come the parol evidence bar. What form should the assistance take? A practical suggestion is to be found in *Giammares v. Insurance Company,*[26] where Vice Chancellor Lane granted an injunction against the defendant's pleading a breach of warranty where the true facts had been revealed to the agent on the ground of an estoppel *in pais.* He was reversed by the Court of Errors and Appeals on another question and the injunction was not mentioned in the appellate opinion.[27] But equity undoubtedly may enjoin the pleading of defenses at law. It has done so recently in the case of the Statute of Limitations.[28] No other instance is found, but the equities of the situation presented here should be sufficient to move the most exacting conscience to extend the remedy.

THE CHANCERY INVESTIGATION—The recent investigation into certain alleged practices on the part of officers of the Court of Chancery concerning the administration of trust and receivership estates, ordered by the late Chancellor Walker[1] and conducted, among others, into the judicial acts and private business affairs of two vice-chancellors of the court,[2] came to an abrupt halt with the recent decision by the Court of Errors and Appeals in *In re New Jersey State Bar Association*[3] reversing the Court of Chancery in the same cause.[4]

The petitioner appellant, one of the vice-chancellors of the court, filed his petition to have suppressed that part of the master's report relating to his findings of fact in connection with the investigation of the vice-chancellor's judicial acts and private business affairs. The chancellor denied the prayer of the petition except that he directed the report contain no conclusions, comments or recommendations by the master. The appellate court held the chancellor had no power to investigate the judicial acts or private business affairs of a vice-chancellor and that the order of reference in that respect was improvidently made.

The action on the part of the late Chancellor Walker in directing the order of reference was unique in the judicial system of this state. One of the purposes in making the order was to enable the

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[26] *Supra,* note 11.
[27] *Supra,* note 11.
[28] Howard v. R.R. Co., 102 N.J. Eq. 517, (Ch. 1928) *aff.* 104 N.J. Eq. 201 (E.&A. 1928).
[1] Chancery Docket 89-639. For preliminary discussion of this matter see *The Current Chancery Investigation,* 1 MERCER BEASLEY L. REV. 51, 2, p. 30 (1932).
[2] *Supra,* note 1.
[3] 114 N.J.Eq. 261 (E.&A. 1933).
[4] 112 N.J.Eq. 606 (Ch. 1933).

chancellor to put an end to existing abuses in the court and to remove any and all officers of the court who had not been faithful to the trust reposed in them. The initial question was, therefore, whether the chancellor could remove, suspend or otherwise discipline a vice-chancellor.

The original act creating the office of vice-chancellor[5] provided that such officer "shall be appointed by the chancellor, and commissioned by the governor, under the great seal of the State, and * * * shall continue in office for seven years from the date of the commission." The original act was amended from time to time as the number of vice-chancellors was increased, until superceded by the act of 1902.[6] The latter reenacted this provision, and the present act, an amendment of the act of 1902, creating ten vice-chancellors is to the same effect.[7] The original act and the amendments are silent as to the removal of a vice-chancellor.

Where the office of a judge is created by the legislature, it is within the power of that body to determine the manner of his selection.[8] The legislature in directing the chancellor to appoint vice-chancellors conferred upon him an administrative power.[9] That the legislature may delegate an administrative duty to a judicial officer, where that duty involves the conduct of the affairs of the courts, is universally recognized and is not an usurption of power delegated by the constitution to the executive department of the government.[10]

Some courts have held that the power of appointment generally carries with it, as an incident, the power to remove.[11] Such was the holding of the United States Supreme Court in *Myers v. United States*,[12] but that case dealt with the right of the President to remove an executive officer (a postmaster) appointed by his predecessor with the advice and consent of the Senate. The court interpreted the Federal Constitution as impliedly extending the executive power vested in the President to removal, without the consent of the Senate, of subordinate officers appointed by him with such consent. The court especially points out that this power of removal relates only to executive, not to judicial, officers. In New Jersey the power to remove state officers having a fixed

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[5] P.L. 1871, ch. 621, p. 127.
[6] P.L. 1902, ch. 158, p. 541.
[7] P.L. 1921, ch. 175, p. 470.
[8] 33 C.J. 936.
[9] State *ex rel.* Attorney General v. Kennon, 7 Oh. St. 547 (1858).
[10] P.L. 1913, ch. 20, p. 828, since amended P.L. 1929, ch. 17, p. 36. *In re* Jury Commissioner of Passaic County, 6 N.J. Misc. 611 (Ch. 1928).
[11] 46 C.J. 984 and cases cited therein.
[12] 272 U.S. 52, 71 L. ed. 160 (1926).

statutory term is not incidental to the power of appointment. The governor has no inherent power to remove from office public officials appointed by him or his predecessor, unless that power is conferred by the constitution or by the statute.[13] The procedure for removal of state officers, be they judicial or otherwise, must be, in accordance with the provisions of law,[14] and in the absence of statutory authorization, the constitution must provide therefor if his removal may be effected.

It was contended by the late Chancellor Walker in *Re Appointment of Vice-Chancellors*[15] that "the Vice-Chancellors as now constituted, that is, appointed by the Chancellor (within their respective spheres and jurisdictions as headmasters of the court and as advisors of the chancellor) are constitutional officers * * *." Where the office is created or recognized by the constitution of the state, it is of course a constitutional office and the judge is a constitutional officer, but, where the office is created by statute it is not a constitutional but a statutory office.[16] Unless a public office is mentioned *eo nomine* in the constitution the legislature may fully control the title and functions of the position.[17] The Constitution of the State of New Jersey creates a Court of Chancery[18] and provides that the court shall consist of "a chancellor".[19] Nowhere in this document is the office of vice-chancellor mentioned nor does it provide for any officer of the court except the chancellor. With great deference to the decision of the late chancellor, it is difficult to understand how the office of vice-chancellor is any other than a statutory office.[20]

Whether a vice-chancellor is a statutory officer holding for a definite term without statutory provision for removal, or whether he is a constitutional officer, was not of great significance in the determination of this controversy, for the power of removal in either case does not appear to lie in the chancellor. The Constitution of New Jersey creates, among others, a court for the trial of impeachments[21] and provides that the House of Assembly shall

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[13] State *ex rel.* Police Commissioners of Jersey City v. Pritchard, 36 N.J.L. 101 (Sup. Ct. 1873) wherein at p. 111 Chief Justice Beasley said: "I have not been able to perceive any intimation, not even the least, either in the constitution of this state, its system of laws, or legal observances, that this right of superintendency over or power of removal from public office, except in instances of statutory specification, has been delegated to the executive head of the government." Bruce v. Matlock, 111 S.W. 990 (Ark. 1908); Haight v. Love, 39 N.J.L. 14 *aff.* 39 N.J.L. 476 (E.&A. 1877).

[14] Taylor v. Doremus, 16 N.J.L. 473 (Sup. Ct. 1838).

[15] 105 N.J.Eq. 759 (Ch. 1930).

[16] Foster v. Jones, 79 Va. 642, 52 Amer. Rep. 637 (1884). 33 C.J. 931.

[17] 22 R.C.L. 382.

[18] Art. 6, §I.

[19] Art. 6, §IV, Subd. I.

[20] McCran v. Gaul, 96 N.J.L. 165 at p. 176 (E.&A. 1921).

[21] Art. 6, §I.

have the "sole" power of impeaching by a vote of all the members.[22] It further provides that all civil officers shall be liable to impeachment for misdemeanor in office.[23] In England the remedy for any official misconduct is by application for removal. In this country the judiciary of the superior courts of record are generally responsible only to the people or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge their duties. If the judges act with partiality, corruptly or arbitrarily, they may be called to an accounting by impeachment and thereupon suspended or removed.[24] Where the constitution plainly prescribes the grounds and methods of removal, it has been held to be the paramount law and not subject to be changed or nullified directly or indirectly.[25]

While a vice-chancellor is necessarily an officer of the Court of Chancery, he is essentially a civil officer of the state, receiving his commission from the governor.[26] Although the power to remove an officer of the court might have been inherent in the chancellor of the High Court of Chancery of England and thereby inherent in our own chancellor, the Constitution of 1844 by providing that a commissioned state officer should be removed from office by impeachment, took away any inherent power in him to remove a vice-chancellor and vested it in the court for the trial of impeachments. By judicial legislation it has been held that where a statute creates an office and also provides for removal of the appointee for cause, such an enactment is within the confines of the constitution. In *McCran v. Gaul*,[27] the Court of Errors and Appeals was requested to pass upon the constitutionality of that section of the Public Utilities Act[28] providing for removal by the governor of any commissioner for neglect of duty or misconduct in office, upon the ground that it was in contravention of Article 3 of the Constitution of New Jersey.[29] The defendant contended that the act attempted to confer upon the governor a power which properly belonged in the court for the trial of impeachments. The affirmance

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[22] Art. 6, §III, Subd. I.
[23] Art. 5, Subd. II.
[24] 15 R.C.L. 550.
[25] Falloon v. Clark, 58 Pac. 990 (Kans. 1899); Conroy v. Hallowell, 144 N.W. 895 (Neb. 1913).
[26] *In re* Hahn, 85 N. J. Eq. 510 (E.&A. 1915); Art. 7, §II
[27] 96 N.J.L. 165 (E.&A. 1921) *aff.* 95 N.J.L. 393 (Sup. Ct. 1920).
[28] P.L. 1911, ch. 195, p. 374, §II.
[29] Art. 3—The powers of the government shall be divided into three distinct departments—the legislative, executive and judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided.

of the decision of the Supreme Court upheld the constitutionality of this statute, but only by a divided court. Mr. Justice Kalisch in a dissenting opinion maintained that where the constitution provides a method of removal of officers by impeachment, that method is exclusive and the power which the legislature might otherwise be regarded as possessing is taken away.[30] It may be deduced from this decision that a statutory civil officer of the state may be removed only by impeachment except where the act creating the office provides for his removal, in which event an alternate remedy is available.[31] A vice-chancellor, not being subject to removal under the statute creating the office, may under this reasoning be ousted only by impeachment and the chancellor has no power to remove him.

Any attempt by the chancellor to deprive a vice-chancellor of his power to act as such by suspension would be an attempt indirectly to achieve a removal despite the absence of power to effect it directly. By constitutional provision when a judicial officer is impeached, he is automatically suspended until his acquittal.[32] This is the only instance in which a civil officer may be suspended without statutory provision therefor. "Suspension from the duties of the office creates no vacancy, the seat is filled but the occupant is silenced."[33] Even where the power of removal has been expressly granted, it has been held that such power does not carry with it and include power of suspension unless that too is expressly provided for.[34] In the court below, the chancellor conceded that he had no power to remove or suspend a vice-chancellor[35] and the Court of Errors and Appeals recognized the soundness of his view.

How, then, may the chancellor discipline a vice-chancellor? It is suggested that he can withhold references from such officers and might also revoke those already made. From the court's inception, the chancellor has had officers to assist him in discharging his judicial duties. These officers are masters of the court, but the orders or decrees advised by them derive their force and effect from the signature of the chancellor which alone makes them orders or decrees of the Court of Chancery.[36] The legislative creation of the office of vice-chancellor was made necessary by the

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[30] *Ibid* at p. 177.

[31] See also State v. Frazier, 182 N.W. 545, 547 (N.D. 1921); United States v. Malmin, *272* Fed. 785 (C.C.A. 3rd, 1921).

[32] Art. 6, §III, Subd. 2.

[33] State *ex rel.* Tyrrell v. Common Council of Jersey City, 25 N.J.L. 536, 544 (Sup. Ct. 1856).

[34] Weinberger v. Hilfman, 8 N.J.Misc. 32 (Sup Ct. 1929).

[35] *Ibid* note 4 *supra.*

[36] *In re* Thompson, 85 N.J.Eq. 221, (Ch. 1915).

tremendous growth of the business of the court. Vice-chancellors perform the same functions as masters of the court to whom causes are referred,[37] the difference being that the former, pursuant to the statute, are appointed for a definite term, receive a fixed emolument and in accordance with the rules of the court certain matters are referred to them by general instead of special orders of reference. The volume of business handled by the court has led the chancellor to adopt the practice of approving and signing the orders or decrees advised by the vice-chancellors as a matter of course. Obviously the legislative intent in creating vice-chancellors would not be effected if the chancellor should deem himself compelled to review the opinion and advice of a vice-chancellor in every case. Even on demand of the parties, a decree advised by a vice-chancellor will not be reviewed by the chancellor unless exceptional circumstances exist, but they will be left to their relief by appeal.[38]

For a proper understanding of the far reaching consequences of this decision by the Court of Errors and Appeals, it is necessary to consider, first, the power of the chancellor to investigate the judicial acts of a vice-chancellor and secondly, the power to investigate into his private business affairs.

While it was not directed to the investigation of a pending cause or an existing order or decree of a vice-chancellor, one of the purposes of the order of reference was to secure facts upon which to formulate new rules for the better conduct and administration of receivership and other trust estates in the Court of Chancery.[39] Here then was an attempted investigation into the judicial acts of an officer of the court not in one case but in several. Since the chancellor may intervene in a suit in his court at the instance of any of the parties thereto or upon his own motion, there can be no reason why he might not do so in a proper case at the request of a disinterested third party. It is also difficult to understand why the chancellor might not inquire into several cases at the same time to determine whether a vice-chancellor was discharging properly his judicial functions as an officer of the court. The power

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[37] Gregory v. Gregory, 67 N.J.Eq. 7, 10 (Ch. 1901).

[38] Gregory v. Gregory, *supra* at p. 11; Beam v. Paterson Deposit & Trust Co., 97 N.J.Eq. 552 (E.&A. 1925); Rusling's Adm. v. Bray, 38 N.J.Eq. 398 (Ch. 1884). In W. D. Cashin v. Alamac Hotel, 98 N.J.Eq. 432 (Ch. 1925), Chancellor Walker said at p. 440: "It is true that the chancellor in all ordinary cases will decline to make such review and leave the objecting party to obtain relief by appeal. * * * As to the chancellor's absolute power to do so in any case I make no doubt, and I think that this matter (*sub judice*) is one in which the chancellor may with propriety interfere, and that he should do so." See also Scranton Button Co. v. Neonlite Corporation of America, 105 N.J.Eq. 708 (Ch. 1930).

[39] Chancery Docket 89-639.

must reside where the responsibility rests and the chancellor could not justify the toleration of conduct or practices impairing the constitutional functions of his court upon the ground that he is helpless to preserve, protect and defend against such evils.[40] "In the great realm of judicial procedure commonly denominated special proceedings, judicial powers may be exercised without having designated plaintiffs or defendants before the court and without arriving at decisions or judgments which are binding upon designated parties."[41]

Creating, enforcing and suspending rules for the conduct of affairs of the Court of Chancery are within the exclusive province of the chancellor both by inherent power and by express legislative authority.[42] But this power is a nullity if the chancellor is unable to investigate his own court for the purpose of formulating such rules; and investigation cannot mean the mere review of decisions by the vice-chancellors, but also any and every official act done by any officer while clothed with judicial power. Prior to this decision, several cases had held that the chancellor had the power to investigate official acts relating to any business of the court to ascertain how the affairs of litigants were being conducted.[43] That such powers are taken away by the broad language of this decision must be conceded.

The power to investigate the private business affairs of a vice-chancellor, however, presents a more troublesome problem. Assuming that the chancellor has no removal power, whether for private or judicial misconduct, he does have the power of withholding references.[44] That the character of a judge should be be-

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[40] Capps v. Gore, 21 S.W. (2d) 266 (Ky. 1929); *In re* the Matter of Proceedings Against Paul Richards, 63 S.W. (2d) 672 (Mo. 1933).

[41] Rubin v. State, 216 N.W. 513, 516 (Wis. 1927).

[42] Chancery Act §87, P.L. 1902, p. 539; 1 Comp. St. 444; Larky v. Larky, 88 N.J.Eq. 591 (E.&A. 1918); Reed v. Benzine-ated Soap Company, 72 N.J.Eq. 622 (Ch. 1907).

[43] In *In re* John Francis Cahill, 66 N.J.L. 527 (Sup. Ct. 1901), the chancellor after ascertaining facts of improper conduct of solicitor, communicated same to Supreme Court with suggestion that the case was one for discipline by that court. In *In re* Raisch, 83 N.J.Eq. 82 (Ch. 1914), vice-chancellor on behalf of chancellor investigated improper conduct on part of a solicitor of the court. In *In re* Hahn *supra,* note 26, the chancellor has no power to disbar a solicitor in chancery but inferentially upheld chancellor's power to investigate the officers of his court. In *In re* the matter of Breidt and Lubetkin, 84 N.J.Eq. 222 (Ch. 1915), the chancellor after investigation suspended for term of years two solicitors guilty of malpractice. In the matter of H— C— Jr., a master in Chancery, 81 N.J.Eq. 8 (Ch. 1912), conduct of master in chancery investigated by direction of chancellor as to improper acts as such master. Smiley v. Hanna, 94 N.J.Eq. 573 (Ch. 1923), upon investigation commission of master in chancery was revoked and cancelled by the chancellor.

[44] *Supra,* note 43.

yond reproach is axiomatic. Why then may not the chancellor, since he can withhold references, investigate the private affairs of a vice-chancellor as well as his judicial acts in order to form a justifiable basis for the withholding of such references? It is submitted that the result reached by the Court of Errors and Appeals can only be sustained on the ground that the chancellor tried to do indirectly that which he was powerless to do directly, that is by a public inquiry to arouse sentiment to such a degree that the officer would be forced to resign. Perhaps it would be far better to leave the entire matter to the Court for the Trial of Impeachments, the court that has the power to rid the state of unfit public servants. Nevertheless, the language of the court was too broad, and it is hoped that at the very least the scope of this decision will be limited to its own facts.