# Joint Report of the Committee on Law Revision, of the Senate and the Committee on Law Revision of the General Assembly.



To the Senate and General Assembly of the State of New Jersey:

The Committees on Law Revision of the Senate and the General Assembly herewith present a Report of their activities in connection with the preparation of the legislation necessary to implement the taking effect of the Judicial Article of the Constitution of 1947.

The Committees met jointly, organized as a Joint Committee by the election of Hon. Harold W. Hannold, Chairman of the Senate Committee, as Chairman of the Joint Committee and Hon. Albert McCay, Chairman of the Assembly Committee, as Vice-Chairman and Hon. Robert B. Meyner as Secretary, and having acted jointly, now present this Report in joint form.

The Committees held 15 joint meetings and had two conferences with the members of the new Supreme Court in relation to the subject matters referred to them.

The Committees attended also a conference with the Governor and the members of the new Supreme Court at the invitation of the Governor.

In their earlier meetings the Committees were compelled to give consideration to the Tentative Draft of the Proposed Rules Governing the Courts Submitted by the new Supreme Court with the understanding that this draft was to undergo extensive changes by the Court.

The final draft of the Rules was not received by the members of the Committees until late in the week of July 19, 1948.

The Committees' Counsel was furnished with one preliminary copy of the Final Draft of the Rules several weeks earlier. It subsequently appeared, however, that so many changes were later made in this draft that it could not be relied upon in the drafting of statutes and a number of statutes which were drafted in reliance upon it had to be redrafted.

The Committees' activities and those of their Counsel, prior to the receipt of the Final Draft of the Rules, were, therefore, necessarily confined to exploratory examination of the legislation affected by the Rules, discussions of questions of policy and the preparation of preliminary drafts of Statutes addressed largely to the tiding over of the transition period incident to the taking effect of the Judicial Article of the Constitution of 1947.

Neither the Preliminary Draft nor the Final Draft of the Rules furnished the Committees sufficiently complete information as to the proposed organization of the new Superior Court to permit the drafting even of these statutes in final form. This information was not furnished until some time after the Final Draft was received.

The task which confronted the Committees was a staggering one; namely, to prepare the legislation necessary to implement the taking effect of an entirely new court system and the institution of an entirely new system of practice in the courts in time for introduction at the Session of the Legislature

to be held on August 16, 1948, a period of less than one month.

At a meeting of the Committees held on May 24, 1948, the Committees examined the provisions of the Constitution applicable to their work.

They concluded that the provision of the Constitution vesting, in the Supreme Court, the power to make rules governing "practice and procedure" in the courts "subject to law" vests in the Legislative Branch of the State Government, at least, a veto power over the rule-making power and thus imposes upon it the ultimate responsibility for the subject matter of the Proposed Rules.

They concluded also that the constitutional limitation, on the rule-making power, to rules governing "practice and procedure" imposes upon the Legislative Branch also the responsibility of examining the text of the Proposed Rules to ascertain whether or not any of their provisions went beyond mere "practice and procedure" and would affect changes in substantive law.

In the latter case, the Committees concluded that the rule must be backed up with statutory enactment if it is to be made valid, since mere acquiescence by the Legislature in such case might be held to be an unconstitutional delegation of a purely legislative function to the judiciary.

The Committees concluded further that, in passing upon the rules, they should adopt the most liberal definition of "practice and procedure" consistent with safety.

At this meeting an examination of the Tentative Draft of the Rules was made.

It disclosed that, in addition to provisions governing practice and procedure, numerous changes in substantive law were contained in them. Some of these suggested changes affected the jurisdiction of the courts; others dealt with questions of evidence, neither of which subject matters the Committees regarded as within the scope of the matters referred to them.

The Committees, therefore, concluded that, while they desired to cooperate with the Court to the fullest extent possible, the shortness of the time allotted to them for the preparation of the Statutes necessary to put the Judicial Article of the new Constitution into effect prevented the amount of study and deliberation required in the consideration of changes in substantive law involving important questions of legislative policy.

The Committees felt that they had no authority to approve changes of this character, except after full study and full disclosure of the possible results to the Legislature.

The Committees, therefore, determined to request the Court to eliminate from the Final Draft of the Rules all matters of this character, leaving them to be considered and to be determined upon by the Legislature, from time to time, as

opportunity for careful consideration and mature deliberation is afforded.

At a conference held with the Court on June 7, 1948, many such questions were discussed and as a result a considerable number of such proposed changes in substantive law found in the Tentative Draft were eliminated from the permanent Draft.

The Committees were informed by the Court that some changes in substantive law had been included in the Draft of the Rules for the express purpose of suggesting to the Legislature that they be made by statute and the Committees agreed that, wherever possible, changes of this character which did not involve important changes in legislative policies and which came to the attention of the Committees and met with their approval would be backed up by statutory authority.

The Committees requested the Court particularly to eliminate from Rule 3:26-2, which relates to the taking of testimony and submission of interrogatories in advance of trial in a civil action, the following provision:

"It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

The Committees agreed that many of the provisions of the proposed Rules which enlarge opportunity for discovery, inspection of documents and property and obtaining admissions

in advance of trial, when properly used, will result in simplifying the issues to be determined, in lessening the volume of evidence to be presented, and in facilitating the arrival at the truth of the controversies involved, at the trial.

But as the depositions may be taken and discovery may be had under the proposed Rule without previous order of the Court, it seemed to the Committees to be wise to limit this right to the obtaining of evidence which reasonably might be expected to be admissible at the trial. By this means, litigants will be enabled to obtain, in advance of trial, information which will contribute to the preparation of the cause and the facilitation of the trial of the issue without subjecting the litigant to a mere "fishing expedition."

The Committees' conclusions in this respect were based upon the following considerations:

(1) The Rule as it is presently expressed sets up no standards to determine what may be "reasonably calculated" to lead to the discovery of admissible evidence and provides no limits to the inquiry which may be undertaken. The only check against unfair use of this procedure being the application to the Court to limit or end the taking of depositions, etc., the Committees felt that the harm might well be done before such an application could be made since no one could determine in advance what the purpose of examination of any witness is.

(2) The use of this procedure may encourage the institution of strike suits for the purpose of forcing

unjustifiable settlements by embarrassment of the defendants or of obtaining information for use other than for the purposes of the suit. In such cases, or in cases in which a concocted defense is anticipated, in which the other party has within his possession documents which would be effective to explode it, the use of this Rule will require disclosure of the evidence to the adversary, thus affording him an opportunity to change his course of action to suit the circumstances.

(3) This procedure would contribute greatly to the expense of litigation and it could be used to give unfair advantage in litigation to the rich against the poor. It has been urged that, because under the Rules the expense of taking the testimony is to be borne by the litigant who moves to take it, no such advantage will result. One of the heaviest expenses of litigation is the cost of the services of counsel. No provision is made under the Rules for payment of the expense of attendance of a litigant's counsel at the taking of depositions to be taken at the instances of his adversary.

(4) An opportunity would be afforded by this procedure for a wealthy litigious party to an action to tire out his adversary by the taking of so many depositions, and the submission of so many interrogatories, demands for inspection of documents, etc., as to discourage the adversary from pursuing the case. In this conclusion, the Committees had in mind the abuses which have grown up in litigation under the prerogative writs where efforts were frequently made to tire out the moving party by the building up of a record of enormous size through

the instrumentality of taking depositions devoted to wholly immaterial matters.

The Committees had before them no results of the experience of the use of this procedure in the Federal Courts since the words objected to in the proposed Rule have been included in the Federal Rules only since September 1, 1947.

The Committees concluded, therefore, that in limiting this procedure to the obtaining of evidence which probably would be admissible in the trial of the cause it was making provision for such inquiry as might legitimately be required for the information of the parties in the preparation and trial of causes without opening the door to possible widespread abuses.

The Committees concluded also that Rule 5:2-1 which reads "No reference for the hearing of any matter in a County Court shall be made to any person" will result in cluttering up the County Courts with hearings on accounts and exceptions to accounts which could more properly and more conveniently be treated through references.

In such cases where the items are numerous and they are subject to numerous objections, the Committees felt that the application of this Rule would make necessary extensive and tedious hearings in open court, requiring the presence not only of the county judge, but of clerks, stenographers, court attendants, etc. in connection with matters which could, with more facility and propriety, be handled in a more informal

manner through reference.

In counties with part time county judges, the Committees felt that the holding of such hearings in open court might well operate to delay the hearing of other matters which necessarily must be heard in open court.

The Committees recognized the abuses which have grown up as a result of the reference system but concluded that such abuses could adequately be controlled in the limited field suggested, through the medium of administrative control of the courts afforded under the new Constitution.

The Committees, therefore, concluded to request the Court to make an exception to this Rule in the cases of accounts and exceptions to accounts in the County Courts.

The Committees accordingly requested the Court to modify the two Rules in question in accordance with these conclusions but the Court informed the Committees that the arguments for and against the adoption of these provisions of the Rules had been considered by the Court and that the Court still remained of the opinion that they should be included in Final Draft and they were so included accordingly.

The drafting of the necessary legislative bills was begun as soon as the Final Drafts of the Rules were distributed to the Committees.

These bills were of two types, those of an over-all or transitional character which were intended to facilitate the change from one court system to another or from one system of practice to another, and those which amend existing practice acts so as to eliminate as many provisions of the Statutes inconsistent with the provisions of the Rules as was possible under the circumstances.

The Committees at first conceived it to be their duty to attempt to cover the field covered by the Rules, as fully as the limitations of time permitted, by making the Statutes relating to litigation in the Courts conform to the Rules.

They recognized the fact that these limitations did not permit as careful examination of the Statutes as was desirable but they did feel that some attempt at reconciliation of the provisions of the Statutes and the Rules should be made wherever possible.

In those instances, in which the inconsistencies found required more complete revision than the time limits permitted, no revision was contemplated.

But wherever Statutes were found regulating the practice and procedure in civil causes generally or the practice and procedure in matters dealt with in Chapter VIII, Provisional and

Final Remedies in Special Proceedings, of Part III of the Rules Governing the Superior Court, an effort was made so to amend them as to reconcile them with the Rules.

Included in this group of bills was one bill of one hundred and eighty-one sections, which was intended to reenact those provisions relating to practice and procedure in the former courts of law and the former Court of Chancery which, in the Committees' judgment, still will remain in effect after the Rules take effect and also to back up numerous provisions of the Rules by statutory enactment.

Preliminary drafts of these statutes were submitted to the members of the Legislature and to the members of the Court.

The Committees regarded the ejectment acts, the attachment act and the replevin act as being of too complicated character to be revised within the time limit and no preliminary drafts of statutes affecting them were submitted.

A considerable number of changes in the over-all or transitional bills were suggested, on behalf of the Court, and the Committees were informed, also, that, in the Court's opinion, most of the proposed statutes intended to back up the Rules by statutory enactment or to bring the statutes into conformity with the provisions of the Rules were not needed, except in the case of the revision of the mechanics' lien act, as to which the court expressed no opinion.

The Court later informed the Committees, however, that it regarded immediate revision of the ejectment acts, the attachment act and the replevin act to be essential.

The Committees then reviewed the preliminary drafts of all of the bills and wherever it seemed to the Committees to be at all possible, they acceded to the Court's suggestion.

In the case of the bill intended to synchronize the general practice provisions of the Statutes with the Rules, the Committees acceded to the Court's request so far as to drop out

all provisions of this bill except those provisions which provide the machinery for the bringing of defendants within the jurisdiction of the courts by service of process or other methods of service, and provide the manner in which infants and incompetent persons may be authorized to proceed and be proceeded against in civil actions. Under the old system of practice these provisions were contained in the Statutes but they are now to be found, in different terms, in the Rules Governing the Practice and Procedure in Civil Actions.

The Committees recognized the fact that these provisions involve the validity of land titles made through judicial proceedings and questions of due process of law under the Federal Constitution.

The query raised was whether or not they could be safely treated as mere matters of "practice and procedure" and thus be provided for solely under Rules of Court.

The Committees concluded that the risk involved in this treatment was too great and, therefore, that these provisions of the Rules should be backed up by statutory enactment.

In the case of the ejectment act, the attachment act and the replevin act, the Committees were forced to undertake complete revision notwithstanding the lack of opportunity for such careful consideration as the importance of the subject matter required.

The provisions of the Rules relating to these matters are of such far-reaching character as to make necessary the

complete revision of these Statutes.

The Committees pointed out to the Court at its first conference that the inclusion of these provisions in the Final Draft would compel the Committees to undertake a task which could not adequately be performed in the time allowed.

The provisions affecting these Statutes were included in the Final Draft of the Rules, notwithstanding the Committees' request, and the Committees were compelled to revise these Statutes almost on the spur of the moment.

Seventy preliminary bills were prepared and sixty bills were finally introduced in the Legislature.

Included among them was an act, the purpose of which is to provide that Statutes referring specifically to former courts, judicial officers, etc., shall be so construed as to be applicable to the new courts, judicial officers, etc.

Another bill puts the Rules into effect and provides that they shall supersede all former Court Rules, practice Statutes and common law practice provisions in effect in the State inconsistent therewith, excepting those instances in which the Committees concluded to the contrary.

During their deliberations the Committees' attention was called to the provisions of Rule 1:7-7 of the Rules of the Supreme Court as follows:

"(a) Neither the clerk of any court nor employees of the court or of any of the judges or of the clerk shall practice in

any court."

It was represented to the Committees that by the enforcement of this Rule members of the Bar would be practically precluded from acting as the clerk of any municipal court or as an employee of any such clerk.

It seemed to the Committees to be desirable to attract members of the Bar to such positions rather than to make it impossible for them so to serve.

Employees of municipal courts are usually part time employees and if full time positions are to be set up in these courts, it will greatly increase the expense of maintaining them.

The Committees, therefore, concluded to incorporate in the bill approving the Rules an additional exception limiting this Rule so that it shall not forbid the clerk or the employees of a clerk or of the judge of any court from practicing in any court except the court of which he is clerk or in which his employer is the judge or clerk.

In the case of such frequently used Statutes as those affecting the foreclosure of mortgages, judicial sales, mechanics' liens and municipal mechanics' liens, and the lis pendens act, the Committees felt that even for the transition period the inconsistencies between the Statutes and the Rules should not be left unreconciled and bills to reconcile them were prepared and introduced by the Committees' direction.

As their work progressed the Committees have been more and more impressed with the necessity of general revision of at least part of the Statutes.

The taking effect of the Judicial Article of the new Constitution and the introduction of new systems of practice in the courts, by the Rules, have made obsolete a great number of Statutes now on the books.

The legislation passed in recent years consolidating the various departments and agencies of the State Government has thrown the Statutes affecting these subject matters into confusion.

At the last Session of the Legislature a bill was passed providing for the revision of the Statutes, enacted since the enactment of the Revised Statutes, by the Law Revision and Bill Drafting Commission.

It is now apparent that the subject matter of this law must be broadened so as to include at least those parts of the Statutes which have been thrown into disorder by the taking effect of the new Constitution and the consolidation legislation of recent years.

The Committees have had a convincing example of the necessity of the allotment of sufficient time to the performance of such a task and the necessity of its performance by persons trained in the drafting and revision of statutes.

The Committees realize that a general revision of the Statutes is an extremely expensive undertaking and are hopeful that a partial revision of the Statutes may be sufficient to

bring the Statutes into order again.

The Committees, therefore, recommend to the Legislature that a Joint Committee of the two Houses be appointed, to consist of not more than three members of each House, for the purpose of making a study of the problem, of conferring with the Governor thereon and of reporting to the Legislature as to the scope of the proposed revision required and its probable cost.

The Committees further recommend that the personnel and facilities of the Law Revision and Bill Drafting Commission be utilized both in the making of the study and in the preparation of the text of such revision of the Statutes as may be provided for.

The Joint Committee takes this occasion to record its appreciation of the services of Charles DeF. Besore', Chief Counsel, and John W. Ockford, Counsel; of Judge John B. McGeehan, who the Chief Justice of the Supreme Court permitted to aid the Committees and whose wide experience in law revision and drafting made his aid of great value; of Maurice Brigadier, Saul Tischler, Henry F. Schenck and Frederick W. Hall, specially employed by the Committees as legal aids, and all members of the legal staff of the Law Revision and Bill Drafting Commission.

The members of this group were untiring in their efforts, and undaunted by the immensity and complexity of their task, and the pressure of the narrowly limited time for its performance.

Except for their endeavors, a task that seemed at times impossible of performance could not have been fulfilled.

Especial credit should be given, and appreciation go, to Charles DeF. Besore', Chief Counsel, who in addition to essential exploratory work, planning and drafting of important parts of the legislation, supervised and coordinated the work of other legal assistants to the Committees.

The Committees desire to express their appreciation of the services rendered to them by the members of the Law Revision and Bill Drafting Commission and especially by its Chairman, Dean Frank H. Sommer who, at great inconvenience to himself, attended most of the Committees' meetings and whose counsel and advice to the Committees and their Counsel were invaluable.

Harold W. Hannold Chairman

Frank S. Farley

Bruce A. Wallace

George A. Redding

J. Stanley Herbert

W. Steelman Mathis

Robert B. Meyner

Law Revision Committee of the Senate

Albert McCay Chairman

Emory S. Kates

Thomas J. Hillery

Emmert R. Wilson

James H. Sanderson

Law Revision Committee of the General Assembly