REPORT OF THE

COURTS COMMISSION

to the

North Carolina

General Assembly

1967

State of North Carolina
COURTS COMMISSION

STATE LEGISLATIVE BUILDING
RALEIGH, N. C.

TO THE MEMBERS OF THE 1967 GENERAL ASSEMBLY:

This report is submitted pursuant to

Joint Resolution 73 of the 1963 General Assembly.

/s/ Lindsay C

LINDSAY C

Chairman

C O N T E N T S

I. INTRODUCTION

Pursuant to the authority vested in it by the new Judicial Article of the State Constitution, the 1963 General Assembly created a 15-member, 8-year Courts Commission, and charged it with the duty of "preparing and drafting the legislation necessary for the full and complete implementation of Article IV of the Constitution."

The Commission made its first report to the 1965 General Assembly. The report consisted primarily of recommendations for a uniform statewide District Court Division to replace, in three stages over a period of four years, all the present courts in the State below the level of the superior court. The report and recommendations of the Commission were accompanied by a bill, "The Judicial Department Act of 1965," designed to accomplish the recommendations of the Commission.

The 1965 report and proposed legislation were received and approved by the General Assembly with minor substantive changes. The only change significant to this report was removal of a proposal limiting the right of appeal to the Supreme Court from a decision of a superior court judge entered in a civil appeal from the district court; unlimited right of appeal to the Supreme Court was retained.

Elimination of the proposal to make the superior court the court of last resort in certain district court cases meant that further attention

should be given by the General Assembly to the problem of the heavy case load of the Supreme Court. Our highest court, already perhaps the busiest in the entire country, and confronted with a deluge of routine business plus an ever-increasing number of post-conviction appeals based on constitutional issues emanating from recent U.S. Supreme Court decisions, faced a crisis. Relief was necessary or the administration of justice would eventually suffer. The solution was an amendment to the Judicial Article of the Constitution authorizing the creation within the Appellate Division of the General Court of Justice of an intermediate Court of Appeals--a proposal previously considered but not originally adopted in 1961 because the appellate problem at that time was not yet so pressing. Meanwhile, however, the case load of the Supreme Court had continued to rise, and the acute predicament of the court and the litigants who appear before it had become more and more apparent to thoughtful legislators in the face of the triple dilemma of an overworked Supreme Court, a steadily mounting appellate case load, and an unlimited right of appeal. The proposal to amend the Constitution to permit the establishment of a Court of Appeals, supported by the Governor, the Courts Commission, the Supreme Court, and the organized bar, was adopted by the General Assembly. It was submitted to the people in the general election of 1965. The people responded with an overwhelming majority for the amendment.

Passage of the Court of Appeals amendment increased the duties of the Courts Commission, and brought about a change in priorities for implementing the new Judicial Article. Top priority was given to studies and plans for the Court of Appeals. The project was delayed somewhat in the fall of

1965 and in the winter of 1966 by two extra sessions of the General Assembly, but the Commission began studies in earnest after the second extra session was completed. Over six months of concentrated effort was required to develop proposed legislation to re-design the Appellate Division to establish therein a new Court of Appeals. The Commission devoted the months then remaining prior to the 1967 session to rewriting Chapter 9 of the General Statutes (dealing with the jury system), studying and recommending changes in the solicitorial system, and finally, in recommending certain supplemental and technical amendments to the Judicial Department Act of 1965. These four items, then, constitute the recommendations of the Courts Commission presented herewith to the 1967 General Assembly. Each of these proposals requires a substantial draft of legislation. While these drafts are not physically a part of this report, they are official recommendations of the Commission in support of its report. They will be introduced as four separate bills with unanimous Commission sponsorship.

II. THE COURT OF APPEALS

A. Basic Principles

With a fresh legislative and constitutional mandate to create a Court of Appeals, the Commission first sought, through debate, to establish the fundamental principles which should be controlling in the creation of such a new court. After much study and discussion, the following guiding principles were agreed upon:

- One trial on the merits, and one appeal on the law, as of right, in every case. This is a traditional principle of Anglo-Saxon and North Carolina jurisprudence, and must be preserved. It naturally follows from this principle that double appeals, as of right, are to be avoided, except in the most unusual cases, the importance of which can be said to justify a second review.
- The Supreme Court must remain the court entrusted with the final decision on all truly important questions of law. From this principle it naturally follows that certain questions of law--those clearly not involving questions of jurisprudence of interest to the state as a whole, or those including routine determinations of interest only to the litigants involved--must be left to final resolution in the Court of Appeals. A strictly limited category of "important" cases--capital cases and cases involving constitutional interpretations, for example --should have access to the Supreme Court by statute. Otherwise, discretion should be vested in the Supreme Court to categorize the "importance" of a case, subject always to its discretionary review power to prevent obvious injustice. Again, it naturally follows that the Supreme Court, by this allocation, should be free to devote all

of its time and energies to the development of those matters of law of major significance to the State as a whole.

- Subject to the controlling principle that matters of major importance should always have access to the highest court, a fair and equitable division of labor must be maintained between the two appellate courts, to the end that all cases on appeal are settled without unnecessary delay. To achieve this goal, rigid jurisdictional allocations of cases between appellate courts is to be avoided, some authority being vested in the Supreme Court to adjust case loads equitably by exercising its discretion.
- Appellate procedure should be simple, inexpensive, and designed to hear and decide cases generally on a "first come, first served" basis.
- The compensation of judges of the Court of Appeals should be sufficient to attract and hold the ablest members of the trial bench and bar.
- The new court should be operational as soon as practicable, the Supreme Court's need for relief being urgent.

These principles, and the difficulties in drafting a Court of Appeals bill which faithfully adhered to these principles, have been the subject of several public discussions.[1]

Having determined generally the road it wished to travel, the Commission

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[1] Sen. Warren, Chairman of the Commission, dwelt on these matters at some length in an address to the annual convention of the N. C. Bar Association in June, 1966. His remarks are printed in Bar Notes, Volume XVII, No. 4 (July, 1966). Dean Phillips, of the University of North Carolina School of Law, also a member of the Commission, has discussed the overall subject, with particular emphasis on jurisdictional allocations between the appellate benches, in Vol. XVII, Bar Notes, No. 3, (May, 1966), and Vol. XVIII, Bar Notes, No. 1, (November, 1966).

sought guidance from the experience of the sixteen other States which have intermediate appellate courts. An analysis of the constitutional, statu tory and case law provisions with respect to each of these courts was made. Several of the courts, upon study, appeared to have been established with little or no regard to the fundamental principles guiding the Commission. Others, usually the most recently established courts, embodied ideas of organization, jurisdiction, or procedure, which the Commission deemed worthy of further study. Two states in particular offered modern, recently adopted intermediate appellate court systems, and these (Michigan and New Jersey) were studied in detail. One of the principal architects of the Michigan system, Professor Charles Joiner of the University of Michigan School of Law, visited the Commission at its request in December, 1965, and gave the members much valuable insight into the problems involved in creating an intermediate appellate court. A commission delegation[2] visited the State of New Jersey and conferred with members of its Supreme Court and Court of Appeals, and with its Administrative Officer of the Courts. The New Jersey appellate system, pioneered by the late Chief Justice Vanderbilt, was so impressive in several respects, and so obviously suited the adminis- trative officials of that system, that the Commission conducted a survey by mail of a cross section of the New Jersey appellate bar, and was pleased to learn that the overwhelming majority of the law firms responding to the survey were enthusiastic about the advantages of this system. The proposal finally developed by the Commission for North Carolina owes much in

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[2]Composed of Commission member David Britt, the Administrative Officer of the Courts J. Frank Huskins, whose assistance the Commission gratefully acknowledges, and a Commission staff member, C. E. Hinsdale.

fundamental philosophy to the excellent thought and experience which has gone into the systems of these two sister states, but the Commission's proposal has significant differences in detail from both.

B. Organization of the Court of Appeals

The 1965 amendment to the Judicial Article of the Constitution provides that the Court of Appeals shall consist of not less than five judges who shall be elected for terms of eight years by the voters of the entire State. The court is authorized to sit in divisions, or other than as a whole. Sessions are to be held at such times and places as the General Assembly may prescribe.

The intermediate appellate courts of other states almost without exception sit in panels (sometimes also called divisions or parts) of three. A few states have only three or six appellate court judges; several of the most populous states have three dozen or more; the most common number is nine. In some states the membership of a panel is fixed and unchanging; in other states the membership of a panel is constituted ad hoc, or at least is changed frequently, and each panel is assigned business as it arises.

For North Carolina, the Commission recommends that appellate judges sit in the almost universally used grouping- in panels of three. The Commission further recommends that the composition of the panels be changed frequently so that each appellate judge sits, as nearly as may be, an equal number of times with every other appellate judge. This system of rotating panel membership tends to prevent the growth of diverging bodies of case law among various panels of fixed membership.

The Commission favors assignment of appellate business to the various

panels without regard to its geographic origin within the State. No advantage is apparent in dividing the State into a number of geographic divisions, over each of which a panel of the Court of Appeals would have exclusive control in appellate matters. This does not mean that a panel or panels could not sit in various localities throughout the State. On the contrary, when facilities are available and the convenience of the public and the litigants warrants it, the Commission sees no reason why panels could not be scheduled to sit at a location or locations in the western, middle, or eastern parts of the State. Initially, however, all panels of the court should sit in Raleigh, and panels should be scheduled to sit in other places, on order of the Chief Justice, only after the desirability of such an arrangement, in terms of convenience and economy, has been clearly demonstrated.

Choosing the proper number of Court of Appeals judges has caused the Commission some concern. This problem had to be considered in common with the problem of the jurisdiction of the Court of Appeals--the answer to each problem necessarily influencing the other. Any number less than six--two panels of three each--was considered to be entirely insufficient if adequate relief for the Supreme Court was to be realized. A decision--discussed later in this report--to channel all civil appeals from the district court directly to the Court of Appeals meant adding many cases currently heard by the superior court under the 1965 Act to the Appellate dockets. Further, consideration of the most desirable allocation of cases between the Supreme Court and the Court of Appeals led to the conclusion that, once the appellate system was fully operational Statewide, two panels would probably be inadequate The number of judges was accordingly fixed at nine. Twelve

of the 16 other states with intermediate courts of appeal have nine or more judges. Consideration was given to more than nine judges, but the Commission felt the most prudent course would be to hold the membership at nine until experience clearly demonstrates that a larger number is needed.

While the Constitution provides that all appellate court judges should serve for eight-year terms, the Commission felt it wise to devise some plan for staggering the terms of the initial incumbents, to guard against the possibility that at some future date all members of the court might fail of re-election at the same time, reducing the experience level of the entire body to zero. The only feasible means to achieve this, in the opinion of the Commission, is to provide that six judges shall take office in 1967, after passage of the basic legislation, and that three more shall take office January 1, 1969. All judgeships should be filled initially through appointment by the Governor, the appointees to serve until the next general election. This arrangement results in six judges being elected in 1968, and three more in 1970. While this plan allows for only six judges in the first few months of the court's existence, this number is considered sufficient because the built-in lag in the appellate process will mean that the appellate court will not have its maximum case load for over a year, by which time the three additional judges should be available.

The Commission recommends that the Chief Justice of the Supreme Court designate one of the Court of Appeals judges to serve as the Chief Judge, to serve at his pleasure. The Chief Judge in turn should determine the composition of the various panels of the Court of Appeals, and designate the presiding judge of each panel, himself presiding over the panel of which he is a member.

The initial six judges should be appointed as soon after July 1, 1967, as practicable, and should meet immediately to draft and promulgate such rules of practice and procedure for the conduct of appellate business as the Supreme Court, under its constitutional authority, might require and approve. The Court should be available to hear arguments and conduct other appropriate business on and after October 1, 1967.

As noted previously, the court should for the time being schedule sessions of court only in Raleigh. The Department of Administration should provide adequate facilities, including a courtroom, judges' chambers, and clerical spaces. The Supreme Court library should be available for use of the court. The court should appoint its own clerk and adopt its own fee bill.

In the opinion of the Commission, the Court of Appeals should print its opinions, and issue advance sheets, in the same manner as the Supreme Court. The same reporter, however, should serve both courts.

C. Jurisdiction of the Court of Appeals and the Supreme Court

By far the most fundamental, important and difficult question associated with creating an intermediate Court of Appeals is that of jurisdiction. Matters of organization and procedure are significant, of course, but a soundly conceived jurisdictional arrangement is the indispensable cornerstone of a successful appellate court system. This became abundantly clear to the Commission as it studied the great variety of appellate jurisdiction arrangements in other states, and became aware of the extremely wide range of similar arrangements which could be utilized in North Carolina.

In the beginning it must be understood that, in speaking of the

jurisdiction of the Court of Appeals, we are necessarily also dealing with the jurisdiction of the Supreme Court. Under our pre-1965 Constitution, all appellate jurisdiction above the trial division was vested in the Supreme Court, and such jurisdiction as is now to be given to the Court of Appeals is necessarily taken from the Supreme Court. However, the exercise of jurisdiction given to the Court of Appeals may still be subject to review by the Supreme Court, and hence it is possible to speak with accuracy and clarity only of the jurisdiction of the Appellate Division, or of its two separate branches, the Court of Appeals and the Supreme Court.

The 1965 amendment to the Judicial Article of the Constitution provides that the Court of Appeals shall have such appellate jurisdiction as the General Assembly may provide. This must be read in conjunction with the Supreme Court's power, set out in Art. IV, Sec. 10(1) ". . . to review upon appeal any decision of the courts below, upon any matter of law or legal inference," and of the grant to the General Assembly in Art. IV, Sec. 10(5), to ". . . provide a proper system of appeals." Construing these sections together, it is clear that the Supreme Court is empowered directly by the Constitution (though not compelled by it) to review any and all cases, and that under the Constitution the General Assembly may assign to the Court of Appeals such appellate jurisdiction as it sees fit. Thus, the only constitutional limitations on making any conceivable division of appellate labors and functions between the two are the limitations implicit in the fact that one is higher than the other in the hierarchy of the General Court of Justice. This allowed the Commission to approach its task essentially unfettered by any constitutional impediment to devising the best possible jurisdictional utilization of the two courts. It could focus entirely

on the problem of identifying the principles which should dictate this allocation and then implementing them.

At the threshold lay the possibility of continuing to use the superior courts in a limited appellate role. This possibility was quickly discarded by the Commission. We have used these trial courts in this role out of necessity in times past, although they were not at all well adapted to it. With the availability of an intermediate appellate court, that necessity no longer exists (except for appeals from decisions of certain administrative agencies).

With the problem thus narrowed to making the best possible use of the two appellate courts, thought turned to defining the proper functions of each of these courts in a "proper system of appeals." Here the Commission started with the fundamental proposition that the functions of appellate courts in general are two-fold. First, they correct error committed at the trial level which is prejudicial to a litigant, i.e., they attempt to insure justice in the individual case. Second, they develop the jurisprudence of the state through their reported decisions, i.e., they serve the precedential function of the common law system by declaring, expanding, and clarifying the case law of the state. These two functions of course are frequently carried on simultaneously. In many cases the general law is clarified or expanded in the very process of correcting trial court error in the individual case. However, there are many cases the determination of which at the appellate level cannot be said to have any further effect than to correct error by pointing out failure of the trial court to make correct application of settled principles of law which are neither clarified, expanded, nor changed in the process. It is of course no less important

to the litigant in the latter case than in the former that error be corrected. However, it is true that in the process the added dimension of a general development of the law of the state is not present. Obviously, those cases having this added dimension of general jurisprudential significance should be reviewed by our highest, our most prestigious, court. As a corollary, those cases which, in great numbers, do not have this added dimension seem the natural basic material for the other appellate court. And, in view of the fundamental operating principle that one appeal rather than two is the ideal, these two different kinds of cases should be identified for what they are, and routed as speedily as possible to the appropriate court for final appellate review. This is to say that, in principle, double appeals ought to be avoided in all cases. If the case has the added dimension of significance above described, waste of time and added expense and nothing of counterbalancing value results from having such a case heard in the first instance by the intermediate court. And if the case does not have this added measure of general significance, then only waste of time and added expense with no sufficient counterbalancing value will result from allowing such a case to be subject to a second review by the highest court at the option of the litigants. This last statement of course assumes an intermediate court of first-rate competence which has the full respect of bench, bar and public. The Commission must assume this, and has assumed it in all its deliberations and in its proposals.

Obviously such a basic allocation of primary functions, and hence of case load, would considerably reduce the burden of the Supreme Court, which now of necessity must handle both kinds of cases. This relief of case load alone would serve the primary legislative purpose in authorizing the creation

of the Court of Appeals. But there is more than simply relief of case burden in this. There is also allocation to the highest court as its primary case load of precisely that type of case the very nature of which requires the greatest opportunity for deep, reflective and relatively unhurried consideration by our highest court.

The next problem was to devise a system whereby in practice cases could be readily differentiated and routed to their appropriate courts. One way to attempt this is to lay down rigid statutory divisions of jurisdiction between the two courts based upon the subject matter content of cases. This assumes that the subject matter content of a case, "contract," "title," "revenue," etc., is itself a likely indicator of whether the case has or has not this added dimension of general significance. Many states have used this means. The Commission studied with care and interest the statutes of these states and their experience. The clear impression gained was that such an approach is largely an ineffectual one. In the first place, as lawyers will readily recognize, the subject matter content of a case is by no means a reliable guide to whether it has this added dimension of significance. The "landmark" case is just as likely to arise out of simple subject matter involving a small amount of money as it is to arise out of a complicated situation involving a fortune. Secondly, it was noted that in some states problems of jurisdictional interpretation have led to confusion and delay. The variety of subject matter categories utilized by different states and the lack of agreement among them as to a substantial common core of categories is perhaps the best indication that attempts to capture the elusive quality of the general jurisprudential significance of a case by means of its subject matter content are essentially off the mark.

The Commission came to the conclusion that this quality about a case can only be detected with predictable reliability after the case has taken shape in litigation--and that consequently the detection must be left fundamentally to the highest court itself on a case-by-case basis. This approach is the central feature of our jurisdictional proposal, and an understanding of this is the key to understanding the whole of the proposal for the utilization of the two courts of the Appellate Division which is embodied in the draft bill. That proposal will now be summarized.

With but one exception (later to be discussed) every case, civil or criminal, appealed from either of the trial divisions is initially appealed directly to the Court of Appeals. So far as its jurisdiction--its power to decide these cases--is concerned, it is fully empowered by the proposed statute to decide finally all cases so appealed. However, the Supreme Court is empowered either on its own motion or on motion of either party, and either prior to or after determination of any such case by the Court of Appeals, to call the case up ("certify" it) for final determination by the Supreme Court. The statute lays down specific criteria (not jurisdictional in nature) for the guidance of the Supreme Court in determining whether to call the case up either before or after determination by the Court of Appeals. All but one of these criteria are designed to express the notion of general jurisprudential significance which, as indicated, provides the basis for the desired fundamental division of labors between the two courts. Thus the Supreme Court is directed that it should ordinarily call up to itself, for hearing and determination, either before or after determination by the Court of Appeals, all cases which appear to it to involve: (1) subject matter of significant public interest (e.g., the

"brown-bagging" case), or (2) legal principles of major significance to the jurisprudence of the State (e.g., the charitable hospitals' tort immunity case).[3] Additionally, the Supreme Court is directed that it should ordinarily call up to itself for second review any decisions of the Court of Appeals which appear to be in conflict with any of its own decisions. It should be noted at this point that a prior call-up of the case under these provisions will not necessitate any further perfecting of his appeal by a party. His appeal has been perfected to the Appellate Division, where either court has complete jurisdiction to decide it. If the case is called up to the Supreme Court without prior determination by the Court of Appeals, counsel for the parties simply present themselves for oral argument at the appointed place and time before the Supreme Court rather than the Court of Appeals.

The above arrangement for appeals is the basic one in the Commission's proposal. It is confidently felt that were it the sole arrangement, the State would have a workable system wherein the Supreme Court would effectively accomplish the division of appellate case load along the functional lines herein suggested. The Commission feels strongly that the flexible and discretionary aspects of the arrangement are the best means to accomplish the desired ends. However, believing certain categories of cases require special attention, a limited number of variations is proposed. These variations will now be discussed.

It was stated that there is one exception to the provision of the basic arrangement that all cases be appealed directly to the Court of

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[3] The "brown bagging" case is D & W, Inc. v. Charlotte, 268 N.C. 577 (Nov. 1966); the hospital case is Rabon v. Hospital, ___ N.C. ___ decided by the N.C. Supreme Court 20 January 1967.

Appeals in the first instance. That exception is cases in which a sentence of death or life imprisonment is imposed. Under the proposal, these cases would be appealable of right directly to the Supreme Court. Judging by the principle of general jurisprudential significance, not all such cases would qualify for review by the highest court. To provide for direct, by-pass appeal in these cases thus departs from the key principle of the over-all proposal. However, the reason seems obvious. Such cases would almost inevitably reach the highest court under the basic discretionary call-up arrangement. It is important to have as a part of the organic law of the State the absolute right of a person under these ultimate sentences to appeal directly and in the first instance to the Supreme Court.

The second variation from the basic arrangement involves provision for an absolute right of appeal after decision in the Court of Appeals to the Supreme Court for second review in a limited category of cases. These are cases: (1) directly involving a substantial question arising under the Constitution of the United States or of this State; (2) in which there is a dissent in the Court of Appeals; and (3) involving review of a decision of the North Carolina Utilities Commission in a general rate-making case. Each of these classes of cases is thought so typically demanding of final adjudication by our highest court that the discretionary pattern of routing is varied in favor of an absolute right to double review for them. The reasons are different for each. Cases involving a constitutional question will invariably have the added dimension of general jurisprudential significance which is the key to discretionary routing. For this reason they will ordinarily be called up by the Supreme Court in its discretion prior to review in the Court of Appeals. However, if for some reason they are

not, it is thought desirable to allow a litigant the absolute right to have final adjudication at the highest level. It should be noted that this subject matter categorizing is the only one in the entire proposal which may engender truly jurisdictional problems of interpretation. It is believed that these will be minimal in practice. Next, the provision for an absolute right of second review in cases wherein there is a dissent in the Court of Appeals lies outside the principle of one appeal. It is justifiable in the thinking of the Commission on another principle--the general uneasiness on the part of litigants and their counsel over any split opinion. Here the split would be absolutely even if it be considered that the dissenting appellate judge and the trial judge are ranged against two appellate judges--all within the General Court of Justice. The relative infrequency of such dissents is thought to justify this frank concession to the attitudes indicated. Finally, the special quality about the general rate-making cases, aside from the almost invariable general state-wide significance which they will have, is the fact that (as developed in detail elsewhere in this report) they originally enter the court system at the Court of Appeals level. Consequently, it is felt that this additionally justifies putting them in this special and limited category.

One final variation from the basic arrangement is important. It proceeds upon a different principle than that of insuring a basically functional division of the total appellate case load between the two appellate courts. It is obvious that such a functional division of the case load will decrease the present case load of the Supreme Court. This is desirable, and is one of the most important goals of the proposal. However, there is the possibility that from time to time under the basic

arrangement for routing cases here proposed, the case load of the Court of Appeals may become burdensome at a time when that of the Supreme Court is relatively light. In such a situation, there should be an opportunity and indeed a mandate upon the Supreme Court, acting as a "load balancer," to reach down and relieve the Court of Appeals by taking a certain number of cases in process of appeal without regard to their general jurisprudential significance. Provision for such a procedure is made in the Commission's proposal in the form of a directive to the Supreme Court to call up cases on appeal prior to their hearing by the Court of Appeals when (1) delay in final adjudication is likely to result from failure to assume initial cognizance, thereby causing substantial harm, and (2) expeditious administration of justice--due to congested dockets in the Court of Appeals--demands earlier adjudication.

It should be said here that the Commission's proposals necessarily impose a heavy duty and responsibility on the Supreme Court. It must be alert and sensitive in fulfilling its duty of selecting for decision the "significant" type cases. It must also willingly assume the role, when circumstances dictate, as diligent and faithful "load balancer." The tradition of our Supreme Court for unstinting work and a high sense of public duty is to the Commission an ample guarantee of its effective administration of the proposed system of appeals.

To recapitulate: (1) all cases appealed from either the district or the superior courts are initially appealed directly to the Court of Appeals, except cases involving sentences of death or life imprisonment; (2) death and life imprisonment cases are appealed directly to the Supreme Court; (3) while any case is pending on appeal to the Court of Appeals, it may be brought up before the Supreme Court on petition of a litigant or on the

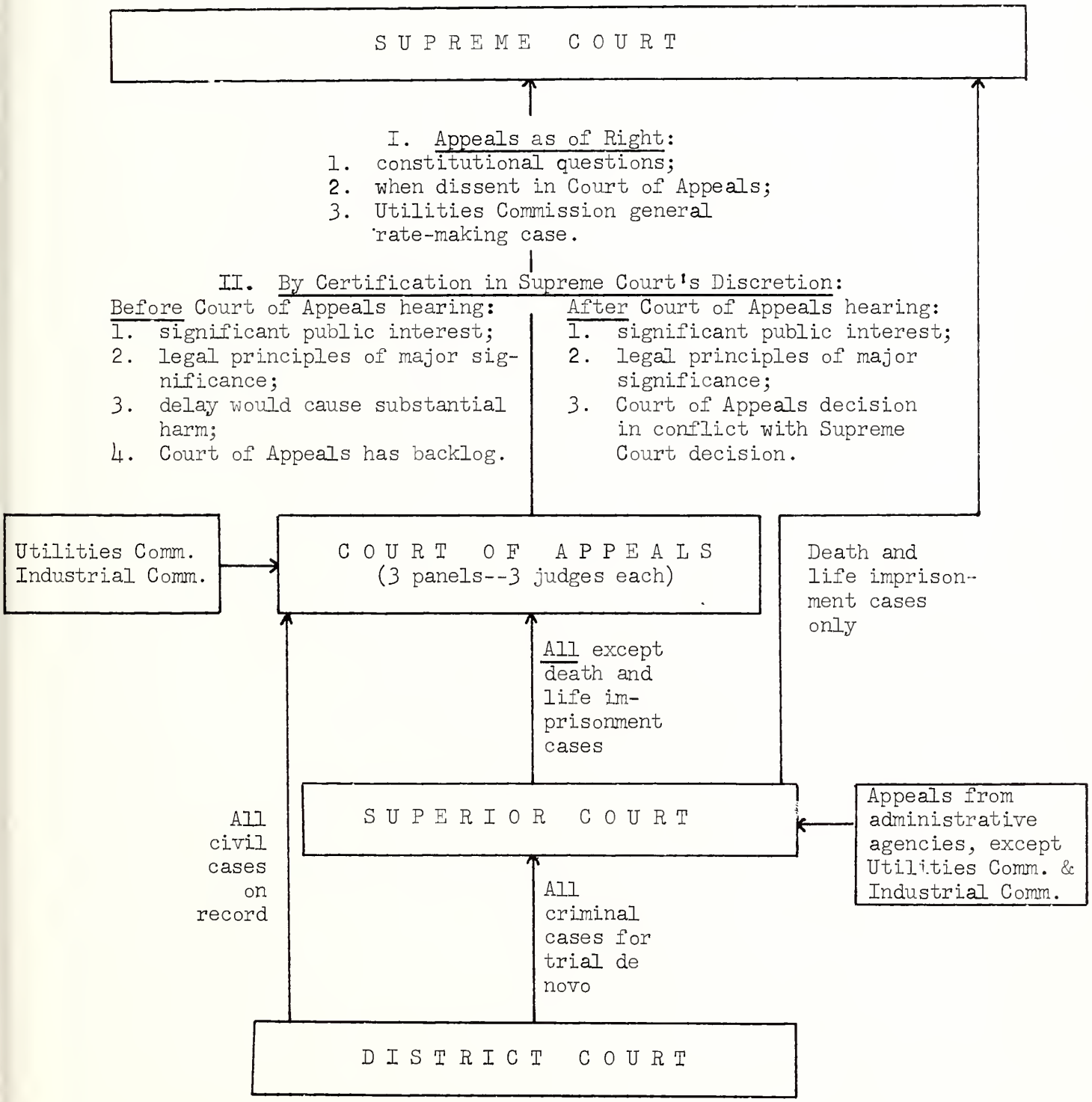
Supreme Court's own motion; (4) the Supreme Court is under a mandate to bring such cases up for review in the first instance if in its discretion it considers the case to be one having general jurisprudential significance, without regard to its subject matter content; (5) after any case is determined in the Court of Appeals, the Supreme Court is under a mandate to bring it up for second review on its own motion or that of a litigant if at this juncture it considers in its discretion that the case has assumed the significance above noted; (6) without regard to the foregoing, any litigant may as of right appeal from any decision of the Court of Appeals rendered in a case which (a) directly involves a substantial constitutional question, or (b) gave rise to a dissent in the Court of Appeals, or (c) involves review of a general rate-making decision of the Utilities Commission; (7) without regard to case content or general jurisprudential significance, the Supreme Court is under a mandate to relieve the Court of Appeals of portions of its case load when the expeditious administration of appellate justice so requires.

Finally, certain features of this proposal should be emphasized. Despite the discretion reposed in the Supreme Court to control the actual routing of particular cases on appeal, two critical features of appellate review are inviolate in the proposal: (1) there is an absolute right of appeal in every case beyond the trial court level to one of the courts of the Appellate Division, and (2) the Supreme Court has the power finally to determine any case tried in the General Court of Justice, and the means are available to any litigant to seek invocation of that power in any case.

It has been well demonstrated in practice that such a system of appeals, based essentially on leaving case routing to the courts themselves under flexible legislative guidelines provides the best means for insuring a

GENERAL COURT OF JUSTICE

Proposed Routes of Appeal*



*See accompanying text for detailed explanation.

proper division of labors between appellate courts and hence an efficient overall administration of justice at the appellate level.

Review of Decisions of Administrative Bodies. At present judicial review of the decisions of administrative bodies is initially undertaken at the superior court level. A 1963 attempt of the General Assembly (G.S. 62-99) to make certain decisions of the Utilities Commission reviewable initially by the Supreme Court was ruled unconstitutional by the Supreme Court in State ex rel. Utilities Commission v. Finishing Plant, 264 N.C. 416 (1965). The Commission agrees generally that review of such decisions should continue to enter the judicial system at the superior court level, with two exceptions, each based on the importance of the subject matter and the need for an early decision. These exceptions are final orders or decisions of the North Carolina Utilities Commission and the North Carolina Industrial Commission. The Courts Commission recommends that these cases be initially reviewed by the Court of Appeals. Thereafter they would be subject to review by the Supreme Court in accordance with the general rules previously described, except that Utilities Commission cases would be appealable as of right to the Supreme Court if they embraced a general rate-making issue (or, of course, if they fell in the "dissent" or "constitutional issue" category).

Review of Interlocutory Decisions. The review of interlocutory orders or judgments of the superior court (or of the district court in a civil action) will remain reviewable to the same extent as at present. The language of G.S. 1 - 277 with its voluminous case law is brought forward substantially verbatim to accomplish this. Interlocutory decisions of the Court of Appeals, including orders remanding the case for a new trial or

for other proceedings, should be certified for review by the Supreme Court only if failure to certify would cause a delay which would probably result in substantial harm.

Issuance of remedial writs by the Appellate Division. The power of the Supreme Court to issue writs of habeas corpus, according to the practices and procedures set forth in the General Statutes, Chapter 17, and to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, is affirmed. This power is extended to the Court of Appeals, to be exercised in each court by one judge or by such number of judges as the Supreme Court shall by rule determine.

D. Appellate Practice and Procedure

Article IV, Sec. 11(2) states "The Supreme Court shall have exclusive authority to make rules of procedure and practice for the appellate division." This is broader than the pre-1962 constitutional authority of the Supreme Court, since it specifically includes rules for the Court of Appeals. To some extent this lessens the burden of the Commission--and the General Assembly. It increases the burden of the Supreme Court, however, as its present rules, written for a one-level Appellate Division, are not adequate for a two-level division or for the jurisdictional arrangement of case loads between the two levels described in the preceding section of this report. The Supreme Court will have opportunity after the passage of this proposed legislation, aided of necessity by the first appointees to the Court of Appeals, to draft new rules of procedure and practice and promulgate them to bench and bar prior to the date the new court hears its first appeal.

Upon activation of the Court of Appeals and the concurrent effectiveness of the two-level appellate jurisdictional arrangement, there will be

a period of a few months in which special, temporary rules will be required for the processing of cases initiated under the present system and finally disposed of under the new system. The detailed procedures to be followed during this transitional period do not lend themselves readily to statutory solution. The Commission accordingly recommends that the Supreme Court, to the extent necessary, and subject to broad guidelines discussed in the next section of this report, promulgate special temporary rules to govern the appellate disposition of cases during this transitional period.

Rules of procedure and practice in the trial division under the Constitution have been and continue to be the responsibility of the General Assembly. When the General Assembly has failed to act, the Supreme Court, under the present G.S. 7-20 and -21, has been authorized to fill the procedural void. The Commission recommends continuation of this rarely-used authority.

E. Activation Date of Court of Appeals; Transitional Provisions

A number of competing considerations entered into the Commission's recommended activation date for the Court of Appeals. On the one hand the Commission realized that the problems of obtaining proper logistical support for the Court and drafting workable appellate rules to fit the new appellate jurisdictional scheme require under normal circumstances a lead time of many months, to be conservative. On the other hand, the Commission was acutely aware of the need, more pressing this year than ever before, of relief for the Supreme Court at the earliest practicable date. In the end the Commission gave more weight to the latter consideration than to the former, and picked the dates of 30 September 1967 - 1 October 1967 (a

weekend) as the dates for termination--in general--of the old appellate system and activation of the new. This choice presupposes early passage of this legislation by the General Assembly, thereby giving the Governor ample opportunity to select qualified judges for the Court of Appeals bench, and giving the Supreme Court sufficient lead time in which to draft and promulgate the necessary changes in, and supplements to, the rules of procedure and practice for the Appellate Division.

To guide the Supreme Court and simplify its task of drafting rules to cover the disposition of cases caught in the appellate process during the transitional period, the Commission recommends the following statutory guidelines:

(1) cases appealed to the Supreme Court on or before September 30, 1967, will be retained by the latter for disposition in accordance with the laws and rules applicable on that date;

(2) cases appealed to the Appellate Division (except capital and life imprisonment cases) on and after October 1, 1967, will be filed with the Court of Appeals for disposition in accordance with the new appellate jurisdiction statute; and

(3) civil cases tried in the district court in which notice of appeal to the superior court has been given on or before September 30, 1967, and which have not been finally disposed of in the superior court on that date, will be disposed of as provided by Supreme Court rule, the jurisdiction of the superior court over civil appeals from the district court continuing to the extent necessary for this purpose.

F. Compensation, Retirement and Recall of Justices and Judges

Article IV, Section 6A, of the Constitution (as amended in 1965)

provides that "The General Assembly may provide for the retirement of members of the Court of Appeals and for the recall of such retired members to serve on that Court in lieu of any active member thereof who is, for any cause, temporarily incapacitated." This addition merely parallels the language of Section 6 with respect to justices of the Supreme Court.

The Commission agreed from the beginning that the Court of Appeals should enjoy a status in the judicial hierarchy closely akin to that of the Supreme Court. It accordingly had little difficulty in arriving at provisions with respect to compensation and retirement benefits designed to support that status. While no specific figure for compensation is recommended, the Commission feels that the compensation of the justices of the Supreme Court should be raised to a figure more closely approaching their responsibilities, and that the compensation of the judges of the Court of Appeals should be in a comparable range, befitting their only slightly-lesser responsibilities as members of the Appellate Division bench. The exact figures will be inserted in the Budget Appropriations Act.

The Commission recommends in general that the retirement, retirement compensation, and recall for temporary service provisions of the present law concerning justices of the Supreme Court be extended to include the judges of the Court of Appeals. The Commission initially anticipated a simple amendment to the present law to accomplish this purpose. A close examination of the present statutes destroyed any hope for such an easy solution. The current sections of law (primarily Article 6A of Chapter 7, beginning with G.S. 7-39.1 plus G.S. 7-50, -51, -51.1, and -51.2) contain conflicting, confusing, inconsistent, ambiguous and complicated provisions which embrace not only the Supreme Court justices, but the superior court

judges as well, plus certain nonjudicial officials. For the sake of clarity alone, a complete redrafting of these provisions was deemed necessary. The subject matter was divided into one Article dealing with the Appellate Division, and another dealing with the judges of the superior court.

It was the intention of the Commission in rewriting these provisions to make no change which would affect any judicial official adversely, but the rewritten provisions are more than a codification of existing law. Of necessity several minor changes in substance or policy had to be made, and some provisions no longer considered appropriate were eliminated.

Appellate Division Retirement. Service as a judge of the Court of Appeals is made equivalent to service as a justice of the Supreme Court, for the purposes of entitlement to retirement under the existing "age 65 and 15 years total judicial service," the "age 65 and 12 consecutive years on the appellate bench," and the "age 75 and 8 consecutive years on the appellate bench" clauses. Consistent with the provisions of G.S. 7A-341, service as Administrative Officer of the Courts is equivalent to service as a superior court judge for retirement entitlement under the "65 and 15" provision. The "24 years service" provision is also continued and expanded to include the judges of the Court of Appeals and the Administrative Officer of the Courts. Time served as Attorney-General, useable under certain circumstances under present law for judicial retirement, is deleted from the Article, as is time served as a superior court solicitor subsequent to January 1, 1971. The Commission felt that, since solicitors are not members of the judiciary and are covered by a separate retirement system, they should be gradually phased out of a system designed for the retirement of

appellate court judges. The date chosen will affect no solicitor in his present term; and since this "tacking" privilege is an inchoate benefit of value only after eight years subsequent service as a judge, the actual loss to any solicitor now in office is highly speculative, if not nonexistent.

The provisions for recall to temporary service were brought forward unchanged, except for extension to members of the Court of Appeals. A justice or judge can be recalled only to the court from which retired (a constitutional provision). The $100 per week compensation for a recalled judge is also continued since, while this sum is admittedly inadequate for the services rendered, it permits emergency judges of ages 65 to 72 to serve up to 15 weeks per year without loss of Social Security benefits.

Retired justices are recalled by the Chief Justice; retired judges by the Chief Judge of the Court of Appeals. The procedure is triggered, as now, by a physician's certificate of temporary disability of an active serving justice or judge.

Retirement for total and permanent disability after eight years service is continued. Such retirees are not subject to recall.

Finally, the compensation of retired justices and judges remains set at two-thirds of the annual salary of the occupant of the office from which the justice or judge retired.

Superior Court Division Retirement. While technically not a part of the Court of Appeals bill proper, redrafting of the current statutes concerning retirement of Appellate Division justices and judges made necessary a concurrent and parallel rewriting of the statutes concerning retirement of superior court judges. The intention of the Commission here was

essentially the same as with the Appellate Division redraft; clarity first, with some incidental substantive changes in the interest of overall consistency and orderliness. Again, service as Administrative Officer of the Courts is treated the same as service as a superior court judge. The "age 65 and 15 years service" provision is retained; a new "age 68 and 12 years service" provision is added; and the "24 years total service" proviso is retained. Credit for "tacking" purposes of time served as Attorney-General, or as a superior court solicitor subsequent to January 1, 1971, is deleted for the reasons noted earlier under the section on Appellate Division retirement. Retirement for total and permanent disability after eight years service is retained. Retirement compensation, as in the case of the appellate bench, remains unaffected.

One new provision of some importance is added. The physical wear and tear of being a trial judge of a court of general jurisdiction, especially under North Carolina's system of rotation of superior court judges, is considered to be such that an age limitation should be imposed. Conceding that North Carolina has several fine trial judges nearing (or beyond) the age of 70, the Commission nevertheless feels that this is an appropriate age at which retirement should become mandatory. This new provision is coupled with two saving clauses: no incumbent shall be forced to retire until the end of the term for which he is elected, and no judge shall be required to retire until he is eligible for retirement compensation under other sections of this Article. These saving clauses will protect the retirement equity, vested or unvested, of all judges now in office. Admittedly they may operate unevenly, retiring some judges at or near age

70 and some few others at a date considerably later, but apparently there is no constitutional sanction for forcing retirement of a judge in mid-term.

III. JURORS - SELECTION, EXEMPTIONS, AND RELATED PROCEDURES

A. Background; Inadequacy of Present System

Many of our present laws concerning preparation of lists of prospective jurors, selection of jury panels, and exemptions from jury service were enacted a century or more ago. Over the decades there have been patchwork amendments, many of which served merely to complicate and burden the law rather than to modernize it. The result is a jury selection system which, through one defect or another, operates under serious handicaps. The new Judicial Article and the implementing Judicial Department Act of 1965, with their requirements for statewide uniformity and State responsibility for the operating expenses of the judicial system, make it clear that these handicaps can no longer be tolerated.

One of the shortcomings of our present jury system is the procedure for preparation of jury lists. In nearly all of the counties of the State lists of prospective jurors are, by statute, prepared by the county commissioners. In many counties the commissioners no longer have the time for proper performance of this tedious, non-policy-making function. Public confidence in the administration of justice calls for removal of the preparation of lists of prospective jurors from the county commissioners, and vesting this duty in a continuing body which can give it the detailed attention it deserves, unfettered by political considerations.

A second major shortcoming of our present jury selection procedure is the large number of exemptions (not to be confused with disqualifications or personal excuses) from jury service. Nearly three dozen categories of

exemptions, totaling many thousands of otherwise eligible citizens, currently exist in our General Statutes.* Some of these exemptions were placed in the law scores of years ago. Whatever may have been the justification for the particular exemption when adopted, it has in nearly all cases ceased to exist. Few, if any, of the current exemptions bear any measurable relation to the public health or safety. Their variety and volume is so great, moreover, as to raise a doubt in some minds as to whether the constitutional right to a trial by a jury of one's peers is infringed. Such an issue has in fact been raised in this State, and has recently been litigated. Notwithstanding the result in that case, it must be conceded that existing exemption statutes deprive criminal defendants, as well as civil litigants, of access in the jury box to a large cross section of the community. Such wholesale exemptions are likely to be viewed with increasing concern by the courts.

Having concluded that the procedures for preparation of the jury list should be modernized, and that exemptions from jury service should be drastically curtailed, if not altogether eliminated, the Commission examined General Statutes Chapter 9, Jurors, with a view to making the necessary changes therein. On close inspection, Chapter 9 was seen to be in need of a complete overhaul. Many sections contain outdated language; other sections are outdated in substance; and a large number of local act modifications to general law sections have destroyed uniformity of application.

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*The majority of the exemptions are contained in G.S. 9-19, but G.S. 90-45 exempts dentists, G.S. 90-150 exempts chiropractors, and G.S. 127-84 exempts "contributing" members of the national guard.

Accordingly, in the interest of clarity, simplicity, uniformity, and economy the Commission deemed it advisable to rewrite Chapter 9 in its entirety. Such a course has resulted in a number of changes in substance and procedure other than the two major changes already noted, but these additional changes for the most part merely conform the overall subject matter to the major changes, and are not considered of sufficient substance to merit independent treatment in this report.

B. Essential Principles of a Fair and Efficient Jury Selection System

Before embarking on the revision of Chapter 9, the Commission deemed it advisable to formulate a set of principles for its guidance in designing a fair and efficient system for the selection of jurors. These principles are:

1. Jury service is an obligation of citizenship in a democracy.
2. The burden of service should fall equally on all qualified citizens.
3. The selection procedure should be well publicized and above suspicion.
4. Consistent with the requirement that it be demonstrably honest and impartial, the selection process should be simple and inexpensive.
5. Persons selected for jury service should be given adequate notice in order that they may have sufficient time in which to arrange their affairs in anticipation of service.
6. Excuses from service should be granted only for compelling personal hardship, or when requiring service would be clearly inimical to the public health or safety. This determination should be made by a judicial official.
7. Applications for excuses from service should be heard, as a matter

of convenience and administrative efficiency, in advance of the convening of the court.

8. To promote economy of manpower, pooling of jurors, when practicable, should be authorized.

C. Procedure for Selection of Jury Lists and Jury Panels

In relieving the board of county commissioners of the function of preparing a list of prospective jurors, the Courts Commission felt that this purely ministerial task should be given to a new and independent body, to be designated a jury commission. To insure its responsibility to the electorate the members of the commission should be appointed by elected officials, and they should serve for short terms. To facilitate continuity, they should be eligible for successive appointments if they have served satisfactorily. The Commission accordingly recommends a jury commission of three persons, one member appointed by the board of county commissioners, one by the clerk of superior court, and one by the senior regular resident superior court judge. They should serve for two-year terms. Their compensation would be fixed by the board of county commissioners, in its discretion, but probably on a per diem basis rather than a salary, since in most counties their duties should not take more than a few days or weeks each biennium. Clerical assistance, as needed, should be furnished to the commission by the clerk of superior court.

The jury commission should prepare a list of prospective jurors biennially. To prepare the list more often would be unnecessarily expensive; to prepare it less frequently, in this time of increasingly transient populations, would result over a period of years in a list with a large

percentage of names of persons who could not be located, or who have died, or who for various other reasons are not available for service.

To give the counties time to prepare for the new procedure, it should be made effective January 1, 1968. The first jury commissioners should be appointed not later than October 1, 1967, and their work should be completed not later than 30 days before the beginning of the biennium on January 1st, in order to provide ample time for the summoning and excusing procedure (outlined in a later section of this report) to work effectively before the first jury sessions of court in January, 1968.

The sources of names available to the jury commission should include the tax lists of the county (the commonest source of names at present) and the voter registration lists, and in addition any other source deemed by the commissioners to be reliable. Both tax and voter registration lists should be used, since the use of the former only would result in the omission of the names of married women, for example, as well perhaps as other blocks of eligible citizens. Some duplication of names will occur, but this can be minimized by alphabetizing the names after their selection. Not all names from any one source need be used, provided a uniform systematic selection method (e.g., every third name) is used. The list when completed should contain at least three times as many names as were drawn for jury duty in all courts of a particular county in the preceding biennium. A larger number of names would be a waste of labor; a smaller number might unduly limit the element of chance, an essential feature of an impartial selection process.

Consistent with its belief that the burden of jury service should be shared by the largest possible number of citizens, the Commission recommends

disqualification for service for the following reasons, and none other: non-citizenship of the State, non-residence in the county, under the age of 21, physical and mental incompetence, conviction of a felony or having entered a plea of nolo contendere to an indictment charging a felony, ad judged non compos mentis, and service within the preceding two years. The last disqualification is inserted to minimize hardship on any individual, and to eliminate "professional" jurors. These are, broadly speaking, the disqualifications of current statutes and case law and, in the opinion of the Commission, cannot reasonably be decreased. Unqualified persons are subject to challenge for cause in the event they are inadvertently included in the original list by the jury commission.

The present equipment and ritual for drawing a jury panel, involving hundreds (sometimes thousands) of name-bearing scrolls, a child under the age of ten, a two-compartment, two-lock, two-key jury box, is over-elaborate, expensive, and inefficient. After studying methods for drawing juries in other jurisdictions, the Commission concluded that a simpler, less expensive, and more nearly tamper-proof system could easily be devised. It recommends the following: names from pre-existing, reliable sources (the tax and voter registration rolls primarily) are copied on 3 x 5 cards, alphabetized, numbered consecutively, and deposited with the register of deeds; small discs or markers, similar in size, weight and appearance, each bearing a number corresponding to a number on the jury list, are kept by the clerk of superior court in a locked box; when a panel of jurors is required, the clerk publicly withdraws from the box a quantity of discs or markers equal to the number of jurors desired; the numbers on the discs so withdrawn are given to the register of deeds, who

matches the numbers received with the numbers on the cards, thereby creating a list of names of prospective jurors, to be summoned by the sheriff.

To assure impartiality in the selection of names placed on the jury list (the 3 x 5 cards) the list would be open to public inspection, and the jury commission would be required to file with the list a statement of the sources used and the procedures followed in preparing the list.

The number of jurors to be drawn for a particular session of court would not be inflexibly specified by statute, but would be left up to the discretion of the senior regular resident superior court judge for superior court sessions, and the chief district court judge for district court jury sessions. Pooling of jurors, in the interest of convenience and economy, would be authorized (but not required) between and among various jury sessions of court.

D. Excusing Prospective Jurors from Jury Service; Procedure

No single facet of the present procedures for jury selection gave the Commission as much difficulty as the lengthy list of statutory exemptions from service. The Commission examined each occupational grouping on this list, and consistent with its basic premise that jury service is a solemn obligation of all qualified citizens, concluded that no single occupation merited a blanket exemption. The Commission recognized that members of a few occupations, closely allied to the public health or safety, might merit relief from jury service on occasion on an individual basis. To exempt in advance all members of any occupation, however, would be unfair to other occupations, to litigants, to the general public, and to individual members of the exempted occupation who might desire to assume their legitimate portion

of one of the burdens of citizenship. The Commission accordingly recommends that the number of statutory exemptions from jury service be reduced to zero, thus restoring the tradition of trial by a jury of one's peers to its fullest scope.

To take care of those relatively infrequent occasions when relief from jury service is warranted, the Commission recommends a procedure by which individuals, of whatever occupation, may be excused upon a showing of (1) compelling personal hardship, or (2) that requiring their service would be contrary to the public health or safety. To facilitate the convenience of those who desire to apply for an excuse from service under these standards, provision is made for a superior or district court judge (depending on the particular district) to hear applicants for excuses prior to the date of the session of court for which the applicant has been summoned. The summons, which must be issued at least 15 days prior to such date, must inform the prospective juror of the time, place and procedure for applying for an excuse. Persons excused for any particular session of court may, in the judge's discretion, be required to serve at a subsequent session of court.

The pre-trial excuse procedure described above is in addition to the traditional power of a presiding judge to excuse prospective jurors at the beginning of a session of court.

E. Grand Jurors

The Commission recommends no major changes in current law with respect to the drawing of jurors for the grand jury. G.S. 9-25, which authorizes in many counties the selection of nine new grand jurors each six months, and thus facilitates continuity and experience, is recommended for extension

to all counties. On those occasions when new grand jurors are to be chosen, nine numbers will be added to the numbers ordinarily drawn from the jury box. The grand jury's authority to inspect jails, workhouses, and county homes is specifically continued.

F. Miscellaneous Changes

In modernizing the language and procedures of Chapter 9, various other relatively minor changes have been recommended. A few illustrations will suffice to indicate the general nature and extent of these: the term "talesmen," together with its "freeholding" requirement, has been abolished, but the concept continued in the term "supplemental jurors"; challenges for cause for failure to pay taxes have been eliminated; peremptory challenges in criminal cases have been transferred from Chapter 15 (Criminal Procedure), in the interest of organizational integrity of subject matter; and the three oaths currently prescribed for petit jurors have been combined into one. Sections dealing with various other matters such as special venires, challenges for cause, and alternate jurors, were brought forward substantially unchanged in substance.

IV. SOLICITORS AND SOLICITORIAL DISTRICTS

A. Background; Problems of Present System

Article IV, Section 16 of the North Carolina Constitution provides:

> (1) Solicitors. The General Assembly shall, from time to time, divide the State into a convenient number of solicitorial districts, for each of which a Solicitor shall be chosen for a term of four years by the qualified voters thereof, as is prescribed for members of the General Assembly. When the Attorney General determines that there is serious imbalance in the work loads of the solicitors, or that there is other good cause, he shall recommend redistricting to the General Assembly. The Solicitor shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe.
>
> (2) Prosecution in District Court division. Criminal actions in the District Court division shall be prosecuted in such manner as the General Assembly may prescribe by general law uniformly applicable in every local court district of the State.

Subsection (1) is not significantly different from the pre-1962 version concerning solicitors, except perhaps in that the present language authorizes the Attorney General to require the assistance of a solicitor in handling an appeal from the superior court to the Appellate Division.

In the last decade or so problems inherent in the system--the compensation, the district boundaries, the steadily mounting but widely divergent case loads, its "part-time" status--have become more evident. Concern with these problems found expression in the Senate in the 1965 session, when a floor amendment which would require the solicitor to discontinue the private practice of law and become a full-time employee of the State passed second reading. Assurances from legislative members of the Courts Commission that the solicitor's office would be the subject of recommendations for comprehensive

legislation by the Commission to the 1967 legislature were effective in preventing passage of the amendment.

The basic difficulty with the office of solicitor over the decades has been that no matter where the district lines were drawn, or how many districts were created, it has not been possible to balance--even approximately--the work load among solicitors. Over the years two devices have been used to attempt to compensate for the imbalance in work loads. The first of these gave the solicitor an expense allowance, which, in the geographically smaller and usually busier districts actually amounted to a salary supplement, since comparatively little travel expense was involved. The second consisted in increasing the number of solicitors -and solicitorial districts--from time to time. (Until 1955 judicial and solicitorial districts were coterminous--21 each. Since that time judicial districts have grown to 30, and solicitorial districts to 24.) Neither of these measures has been particularly effective. Together with the solicitor's "part-time" status, they have operated in a number of ways to perpetuate and gradually worsen an already unsatisfactory situation:

- Allowing the solicitor to practice civil law often confronts him with a possible conflict of interests. Prosecuting a traffic violation, for example, may require the solicitor to deny himself employment in a civil action arising from the same violation. Similarly, on more than one occasion a solicitor has found himself scheduled to try a civil suit in one court when he was scheduled to prosecute the superior court criminal docket in another.
- In districts in which the case load exceeds the capacity of the

solicitor, assistant solicitors have sometimes (but not always) been provided by the county or counties in the district. On occasion lack of sufficient prosecutorial manpower has led to delays in the prosecution of the dockets. The quality of the administration of criminal justice has accordingly at times varied from district to district.

- In only 15 counties are the judicial and solicitorial districts coterminous. Some judicial districts are served by three or more solicitors; and some solicitorial districts overlap parts or all of two or more judicial districts. This confusing arrangement has led to conflicting sessions of court - occasions when the solicitor is required to be prosecuting the docket in two districts at once.
- Disparities in work loads continue to grow. For the fiscal year ending June 30, 1966, the number of solicitorial days in court varied among districts from a high of 260 days to a low of only 52 days. This figure of course does not take into account the many hours and days of office time when the solicitor is busy advising law enforcement officials, reading petitions and records, preparing appellate papers, etc., but these duties probably vary in time consumed roughly in proportion to the days-in-court figures. Since the compensation is the same for all solicitors, the inequity is obvious.
- In recent years decisions of the federal courts greatly enlarging the scope of the writ of habeas corpus have added an extremely heavy burden to the duties of the solicitor. Post conviction hearings, which require the solicitor to read many prisoner petitions and prepare answers in each case, have increased many fold. The busier a solicitor is obtaining convictions, the more post conviction proceedings he must process later.

B. Proposed Reorganization of the Solicitorial System

After much discussion, and consultation with the solicitors themselves, the Commission concluded that the problems of the present system were such that only a fundamental restructuring would achieve a satisfactory solution. This restructuring includes three major changes in the present system:

1. All solicitors (and assistant solicitors in numbers deemed necessary by the General Assembly) should become full-time State employees, none being allowed to engage in the private practice of law.
2. Solicitorial districts should be increased in number from 24 to 30 to match the judicial districts (for both levels of the trial courts), with the solicitorial and judicial districts being identical in all cases.
3. Solicitors should be responsible for prosecuting all crimes, both felony and misdemeanor, at both levels (superior and district) of the trial divisions.

These changes are interdependent, and must be adopted as a package. Adoption of one or two, without all, will not achieve the desired results. Adoption of all necessarily entails the concurrent abolition of the present district court prosecutorial system.

The key recommendation calls for consolidation of the prosecutorial function in both trial courts in one person--the solicitor. At the present time, there is no judicial district in which the solicitor, under this arrangement, would not be fully employed at all times. This disparity in workloads would be handled by allocation of full-time assistant solicitors,

in the numbers per district deemed necessary by the General Assembly. Some districts will require only one; other districts may require several. If a district requires a part-time assistant, provision is made for assignment of an assistant from another district, or for appointment by the solicitor, on authorization by the Administrative Officer, of a qualified local attorney to assist temporarily.

Making the solicitorial districts identical with the judicial districts, as they were prior to 1955, will eliminate much confusion which now exists, and permanently solve the problem of conflicting sessions.

Placing all solicitors on the State payroll as full-time officials will do away with the disparity in income which now results in fact from disparity in workloads, office expenses, and in time available for private practice. At the same time the present $3,000 expense allowance can be eliminated, and all solicitors and their assistants reimbursed for travel and subsistence expenses to the same extent as State employees generally. A substantial increase in the present annual salary of $12,000 will of course be necessary, not only to compensate for the loss of income from private practice, and for loss of the expense allowance, but also to reflect the added importance and responsibilities of the office, with a view to attracting and holding within the solicitorial ranks career attorneys of the highest professional competence.

All the solicitors of the State entered upon a new four-year term of office in January of this year. Implementation of the proposals outlined above, in mid-term, would present insurmountable difficulties. A constitutional issue might be raised by changing district lines in mid-term, since

solicitors must be elected by the qualified voters of their districts; the solicitors already in office would find their "conditions of employment" changed in "mid-contract" so to speak, without adequate notice; and the nine full-time district court prosecutors and assistant prosecutors already in office would find their four-year terms shortened, also without adequate notice. Accordingly, the Commission recommends that these changes be enacted now, to take effect January 1, 1971.

Adoption, effective in 1971, of the long range plan for the office of solicitor, as recommended herein, will require certain conforming amendments to the Judicial Department Act of 1965. Specifically, the office of district court prosecutor and assistant prosecutor must be terminated by December 31, 1970, since the functions of this office will be absorbed by the solicitor and his assistant solicitors. Prosecutors appointed in December, 1968, will serve only two years. The number of full-time assistant solicitors per district must also be specified, but this can be done more accurately by the 1969 General Assembly. Specification of the annual salary of solicitors and assistant solicitors under the new system should also be left to the 1969 legislature.

V. AMENDMENTS TO THE JUDICIAL DEPARTMENT ACT OF 1965

The Commission recommends a number of amendments to the Judicial Department Act of 1965. Some of these are of a supplemental nature, to complete areas intentionally left vacant in the 1965 law; others are of a clarifying nature, to remove minor ambiguities in the original language; and still others are of a purely technical nature, to correct minor oversights which arose in the drafting or legislative stages.

Of the supplemental amendments, perhaps the most important is the expansion of the table in G.S. 7A-133 to include the number of judges and full-time assistant prosecutors per district and the number of magistrates per county, and to specify the additional seats of court per county for the approximately 60 counties scheduled to come under the Act in 1968. The Commission's recommendations here are based not only on population, geography, and other factors relevant in 1965, but also on the experience of the first two months of operations of the district court system in 22 counties of the State. For example, experience to date has indicated that the original minimum number of magistrates per county, as set forth in the table in G.S. 7A-133, is in several instances inadequate. The Administrative Officer of the Courts has found it necessary in these counties to authorize an additional magistrate or magistrates from the maximum quota set forth in the same statute. Fortunately, the flexibility built into the statute has minimized any inconvenience or hardship, and will continue to do so in any county in the future if the minimum number of magistrates should prove inadequate for the proper administration of justice.

The 1965 Act made no provision for problems of district court venue,

magistrate's jurisdiction, or clerical responsibilities in cities, such as Rocky Mount, which lie in more than one county. Since Rocky Mount, and the counties in which it is located, will become sites of the district court in 1968, it has been necessary to add sections to the law providing for this unique situation. The proposed additions to the law are so worded as to encompass any cities which become similarly situated due to future growth. The basic consideration underlying these proposals has been convenience to the public consistent with the rights of defendants and litigants.

A third addition to the 1965 Act expands the list of specifically enumerated quasi-judicial or ministerial powers of a magistrate. The law currently provides that the magistrate may " . . . perform any civil, quasi-judicial or ministerial function assigned by general law to the office of justice of the peace." [G.S. 7A-292(5)]. This "catch-all" provision was made necessary in 1965 by the numerous references throughout the General Statutes to the power in specific circumstances (some obsolete, some still valid) of the justice of the peace, and the lack of time for the intensive study necessary to analyze these extensive references for their current relevance to the office of the magistrate. Much of this analysis has now been done, and the Commission concludes that the addition of about 10 specific functions to the brief 1965 list will cover nearly all of the currently significant functions of the justice of the peace which should be brought forward for exercise by the magistrate. This will minimize the need for reliance on the "catch-all" clause. Examples of the powers recommended for specific inclusion in the magistrate's authority are the power to appoint assessors to allot property for homestead and personal

property exemptions, as provided in G.S. 1-386; the power to take acknowledgement of a written contract or separation agreement between husband and wife, and to make a private examination of the wife, as provided in G.S. 52-6; and the power to assign a year's allowance to the surviving spouse and a child's allowance to the surviving children, as provided in Chapter 30, Article 4, of the General Statutes. It is anticipated that further study will make possible the complete elimination of the "catch-all" clause in the next biennium.

It was the intention of the Commission in the 1965 Act to make the powers of magistrates and clerks of court substantially co-extensive with respect to the handling of traffic offenses. A magistrate was authorized to set bail in cases in which the defendant desired to plead not guilty; through oversight, a clerk was not. The present bill cures this omission, specifically authorizing the clerk ". . . in traffic cases, upon waiver of a preliminary hearing, to set bail, in accordance with a bail schedule furnished by the chief district judge." The primary purpose of this amendment is to increase the convenience to the motoring public when minor offenses are committed and when the offender desires to waive a preliminary hearing and post bail for a contested hearing before a district court judge by permitting the clerk of court, as well as the magistrate, to set bail, under the chief district judge's supervision.

G.S. 7A-148 currently provides that the chief district judges, in annual conference ". . . shall discuss mutual problems affecting the courts and the improvement of court operations . . . [and] . . . take such further action as may be found practicable and desirable to promote the

uniform administration of justice." The Commission recommends that two specific powers be added to this general authority. The first is the authority to prepare and adopt "uniform bail policies." This is an increasingly sensitive field of criminal procedure, currently undergoing statutory and case law changes throughout the country, and the Commission deems it particularly appropriate that the chief district judges should be authorized to keep abreast of developments in this field and arrive at uniform policies throughout the State with regard to the granting of pre-trial bail and the amount thereof in specific cases.

The uniform traffic ticket and complaint is in use generally throughout the State, but its format is not 100% standardized, and its use is not mandatory. The advantages of a single version of this form, use of which would be mandatory, are such that the Commission believes that the chief district judges should prescribe such a form, to be in use throughout the State by December, 1970, the date by which the district court system will be operational in all counties. Presumably the form adopted will vary in only minor details, if any, from the form now in use by the State Highway Patrol and by numerous cities. The power granted to the chief district judges in this respect will complement, and be an appropriate extension of, their current power to promulgate a uniform schedule of traffic offenses for which magistrates and clerks of court may accept written appearances, waivers of trial and pleas of guilty, and set a schedule of fines therefor.

Several amendments, mainly of a minor or technical nature, are proposed in the subchapter on costs of court. Two of these are deemed worthy of mention. One would eliminate the liability of a convicted defendant in a criminal case for costs of court when the judgment includes an active

prison sentence, except when the sentencing judge specifically assesses costs in pronouncing judgment. This comports with widespread practice at present, and relieves the clerks of keeping open accounts for uncollectible costs in numerous cases. The second amendment would overturn an opinion of the Attorney General that the process tax set forth in G.S. 105-93 is applicable in counties in which the district court has been established. It was the intention of the Commission in preparing the 1965 Act that the costs set forth in the Act were to be assessed in lieu of any and all other costs, including costs denominated as "taxes."

A minor amendment to the statutes concerning the bonding of the clerk of superior court is designed to effect a savings to the State in the premium on the clerks' bond or bonds in future years. G.S. 7A-104 requires that the clerk be bonded individually; G.S. 7A-105 permits blanket bonding of assistant and deputy clerks and other employees in the clerks' offices. The Administrative Officer of the Courts reports that blanket bonds can be purchased for clerks of court also, and at substantial annual savings in premiums. Repeal of G.S. 7A-104 and amendment of G.S. 7A-105 to include the clerk is accordingly recommended.

The Commission at this writing (January, 1967), has had the advantage of only a few weeks observation of the operations of the new district court system. The Commission is encouraged by preliminary reports of simplicity and efficiency of the new system. No statutory defects have come to its attention which have not been incorporated in the amendments proposed in this bill. It is possible, however, that further experience under the new law--even while the General Assembly is in session--will demonstrate the need for additional amendments. The Commission will be alert to this

possibility, and if the need for further amendment becomes clear, make prompt and appropriate recommendations to the General Assembly.

VI. CONCLUSION

With the enactment of the four proposals outlined in this report, phase two of the work of the Courts Commission will be completed. A District Court Division statute, complete in all details for operation in every county of the State, has been adopted; an intermediate Court of Appeals, together with an entirely new appellate jurisdiction statute, has been created, and will shortly be in operation; the system for the prosecution of all crimes in both trial levels of the General Court of Justice has been redesigned and modernized; the procedure for the preparation of jury lists and the drawing of jurors has been revised, and provision made for jury service by all qualified citizens; laws with respect to the retirement and recall of Appellate and Superior Court Division judges have been rewritten and brought up to date; and a broad and thorough foundation has been laid for completion of the Commission's assigned task in the three years remaining to it.

Phase three of the Commission's work--in the next biennium--will be characterized primarily by consolidation. Some substantive assignments yet remain to be done, but the larger duty of the Commission will be to observe the operations of the district courts and of the Court of Appeals, and to diagnose the problems, if any, which require legislative correction in 1969. The consolidation function will include, as a secondary but nevertheless important task, the "clean-up" of various chapters of the General Statutes, such as Chapters 2, 6, and 7, which have been largely superseded by the new Chapter 7A (Judicial Department), and perhaps transferring the viable remnants of these Chapters to Chapter 7A.

APPENDIX A

RESOLUTION 73

A JOINT RESOLUTION PROVIDING FOR THE APPOINTMENT OF A COMMISSION WHICH SHALL BE CHARGED WITH THE RESPONSIBILITY OF MAKING RECOMMENDATIONS TO THE GENERAL ASSEMBLY NECESSARY TO IMPLEMENT THE JUDICIAL ARTICLE OF THE CONSTITUTION.

WHEREAS, Article IV of the Constitution of the State of North Carolina was amended in 1962; and

WHEREAS, the new Judicial Article requires changes in the courts of the State to be made by January 1, 1971;

Now, therefore, be it resolved by the House of Representatives, the Senate concurring:

Section 1. There is hereby created a Commission to be known as the Courts Commission. The Commission shall consist of fifteen members to be appointed jointly by the Governor, the President of the Senate, the Speaker of the House of Representatives and the chairman of the House and Senate Judiciary Committees. The members of the Commission shall serve for terms expiring December 31, 1970, unless the work of the Commission should be sooner completed. At least eight of the members so appointed shall be members or former members of the General Assembly. The Commission shall elect one of its members as chairman. Vacancies shall be filled by the Commission.

Sec. 2. It shall be the responsibility of the Commission to prepare and draft the legislation necessary for the full and complete implementation of Article IV of the Constitution of North Carolina. The Commission shall proceed as expeditiously as practicable, and shall make its initial recommendations to the 1965 Session of the General Assembly immediately upon the convening thereof.

Sec. 3. The Commission shall meet at such times and places as the chairman may designate. The facilities of the State Legislative Building shall be available to the Commission for its work. The members of the Commission shall be paid such per diem, subsistence and travel allowances as are prescribed in the Biennial Appropriations Act for State boards and commissions generally. These expenses shall be paid out of the Contingency and Emergency Fund.

Sec. 4. The Commission is authorized to employ an executive secretary and such clerical and other assistance and services as the Commission may deem necessary for the proper performance of its duties. The salary of the executive secretary shall be fixed by the Commission and shall not be deemed to include his expenses. The executive secretary shall serve at the pleasure of the Commission.

Sec. 5. This Resolution shall become effective upon its adoption.

In the General Assembly read three times and ratified, this the 11th day of June, 1963.