NOTES

A FAREWELL TO SIDE JUDGES; OR, ARE WE AVAILABLE?

INTRODUCTION

Vermont is unique in its use of non-attorney judges in courts of general jurisdiction.[1] The assistant judges of the superior courts (formerly county courts) are elected every four years, and have been exclusively laymen for more than fifty years.[2] For over a century and a half, the assistant judges (more commonly referred to as side judges) performed their judicial functions without creating any notable controversy. Although the presiding judges of these courts were, without exception, law-trained throughout this period, and the assistant judges were almost all laymen,[3] it was not until quite recently that any litigant in these courts thought to object to the result of proceedings on the ground that the assistant judges were not competent to participate fully in the decisions of the court.[4]

Since the early 1970's, however, the powers and role of the side judges have become the focus of a complex and ill-defined controversy involving both the judicial and legislative branches of state government, and resulting in a number of decisions and statutory amendments intended to define and to restrict the authority of lay judges.[5] It is the purpose of this note to examine these developments, to analyze the case law and statutes which have attempted to resolve this controversy, and to discover what purpose,

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1. Silberman, *Non-Attorney Justice*, 17 HARV. J. ON LEGIS. 505, 528 (1980). The Vermont Superior Courts have general civil and criminal jurisdiction and exclusive jurisdiction over equity matters. District courts have general criminal jurisdiction, and civil jurisdiction where the amount in controversy is less than $5000. *See* VT. STAT. ANN. tit. 4, § 113, 114, 219, 437, 439, and 440 (1972 & Supp. 1985).

2. 1973 Vt. Acts 193 (Adj. Sess.) changed the name of the county courts to superior courts. No attorney has served as a side judge since the supreme court's decision in Cady v. Lang, 95 Vt. 287, 115 A. 140 (1921). *See infra* notes 26-31 and accompanying text.

3. *Infra* notes 20 and 21.

4. The first case to involve an objection to the presence of the side judges was Villeneuve v. Bovat, 128 Vt. 345, 262 A.2d 925 (1970). Cases involving objections to the *absence* of side judges are discussed *infra* at notes 32-48.

5. *See infra* notes 6, 53-80, 87-104, 131-185, and accompanying text.

if any, is served today by the continued existence of non-lawyer assistant judges.

This note examines briefly the history of the assistant judges' position, up to the time at which questions about their authority began to emerge. Then the two major areas of case law related to the powers of the side judges, involving their power to participate in cases in equity and in criminal cases, are described and discussed. The manner in which these two areas of case law influenced, and are reflected in, the recent statutory amendments which currently govern the activities of the side judges, is analyzed in detail. Because these amendments, which took effect in April, 1984, are so significant to this note, the relevant sections of the text are set out below.[6] The effect of these statutes, potential am-

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6. The pertinent text of 1983 Vt. Acts 201 (Adj. Sess.) (codified at VT. STAT. ANN. tit. 4 §§ 111(a), 112, & 219 (Supp. 1985)) is as follows:

> No. 201. AN ACT RELATING TO ASSISTANT JUDGES AND MURDER AND EQUITY CASES.
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> (H. 596)
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> It is hereby enacted by the General Assembly of the State of Vermont:
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> Sec. 1. 4 V.S.A. § 111(a) is amended to read:
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> (a) A superior court shall be held in each county at the times and places appointed by law. Sec. 2. 4 V.S.A. § 112 is amended to read:
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> § 112. COMPOSITION OF COURT
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> (a) The superior court shall consist of one presiding judge and two assistant judges, if available.
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> (b) Questions of law and fact. In all proceedings, questions of law shall be decided by the presiding judge. In cases not tried before a jury, questions of fact shall be decided by the court. Mixed questions of law and fact shall be deemed to be questions of law. The presiding judge alone shall decide which are questions of law, questions of fact, and mixed questions of law and fact. Written or oral stipulations of fact submitted by the parties shall establish the facts related therein, except that the presiding judge, at his discretion, may order a hearing on any such stipulated fact. Neither the decision of the presiding judge under this subsection nor participation by an assistant judge in a ruling of law shall be grounds for reversal unless a party makes a timely objection and raises the issue on appeal.
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> (c) Availability of assistant judges. If two assistant judges are not available, the court shall consist of one presiding judge and one assistant judge. In the event that court is being held by the presiding judge and one assistant judge, and they do not agree on a decision, a mistrial shall be declared. If neither assistant judge is available, the court shall consist of the presiding judge alone, and the unavailability of an assistant judge shall not constitute reversible error.
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> (d) Method of determining availability. Before commencing a hearing in any matter in which the court by law may consist of the presiding judge and assistant judges, the assistant judges physically present in the courthouse shall determine whether they are available for the case. If two or more cases are being heard at one time, and assistant judges may by law participate in

biguities and possible interpretations, are suggested, and finally, the note proposes conclusions about the extent of the actual present judicial powers of the side judges, and the usefulness of the side judges' position in a modern judicial system.

Throughout the research and preparation of this note, the writer has sought to discover any explicit statements of the theories or rationales or myths as to why Vermont established the side

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either, each assistant judge may determine in which case he will participate.

(e) Duty to complete hearing or trial. After an assistant judge has decided to participate in a hearing or trial, he shall not withdraw therefrom except for cause. However, if he is not available for a scheduled hearing or trial or becomes unavailable during trial, the matter may continue without his participation, and he may not return to participate.

(f) Emergency relief. A presiding judge may hear a petition for emergency relief when the court is not sitting, and may issue temporary orders as necessary.

(g) Jury trial. In order to preserve the right to trial by jury, when the claims of one party sound in equity and the claims of the opposing party sound in law, the latter party may demand that the claims be tried separately. Where a party has a right to trial by jury, that party does not waive the right by also seeking temporary or preliminary injunctive relief in the same action. Sec. 3. 4 V.S.A. § 219 is amended to read:

§ 219. POWERS OF CHANCELLOR

The powers and jurisdiction of the courts that were heretofore vested in the courts of chancery are vested in the superior court. District and probate judges have the powers of a chancellor in passing upon all civil matters which may come before them.

Sec. 4. [OMITTED]

Sec. 5. LIMITATION

After the effective date of this act, no court shall set aside any judgment, decree or order entered before December 12, 1983 by the superior court in an action, appeal or other proceeding on the grounds that the participation or non-participation of assistant judges was improper under 4 V.S.A. §§ 111(a) or 219.

Sec. 6. FINDINGS; INTENT

(a) The general assembly finds that the 1969 general assembly passed act number 129 of that year in order to merge law and equity. While matters of equity were assigned to the presiding judges of the courts then known as county courts and now known as superior courts, the 1969 general assembly recognized that often it was and is difficult to clearly define what is an equity matter.

(b) The general assembly further finds that the 1969 general assembly intended that participation of assistant judges in equity matters was not intended to constitute reversible error.

Sec. 7. [OMITTED]

Sec. 8. EFFECTIVE DATE

This act shall take effect from passage.

Approved: April 27, 1984.

The title of this act is odd, in that the statutes themselves have nothing to do with murder cases.

judges and why they are retained. No clear answer has emerged. The fragmentary explanations cited in the text[7] are tantalizing in their ambiguity, often contradictory, and in some cases factually wrong.[8] These attempts to explain the origins and purposes of the side judges lead only to the conclusion that it is futile to try to make sense of the existence of an institution which did not necessarily develop for consistent, rational reasons and which is currently the subject of so much dispute. These theories or myths are nevertheless valuable in particular contexts, and are included where they illuminate a specific point or emphasize an inconsistency in the law. Here, the reader's attention is drawn to the *lack* of any explicit statement of purpose or justification of the existence of side judges.

I. Historical Background

Vermont's county courts, the predecessors of today's superior courts, were established in 1781.[9] Originally these courts consisted of a chief judge and four assistant judges, all elected by the freemen.[10] In 1787 the number of assistant judges in each county was reduced to two,[11] and the power to elect these judges was given to the General Assembly.[12] In 1824 the positions of the chief judges of the county courts were abolished, and the courts were held by a justice of the supreme court, and two side judges.[13] This change ensured that the county courts could no longer be composed exclusively of non-lawyers. According to an account written in 1902, the previous courts were "liable to frequent error through a lack of knowledge of the law"[14] and the new system "added dignity to the County Courts, and inspired litigants with confidence in having

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7. *See infra* notes 13-15, 51, 150, 193, 194, 196, and accompanying text.

8. The statement that "Assistant judges actually came into existence in the 1830's as a measure to counteract a large number of full-time judges who came from outside Vermont . . .," which appears in National Center for State Courts, A Unified Court System for Vermont 79 (1974) is completely false. The side judges have existed at least since 1781, and no change in the selection or function of the side judges occurred between 1824 and 1850. *See infra* notes 9-13, 17, 18, and accompanying text.

9. Act of April 14, 1781, *reprinted in* 13 State Papers of Vermont 21-22 (J. Williams ed. 1965).

10. *Id.* at 7-9.

11. Act of March 8, 1787, *reprinted in* 14 State Papers of Vermont 213 (J. Williams ed. 1966).

12. Vt. Const. of 1787, ch. 2, § IX.

13. Act of Nov. 12, 1984 *reprinted in* Laws of Vermont 1824, ch. 7, No. 46, § 4.

14. L. Wilbur, 3 Early History of Vermont 167 (1902).

their legal rights secured."[15] Presumably, even though at that time the side judges could overrule the presiding judge on any question of law or fact, the presence of a trained jurist produced a greater consistency and led to fewer reversals on appeal.

In a general guidebook to Vermont written in 1968, the origins of the side judges were explained by the statement that they "date back to the eighteenth century when Vermonters distrusted lawyers and judges. Many Vermonters still do, so they continue to elect side judges as a layman's check on potential judicial hornswoggling."[16] The earlier explanation for the changes made in 1824 suggests that the distrust of lawyers and judges was not so complete as it has been since made to appear.

Throughout this formative period the side judges were not elected by popular vote; only in 1850 was the constitution amended to return the power to elect the assistant judges to the freemen.[17] The system established in 1824 was interrupted from 1850 to 1857, during which period four circuit judges appointed by the General Assembly presided over the county courts.[18] From 1857 to 1906 the justices of the supreme court once again rode circuit to preside over the county courts. In 1906 the current office of superior judge was established, and no significant changes in the composition of the county and superior courts have occurred since then.[19]

At least from 1824, the presiding judges of the county and superior courts, whether supreme court judges, circuit judges, or superior judges, have all been attorneys.[20] The assistant judges have been primarily, but not exclusively, laymen.[21] In at least two counties, there were periods during which both assistant judges were lawyers.[22] These facts further diminish the credibility of state-

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15. *Id.*

16. VERMONT: A GUIDE TO THE GREEN MOUNTAIN STATE 90 (R. Bearse ed. 3d ed. 1968).

17. VT. CONST. of 1793, amend. 14 (1850) (now ch. II, § 45).

18. 1849 Vt. Acts 40, § 3.

19. 1906 Vt. Acts 63, §§ 8, 13.

20. *See* Fish, *The Vermont Bench and Bar*, in 5 HISTORY OF VERMONT (W. Crockett ed. 1923). The last lay supreme court justice, Jonas Galusha, served from 1807 to 1808. *Id.* at 79. All the circuit judges and superior judges have been lawyers. *Id.* at 180-192.

21. *Id.* The essay by Superior Judge Fish in this volume of Crockett's *History* contains brief biographies of all the members of the Vermont bar in 1921. Eight had served as assistant judges. It is practically certain that other lawyers not included in Fish's essay had also been side judges, but this information is not readily available.

22. *Id.* In Rutland County from 1891 to 1896 and from 1899 to 1902. In Windsor County from 1918 to 1919.

ments that the side judges were established or have been retained due to an inherent distrust of lawyers.[23] In 1921, there were two attorneys serving as side judges, and six other members of the bar who had served previously.[24] Most of the lawyers who served as side judges appear to have been active in practice at the same time.[25] In that year the Vermont Supreme Court first addressed the issue of the conflict of interest inherent in an assistant judge's actions as counsel, in *Cady v. Lang*.[26]

Judge Edgerton represented the plaintiff, Cady. As assistant judge, he sat on the bench for the opening of the term of the court. The next day, when the case of *Cady v. Lang* commenced, he sat "within the bar apart from the counsel actively engaged in the trial" and consulted with them, out of the presence of the jury, except in one instance he handed his co-counsel a written suggestion for cross-examination, in the jury's presence.[27]

The supreme court held that a judge of the county court was absolutely prohibited from acting as an attorney during his term of judicial office.[28] The court did not limit this prohibition to appearances in the same court of which the attorney was also assistant judge, as was the case in *Cady*, but rather found that the law did "not contemplate that the same person shall be actively occupying the two positions at the same time, even in different matters."[29] A judge was prohibited from acting as an attorney in *any* suit. This conclusion, the court reasoned, was required "for the reasonable protection of public and private rights, the great object for which courts with their judges and officers are established and maintained."[30]

Under such a ruling, it is unlikely that any member of the bar would seek election as an assistant judge. The side judges receive $55.50 per day for time spent in the performance of official duties.[31] I have found no more recent reference to an attorney having

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23. *See supra* note 16 and accompanying text.

24. Fish, *supra* note 19. The currently serving attorney side judges were in Washington and Windsor counties.

25. *Id.* Most were men in their early fifties or later forties. One was said not to have been in active practice before the courts, and one was eighty-four years old when elected.

26. 95 Vt. 287, 115 A. 140 (1921).

27. *Id.* at 290, 115 A. at 141.

28. *Id.* at 293, 115 A. at 142.

29. *Id.* at 292-93, 115 A. at 142.

30. *Id.* at 295, 115 A. at 143.

31. VT. STAT. ANN. tit. 32, § 1141 (Supp. 1985). Since the superior courts are not in

served as a side judge.

The earlier cases involving issues of the composition of the county courts all arose from objections to the absence of the side judges, in contrast to the current objections to their presence.[32] It is questionable whether this is indicative of any belief in the importance of side judges, or whether these older cases are merely examples of disappointed litigants grasping at straws, attempting to take advantage of the not infrequent absence of an assistant judge in order to gain a reversal or a retrial. The supreme court consistently took a tolerant view of the side judges' absences, and applied a broad definition of the legal disqualification necessary to permit the court to proceed in the absence of either or both of the side judges.[33] Several of these early cases demonstrate that the assistant judges were not regarded as essential to the functioning of the county courts.[34]

In *State v. Blair*,[35] in 1880, the defendant appealed the denial of his motion to set aside the verdict on a charge of arson, on the ground that the court was improperly constituted because no side judges were present when the jury was charged or the verdict received.[36] One of the side judges was disqualified on account of his being a witness; the other judge left the courtroom while the presiding judge was charging the jury, because of an attack of pleurisy.[37] The supreme court decided that illness was sufficient ground for disqualification, and supported its position by saying that "unless such a construction is given to the statute, if the assistant judges are disabled by disease from attending at the sessions of the County Courts, the courts would be obliged to stop, until they were restored to health, or others were appointed or elected."[38] This construction of the statute may be justified by the side judges hav-

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session year-round, the annual income to be derived from the office of assistant judge is quite small. A side judge who sat on the bench five days a week for six months would receive approximately $7200.00.

32. *See supra* note 4.

33. 1849 Vt. Acts 13 (codified at VT. STAT. ANN. tit. 4, § 112 (1972)) (*amended by* 1977 Vt. Acts 235 (Adj. Sess.) and 1983 Vt. Acts 201 (Adj. Sess.)) provided that "[o]ne judge of the county court may try and determine a cause pending in such court, when the other judges are disqualified to try the same."

34. *See infra* notes 35-45 and accompanying text.

35. 53 Vt. 24 (1880).

36. *Id.*

37. *Id.* at 25.

38. *Id.* at 29.

ing traditionally been older persons.[39] Several later cases dealt with issues raised by the death or disability of a side judge.[40] Under the recent amendment to the Vermont Constitution[41] requiring the retirement of all judges over the age of seventy, fourteen of the twenty-eight side judges were unable to run for re-election in 1974.[42]

In 1892, the supreme court extended its tolerance of the absence of the side judges, by holding that a judge who was absent for no reason was presumed to be disqualified.[43] Referring to an absent side judge, the court held that "It was his duty to be present, unless he was physically or otherwise disqualified; and this court will not presume that he did not do his duty."[44]

Two years later, in holding that the absence of a side judge who was not disqualified did not constitute error, when there was still a quorum on the court, the supreme court commented that "It has always been the practice, as far as we know, for one or the other of the assistants to be absent occasionally though not disqualified, and it has never been thought to lie with a party to object."[45] Here the court appears to have abandoned the presumption that an absent judge must be considered disqualified, when no reason appears for the absence. The implication that the side judges have a duty to be present is not repeated. Indeed, it may be inferred that some prearrangement was customary, to ensure the presence of one or the other, to make up the quorum required by statute.[46] The evident willingness of the supreme court to extend the definitions of permissable absence as far as possible, to permit the business of the county courts to proceed regardless of the at-

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39. A NUQUIST & E. NUQUIST, VERMONT STATE GOVERNMENT AND ADMINISTRATION 226 (1966).

40. Bates v. Sabin, 64 Vt. 511, 24 A. 1013 (1892); Platt v. Shields, 96 Vt. 257, 119 A. 250 (1923); Vt. Union School Dist. No. 21 v. H.P. Cummings Co., 143 Vt. 416, 469 A.2d 742 (1983).

41. VT. CONST. ch. 2, § 35 (amended 1974).

42. NATIONAL CENTER FOR STATE COURTS, A UNIFIED COURT SYSTEM FOR VERMONT 79 (1974).

43. Bates v. Sabin, 64 Vt. 511, 24 A. 1013 (1892).

44. *Id.* at 515-16, 24 A. at 1014.

45. State v. Bradley, 67 Vt. 476, 32 A. 238, 241 (1894).

46. VT. STAT. ANN. tit. 4, § 111, prior to the 1981 and 1984 amendments, provided that "[a] county court shall be held . . . consisting of one presiding judge . . . and two assistant judges . . . two of whom shall be a quorum." Read in conjunction with § 112, the legislative intent appears to have been to require a quorum of two, unless the others were disqualified. This requirement has been abolished by the 1984 amendments.

tendance of the side judges, suggests that the side judges were not considered essential, even a century ago.

Likewise, the side judges were not considered the equal of the presiding judge, even where the distinction did not appear in the statutes themselves. Since 1850, the law had permitted "one judge of the county court" to try and to decide pending cases when the other judges were legally disqualified.[47] Despite the plain language which seems to permit *any* of the judges to proceed, no recorded case appears in which an assistant judge presided alone. In the event of the disqualification of a presiding judge, a replacement was appointed, even though such a replacement was not strictly required by law, rather than to allow the assistant judge or judges to proceed alone.[48]

The fiction of "disqualification" and the necessity for stretching the statutory language to fit the realities of the operations of the courts are no longer applicable. In 1977 the statute was revised to permit a superior judge to hear a case alone when the side judges were "disqualified or are otherwise unavailable,"[49] and the 1984 amendment goes even further, permitting the side judges to decide for themselves whether they are "available" and stating that unavailability shall not constitute reversible error.[50] The historical background reveals that these provisions are not novelties, and do not represent a recent or sudden attempt to reduce the importance of the side judges. Rather, this history reveals that a fundamentally consistent view of the relative importance of the side judges has prevailed for over a century. They have never been considered necessary to the functioning of the court system. Perhaps part of the reason for the current controversy lies not in any reduction of the role of the side judges, but rather in a change of the side judges' perception of their own role, reflecting a greater belief

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47. *See supra* note 33.

48. In Platt v. Shields, 96 Vt. 257, 119 A. 520 (1923), the superior judge originally assigned, and one of the assistants, were both legally disqualified. Rather than allowing the remaining judge to proceed, another superior judge was assigned. Before the findings and judgment were issued, the remaining assistant judge died, and the superior judge completed the proceedings alone. The supreme court found no error in this procedure. It seems to have been accepted that in the event of the disqualification of a presiding judge, a replacement would be appointed even though such a replacement was not strictly required by law, rather than to allow the side judge or judges to proceed alone.

49. 1977 Vt. Acts 235, § 4 (Adj. Sess.) (codified at VT. STAT. ANN. tit. 4, § 112 (Supp. 1978)).

50. 1983 Vt. Acts 201 (Adj. Sess.) (codified at VT. STAT. ANN. tit. 4, § 112(c) and (d) (Supp. 1985)).

in their own importance and a determination to oppose any efforts to reduce their powers or abolish the office.[51]

II. Challenges to the Presence of Side Judges in Equity Cases

As part of the act providing for the merger of law and equity in 1969, the powers of a chancellor were vested exclusively in the *presiding* judges of the superior courts.[52] The effect of this provision on the role of the side judges was disputed in a series of cases extending for fourteen years and has now been resolved, perhaps only temporarily, by legislation.[53]

The initial effect of this statute was not to exclude the side judges from participation in equity cases, even though the issue was brought to the attention of the supreme court quite soon after the 1969 act. In *Villeneuve v. Bovat*,[54] an action for specific performance of a contract to convey land, the court found that the "presence and participation" of the assistant judges was unnecessary, and characterized it as "surplusage."[55] However, there is no indication in the opinion of what action the side judges took during the trial. The *Villeneuve* holding remained undisturbed for a decade, and no further challenges were made to the participation of the side judges in equity cases until 1980.

Justice Billings, concurring in the result in *Nugent v. Shambor*,[56] cautioned trial courts that although the participation of the side judges in equity had been referred to as surplusage, such participation might be found prejudicial on a proper showing.[57] Such prejudice, he suggested, might constitute reversible er-

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51. Examples of the efforts of the side judges to promote their own authority include the filing of an *amicus curiae* brief on behalf of the Association of Assistant Judges in State v. Hunt, and the widely publicized lobbying efforts of Assistant Judge Jane Wheel in the same case. According to published reports based on affidavits and motions filed in the case, both Judge Wheel and an attorney representing the Association of Assistant Judges attempted to influence the outcome of the appeal to the Vermont Supreme Court. Wheel is alleged to have contacted both the Chief Justice and the Attorney General while the appeal was pending. *See* Burlington Free Press, Dec. 8, 1984, at 1, col. 1; Barre-Montpelier Times-Argus, Feb. 2, 1985, at 1, col. 4; Rutland Herald, Feb. 3, 1985, at 8, col. 5.

52. 1969 Vt. Act 129, § 1 (codified at Vt. Stat. Ann. tit. 4 § 219 (Supp. 1985)).

53. *See infra* notes 55-129 and accompanying text.

54. 128 Vt. 345, 262 A.2d 925 (1970).

55. *Id.* at 346, 262 A.2d at 926.

56. 138 Vt. 194, 413 A.2d 1210 (1980).

57. *Id.* at 199, 413 A.2d 1213 (Billings, J., concurring).

ror.[58] *Nugent* was a singularly peculiar case, involving proportional allocation of a joint tenancy: despite the equitable nature of the action, it was tried before a jury.[59] Following the jury's response to a special interrogatory, the court reached a different result, and entered judgement accordingly.[60] The side judges participated in making the findings of fact and conclusions of law in the court's final judgement.[61] The supreme court held that a jury verdict in an equitable action was purely advisory, and that the lower court could disregard it.[62]

Justice Billing's warning opened the floodgates for litigation challenging the side judges' authority to sit in equity cases. In *Pockette v. LaDuke*,[63] decided in June, 1981, the court went beyond the warning in *Nugent*, and found that a superior court including side judges was without jurisdiction to hear a case in equity. The judgment of such a court was held to be void, regardless of the participation of the side judges or their influence on the result.[64] In *Pockette* the superior court had granted the plaintiff injunctive relief and damages.[65] The defendant appealed, claiming that the side judges should not have participated.[66] The supreme court's holding went beyond the issues on appeal, which did not include jurisdiction. Although no objection to the side judges' presence or participation was made at trial, the supreme court found that the superior court as constituted had no jurisdiction over the equitable issues, and that such a defect could not be waived or cured by agreement.[67]

Only three months later, the supreme court seemed to retreat from its *Pockette* holding. In *Maskell v. Beaulieu*,[68] an action for specific performance, the court held that "[a]ssistant judges have no role in these matters, and their presence is improper. The record . . . reveals that the assistant judges . . . participated in mak-

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58. *Id.* (Billings, J., concurring).
59. *Id.* at 195, 413 A.2d at 1211.
60. *Id.*
61. *Id.* at 197, 413 A.2d at 1212. *See also* VT. R. CIV. P. 39(c) for the Vermont rule on advisory juries in equity cases.
62. *Nugent*, 138 Vt. at 199, 413 A.2d at 1213.
63. 139 Vt. 625, 432 A.2d 1191 (1981).
64. *Id.* at 627, 432 A.2d at 1192.
65. *Id.* at 627, 432 A.2d at 1191-92.
66. *Id.* at 627, 432 A.2d at 1192.
67. *Id.* at 627-28, 432 A.2d at 1192.
68. 140 Vt. 75, 435 A.2d 699 (1981).

ing the findings . . . and conclusions . . . . Since this circumstance clearly affected the eventual result, we remand for retrial . . . ."[69] The language of this very brief opinion creates some uncertainty about whether the case was remanded because of the composition of the court, or because the participation of the side judges affected the result. Precisely how the side judges affected the outcome of the case is not stated in the opinion.

This uncertainty was resolved in *Brower v. Holmes Transportation, Inc.*,[70] decided the same day as *Maskell*. Here the plaintiff appealed the superior court's order granting the defendant's motion for summary judgment, and the supreme court held that the participation of the side judges, while improper, presented no grounds for reversal.[71] *Pockette* was distinguished because the assistant judges in that case had "prevailed over the presiding judge,"[72] and the court explicitly directed that the *Pockette* holding should apply only when the participation of the side judges affected the result.[73] The side judges could have had no influence on the outcome in *Brower*, where only a pure question of law was involved.[74]

In two cases decided the same day, two months after *Brower*, the supreme court again declined to reverse on account of the participation of assistant judges in equity. In *White Current Corp. v. State*,[75] the court noted that side judges "should not and cannot participate" in equitable actions, but found the error harmless, as the superior court's decision was unanimous.[76] The court, however, indicated that a showing by the appellant that the side judges had "actually participated in the hearing and the making of findings of fact" might compel a different result, even absent a split decision.[77] This point is more clearly made in the companion case, *Braun v.*

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69. *Id.* at 76, 435 A.2d at 700.

70. 140 Vt. 114, 435 A.2d 952 (1981).

71. *Id.* at 118, 435 A.2d at 954.

72. *Id.*

73. *Id.*

74. *Id.* The statement in the court's opinion, that the side judges could have had no influence on a "legal ruling as to summary judgment," appears to be incorrect. The *Dunkerley* decision, *see infra* notes 134-141 and accompanying text, applied only to criminal cases, and there was no prohibition against the side judges' participation in legal rulings in civil cases at the time *Brower* was decided.

75. 140 Vt. 290, 438 A.2d 393 (1981).

76. *Id.* at 291, 438 A.2d at 394.

77. *Id.*

Humiston,[78] where the court stated explicitly that a record which showed the "active participation" of the side judges in the hearing and findings would be ground for reversal.[79] The court did not define "active participation" but cited *Maskell*, which contains only the suggestion that the record showed that side judges took an active role in the hearing.[80]

This series of decisions left the superior courts in a state of uncertainty from 1981 to 1983. The supreme court had repeatedly admonished the superior judges to be sure that the court was properly constituted in equity cases.[81] But the merger of equity and law had allowed equitable and legal actions to be joined in a single action. In many instances, claims for equitable and legal relief arose from the same facts and the same transaction. The most important remaining distinction between law and equity is that equitable claims cannot be tried to a jury,[82] while in legal actions trial by jury is a constitutional right.[83] In Vermont, however, until 1983, any equitable claim gave the court of equity complete jurisdiction over the entire case, and the right to a jury trial on the legal issues in the case was lost.[84]

So, under these circumstances the duty of the presiding judge was twofold: first, to detect in advance any equitable claims of the parties, and second, to regulate the participation of the side judges so as to avoid reversible error. The presiding judge's problems were further complicated by the supreme court's decision in *Merchants Bank v. Thibodeau*,[85] in which the court held that a party is entitled to a jury trial on any claim seeking legal relief, even if filed as a counterclaim or crossclaim in an equitable action.[86] This decision can be read to permit the participation of the side judges as finders of fact in legal claims over which the court would previously have retained its equity jurisdiction. A party advancing a legal counterclaim, for example, who waived the right to a trial by jury, might

78. 140 Vt. 302, 437 A.2d 1388 (1981).
79. *Id.* at 305-06, 437 A.2d at 1389.
80. *Maskell*, 140 Vt. at 76, 435 A.2d at 700.
81. *Nugent*, 138 Vt. at 199, 413 A.2d at 1213; *Pockette*, 139 Vt. at 628, 432 A.2d at 1192; Swanson v. Bishop Farm, Inc., 140 Vt. 608, 612, 443 A.2d 464, 467 (1982); *Braun*, 140 Vt. at 305, 437 A.2d at 1389.
82. *See* VT. R. CIV. P. 39(c) reporter's notes.
83. VT. CONST. ch. 1 arts. 10 and 12.
84. *See* Holton v. Hassam, 94 Vt. 324, 111 A. 389 (1920).
85. 143 Vt. 132, 465 A.2d 258 (1983).
86. *Id.* at 134, 465 A.2d at 260.

still have argued that the side judges could not be prohibited from deciding the issues of fact in the counterclaim, as the counterclaim was no longer under the court's equity jurisdiction. The problems arising from situations which might potentially be presented under these rules could form the curriculum of a highly abstruse advanced civil procedure course.

Most of the uncertainty as to the nature of the duties imposed on the presiding judges in equity cases was removed by the supreme court's decision in *Soucy v. Soucy Motors, Inc.*,[87] on December 12, 1983. In *Soucy*, the plaintiffs sought a restraining order, injunctive relief, and damages.[88] Both side judges participated in the hearing on the request for a temporary restraining order.[89] Issues as to the jurisdiction of that court and the validity of the order were "resolved . . . by stipulation" and were not raised on appeal.[90] This statement, that certain of the jurisdictional issues in the case were resolved by stipulation, appears utterly inconsistent with the holding of the case itself, which was that lack of jurisdiction is incurable and cannot be waived or stipulated. The case reached the supreme court on an appeal by the plaintiffs from a judgment for the defendants on a counterclaim for delinquent rent, granted by a court consisting of a superior judge and one side judge.[91] The plaintiffs argued that because the action as a whole was equitable in nature, the court as constituted had no jurisdiction over the counterclaim.[92]

In an apparent reversal of its six-month-old decision in *Thibodeau*, the court held that the initial request for a restraining order had invoked the court's equitable jurisdiction, which was retained "over the entire action to see that complete relief is administered."[93] Emphasizing the unequivocal language of the statute vesting equity jurisdiction exclusively in the superior judges, the court found a clear legislative mandate that actions in equity should be heard and decided by the presiding judge alone.[94] The very presence of the side judges, at any phase of an equitable action, was held to be reversible error. The essence of this error was

87. 143 Vt. 615, 471 A.2d 224 (1983).
88. *Id.* at 616, 471 A.2d at 225.
89. *Id.*
90. *Id.*
91. *Id.* at 616, 471 A.2d at 225. The second side judge was absent due to illness.
92. *Id.* at 617, 471 A.2d at 225.
93. *Id.*
94. *Id.* at 619, 471 A.2d at 226-27.

that the court was improperly constituted and therefore had no jurisdiction.[95] The cases which had distinguished *Pockette* and held the jurisdictional flaw harmless unless the result was affected by the participation of the side judges were overruled.[96]

Justice Gibson wrote a dissenting opinion which was joined by Justice Hill.[97] He argued that "the majority have confused the privilege of sitting and listening to the evidence with the power to render a decision."[98] He equated the participation of the side judges in these cases with the use by equity courts of advisory juries to hear issues of fact, and concluded that the mere presence of the side judges at an equity trial should not be grounds for reversal under the statute.[99] The sole authority of the presiding judge, as granted by law, would not be diminished by the presence of the side judges in an advisory capacity. The statute provided that the powers of chancellor "shall vest exclusively in the presiding judges . . . and the jurisdiction of the courts . . . of chancery shall vest in the county courts."[100] This language explicitly distinguished the power of a chancellor from the jurisdiction of a court of chancery. Justice Gibson recognized that the side judges had no power to decide cases in equity, but he distinguished, as the majority did not, between the power to decide and the right to sit.[101] The equitable *jurisdiction* was granted by the statute to the superior court, including the assistant judges.

Justice Gibson's conclusions reflect a more precise reading of the statutory language than does the majority opinion. His dissent was an implicit recognition that the mere physical presence of a person in a courtroom, without regard for that person's actions or decisions, is an artificial and unrealistic basis on which to determine the jurisdiction of a court. Justice Gibson regarded the *Soucy* decision as a deviation from established case law, as not necessitated by the statutory language, and as potentially wasteful and burdensome. "[W]henever a whiff of equity appears in any complaint that case will have to go before a judge sitting alone; any miscalculation . . . will automatically mean a retrial . . . ."[102] Had

95. *Id.* at 620, 471 A.2d at 227.
96. *Id.* at 619, 471 A.2d at 226.
97. *Id.* at 620, 624, 471 A.2d at 227, 229 (Gibson J., dissenting).
98. *Id.* at 621, 471 A.2d at 228 (Gibson, J., dissenting).
99. *Id.* at 623, 471 A.2d at 229 (Gibson, J., dissenting).
100. VT. STAT. ANN. tit. 4, § 219 (1977).
101. *Soucy*, 143 Vt. at 621, 471 A.2d at 228 (Gibson, J., dissenting).
102. *Id.* at 624, 471 A.2d at 229 (Gibson, J., dissenting).

the legislature not overruled *Soucy* by amending the statute, Justice Gibson's prediction might well have come true. As it happened, the law was changed before the *Soucy* rule could produce many appeals.

Four and a half months after *Soucy* the legislature amended section 219 of title 4 to omit any reference to the powers of a chancellor, but rather simply to provide that the powers of a court of chancery are vested in the superior courts.[103] In its findings, the legislature clarified what it believed to have been the intent of the 1969 general assembly, saying that it had not intended that participation of side judges in equity would constitute reversible error.[104] Had the 1969 legislature made its intent clear a great deal of the complicated and expensive litigation described in this section would have been avoided.[105]

The same act of the legislature amended section 112 of title 4, guaranteeing the right to trial by jury of legal claims involved in actions in which the claims of one party are equitable.[106] As amended, the statute provides that the party advancing the legal claims may demand a jury trial on those issues.[107] This amendment in effect reinstates the holding of *Thibodeau*[108] and overrules the modification of *Thibodeau* expressed in *Soucy*.[109] The amendment to rule 39 of the Vermont Rules of Civil Procedure, effective March 15, 1985, attempts to define the procedure to be followed in an action in which equitable and legal claims are joined.[110] The rule as amended permits the court to order a joint trial with separate fact-finding by the jury and by the court, as long as the legal issues are tried first, to preserve the right to trial by jury.[111] This

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103. 1983 Vt. Acts 201 (Adj. Sess.), § 3 (codified at VT. STAT. ANN. tit. 4, § 219 (amended 1984)).

104. *Id.* at § 6(b).

105. The legislature in 1984 claimed to understand the intent of the 1969 legislature, *see supra* note 6, at sec. 6(b), but ignored the clear statement of intent contained in 1971 Vt. Acts 185 § 236(a), which provided that the words 'chancery' or 'court of chancery' meant "a county court held by the presiding judge alone . . . ." Unless the legislature intended that the participation of side judges in equity cases should be reversible error, this provision could have no effect.

106. 1983 Vt. Acts 201 (Adj. Sess.), § 2 (codified at VT. STAT. ANN. tit. 4, § 112(g) (amended 1984)).

107. *Id.*

108. *See supra* notes 85 and 86 and accompanying text.

109. *See* VT. R. CIV. P. 39 reporter's notes to 1985 amendment.

110. VT. R. CIV. P. 39(d) (amended 1985).

111. *Id.*

procedure follows the federal rule as expressed in *Beacon Theaters, Inc. v. Westover*.[112]

This rule appears to limit the role of the side judges in these compound cases. When both equitable and legal relief are sought on the basis of the same facts, and the legal claims are tried first, to a jury, the jury's findings of fact will ordinarily apply to both issues. The remaining proceedings on the equitable claims, therefore, must be controlled by the jury's findings in the legal action. Should the jury in such a case reach a verdict necessarily depending on particular findings of fact, it would be wholly illogical and inconsistent to allow the court to reach different findings on the equitable claim, requiring a result contradictory to that already reached in the legal action.

1983 Vt. Acts 201 (Adj. Sess.), § 3, amending section 219 of title 4, directed that after the date of enactment, April 27, 1984, no judgment or order of any court issued before December 12, 1983 (the date of the decision in *Soucy*) was to be set aside on the grounds that the participation or absence of the side judges was improper.[113] The purpose of this provision, in light of the legislature's finding that the participation of the side judges in equity had never been intended to be ground for reversal, was to limit the effect of *Soucy* to cases decided during the four-and-a-half month interval between the decision in that case and the effective date of the statutory amendment.[114] Otherwise, any judgment entered by a superior court prior to April 27, 1984, in an equity case in which the side judges had even been present[115] would be subject to automatic reversal. These consequences were plainly undesirable.

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112. 359 U.S. 500 (1959).

113. 1983 Vt. acts 201 (Adj. Sess.), § 5.

114. A number of cases which had been decided in the interval were, in fact, reversed for retrial before a single judge. Higgins v. Blush Hill Country Club, Inc., 144 Vt. 647, 470 A.2d 226 (1983) (mem.); Gallo v. Miller and Miller Land, Inc., 144 Vt. 647, 470 A.2d 226 (1983) (mem.); Beshaw v. Walton, 144 Vt. 275, 475 A.2d 1084 (1984) (per curiam); Levinsky v. State, 144 Vt. 649, 475 A.2d 242 (1984) (mem.).

115. In Vt. Nat'l. Bank v. Dowrick, 144 Vt. 504, 481 A.2d 396 (1984), the Vermont Supreme Court held that *Soucy* was to be applied according to the issues actually considered at trial, rather than on the basis of the pleadings. *Id.* at 509, 481 A.2d at 399. The plaintiff bank argued that because the case began as an equitable action, a foreclosure, and because the assistant judges sat throughout the trial and signed the judgment order, equity had been "invoked" and the court was without jurisdiction. *Id.* at 508, 481 A.2d at 398. The supreme court rejected this reasoning, and held that jurisdiction must be determined at the time of trial, rather than when the pleadings were filed. *Id.* at 509, 481 A.2d at 399. Because the equitable claims were resolved before trial, the court held that the presence of the side judges was proper. *Id.*

An example of the negative effect of a retroactive application of *Soucy* appeared almost immediately, in the case of *Solomon v. Atlantis Development, Inc.*[116] In the original action, tried before a three-judge superior court in 1980, the plaintiffs sought equitable relief.[117] The court entered judgment for the defendants one week before the supreme court decided *Pockette.*[118] The plaintiffs appealed. The appellate process dragged on, and the case had still not been decided when the *Soucy* decision was handed down.[119] Following *Soucy*, the supreme court in January 1984 vacated the judgment of the superior court and remanded the case for a new trial.[120] Both parties moved for reargument of the case in the supreme court, and both argued that *Soucy* should not be applied retroactively.[121] The original trial had lasted almost three weeks, and had taken place nearly four years before,[122] so the parties' interest in avoiding a new trial was understandable.

The initial issue to be resolved was the effect of the statute forbidding the retroactive application of *Soucy*. The supreme court found that this attempt by the legislature to dictate the effect to be given to the court's judgments violated the principle of the separation of powers and was therefore unconstitutional.[123] The court, however, then proceeded to analyze the question of the applicability of *Soucy* under a federal standard for determining the retroactivity of civil cases,[124] and reached the same result as had been dictated by the statute.[125] The supreme court vacated its previous order remanding the case for retrial, and ordered that the appeal

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116. 145 Vt. 70, 483 A.2d 253 (1984).

117. *Id.* at 71, 483 A.2d at 255.

118. *Id.*

119. *Id.* at 72, 483 A.2d at 255.

120. *Id.*

121. *Id.*

122. *Id.* at 71, 483 A.2d at 255.

123. *Id.* at 73, 483 A.2d at 256.

124. *Id.* at 73-74, 483 A.2d at 256. The standards employed by the court were those enunciated in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Under this analysis, the effect of a judgment in a civil case *is* retroactive unless several criteria are met. If the decision establishes a new principal of law, either by deciding an issue of first impression whose outcome was not "clearly foreshadowed," or by overruling cases on which the parties may have relied, then the court inquires whether retroactivity would produce injustice or hardship. In applying these standards to *Solomon*, the court found that *Soucy* had established a new principle of law which the parties in *Solomon* could not have foreseen, and that the retroactive application of *Soucy* in these circumstances would produce substantial hardship. *Solomon*, 145 Vt. at 74-75, 483 A.2d at 256-57.

125. *Id.* at 75, 483 A.2d at 257.

on the merits be set for hearing.[126]

A retroactive application of *Soucy* would almost certainly produce the undesirable consequences predicted in Justice Gibson's dissent in that case. The legislature, in seeking to prevent such application, acted correctly. The supreme court, however, substituted a case-by-case analysis for the predictability and certainty created by the law which the court invalidated. The *Solomon* decision, by applying a subjective, factual analysis of the inequity of possible retroactive application of *Soucy*, appeared to have left open the possibility that other pre-*Soucy* cases may be brought up on appeal. The degree to which the *Solomon* decision rested on the particular facts of the case, rather than on a general conclusion that any retroactive application of *Soucy* would be inequitable, was not clearly expressed by the opinion. The detailed factual examination which the court made in arriving at its decision suggested that the *Solomon* decision did not establish any general rule as to the retroactivity of *Soucy*. However, a recent supreme court case, *Circus Studios, Ltd. v. Tufo*,[127] described *Solomon* in the most unequivocal language. "[W]e held in *Solomon* . . . that *Soucy* is to be applied prospectively only."[128] Without any examination of the facts, and without using the *Solomon* analysis, the court in *Tufo* simply held that the case was not subject to reversal because it was decided prior to *Soucy*.[129] It would be futile to speculate whether this holding is the last word on the subject.[130]

Some conclusions, however, do emerge from this almost impenetrable tangle. It is now clear that side judges may participate in equity actions, just as they may participate in any case. The superior judges are no longer required to predict the nature of every case in order to avoid reversal. Indeed, because equitable actions are not tried before juries, the side judges' role is likely to be generally more significant in equity than in other kinds of cases

126. *Id.* at 76, 483 A.2d at 257.

127. 145 Vt. 219, 485 A.2d 1261 (1984).

128. *Id.* at 222-23, 485 A.2d at 1263.

129. *Id.* at 223, 485 A.2d at 1263.

130. Without citing *Circus Studios*, the supreme court in Crabbe and Sweeney v. Veve Assocs., No. 84-506 (Vt. May 24, 1985) held that the case at hand, having been decided before *Soucy*, "would not be *required* to be retried." *Id.* slip op. at 2 (emphasis supplied) (citation omitted). The court spoke of its "determination that *Soucy* should be applied prospectively only," but referred to the reasoning in *Solomon* as the basis for its decision. *Id.* slip op. at 3-4. The language of the opinion in *Crabbe and Sweeney* leaves open the possibility that *Solomon* might permit, even if it does not require, retrial of a pre-*Soucy* case.

where their power to decide questions of fact may be preempted by a jury. For the purpose of fact-finding in equity cases, the assistant judges control the court, and may still combine to overrule the presiding judge. To the degree that the ability of the presiding judge to make conclusions of law is dependent on the findings of fact, the side judges may still control the ultimate outcome of cases.

III. The Role of the Side Judges in Criminal Cases

The present powers of side judges in cases of all kinds are defined by the 1984 amendments to title 4.[131] Although these amendments deal with the powers of the side judges in general, they were largely motivated by supreme court decisions regarding the authority of side judges in criminal cases. Very little of the current business of the superior courts involves criminal matters;[132] however, the general criminal jurisdiction of the superior courts still exists.[133] Criminal cases, particularly murder cases which have received widespread publicity, have been responsible for much of the controversy over the powers of the assistant judges.

Prior to 1976, no criminal case in which the grounds for appeal involved the participation of side judges had reached the Vermont Supreme Court. None are cited in the court's brief opinion in *State v. Dunkerley*,[134] in which the issue was first raised.

Dunkerley was charged with first degree murder; no other facts about the case appear in the opinion.[135] In the superior court, prior to trial, he moved that the side judges not be allowed to participate, at least in the adjudication of matters of law.[136] The motion was denied, and the question certified as an interlocutory appeal.[137] The supreme court defined the issue as one of due process.[138] Since the side judges were a majority of the court, they had the power to make any legal ruling over the dissent of the pre-

131. *Supra* note 6.

132. As of June 30, 1985, only four of 6039 pending cases in the superior courts were criminal cases. Six new criminal cases had been filed during the preceding year, all but one in Orleans County. The only other pending criminal cases were in Bennington County. By contrast, 5333 criminal cases were pending in the district courts. Office of the Court Administrator, *Judicial Statistics for the Year Ended June 30, 1985.*

133. Vt. Stat. Ann. tit. 4, § 114 (1972 and Supp. 1985).

134. 134 Vt. 523, 365 A.2d 131 (1976).

135. *Id.*

136. *Id.* at 524, 365 A.2d at 131.

137. *Id.*

138. *Id.*

siding judge; therefore, the trial might be governed entirely by laymen.[139] As a matter of law, the supreme court found that such a possibility violated due process, and held that the side judges must be prohibited from participating in the decision of any legal issues in criminal cases.[140] Justice Billings, concurring, expressed his regret that the decision was limited by the certified question, and would have applied the holding to civil as well as criminal cases.[141]

Following the *Dunkerley* decision, the Vermont Rules of Criminal Procedure were amended to require that the presiding judge alone decide all questions of law and all legal issues included in mixed questions of law and fact.[142] The reporter's notes state that the purpose of the amendment was to "make clear that the case [*Dunkerley*] does not exclude assistant judges from trial participation in criminal cases."[143] The notes further explain that the powers of the side judges remain unaffected in all respects other than in purely legal matters, and explicitly preserve their authority to participate in the sentencing process.[144]

Dunkerley, and the amendments to the rules, seemed to have settled the question of the criminal jurisdiction of three-judge superior courts, and the powers of the side judges in criminal cases, until 1984. In that year, the supreme court decided the first case since *Dunkerley* to raise significant issues of the powers of the assistant judges in criminal proceedings. *State v. Hunt*[145] raised the issue of whether the assistant judges could reject a proposed plea bargain agreement, overruling the presiding judge.[146] Hunt was charged with first-degree murder for the apparently senseless slaying of a Barre chiropractor. Hunt allegedly told the police he had always wanted to shoot someone; there was a substantial expression of outrage in the community, and the trial was moved to Chittenden County.[147] Before trial, the parties submitted to the superior court a plea bargain agreement whereby Hunt would plead guilty to second-degree murder and the court would impose a min-

139. *Id.*
140. *Id.* at 526, 365 A.2d at 132.
141. *Id.* at 526, 365 A.2d at 133 (Billings, J., concurring).
142. VT. R. CRIM. P. 54 (c)(1)(ii) amended Oct. 13, 1976).
143. VT. R. CRIM. P. 54 reporter's notes to 1976 amendment.
144. *Id.*
145. 145 Vt. 34, 485 A.2d 109 (1984).
146. *Id.* at 37, 485 A.2d at 110.
147. Rutland Herald, Feb. 3, 1985 at 8, col. 5.

imum sentence of no more than ten years.[148] The presiding judge favored accepting the agreement, because of the anticipated difficulty of proving premeditation and sanity, and the possibility that important evidence might be suppressed if Hunt was found guilty and appealed.[149] The side judges apparently felt that the minimum sentence was too lenient, and overruled the superior judge. The court rejected the proposed agreement.[150]

As in *Soucy*, both parties appealed. Both sides wanted the plea bargain accepted, and argued that the assistant judges should be excluded from the decision.[151] Their arguments were, first, that the side judges acted beyond their powers as defined in *Dunkerley*, because the decision to accept or reject the plea bargain involved issues of law; second, that Hunt's rights to effective assistance of counsel and to due process were denied by allowing the side judges to overrule the presiding judge on a matter involving legal issues; and third, that the rejection of the plea bargain violated Hunt's right to equal protection, because the state's attorney had the discretion to bring the case in either the superior court or in the district court, where no lay judges sit.[152]

The court found that all the parties were in agreement that the side judges could not decide legal issues, but could decide factual issues and could participate in sentencing procedures other than the consideration of proposed plea bargain agreements. These powers, thus, were not at issue.[153] The court decided that the plea bargain agreement decision contained no legal issues, and called only for an exercise of discretion. Therefore, the court held that *Dunkerley* was not controlling, and did not forbid the rejection of a plea bargain by the side judges.[154] Likewise, the court found that Rule 54 of the Vermont Rules of Criminal Procedure did not apply because the plea bargain did not raise any mixed question of law and fact.[155] The court defined such mixed questions rather narrowly, as limited to circumstances such as motions to suppress, in which formal findings of fact and conclusions of law must be

148. *Hunt*, 145 Vt. at 37-38, 485 A.2d at 110.
149. *Id.* at 38, 485 A.2d at 110.
150. *Id.* at 38, 485 A.2d at 110-11.
151. *Id.* at 38-39, 485 A.2d at 111.
152. *Id.*
153. *Id.* at 40, 485 A.2d at 112.
154. *Id.* at 42, 485 A.2d at 115.
155. *Id.*

made.[156]

The court did not squarely face the issues of effective assistance of counsel and due process. Rather, the opinion seems to have added together a number of minor, peripheral points to arrive at the conclusion that Hunt's rights were not violated. The limitations on the side judges' participation in legal questions, the presence at the trial of an attorney judge, the provision of appeal as of right, and the availability of sentence review were found to be a collectively sufficient due process safeguard.[157] In reaching this conclusion, the court sidestepped the issue of what the side judges actually *did* in Hunt's case, and how their actions actually affected him. Surely there was nothing any counsel could have done, or any action the presiding judge could have taken, to alter the result. Appeal, likewise, is not a sufficient remedy to render harmless a violation of due process at the trial level. These concerns were never addressed, much less answered, by the supreme court.[158]

Nor did the court reach the third question, the equal protection violation claimed as a result of the prosecutor's discretion to choose between two differently constituted trial courts.[159] At the time the state's information was filed, only the superior court had jurisdiction of a charge carrying the possibility of life imprisonment. Two weeks later, the distinction was abolished.[160] Hunt, however, not having been adversely affected by any choice available when he was charged, was found to have no standing to bring the equal protection claim.[161]

In any criminal case initiated since May 4, 1982, however, the defendant could argue that the discretionary choice of courts is a violation of equal protection. A defendant convicted in superior court, even if the side judges decided only issues of fact, could ar-

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156. *Id.* at 42, 485 A.2d at 113.

157. *Id.* at 49, 485 A.2d at 117.

158. No more recent case in which the effective assistance and due process arguments were properly raised at trial has been decided by the supreme court. In State v. Willis, ___ Vt. ___, 494 A.2d 108 (1985), the defendant raised for the first time on appeal the issue of whether the side judges' participation in deciding a motion to transfer to juvenile court and a motion to suppress violated his rights to due process and effective assistance of counsel. *Id.* at ___, 494 A.2d at 122. Had these arguments been raised and properly preserved at trial, they would have presented issues of first impression. However, under plain error analysis, the court found the evidence of impropriety insufficient to warrant reversal. *Id.*

159. *Hunt*, 145 Vt. at 49-50, 485 A.2d at 117.

160. *Id. See* VT. STAT. ANN., tit. 4, § 439 (amended 1982).

161. *Hunt*, 145 Vt. at 50, 485 A.2d at 117.

gue plausibly that other persons similarly situated, charged with an identical offense, could at the unbridled discretion of the state's attorney be tried in district court, where a single law-trained judge presides.[162] At the present time it appears that this distinction is largely academic, as criminal charges are rarely brought in superior court. The possibility still exists in theory, and occasionally in practice, as both court systems have general criminal jurisdiction. It would seem that the legislature could remove any possibility of conflict in this area, and make statutory jurisdiction conform to reality, by repealing section 114 of title 4, which vests criminal jurisdiction in the superior courts. The Vermont Constitution requires only that courts be maintained in each county; the jurisdiction of the courts may be regulated by the legislature.[163]

In a detailed and forceful dissent, Justice Peck accused the *Hunt* majority of retreating from and evading the holding of *Dunkerley* by erroneously characterizing judicial discretion as not involving issues of law.[164] Justice Peck contended that judicial discretion was *always* a matter of law, involving the understanding and application of legal principles and standards. The discretion exercised by the side judges in *Hunt*, he argued, was legal discretion, and thus the rule of *Dunkerley* and Hunt's right to due process were both violated.[165]

Justice Peck pointed out that the majority used only a single definition of judicial discretion, taken from a twenty-year-old federal district court opinion, to support its reasoning that discretion does not involve the decision of legal questions.[166] This opinion merely omitted to say that legal issues and standards were necessarily included in judicial discretion. This omission may well have reflected an assumption that judicial discretion is legal in nature, rather than any belief to the contrary. As Justice Peck noted, be-

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162. A recent attempt to raise this equal protection issue before the supreme court was rebuffed on account of inadequate briefing. In dicta, the court remarked that the claim, however well briefed, would not constitute plain error. State v. Miller, No. 83-279, slip op. at 15-16 (Vt. July 19, 1985). The equal protection issue was not raised at trial. *Id.* slip op. at 15.

163. VT. CONST. chap. II, § 4. *See* VT. STAT. ANN. tit. 4, §§ 2, 113, 114, 437, 439, 440 (1972 & Supp. 1985) for the provisions which demonstrate the legislature's control over the jurisdiction of the courts.

164. *Hunt*, 145 Vt. 50-51, 485 A.2d 118 (Peck, J., dissenting).

165. *Id.* at 51, 485 A.2d at 118.

166. *Id.*

cause the case cited by the majority did not involve lay judges,[167] the language of the holding was inapplicable to the facts before the supreme court in *Hunt*.[168]

In fact, it appears that no court has ever discussed or defined the parameters or ingredients of judicial discretion as exercised by lay judges. Certainly *Hunt* was a case of first impression. No Vermont case is cited by either the majority or the dissent, and as no other state permits lay judges to exercise such discretion, it is unlikely that the issue has been raised elsewhere. Other discussions of judicial discretion are premised on the assumption that the judges who exercise discretion are trained in the law.[169]

The dissent implicitly criticizes the manner in which the *Dunkerley* holding was implemented by the Rules of Criminal Procedure, specifically by the version of Rule 54 (c)(1)(ii) which was in effect from October 13, 1976 to March 15, 1985.[170] This rule permitted the side judges to participate in determining the facts involved in mixed questions of law and fact.[171] Justice Peck's analysis and rejection of the majority's (and the rule's) definition of the nature of a mixed question of law and fact is one of his most telling points:

> They are not like apples and oranges mixed together in a basket, each unit of which may be identified as one or the other and separated out. A mixed question is analogous to a cross-bred animal. In the latter instance there is but one animal,

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167. *Id.*

168. *Id.*

169. There are other areas of Vermont law, however, in which three-judge superior courts are given broad discretionary powers, which are based on factual determinations. For example, VT. STAT. ANN. tit. 15, § 751 (Supp. 1985) gives the court wide discretion in the division and assignment of property under a divorce decree. The statute provides simply that the court shall settle the rights of the parties by an equitable division of the property, and lists eleven relevant factors to be considered, all of which involve findings of fact. In 1978 the supreme court held that "[t]he distribution of property in a divorce proceeding is not an exact science. Such distributions are required only to be equitable, and wide discretion is vested in the trial court." Hogel v. Hogel, 136 Vt. 195, 197, 388 A.2d 383, 384 (1978). Divorce cases make up a large proportion of the workload of the superior courts, and the side judges have always participated actively in these matters. *See* NATIONAL CENTER FOR STATE COURTS, A UNIFIED COURT SYSTEM FOR VERMONT 80 (1974). Justice Peck himself, writing for the majority in Ohland v. Ohland, 141 Vt. 34, 442 A.2d 1306 (1982), suggested that the superior court's exercise of discretion in custody cases was no more than "its best, albeit human, judgment . . . ." *Id.* at 40, 442 A.2d at 1308. But of course, the authority of the side judges was not at issue here.

170. *Hunt*, 145 Vt. at 54-55, 485 A.2d at 120 (Peck, J., dissenting).

171. VT. R. CRIM. P. 54 (c)(1)(ii).

> not two. In the former there is but one question, although it contains elements of law and elements of fact.[172]

Thus, the post-*Dunkerley* rule had erroneously presupposed the severability of the components of a single question. While the actual effect of this rule during its life of more than eight years is unknown, the 1985 amendment resolves the difficulty Justice Peck pointed out, by providing that mixed questions shall be deemed questions of law for the determination of the presiding judge.[173]

The *Hunt* dissent distinguished the plea bargain decision from the usual sentencing process, pointing out the obvious, that the two occur at different phases of the trial.[174] At sentencing, the legal issues in the case have been decided. In contrast, when the typical plea bargain proposal is considered, the legal and factual issues have not even been presented to the court. Justice Peck reasoned that the consideration of at least some of these issues is necessary to the plea bargain decision, and that the side judges' focus on the sentencing aspect of the plea bargain involves very different considerations from those taken into account at post-trial sentencing.[175] Pretrial consideration of such a question is inextricably entwined with unresolved issues of law.

The effect of the *Hunt* decision on the future activities of the side judges is unclear. Most likely, it will have no effect at all, for two reasons. First, the superior courts are currently involved in very few criminal cases;[176] second, the holding was in many ways rendered moot by the statutory amendments that took effect in April 1984.[177] These amendments, which took effect two weeks before the *Hunt* decision, represent a thorough overhaul of the statutory requirements for the composition of the superior courts, and a comprehensive, if not definitive, attempt to specify and codify the authority of the assistant judges.

IV. The Authority of the Side Judges Under Current Law

In eliminating the requirement that two judges form a quorum

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172. *Hunt*, 145 Vt. at 55, 485 A.2d at 120 (Peck, J., dissenting).
173. Vt. Stat. Ann. tit. 4, § 112(b) (Supp. 1985) (amended 1984).
174. *Hunt*, 145 Vt. at 56, 485 A.2d at 121 (Peck, J., dissenting).
175. *Id.*
176. *Judicial Statistics*, *supra* note 132.
177. *Supra* note 6.

in the superior court, the current law has removed the last vestige of legal necessity for any judicial activities of the side judges.[178] The language of the amendment makes the presence of the side judges entirely optional, and leaves that option to the side judges themselves.[179] If a case may legally include the side judges, the side judges present in the courthouse may decide whether they are available.[180] No definition of availability is given, and no criteria for making the decision are suggested. Apparently, the side judges are merely to ask themselves, "Are we available?"

After a side judge has "decided to participate" in a case, he "shall not withdraw . . . except for cause. However, if he is not available, or becomes unavailable during trial, the matter may continue . . . and he may not return . . . ."[181] This provision may mean that non-availability is somehow the equivalent of withdrawal for cause, or it may mean that a side judge has the option whether to "become unavailable" or to withdraw for cause. In any event, the absence of one or both of the side judges is no longer grounds for objection.[182] If only one side judge is unavailable, the court may consist of the presiding judge and the other side judge. A mistrial must be declared if they "do not agree on a decision."[183]

This statutory language must be read in light of the other provision of the amendment which categorizes legal, factual, and mixed questions, and gives the presiding judge alone the power to classify issues among these categories.[184] The side judges themselves appear to have no standing to challenge the rulings of the presiding judge in classifying the issues; the statute provides that the classification decision of the presiding judge shall not be ground for reversal unless a *party* objects and raises the issue on appeal.[185] The sole remaining power of a court including side judges seems to be to decide questions of fact in non-jury cases.[186] This raises the possibility that *Hunt*, if considered under the new statutes, would be decided differently. The *Hunt* decision itself is

178. *See* VT. STAT. ANN. tit. 4, § 112(c) (Supp. 1985).
179. title 4, § 112(d).
180. *Id.*
181. title 4, § 112(e).
182. title 4, § 112(c).
183. *Id.*
184. title 4, § 112(b).
185. *Id.*
186. According to the Bar Docket of the Windham Superior Court for the March term, 1985, more than 55% of the civil cases pending are jury cases.

not helpful in illuminating the meaning of these classifications.

The majority in *Hunt* found that the issue of whether to accept the plea bargain was neither a legal question nor a mixed question. "The Agreement itself . . . contained no legal issues for the trial court to resolve . . . ."[187] However, the court never specifically referred to the plea bargain decision as an issue of fact, characterizing it only as an exercise of discretion. The court's language suggests that this exercise of judicial discretion exists outside of the categories mentioned in the statute, and that the statutory classes are applicable only to questions raised during the trial phase—the actual determination of guilt or fault.[188] The future scope of the side judges' authority depends to a considerable extent on whether the statutory categories are regarded as exclusive. If all issues before the court must be questions of one of the three kinds, then the language of section 112(b) of title 4, "In cases not tried before a jury, questions of fact shall be decided by the court," might be held to eliminate the role of side judges in any phase of a jury trial, except for sentencing.

The issue of whether the participation of side judges in sentencing deprives a defendant of due process was not raised or decided in *Hunt*.[189] In *State v. Hamlin*,[190] decided fifteen months after *Hunt*, the defendant argued on appeal that because sentencing involves questions of law, the participation of side judges was improper under *Dunkerley*.[191] The court dismissed this claim by referring to federal case law holding that *jury* participation in sentencing is constitutional, and by reasoning that side judges are at least as qualified as jurors to perform that function.[192]

The authority of the presiding judge to categorize the issues

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187. *Hunt*, 145 Vt. at 40, 485 A.2d at 112.

188. *See supra* notes 138, 139 and accompanying text.

189. In State v. Miller, No. 83-279, slip op. at 15 (Vt. July 19, 1985), the supreme court stated that it had held in *Hunt* that participation of side judges in sentencing was not a due process violation. In fact, no such holding appears in the *Hunt* opinion. The issue in *Hunt* was the authority of side judges to accept or reject a pre-trial plea bargain. 145 Vt. at 37, 485 A.2d at 110. The issue of side judge participation in sentencing was not argued, and the court's only reference to it was to say that the litigants "seem to agree" that side judge participation in post-trial sentencing is proper, absent a plea bargain. *Id.* at 40, 485 A.2d at 112. *See also supra* notes 174, 175 and accompanying text.

190. No. 82-339 (Vt. July 5, 1985).

191. *Id.* slip op. at 16.

192. *Id.* slip op. at 16-17. *See also* State v. Messier, No. 83-340, slip op. at 21-22 (Vt. July 19, 1985).

could be used broadly to restrict the role of the side judges in most ordinary civil litigation. Already, the side judges have less scope for decision than a jury; a jury is instructed in the law and allowed to apply the law to its findings. The side judges may participate only in preparing findings to which the presiding judge then applies the law.[193] If every issue containing even a hint of a legal question is classified as a mixed question, the side judges could be relegated to almost exclusively ornamental status.

For example, decisions under section 751 of title 15, governing the disposition of marital property in divorce cases, might be classified as mixed questions, by holding that the statutory mandate to "equitably divide" refers not to common sense but to the principles and rules of equity. Thus a superior judge could plausibly classify the entire determination, including the factual issues under § 751(b), as a single mixed question from which the side judges are excluded by law. This example is perhaps extreme, but it serves to illustrate the possibilities which exist. Justice Peck's argument that the plea bargain decision in *Hunt* involved the application of legal principles and was therefore beyond the power of the side judges, could be easily extended to almost any other determination made in court. How the superior judges will use this authority remains to be seen. This writer predicts that many appeals of their decisions in classifying issues will be based on claims of improper participation of the side judges in mixed questions. It would be difficult for a party to claim prejudicial error because the side judges were *not* permitted to participate, as it would be practically impossible to show that a decision would have been different had they taken part. Therefore, a superior judge wishing to avoid reversal will tend to classify issues so as to reduce the participation of the side judges as much as possible.

The real power of the side judges, then, is currently limited to questions of fact in non-jury cases, and perhaps to matters such as sentencing which may involve the pure exercise of discretion, if such a thing exists. There is good reason for the presiding judges to restrict the side judges' role as narrowly as possible, even with these categories. The role of side judges has now been reduced to that of an elected jury, not subject to examination or challenge for cause by the parties, and accountable only to the electorate, which is not likely to be concerned with their performance in individual

193. VT. STAT. ANN. tit. 4, § 112(b) (Supp. 1985) (amended 1984).

cases, except in such cases as *Hunt* where the side judges' actions arouse public controversy.

CONCLUSION

Among the justifications which have been advanced for the existence and retention of the side judges are their knowledge of local conditions and individuals,[194] and their inclination to "temper justice with mercy."[195] Today, it appears that mercy is no longer the concern of the side judges. Rather, their role reflects the public desire for more severe punishment in criminal cases, most notably illustrated in the *Hunt* case. If side judges continue to participate in occasional criminal sentencing, this tendency is likely to continue. Although the electorate should have some influence on the penalties meted out through the judicial system, side judges are not the proper vehicle for the effectuation of this public concern. These judges influence the disposition of only a tiny fraction of the criminal cases in the court system, and these few are at the whim of the state's attorney who may or may not choose to bring charges in the superior court. It is conceivable, even, that a prosecutor might choose to bring charges in the superior court because the side judges would be less likely to approve a settlement or a lenient sentence. An equal protection challenge such as the one made in *Hunt* would seem particularly applicable to such a situation.[196]

One study completed in 1974 found that the side judges "pressur[ed] the Superior judges to agree to lighter sentences in criminal cases where the side judges are familiar with and favorably disposed towards defendants."[197] Regardless of the direction of such pressure, for leniency or severity, such actions are the result of bias which is improper and inappropriate. "Local knowledge" in this context is nothing more than the injection of irrelevant and prejudicial elements, which have no place in a modern court.

Whatever the rationales or myths behind the retention of the side judges, no justification is valid if the side judges have no meaningful judicial authority. Their present powers are so limited that their ability to contribute *anything* to the judicial pro-

194. A. NUQUIST, *supra* note 39, at 226; NATIONAL CENTER FOR STATE COURTS, *supra* note 42, at 80.

195. A. NUQUIST, *supra* note 39, at 226.

196. *See supra* notes 159-163 and accompanying text.

197. NATIONAL CENTER FOR STATE COURTS, *supra* note 42, at 80.

cess—common sense, local knowledge, democratic values, mercy, or whatever—is insignificant. The abolition of the office has been recommended several times over the past half-century.[198] However, none of these proposals has considered the ramifications of the complete abolition of the office of assistant judge.

Any proposal to abolish the office must take into account the non-judicial duties which are assigned by statute to the side judges. In effect, the side judges are the executives of county government in Vermont. Their duties are detailed in title 24. They are responsible for the care of county property, including the courthouses,[199] for presentation of a county budget and the setting of a county tax rate.[200] They appoint the county clerk,[201] county treasurer,[202] and county auditor.[203] They commission notaries public.[204] They are responsible for maintaining law libraries,[205] and for ensuring that the United States and Vermont flags are displayed in the courtroom.[206]

All these duties would still have to be performed, if the side judges' position were abolished. One solution would be to retain the assistant judges as elected officials of the county, possibly under a different title, to continue to perform these functions. This would enable the present side judges to continue to hold elective office, and would ensure the continuity of the operations of county government. A constitutional amendment would be required if the title of the position was to be changed.

The assistant judges' judicial functions are not constitutionally mandated. Should the legislature remove all reference to the assistant judges from title 4, the side judges could continue to administer the various aspects of county government detailed in title 24, but not perform any judicial functions. Such a compromise might serve the interests of everyone concerned, and remove some of the political obstacles to the abolition of the side judges. The reluc-

198. REPORT TO THE SPECIAL COMMITTEE TO STUDY THE JUDICIAL SYSTEM IN VERMONT (1937); JUDICIAL BRANCH STUDY COMMITTEE, REPORT TO THE LEGISLATIVE COUNCIL ON PROPOSAL No. 5 (1966); NATIONAL CENTER FOR STATE COURTS, *supra* note 42.

199. VT. STAT. ANN. tit. 24, § 131.

200. title 24, § 133.

201. title 24, § 171.

202. title 24, § 211.

203. title 24, § 261.

204. title 24, § 441.

205. title 24, § 76.

206. title 24, § 132.

tance of the legislature to abolish the judicial functions of the side judges may be explained rationally only as the result of misconceptions as to the side judges' actual powers. In an era of public interest in efficiency and economy in government, there is no reason for the retention of so ineffectual an institution.

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