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N. J. COURT OF ERRORS AND APPEALS

THE BOARD OF CHOSEN FREE-
HOLDERS OF THE COUNTY OF
PASSAIC,

Plaintiff-Appellant,

vs.

JOHN J. SLATER,
Defendant-Appellee.

*Action at Law.
On appeal from
a judgment
striking out the
Complaint of
the plaintiff.*

BRIEF OF PLAINTIFF.

This is an appeal from a judgment in the above suit striking out the complaint of the plaintiff.

The action was brought to recover the amount of fees collected and retained by John J. Slater, as Clerk of the Court of Common Pleas of the County of Passaic, in naturalization matters.

The entire amount collected between November 13, 1906, and December 31, 1912, is \$13,593.

One-half of this amount, \$6,796.50, is the amount retained by the defendant who is the Clerk of the Court of Common Pleas of the County of Passaic. The act placing the County Clerk of Passaic County on a salary and requiring him to account for fees was approved March 30, 1906 (1906, p. 76, Comp. Stat., 4643) and took effect in Passaic County after the election, November 13, 1906.

New Jersey State Library

At the time the Act of March 30, 1906, was passed the fees for naturalization were fixed by the Legislature of the State of New Jersey, Comp. Stat. 3690, Sec. 7, 1895, p. 697.

June 29, 1906, Congress passed an act regulating the naturalization of aliens and fixing the fees.

This appeal raises the legal question whether these moneys should be retained by the defendant as his private property, or, having received them as clerk, if he should not be compelled to account therefor and pay them over to the County of Passaic.

I.

The words "fees, costs, allowances, percentages and all other perquisites of whatever kind which by law" County Clerks, etc., may receive for any official act or service rendered by such County Clerk, etc., as used in said act of March 30, 1906, include naturalization fees retained by the Clerks of the several counties of this state.

Prior to the 30th day of March, 1906, the County Clerks of the several counties of this state, excepting the counties of the first class, collected and received all fees and retained the same for their sole use and benefit, including the naturalization fees which were then allowed by law.

Out of the fees so received and retained by the County Clerks they were required to pay all clerk hire and practically all the expenses of operating the office.

The same conditions applied to the other county officers: Register of Deeds, Sheriff and Surrogate.

These officers were receiving compensation beyond that which they were justly entitled to, and to remedy this the act of March 30, 1906, was passed.

Sec. 1 of the Act of March 30, 1906, provides that

The fees, costs, allowances, percentages and all other perquisites of whatever kind, which by law the Surrogate, Register of Deeds and Mortgages, County Clerks and Sheriffs may receive for any official acts, or services rendered by such county clerk, sheriff, etc., or *by any assistant or other person in their office or employment for any act done or services rendered in connection with such offices, shall continue to be payable and received and collected by said county clerks, etc., for the sole use of their respective counties, as public moneys belonging to said counties, and shall be accounted for by said clerks, etc., and be paid over as hereinafter provided.*

Sec. 2 requires the County Clerk to keep an account of all fees and moneys, received by him pursuant to the provision of this act for the use of their respective counties, and, on or before the 15th day of each month, make a full itemized statement and return verified by oath to the county collector of their several counties, of the fees, costs, allowances, percentages and all other perquisites of whatever kind, received by them, or by any assistant or other person in their office or employment, *for any act done or service rendered in connection with said office*, and all sums which may have been charged or taxed, or which shall have accrued, or become payable, for any such services during the month preceding the making of such statement * * * and on or before the 20th day of each month said county clerks, etc., shall, respectively, pay over the amount of such fees and moneys to the County Collector of their respective counties, etc.

Sec. 3 of the act makes the County Clerks, etc., liable to the respective counties for the payment of

all fees and authorizes them to require advance deposits to cover such fees.

Sec. 4 of the act fixes the salaries, under which section the Clerk of the County of Passaic is entitled to an annual salary of \$6,500, "*in lieu of all other compensation.*"

DUTIES OF COUNTY CLERKS.

The Act of 1902, Sec. 11 (1902, p. 484, Comp. Stat., 1522, Sec. 22) says:

"The Clerks of the respective counties shall be the Clerks of the Circuit Court, *the Court of Common Pleas*, the Court of Oyer and Terminer, the Court of Quarter Sessions and the Court of Special Sessions in and for the counties in which they ~~are re-~~ are respectively elected clerks, and shall perform all the duties appertaining to or devolving on clerks of said courts respectively."

This latter act makes the County Clerk the Clerk of the Court of Common Pleas and compels him to perform all duties appertaining to or devolving on the Clerk of said Court.

At that time the Court of Common Pleas, under an Act of Congress, had jurisdiction in naturalization cases.

The United States Statute then provided for the naturalization of aliens by application to a Circuit Court or District Court of the United States, or a District or Supreme Court of the territories, or a Court of record of any state having common law jurisdiction and a seal and a Clerk.

The State of New Jersey, by an Act of 1895, p. 693, provided that the Supreme Court and the

Court of Common Pleas in the several counties of this state should, respectively, *have jurisdiction in naturalization cases*, and provided certain requirements in the making of declarations and fixed the fees that the Clerks of said Court would be entitled to in naturalization cases.

There can be no question but that these fees so fixed by the Legislature of the State of New Jersey and collected by the Clerks of the Court of Common Pleas came within the statute of March 30, 1906.

The Clerk of the Court of Common Pleas was just as much a federal agent under the law as it existed from 1895 to June, 1906, as he was after June 29, 1906, because, the United States Government had at that time selected, with the concurrence of the State of New Jersey, the Court of Common Pleas, as one of its agencies to hear and act upon applications for naturalization.

In counties of the first class, the County Clerks have been required under a Statute similar to the Act of March 30, 1906 (1898-226 Comp. Stat., 4642-34), to pay over all fees, perquisites, etc., to their respective county collectors.

During the period from 1898 to 1906, and from 1906 down to the present time, County Clerks of counties of the first class have always accounted for and paid over to the County Collector all naturalization moneys provided for as under the act of 1895, above cited, and afterwards which they were authorized to retain under the act of Congress of June 30, 1906.

It has been decided in this state that Congress is without power to interfere with or control state courts, except so far as the federal courts have appellant jurisdiction, that Congress cannot, *with*

out the consent of the State, constrain a State Court to act upon applications for naturalization.

It is competent for the State Legislature to prescribe and limit the times when and during which said applicants will be heard in these courts.

Rushworth vs. Judges of Hudson County,
58 N. J. L., p. 97.

As in said case stated, the federal constitution provides:

“Congress shall have power to establish a *uniform rule of naturalization* and uniform laws on the subject of bankruptcy throughout the United States.”

In Rushworth vs. Judges of Hudson County, above cited, (p. 99) Justice Van Syckel says:

“While it must be conceded that the State can pass no law which regulates the subject of naturalization or the order of business in the federal courts, the solution of the controversy in this case, in my judgment, turns upon the question whether the state may not regulate the order of business in its own courts in relation to this subject, or refuse altogether to permit its courts to entertain applications for naturalization.”

Cyc., Vol. 2, page 111, says:

“Though Congress may authorize the State Courts to naturalize aliens, and State Courts, under such authority, may do so, a State is under no constitutional obligation to furnish tribunals to aid in the administration of the naturalization laws of Congress, and hence may prescribe limitations upon the exercise by its courts, of jurisdiction in such matters, or even altogether prohibit its courts from entertaining jurisdiction.”

Am. & Eng. Enc. of Law, 2nd Ed., Vol. 6, p. 22, says:

“The declaration in the United States statutes that certain state courts may hear and act upon applications for naturalization is permissive merely, for Congress is without power to interfere with or control State courts, except in so far as the federal courts have appellate jurisdiction.”

The Legislature of the State of New Jersey has designated the Courts in this state to have jurisdiction in the naturalization of aliens.

The act of 1895, above cited, provided:

“That *the Supreme Court and Court of Common Pleas* in the several counties of this state shall respectively have jurisdiction of declarations of intention, and of applications of aliens to become citizens of the United States; *no other court or courts now established by this state shall entertain a primary or final declaration or application made by or on behalf of an alien to be admitted to become a citizen of the United States, etc., nor shall any Clerk of any such Court or Courts receive any such declaration, application or papers.*”

This act was held constitutional in the case of *Rushworth vs. Judges of Hudson County*, above cited.

It is clear that the Court of Common Pleas in the exercise of its jurisdiction in naturalization cases is not alone dependent upon the Act of Congress, *but also upon the Statute of the State of New Jersey.*

The act of Congress, June 29, 1906, revising the rules and regulations in reference to naturalization provided that,

Sec. 3. All courts of record in any state having a seal and clerk and jurisdiction in actions at law or equity in which the amount is unlimited shall have naturalization jurisdiction. *1895*

The Statute of New Jersey, *1905*, above cited, prohibits *our Court of Equity from acting and prohibits the Clerk of the Court of Equity in our State from receiving applications.*

It is clear therefore that when the legislature dealt with the question of fees in the act placing County Clerks on a salary basis, it contemplated all fees received by the Clerk as Clerk of the Court of Common Pleas in naturalization cases, and the words, "by law," mentioned in the first section of the act, as to the fees which they were to collect, used the term *law* in its broad sense, and included such fees as might be allowed by the laws of the United States to such Clerk. For by the Act of 1895, above stated, the Court of Common Pleas derives its authority from the State to exercise the naturalization jurisdiction granted by the Act of Congress, June 29, 1906. If the Act of 1895 had excluded the Court of Common Pleas from exercising naturalization jurisdiction as it did other Courts, the defendant could not have collected these fees. While the fees are now fixed by Act of Congress, he collects these fees as Clerk of the Court of Common Pleas by virtue of the Act of 1895—"by the law" of the State of New Jersey.

The words "by law," as used in the Act of March 30, 1906, are used in the broadest sense.

The Second Section of the act shows this (1906-76).

The Clerk of this section is to make an itemized statement

“of the fees, costs, allowances, percentages and *all perquisites* of whatever kind received by them, or by any assistant or other person in their office or employment, for any act done or service rendered in connection with said offices” * * * and “pay over the amount of such fees and moneys to the County Collectors.”

The language here used clearly indicates that the words “by law” were used in their broadest sense.

And then further the Fourth Section of the Act says,

The County Clerk shall receive “*in lieu of all other compensation*” an annual salary of \$6,500.

In the case of the City and County of San Francisco vs. Mulerevy, 113 Pac. Rep., 339, the Court held, that where the Clerk gave bond for the faithful performance of all official acts *imposed by law*,

“It was not for him to say in naturalization cases that the services were performed under the authority of the United States, and not under the authority of the state.

“His bond contained the condition that he would faithfully perform all official duties that might thereafter be imposed upon him *by law*.

“*The Act of Congress was a law.*”

The *Second Section* of the Act of March 30, 1906, where the Clerk is required to pay over fees, does not limit it to the fees allowed by law, but includes all fees, perquisites, etc., “for any act done, or service rendered in connection with said office.”

II.

These naturalization fees were received by the Clerk of the Court of Common Pleas for official acts or services rendered by him as Clerk of said Court and for acts done and services rendered by him in connection with his said office.

The Court of Common Pleas remains a State Court while exercising naturalization jurisdiction.

Rushworth vs. Judges of Hudson County,
58 N. J. L., p. 97.

In the case of United States vs. Severino, 125 Fed. R., 949, the Court held (954):

"It is concluded that State Courts while entertaining jurisdiction in naturalization proceedings remain State Courts, and that perjury by a witness in such proceedings is punishable by the sovereign whose justice is offended, (that is the State Court); and that Federal Courts cannot entertain jurisdiction in the absence of a federal statute conferring it."

In the case of Clafflin vs. Hauserman, Assignee, 93 U. S., 130 (23 L. Ed., 833), Justice Bradley says (140):

"So with regard to naturalization, a subject necessarily within the exclusive regulation of Congress, the first act on the subject, passed in 1790, and all subsequent acts, give plenary jurisdiction to State Courts."

It is clear therefor that the Court of Common Pleas in the exercise of the jurisdiction conferred upon it by Congress remains a State Court in naturalization cases.

The Act of Congress, June 29, 1906, directed the Clerk of the Courts exercising naturalization

jurisdiction to perform certain duties as Clerks of said Court.

Also authorized the deputy Clerk of said Courts to perform certain duties which the Clerk could perform, for instance,

Sec. 4, says that an alien shall declare on oath before the Clerk of any Court authorized by this act to naturalize aliens, or "*his authorized deputy,*" etc.

The 13th Sec. of the Act provided that the Clerk of each court, exercising jurisdiction in naturalization cases, shall charge, collect and account for the following fees:

For receiving and filing a declaration of intention and issuing a duplicate thereof, \$1.00.

For making, filing, and docketing the petition of an alien, etc., and for final hearing thereon \$2.00.

For entering the final order and a certificate of citizenship thereon, if granted, \$2.00.

The Clerk of any Court collecting such fees is hereby authorized to *retain* one-half of the fees collected by him in such naturalization proceeding.

The remaining one-half is to be accounted for to the Bureau of Immigration and Naturalization, and paid over to such bureau.

This section of the act provides further that the Clerks shall be permitted to retain one-half of the fees in any fiscal year up to the amount of \$3,000, and that the clerks in the various courts exercising jurisdiction shall pay all additional clerk force that may be required in performing the duties imposed by this act upon the clerk of the court from fees received by such clerk in naturalization proceedings, and then further provides for the allowance by the Secretary of Commerce and Labor of additional salaries in certain cases.

In this whole act every dollar provided to be retained by the Clerk *is retained by him as Clerk of the Court of Common Pleas* and in no other capacity.

If he acts as a federal agent in the performance of these duties, and the retention of these moneys, it is as Clerk of the Court of Common Pleas, and not as an individual, and is therefore required under the act of March 30, 1906, to account to the county for said moneys.

The Act of Congress, June 29, 1906, does not go any further than to say that he may retain one-half of these fees. The only implication that can be drawn is that he is to retain them as Clerk of the Court of Common Pleas to be disposed of after paying the salaries for the additional helpers, as are other fees received by him as Clerk of such court.

The State of New Jersey, by the act 1895, having required the Court of Common Pleas to exercise the naturalization jurisdiction given by the Congress of the United States, the Clerk of the Court of Common Pleas would be compelled to perform the duties required of him in such proceedings whether any fees were paid to him or not.

23 Am. & Eng. Enc. of Law, 2nd Ed., p. 382; Township of New Barbadoes vs. Demarest, 1 N. J. L. J., 54.

The County Clerk's compensation for all duties required of him in said court is covered by his salary, \$6,500 per annum, given him by the Act of March 30, 1906, Sec. 4, "*in lieu of all other compensation.*"

If this is not true, who pays the judge of the Court of Common Pleas for attending court day

after day and hearing the evidence and making final determinations in naturalization cases?

He does not act without compensation, because the Act of Congress June 29, 1906, does not provide fees for the Judge.

The state having determined that the Court of Common Pleas shall act in such matters, *compensation given to him by statute* covers his services as Judge *as well as the compensation given to the Clerk of the Court by statute covers his compensation as Clerk.*

Whatever allowances are made to and received by the Clerk or by the Judge in the performance of their official duties belong to the county.

How is the work performed in naturalization cases?

(1) The work is done by the county clerk or his deputy, *as Clerk of the Court of Common Pleas of the County of Passaic* with such additional help as the Clerk sees fit to hire.

(2) Every paper is signed John J. Slater, Clerk of the Court of Common Pleas of the County of Passaic, or by the deputy clerk of the Court of Common Pleas.

(3) The papers are filed in the office of the Clerk of the Court of Common Pleas of the County of Passaic.

(4) The records are kept in the office of the Clerk of the Court of Common Pleas of the County of Passaic.

(5) The judge sits as the Judge of the Court of Common Pleas of the County of Passaic, and the Clerk of said Court or his deputy, or both, are present acting as Clerk of said Court while said Court is exercising its jurisdiction in naturalization cases.

(6) The fees allowed by the act of Congress, June 29, 1906, in naturalization cases are paid to

the defendant John J. Slater, as Clerk of the Court of Common Pleas of the County of Passaic.

Therefore, we insist that these fees are fees, costs, allowances and perquisites received by the defendant for acts done and services rendered in connection with his office as Clerk of the Court of Common Pleas of the County of Passaic, and are such fees, costs, allowances and perquisites which, under Sec. 2 of the Act of March 30, 1903, as he is required to make a statement verified by oath to the County Collector, and to pay over by him to the County Collector on or before the 20th day of each month. The Clerk's salary pays him for all the services required of him as Clerk of said Court and *is in lieu of all other compensation.*

In the case of City and County of San Francisco v. Mulcrevy (113 Pac. Rep., 339) above cited, the Court of Appeals of California says:

"It was by reason of his election as County Clerk and his taking office and giving his bond and receiving a salary of \$4,000 per annum, that he was enabled to receive the fees for naturalization proceedings in the superior court. He received them in his official capacity."

In Barron County v. Beckwith, 142 Wis., 519 (1910) the Court held,

The Clerk of the Circuit Court for Barron County, who received a salary for such services "in lieu of all fees, per diem and compensation for services rendered by him or his deputy," should account for and pay over to the County treasurer all moneys retained by him in naturalization cases for services performed as Clerk of such Court. That it was the manifest purpose of the legislature to make his salary full compensation for his services as such clerk.

In *Keeling vs. Searcy Co.*, 144 S. W. (Ark.) 925, where the Clerk of the Supreme Court received a salary in full compensation for all his work and services, the court held,

That the Clerk was not entitled to retain, in addition to his salary, the fees he earns in taking oaths and depositions authorized by a Federal Statute, to be taken before him in the federal public law matters.

In *Franklin County v. Barnes*, 123 Pac. Rep., 779 (Sup. Ct. Wash., 1912) the Court says:

"Both on reason and authority we hold that where fees are paid to a county clerk, clerk of a state court, or other state or county officer, for services performed under a federal statute, that officer receives the money by virtue of the office created by the state law. *The Clerk acts in an official, not a personal capacity.*" * * *
 "The Clerk is designated by the Act of Congress to receive the fees because he is Clerk of the Court designated by act to naturalize aliens. *It was the office which was in the legislative mind, not the individual. It was the Clerk as Clerk.*"

See also *Rhea vs. Board of County Commissioners* (Idaho), 88 Pac. R., p. 89.

State v. Kelly, 30 Neb., 574.

III.

There is no conflict between the statute of March 30, 1906 providing for the disposition of fees, allowances, perquisites, etc., collected by the county clerk, and the act of Congress of June 29, 1906.

In a similar case to the case at bar, *Franklin County vs. Barnes*, 123 Pac. Rep., 779 (Sup. Ct. of Wash., 1912) above cited, the Court held that:

“The disposition of these fees is a question between the clerk and the state. The Clerk derives his office from the state. He takes his office upon the condition that he pay into the county treasury all fees collected by virtue of that office. This is a matter over which the federal government has no concern.”

In this case, action was brought by Franklin County against A. A. Barnes, county clerk of that county, for one-half of certain fees collected by him in naturalization proceedings. A demurrer to the complaint was overruled, and judgment was entered against the defendant from which he appeals.

“The case presents but one question. May the county clerk retain for his own use one-half the fees collected in naturalization proceedings under Act of Cong. June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp., 1911, p. 528) or is he bound to account for such fees to the county as in case of other fees collected by him?” * * *

“The state constitution in section 6 of article 4 provides that the Superior Court ‘shall have the power of naturalization and to issue papers therefor’. The same power is vested in the superior courts of the state by statute. The Constitution, in section 5 of Article 11, makes it incumbent upon the legislature to provide by general and uniform laws for the election of county officers, including county clerks, prescribe their duties, fixes their terms of office, regulates their compensation in proportion to their duties, and for that purpose authorizes the Legislature to classify counties by population, and further declares: ‘And it shall provide for the strict accountability of such

officers for all fees which may be collected by them, and for all public moneys which may be paid to them or officially come into their possession.' Section 8 of the same article provides that 'the Legislature shall fix the compensation by salaries of all county officers * * *'

"Section 1 of that act (Rem. & Bal. Code, Sec. 4073) is as follows: 'Every county officer, who, by the laws of this state is allowed a salary, shall on the first Monday of each month, pay into the county treasury all moneys and sums which have come into his hands for fees and charges in his office, or by virtue of this office, during the preceding month. And no officer is permitted to retain to his own use or profit any sums paid him in his office or by virtue of his office, no matter from what source, but all of such moneys so paid him by virtue of the laws of this State, or of the United States, shall be the property of the County * * *'. Every salaried officer is required to pay into the county treasury all monies' paid him by virtue of the laws of this state, or of the United States."

Such monies are declared to be "the property of the county." The language is too plain for construction. The Statute was designed to cover and does cover, the fees paid to the clerk under the act of Congress relating to naturalization.

The appellant contends that, inasmuch as the Federal Constitution (Section 8, art. 1) confers upon Congress the power, "to establish a uniform rule of naturalization," and Congress has by the act of June 29, 1906, above quoted, established such a rule, definitely fixed the fees to be charged and

the method of collecting and accounting for such fees, its jurisdiction is exclusive, and therefore that act supercedes all state legislation upon the subject. The premises are correct, but they do not justify the broad conclusion. By what seems to us to be a correct construction of the act of Congress and the state statutes they present, at most, only an apparent, not a real conflict. In order to create such conflict, resort must be had, and an implication which is neither necessary to the purposes of the Federal Statute nor unavoidably conveyed by the language used therein. The authorization of the clerk "to retain one-half of the fees" does not necessarily imply a grant to him of those fees for his own use. The sentence in which this authorization is found was palpably intended merely to fix the basis of adjustment between the clerk and the bureau. With that adjustment the interest of the Federal Government ends. *It can be no matter of concern to the United States nor to the Bureau of Immigration and Naturalization, the beneficiary of one-half of the fees, what disposition be made of the other half retained by the clerk on the adjustment.* Courts will not invoke an implication not necessary to the purpose of the law in order to raise a conflict between a Federal and a State Statute which would not otherwise exist. The objects of the two statutes, State and Federal, are different. The language of each must be restricted to its own object or subject. This is a rule of construction often invoked to avoid an apparent conflict between two statutes of the same state (Endlich on Interpretation of Statutes, Sec. 211; Lewis Sutherland Statutory Construction (2nd. Ed.), p. 468), and there is equal reason for its application as between Federal and State legislation. *The obvious purpose of the Federal Statute was to exercise the power "to establish a uniform rule of naturalization" conferred by Sec-*

tion 8 of Article 1 of the Federal Constitution. It evinces no purpose to interfere with the power of the State Legislature to fix the full compensation of county officers or to modify the duties imposed by the Legislature upon those officers in accounting to the county. While the procedure, the form, and the amount of the fees to be charged in naturalization proceedings, are matters going to the uniformity of those proceedings and are therefore within the exclusive power of Congress to fix (*Newman vs. Libby*, 147 Wash., 481, 92 Pac., 350), what disposition is made of the half of the fees relinquished by the act in no manner affects the uniformity of the rule of naturalization the establishment of which is the sole purpose of the Federal law as meeting the full purpose of the constitutional provision pursuant to which it was enacted. On the other hand the *State Statute does not trench upon any matter connected with the uniform rule of naturalization established by the act of Congress*. It merely directs the disposition of money coming into the hands of the county clerk after all right or claim thereto has been relinquished by the act of Congress. When the objects of the two statutes are considered and the language of each restricted to its object, there is no conflict.

It is argued that the duties of the clerks in naturalization proceedings are outside of their duties as clerks, and that therefore, the disposition of the fees as well as the fixing of their amount is within the power granted to the general government. We are not called upon to determine the extent of the power granted to Congress, but only the extent to which it has exercised that power. From what we have said we think it plain that there was no intention by the act in question to make a final disposition of the half of the fees relinquished by Congress, but only to provide a basis of account-

ing for the fees collected as between the clerk and the bureau. But aside from this, which we conceive to be a sufficient answer, we think the argument proceeds upon an unsound assumption. Both on reason and authority we hold that, where fees are paid to a county clerk, clerk of a state court, or other state or county officer for services performed under a Federal Statute, *that officer receives the money by virtue of the office created by the State law.* The clerk acts in an official, not a personal capacity. The certificate issued is an official, not a personal document. *Barron County vs. Beckwith*, 142 Wis., 519; *San Francisco vs. Mulerevy*, 15 Cal. App., 11, 113 Pac., 339; *Rhea vs. County Commissioners*, 13 Idaho, 59, 88 Pac., 89; *People ex rel. Whittemore vs. Seabury*, 23 How. Prac. (N. Y.) 121. *The clerk is designated by the act of Congress to receive the fees because he is clerk of the court designated by the act to naturalize aliens.* It was the office which was in the legislative mind, not the individual. It was the clerk as clerk.

IV.

The cases on which the defendant places his reliance in this suit have been overruled and criticised adversely by recent decisions in other states.

The defendant relies upon the *Inhabitants of Hampden County vs. Morris* (Mass.); *Gardner, County Judge vs. State* (Oklahoma) 110 Pac. Rep.; *Eldredge vs. Salt Lake County*, (Utah) 106, Pac. R., 939, and *Fields vs. Multnomah Co. et al.*, (Oregon) 128 Pacific, 1045.

No other precedent is followed in any of these cases than the Utah case, but the Utah case was one of first impression in that jurisdiction. It relies wholly upon reason, which is fallacious. The court expressly disclaims relying upon any pre-

cedent. There can be no doubt that the reasoning of the Utah case is unsound. In short, the reason given is that the state courts in the naturalization proceedings, act as federal agents, that naturalization proceedings are not part of their office, and are not official duties. *That case has been carefully analyzed and no other reason was discussed or advanced for its support.*

But this reason is not founded on fact for the Federal case of Severino, above recited, holds that *the State courts remain State agents despite their powers under the Federal act.* If the courts remain State agents, how can their clerks rise to any higher dignity than they?

In addition thereto we would say that the reason given in the Utah case is in conflict with those set forth in the Severino case, above recited, and in as much as the Severino case was decided by a higher court we take it that that must be controlling in this case.

The Massachusetts case and the Utah case above cited, are criticized in the case of Franklin County vs. Barnes, 123 Pac. Rep., 779, Sup. Ct. of Wash., 1912, where the court said:

“We have not overlooked the fact that the Supreme Courts of Utah and Massachusetts have reached the contrary conclusion.”

Citing the Eldridge and Hampden County cases, above referred to,

“These decisions proceed upon what we believe to be a mistaken assumption, that the State Statutes involved were in conflict with the Federal law. *The disposition of these fees is a question between the clerk and the state.* The clerk derives his office

from the state. He takes his office upon the condition that he pay into the county treasury all fees collected by virtue of that office. This is a matter upon which the Federal government has no concern. *Despite the high standing which the Massachusetts court justly holds, its decision as it seems to us discloses its own fallacy."*

The Oklahoma and Oregon cases rest solely upon the Utah case as a precedent. The cases have no original reasons of their own, but expressly state that they rely upon the logic and the reason in the Utah case, and are held by them to be conclusive against the claim of the plaintiff in those cases. Inasmuch as the Massachusetts case and the Oklahoma and Oregon cases rely solely upon the Utah case, for which in turn there is no precedent, and since the reasoning of the Utah case is unsound, and expressly opposed to that of the federal case, that is, the Severino case, *supra*, the only three case cited by the defendant in his support must be rejected as precedents.

In *U. S. v. Severino*, 125 Fed. Rep., 949, where laws of New York provided in addition to the procedure prescribed by Congress in the naturalization of aliens, that an application in the form of a petition, accompanied by an affidavit of some citizen who may or may not afterwards be a witness, shall be filed &c. Held, that perjury in the making of this affidavit was not punishable in the federal courts under Rev. St., Sec. 5395 (U. S. Comp. Stat., 1901, p. 3654) punishing perjuries occurring in naturalization proceedings, Sec. 711, Ch. 1 (U. S. Comp. St., 1901, 577) giving United States Circuit and District Courts jurisdiction of all crimes and offenses cognizable under the authority of the United States.

It was said at p. 951:

"According to this view the state court while entertaining such proceedings, remains a part of the sovereignty which created it, and does not become a federal court. See also *Rump v. Commonwealth*, 30 P., 475; *State v. Whittemore*, 50 N. H., 245; *Spratt v. Spratt*, 4 Pet., 393. Those cases held such proceeding was a judicial proceeding in a court of the state."

At p. 954 we find:

"It is concluded that state courts, while entertaining jurisdiction in naturalization proceedings, remain state courts, and that perjury committed by a witness in such a proceeding is punishable by the sovereignty whose justice it offends (that is, the state court)."

At p. 958, the opinion reads:

"But it is not necessary to hold that a state, as a condition of allowing its courts to entertain naturalization proceedings, may not regulate its practice and punish suitors who knowingly violate by false oaths the requirements of its statutes relating thereto, *provided the rule of naturalization enacted by Congress is not varied*. It is enough that the new requirement *does not become a part of the federal law*, and that any disobedience thereto must be punished by the sovereignty offended. What the defendant did he did in a court ordained and established by the State of New York and its constitution, respectively prescribed by such state, *and unprovided for in the federal law*, before a judge neither appointed nor compensated by the United States, but by the State * * * and in nowise accountable or owing official duty to the United States."

In support of the plaintiff's interpretation of this statute, and more particularly bearing upon the point as to whether or not there is a conflict between the state and the federal laws the plaintiff submits the case of Franklin County vs. Barnes, 123 Pacific Reporter, 779, Sup. Ct. of Washington, May 23, 1912, which we submit as a precedent, because what was wanting in the Massachusetts, Utah, Oklahoma and Oregon cases as precedents, is to be found there.

The four case cited by the defendant either state conclusions of law without any precedent in support of them, or else the reasoning, as above stated, is defective. The cases cited by the defendant all assume a conflict between the state and federal laws. In none of these cases was the question raised as to the meaning of the state law, or the meaning of the federal law, but in each and every one of them it was boldly assumed that there was a decided conflict between the state and the federal laws, and that the only question left to be determined was which law should prevail in case of conflict.

The plaintiff insists that the judgment below should be set aside and reversed.

Respectively submitted,
J. W. DEYOE,
Counsel of Plaintiff.

New Jersey Court of Errors and Appeals

THE BOARD OF CHOSEN FREE-
HOLDERS OF THE COUNTY OF
PASSAIC,

Plaintiff-Appellant,

vs.

JOHN J. SLATER,

Defendant-Respondent.

Action of Law.

*Plaintiff's Appeal
From the Sup-
reme Court.*

BRIEF FOR DEFENDANT-RESPONDENT

The question upon which the result of the present appeal depends is as to whether the defendant, who is the Clerk of Passaic County, must pay to the plaintiff certain fees received by him under the provisions of an act of Congress entitled "An act to establish a Bureau of Immigration and Naturalization and to provide for a Uniform Rule for the Naturalization of Aliens throughout the United States," approved June 29th, 1906,—34 Stat., 596 (U. S. Comp. St. Supp. 1909, PP. 97, 477 et seq.)

The defendant claims that he is entitled to the fees in question by virtue of Section 13, of said act; the pertinent part of which reads as follows:

"Sec. 13. That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect and account for the following fees in each proceeding:

"For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar.

"For making, filing and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for

entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.

"The clerk of any court collecting such fees is hereby authorized to retain one half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Immigration and Naturalization, and paid over to such bureau within thirty days from the close of each quarter in each and every fiscal year, and the moneys so received shall be paid over to the disbursing clerk of the Department of Commerce and Labor, who shall thereupon deposit them in the Treasury of the United States, rendering an account therefor quarterly to the Auditor for the State and other departments, and the said disbursing clerk shall be held responsible under his bond for said fees so received. * * * Provided, That the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said Bureau as in case of other fees to which the United States may be entitled under the provisions of this act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this act upon the clerks of courts from fees received by such clerks in naturalization proceedings. And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose if in the

opinion of the said Secretary the business of such clerk warrants such allowance."

On the other hand, the plaintiff claims that defendant should account for and pay over to it the fees so received by him and mentioned in the complaint.

The basis of plaintiff's claim is the provision of an act of the legislature of New Jersey, approved March 30, 1906, entitled "An act respecting the fees of surrogates, registers of deeds and mortgages, county clerks and sheriffs in certain counties of this state, and providing salaries for such officers." P. L. 1906, p. 38. It reads as follows:

"Sec. 1. The fees, costs, allowances, percentages and all other perquisites of whatever kind which by law the surrogate, registers of deeds and mortgages, county clerks, and sheriffs in counties other than counties of the first class of this state may receive for any official acts or services rendered by such surrogates, registers of deeds and mortgages, county clerks and sheriffs, respectively, or by any assistant, or other person in their office or employment, for any acts done, or services rendered in connection with said offices, shall continue to be payable, and shall be received and collected by the said surrogates, registers of deeds and mortgages, county clerks and sheriffs, respectively, for the sole use of their respective counties as public moneys belonging to the said counties, and shall be accounted for by said surrogates, registers of deeds and mortgages, county clerks and sheriffs, and paid over as such in manner hereinafter provided. (P. L. 1906, p. 76.)

Sec. 2. The said surrogates, registers of deeds and mortgages, county clerks and sheriffs shall respectively keep an account of all fees and moneys received by them pursuant to the provisions of this act for the use of their respective counties, and shall, on or before the fifteenth day of each month, make a full and itemized statement and return verified by oath, to the county collectors of their several counties, of the fees, costs, allowances, percentages and all perquisites of whatever

kind received by them, or by any assistant or other person in their offices or employment, for any act done or service rendered in connection with said offices, and all sums which may have been charged or taxed, or which shall have accrued, or become payable, for any such services during the month preceding the making of such statement; which statement shall be made under oath upon blanks containing a form of said statement, to be furnished to the said surrogates, registers of deeds and mortgages, county clerks and sheriffs by the county collectors, respectively, and shall be filed in the offices of the county collectors, respectively, there to remain as public records. Such statement shall be forthwith audited by the county auditors, or other proper county officers, and on or before the twentieth day of each month the said surrogates, registers of deeds and mortgages, county clerks and sheriffs shall, respectively, pay over the amount of such fees and moneys to the county collectors of their respective counties, under penalty of one hundred dollars for each day's neglect to file such certificate, or, to pay over such moneys, to be recovered in the name of the board of chosen freeholders of such county where such default shall occur, for the use of the said county in an action upon contract in the Supreme Court, or in the Circuit Court of said county. (P. L. 1906, p. 76.)

Sec. 3. The said surrogates, registers of deeds and mortgages, county clerks and sheriffs shall be personally liable to their respective counties for the payment of all such fees and costs as are mentioned in the first section of this act, and for their own protection it shall be lawful for them to exact the payment of such fees and costs before filing any paper, entering and docketing any writ, order or judgment, recording any paper, making a copy or search, or performing any other services in their said offices for which costs, fees or compensation is allowed; and for convenience it shall be lawful for the said surrogates, registers of deeds and mortgages, county clerks and sheriffs, to receive from

suitors and their attorneys, or any person having business with said offices, reasonable deposits of money in advance to answer such fees and costs, rendering an account thereof to the person or persons making such deposit at least once in four months. (P. L. 1906, p. 77.)

Sec. 4. The said surrogates, registers of deeds and mortgages (wherever such office now is, or may hereafter be created), county clerks and sheriffs shall receive in lieu of all other compensation annual salaries as follows: In counties having between one hundred and twenty-five thousand and two hundred thousand inhabitants, six thousand five hundred dollars; in counties having between one hundred thousand and one hundred twenty-five thousand inhabitants, five thousand five hundred dollars; in counties having between sixty-five thousand and one hundred thousand inhabitants, four thousand five hundred dollars; in counties having between fifty thousand and sixty-five thousand inhabitants, three thousand five hundred dollars; in counties having between twenty-five thousand and fifty thousand inhabitants, two thousand five hundred dollars; in counties having less than twenty-five thousand inhabitants two thousand dollars; to be paid by the proper disbursing officer of their respective counties, in equal monthly payments. Such salaries shall be determined and paid upon the basis of population shown by the latest state or national census promulgated, without regard to the date of election or appointment of such surrogates, registers of deeds and mortgages, county clerks and sheriffs. Said surrogates, county clerks, registers of deeds and mortgages and sheriffs in any county of this state shall select and employ the necessary deputies and assistants for said offices respectively, who shall receive such compensation to be paid monthly by the proper disbursing officers of said counties, as shall be approved by the judge of the Court of Common Pleas of their respective counties

on warrants approved by said judge. (P. L. 1906, p. 78, as amended P. L. 1909, p. 460.)

Sec. 5. All acts and parts of acts inconsistent herewith be and the same are hereby repealed, and this act shall take effect so far as respects said offices at the expiration of the terms of office of the present surrogates, registers of deeds and mortgages, county clerks and sheriffs, respectively. (P. L. 1906, p. 78.)

POINT I

The New Jersey statute does not apply to fees received by the defendant under the provisions of the Federal "Naturalization Act."

POINT II

If the New Jersey statute was intended to apply to such fees, it is either unconstitutional, or its force and effect has been suspended by the Federal Act.

ARGUMENT

It is conceded that under the New Jersey Statute, all fees which, by law, the defendant may have received for any official act or services are payable to the county. It is therefore to be considered, in the first place, whether the New Jersey statute applies to fees collected by the county clerk under the provisions of the United States statute, and, secondly, if it is to be construed as so applying, whether the operation of the New Jersey statute is nullified or suspended by the National statute.

POINT I

The New Jersey statute does not apply to fees received by the defendant under the provisions of the "Naturalization Act."

It will be observed that the New Jersey statute does not require the payment to the county of *all* fees. The statute limits and characterizes the fees which are to

be turned over to the county. They are to be such fees only, as he receives "*by law*" for any "*official acts or services.*"

Now, it is submitted, that when the legislature of New Jersey used the term, fees received "*by law,*" it meant, not law generally, not the law of any other sovereignty, but, the law of New Jersey. It was dealing with transactions to occur within its own territorial boundaries, wherein no other law making power, save the United States Congress in certain limited matters, possessed the right to make law. It was dealing with an office of its own creation, and, therefore absolutely dependent upon its creator for existence, power and authority. Therefore when it refers to the fees of that office as being such as the incumbent may receive *by law*, it means, in the absence of language to make it broader, its own law. If it be said that the legislature would have in mind the law making power of the National Government and therefore would have in mind not only its own law but the National law as well, the answer is that such intendment could not be made when the words "*by law*" refer to laws which deal with a subject matter over a branch of which, the Federal government has exclusive power. As will be shown hereafter, in dealing, with the naturalization of aliens, the Federal government has exclusive power, when once it exercises it.

(b)

The argument, from the use of the words "*by law,*" that the New Jersey statute was not intended to apply to fees paid under the Naturalization act would seem to be rendered conclusive when the subsequent words which characterize the fees referred to in the act are duly considered. As has been stated, the statute not only limits its subject matter to fees received "*by law,*" but, also, to fees received by law for any "*official acts or services.*"

Now, it is submitted, that the fees paid to the defendant for services under the Naturalization act are not fees paid him for any "official acts or services" within the meaning of the New Jersey Statute.

The legislature of New Jersey has power to create an office. It may invest the office with any power it sees fit, provided it relates to a subject matter over which it is sovereign. But it needs no argument to show that it cannot invest any office with powers respecting a subject matter over which it possesses no jurisdiction. It could confer upon no office the right to coin money, nor to emit Bills of Credit, nor to perform any other function which it is the province of the Federal Government to regulate.

Nor, when Congress has legislated upon the matter, may the state, within the limits of such legislation, legislate upon the subject matter of naturalization. By Article I, Sec. 8, of the Federal Constitution, it is provided, "The Congress shall have power * * * to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." The nature and extent of the power vested in Congress under this constitutional provision, in its relation to bankruptcy, has received frequent consideration. The principles laid down in the great cases of *Sturges vs. Crowninshield*, 4 Wheat. (U. S.), 122; *Ogden vs. Saunders*, 12 Wheat., 213, have been followed to this day. They may be summarized as establishing the rules, (a) that until Congress chooses to legislate, the state may control bankruptcies by its own laws, (b) when Congress legislates, its law upon the subject becomes supreme, and any law of the state is, *ipso facto*, suspended until the act of Congress is repealed. A resumé of the adjudications upon the subject may be found in 1 *Remington on Bankruptcy*, Secs. 1625, 1626, 1627, et seq. In our own state (*Singer vs. Natl. Bedstead Co.*, 65 E., 290), it has been said: "Congress is not obliged to legislate on the whole subject of bankruptcy, it may deal with only one

or several parts. It is the enactment by Congress of a law applicable to a particular case which suspends any state law which otherwise would be applicable to that case." The following are some of the cases dealing with the same matter:

Sturges vs. Crowninshield, 17 U. S. 4 Wheat., 122 (4:529).

Ogden vs. Saunders, 25 U. S. 12 Wheat., 213 (6:606).

Boyle vs. Zacharie, 31 U. S. 6 Pet., 348 (8:423).

Cook vs. Moffat, 46 U. S. 5 How., 295 (12:159).

Bank of Tennessee vs. Horn, 58 U. S. 17 How., 157 (15:70).

Baldwin vs. Hale, 68 U. S. 1 Wall, 223 (17:531).

Baldwin vs. Bank of Newbury, 68 U. S. 1 Wall, 234 (17:534).

Gilman vs. Lockwood, 71 U. S. 4 Wall, 409 (18:432).

Crapo vs. Kelly, 83 U. S. 16 Wall, 610 (21:430).

Cole vs. Cunningham, 133 U. S., 107 (33:538).

Geilinger vs. Philippi, 133 U. S., 246 (33:614).

Brown vs. Smart, 145 U. S., 454 (36:773).

It needs little consideration to lead one to conclude, that the same rules of constitutional construction

which are to be applied to bankruptcy legislation when considering the respective powers of state and Nation are, also, to be applied in respect to laws regulating the Naturalization of aliens. The opinion of Mr. Justice Johnson, in *Ogden vs. Saunders*, *supra*, 275, et seq., recognizes the analogy.

When the New Jersey statute was passed in 1906, Congress, while, perhaps, it had not dealt with the whole subject of Naturalization, had dealt with it so far as to declare the manner in which an alien might become a citizen. It had designated the courts which should have jurisdiction, and, among others, named "a court of record of any of the states having common law jurisdiction, and a seal and clerk." It had established the procedure and provided that the declaration might be made before the clerk, who should record the proceedings. See U. S. Comp. St. 1901, Vol. 1, p. 1329, et seq. That Congress had authority to use the state courts and state officers, and clothe them with official power to act and serve in the administration of the Naturalization law is well settled. See *Wayman vs. Southard*, 10 Wheat. 40; *U. S. vs. Jones*, 109 U. S., 519.

Consequently, it is submitted, when the New Jersey statute of 1906 was adopted in March, at that time the act of Congress of June, 1906, not having been adopted, though it might have been permissible for the New Jersey legislature to have appropriated the fees received by the clerk in Naturalization cases, (but probably not; see *U. S. vs. Hill*, 165 U. S., p. 504, 513), yet it clearly manifested its intention that such fees should not be appropriated, by expressly limiting the fees to be paid to the county to those paid for any "official acts or services."

An illustration of the rule that an official may act, even in matters connected with his office, and yet not act officially nor be precluded from receiving compensation in addition to his salary, is to be found in the case of *Evans vs. Trenton*, 24 N. J. L., 764, 768. In that

case the city treasurer was bound by law, to *issue, re-issue* and *redeem* certain certificates. He did this. But, at the request of the city, he also, separated, *trimmed* and *numbered* these certificates; for which he demanded additional compensation. The Court of Errors and Appeals held him to be entitled to it. The court recognized the rule that officers must perform all duties added to their office, but said: "But the rule, nevertheless has its limit. It does not follow from the principle laid down, that a public officer is bound to perform *all manner of public service* without compensation, because his office has a salary annexed to it. Nor is he in consequence of holding an office rendered legally incompetent to the discharge of duties which are clearly extra official, outside of the scope of his official duty."

It is to be assumed that the legislature enacts laws with a knowledge of all the limitations imposed upon it by the Federal Constitution and the Acts of Congress which may vivify dormant National powers, and, therefore, that any statutory language is to be interpreted, if possible, as not being intended to contravene either those Federal Laws then existing or such as may be subsequently passed. Or, more concretely, that when the State appropriated fees received by the Clerk for "official acts and services," it had in mind the power in Congress to provide fees in furtherance of a system for the Naturalization of Aliens; and, that it was not within the power of the State to deprive the Federal officer of such compensation as Congress might award for services in the administration of its law.

While I find no adjudged case upon the precise point, yet the principle is firmly established by the highest authority that the state cannot take from a Federal officer any part of the compensation awarded him by Congress. It is the principle underlying the leading case of *M'Culloch vs. Maryland*, 4 Wheat., 316. The court there says: "The states have no power, by taxation, or otherwise, to retard, impede, bur-

den, or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the national government."

It was the application of this principle in *Dobbins vs. Erie County*, 16 *Peters*, 435, that defeated the attempt of Erie County to levy a tax upon the salary of Dobbins, who received it as captain of a United States revenue cutter. It was there said:

"The powers of the national government can only be executed by officers whose services must be compensated by Congress. The allowance is in its discretion. The presumption is that the compensation given by law is no more than the services are worth, and only such in amount as will secure from the officer the diligent performance of his duties. 'The officers execute their offices for the public good. This implies their right of reaping from thence the recompense the services they may render may deserve,' without that recompense being in any way lessened, except by the sovereign power from whom the officer derives his appointment, or by another sovereign power to whom the first has delegated the right of taxation over all the objects of taxation, in common with itself for the benefit of both. And no diminution in the recompense of an officer is just and lawful, unless it be prospective, or by way of taxation by the sovereignty who has a power to impose it, and which is intended to bear equally upon all according to their estate.

"The compensation of an officer of the United States is fixed by a law made by Congress. It is in its conclusive discretion to determine what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Does not a tax, then, by a State upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entirety? It certainly has such an effect; and any law of a State imposing such a tax cannot be constitutional, because it conflicts with a law of Con-

gress made in pursuance of the Constitution, and which makes it the supreme law of the land."

The case of *Weston vs. Churchill*, 2 Pet., 449, is also in point.

If the hypothesis be sound that state legislation is enacted with a knowledge of the dormant powers of Congress and so as to not invade them when awakened, then it follows that the words in the New Jersey statute "official acts and services" must be interpreted so as not to include acts and services under the act of Congress, for the reason, if otherwise interpreted, they would be unconstitutional under the principle in the cases last cited in that they would result in depriving an agent of the National Government of the compensation provided by that government for the services required of him.

REPLY TO PLAINTIFF'S ANSWER ON THIS POINT

(a)

Plaintiff seeks to overcome the effect of the restrictive use of the words "by law" in the first section of the act by reference to the case of *San Francisco vs. Mulcrery*, 113 Pac. Rep. 339. It is true that in that case the words "by law" in the clerk's bond were construed by the aid of the context to include an act of Congress. But the bond in that case was a very different matter from our statute. The result, too, was a necessary corollary of the views of the California Court upon the respective powers of Congress and the State, which will be hereinafter referred to.

(b)

Plaintiff contends that the language of the second and fourth sections of the state act, shows that the term "by law" in the first section is a *general* term; by which I understand that it is claimed that the term is intended to include an act of Congress. A compari-

son of the two sections fails to establish such a result. The only provision of the act for the receipt of fees by the clerk is in the first section and by that section they are required to be paid over as thereafter provided. Sec. 2 provides the manner in which the clerk shall keep an account of such fees and how he shall pay them over. What he pays over are, of course, only such fees as by law he receives under Sec. 1 of the act for official acts or services in connection with his particular office. The salary given by the fourth section "in lieu of all other compensation" is a salary for his "official acts and services."

(c)

Plaintiff again contends that the words "by law" include naturalization fees because at the time of the passage of the state act of 1906 there was in existence a state law of 1895 which provided for the payment of naturalization fees to the clerk; and, therefore, that in using the words *by law* in the act of 1906 fixing salaries, the Legislature clearly contemplated including fees in naturalization cases. If the fees sued for were fees received under the state act of 1895, there would be force in this proposition, it is not denied that they would be included, but the fallacy in the proposition is that the defendant doesn't receive such naturalization fees as he is sued for, under the state act. He receives them under the act of Congress. The complaint recognizes that he so receives them by reference to the remittance of fees to the Secretary of Commerce and Labor. The amount of the fees under the act of 1895 is different from that under the act of Congress. It is one thing to say that the words "by law" would include naturalization fees received by the Clerk under the state law and quite another to say it would include those under the act of Congress.

It will be of assistance at this point to state the history of the laws regulating naturalization fees. It ap-

pears that with one exception, which was the law for but a short time, Congress never enacted any statutory prescription of the fees to be paid in naturalization cases until the act of 1906. A review of the legislation on the subject is made in the case of the *United States vs. McMillan*, 165 U. S. pp. 504, 514, decided in 1896. Mr. Justice Gray says:

"The question of the appellee's right to retain, or his duty to account for, sums received by him in naturalization proceedings, depends upon distinct and peculiar considerations.

"The only place, it is believed, in the statutes of the United States, in which fees received by the clerk in such proceedings have ever been mentioned, is in one of the earlier naturalization acts. The act of April 14, 1802, chap. 28, enacted in Sec. 1 that an alien's declaration of intention to become a citizen might be made before a court of record of one of the states or of a territory of the United States or before a circuit or district court of the United States; and in Sec. 2, that a report in behalf of an applicant for naturalization, stating his name, birthplace, age, nation, and allegiance, the country whence he migrated, and the place of his intended settlement, should be received and recorded by the clerk of the court; and that the clerk should receive fifty cents for recording such report, and 50 cents for a certificate thereof under his hand and seal of office. 2 Stat. at l. 153. The provision as to a clerk's fees has been omitted in the later naturalization acts. Conkling's U. S. Practice, 4th ed., 722; U. S. Rev. Stat. tit. 30; Act of February 1, 1876, chap. 5 (19 Stat. at L. 2). And no act of Congress, regulating the fees and accounts of clerks of court, has fixed the sum which they might charge, or specifically required them to account to the United States for services performed for aliens presenting to the court, through the clerk, preliminary declarations of intention to become citizens, or final applications for naturalization."

The act of 1802 remained in force until 1824, since which time, until 1906, there were no fees in naturalization matters established by Congress.

In New Jersey, during the period between 1802 and 1853 it is notorious that the courts of the state admitted aliens to Federal citizenship, yet, no state legislation provided fees for the clerks in such matters until the latter year, when "An Act to establish uniform fees of clerks and judges in naturalization cases, and to provide for the taxation of the same" was passed. *Nixon's Digest*, 1709, 1855. Up to that time it is probable that the fees were regulated by the court itself, upon the same principle under which the allowances were made to Mr. Hill, the defendant in *U. S. vs. Hill*, 120 U. S., 169, and that they were not uniform, inasmuch as one of the expressed objects of the act of 1853 was to provide for such uniformity. No further state legislation occurred on the subject until the act of 1895, when, by Sec. 7 of the act a new table of fees was provided.

Congress having been silent as to the fees in such cases from 1824 to 1895, it was probably quite within the powers of the state at that time to establish the fees to be paid the clerk, and when in March, 1906, the state legislature provided that all fees which the clerk received "by law" should be paid over to the county, it undoubtedly included such fees as he received under the act of 1895, but, just as clearly, it could not have referred to such fees as Congress might thereafter provide for him.

(d)

The plaintiff's next proposition to be considered under this head is that "The clerk in performing the duties required of him" (i. e. under the naturalization act) "is not a federal agent or agent of the national government." The deduction which, as I understand it, plaintiff desires to make from this proposition, is

that if the clerk is not a federal agent then he performs no federal "official service" under the naturalization act; that if he performs no federal "official service," then he performs a state "official service" and, therefore, any fees he receives for such services pass to the county under the state act of 1906. The difficulty in reaching this conclusion is that for the purposes of the naturalization procedure the clerk becomes a federal agent. He derives his whole power to act in the premises from the federal law. The declaration of the alien and his oath, in short the whole procedure, including the fees demandable by the clerk, are those prescribed by Congress. Under the state law regulating the subject he has no power, nor is it pretended that he has. The state act of 1895 goes no further in respect to any power the Clerk exercises than to give consent to the performance by him of any act authorized by Congress. Such consent was not necessary in order to enable him to act. Clerks of courts in New Jersey had acted for a century without any such consent. Indeed, the courts of the state, themselves, had exercised jurisdiction in naturalization proceedings for a like period without any such consent. In this state, "silence gave consent." It was never pretended in New Jersey that even the jurisdiction of the courts, which is a different matter from the power of the clerks, was derived from state legislation. The state act of 1853, above referred to, clearly recognized that the jurisdiction came from Congress. That act begins by providing "The several clerks of the courts of this state, *which by law have jurisdiction in cases of naturalization,*" &c. There was then no state law which gave them jurisdiction, and never had been.

Plaintiff relies for support of his proposition that the clerk is not a federal agent, upon the case of the United States vs. Severino, 125 Fed., 949, which, it is submitted, gives it no support at all. In the Severino case the question was as to whether perjury committed in a state court in a naturalization proceeding,

in respect to a state statute, was punishable in a federal court in the absence of a federal statute. It was held: (1) "that state courts, while entertaining jurisdiction in naturalization proceedings, remain state courts, and that perjury committed by a witness in such a proceeding is punishable by the sovereignty whose justice it offends (that is, the state;) and that the federal court cannot entertain jurisdiction in the absence of a federal statute conferring it." (2) That Congress had made it a crime to commit perjury in a naturalization proceeding in a state court. (3) That the false oath in question was not one authorized or demanded by the federal law, but was an oath added by the state law and was, therefore, extra-judicial. (4) Being extra-judicial, it was not indictable under the federal statute. And, finally, the court says: "*The exclusive power of Congress to establish a uniform rule of naturalization has not been considered in the present condition. But if it be claimed that the requirement of the state statute was an addition to the existing law relating to naturalization, it would be a sufficient answer that the state has no power to enact it, as it was deprived of such power by the federal Constitution, as the cases already cited illustrate.*"

These conclusions are very far from sustaining plaintiff's proposition. To say that a state court remains a state court when acting as an agency of the federal government in no way conflicts with the theory that it, much less its clerk, is acting as a federal agent and performing a federal function. The fact that Jones remains Jones, when he is acting as Smith's agent, in no way alters the character of his action or his relation to Smith. Nor would the fact that Jones's employer gave him consent, during his employment, to act as Smith's agent, affect the character of Jones's relation to Smith.

(e)

To give the construction to the New Jersey act which is contended for by the plaintiff would be to contravene a principle recognized by our highest court in the case of *Schwenk vs. Wyckoff*, 46 N. J. L., 560, followed in *Wayne vs. Cahill*, 49 N. J. L., 144, under which an assignment of his salary by a public officer is regarded as being so much against public policy as to render it unenforceable in the courts. Mr. Justice Reed, in the case cited says: "The restriction upon the power to dispose of rights having a potential existence, is put upon the ground that the recognition of such assignments would operate prejudicially upon the public service. * * * * * The object of the rule, in both countries, is to secure the most efficient service to the public by those who are appointed or elected to perform public duties." The plaintiff, in this case, seeks, by construction of law, to create, out of the statute, a duty for defendant to turn over the compensation given by the federal government to the clerks; a discharge of which duty would deprive him of the incentive which Congress had provided for the proper discharge of his duty under the naturalization law; the doing of which our own courts would denounce as being contrary to public policy.

(f)

Plaintiff argues that Sec. 1 of the state act of 1906 should be interpreted as including fees received under the naturalization act, upon the assumption that the clerk is bound to give all his time to the service of the county. This is a false assumption. The duties of the county clerk are defined by various statutes; such as "An Act relative to clerks of counties and of county courts," *Comp. St.*, p. 1519, the Conveyancing Act, the acts respecting Judgments, Executions, Inns and Taverns, &c. and so long as he performs those duties, he may perform such others as he see fit. The law

doesn't even contemplate the necessity of his attending court in person. *Comp. St.*, p. 1522, Sec. 23. In order to make it unlawful for him to practice as an attorney at law in his own county a statutory enactment was necessary—*Comp. St.*, p. 1521,, Sec. 21. This statute left him free to practice in some other county or to act as a solicitor in Chancery or to advise as a counsellor at law in his own county.

A public officer is not bound to give all his time to the public, but only so much as is necessary for the discharge of his duties. One man may hold two offices. 19 Am. & Eng. Encyc. of Law (1st Ed.), p. 530 and cases cited. *Evans vs. Trenton*, 24 N. J. L., 764.

(g)

There is one matter in addition to what has been said which should be mentioned, as it shows the incompatibility of the Act of Congress with the state act and the consequent necessity of considering the state act as not relating to fees received under the act of Congress, in order to avoid its being adjudged unconstitutional.

Sec. 1 of the state act provides that "the fees * * * which by law * * * the county clerks * * * may receive for any official acts or services rendered by such * * * county clerks * * * or by any assistant, or other person in their office or employment, for any acts done, or services rendered in connection with said offices," &c., &c. shall be payable, &c., &c.

Sec. 4, provides "County Clerks * * * shall select and employ" (subject to the civil service law of the state) "the necessary deputies and assistants for said offices respectively, who shall receive such compensation to be paid monthly by the proper disbursing officers of said counties, as shall be approved by the judge of the court of Common Pleas * * * on warrants approved by said judge."

Sec. 13 of the Naturalization act of 1906, and the supplement of 1909, *supra*, make entirely different provisions for the payment of assistants to the clerk under that act, and expressly provide for the payment of such assistants by the fees received in naturalization proceedings.

POINT II

If the New Jersey statute of March, 1906, was intended to give the county the fees received by the County Clerk under the provisions of the Naturalization Act of June, 1906, then the New Jersey statute, in respect to such fees, was unconstitutional, or was suspended, upon the adoption of the act of Congress.

The analogy between the effect of Congressional legislation to suspend state bankruptcy laws, and the effect of such legislation upon the subject matter of Naturalization to suspend state laws upon that subject has been dealt with under the last point.

It would seem that in this day no argument is necessary to support the general proposition that the state has no power to legislate upon subjects over which the Federal Constitution has given the Congress exclusive legislative power. Nor is argument necessary to establish the proposition that where that constitution reposes in Congress the power to legislate concerning a given subject matter the states right to legislate is taken away and its regulations of the subject matter are nullified so soon as Congress exercises such power.

The subject matter of naturalization is placed under Congressional jurisdiction (Art. I, Sec. 8) by the following constitutional provisions:

"Congress shall have power to establish a uniform rule of naturalization throughout 'the United States' also to make all laws which shall be necessary and

proper for carrying into execution the foregoing powers."

Under the provisions the jurisdiction, when exercised, is exclusive

Chirac vs. Chirac, 2 Wheat., 259;

Dred Scott vs. Sanford, 19 How. 393-405.

U. S. vs. Wong Kim Ark, 169 U. S., 649, 700;

Gladhill, Petitioner, 8 Metc., 168;

Stephens, Petitioner, 4 Gray, 559, 561;

Rushworth vs. The Judges, 58 N. J. L., 97.

Sturges vs. Crowninshield, and other cases, *supra*

and the state Legislature cannot nullify the federal statute by enacting that the clerk shall pay all the money he is authorized by the federal statute to retain into the county treasury.

Eldridge vs. Salt Lake County, 106 Pacific, 939.

Hampden County vs. Morris, 207 Mass., 167.

Gardner vs. State, 110 Pacific.

Farmer's National Bank vs. Derring, 91 U. S., 31.

Davis vs. Elmira Bank, 161 U. S., 275.

Central Bank vs. Pratt, 115 Mass., 539.

Griswold vs. Pratt, 9 Metc., 16.

Parmenter Mfg. Co. vs. Hamilton, 72 Mass., 178.

The argument upon the proposition involved in the present case, under the point now made, is so fully and cogently set forth in *Eldridge vs. Salt Lake County*, *supra*, and in the opinion of Chief Justice Knowlton in *Hampden County vs. Morris*, *supra*, that any attempt to make it in this brief would amount to mere reiteration and therefore, such attempt is not made, but as a matter of convenience the opinion of Chief Justice Knowlton is set forth:

Inhabitants of Hampden County vs. Morris.
(Supreme Judicial Court of Massachusetts, Hampden,
Jan. 2, 1911.)

KNOWLTON, *C. J.* This is an action for money had and received. The defendant is the clerk of the courts for the county of Hampden, and he has in his hands certain fees received officially for services in connection with the naturalization of aliens. The question is whether he is bound to pay over to the county treasurer the balance in his hands, in accordance with the provisions of Rev. Laws, C. 165, Sec. 31, as amended by St. 1908, C. 253, or whether his conduct is to be governed by the statute of the United States in regard to the naturalization of aliens.

(Article I, Sec. 8) that "Congress shall have power * * * to establish a uniform rule of naturalization throughout the United States;" also "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," etc. It is entirely clear, under this provision, that the Congress has jurisdiction over the subject of the naturalization of aliens, and that this jurisdiction is exclusive. *Chirac vs. Chirac*, 2 Wheat., 259, 4 L. Ed., 234; *Dred Scott vs. Sandford*, 19 How., 393, 405, 15 L. Ed., 691; *United States vs. Wong Kim Ark*, 169 U. S., 649, 700; 18 Sup. Ct., 456, 42 L. Ed., 890; *Gladhill*, Petitioner, 8 Mete., 168; *Stephens*, Petitioner, 4 Gray, 559, 561.

The act of Congress of June 29, 1906 (34 Stat., 596, C. 3592 (U. S. Comp. St. Supp., 1909, p. 4771), is "An act to establish a Bureau of Immigration and

Naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States." This contains very full and elaborate provisions covering the whole subject, and makes many new requirements to prevent fraud, and to insure results in the interest of good citizenship. It confers jurisdiction, for the purposes of the act, upon the United States Circuit and District Courts in every state, upon the district courts for the territories, upon the Supreme Court of the district of Columbia, and upon all courts of record in any state or territory, having a seal, a clerk and jurisdiction in actions at law or in equity, or at law and in equity, in which the amount in controversy is unlimited.

If we assume that Congress could not compel the courts of a state to take jurisdiction of matters in regard to which the federal government has the exclusive right to legislate (see *Kentucky vs. Dennison*, 24 How., 66, 107; 16 L. Ed., 717; *Ex parte Virginia*, 100 U. S., 339, 348; 25 L. Ed., 676; *Stephens, Petitioner*, 4 Gray, 559, 562), there is no doubt that such courts, at least with the consent of the Legislature of the state, may exercise this jurisdiction if it is conferred upon them by a law of the United States. *Gladhill, Petitioner*, 8 Metc., 168; *Stephens, Petitioner*, 4 Gray, 559, 561; *Levin vs. United States*, 128 Fed., 826; 63 C. C. A., 476; *Robertson vs. Baldwin*, Baldwin, 165 U. S., 275; 17 Sup. Ct., 326; 41 L. Ed., 715; *United States vs. Nisbet (D. C.)*, 168 Fed., 1005; *State vs. Libby*, 47 Wash., 481; 92 Pac., 350.

In this commonwealth the superior court has been exercising jurisdiction of this kind since the passage of the act of Congress of 1906, as well as before, and St. 1908, c. 253 seems to give legislative consent to this action of the court.

It is plain, however, that the jurisdiction must be exercised under and in conformity with the federal statute. All the authority of the court is derived from that statute and no proceedings can be taken by the

state court or by any officer of it in a case of naturalization, that is at variance with the statute. As to all matters that enter directly into the subject of naturalization, this is too plain for argument. It is equally true of all matters of legislation by Congress that are fairly incidental to the exercise of the power given by the Constitution to deal with this subject.

The fees prescribed by the federal statute are not all the same as those prescribed by the law of Massachusetts under which naturalization was previously conducted. The disposition of the fees is not the same under the two statutes, and the methods of procedure are very different. As all authority for action is derived from the federal law, this authority permits only such action as that law prescribes. The fees must be regulated by that law, and unless the disposition of them is a matter not fairly belonging to the general subject referred to in the Constitution, the disposition of the fees must also be as therein provided. We are of opinion that the disposition of the fees, as well as the amount of them, may properly be regulated by Congressional legislation, as incidental to the establishment of a system with a view to the accomplishment of good results. Under this federal statute the clerks of the courts are required to account to the Bureau of Immigration and Naturalization for one half of the fees collected by them, and to pay them over to the disbursing clerk of the Department of Commerce and Labor; and the other half the clerks may retain for themselves, first paying from these fees all additional clerical force that may be required in performing the duties imposed by the act. There are additional provisions for special conditions, such as the collection of fees in excess of \$6,000 in one year, which we need not consider.

The law of Massachusetts (St. 1908, c. 253) requires that all fees received by the clerk in naturalization cases, except sums expended for additional clerical assistance, shall be paid over to the county treas-

urer. This statute is in conflict with the federal law, and in our opinion must yield to it. This has been expressly decided by the Supreme Court of Utah in a similar case. *Eldredge vs. Salt Lake County*, 106 Pac. 939.

If the courts or Legislature elect to exercise the jurisdiction conferred by the federal statute, they must exercise it upon the terms and with the limitations stated in the statute. We assume that they may decline to exercise it at all; but if they choose to exercise it, they cannot depart from the statute in any particular upon which it is within the constitutional power of Congress to legislate. The amount of the fees to be charged is a proper subject for congressional regulation. So, too, in our opinion, is the disposition of the fees. Congress well might require a part of them to be paid into the treasury of the United States, where they would be available for the payment of a part of the expenses of maintaining the bureau. It cannot reasonably be contended that a state can take these fees away from the government of the United States. Congress well might think that the elaborate proceedings required by the statute impose such duties upon clerks of the courts that the interests of the public will be promoted by giving them special compensation to be taken from the fees. As this is the policy of the law under which the court is acting, the Legislature cannot nullify the statute by enacting that the clerk shall pay all the money to the county treasurer. *Farmer's National Bank vs. Dearing*, 91 U. S. 31, 23, L. Ed. 196; *Davis vs. Elmira Savings Bank*, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700; *Central National Bank vs. Pratt*, 115 Mass. 539, 15 Am. Rep. 138; *Griswold vs. Pratt*, 9 Mete. 16; *Parmenter Manufacturing Company vs. Hamilton*, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258.

St. 1908, c. 253, relied on by the plaintiff, and other similar statutes, have for their object the limitation of the compensation of the clerks for all official ser-

vices to the salaries prescribed by law. If the Legislature had seen fit, in reference to the fees for services in naturalization cases, to declare that the statutory salary elsewhere provided should be diminished by the amount received as fees in proceedings for naturalization, the provision might have been enforced. But the statute before us is not of this kind. It does not assume to change the salaries, but attempts to deal directly with the fees received under the law of the United States. In this respect it goes beyond the power of the Legislature.

Judgment for the defendant.

Reply to Plaintiff's argument that the act of Congress does not give one-half of the fees in naturalization cases to his own use.

The plaintiff presents no original argument for the affirmative of the proposition, and rests upon the authority of

Barron County vs. Beckwith, 142 Wis
519, and

Franklin County vs. Barnes, 123 Pas.
779.

The other case, in conjunction with them, upon which plaintiff places reliance, *San Francisco vs. Mulcrevy*, fails to notice this point except by saying that it was not for the defendant "to say that the services were performed under the authority of the United States, and not under the authority of the State." Which remark, it is respectfully submitted, presents a striking failure of the court to perceive the distinction between the right of the defendant as an individual, and the duty of the court to enforce the law of Congress when superior to that of the State. It shows, also, a failure on its part to recognize the rule that even if the clerk had assigned his fees, or agreed that they should be taxable by the state, his contract would be

without efficacy because he was dealing with a subject matter which public policy would not permit to be taxed or assigned.

The language of the court in *Barron County vs. Beckwith*, *supra*, upon this point is as follows:

"It is further argued that the words of the act of Congress that the clerks are 'authorized' and 'permitted' to retain one half of the fees," involve the granting of a privilege to hold the fees as their own. *We think the words used in this connection have reference solely to the adjustment under the act of Congress between the clerks and the bureau.* Clearly they cannot be held to authorize or permit the clerks on salary basis to hold them as against the counties if they are fees or emoluments which belong to the counties," which is as clear an instance of arguing in a circle as may be found. The question put by the court was, Do the fees belong to the clerk or to the county? They answer by saying: They can't belong to the clerk if they belong to the county. With which conclusion we have no dispute. It is true the court says: "We think the words used in this connection have reference solely to the adjustment under the act of Congress between the clerks and the bureau;" but, why the court "thinks so" isn't indicated.

The meaning of the language of the federal act is in no way interpreted; the evident interest of Congress in providing for the payment of the officers it selected to do its work is not referred to, nor is the fact that under the same act and language Congress provides for the remuneration in naturalization proceedings of the clerk of every federal court.

The extensive quotation in plaintiff's brief from *Franklin County vs. Barnes*, *supra*, is introduced by the statement that it is submitted "as a precedent, because what was wanting in the Massachusetts, Utah and Oklahoma cases as precedents is to be found there." By which I understand, reference is made to the inter-

pretation in the case mentioned of the words "authorized to retain" as used in the federal law.

Franklin County vs. Barnes, in effect, holds that by correct construction of the federal statute the clause in which the quoted words occur should read: "The clerk of any court collecting such fees is hereby authorized to retain one half of the fees collected by him in such naturalization proceedings; *but when he is the clerk of a state court he shall retain them to such use as may be appointed by the state when the state appoints.*"

The court expressly says that it is "not called upon to determine the extent of the power granted to Congress, but only the extent to which it has exercised that power," and then, neglecting all established rules of statutory construction, it is respectfully submitted, puts upon the federal act the meaning above stated.

The reason given for the decision is that there was a conflict between the federal and state statutes; that this conflict was not real, but only apparent. That the court could remove this apparent conflict by construction of the federal act and accordingly removed it by interpreting in effect, the word "retain" as meaning what is stated in the above italicized words. This was sheer legislation. They could with equal right have construed the state statute so that there should be no "apparent conflict."

The first rule of construction violated is a primary one; it is that a departure from the language of an unambiguous statute is not justified by any rule of construction, and is an exercise of legislative power. *Douglas vs. Freeholders*, 38 N. J. L. 214; *Camden R. Co. vs. Commissioners*, 18 N. J. L. 71; *Rudderow vs. State*, 31 N. J. L. 512. There was no ambiguity in the federal law. The court doesn't say so. It merely says that there was an apparent conflict between it and the state law and proceeded to remove the conflict by adding to the federal act, words it doesn't contain, although the act is clear in itself.

The word "retain" is not of doubtful meaning. The Standard Dictionary defines it as meaning "To hold in possession or connection, or under control; not to lose, part with, or dismiss; hold, keep, preserve; maintain; as to keep money in one's possession," etc. It says it is synonymous with "keep in pay." In the language of contracts the word is frequently used, and it requires no citation of authority to show that it is always understood, unless limited by the context, to mean that the party authorized to retain the thing mentioned in the contract, shall keep it to his own use.

Assuming that the word "retain" as used in the statute was ambiguous, yet "in the construction of statutes, other statutes *in pari materia* must be regarded; and when a term or phrase used in any statute is ambiguous, that meaning will be given to it in which it was used in former legislation on the same subject." *State vs. Garthwaite*, 23 N. J. L. 143. Upon applying this rule it will be found, beyond question, that whenever a federal statute has authorized a clerk or other officer to keep fees as compensation, to "keep for pay," it has used the same or substantially the same language as that now considered, i. e. the word "retain" is always used in reference to compensation. A citation of all such statutes would be onerous. In *United States vs. McMillan*, 165 U. S. 506, a portion of the language of the act of 1853 concerning the fees of clerks is quoted. It provides that the clerk should pay into the treasury of the United States "any surplus of the fees and emoluments of his office, which his half yearly return, so made as aforesaid, shall show to exist over and above the compensations and allowances hereinbefore authorized to be retained and paid by him."

By the act of 1855, clerks of territories were subjected to the directions of the act of 1853 that clerks should be allowed no other compensation than the fees and costs therein specified; that they should make half yearly returns, embracing all the fees and emoluments of their respective offices, of every name and character,

that no clerk should be allowed to *retain* of the fees and emoluments of his office a sum exceeding \$3,500 a year; and that any surplus should be paid into the treasury.

Chapter 16 of title 13, entitled "The Judiciary" of the U. S. Revised St. approved June 22, 1874, established a new fee bill; provided for returns and for the amount to be *retained* by the clerk; which amount to be retained was to be his compensation.

"The earliest legislation restricting the aggregate amount which clerk's might *retain*, or requiring any returns from them, was in the appropriation act of Mar. 3, 1841."

U. S. vs. McMillan, supra.

The court neglected to examine the context of the federal law for the purpose of determining its meaning. The last sentence of sec. 13 of the naturalization act of 1906, reads: "And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive *additional compensation* for the employment of additional clerical assistance." The *additional compensation* was additional to the sum of one half the fees he was before "authorized to retain." Therefore what he was "authorized to retain" was his compensation.

The court further neglected to consider the "reason and spirit" of the law so far as the provision concerning fees was concerned. A reading of the opinion in *U. S. vs. McMillan*, would have been most illuminating upon that matter. It is given on pages 513-517 of the opinion in that case. It there appears that for many years prior to 1884 there had been a great dispute between the financial officers of the government and the clerks of the various district and circuit courts as to whether the latter were bound in any way to account

for fees received by them in naturalization cases. The financial officers claimed they should account. The clerks claimed they had a right to retain all such fees. Finally a suit (*U. S. vs. Hill*, 120 U. S. 169) was brought to test the matter, and it was decided that under the construction by usage given the act of 1853, the clerks could retain the fees, there being no other law requiring a return to be made by them. Thereupon began efforts to secure legislation compelling them to account for such naturalization fees, all of which was defeated and the clerks continued to retain all such fees until 1906. In 1906, however, a compromise was effected, and when the federal naturalization act of that year was passed, the provision under consideration in this case was inserted, and by that compromise they were permitted to *retain*, not the whole as theretofore, but one half of such fees as they might receive.

How inept, therefore, in view of the circumstances above referred to, was it for the court in the Washington case to interpret the word *retain* as meaning "retaining to such use as the state appoints." It will be observed, too, that it makes such interpretation upon no valid rule. Its reasoning is as follows: The Washington statute says one thing; the federal statute says something to the contrary; but, if we give a certain meaning which suits us to a certain word in the federal statute, there will be no conflict; therefore, to obviate the conflict, we will give the word in question such a meaning as suits us, regardless of the fact that it isn't the ordinary meaning of the word, that it isn't the meaning to be attributed to it in view of the context, in view of acts *in pari materia*, in view of the history of the statute in which it is contained, in view of the fact that as a consequence the same word is to mean one thing to clerks of the federal courts and another to clerks of state courts, but simply because such meaning will remove the conflict. It is respectfully submitted that under such a rule of interpretation any

conflict arising between a Constitution and a statute or between a federal and state statute may be avoided without a shadow of right or reason. Where the language of the statute of the superior jurisdiction is clear, that of the inferior, if in conflict, must yield.

In the Washington case it is said:

“In order to create such a conflict, resort must be had, and an implication which is neither necessary to the purposes of the federal statute, nor unavoidably conveyed by the language used therein.”

As has been shown, the conflict arises not from any doubt as to the meaning of the words “authorized to retain.” The meaning is plain. The only doubt involved is that made by the court itself.

Again the court says:

“The sentence in which this authorization is found was palpably intended merely to fix the basis of adjustment between the clerk and the bureau.”

How, in view of the ordinary meaning of the words, their context, their use in similar acts and the history of federal legislation on the subject, such meaning is “palpable,” or even possible, is difficult to perceive. Again:

“With that adjustment the interest of the federal government ends.”

But this can not be so. It is impossible to differentiate the interest of the federal government in securing efficient services from the clerks engaged in the discharge of duties under the naturalization act, from the interest of either state or federal government in securing such efficiency from all other officers. This interest is so great as to make void an assignment by the officer of his salary, *Schwenk vs. Wykoff*, 46 N. J. L.

560; and to prevent the state from taxing the salary of a federal officer. *Dobbins vs. Erie County*, 16 *Peters*, 435; *Collector vs. Day*, 11 *Wall*, 113.

It is submitted that the conclusion in the Washington case rests upon the fallacious idea that the object of Congress being to establish a uniform rule of naturalization, it had no interest in providing for the payment of the officers designated and authorized by it to discharge certain functions necessarily and properly incident to the operation of the rule, and from such fallacy they inferred that it was not an object of the statute to provide compensation for such officers, notwithstanding the express words of the act. It is very doubtful, too, if the premises were sound, whether the rule quoted from Endlich is properly applicable for the purpose of obviating a conflict between statutes of a superior and inferior power. The special rule referred to is an incident of the fundamental rule that words must be interpreted in the light shed upon them by the object of the enactment and is applied to the construction of conflicting statutes of the same sovereignty so as to avoid a repeal by implication. But the reason of this rule as Mr. Endlich points out (sec. 210) is that

“It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments in the statute book, or to effect so important a measure as the repeal of a law without expressing an intention to do so.”

The reason for the application of this rule in order to avoid a repeal by implication of a statute of the same sovereignty is apparent. But no such presumption can arise when one considers the enactments of two different sovereignties, particularly when one is superior to the other, for the superior would have no regard to the laws of the inferior upon the subject, particularly where the inferior is one of a numerous class in which

there exist great varieties of enactments upon the same subject.

The Washington case criticises the Utah and Massachusetts cases in but one respect. It conceives that

“These decisions proceed upon what we believe to be a mistaken assumption, that the state statutes involved were in necessary conflict with the federal law.”

It described as fallacious that portion of Chief Justice Knowlton's opinion wherein he says:

“If the legislature had seen fit, in reference to the fees for services in naturalization cases, to declare that the statutory salary elsewhere provided should be diminished by the amount received as fees in proceedings for naturalization, the provision might have been enforced.”

And thereupon the Washington case says:

“It is manifest that if there is a real conflict between the state and federal statutes, and that the act of Congress is to be construed as making a final disposition of these fees, the conflict could not be obviated nor the purpose of the federal act defeated by any such subterfuge.”

While, perhaps, not pertinent, because the chief justice's remark is clearly obiter, it is respectfully submitted that false reasoning is not with the chief justice, but with the critic. The latter assumes that such a law as is proposed would conflict with the federal law. The very point made for it is that it would not conflict. The reason that there “might” be no conflict is that the state would not be touching or in any way interfering with the fees given by Congress. It would be merely fixing the salary of its own officer. It might

pay him nothing if it saw fit, or pay him such amount as would be fixed in relation to any condition it might choose. But, whatever salary it gave, it would never get the fees that Congress had given the clerk, however much they might amount to. Their statute would touch the salary, not the fees. This would not be a subterfuge. It would have due regard for the power of Congress and the power of the state over two different subject matters.

As to whether, if the act of Congress conflict with the state statute, the state may nullify or disregard it.

The proposition involved in the above question has been already considered. There remains, however, the case of *Rushworth vs. Judges of Hudson County*, 58 *N. J. L.* to be taken up.

It is submitted that the case cited gives no support to the contention of the plaintiff. As was said therein by Mr. Justice Van Syckel:

“The solution of the controversy in this case, in my judgment, turns upon the question whether the state may not *regulate the order of business* in its own courts in relation to this subject.”

The precise question, upon this head, was whether the state could lawfully provide that

“No person shall hereafter be naturalized or admitted to be a citizen of the United States by any court of this state within the thirty days next preceding any * * * election.”

It was held that inasmuch as the state could absolutely refuse the use of its courts for the purpose of naturalization, it might lawfully restrict their use to such

periods as the convenience of the state required. The court said:

"That it is competent for the state legislature to forbid state courts altogether to entertain or act upon applications for naturalization, and therefore it could lay any restraint, regulation, limitation or condition upon the *practice in such cases* which it might deem expedient or proper."

It is submitted that the subject of fees payable to the clerk is not a matter of "practice" of the courts, nor does it relate to the "order of business." The Washington case says that the fees are a matter within the exclusive jurisdiction of Congress. The Rushworth case, indeed, deals only with the principle that the state may refuse to take jurisdiction under the act of Congress, and deduces therefrom that it may refuse to exercise that jurisdiction except at its convenience. The case is cited with notes in 30 L. R. A. 761.

The principal of the case is not a broad one. It affords no foundation for the theory that as a state may refuse to exercise the jurisdiction conferred by Congress, it may, as a condition of acceptance, change the character or incidents of that jurisdiction. As said in *Hampden County vs. Morris* (Mass.)

"It is plain, however, that the jurisdiction must be exercised under and in conformity with the federal statute. All the authority of the court is derived from that statute and no proceedings can be taken by the state court or by any officer of it in a case of naturalization that is at variance with the statute. As all matters that enter directly into the subject of naturalization, this is too plain for argument. It is equally true of all matters of legislation

by Congress that are fairly incidental to the exercise of the power given by the Constitution to deal with this subject."

It is submitted that, beyond question, the state has no power to nullify or disregard an act of Congress which concerns a matter lying within its constitutional powers of legislation, as the subject of naturalization lies, and the case of *Rushworth vs. Judges of Hudson* affords no authority therefor.

CONCLUSION

It is respectfully submitted:

(1) That the language of the New Jersey statute does not apply to fees paid the defendant in naturalization cases and, if it does not, the fees cannot be recovered from him. The fees are not paid to him by virtue of any statute of New Jersey so that there is no color of right to take them from him unless it can be found in the state statute of 1906. That the words "by law" are to be understood as referring to the laws of New Jersey; and the words "official service" refer to services imposed upon the clerk by the laws of New Jersey, and not such as he performs by authority of the act of Congress,—the principal for whom an officer acts being determinable by the authority under which he acts, and not by the incident that he is also under engagement to act in other matters for another principal, even though in acting for the former he does so by consent of the latter. That in so far as the statutes of Wisconsin, California and Washington are concerned, they are very different from that of New Jersey and leave no room for construction.

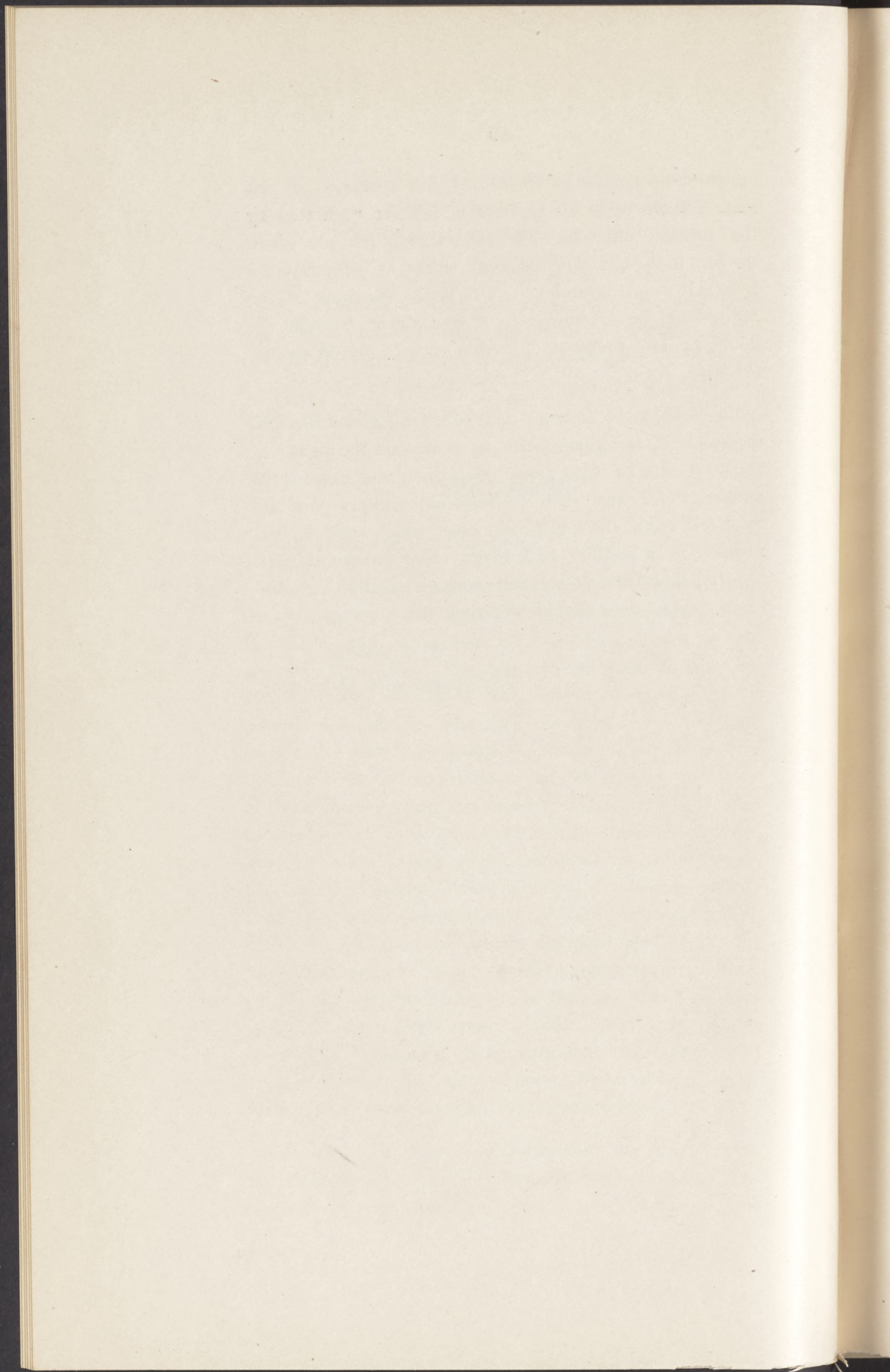
(2) That if it be considered that the language of the New Jersey statute is broad enough to cover fees received in naturalization cases, yet, when the federal

statute was passed it suspended the operation of the state statute upon all matters which are regulated by the former, and that the federal statute has given the fees to the clerks of the state courts as compensation for their services under it. That the meaning of the federal act is so plain that it was never brought in doubt by any pretense of reason save in the Washington case.

(3) That the federal statute having given the fees to the clerk, as compensation, it is beyond the power of the state to take them away from him; and there is no authority for any such proposition, except, possibly, by implication, the California case, which case, in that respect, is in conflict with every other on the subject.

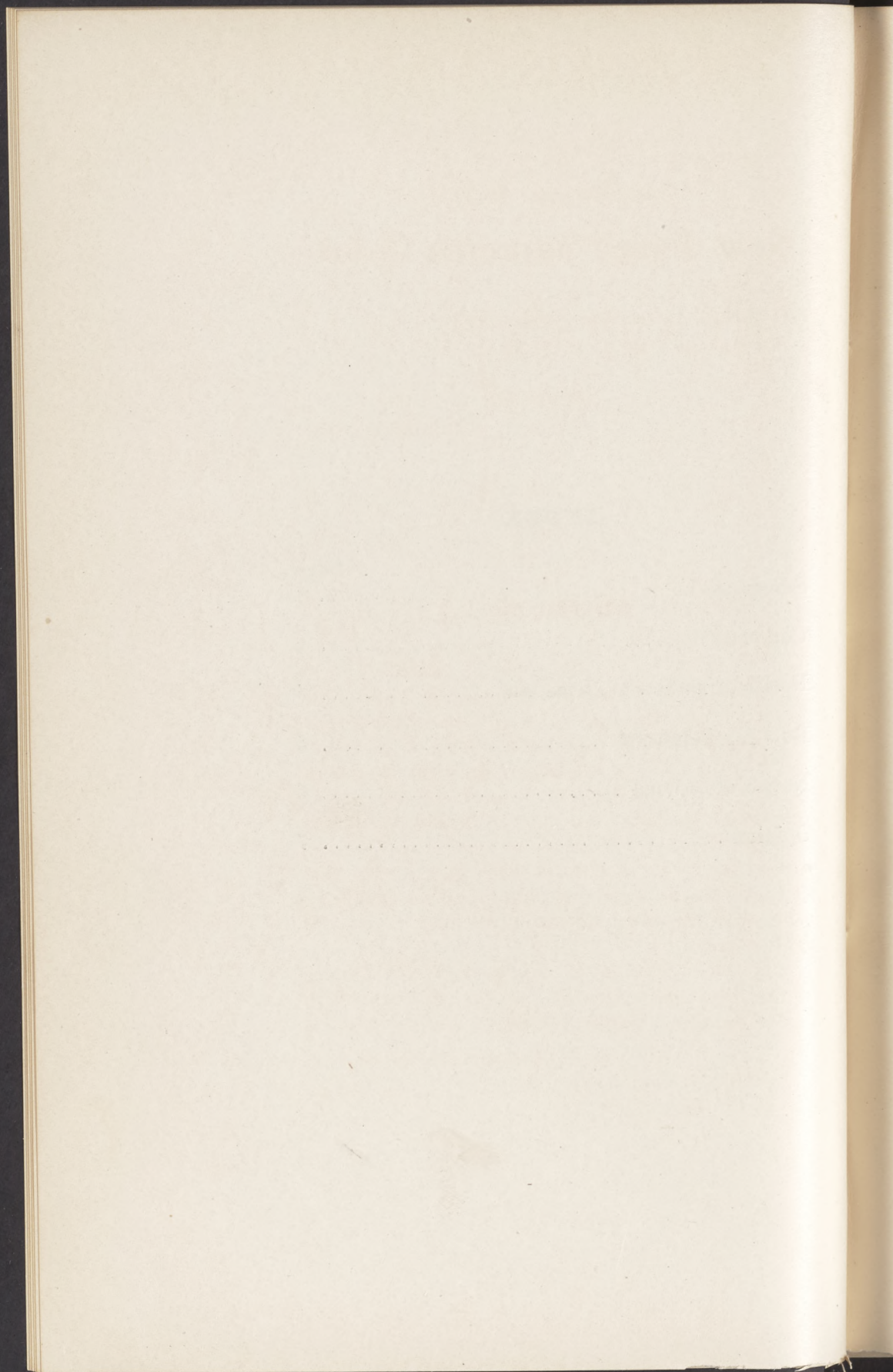
It is, therefore, respectfully submitted that the complaint in this case should be struck out.

W. I. LEWIS,
Of Counsel with Defendant.



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(Filed January 20, 1913).

New Jersey Supreme Court

THE BOARD OF CHOSEN FREE-
HOLDERS OF THE COUNTY OF
PASSAIC,

Plaintiff,

vs.

JOHN J. SLATER,

Defendant.

Action at Law.

10

SUMMONS

State of New Jersey.

To, John J. Slater:

(Seal) You are summoned to answer
the annexed complaint of the Board
of Chosen Freeholders of the Coun-
ty of Passaic, in an action at law in
the Supreme Court, And take notice

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that unless you file your answer to said complaint
with the Clerk of the Supreme Court, at Trenton,
within twenty days after service upon you of this
writ, and the annexed complaint, the plaintiff may
proceed in the suit, and judgment may be entered
against you.

Witness, William S. Gummere, Chief Justice
of the Supreme Court, at Trenton, this twentieth
day of January, nineteen hundred and thirteen.

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WILLIAM RIKER, JR.

Clerk.

J. W. DEYOE,
Attorney.

(Filed January 20, 1913).

NEW JERSEY SUPREME COURT.

THE BOARD OF CHOSEN FREE-
HOLDERS OF THE COUNTY OF
PASSAIC,

Plaintiff,

10

vs.

JOHN J. SLATER,

Defendant.

Action at Law.

COMPLAINT

The plaintiff, a body politic and corporate in law of the State of New Jersey, says, that

20 (1) The defendant, John J. Slater, resides in the City of Passaic, in the County of Passaic and State of New Jersey;

(2) That the defendant, John J. Slater, is County Clerk of the County of Passaic and State of New Jersey, and has been continuously County Clerk of the County of Passaic since the thirteenth day of November, nineteen hundred and six;

(3) That by virtue of his office as County Clerk, as aforesaid, he is Clerk of the Court of Common Pleas of the County of Passaic;

30 (4) That as Clerk of said Court from the thirteenth day of November, Nineteen hundred and six to the thirty first day of December, Nineteen hundred and twelve, he has collected fees, costs, allowances and other perquisites, which by law he received as such Clerk of the Court of Common Pleas in the exercise of its jurisdiction in naturalization cases the sum of \$6,796.50, after deducting the amount remitted by him to the Secretary of the Department of Commerce and Labor;

NEW JERSEY SUPREME COURT.

(5) That it was the duty of the said defendant to keep an account of all such fees and moneys received by him for the use of the County of Passaic, and on or before the fifteenth day of each month to make a full itemized statement and return verified by oath to the Collector of the County of Passaic all of such fees, costs, allowances, per centages and perquisites;

(6) That the said defendant has neglected and refused to make such account and pay over said moneys to the County Collector as required by law.

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The plaintiff demands the said sum of \$6,796.50, with interest thereon from the time said fees were paid to him, making in all the sum of \$10,000.

J. W. DEYOE,
Attorney of Plaintiff.

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4 NOTICE OF MOTION TO STRIKE OUT.

NEW JERSEY SUPREME COURT.

THE BOARD OF CHOSEN FREE-
HOLDERS OF THE COUNTY OF
PASSAIC,

Plaintiff,

vs.

JOHN J. SLATER,

Defendant.

Action at Law.

**NOTICE OF MOTION TO STRIKE OUT
UNDER RULE 26.**

To J. Willard DeYoe, Esq., Attorney of Plaintiff:

Take notice that on the fifteenth day of February, instant, at ten o'clock in the forenoon, at No. 630 Hudson Street, Hoboken, New Jersey, before the Honorable James F. Minturn, Justice of the above stated court, I shall move to strike out the complaint filed in this cause, upon the ground that it discloses no cause of action, to wit;

Although said complaint alleges that it was the duty of the said defendant to keep an account of all such fees and moneys received by him for the use of the County of Passaic, and on or before the fifteenth day of each month to make a full itemized statement and return verified by oath to the collector of the County of Passaic of all such fees, costs, allowances, percentages and perquisites: and that the said defendant has neglected and refused to make such account and pay over said moneys to the County Collector as required by law, to wit, the moneys in said complaint mentioned:

Yet, it was not the duty of the said defendant to make such account and pay over said moneys to the County Collector.

Dated, Paterson, N. J., Feb. 1, A. D. 1913.

WM. I. LEWIS,
Attorney of Defendant.

(Filed July 31, 1913).

NEW JERSEY SUPREME COURT.

THE BOARD OF CHOSEN FREE-
HOLDERS OF THE COUNTY OF
PASSAIC,

vs.

JOHN J. SLATER,

Action at Law.

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RULE FOR JUDGMENT

Defendant having moved to strike out the complaint on the ground that it disclosed no cause of action; upon which motion arguments for plaintiff and defendant, by their respective counsel, were duly heard and the Court, being of opinion that the complaint disclosed no cause of action;

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It is ordered that judgment be entered in favor of defendant and against the plaintiff, adjudging that the complaint of the plaintiff be struck out and that the defendant recover his costs to be taxed.

Rule actually entered this thirty-first day of July,
A. D. 1913.

On motion of

WILLIAM I. LEWIS,
Attorney of Defendant.

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I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal filed and also of a rule entered in the minutes of the Court in the above stated cause.

(Seal) In testimony whereof, I have set my hand and the seal of said Court at Trenton, this eleventh day of August, A. D. nineteen hundred and thirteen.

WM. C. GEBHARDT,
Clerk.

(Filed August 9, 1913).

NEW JERSEY SUPREME COURT.

THE BOARD OF CHOSEN FREE-
HOLDERS OF THE COUNTY OF
PASSAIC,

Plaintiff,

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vs.

JOHN J. SLATER,
Defendant.

Action at Law.

NOTICE OF APPEAL.

To William I. Lewis, Esq., Attorney of defendant.

Take notice that the plaintiff appeals to the Court of Errors and Appeals from the whole judgment entered in this cause, on the following grounds:

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(1) The Court dismissed the complaint of plaintiff.

(2) Judgment should have been given in favor of the plaintiff and the motion of the defendant denied.

J. W. DEYOE,
Attorney of Appellant.

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NEW JERSEY SUPREME COURT.

CHOSEN FREEHOLDERS OF PAS-
SAIC COUNTY,

vs.

JOHN J. SLATER,

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OPINION.

Motion to dismiss the complaint, argued before
Justice Minturn.

William I. Lewis, for the motion.

J. W. DeYoe, contra.

The clerk of the County of Passaic, in the receipt of fees, for services, under the naturalization laws of Congress, acts as a Federal and not a State agent, and the County is not entitled to receive such fees under P. L. 1906, p. 76, which changed the compensation of the clerk to a salary in lieu of the fee system.

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Minturn, J.:

The motion is to strike out the complaint. The action was brought to recover the fees collected by defendant for services in naturalization matters, under the acts of Congress.

The basis of the claim is the act of the legislature of 1906, p. 76 (C. S. 4633) under which the Clerk is required to surrender all fees to the County in lieu of a substituted salary. The second section of the act provides that the fees, costs, allowances, percentages, and all other perquisites of whatever kind, which by law, etc., the clerk is entitled to receive therefor shall become the property of the County. The crucial inquiry therefore is to determine what the legislature contemplated by the

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use of the words "by law." In other words whether the legislature contemplated the surrender of all fees received by the clerk, or only those received by him under the laws of the State.

10 The clerk had received as the delegated agent of the Federal government certain fees under the acts of Congress for naturalization services performed by him, and those he insists he is entitled to hold as his own since they are not received by him under the laws of the State, but under the act of Congress. The act of 1906 was meant to change the public policy of the State with reference to the payment of its officials, by substituting a salary for the fees which up to that period had gone to the officer in payment for his services.

20 The mischief to be overcome therefore was the practical farming out of the State's revenues to be exploited by the individual. But in accomplishing this purpose can it be supposed that the legislature was attempting to impose this State policy upon the Federal government, as a Federal policy, and thus legislate for Congress, or if it so contemplated is it supposable that it could constitutionally effectuate such legislation?

In order to so construe legislation of this character it must be clear that such was the legislative intent, and if the legislature had so intended we must assume that it would manifest its intent by language so clear as to leave no room for construction.

30 In the absence of such a clear intent it is the reasonable assumption that the State in legislating had in mind conditions existing within its jurisdiction, and not within a jurisdiction specifically committed by the Federal constitution to Congress, and over which the State could constitutionally exercise no control or supervision in the absence of Federal legislation delegating the power. In performing this federal service the clerk is considered *pro hac vice* a federal and not a State agency, and it is not within the power

of the State to control a Federal agency by legislation, where the subject matter of the power, as in this case, is a recognized constitutional department of the Federal government.

McCulloch v. Maryland, 4 *Wheat.*, 316.

Gardner v. State, 110 *Pac. Rep.*

Eldridge v. Salt Lake City, 106 *Pac. Rep.*, 939.

Statutes of other states containing language of similar import have received a construction of the highest Courts of those States, in accordance with the proposition above stated. 10

Inhabitants of Hampden Co. v. Morris, *Mass.*

Eldredge v. Salt Lake City, *supra*.

We must assume therefore, that the legislature intended to pass a legal and not an unconstitutional act. The fees of the County Clerk were clearly within its power to control, but not so the fees of a Federal agency acting under an act of Congress, passed in pursuance of the exclusive power delegated to it by Section 8, Art. 1 of the Federal Constitution. Therefore when the legislature in the act of 1906 provided that the fees be surrendered by the Clerk as quid pro quo for a substituted salary, it contemplated a change of State and not a change of Federal policy in the payment of its officials; and when it provided that the fees to be surrendered were those received "by law" and for "official acts or services" it contemplated the law of the State of New Jersey, and not those fees received by the defendant under the laws of the United States, in his capacity as an agent of the Federal government, acting under its laws, and governed in the performance of his duties and charges by the provisions of the Federal Statutes. 20 30

The case of *Rushworth v. The Judges of Hudson Co.*, 58 *N. J. L.*, does not militate against this conclusion, since its only effect is to enunciate the principle that in regulating the procedure of its

own Courts the legislature in no wise contravenes the constitutional provision regarding the enactment by Congress of naturalization laws, the administration of which is conceded by acts of Congress to the State Courts.

10 The construction therefore given to the statute in question is that it was intended to change the State policy of remunerating officials for their services as State officers, and was not intended to apply to fees received by such officers as compensation for the discharge of duties performed by them as agencies of the Federal government.

This conclusion leads to a dismissal of the complaint.

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