is finally*
 2 *agreed to, pursuant to Article IX, paragraph 1 of the Constitution,*
 3 *it shall be submitted to the people at the next general election*
 4 *occurring more than 3 months after such final agreement and be*
 5 *published at least once in at least one newspaper of each county*
 6 *designated by the President of the Senate and the Speaker of the*
 7 *General Assembly and the Secretary of State, not less than 3*
 8 *months prior to said general election.*

1 3. This proposed amendment to the Constitution shall be sub-
 2 mitted to the people at said election in the following manner and
 3 form:

4 There shall be printed on each official ballot to be used at such
 5 general election, the following:

6 a. In every municipality in which voting machines are not used,
 6a the following legend shall immediately precede the question:

7 If you favor the proposition printed below make a cross (X),
 8 plus (+) or check (✓) in the square opposite the word "Yes." If
 9 you are opposed thereto make a cross (X), plus (+) or check (✓)
 10 in the square opposite the word "No."

11 b. In every municipality the following question:

	Yes.	INCORPORATION OF THE COUNTY COURTS INTO THE SUPERIOR COURT Shall the amendment to Article VI and Article XI of the Constitution to incor- porate the existing County Courts into the Superior Court, transfer their juris- diction and pending causes to the Su- perior Court, and appoint their judges to the superior court, be approved?
	No.	

ASSEMBLYMAN WILLIAM O. PERKINS, JR.(Chairman): We will call the session to order. We have complied with the Sunshine Law requirements as to the notice of this meeting which was sent out on March 25. I will make an opening statement. We have one of the sponsors of the bills that are being considered at this hearing, and that is William Bate. He has the Assembly Concurrent Resolution Number 66.

This public hearing on Assembly Concurrent Resolution Number 66 is being held by the Assembly Judiciary, Law, Public Safety and Defense Committee in order to obtain the views of interested parties on both the substantive and technical issues relating to the incorporation of County Courts into the Superior Court system. There is some question that is being asked by the Surrogates and the Assignment Clerks with respect to the courts. Hopefully, we can receive their comments, and if there is any need to supplement the legislation with additional legislation, we will then be able to do that.

As most of you are aware, on March 25th of this year, this Committee held a similar public hearing on ACR-66, and on ACR-41. As a result of the testimony received at that hearing, and by agreement of the prime sponsors of both bills, Assemblyman William Bate and Assemblyman John Spizziri, amendments were made to ACR-66.

The purpose of this hearing, therefore, is to elicit comments on ACR-66 as amended in order to insure that ACR-66 is in the best possible form for placement on the ballot. Before calling the first witness, I would like at this time to introduce the members of the Committee present. We have on my right, a gentleman you probably have heard about before, since in many instances I have to collaborate with him or debate with him on legislation of import, Mr. Francis Mc Dermott. Might I state that although Mr. Mc Dermott is a Republican, and we don't have any in Hudson County, we welcome him here. On my left is Mr. William Bate, who is the sponsor of ACR-66. He also sits as a member of the Judiciary Committee, along with Mr. Mc Dermott. I enjoy his comments and his input on many of the bills that come before the Committee.

Our first witness to speak today will be Justice Alfred Clapp, Judge of the Superior Court. By the way, before you begin your comments, we have copies of the transcript of the last public hearing for those who are interested.

A L F R E D C L A P P: Mr. Chairman, and members of this distinguished Committee, thank you for affording me an opportunity to express my deep interest in ACR-66. I very strongly believe that it should be adopted by the Committee, by the Legislature and by the electorate. I was one of a group of delegates at the 1947 Convention who fought for the integration of the county courts into our unified court system. We succeeded in securing our much heralded unified court system by bringing in the Law Division, the Chancery Division, the Appellate Division of the Superior Court, but were defeated by political considerations-which, let me emphasize, are no longer present-from bringing the county courts into the system. With our integrated Law Division calendar today, integrating the work of the Law Division of the Superior Court and the County Court, it would be difficult for any lawyer to understand what rational basis there was in 1947, a reason, for excluding the county courts from the unified court system.

Our Chief Justices, Chief Justice Vanderbilt, Chief Justice Weintraub, Chief Justice Hughes worked very hard to enlist the aid of the legislature in repairing the damage done at the '47 Convention. They, as the administrative

directors, administrative heads of all the courts in the State, are aware every day of the week in their work of this hole in our unified system.

From the dollars and cents standpoint, the public will be well served by ACR-66. The addition to the State's budget as a result of ACR-66 is not a large sum, but the point is that it is very substantially less than what the people in the counties will say through the ACR-66 changes. Through ACR-66 there will be secured not only the economies I speak of but also the efficiencies of centralizing the administration in Trenton, rather than having it decentralized in twenty-one counties.

There are many incidental advantages. We have good county court judges who should be sitting in the Chancery Division who are in the Appellate Division. There is a serious loss of flexibility in our present system, for while the Chief Justice has the power to assign judges - county judges in other counties - nevertheless, there is the problem of reimbursement. We fought in '47 for a unified court system, so as to avoid piecemeal litigation of a case, but today there are still decisions where a county court denies relief because of a lack of jurisdiction in sending the parties into the Superior Court.

I subscribe to the amendments made to ACR-66 appearing in the official copy reprint providing for the transfer to the Superior Court of the Surrogates and the Clerks and employees of not only the Surrogates, but also the Clerks of the county, but the employees of the county courts. That is another body of employees that has to be taken care of under the County Courts. These important officials should be given full assurance as to their status on the elimination of the county courts. The language you will find in this amended ACR-66 is substantially that which was written into the State Constitution, in order to give assurance to the offices and employees of abolished courts at that time.

I respect the omission mentioned a little earlier today, from the Resolution of a clause that I had suggested to the Committee, as to constituting, A, the County Clerks to Deputy Clerks of the Superior Court, Law Division, and, B, the Surrogates as the Clerks of the Probate Part of the Chancery Division. This is the plan that we worked out with the distinguished Surrogate Gil Job and other members of the Surrogates and County Clerks Association some years ago, as Surrogate Job mentioned in his statement before this Committee at its last hearing.

I think it is better not to freeze these provisions into our Constitution and to leave it to the legislature and to rule of court to work it out. Under such a system, the system will have more give in the joints over the years. We must have respect for the feelings of the counties reflected in the provisions of ACR-66 requiring at least two county judges resident in each county, and requiring the assignment of at least one judge to sit in each county. There should be no risk that all judges are drawn from a single county, or several counties, which at the time have the greatest political power. And respect must also be given to the feelings of the local Bar and local citizenry who ask that at least one judge appointed from the county should sit in the county, enabling him to attend to local business.

ACR-66 is an excellent resolution. I know you distinguished gentlemen will see it through the shoals of indifference, which might otherwise beset it. Thank you very much for the opportunity to speak.

ASSEMBLYMAN PERKINS: Thank you very much. Are there any questions from the members of the Committee?

The next speaker is the Assignment Clerk for Hudson County.

MR. CONTE: I will defer to Judge Simpson. I will speak after I have heard all the testimony.

ASSEMBLYMAN PERKINS: All right. Mr. Francis Mc Quade, Professor of Law at Seton Hall University. He is also the Attorney representing the County Officers Association of New Jersey, and more specifically the County Clerk's Division and the Surrogate's Division.

FRANCIS MC QUADE: First, I would like to introduce to the Committee Eugene Mc Caffrey who is the Surrogate of Gloucester County and also the President of the New Jersey Officers Association. Also, Gil Job, who is the Bergen County Surrogate, Anne Rieker, who is the Sussex County Surrogate, and then the County Clerk of Union County, Walter Halpin, and the Deputy Surrogate for Hudson County, Mr. Charles Gallagher, representing Mr. De Fino.

Before presenting our testimony, I would like to hand up to you a copy of a Resolution - and it is the original - for your inspection. May I please read it into the record. This is from the County Officers Association of New Jersey, and it is addressed to the State of New Jersey, Assembly Judiciary, Law, Public Safety and Defense Committee, Assemblymen Perkins, Bate, Karcher, Mc Dermott, and Spizziri, regarding ACR-66 amended.

"Gentlemen, the county clerk and surrogate's section of the within named association by resolution unanimously passed at our regular bi-monthly meeting held on Wednesday, May 11, 1977, respectfully ask that the following paragraph commencing from line 97 to 106 on page four of ACR-66 amended be changed to read as follows: (C) Until otherwise provided by public law, enacted by the Legislature, all county clerks shall become clerks of the Law Division of the Superior Court and all surrogates shall become clerks of the Chancery Division, Probate part of the Superior Court for their respective counties, and shall perform such duties and maintain such files and records on behalf of the clerk of the Superior Court as may be required by law and rule of court, and all fees payable to the county clerks and surrogates prior to the effective date of this amendment shall continue to be so payable and to be received for the use of their respective counties until otherwise provided by law." That is the end of the suggested amendment.

Now, actually, this change has been suggested because of the possible ambiguity with the words "until otherwise provided by law." By law can mean either by rule of court or statutory enactment of the Legislature. The county clerks and surrogates in this Association suggest the precise language, "public law" meaning by an act of the Legislature. This is respectfully submitted by Eugene J. Mc Caffery, President, and attested by Joseph J. Hoffman, who is Chairman of the County Clerks Section, and by Leonard Fiedler, who is Chairman of the Surrogate Section and also by Anne Rieker who was the Surrogate Section Secretary.

The Constitution of the State of New Jersey simply states that in each county there shall be a county clerk, a surrogate, and a sheriff. It at least says that much, but it does not define their duties. Argument has been made in the court of New Jersey that the duties of these three offices are at least what they were when the Constitution of the State of New Jersey was originally adopted and amended on several occasions - most notably, the largest amendment at the Convention of 1947.

The Supreme Court has rejected that view and says that the duties and the privileges and the services and the role of the county clerk and the surrogate should be defined by the Legislature. It is conceivable, for example, that the Legislature could take all the duties away from the County Clerk, but

he would still be a Constitutional officer until the Constitution was amended. As this act now stands with the words "by law," particularly in light of the famous decision written by Chief Justice Arthur T. Vanderbilt, Winberry against Salisbury, the "by law" may mean by rule of court, since the Constitution says that the administration of the courts is certainly in the Supreme Court, to make those rules.

The surrogates and clerks are afraid that unless the Legislature very clearly indicates that any change in their duties will be done exclusively by the Legislature, that by a rule of the Supreme Court, they may find themselves out of the various offices and services and duties that they perform at the present time. That is not a paranoia of imagination. It is possible. There have been examples where the Supreme Court has exercised its administrative power over the courts to control, for example, the sheriff's officers in court assigned as court attendants, the county clerks officers in the courts as court clerks, and, of course, the unique situation of the surrogate who is an elected officer of the court at the same time the rest of the Judiciary is appointed, as we know, Constitutionally by the Governor and confirmed by the Senate.

It has been suggested that by deletion of the words "by law" the same thing would be accomplished. I don't know that that is true. Unfortunately, from the text point of view, the one who would make the determination that this was so would be the Supreme Court. The Supreme Court would make a ruling, and then if one wishes to bring an action against them, the one to determine whether their rule was correct or not was the very court that made the rule - and we all know what that means. Consequently the clerks and the surrogates strongly urge the Legislature to make it very clear, and certainly to make this as part of the Legislative history of this act, that any change in the surrogate's and the county clerk's duties in the courts under this act, any change in those, would be something that would be subject to the Legislature's power to make law and not to the Supreme Court's power to make law, by way of their rule making powers. That is the significance of this approach.

The clerks and the surrogates, obviously, have no objection to unification of the courts. As a matter of fact, we have de facto a unified court system in this state. In Essex County - speaking from experience - we have judges who have been appointed to the District Court and have never sat a day in the District Court. They have been assigned to Superior Court or a County Court to hear criminal matters. I am thinking particularly of a man who isn't on the bench right now, and that is Mr. Richard Mc Glynn. He never heard one case in District Court. Unfortunately, he got paid the salary of a District Court judge, which is \$3,000 less at the present time than any other judge in the State or in the County of Essex. So that there is a unified system in fact. What this bill calls for is a Constitutional change, as I understand the bill.

There is a fear among the clerks and the surrogates - and I might add the sheriffs, since I happen to be the attorney for the New Jersey Sheriffs Association - that this will happen if this Constitutional Amendment takes place. And I might add parenthetically, and politically, if the State is able to have an income tax which is able to cover other State offices than simply Education--- We know that the lack of money is one of the things that prevents many things from being done at the present time. The Court will try to make all court attendants presently

under the sheriff part of the Administrative Office of the Courts, all court clerks who are presently under and employees of the county clerk, under the Administrative Office of the Courts, and all the people in the surrogates office who are presently employees of an elected local official, employees in the Administrative Office of the Courts.

ASSEMBLYMAN PERKINS: How do you see that?

MR. MC QUADE: How do I see it?

ASSEMBLYMAN PERKINS: As separate functioning offices.

MR. MC QUADE: Well, as it stands right now, there is no doubt that when these persons are in the court - for example, there is a rule of the Supreme Court that if the sheriff appoints a court attendant to a court, he has to stay there for one year. The sheriff doesn't object to that, but as an example of how the court is exercising its power and perhaps rightly so - I am not questioning the right, and I am certainly not going to argue the merits of it --- As it stands right now, the most that the Supreme Court can do through the Administrative Office of the Courts at the present time, is, when the employees of the county clerk, when the employees of the county surrogate, when the employees of the county sheriff are in the court, they are still employees of these three locally elected officials, but while they are in the court, they are subject, as ministerial officers of the court, to the direction and judicial supervision of the court.

ASSEMBLYMAN PERKINS: I can understand that. But I am talking about the time of dedication, that one year requirement. Is that a---

MR. MC QUADE: That has not been questioned by the sheriffs. They have gone along with it, but the point I am trying to drive at is this: It is conceivable that the function of this bill is that these local county clerks - who are not necessarily under the new bill court clerks, unless it remains as you have it now - will remain deputies to the Superior Court Clerk. As it stands now, and again, as I understand their position in this colloquy, it could be developed in the county court. The county clerk without question is the clerk of that court. Now you are going to do away with the county court, and you are going to have the statewide Superior Court, correct?

ASSEMBLYMAN PERKINS: Right.

MR. MC QUADE: The very fact that you have to have this language in this bill in order to preserve their role in this Superior Court --- At the present time they are deputies, and their employees are their employees, even though they are under the supervision of the court, and they are subject to all the things that I think should be; namely, that they can't participate in politics like other county clerk employees.

ASSEMBLYMAN PERKINS: Why wouldn't they want to do that?

MR. MC QUADE: Why wouldn't they want to do that? Well, Hudson County is not the whole of the State of New Jersey. There are many counties where many government employees do not wish to participate, and they are very happy to be protected from that, and they realize it particularly in the courts where there must be an objectivity and an impartiality, and a neutrality. It is not good for the people in the courts to be---

ASSEMBLYMAN PERKINS: If I get a confirmation from Harry Lerner on that statement---

MR. MC QUADE: Who is Harry Lerner? I don't know who Harry Lerner is. Does he have the Lerner's Mens Shops? I don't know him. Who is he?

ASSEMBLYMAN MC DERMOTT: I think he is the Director of the ABC.

MR. MC QUADE: That is Judge Lerner, yes. What I am trying to drive at is, the county clerks want to preserve their role as the elected local clerks and surrogates. The sheriffs are not here, but the same thing will happen to them. And at the same time, they don't want to be pushed out of the courts completely. Now, it is conceivable that what could happen is, after this bill passes by rule of law, the Supreme Court could say, the county clerk will no longer be the deputy to the Superior Court, and any of the court clerk employees, any of the court employees, will now be state employees under the Superior Court Clerk himself and ultimately under the Administrative Office of the Courts and the Supreme Court in that particular county, and the same point could be strongly made about the role of the surrogate who is a quasi-judicial officer, and an administrative officer.

ASSEMBLYMAN PERKINS: Is that how you interpret the phrase, "otherwise provided by law."

MR. MC QUADE: Yes, unless it is very clear that once you say this, that the Supreme Court cannot make "a grab of" local county employees who are working in the courts, whether it is a surrogate's or clerk's or sheriff's officer. Yes, I think it is conceivable - as an attorney - that an argument could be made that they have that power under the Constitution as defined and interpreted or expounded by the case of Winberry against Salisbury.

ASSEMBLYMAN PERKINS: Can I interrupt you for a moment and have Assemblyman Bate speak to that very question, since he is the author of the bill.

On line 102, page four of the bill--Let's start at the beginning, line 97, where it says, "Until otherwise provided by law, all county clerks shall become clerks of the Law Division of the Superior Court and all surrogates shall become the clerks of the Chancery Division (Probate Part) of the Superior Court for their respective counties and shall perform such duties and maintain such files and records on behalf of the Clerk of the Superior Court as may be required by law and rule of court;" There is a distinction there. However, that distinction as to changes in the law and/or rules of the court is not contained in a prior paragraph, which sort of addresses itself to the questions that you raised before.

William Bate is the author of these amendments to our Constitution, and maybe you can speak to that, Bill.

ASSEMBLYMAN BATE: Well, there are three occasions where there is reference to "provided by law." In line 97 it says, "until otherwise provided by law." On line 102 it mentions or makes reference to "as may be required by law and rule of court." And finally on line 106, "until otherwise provided by law" which is the precise language used in line 97.

I quite agree with the Chairman, that the broader reference, line 102, "as may be required by law and rule of court" certainly differentiates and expands what is meant there. I think that the middle reference, the broader reference, clearly establishes the legislative intent that "until otherwise provided by law" means or what you would like it to mean, and I don't have your amendment before me, but I believe that your amendment stated, "until otherwise provided by public law as enacted by the legislature."

MR. MC QUADE: Yes.

ASSEMBLYMAN BATE: I think that is basically what we have in mind, and I think that is fortified by the fact that in line 102 we make a broader reference, "as may be required by law and rule of court."

MR. MC QUADE: May I respond to that?

ASSEMBLYMAN PERKINS: Yes, sir.

MR. MC QUADE: I understand you to say, then, that this protection as you read this law, as this Committee now intends it to be for passage by the Legislature, is that as far as maintaining their records is concerned, of course, the Supreme Court can have something to say about that, because they are records of the court; or, you could have something to say about it too. But, as far as their role as being a deputy of these various courts, that could only be changed by the legislature. Do I understand it correctly, Assemblyman Bate?

ASSEMBLYMAN BATE: That is my understanding of this paragraph. That is to say that "unless otherwise provided by law" has not been interpreted in another fashion, as it was, I think, in Winberry versus Salisbury. As far as this paragraph is concerned, that was my intention when drafting the bill, and I so state it.

MR. MC QUADE: All right. Now it has been suggested by me and by certain persons in the association that the elimination of the words "by law" --- May I read this, please, so I am sure everyone knows what I am covering here?

I might add that Mr. Kattak, the County Clerk of Passaic County has also joined us. He is also a member of the Bar Association of the State of New Jersey, and I might add, one of my most distinguished students, after Mr. Perkins.

ASSEMBLYMAN PERKINS: Thank you.

ASSEMBLYMAN BATE: Does that mean he is younger than Mr. Perkins?

MR. MC QUADE: No, just shorter - which we all are. (Laughter) I will read this to you now. "Honorable Eugene J. Mc Caffrey, Surrogate, Freeholders Building, Woodbury, New Jersey. Dear Gene, this will confirm my remarks of yesterday. I believe that the first five words of line 97 on page four of Assembly Concurrent Resolution 66 should be deleted" -that would be the words, "unless otherwise provided by law" - "with the phrase included in the law, county clerks and surrogates could be stripped of their duties by a simple act of the Legislature. Since all laws of a general nature passed by our Legislature are deemed public laws, by inserting the word 'public' in line 97 before the word 'law' would have no protection of our duties. On the other hand, the deletion of the entire phrase will give our duties constitutional sanction."

Parenthetically, I must say I disagree with that. The only thing that would give it constitutional sanction would be if there was an amendment to the Constitution. We are speaking about a statute here. But, anyway, it indicates the thinking in the Association on this problem.

"Angie has also suggested that the similar phrase in line 106 be also deleted. While her idea was to protect county revenue. The fees that are generated by filing papers in county court presently go to the county treasury. One thing that hasn't been gone into too much is the fact that one of the things that is going to happen here is when this court gets unified, all the fees are going to Trenton. None of them stay where the court house is being maintained. Now, does this mean that with the unification of the court system, the State is going to maintain the court house, the furniture, the employees, the stationary, et cetera? Maybe this is a crass, political, local, patronage, tax revenue, finance approach, but this is reality.

I don't know whether it has been raised before this Committee, but it will be a loss to the counties, just as happens in other--- I wasn't prepared to say all this, so I am talking off the top of my head. This is not the first

time the State has taken away from the counties the fees that were generated locally at the same time they mandated costs on the county. Of course, their whole program is going to be now tied in---

ASSEMBLYMAN PERKINS: I believe that question was raised at the last public hearing. That is one of the processes that would have to be taken over by the State.

MR. MC QUADE: Just the employee's salaries?

ASSEMBLYMAN PERKINS: No, the contribution made by the respective counties towards the operation of the county court. That would be deleted from the county budget and assumed by the State.

MR. MC QUADE: You mean they are going to maintain the steps going into the court house, and they are going to maintain the shrubbery, and they are going to maintain the corridors, and they are going to maintain the elevators to get to the court room?

ASSEMBLYMAN PERKINS: If that is a part of the cost of operation that the municipalities and counties are presently picking up.

MR. MC QUADE: And out of what source of revenue is this going to be paid? Is this going to be paid out of an income tax?

ASSEMBLYMAN PERKINS: I suppose it will be paid out of those fees you are talking about.

MR. MC QUADE: Those fees don't come anywhere near these costs.

ASSEMBLYMAN PERKINS: We are talking about a county cost of \$2.47 million.

MR. TUMULTY: I think that is the figure that Judge Simpson gave us at the last hearing.

MR. MC QUADE: Well, you know, I really didn't finish this letter, and I brought this all on myself, but let me continue this little message for a minute. There is another interesting thing about this. The law Division Judges of the Superior Court and the Chancery Division Judges, their salaries are paid by the State, right? Everything else in that court room is paid by the county. When you are in the Chancery sections or the equity sections, strangely enough, all those costs in there are paid not by the county but by the State. I asked Chief Justice Weintraub one time why that was, and he said, I don't know why.

For example, in Essex County, when I was the County Counsel, we rent four chambers to equity judges and the Administrative Office of the Courts pays us so much per square feet just for that floor space. They also pay for the employees of those judges, their secretary, and law clerk, whereas we pay for the ones in the Law Division, and county et cetera.

So even right now, as far as Chancery is concerned, they are paying all of the costs there. Really, this thing is a little bit---

ASSEMBLYMAN PERKINS: I don't know how any of this supports your argument.

MR. MC QUADE: I don't know, either, but the only part I am trying to drive at, are we going to end up here with all of the revenue, all the employees, and the elected clerks and surrogates no longer having any functions in the courts? That is the problem with the bill.

Let me finish this letter. I stopped where it said, "While her idea was to protect county revenue, I would not press the point if it would jeopardize the phrase 'omission' from line 97. I believe it has been held that the judge has the inherent power to control the personnel within his court and the records pertaining to actions in his court. I cannot see how he can limit this inherent power in the

courts, even if the above phrase was modified by the words 'public law.' I admit that I have not given this resolution the fullest study it requires, however, this particular portion of the resolution was forcibly called to my attention by Joseph Hoffman" - and that is not the candidate for Governor, that is the clerk in Gloucester County - "and I believe his concern is justified. Very truly yours, Frank A. Headley, Morris County Clerk."

What does this letter stand for? I think it is a corollary to the official resolution which was passed by this Association that there is a real concern that by rule of law the county clerk and the surrogate - and I might even add the sheriff, although it is not in here - will be ousted from the courts---

ASSEMBLYMAN PERKINS: Will be absorbed might be a better term.

MR. MC QUADE: Well, they might be absorbed--- No, the county clerk would not be absorbed. His employees would be absorbed, but he would be ousted. So it would be the county clerk out of the courts, and his employees in the courts still being there.

Now, we say if this happens, if it is the will of the lawmaking body of this State, the Legislature, to do that, so be it. That can be dealt with, because there are 120 persons to persuade, or at least the majority of the two houses. But for a majority of the Supreme Court, and more especially the Chief Justice, or those who advise the Chief Justice, to make this decision, the county clerks and the surrogate don't want that to happen. Now, if you are satisfied that is what your intention is by this language, and that it will be sustained in court, then, fine, let it in. If there is any doubt in your mind - as there was a doubt in our minds, anyhow until the author of the proposed act and constitutional amendment says there isn't that problem, all right, at least it is on the record that he says it isn't, and it is your Committee's intention.

ASSEMBLYMAN BATE: Having read that letter in which it was recommended that "until otherwise provided by law" be stricken from line 97, is it your view that if that occurs that certainly the Legislature in the future is always in a position to legislate with regard to this paragraph but that the Supreme Court would be foreclosed from making any modification?

MR. MC QUADE: That is a tough question, and you would not have posed it unless it was a tough question. Certainly the role of the elected officials of this State is in the hands of the Legislature as to what their function is, because the authority of the Legislature is really the authority of the State of New Jersey. And if you took out those words, you would still have the power to change the duties of the clerk and the surrogate and the sheriff. Of course you could do that.

If those words were not in there, could the Supreme Court itself by rule do it? I think they might be able to under the Constitutional provision that they have administration of the court power in the Constitution. I mean, I personally have been embroiled with this from the old case of Judge Giuliano against Sheriff Cryan which went the whole way to the Supreme Court, where Judge Giuliano decided that regardless of what it said in the statute about the sheriff being the one to serve process, he could establish one of his clerks to be a summoner of the jurors in Essex County. It went up the whole way to the Supreme Court. The Supreme Court held that this was an administrative matter, and even though Judge Giuliano served an Order to Show Cause on Cryan, he heard the case, and then he enjoined him. It was perfectly legitimate.

Now, that is the type of thing I am talking about. Remember, the one who has the last word on what is the law is the Supreme Court until you amend it,

or until the Constitution is amended. It is much easier to get an opinion from the Supreme Court than it is to get a decision from the Legislature.

ASSEMBLYMAN BATE: What you are saying, Mr. Mc Quade, I think is that whether the language is retained, or whether it is deleted, you still suspect that the Supreme Court may intercede. Is that accurate?

MR. MC QUADE: Yes.

ASSEMBLYMAN BATE: Now, if that is the case, isn't it better to have the phraseology within the bill, with at least my statement on the record - and I would hope corroborated by my colleagues - that what we intend, namely, in that line 97, when we say "until otherwise provided by law" is to mean legislative enactment rather than rule of court, which you referred to in line 106.

MR. MC QUADE: Let me answer the question. Yes, I agree with you.

ASSEMBLYMAN PERKINS: I was just going to give a synopsis. The fact is that the challenge to this legislation is the challenge of interpretation. And since the author now has placed on the record that the interpretation is thus and so, that he means legislative enactment---

MR. MC QUADE: We are grateful for that. We are also grateful that this Committee with this important piece of legislation has made a record. As attorneys you have had the same problem that I have had. Many times when you go to look for the legislative intent, there isn't any, because there were no Committee hearings, and there was no record as such from the public, or no statement really as to what the intention was. At that point the Judiciary simply tells what they think the intention was, or else someone tries to put in newspaper clippings of what happened that day. That is not legislative intent.

I think that the rule in this State is, it is the clear meaning of the law which controls. Now, in order to get that clear meaning, if you have something like you have done today, and a person is arguing this case for the clerks - assuming that the Supreme Court did, what they are afraid could happen - certainly this legislative record would clearly indicate what your intent was, and therefore the courts couldn't substitute what they might surmise your intent was. And to that extent, we are extremely grateful that you have given us the time here to put this on the record.

ASSEMBLYMAN PERKINS: Have you stated succinctly the objections that you have, the specific paragraphs and the specific language and line, and has Mr. Bate stated specifically the meaning of the verbiage that you had questioned previously, since we are going to rely upon the record to some degree? The record ought to be clear as to what you are addressing yourselves to in questioning the legislation, and, of course, if Mr. Bate can answer that definitively, we should place that on the record.

MR. MC QUADE: Yes, I will try to be succinct. I will say wherever the words "by law" appear in this act it means by act of the Legislature - and that alone. Wherever the words "rule of court" appear, it means by rule of the court.

ASSEMBLYMAN PERKINS: Let me address myself to line 102 again, because there is a conjunction there that connects the phrases "may be required by law" and "rule of court." The question then is, whether it is a concerted action, with both parties joining in the changes, or is it an "and"/"or" situation?

MR. MC QUADE: Assemblyman, you well know that "and" as interpreted by the court has been interpreted to mean "or" or "and," as "shall" has been interpreted to mean "may," or "may" has been interpreted to mean "shall." We are all familiar,

as experienced attorneys that the ultimate referee can say what it means. I wouldn't go on record saying that "and" absolutely means---

ASSEMBLYMAN PERKINS: All right, since you posed the interrogatory, let's hear from Mr. Bate in defining those type frailties of interpretation that might creep in sometime in the future. Mr. Bate.

ASSEMBLYMAN BATE: While you were engaged in that dialogue with Mr. Mc Quade, I was hurrying through the bill to put down all of those instances where "provided by law" was made specific mention of. And I perhaps should listen to whatever your question is.

ASSEMBLYMAN PERKINS: I think the request is that you define the meaning on each specific line, since there might be a bifurcated attack on the bill. Let's go by each specific line where that phraseology appears.

ASSEMBLYMAN BATE: If you will bear with me for about one minute, because I want to---

MR. MC QUADE: Assemblyman Perkins, could we take a five-minute recess while this is being done?

ASSEMBLYMAN PERKINS: Yes, surely.

(Whereupon a shore recess was taken.)

AFTER RECESS

ASSEMBLYMAN BATE: May we begin again. I suppose Mr. Perkins has been detained and we don't want to hold anyone here unduly. So will you continue, Mr. McQuade. As I understand it, Mr. McQuade, your question ---

MR. MC QUADE: It was a question addressed to you, Assemblyman, concerning any place the words "provided by law and rule of court" appeared. That was the last thing.

ASSEMBLYMAN BATE: I thought on line 102 you were asking my interpretation of whether that was an either/or situation, and that would be my understanding with reference to the files and records, yes.

MR. MC QUADE: In other words, in "by law and rule of court," "and" could mean "or."

ASSEMBLYMAN BATE: That's right.

I have reviewed quickly ACR 66 with specific reference to the terminology "provided by law" and "authorized by law" and I think that the wording is clear. The first time it appears is on line 8, talking about the courts being "established, altered or abolished by law." Clearly, that is the function of the State Legislature and not the function of the court system.

MR. MC QUADE: May I interrupt at this point?

ASSEMBLYMAN BATE: Yes.

MR. MC QUADE: This is a proposed amendment to the Constitution of the State; it is not an act of the Legislature as such. After it is proposed to the voters and the voters adopt it, it is no longer a statute; it becomes the Constitution of the State. Correct?

ASSEMBLYMAN BATE: It becomes the Constitution of the State - that's correct - but it is our responsibility to amplify it by enabling legislation.

MR. MC QUADE: All right. Then that brings me back to my original contention. The Supreme Court, when it comes to a constitutional matter, does not construe. There is another term at law. You construe a statute and the construction that is placed upon a statute remains until the Legislature changes the statute. That is fundamental in interpretation.

Time and time again, the Supreme Court says, this is not a statute we are constructing - this is a constitutional provision which we are elaborating or explaining. Consequently, if you are amending the Constitution and you are amending the Constitution and using the words "by law," I can still see when the Supreme Court is elaborating upon that term that it can give it the Winberry against Salisbury interpretation.

Now I haven't supplied you with the proper word for interpreting a constitution. We do know that the word for interpreting a statute is called construction. But the word for interpreting a provision of the Constitution isn't construction. I don't think they are bound by the intention of the Legislature. They would be if they were construing a statute. That is why I am going to say absolutely for the record, since this is going to be a constitutional provision, I would think that you have to clearly say "by act of the Legislature" and not "by rule of court."

ASSEMBLYMAN BATE: Well, that doesn't trouble me. I will tell you why. There was a constitutional amendment overwhelmingly approved by the voters in recent

years pertaining to six-man juries. It took at least a year, as I recall it, an exceptionally long time, for something that was minimally controversial for enactment of a statute to carry it through. That is one example.

The second is the casino gambling. The voters of New Jersey decided to permit casino gambling in Atlantic City and we have been laboring for hours and hours, days and months, to try to get the proper legislation to carry out the will of the people as expressed in that referendum.

It seems to me, in similar vein, that if the people of New Jersey see fit to vote affirmatively on ACR 66, it will be incumbent upon me or Mr. Spizziri or whoever introduces the legislation to make this a fact, to expand upon what you are suggesting at this time. This is only an essential step. The people have to approve. But, beyond that, we have work to do. It seems to me it is our responsibility to clarify and make absolutely certain that we are talking about the Legislature with reference to that particular paragraph and not the Supreme Court.

MR. MC QUADE: When you used the word "expand," you supplied me with the proper word I was searching for - "expound." The Supreme Court expounds a constitutional provision; it construes a legislative act. Now, since this is going to be a constitutional provision, they are not bound by any intention of yours when they go to expound it, because in the Constitution it says that the administration of the courts - and I don't think that will be changed by this proposed amendment to the Constitution - is to be handled by the courts. They can make rules and administrative procedures for the courts.

It is true that any subsequent legislation which you pass to carry out this provision in the Constitution which the people adopt, not the Legislature --- All you are doing is proposing a constitutional provision which the people enact as the basic law. It would seem to me if the question on that constitutional issue went to the Supreme Court, they are not bound by what your interpretation of this is because it is not a statute to start with. It is a proposed constitutional amendment.

I grant you that any enabling legislation which you would pass after the constitutional amendment was adopted and you said, "this is the intention of it" - I have no doubt that would be controlling because the Supreme Court would be construing the statute.

ASSEMBLYMAN BATE: Don't you expect us to do that?

MR. MC QUADE: Of course I do. Of course I do. But what I am trying to do is to cover all the bets possible that they would consider the problem not under enabling legislation which followed but on the very enactment by the people in the case of a constitution, wherein they would be saying, we are expounding that constitution and not construing. This may seem tortured to you at this time. But you know as well as I do that many of the things that are contemplated by the Legislature as a supposedly easy thing, once you get down to the problems, you say, why didn't we think of that or why isn't that provided there. I just went through that yesterday upstairs about the law having a vacancy in it.

ASSEMBLYMAN BATE: Now, if the Assembly passes ACR 66 and the Senate likewise passes it in time for it to get on the November ballot, the people of New Jersey will be asked the following: Do you vote "yes" or do you vote "no." "Shall the amendment to Article VI and Article XI of the Constitution to incorporate

the existing County Courts into the Superior Court, transfer their jurisdiction and pending causes to the Superior Court, and appoint their judges to the Superior Court, be approved?" That is all the people are voting "yes" or "no" on. It is the responsibility of those who propound the question and those who oppose it to inform the public. But I find it hard to believe that the public's knowledge of what is going on will be regarded by a court in preference to what we are saying here today as our intention. That is number one, with respect to the actual vote by the people of New Jersey.

The second thing is that, within a period of months, it is the responsibility of the Legislature to carry out what in effect is the legislative intendment of those who are here, to see that the enactment follows carefully what we have proposed.

MR. MC QUADE: I assume you have read the Minutes of the Constitutional Convention of 1947 which adopted as a convention the Judicature Article which we now have and which the people are going to amend without a convention, but by vote at a general election. I assume you have read those minutes. It is clear in those Minutes from my interpretation and that of many others that it was never intended that those words, 'regarding administration of the courts, etc.', be ever interpreted by Arthur T. Vanderbilt when he got his first chance under Winberry against Salisbury the way he did.

ASSEMBLYMAN BATE: I agree.

MR. MC QUADE: In other words, you had the Minutes of the Constitutional Convention which adopted that constitutional provision and the Supreme Court ignored those Minutes. And the man who was the very architect of that Convention, together with Justice Nathan Jacobs and others, ignored that whole thing and said it doesn't mean that. Now, do you mean to say you are telling me ---

ASSEMBLYMAN PERKINS: Let me ask this question.

MR. MC QUADE: May I finish, Assemblyman?

ASSEMBLYMAN PERKINS: Yes.

MR. MC QUADE: Do you mean to tell me, if this comes up as a constitutional provision on a constitutional case before the Supreme Court, they would be bound by your statutory interpretation right now? I don't think so.

ASSEMBLYMAN PERKINS: Let me ask this question: You seem to have gone away from your acceptance of the fact that if the verbiage was placed on the record, the record would be referred to in light of any constitutional challenge and the record would be controlling as to the legislative intent. Are you now moving away from that argument?

MR. MC QUADE: Yes, I am, because it has come out in the colloquy between Assemblyman Bate and myself that really this as it presently stands ultimately will not be a statute of the State of New Jersey. This is a proposed constitutional amendment. Consequently, it will become part of the Constitution of the State, which is coming from the people either by way of convention or by way of voting on that public question. Therefore, what you say here regarding the constitutional provision is not binding upon the Supreme Court at all, any more than the Minutes of the Constitutional Convention of 1947 were binding upon the court.

Any enabling legislation that you pass afterwards, assuming that you are carrying out the constitutional amendment, and in that you said, this is our intention, I think would be binding even though it wasn't spelled out explicitly in your legislation.

Now, this is a constitutional amendment which you are urging and a Constitution is expounded by the Supreme Court, whereas a statute is construed by the Supreme Court, and if you didn't agree, for example, with the construction which was given to a statute of yours in a particular case, you could amend the law. But you can't amend the Constitution. Only the people can do that in convention or in a constitutional question.

ASSEMBLYMAN PERKINS: But you can interpret the meaning of the Constitution.

MR. MC QUADE: Only the Supreme Court can do that. And they are not bound by what we say here today.

ASSEMBLYMAN PERKINS: What you are implying then is that the Supreme Court would ignore the record.

MR. MC QUADE: Yes. I am saying they could ignore it and they have. They ignored the record of the Constitutional Convention of '47.

ASSEMBLYMAN PERKINS: And they would then place their own interpretation on it.

MR. MC QUADE: Yes, because they are expounding a constitution; they are not construing a statute. That is why I think as a constitutional amendment, the language should be in there "unless changed by the Legislature." It makes it very clear that they can't possibly do what they did in Winberry against Salisbury and ignore the Minutes of the Constitutional Convention, and go ahead and say, no, it doesn't mean that - it means this. As Assemblyman Bate just said, in the construction of "and" in "by law and rule of court" - that was your last question before we took a recess - he thinks that does mean "or rule of court." That would still be part of this constitutional amendment; is it not, Mr. Bate?

ASSEMBLYMAN BATE: That's right.

MR. MC QUADE: This is all going to be the amendment of the Constitution - all of it here. Any enabling legislation which you pull up afterwards has nothing to do with this right now. It has to pass. Then whatever you say as a Legislature on your statutes, sure, the court would be bound by your intention which they would use to construe that statute. But if you don't make this constitutional amendment clear now - yes, I have shifted my position, thanks to this discussion -- I would say unless you put it in the Constitution now that it is by the Legislature and not by the word "law," itself, you are going to have trouble. You are going to have trouble.

Incidentally, if I may add something else, I told you earlier off the record the Administrative Office of the Court has sent this: "Administrative Office of the Court, Clerk Unification Project. Outlines for completing personnel information request form. The information collected on these forms will be key-punched and processed by computer. For this reason, information for each employee cannot exceed the total number of spaces allocated under each heading. Where sufficient spaces are not available, you may abbreviate the department name, position, title, bargaining unit, so that the information can be contained within the number of spaces allocated." And it goes on, "County, County Code, Department, Employee Name, First Initial, Position, Title, Function Code, Description of the Duties." And it goes through about 33 different duties, salary rates, salary minimum, salary range ---

ASSEMBLYMAN PERKINS: Why are you ---

MR. MC QUADE: What I am trying to get at, if this isn't clearly indicating from the Supreme Court that they are very interested in the employees of the County Clerk becoming de facto County Superior Court -- Supreme Court employees, I don't know what is.

ASSEMBLYMAN PERKINS: I think it is preparatory to anticipated action.

MR. MC QUADE: Yes. And the anticipated action for the County Clerks is to say, good-bye, so long, employees?

ASSEMBLYMAN PERKINS: It might be, and it might be alternative action.

MR. MC QUADE: I don't know.

ASSEMBLYMAN PERKINS: I don't want to offer any conjecture as to what that document represents since it is not pertinent to our discussion this morning. The contents of that document are not pertinent.

MR. MC QUADE: Granted.

ASSEMBLYMAN PERKINS: If there is anything else that you have, we would be glad to hear it, but I would like to move on to the next speaker.

MR. MC QUADE: I would like to introduce Andy Smith, who is the Surrogate in Monmouth County. Also I would like to have Mr. Gill Job, Surrogate of Bergen, present what he conceives to be a real constitutional problem in the language here.

ASSEMBLYMAN PERKINS: Will that be different from your prior statements on this?

MR. MC QUADE: Yes.

ASSEMBLYMAN PERKINS: All right.

MR. MC QUADE: Thank you very much. You have been very patient.

G I L L C. J O B: Thank you, Mr. Chairman and members of the Committee.

Following a learned constitutional attorney such as Mr. McQuade, I don't know that I am qualified to present this. But I did raise a point with him that had not been discussed at our conference a few moments ago.

One of the things that bothers me - again pertaining to the words "provided by law" - is that I have always had the understanding that as a Surrogate, I really wore two hats: an elected constitutional officer as a Surrogate and then, by designation, Clerk to the County Court, Probate Division, in contested matters.

I am very mindful of a recent case which I am sure, Mr. Chairman, you are very well acquainted with, since it occurred in your county, the Lemken Case, where an incumbent Surrogate in Hudson County, as I understand the facts, got involved in an indictment - it had nothing to do with his duties as Surrogate, but in another legal matter - and in an effort to continue as Surrogate, the Supreme Court saw fit to enjoin him from activity in the conduct of his duties. As I understand the case, Surrogate Lemken appealed on the grounds that while they may have some authority in his capacity as Clerk to the County Court, Probate Division, they certainly had no authority over him as a constitutional officer and in the conduct of the administrative duties of his office: hiring and firing the employees, setting up his budget and carrying out the functions of the office to which he was elected.

The verdict apparently as it came down from the courts was that there was no way that you could divorce the duties and that every single act of his in the office and every single act of his clerks working under him in the administration of that office constituted and touched upon the judicial nature of it. Therefore, he was enjoined from doing anything - suspended from the office completely.

The point that I am raising here - and the only reason I am raising it - I don't know the answer -- but I certainly would like to place on the record that I would certainly have a strong objection to the courts taking over my entire personnel, as far as my help is concerned, those people that I hire and fire and work with, taking them over under the guise of a judicial takeover. I am particularly concerned about the paragraph, the italicized material, at line 96D: "Until otherwise provided by law, the judicial officers, surrogates and clerks of the County Courts and the employees of said officers, clerks, surrogates and courts, shall continue in the exercise of their duties as if this amendment had not been adopted." However, I don't propose to endeavor to continue in the exercise of these duties following the Lemken Case because I happen to disagree with that Lemken Case. I don't feel that we should insert into the Constitution something that will provide this possible obstacle to the conduct of the affairs of my office since I am an elected official.

Now I don't know what bearing that has on this present court merger.

ASSEMBLYMAN PERKINS: I don't know either.

MR. JOB: But if it is in any way a threat to corroborating that particular interpretation that appeared in the Lemken Case, I just would like to register my objection for the record.

ASSEMBLYMAN PERKINS: And quite rightly so. I believe what the court did was absorb the function into the judicial function of that office. Would your objections be alleviated if there was concurrent legislative mandate defining the duties of your office, in conjunction with the constitutional change?

MR. JOB: Well, I would certainly say that there is a crying need for remedial legislation at the present time, not only in that area, but also in the area of another matter concerning a Surrogate in Hudson County. I don't know how you can divorce an elected position from partisan politics.

ASSEMBLYMAN PERKINS: How do you practically divorce appointive positions from partisan politics?

MR. JOB: Well, I suppose you don't. I suppose you get down to the point, to the victor belongs the spoils.

ASSEMBLYMAN PERKINS: Exactly.

MR. JOB: But I certainly I think there is a difference between that and a proposal - and there have been various proposals made in the past - to take elected officials, such as Surrogates, out of politics completely. That is completely impractical and just will not work. You may as well limit the service of a Surrogate to one elected term because I can't conceive of any political situation where a Surrogate can go broke for five years, politically speaking, and then expect at the end of five years that he is going to have to confront possibly a new county chairman or possibly newly-elected officials throughout the entire political spectrum.

ASSEMBLYMAN PERKINS: Maybe we should give them tenure.

MR. JOB: Well, I think one of the members of your Committee had a Tenure Bill in a few years ago - Senator Bate. I believe he was a Senator at that time. And perhaps that might be the solution. But nevertheless these are real fears and in answer to your question, I think that remedial legislation could take care of a good number of problems that have arisen, as far as Surrogates are concerned. I would strongly suggest it. And I might say that only a couple of

hours ago prior to the beginning of this meeting, we did have a discussion in Surrogate De Fino's office and we brought up that very point, that we feel that remedial legislation in certain respects is essential and we do intend to try to get that.

ASSEMBLYMAN PERKINS: Did you discuss any components of that legislation or was it just a general consensus that ---

MR. JOB: No. It was a general discussion and I think there was complete agreement. But we are speaking specifically of the statute which resulted in Surrogate De Fino's office being vacated and which brought about what I consider, and I think many people agree, is a rather ludicrous situation, in which he can run for an office while he is ---

ASSEMBLYMAN PERKINS: I will not address myself to that.

MR. JOB: No. I wouldn't ask you to.

It has been suggested by President McCaffrey that I discuss the legislation pertaining to Surrogate De Fino's situation. I don't know that you want to hear that at the present time.

ASSEMBLYMAN PERKINS: No. That would be extraneous material in this hearing. If you have ---

ASSEMBLYMAN BATE: I was going to say, if Mr. McQuade or any one of you could furnish us with information, we will be happy to move on it and certainly any one of us would probably be most willing to introduce a bill incorporating it.

MR. JOB: There is a present statute - and I don't have the exact wording before me --- What is it? Is it 2A:5-11?

ASSEMBLYMAN PERKINS: Why don't you mail to me or, better yet, mail to Mr. John Tumulty in Legislative Services, the information and he can disseminate the material to the members of the Committee.

MR. JOB: Substantially what it is, it is a present statute which states that any judge of any court of the State - I think I have the wording correctly - shall, upon declaring his candidacy for an office, forfeit that particular office. The only other line to that particular statute states that this shall not apply to a Surrogate seeking re-election. It is our hope on behalf of the Surrogates that we can get an amendment to that bill and drop the final words, "this shall not apply to a Surrogate," period.

ASSEMBLYMAN PERKINS: Then you are eligible to run for two offices, is that it? That is a different political question you are proposing now.

MR. JOB: You know, it isn't only for that reason.

ASSEMBLYMAN PERKINS: There are nuances to what you are saying that you might not be aware of. So why don't you just send us the material.

MR. JOB: Apropos of that point, Mr. Chairman, there is statutory authority at the present time and not all political officers, not all dual job-holding, as you know, is illegal or contrary to law. Title 19 of the statute, specifically a certain section of it, tells you which officers are in conflict.

ASSEMBLYMAN PERKINS: I understand presently that is the case. There are bills pending which might negate that statement.

MR. JOB: But I will see that you get a copy of our proposed legislation with an explanatory statement. Thank you very much.

ASSEMBLYMAN PERKINS: Thank you, Mr. Job.

MR. MC QUADE: To finish up our presentation ---

ASSEMBLYMAN PERKINS: There are two brief statements, Mr. McQuade, which we will hear first. Mr. Gallagher has a brief statement to make on behalf of Surrogate DeFino, and so does Mr. Conte.

MR. CONTE: At this time, I will yield.

ASSEMBLYMAN PERKINS: Charles Gallagher of the Hudson County Surrogate's Office.

CHARLES GALLAGHER: I am just here to offer the memorandum regarding the proposed constitutional amendment, ACR Number 66.

This memorandum does not address itself to the basic purpose of the proposed amendment, namely, the absorption of the County Courts into the Superior Court, a desirable objective.

This memorandum is addressed to the addition or supplement to be added as Section 6 to Article XI, and particularly Paragraph (C) thereof.

Paragraph (C) provides in the pertinent part: "Until otherwise provided by law . . . all surrogates shall become clerks of the Chancery Division (Probate Part) of the Superior Court for their respective Counties and shall perform such duties and maintain such files and records on behalf of the Clerk of the Superior Court as may be required by law and rules of Court; . . ."

The proposed amendment set forth in Paragraph (C) invites a clash of power and authority between two branches of government, namely, the legislative and judicial branches; it violates the basic concept and doctrine of Separation of Powers.

The Surrogate is a constitutional officer elected by the people under the "Public Officers and Employees" Article of the Constitution (Article VII, Sec. 2, Par. 2).

The Surrogate's duties and responsibilities are spelled out by the Legislature, which not only sets out the kind of bond the Surrogate must post, under NJS 2A:5-2, but also the duties the Surrogate must perform and the records and files the Surrogate must keep. (NJS 2A:5-17 et seq.)

The proposed amendment now provides that the Surrogate shall perform "such duties" and "maintain such files and records" on "behalf of the Clerk of the Superior Court as may be required by law and the rule of Court."

The proposed amendment places a constitutional elective official, whose duties and responsibilities are spelled out by the Legislature, into the Judicial Article of the Constitution, thereby making him constitutionally subject to the control of the Judiciary under "the rule of Court."

It thus creates a situation where two branches of the government - the legislative and the judicial - exert controls over and are in a position to compete for control over an official elected by the people.

In addition, the will of the people in electing a Surrogate, pursuant to the constitutional right reserved (Art. VII, Sec. 2, Par. 2) should not be diluted or made meaningless by subjecting the Surrogate to "rule of Court." It is sufficient that his responsibilities and duties are spelled out by the Legislature - "as required by law".

The basic Constitution does not mention the Surrogate in the Judicial Article (Article VI), but does in Article VII, the "Public Officers and Employees" article, which renders the office of Surrogate an elective one.

The Legislature has likewise indicated the existence of the substantial argument that the Surrogate should be excluded from the Judicial Article of the Constitution in that when it enacted the statute dealing with the removal of Judges, it specifically eliminated the Surrogate as a Judge.

The Surrogate as an elective official should not be placed in the Judicial Article of the Constitution.

The Supreme Court of New Jersey has heretofore indicated a measure of control over the Surrogate by reason of its conclusion that the Surrogate is a judicial officer, but this was on the basis of interpretation by the Court and not of a constitutional directive.

If the amendment as proposed is adopted, the Surrogate will be squarely and directly encompassed within the Judicial Article of the Constitution, thus presenting the problems above outlined.

An additional note: Although the proposed amendment provides that Article VI, Sec. IV, be repealed, it fails to provide for the repeal of Article XI, Sec. 4, Par. 2 and Par. 5. These paragraphs perhaps may be permitted to stand as historical notes and establishing the life span of the County Courts to be done away with by the proposed amendment.

I read this on behalf of Surrogate Anthony M. DeFino of Hudson County.

MR. MC QUADE: Assemblyman, one last statement, by the Surrogate of Sussex County, Mrs. Rieker.

ANNE RIEKER: I have just one other thing I would like to expand on. It is actually in addition to what Surrogate Gill Job said in regard to the Lemken matter and based on some of the other testimony we heard this morning.

The Surrogates as a group were given constitutional existence and now we are talking about a constitutional amendment. And it says in lines 98 and 99, ". . . all surrogates shall become clerks of the Chancery Division . . ." If, in effect, you cannot separate the judicial responsibilities and duties and the duties as a clerk under the Lemken decision, now we become clerks of the Chancery Division. Are we actually doing away with ourselves as Surrogates? This is the question that I have.

This may not be your intent in creating this amendment. But is this something that can be interpreted later on as having us really taking part in our own demise as constitutional officers? If we become clerks, then are we, since it is an amendment, no longer Surrogates at all?

ASSEMBLYMAN PERKINS: Mr. Bate, do you want to answer that?

ASSEMBLYMAN BATE: Now you are the clerk of the County Court (Probate), aren't you?

MRS. RIEKER: Yes. That is one of our responsibilities. That's right.

ASSEMBLYMAN BATE: That's correct. So if there is a unified court and the County Court becomes the Superior Court, the logical step is to become the clerk of the Chancery Division (Probate Part). That remains unchanged except for the title.

MRS. RIEKER: That's the one thing I want to be certain today.

ASSEMBLYMAN BATE: That is certainly true.

MR. MC QUADE: May I make one statement? That present status is not constitutionally stated. It will now be constitutionally stated. That is the point. In other words, at the present time ---

ASSEMBLYMAN PERKINS: That is the function of the office, but that is not the mandated function as per the Constitution. That is what you are saying.

MR. MC QUADE: --- at the present time. But this Article ---

ASSEMBLYMAN PERKINS: We are getting into a form and substance argument here and I really don't want to do that.

MR. MC QUADE: I know that, Assemblyman. But it is our opinion that far too much enabling legislation which would follow has been incorporated into the constitutional amendment and that is wrong. When you get too much in the Constitution, then it is out of control of the Legislature.

ASSEMBLYMAN PERKINS: Actually, what he did was make a recitation of what is fact at this juncture.

MR. MC QUADE: But fact and constitutional law are two different things.

ASSEMBLYMAN PERKINS: I understand that.

MR. MC QUADE: What is the fact today is not by way of the Constitution; it is by way of enabling legislation and rule of court.

ASSEMBLYMAN PERKINS: By a hodge-podge of activity.

MR. MC QUADE: I suspect that this Article of the Constitution was mainly prepared by the Judiciary and is not coming whole cloth from the Legislature.

ASSEMBLYMAN PERKINS: Maybe the Legislature took a bird's eye view of what was in fact happening now and merely incorporated it as a constitutional mandate. But be that as it may, why don't you voice your objections since we are here to find out what your opinions are and how it adversely or affirmatively affects you.

MRS. RIEKER: I would like to see further definition of what our total responsibilities will be rather than just the statement that the Surrogates will become ---

ASSEMBLYMAN PERKINS: That would not have to be a part of this document. You understand that?

MR. MC QUADE: What she is really saying is that you delete from the constitutional amendment the Surrogate or his duties in the Judicial Article because the Surrogate really occurs in the Public Officer's Section.

ASSEMBLYMAN PERKINS: I understand that.

MR. MC QUADE: Now, any enabling legislation which you pass afterwards can define the duties of the Surrogate. But you know some of that language in there - if it isn't amended, then this will happen - that shouldn't be in the Constitution.

ASSEMBLYMAN PERKINS: You are back to the "unless provided by law" argument. All roads lead to Rome. I understand that.

MR. MC QUADE: Mr. Perkins, just one thing: Besides this business "unless provided by law," it has come to my attention through discussion with the Surrogates, and certainly with you right now, that what has happened is in the very text of the constitutional amendment, and that's what all this is - a text of a constitutional amendment. It is not a statute to be enacted. It is a proposed amendment. All of this will become part of the Constitution and the Constitution will say, if the amendment isn't adopted, etc. That will all be in there. It becomes moot after that point. What I am trying to say is that the duties of the Surrogate as such should not be in the Constitution any more than they are right now. The duties of the Surrogate should be determined by the Legislature by enabling legislation after the passage of the constitutional amendment, which should be kept down to the bone,

dealing only with the Judiciary, not with the Surrogate, as such, because he is not in the Judiciary Article now. Why put him in there? If you put him in there, then the courts can control him completely.

ASSEMBLYMAN PERKINS: Again we are talking about those arguments which in concert come back to the question "unless provided by law." Okay? I understand what you are saying. You want to incorporate, by deletion of some of this verbiage, a degree of flexibility ---

MR. MC QUADE: In the Legislature.

ASSEMBLYMAN PERKINS: (Continuing) --- because it obviously takes more to change the Constitution than it does to change a law.

MR. MC QUADE: As a matter of fact, I don't think that the County Clerk or the Surrogate should be mentioned in this provision of the Constitution at all.

ASSEMBLYMAN PERKINS: Perhaps they should be mentioned, but their functions not defined. The latter statement I adopt by reference, but the former statement I can't adopt.

EUGENE J. MC CAFFREY: May I hitchhike on Mr. Rieker's testimony?

I am Eugene McCaffrey from Gloucester County. I think what I would like to see in that particular area -- it is the wording, I think, that bothers us -- there is sort of a transition taking place -- the Surrogate shall become the clerk.

ASSEMBLYMAN PERKINS: I understand.

MR. MC CAFFREY: If we say "assume the duties of the clerk," it would be much better.

ASSEMBLYMAN PERKINS: Dr. McQuade was articulate in presenting those objections. I understood them well. He presented them in three different ways and I understood each one of them. Okay?

MRS. RIEKER: If I may refer back to the testimony that I made at the last hearing we had ---

ASSEMBLYMAN PERKINS: We have copies of it.

MRS. RIEKER: I said then that we were pleased to be mentioned in the amendment because for once our duties would be described in the Constitution. I, personally, still feel that way. In that respect, Dr. McQuade and I may not be in agreement. But it is the word "become" that bothers me. Maybe "assume the duties of" is all right. But I don't want to feel that as a Surrogate that I am agreeing to something that is going to make me no longer the Surrogate. I don't want to just be the clerk of the Superior Court. I like the title and the duties, and the role the way it is.

ASSEMBLYMAN PERKINS: Thank you very much.

Mr. Conte.

MR. MC QUADE: May I impose upon your good nature, Mr. Conte. Mr. Smith has to go back to Monmouth County. He says he has two sentences. He wrote you a letter. It will finish up our testimony.

ASSEMBLYMAN PERKINS: Would you defer to that request?

MR. CONTE: Yes.

ANDREW M. SMITH, JR.: I have a few things to say. Mr. Chairman, I just wanted to ---

ASSEMBLYMAN PERKINS: He said two and that's a couple. Mr. Conte has

very graciously deferred to the next succeeding speakers, but the line shouldn't get too long nor should the verbiage.

MR. SMITH: My name is Andrew M. Smith, Jr. - I am, I guess, the junior member of the Surrogates - from Monmouth County. I would simply say, Mr. Chairman, that if there is to be a reference to the Surrogates in the constitutional amendment, I am a little bit worried about the phrase "until otherwise provided by law." I would rather just see it "Surrogates shall become" or "assume the duties of clerk of the Probate Division of Superior Court."

ASSEMBLYMAN PERKINS: All laws are as they are until otherwise provided by law. So it is somewhat of a redundancy anyway in that regard.

MR. SMITH: I realize you can amend the Constitution subsequently and knock out the entire thing. I think that this would sort of give either the Legislature or the courts, by administrative rule, the power to reduce us to the status of coroners.

ASSEMBLYMAN PERKINS: I don't know whether that is true. Let me ask you this question: Assuming that that verbiage was taken out, was eliminated altogether - "or until otherwise provided by law" - what effect would it have with reference to the changes by law of the functions or duties of these respective people? Would it not be a fact of life that the Supreme Court, for instance, can promulgate its rules and somehow incorporate the duties and functions as part of the duties and functions of the court; or can the Legislature then come along later on and determine that the duties and functions are outside of the control of the court system? If we eliminated that verbiage as suggested, wouldn't the functions, wouldn't the prospect, wouldn't the ability of those two branches of government still exist to make the changes that they feel necessary to their functions?

MR. SMITH: I think if you eliminated reference to Surrogate's duties --- As it stands now, I think the Legislature could say that the Surrogates shall be in charge of collecting stray dogs in every county and abolish the Surrogate's Court and everything else. They could say the County Clerks are in charge of welfare in every county.

All Article VII of the Constitution says is that Surrogates and County Clerks shall be elected for terms of five years and Sheriffs shall be elected for terms of three years. Here in this constitutional amendment you are defining to some extent part of the duties of Surrogates and County Clerks.

ASSEMBLYMAN PERKINS: But you see, "unless otherwise provided by law" does not in any way enhance the prospect of action by the court or the Legislature, nor does it negate their function or domain in promulgating rules or laws.

MR. SMITH: You are going right back to the situation that we have at present.

ASSEMBLYMAN PERKINS: Exactly. What we have really done is nothing more than recite the capabilities of the courts and the Legislature. We don't mandate anything. We don't say anything. We really reiterate what their powers are at this point. So I don't know why everyone is getting excited about "unless otherwise provided by law," except if there is an affirmative function by either one of those bodies, either the court or the Legislature. If one wants to place the capacity for change only in one body, then we would be required to change the

verbiage to indicate "unless otherwise provided by the Legislature," which would exclude the court.

MR. SMITH: I kind of like the idea of memorializing it in a Constitution, that we do have some specific duties.

ASSEMBLYMAN PERKINS: You are arguing at cross purposes with your colleagues because your colleagues just argued that the function of your office should not be incorporated in the Constitution.

MR. SMITH: I see Mr. McQuade's point. I think there is a good deal of merit to it. I did not consider it before I came up here this morning and listened to him.

MR. MC QUADE: Assemblyman, if I may, I think there is really not a contradiction. We are saying, don't put the Surrogate in the Judicial Article - leave him in the Public Officer's part. But if you are going to put him in the Judicial Officer's Section, make sure you are not turning him into a mere clerk and doing away with him as a Surrogate. To that extent, I don't think there is a contradiction between us.

MR. SMITH: I would concur in that.

MR. MC QUADE: In other words, are you abolishing by indirection the office of Surrogate by saying he becomes a clerk of Superior Court? That's the problem.

ASSEMBLYMAN PERKINS: That was the process of absorption I was talking about.

MR. MC QUADE: All I am saying, as you referred to early, is that you are trying to make constitutional what are certain de facto things that have occurred by way of legislation and rule of court. I say, why do that? Why don't you leave it the way it is and keep your power to say what the role of a Surrogate should be because there is no question - you said what a judge is and then you left it up to ---

ASSEMBLYMAN PERKINS: The question is whether or not we want to make those definitions a part of this Constitution or whether or not we want to make it part of separate legislation.

MR. MC QUADE: That's exactly the point. And the Surrogates have a feeling that if you make them part of the Judicial Officers, they are no longer elected public officers.

ASSEMBLYMAN PERKINS: I understand their objections very well.

MR. MC CAFFREY: On behalf of our Association, we thank you very much for your patience. Thank you so much for hearing us.

ASSEMBLYMAN PERKINS: Mr. Neil Conte. Maybe we should stand up and give Mr. Conte a hand for his patience and for his deferring to each one of the speakers before he was allowed to speak.

NEIL CONTE: Mr. Chairman and members of the Committee, I appear here today wearing two hats. As I indicated when I first came in, I am a Civil Assignment Clerk here in Hudson County. In addition to that, I am the Hudson County Board of Director member of the New Jersey State Federation of Court Clerks.

As the Assignment Clerk here in Hudson County, I am appearing as a citizen and resident of the State of New Jersey, County of Hudson, City of Jersey City. I have seen what has happened here in this county where the County Court Judges do the same work as the Superior Court Judges. I can see no reason why this legislation should not pass because they are all qualified, they are all doing

MR. CONTE: I realize that.

ASSEMBLYMAN PERKINS: It is an ancillary question that has to be answered obviously.

MR. CONTE: Sooner or later, it is going to have to be answered.

ASSEMBLYMAN PERKINS: You are talking about the procedure.

MR. CONTE: Yes, in the event this should be enacted and approved by the voters. Thank you.

ASSEMBLYMAN PERKINS: Thank you very much. The hearing is adjourned.

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