THE STATE OF NEW JERSEY,

Respondent

vs

JAMES J. DONOVAN, DANIEL J. SWEENEY
and CORNELIUS J. O'NEILL,

Defendants-Appellants,

JOHN DREWEN,

Respondent-Pro-Se.

****

THE STATE OF NEW JERSEY,

Defendant-in-Error,

vs

ROBERT DEEGAN,

Plaintiff-in-Error.

****

UNITED DELIVERIES, INC.

vs

NORWICH UNION FIRE INSURANCE SOCIETY,
LTD., a corporation,

Defendant-Appellant.

****

ARCH R. EVERSON,

Prosecutor-Appellee,

vs

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, FLORENCE S. HIGGS, GRACE HOY, GRACE KENDALL, KOSEPHINE KOPEZNISKI, JULIA? LYDON, FRANCES SMITH, AMMA WILLIAMS, ANNAY KELLY, RUTH O'BRIEN, PAUL N. BARR, HELEN HARTER, JAMES T. HUGHES, MARY E. RYAN, CATHERINE WIEGER, BERTHA BRODOWSKI, JOHN P. SWEENEY, AUGUST JACOB, JAMES H. WILLIAMS, SARAH HILLS, VICTORIA DOMANSKI, ROBERT J. RYAN and WILLIAM RYAN

Respondents-Appellants.

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Notice of Appeal and Grounds

(Filed—April 27, 1945.)

New Jersey Supreme Court

THE STATE, *vs.* JAMES J. DONOVAN, DANIEL J. SWEENEY and CORNELIUS J. O'NEILL, *Defendants.*	On Indictment. On Motion to Quash. Notice of Appeal from Order Directing Defendants to Pay One-Half of Allowance to Supreme Court Commissioner, and Grounds. Sat below: Justices Case, Donges and Colie.

To:

Hon. JOHN DREWEN and
Hon. WALTER D. VAN RIPER, Attorney General of the State of New Jersey.

SIRS:

PLEASE TAKE NOTICE, that the defendants in the above entitled cause appeal to the New Jersey Court of Errors and Appeals of last resort in all causes from that portion of the order of the Supreme Court made April 4, 1945, which provides:

"and it is hereby

FURTHER ORDERED and ADJUDGED that one-half of said sum be paid by the County of Hudson wherein the said matter arose and one-half by the defendants",

on the following ground, viz.: because the Supreme Court erred in ordering that one-half of the allowance to Honorable John Drewen, Supreme Court Commissioner, be paid by the defendants and that only one-half thereof be paid by the County of Hudson, in that

(1) The Supreme Court should have ordered that the whole of said allowance be paid by the County of Hudson or by the State of New Jersey.

(2) The Supreme Court should not have ordered that any part of said allowance be paid by the defendants.

(3) The payment of any portion of said allowance was not a term of the allocatur, and the order, in the respects stated, violates the rights of the defendants under R. S. 2:189-7, 8, 10, and the Supreme Court was without jurisdiction to so order.

(4) The order, in the respects stated, violates the rights of defendants under the Magna Charta, preserved to them by Article I, Paragraph 21, of the New Jersey Constitution, in that it imposes upon the defendants unreasonable charges for the use of the courts in this criminal proceeding.

(5) The order, in the respects stated, imposes costs on the defendants, in violation of R. S. 2:194-3.

(6) The order, in the respects stated, denies to the defendants due process of law by imposing an

unreasonable cost upon them, in their defense under said indictment pursuant to the law, and so violates their rights under the Fourteenth Amendment to the Constitution of the United States.

(7) The order, in the respects stated, violates R. S. 2:194-1.

(8) The order, in the respects stated, imposes costs upon the defendants, who have not been convicted under the indictment, and may subject the defendants, who may later be acquitted, to execution and sale of their property or confinement to a county jail or penitentiary, which, under R. S. 2:194-12, may only be done after judgment of conviction, and in this respect the right of defendants that costs be not imposed upon them before their conviction has been violated by the said order, which likewise, in this respect, deprives the defendants of due process of law, guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, and to their rights under the common law preserved to them by Paragraph 21 of Article I of the New Jersey Constitution.

(9) The services of the Honorable John Drewen as Supreme Court Commissioner were for the convenience and benefit of the Supreme Court, and are an expense of the State of New Jersey in the operation of the Supreme Court as a part of its judicial system, and the Supreme Court was without jurisdiction to order that such expense, or any part thereof, be paid by the

indicted defendants, who were, in the discretion of the Supreme Court, permitted the use of its procedure in their defense.

Dated: April 17, 1945.

Yours respectfully,

JOHN WARREN,
Attorney for Defendants.

Writ of Certiorari

(Filed—September 17, 1942.)

NEW JERSEY, ss.

(L. S.) THE STATE OF NEW JERSEY TO OUR COURT OF QUARTER SESSIONS OF THE COUNTY OF HUDSON.

GREETINGS:

We being willing, for certain reasons, to be certified of a certain indictment now before you, lately found against James J. Donovan, Daniel J. Sweeney and Cornelius J. O'Neill by the Grand Jury of Hudson County, as is said:

We do command you that you send under the hand of a Judge of said court, and the seal thereof, to the Justices of the Supreme Court of judicature at Trenton on the 17th day of September, instant, all and singular, the said indictment, with

all things touching and concerning the same of whatsoever name the said James J. Donovan, Daniel J. Sweeney and Cornelius J. O'Neill, may be named and called in the said indictment, together with this, our writ, that we may further cause to be done what of right and according to the laws of this State should be done.

WITNESS, THOMAS J. BROGAN, Chief Justice of our Supreme Court at Trenton, the 15th day of September, A. D. One Thousand Nine Hundred and Forty-two.

FRED L. BLOODGOOD,
Clerk.

JOHN WARREN,
Attorney.

Allocator

This writ is allowed. Let it be sealed. Let each defendant enter into recognizance as provided in statute in the sum of $5,000 Dollars ($5,000).

CLARENCE E. CASE,
J. S. C.

Recognizance

(Filed—September 17, 1942.)

NEW JERSEY SUPREME COURT

THE STATE OF NEW JERSEY

vs.

JAMES J. DONOVAN

State of New Jersey }
County of Hudson } ss.:

BE IT REMEMBERED, that on this 14th day of September, 1942, personally appeared before me, the undersigned, Joseph F. S. Fitzpatrick, a Supreme Court Commissioner of the State of New Jersey, James J. Donovan, defendant, and Michael Mahon and Neil O'Donnell, sureties, and they did severally acknowledge themselves to be indebted to the State of New Jersey in the sum of Five Thousand Dollars ($5,000.00) each, to be levied and made of their respective goods and chattels, lands and tenements, if default be made in the following conditions, to wit:

THE CONDITION of this Recognizance is such that if James J. Donovan, defendant as aforesaid shall

Recognizance

(a) Upon the return of the Writ of Certiorari to remove an indictment of the Hudson County Grand Jury now before the Hudson County Court of Quarter Sessions, appear and plead to the indictment in the Supreme Court and at his own costs and charges cause and procure any issue of fact that shall be joined upon the indictment to be tried at the next circuit of the Supreme Court to be held for the County of Hudson after the writ shall be returnable, if the Supreme Court shall not appoint any other time for the trial thereof, and if any other time is so appointed, then at such other time; and

SEAL

(b) That he shall not depart the Supreme Court until discharged by it and shall pay costs if convicted of the offense charged in the indictment;

and

(c) That he shall, if the Supreme Court shall so order, appear in the court from which the indictment was removed at any term thereof which the Supreme Court shall order and plead to the indictment and abide by the judgment of the court and pay costs, if convicted of the offense charged in the indictment, then this Recognizance to be void or else to be and remain in full force and virtue.

JAMES J. DONOVAN.

Recognizance

Taken and acknowledged before me the day and year first above written.

MICHAEL MAHON,

NEIL O'DONNELL.

JOSEPH F. S. FITZPATRICK,
Supreme Court Commissioner.

I hereby approve within Recognizance as to form and sufficiency of surety.

JOSEPH F. S. FITZPATRICK,
Supreme Court Commissioner
of New Jersey.

Clerk's Office,
Sep. 16, 11:07 A. M., '42,
Hudson County, N. J.

(Similar Recognizances of Daniel J. Sweeney and Cornelius J. O'Neill were similarly approved and filed.)

Rule to Take Depositions

(Filed—September 17, 1942.)

NEW JERSEY SUPREME COURT

JAMES J. DONOVAN, DANIEL J. SWEENEY, CORNELIUS J. O'NEILL, *Prosecutors,* *vs.* THE STATE OF NEW JERSEY, *et als.,* *Defendants.*	On Certiorari Rule to Take Depositions

Application being made for leave to take depositions, to be used in the argument of the above stated cause;

It is ordered that the said prosecutors and defendants have leave to take depositions on—2—days' notice, to be used in the said argument.

It is further ordered that John Drewen, Esq., Supreme Court Commissioner, is hereby appointed a commissioner to take the said depositions,

Entered September 17, 1942.

On motion of

DANIEL T. O'REGAN,
Prosecutor of the Pleas,
Attorney of Defendants.

Dated: September 17th, 1942.

Let the above rule be entered on the minutes.

CLARENCE E. CASE,
Justice.

Notice of Application

NEW JERSEY SUPREME COURT

THE STATE OF NEW JERSEY, *Plaintiff-Respondent,* *vs.* JAMES J. DONOVAN, DANIEL J. SWEENEY and CORNELIUS J. O'NEILL, *Defendants-Prosecutors.*	On Certiorari Notice

To:

JOHN WARREN, Esq.,
Counsel for Defendants-Prosecutors,

and

Hon. WALTER D. VAN RIPER,
Attorney General of New Jersey.

SIRS:

TAKE NOTICE that on Tuesday, the 4th day of January, 1945, at 10:15 o'clock in the forenoon (E. W. T.), or as soon thereafter as counsel can be heard, I shall make application before Justices Case, Donges and Colie, at the State House Annex, in the City of Trenton, for an allowance to me, as the Supreme Court Commissioner to whom was referred the hearing and taking of testimony under the writ of certiorari issued in this cause; and that this application shall be based

upon the matters and things set forth in the affidavit to be presented to the said Justices at the time and place aforesaid, copy of which is hereto annexed and made part of this notice.

JOHN DREWEN,
S. C. C.

Dated: December 26th, 1944.

Affidavit of John Drewen, in Support of Foregoing Notice of Application

NEW JERSEY SUPREME COURT

THE STATE OF NEW JERSEY, *Plaintiff-Respondent,* *vs.* JAMES J. DONOVAN, DANIEL J. SWEENEY and CORNELIUS J. O'NEILL, *Defendants-Prosecutors.*	On Certiorari Affidavit

State of New Jersey }
County of Hudson } ss.:

JOHN DREWEN, of full age, being duly sworn according to law, upon his oath deposes and says:

Affidavit of John Drewen, in Support of Foregoing Notice of Application

1. I am one of the Supreme Court Commissioners of this State, and as such was designated on or about July 10, 1942 by Honorable Clarence E. Case, one of the Justices of the Supreme Court, to hear and take testimony on a reference to me in the above-entitled cause of witnesses adduced by the respective parties thereto.

2. Pursuant to the reference aforementioned I conducted hearings, heard testimony and supervised the introduction and recording of exhibits, as by the said reference I was required, in all of which I was attended by one or more counsel for the respective parties.

3. The hearing sessions were begun on September 29, 1942 and were continued from time to time thereafter until the conclusion of such hearings on May 10, 1943. The total number of full court days consumed by the actual hearing of testimony is 29 days. The printed transcript of the testimony taken and of the case as made from the hearings before me comprises seven volumes. The total number of exhibits offered by the Prosecutor of the writ was 210, and by the State was 36.

4. In addition to the time consumed by actual hearings as above set forth, I also devoted time to conferences with the respective parties for the selection of an agreed place for the taking of the testimony and also with respect to arrangements for stenographic services and equipment for the production of daily copy produced by

stenographers working in relays. The time consumed in this way approximates two days.

5. I also was required to devote one day to attendance before the Supreme Court at Trenton for the determination by the court of a dispute between the respective parties relative to application by Prosecutors' counsel for amendment of the rule to take testimony. This was on October 6th, 1942. Another day was consumed by attendance upon the Chief Justice at his Chambers in Jersey City for the determination of other disputes between the respective counsel, and by conference preliminary thereto. This occurred on October 19, 1942.

6. The total time consumed by the taking of testimony under the reference aforesaid and matters relating thereto of the kind already mentioned is approximately 230 hours.

7. The data hereinabove set forth is taken from entries made by me and kept currently with the events recorded.

JOHN DREWEN,
(L. S.)

Sworn and subscribed to before me
this 26th day of December, 1944,
at Jersey City, N. J.

FREDERICK M. ROLLENHAGEN,
A Master in Chancery of New Jersey.

Per Curiam Opinion of New Jersey Supreme Court

(Filed—February 27, 1945.)

NEW JERSEY SUPREME COURT

THE STATE,
Respondent,

vs.

JAMES J. DONOVAN, *et al.*,
Defendants-Prosecutors.

(Not to be printed in any report)

On writ of *certiorari.*

Before Justices Case, Donges and Colie.

For the state, Walter D. Van Riper.

For the defendants, John Warren.

John Drewen, pro se.

PER CURIAM

John Drewen, Supreme Court Commissioner, applies, on notice to the parties, for an allowance for services performed by him in the taking of depositions in the above entitled *certiorari* proceedings on court appointment. The allowance will be in the amount of $2500. It is suggested that prosecutors, because they are the defendants named in the indictment, are immune from being charged with any part thereof. We find otherwise. The writ of *certiorari* did not issue *ex debito jus-*

titiae; it was allowed as a matter of grace. The allowance both as to amount and the allocation for payment is in the court's discretion. Counsel for both sides unnecessarily burdened the commissioner and swelled the transcript beyond any reasonable need. The charge for the allowance to the commissioner will be equally distributed between the state and the defendants, $1250.00 to be paid by the state and $1250.00 to be paid by the defendants. That will be the order.

Order Appealed From

(Filed—April 4, 1945.)

NEW JERSEY SUPREME COURT

THE STATE, *Respondent,* *vs.* JAMES J. DONOVAN, *et al.,* *Defendants-Prosecutors.*	On Certiorari Order

This matter coming on to be heard on the 4th day of January, 1945, before Justices Case, Donges and Colie, upon notice and petition of John Drewen, Esq., Supreme Court Commissioner, for an allowance for services performed by him in the taking of depositions on special reference to him

by the court under the writ herein; and the Court having heard and considered the argument of the said petitioner, pro se, and of Walter D. Van Riper, Attorney General, appearing for the State, and of John Warren, Esq., for the defendants; and having examined and considered the affidavit of the said petitioner bearing on the nature and extent of the services rendered;

It is, on this 4th day of April, 1945, ORDERED and ADJUDGED that the said John Drewen, Supreme Court Commissioner, upon his said petition as aforesaid, be and he hereby is allowed the sum of $2500.00 for the services performed by him as in his said affidavit set forth; and it is hereby

FURTHER ORDERED and ADJUDGED that one-half of the said sum be paid by the County of Hudson wherein the said matter arose and one-half by the defendants.

Entered April 4, 1945.

On Motion of

John Drewen, Pro se.

New Jersey Court of Errors and Appeals

MAY TERM—1945

THE STATE OF NEW JERSEY,
Respondent,

vs.

JAMES J. DONOVAN, DANIEL J. SWEENEY and CORNELIUS J. O'NEILL,
Defendants-Appellants.

JOHN DREWEN,
Respondent.

On Indictment

On Motion to Quash

On Appeal from Order Directing Defendants to Pay One-Half of Allowance to Supreme Court Commissioner

BRIEF OF DEFENDANTS-APPELLANTS

(Emphasis ours unless otherwise indicated)

Statement

James J. Donovan, Daniel J. Sweeney and Cornelius J. O'Neill, the defendants-appellants, were indicted by a Hudson County Grand Jury and they applied to Mr. Justice CASE for a writ of certiorari to remove the indictment into the Supreme Court for the purpose of moving in the Supreme Court to quash the indictment, or, in the alternative, to move for a trial in the Supreme

Court in a circuit other than the Hudson County Circuit. *In re Donovan,* 129 N. J. L. 25.

The writ of certiorari (S. C., pp. 4, 5) was allowed and the allocatur (S. C., p. 5, ll. 25-32) was conditioned upon each defendant entering "into recognizance as provided in statute in the sum of $5,000 Dollars ($5,000)."

Each defendant entered into such recognizance (S. C., pp. 6-8).

On motion of the Prosecutor of the Pleas, a rule to take depositions was allowed, the Court therein naming John Drewen as Supreme Court Commissioner to take such depositions (S. C., p. 9).

Mr. Drewen gave notice of an application before Justices CASE, DONGES and COLIE for an allowance for his services as Supreme Court Commissioner under said rule to take depositions, and annexed thereto his affidavit of services (S. C., pp. 10-13). On Mr. Drewen's application, the said Justices of the Supreme Court filed an opinion (S. C., pp. 14, 15), whereby they allowed Mr. Drewen the sum of $2,500 and decided that "The charge for the allowance to the commissioner will be equally distributed between the state and the defendants, $1250.00 to be paid by the state and $1250.00 to be paid by the defendants."

Following that opinion, an order was entered in accordance therewith, which provided that it was "FURTHER ORDERED and ADJUDGED that one-half of the said sum be paid by the County of Hudson wherein the said matter arose and one-half by the defendants" (S. C., pp. 15, 16).

While the order is interlocutory, it is in the nature of a final judgment, for its effect is to

enter a judgment against defendants-appellants in the sum of $1,250, which is a lien on their lands.

It is from the quoted portion of the said order, which, in effect, enters judgment against the defendants-appellants for said amount, that they here appeal for the reasons set forth in the notice of appeal and grounds (S. C., pp. 1-4).

The motion to quash was argued before Justices Parker, Perskie and Heher, and was denied in an opinion of Justices Parker and Perskie, Justice Heher not participating therein, and the opinion stated that "The writ of certiorari will accordingly be dismissed, with costs." *State* v. *Donovan,* 132 N. J. L. 319.

The question as to whether or not costs should be, or could be, allowed against defendants-appellants on the motion to quash has not been argued before the Supreme Court, and the defendants-appellants have asked to be heard on that question when the order denying the motion to quash is signed. Such order has not yet been entered, and defendants-appellants have not yet had an opportunity to argue that they are not liable for the costs on the motion to quash.

Argument

Each and every one of the grounds of appeal presents a simple question as to whether or not the Supreme Court, in this criminal proceeding, had power to order the defendants-appellants to pay one-half of the allowance made by the Court to Mr. Drewen for his services as Supreme Court Commissioner in this criminal cause, and this is so whether the allowance to Mr. Drewen be con-

sidered as an expense of the Supreme Court necessitated by the motion to quash, which it permitted the defendants-appellants to make in that Court, or costs.

This is a criminal case and our criminal procedure nowhere provides that an expense of this nature is to be paid by defendants on an indictment, either as costs or otherwise, and we submit that the law which sets up the procedure in which such services became requisite must be taken as contemplating their compensation by the sovereignty, in the absence of any provision for their payment otherwise.

The allowance of the writ of certiorari to remove the indictment into the Supreme Court, for the purpose of permitting the defendants-appellants to there move to quash it and for other purposes, was not, and could not have been, conditioned upon their agreement to pay, to assume, or to be liable for, the expenses, or costs, in this *criminal* proceeding.

The writ of certiorari was allowed by Mr. Justice Case under the authority of R. S. 2:189-7, which provides:

> "The supreme court or any justice thereof may, at the instance of any person indicted, * * * award a writ of certiorari to remove into the supreme court any indictment before trial from any court of * * * quarter sessions, upon the terms prescribed in section 2:189-8, of this title, *and no other.* * * *"

R. S. 2:189-8 provides:

> "The terms upon which a writ of certiorari may be awarded by virtue of section 2:189-7 of this title shall be as follows:

The person indicted and prosecuting the certiorari shall, before the allowance thereof, enter into recognizance to the state * * *, with condition:

a. That the person so indicted and prosecuting the writ shall, * * * at his own costs and charges, cause and procure *any issue of fact that shall be joined upon the indictment to be tried at the next circuit of the supreme court to be held for the county wherein the indictment was found,* after the writ shall be returnable, if the supreme court shall not appoint any other time for the trial thereof, and, if any other time is so appointed, then at such other time; and

b. That such person shall not depart the supreme court until discharged by it, and shall *pay costs, if convicted* of the offense charged in the indictment; and

c. That such person shall, if the supreme court shall so order, appear in the court from which the indictment was removed, at any term thereof which the supreme court shall order, and plead to the indictment and abide the judgment of the court, and *pay costs, if convicted* of the offense charged in the indictment."

R. S. 2:189-10 provides:

"* * *. If the indictment is determined sufficient in law, the court may retain it, to be sent down for trial before the proper circuit of that court, or may order it returned by the clerk to the court from which it was removed, and the court to which the indictment is remanded shall proceed thereon as if the writ had not been allowed."

The allowance made to Mr. Drewen for his services as the officer of the Supreme Court appointed to take the depositions, the charges of

the Court's stenographer for the original transcript of the depositions filed in the office of the Clerk of the Supreme Court and the copy thereof furnished to the printer, and the cost of printing the record for use of the members of the Supreme Court, as required by Supreme Court Rule 155, are not costs and charges of the trial of an "issue of fact that shall be joined upon the indictment to be tried at the next circuit of the Supreme Court to be held for the county wherein the indictment was found" (2:189-8, term a), and they are not costs payable on conviction (2:189-8, terms b and c).

Mr. Justice Case could not, when he allowed the writ, have imposed as a condition that the defendants-appellants pay the expenses of the Court on the motion to quash, because such is not a "term" included in R. S. 2:189-8, and R. S. 2:189-7 prohibits any "term" not included in R. S. 2:189-8, and he did not. He imposed the statutory terms only and the recognizance is solely conditioned upon their performance. By their recognizance filed in the Supreme Court, neither the defendants-appellants, nor their bondsmen, agreed to pay the Court's expenses, or any costs, on the motion to quash.

The Court may not now order the defendants-appellants, or their bondsmen, to pay such expenses, which it could not require them to pay, when the writ was allowed, as a term of the allocatur.

The proceedings here are in a criminal case and are a step in the cause preliminary to trial. They are not proceedings in certiorari. The writ of certiorari, under R. S. 2:189-7, functioned

solely to bring the indictment up to this Court. Having done that, it expired and the proceedings in the Supreme Court thereafter were in the criminal cause, just as they would have been if the indictment had not been brought up and the motion to quash had been made in the Quarter Sessions.

In *State* v. *Tilton,* 104 N. J. L. 268, the Court said:

> "The simple object of the certiorari was to remove the indictment from the court in which it was pending, which, in the present case, was the court of General Quarter Sessions * * * to the Supreme Court under section 6 of the Certiorari Act (1 Comp. Stat., p. 404) for the purpose of moving before the latter tribunal to quash the indictment. The removal of the cause did not operate to alter its title; but on the contrary, it retained the same as it bore in the court below, namely, State v. Jack Tilton * * *.
>
> "The settled practice is, after an indictment has been removed to the Supreme Court for the purpose of moving before that tribunal to quash it, to give notice to the prosecutor of the pleas of the grounds upon which the motion to quash is based, and not as has been done in the instant case, by filing reasons *as if the case were of a civil or quasi-criminal character.*"

See, also, *State* v. *Reed,* 8 N. J. L. 178, where the Supreme Court refused to allow civil costs on an indictment sent to the circuit for trial.

If the motion to quash had been made in the Quarter Sessions, the defendants-appellants would not have had to pay for the services of the judge, or for the Court's transcript of the testimony.

If a Justice or Justices of the Supreme Court sat on the motion to quash, the defendants-appellants would not have had to pay for their services or for those of the Court's stenographer.

The Legislature, in 1937, when re-enacting 2:189-7 to 2:189-10 (first enacted February 6, 1799), knew that the multitudinous duties of the Justices of our Supreme Court precluded them from sitting on such motions requiring much testimony, and that the prior practice in this Court was to take evidence on depositions to be used on the argument of the motion to quash before Part II, and the printing of the depositions as required by Rule 155 of the Supreme Court.

Knowing this, when enacting 2:187-7 and 2:187-8, the Legislature did not provide that defendants pay the expense of the reference as a term of the allocatur, but, instead, expressly prohibited it by the provision of 2:189-7, limiting the terms to those specified in 2:189-8.

In fact, the Legislature could not constitutionally enact a statute requiring a defendant, in a criminal proceeding, to pay the expenses of Court, or any costs, before a judgment of conviction on the indictment. Emphasis on the justice of this rule is evident where the costs, as on this motion to quash, exceed any fine and costs which could be imposed upon conviction.

To require the defendants-appellants to pay the large expenses of the Court on the motion to quash

1. would deter others from seeking justice through application to the Supreme Court under the established practice of that court of one hundred and forty-six years;

2. would deny justice in the Supreme Court except to the wealthy;

3. would flout the provisions of Magna Charta, *i. e.*, "To none will we sell, to none will we deny, or delay, right or justice," creating rights preserved to the defendants-appellants by Article I, paragraph 21 of the New Jersey Constitution. (That provision of Magna Charta was "aimed not merely against bribery and corruption, but against the imposition of unreasonable charges for the use of the courts." 16 C. J. S., Sec. 714, p. 1503);

4. would impose costs upon defendants to an indictment before conviction, in violation of the provisions of 2:189-8, enunciating the terms of the allocatur;

5. would impose costs on innocent defendants, who are later acquitted, in violation of R. S. 2:194-3, which provides:

> "If * * * a verdict pass or judgment be given for the defendant in any criminal proceeding * * * *no costs shall be awarded against the* defendant * * *";

6. would deny due process of law to the defendants by imposing an unreasonable cost upon them in their defense pursuant to the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Certainly, no judgment has been entered against the defendants-appellants in this criminal proceeding on the indictment and none will be, unless they are convicted in the court where the trial on the indictment will be held. That the order denying the motion to quash (not yet entered), will not be a judgment, but will be non-

appealable (except as to costs, if ordered paid by defendants-appellants), until after a judgment of conviction, needs no citation.

To order the defendants-appellants to pay for Mr. Drewen's services as an officer of the Supreme Court would, in effect, be imposing costs against them. But this may only be done after *judgment of conviction* and *in the court entering such judgment.*

R. S. 2:194-1 provides:

> "All bills of costs in criminal cases shall be taxed by the clerk of the court in which *the judgment is had,* in the manner provided by law. * * *"

Costs against a defendant to an indictment may be collected by execution, *but only after a judgment of conviction,* R. S. 2:194-12, or may be collected by the proceeds of his labor in a county jail or penitentiary, *but, only after a judgment of conviction,* R. S. 2:194-16. As has been before shown, *no costs may be awarded against a defendant who is acquitted,* R. S. 2:194-3.

R. S. 2:194-3 is declaratory of the general law that "acquitted defendants, being by the record shown to be without fault, are not justly subject to costs." *Bishop, 2 Criminal Procedure* (2d Ed.), sec. 1317, p. 1143.

Costs, in criminal cases, are the creatures of our statutes. *Bishop, 2 Criminal Procedure* (2d Ed.), sec. 1313, p. 1141; *State* v. *Walsh,* 44 N. J. L. 470; *State* v. *Reed, supra.*

There is no statute taxing costs against a defendant on his motion to quash, or requiring him to pay the compensation of the judges or other

officers or employees of the court, for services in the proceedings or for other expenses thereof. That portion of the order under appeal, requiring the defendants-appellants to pay such court expenses, is illegal. As was said by BEASLEY, *C. J.*, in *State* v. *Walsh, supra:*

> "All costs are the creature of statute, as has been repeatedly decided in this court, and no statutory provision is to be found which legalizes these items."

Not only is there no statute requiring defendants moving to quash an indictment to pay costs or court expenses, but there is no statutory fee allowed the clerks of the Supreme Court, Court of Oyer and Terminer, or Clerk of the Court of Quarter Sessions on a motion to quash. R. S. 22:3-1; 22:3-3.

This clearly indicates that the legislature recognizes the rules that criminal proceedings are free to indicted, but unconvicted, defendants.

In *State* v. *Borg,* 9 N. J. Misc. 261, the defendants moved for *civil costs* as on certiorari. These were denied, the Court citing P. L. 1903, Ch. 247, Sec. 242, p. 599 (an act to regulate the practice of courts of law, now R. S. 2:27-382 under Subtitle "Practice and Procedure in Civil Actions generally").

Of course, the defendants were not entitled to civil costs in a criminal proceeding. Cf. *State* v. *Reed, supra.*

Clearly, the counsel and Court, in the *Borg* case, overlooked, as did counsel for the defendants in *State* v. *Tilton, supra,* that the writ of certiorari was exhausted when the indictment was

lifted into the Supreme Court, and that the motion to quash is a step in the progress of the criminal litigation, and is made in the Supreme Court by virtue of R. S. 2:189-7, 8 (under the sub-title "Criminal Procedure"), and is not a "hearing on certiorari" under the civil Certiorari Act, R. S. 2, ch. 81, which authorizes costs on such a civil hearing, R. S. 2:81-7.

Justices Parker and Perskie, in their opinion in this case, "dismissed the writ of certiorari, with costs." This, we think, was erroneous and we have asked to be heard on the order to be made and, on an application, to have the court expenses paid by the County of Hudson.

The whole question is simplified by a reduction to fundamentals:

a. These proceedings were in certiorari only by appearance. Actually, they were incidental to, and not separate from, the judicial course of the State's prosecution of its indictment. The writ was but the means of getting the indictment into the Supreme Court, wherein the Commissioner's services were rendered. An analogous use of the writ is in its function as auxiliary to a writ of error, to bring up out-branches of a record.

b. The expense of the Commissioner's services is nowhere designated as costs and cannot, therefore, be either chargeable, taxable, or payable as such.

c. What remains is an obligation of the sovereignty to defray the expense of a subordinate service rendered one of its courts by an officer thereof.

We think it clear that defendants-appellants are not liable for costs or court expenses on the mo-

tion to quash, and that that portion of the order with respect to which this appeal has been taken should be reversed, so that all of the fee allowed to Mr. Drewen shall be payable by the County of Hudson as part of the expenses of the criminal litigation instituted in the courts of Hudson County by the indictment mentioned.

Respectfully submitted,

JOHN WARREN,
Attorney for, and of Counsel with,
Defendants-Appellants.

MAURICE A. COHEN,
Of Counsel with Cornelius J. O'Neill,
Defendant-Appellant.

To be argued orally by
JOHN WARREN.

New Jersey Court of Errors and Appeals

MAY TERM—1945.

THE STATE OF NEW JERSEY,
Respondent,
vs.
JAMES J. DONOVAN, DANIEL J. SWEENEY and CORNELIUS J. O'NEILL,
Defendants-Appellants.
JOHN DREWEN,
Respondent.

On indictment on motion to quash on appeal from order directing defendants to pay one-half of allowance to Supreme Court Commissioner.

BRIEF OF RESPONDENT, THE STATE OF NEW JERSEY.

(Italics ours unless otherwise indicated.)

Statement.

In addition to the facts set forth in the Brief of the defendants-appellants, hereinafter referred to as the appellants, it is deemed necessary that additional facts be furnished, as well as a résumé of certain basic legal concepts, an appreciation of which may aid in determining this issue.

The record of this case in the Supreme Court shows that after indictment was found against appellants, pleas of not guilty were entered in the Quarter Sessions Court of Hudson County, and each one admitted to bail in the sum of $5000.00. The pleas of not guilty were allowed to be withdrawn.

Before a motion to quash an indictment is made, it is required under proper practice and

procedure that a defendant withdraw his plea heretofore entered and then, and only then, can he make an attack upon the indictment before trial. *State* v. *Nichols,* 5 N. J. L. 539; *State* v. *Lambertino,* 13 Misc. 687; *R. S.* 2:188-6. In passing it is well to observe that an indictment is just another pleading and may be attacked as any other pleading can be attacked for insufficiency on its face.

In the instant case the record further shows that the appellants did not make motion to strike the indictment before the trial court, but application was made to Mr. Justice Case, who on the 15th day of September, 1942, granted a writ of certiorari to the defendants and the allocatur provided "Let each defendant enter into recognizance as provided in statute in the sum of $5000." (S. C., pp. 4-5.)

In their motions to quash the indictment made to the Supreme Court, the appellants urged, in the main, (1) that the indictment was insufficient on its face, and (2) that the indictment was motivated and came into being because of political prejudice, bias and malice. (Matters *de hors.*)

On September 17, 1942, a rule to take depositions was entered on motion of the then Prosecutor of the Pleas and the order was signed by Mr. Justice Case. The order provided also for the appointment of John Drewen as Supreme Court Commissioner to take the said depositions (S. C. p. 9).

Pursuant to the rule to take depositions voluminous testimony was taken. The transcript of testimony taken comprised seven volumes and one separate volume containing the exhibits, which amounted in all to 236. The taking of this testimony consumed 29 full court days (S. C. pp. 11-12-13).

With respect to the issues involved in the testimony taken, practically all of the aforesaid testi-

mony concerned itself with matters *de hors* above mentioned.

The testimony having been completed and briefs filed and argument had before the Supreme Court (Part II), a decision was handed down upholding the validity and legality of the indictment, the Court saying, in conclusion:

> "*The writ of certiorari* will accordingly be dismissed, with costs." *State* v. *Donovan,* 132 N. J. L. 319.

Ordinarily, application to quash an indictment is addressed to the trial court, whose discretion is not exercised so to do, unless on the plainest and clearest ground, the defendant being left to his other remedies, *i.e.* demurrer, motion in arrest, or writ of error. 1 *Bishop's Crim. Prac.* (3d ed.) Sec. 758, 759; *State* v. *Proctor,* 55 N. J. L. 472; *State* v. *Sweeten,* 83 N. J. L. 364; *State* v. *Davidson,* 116 N. J. L. 325.

An application to a Supreme Court Justice for a writ of certiorari to remove an indictment into the Supreme Court for the purpose of moving before that tribunal to quash, is addressed to the discretion of the Justice. If he refuses to exercise his discretion to allow the writ, the application may be made to the Supreme Court *en banc.* But the refusal of either furnishes no ground for writ of error. *State* v. *Ruffu,* 8 Misc. 392 p. 395; *State* v. *Bolitho,* 103 N. J. L. 246, at p. 253, aff. 104 N. J. L. 446; *State* v. *McCarthy,* 76 N. J. L. 300.

Again, with respect to the granting of a writ of certiorari by the Supreme Court in these particular instances, it has been the uniform practice to decline to exercise such discretion save in rare instance. *State* v. *Bolitho, supra; New Jersey Criminal Practice and Procedure, O'Regan and Schlosser* (Single Edition), pp. 87-88.

In the State of Case the appellants have included in their notice of appeal the grounds upon which they seek a reversal of the order of the Supreme Court made in this case on April 4th, 1945, which provides, *inter alia,* that they pay the sum of $1250 to Mr. Drewen, the Supreme Court Commissioner. In the notice of appeal there has been assigned as grounds of appeal some nine specific reasons for specifications of reversal (S. C., pp. 1, 2, 3 and 4). In support of these assignments for reversal the brief of the appellants does not specifically set forth the points relied upon and enumerated, but rather combines all their arguments in support of the grounds for reversal in one main argument. The reason this is pointed out in this brief is not by way of raising any technical objections to the same, but rather to indicate that in the arguments advanced by the State, its brief shall specifically point out the first two grounds of appeal and seek to answer them categorically. As to the remainder of the State's brief, it shall seek to combine generally its argument in ~~support of~~ reference the order heretofore made.

POINT I.

Costs in criminal cases cannot be taxed against the State.

The appellants in their "Notice of Appeal and Grounds" allege:

> "(1) The Supreme Court should have ordered that the whole of said allowance be paid by the County of Hudson or by the State of New Jersey" (S. C., p. 2).

At common law costs were unknown and were not recoverable *eo nomine* by either party in any

action, real, personal or mixed. If the plaintiff failed to recover, he was *amerced pro falso clamore;* and if judgment were entered against the defendant, he was *in misericordia* for his unjust detention of the plaintiff's debt and was punished at the court's discretion by exacting payment of the costs of litigation (14 Am. Jur., p. 6).

Again, *costs in criminal prosecutions were unknown at common law* and their recovery in any criminal case depended wholly upon statutory provisions therefor. Under some statutes the defendant may be required to pay the costs on conviction of certain kinds of crimes, usually those for which a fine may be imposed, although liability is sometimes extended to include costs of prosecution of any offense less than capital. Such statutory provisions are valid as against a constitutional provision that in no instance shall any accused person before final judgment be compelled to advance moneys or fees to secure the rights guaranteed (14 Am. Jur., p. 69).

The provisions for the imposition, taxing and collection of costs and fines in the administration of criminal justice within this State are set forth in R. S. 2:194-1 to R. S. 2:194-22.

An examination of these sections of our Revised Statutes will disclose that nowhere, either by express or implied language, is there to be found any sanction, authority or suggestion that the State is liable for costs to any defendant in criminal prosecutions.

Under R. S. 22:3-1 up to and including R. S. 23:3-19, the statutory fees are specifically set forth which are allowable and payable to the attorney general, prosecutor of the pleas, judges, magistrates, clerks and constables in the prosecution of all and any defendants in all types of cases up to and including capital offenses. An examination of these sections of the Revised Stat-

utes again will disclose that nowhere, either by express or implied language, is there to be found any sanction, authority or suggestion that the State is liable, in terms of costs, in any type of criminal prosecution.

Consonant with the common law hereinbefore set forth and in keeping with the analyses of the Revised Statutes hereinbefore alluded to, attention is directed to the language employed by our Supreme Court in the case of *State* v. *Borg,* 9 Misc. 261:

> "The right to costs in a law action depends upon the statute, 15 Corp. Jur. 21; New Jersey Digest, tit. 'Costs,' §2."

The Court continues:

> "However, unless the legislature provided by express enactment that costs should run against the state in criminal cases, we know of no way by which costs could be taxed. Therefore, the legislative prohibition seems unnecessary but confirmatory of our judgment that no costs in this matter can be allowed."

Again we have the following definitive and pertinent language appearing in, *In Re United Hatters of North America,* 110 N. J. Eq., p. 42 at p. 44:

> "There are, however, several reasons for this, none of which applies to the present case. First, no statute authorizes a discretionary counsel fee to either party in a criminal court as against another party. *Second, no statute, by any reasonable construction, authorizes a judgment for costs in favor of a defendant in a criminal trial court. Third, in the ordinary criminal prosecution,* the only parties are the defendant and the state, and *costs are not adjudged against the state in the absence of express legislative sanction. Town of Kearny* v. *State Board of Taxes*

> *and Assessment,* 103 N. J. Law 541. The *Certiorari* act (P. L. 1903, p. 343 sec. 10; Comp. Stat., p. 405) and an act concerning costs (Rev., p. 411, sec. 11), 13; Comp. Stat., p. 2296), contain language sufficiently broad to warrant the recovery of costs from the state on *certiorari* and on appeal, were the construction not restricted by the rule last above mentioned. The state, I take it, is a party to every criminal contempt proceeding, although an unnamed and usually inactive party. I see no reason why the state through the attorney-general could not conduct the prosecution of a criminal contempt in this court, but even if it should do so, it would not be liable to costs." (It is to be noted that this decision was approved without dissent by this Court.)

The appellants in their brief state without equivocation "This is a criminal case" (S. C., p. 4). Again, the appellants state "The proceedings here are in a criminal case and are a step in the cause preliminary to trial" (Brief, p. 6).

If we accept the assertions of the appellants in their argument that the proceedings in the writ of certiorari are criminal in nature and a step in the criminal proceedings on the indictment, then the argument that the State should pay the whole of the costs involved in the proceedings on certiorari must fall of its own weight. There can be no doubt. The State cannot be taxed for costs in a criminal proceeding.

POINT II.

The awarding of costs by the Supreme Court in the instant proceedings was not determined by the recognizance filed by the defendants in the Supreme Court.

The appellants in their grounds of appeal assert:

> "(2) The Supreme Court should not have ordered that any part of said allowance be paid by the defendants" (S. C., p. 2).

They further assert:

> "(3) The payment of any portion of said allowance was not a term of the allocatur, and the order, in the respects stated, violates the rights of the defendants under R. S. 2:189-7, 8, 10, and the Supreme Court was without jurisdiction to so order" (S. C., p. 2).

In support of the above contentions the appellants argue, first of all, that the proceedings were in a criminal case and merely a step in the cause preliminary to trial (Brief, p. 6). They further argue that Mr. Justice Case, in signing the allocatur, did not impose any obligations in the recognizance compelling the appellants nor their bondsman to pay the court's expenses or any costs on the motion to quash (Brief, p. 6).

They further contend that to assess costs at this time in this case would be violative of R. S. 2:194-3 which provides:

> "If * * * a verdict pass or judgment be given for the defendant in any criminal proceeding * * * no costs shall be awarded against the defendant * * *." (Brief, p. 9.)

It is further contending that by imposing unreasonable costs upon them in their defense pursuant to the law, it would violate the Fourteenth Amendment to the Constitution of the United States and would deny justice in the Supreme Court except to the wealthy. (Brief, p. 9.)

In limine, it is essential to connote what is the general notion of bail in criminal cases and the type of recognizance required under R. S. 2:189-7 and 8. (S. C., pp. 6, 7 and 8.)

The ordinary bail is triple in effect; it binds the accused to do three things:

(1) To appear to answer;

(2) To stand to and abide the judgment of the court;

(3) Not to depart without leave of the court until discharged.

State v. *Stout,* 11 N. J. L. 124. In the ordinary bail bond no mention is made whatsoever of costs. In the ordinary bail bond the surety is never held liable for costs, even on conviction; nor is he liable for a fine or penalty that may be imposed upon the defendant.

Under R. S. 2:187-1 to R. S. 2:187-27, the statutory provisions respecting the posting of bail are set forth and enumerated including the disposition and proceedings under bails that have been forfeited where defendant fails to appear and "stand to". It is to be well observed that the recognizance, mandatorily exacted in the certiorari proceedings, does not come under the purview of regulations contained in R. S. 2:187-1 to R. S. 2:187-27.

The recognizances filed in the instant certiorari proceedings were in accord with the mandates of R. S. 2:189-7 and R. S. 2:189-8.

R. S. 2:189-7 provides as follows:

"The supreme court or any justice thereof, may, at the instance of any person indicted, on application in term time or vacation, award a writ of certiorari to remove into the supreme court any indictment before trial from any court of oyer and terminer or court of quarter sessions, *upon the terms prescribed* in section 2:189-8 of this title, *and no other*. Every writ of certiorari so allowed shall be delivered to the court to which it is directed in open court."

R. S. 2:189-8 provides as follows:

"The terms upon which a writ of certiorari may be awarded by virtue of section 2:189-7 of this title shall be as follows:

"The person indicted and prosecuting the certiorari shall, before the allowance thereof, enter into recognizance to the state, with two sufficient sureties, before the supreme court, or any justice thereof, or a supreme court commissioner, in such sum as the court or justice shall direct, with condition:

"a. That the person so indicted and prosecuting the writ shall, at its return, appear and plead to the indictment in the supreme court, and, at his own costs and charges, cause and procure any issue of fact that shall be joined upon the indictment to be tried at the next circuit of the supreme court to be held for the county wherein the indictment was found, after the writ shall be returnable if the supreme court shall not appoint any other time for the trial thereof, and, if any other time is so appointed, then at such other time; and

"b. That such person shall not depart the supreme court until discharged by it, and shall pay costs, if convicted of the offense charged in the indictment; and

"c. That such person shall, if the supreme court shall so order, appear in the court from

> which the indictment was removed, at any term thereof which the supreme court shall order, and plead to the indictment and abide the judgment of the court, and pay costs, if convicted of the offense charged in the indictment."

An examination of these provisions with respect to the conditions of the bond shows the following provisions that do not appear in the ordinary type of bail bond, viz.:

> (a) The bond provides that both the convicted defendant and the surety are liable to costs and the bond is surety for the same;
>
> (b) These costs to be paid by the convicted defendant and the surety are to be paid only if the defendant is tried and convicted in the Supreme Court circuit.

The reasons this type of recognizance is exacted are, first, that when the defendant is allowed to withdraw his plea of not guilty, it becomes essential that a new recognizance be entered into; and secondly, the legislature intended that since the writ of certiorari is not a matter of right, it sought to *impose costs and collect them* in the event of conviction, providing, of course, it retains jurisdiction of the case.

The bond is, therefore, in keeping with the provisions of the statute relied upon by the appellants in their brief, viz., R. S. 2:194-3, providing that no costs shall be awarded against the defendant if acquitted in a criminal proceeding, with the additional conditions enumerated.

It follows, therefore, from the foregoing that this recognizance has nothing to do whatsoever with the issue involved. The fee allowed to the Supreme Court Commissioner is in nowise related to or connected with the bond.

In this connection, also, attention is directed to the record in this case which reveals that the prosecutors of the writ expressly asked the Supreme Court to retain jurisdiction which was refused.

The case is to be remitted and tried at Quarter Sessions in Hudson County as provided in R. S. 2:189-10:

> "When an indictment is removed into the supreme court and determined by that court not sufficient in law, the person indicted shall be discharged and all further proceedings thereon shall cease. If the indictment is determined sufficient in law, the court may retain it, to be sent down for trial before the proper circuit of that court, or may order it returned by the clerk *to the court from which it was removed,* and the court to which the indictment is remanded shall proceed thereon as if the writ had not been allowed."

POINT III.

Subject only to the rights of the State in a criminal matter, the Supreme Court, by virtue of its inherent and statutory powers, has authority to assess costs at its own discretion in a certiorari proceeding.

R. S. 2:81-7 reads as follows:

> "The court, justice or judge on the hearing on any certiorari may give judgment for costs in favor of any party."

The allowance of costs on certiorari is in discretion of the court. *Lehigh Valley Railroad Company* v. *City of Newark,* 44 N. J. L. 323; *C. B. Smith & Co.* v. *Holshauer,* 68 N. J. L. 137.

In the case of *Stokes* v. *Schlacter,* 66 N. J. L. 334 (E. & A.), we have the following significant language:

> "The plaintiff in error obtained, in this court, not only a reversal of the judgment of the Supreme Court, but also an affirmance of the original judgment in the trial court, thus finally ending the litigation in his favor. He is, therefore, entitled to costs in this court.
>
> "The cause having been brought into the Supreme Court by *certiorari,* the question of costs there is, by statute, committed to the discretion of that court, and consequently application must be there made for costs in *certiorari.*"

The wording of the statutory language would appear to allow the Supreme Court, at first blush, to assess costs, in its discretion, against any and every party in the case; however, in view of the language set forth in *In Re United Hatters of North America, supra,* and in view of the common law concepts set forth earlier herein, it is apparent that the restriction concerning the State of New Jersey is binding upon the Supreme Court, and that it is powerless to assess costs against it regardless of whether or not it is the successful party or otherwise. We repeat the pertinent language contained in that decision:

> *"The Certiorari act (P. L. 1903 p. 343 sec. 10; Comp. Stat. p. 405) and an act concerning costs (Rev. p. 411 sec. 11, 13; Comp. Stat. p. 2296), contain language sufficiently broad to warrant the recovery of costs from the state on certiorari and on appeal, were the construction not restricted by the rule last above mentioned."*

Conclusion.

For the reasons set forth herein, it is urged that the order with respect to assessing the defendants the sum of $1,250.00 be affirmed, but with respect to that part of the order assessing $1,250.00 as against the State, it is respectfully submitted that this Court remand the order to the Supreme Court that the same may be reformed in keeping with the reasons urged herein.

Respectfully submitted,

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Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.
(4555)

New Jersey Court of Errors and Appeals

MAY TERM—1945.

THE STATE OF NEW JERSEY,
Respondent,

vs.

JAMES J. DONOVAN, DANIEL J. SWEENEY and CORNELIUS J. O'NEILL,
Defendants-Appellants.

JOHN DREWEN,
Respondent.

On Indictment.
On Motion to Quash.
On Appeal from Order Directing Defendants to Pay One-half of Allowance to Supreme Court Commissioner.

BRIEF OF RESPONDENT, JOHN DREWEN.

Needless to say, this respondent has properly no interest in the issue presented, that is—whether payment of the Supreme Court's allowance should be made by the State or by defendants-appellants. But it so happens that when the application for allowance was made to the court below (upon notice and in the presence of the Attorney General and counsel for defendants-appellants), the question arose as to source of payment, and the parties were all asked by the court to submit memoranda on the point. The study and research we gave to the question resulted in our having the same view as that expressed by Mr. Warren in the brief now submitted by him to this court. Our memorandum in the Supreme Court is with our consent embodied in Mr. Warren's brief here.

We understand that our present memorandum is occasioned by the fact that at the time of the oral argument in this court it was ordered that leave therefor be given.

It will appear from the above that extended discussion by us now would be bound to involve repetitions of the brief of defendants-appellants. Perhaps we can best aid the argument by calling attention to the brief submitted on behalf of the Attorney General, in its failure to so much as approach the real issue. What the State deals with is the matter of "assessing costs against the State" and with doing so "in a criminal case". That question presents no difficulty at all, and the State's disposition of it does not in the least affect this controversy.

No one contends that costs *can* be assessed against the State. On the other hand, the only considerations that relate to costs in a criminal case are punitive; and they are, of course, not to be thought of where the accused stands unconvicted. The idea of awarding costs *against* the State is contrary to basic principle, because such award would carry with it a kind of penalty or forfeiture on the State's part for prosecuting in a case where it could not or did not convict. From this there would easily run the intolerable implication that the State in every criminal case must bring about a conviction or be at the hazard of paying costs to the accused. The thing answers itself. But such is the question with which, in one aspect or another, the State's brief occupies itself throughout. It seems to see a clincher (p. 7, mid.) in the fact that:

> "The appellants in their brief state without equivocation 'this is a criminal case' * * * and a step in the cause preliminary to trial."

That use of the term "criminal case", thus seized upon by the State as an admission, is merely to emphasize the public character of a criminal prosecution as against the private character of a civil suit. That the Court might be requiring

these defendants to pay an expense of operating the forum of judgment, in a public cause, the State's brief fails to discern.

There is another light in which it is clearly seen that the present question has nothing to do with costs. Costs are fixed and definite; they are specifically itemized, defined and prescribed. As such "they are certain allowances authorized by statute" (15 C. J. Sec. I, p. 19). The manner in which costs are established in the procedure of New Jersey appears in Rev. Stat. 22:3-1; 2:194-1. There would appear to be no authority whatever for confusing the allowance made by the Supreme Court to this respondent with the charges that are known in the law as "costs".

The plain truth is that this precise question has not been up before, at least not in this State. The two cases cited as direct authority in the Attorney General's brief (*State* v. *Borg,* 9 Misc. 261; *In re United Hatters,* 110 Eq. 42), are not at all in point. In the *Borg* case what the Court had before it was a "motion to tax costs"; in the *United Hatters* case the application was for allowance to counsel of a fee *for representing one of the contending parties against the State* in a criminal contempt.

The allowance *sub judice* was made under Rev. Stat. 22:1-6 as amended by P. L. 1940, c. 30, p. 109, Sec. I. That amendment was the addition to the original enactment of the following clause:

> "The court in its discretion may allow such further sum as may be proper, based on the services performed."

Without that amendment the allowance would have to be confined to the particular statutory fees as theretofore prescribed. It is of interest that the history of this amendment relates to a situation wherein services had been rendered by a Su-

preme Court Commissioner, in a public matter that was in the nature of a probe or inquest. Without the amendment no commensurate allowance in that instance could have been made. The amendment enlarged the statute so as to make provision for an extraordinary situation, like the one then in contemplation and like the present one.

Now, when defendants-appellants petitioned the Supreme Court for an inquest into the validity of the indictment against them, they must have made adequate showing to that end, else the court would not have allowed its writ. To require them to pay any portion of the present allowance is by so much to require them to defray the expense of the court's own juridical function, exercised in a criminal, *i. e.* public case, in taking the testimony and proofs upon which the court was to render its judgment. As in any other probe or inquest, the court might have performed the hearing function itself, without delegating it to one of its commissioners. In theory at least it did perform that function itself, through its designated subaltern. And also, to require defendants-appellants to bear that burden now would be tantamount to imposing it as a condition in the first instance, a thing that could not lawfully have been done.

The establishment in our law of the proposition advanced by the Attorney General on this argument would carry connotations that should not need mentioning. For one thing, the invoking of defensive process in the criminal law could in many instances thus be rendered prohibitive. If in extreme cases regulatory measures (by statute) may be called for, that is another matter.

Respectfully,

JOHN DREWEN,
Pro Se.