NEW JERSEY

Court of Errors and Appeals.

In the Matter of the Petition of Mark M. Fagan, Mayor of Jersey City.	*In Error to Supreme Court.*

The Mayor of Jersey City, insisting that Chapter 340 of the Laws of 1894 is unconstitutional, appointed a Board of Street and Water Commissioners, to take the place of members elected under that act. The Supreme Court decided that, act of 1894 being void, the Mayor could appoint under the act of 1891.

Probably because of lapse of time between argument and decision, the Supreme Court took the mistaken view that "much stress" was, in the argument for

the incumbents, laid upon the language used in section five of the act of 1894, as determining the scope of the act. Counsel for the incumbents did not contend that the decision in Ross v. Essex Park Commissioners, 55 Atl. Rep., p. 310, is controlling; but, on the contrary, contended that the decision in that case is almost wholly irrelevant.

Sections four and five of the act of 1894 do not provide a scheme to be applied only to cities of the first class existing at the time of the passage of the act, but, when read in connection with the general election act, a scheme for all time to come. The directions for printing ballots at the election to be held in 1895 are neither more nor less than the provisions of the general law under which any city arriving in the first class in any year would proceed.

The Supreme Court determined that the "prime object" of the statute is the "immediate ousting from office of the va-

rious members of the Board of Street and Water Commissioners in those cities which were in the class specified at the time of the passage of the act." Assuming this proposition, it is submitted that it does not make the act violative of the Constitution. The act of 1891 created Boards of Street and Water Commissioners, to be appointed by Mayors in cities of the first class. In this, a distinctive policy, recognized by every writer upon municipal government—that of centralization of responsibility—was adopted. It contained, however, a most demoralizing proposition in that it allowed a majority of each Board to hold over during the term of the Mayor who succeeded the one making the appointments. It also became a subject of animadversion by those who insisted that it was contrary to the true policy of our form of government, and really contrary to the spirit of our constitutional inhibition of the appointment of commissions.

The act of 1894 sought to cure both evils, and provided that while appointive commissions continued they should be made up of the appointees of the Mayor whose policies they were supposed to represent. If the idea of appointed Boards had continued in favor the act would probably have provided that the terms of members should expire in five days and that the terms of their successors should expire with the terms of the Mayor who appointed them, a policy that was, to some extent, adopted when mnnicipal elections were consolidated with general elections. I respectfully submit that there is not any argument that will support the appointing of Boards in cities of the first class that will not equally support the proposition that, while such Boards continue appointive, they shall be composed of the appointees of the Mayor with whom they are called upon to act. Attack upon such a proposition is within the field of the political,

and wholly without the scope of the judicial department of our State government. Every argument that will support the act of 1891 will support the proposition that the Mayor who has the veto power in one of our greatest cities shall have the appointing power of the Board, for whose actions he is theoretically responsible, until the right to designate shall be returned to the people.

Under "An act concerning the government of cities in this State," approved April 6, 1889, a Board of Street and Water Commissioners was authorized in every city. It was to consist of three persons, whose terms were to be, respectively, one, two and three years. Under this scheme each Mayor would appoint at least a majority of the Board in his city during his term, and if he was re-elected he would appoint, during his two terms, an entire Board. (Gen. Stat., p. 731, Sec. 1319). This act became operative only in Jersey City. In 1891,

an act provided for a Board of Street and Water Commissioners in each city of the first class, to consist of five members, one to hold office for three years, two for four years and two for five years, their successors to be elected for five years. This meant that a Mayor would have to be elected for three terms before he would, except in the instance of first appointments under the act, appoint a majority of the Board for whose doings he was, under the only theory justifying this kind of legislation, to be held, in a very considerable degree, responsible.

The act of 1891 ended the terms of the Commissioners appointed under the act of 1889, but it did not occur to counsel attacking the act of 1891 to insist that its "prime object" was to end the terms of Commissioners appointed under the act of 1889. In re Haynes, 25 Vr., 6. It is true that the act of 1891 provided a scheme for the government of all cities of the first class for all time;

but in the case of Jersey City it provided for ending the terms of the then found Street and Water Commissioners, a thing which it can never effectuate in cities hereafter entering the first class. It may be that this was the "prime object" of the act. If so, the act of 1891 is void, and Street and Water Commissioners in Jersey City should be appointed under the act of 1889. This sort of argument may not seem pregnant with common sense, but the doctrine of "prime object," although it has passed the nebulous stage, is as yet of uncertain dimensions. It is yet within the realm of guess, and where it will strike cannot be foretold. The discovery of "prime objects" depends upon the point of view. The savage who, in prehistoric days, sat upon a bank of the Nile, cooling his toes in its rising waters, probably thought that his visual enjoyment was the prime object of the enactment of the stars. There is scarcely a page of history in

which some punctuation mark may not become the subject of an argument that will distort the record, transposing minor for major and twisting certainty into coils of doubt,—to be further twisted, straightened and retwisted until controversy becomes intolerable. This may become the case in the search for "prime object" in legislation, while, in physiology, it may yet be contended that the vermiform appendix is the prime object of human existence.

The learned Chief Justice, delivering the opinion of the Supreme Court, says:

> "The sole point presented for decision is whether the provisions of this supplement are limited to cities which were in the designated class, at the time of its passage, or whether they also embrace all cities which should thereafter come into the class."

and, deciding this point:

> "The provisions of the supplement of 1894, being limited to those cities which were in the first class at the time of the passage of the act, and not being applicable to those cities which might thereafter come into the class, must be declared to be unconstitutional under the rule laid down by the Court of Errors in the case of *DeHart v. Atlantic City*, 34 Vr., p. 223."

The error in this finding is that it ignores the fact that sections one, two and three applied to every city in the first class in 1894, and that none other than the cities in that class in 1894 could come into it with conditions upon which those sections could operate. The cities in the first class on the 25th of May, 1894, were all that could enter that class before the day fixed for the "next annual or charter election." The next State census was to be taken in May–July, 1895, and reported to the Legislature on or before the fifteenth day of January, 1896, and to become applicable to the classification act ninety days after official promulgation. Census Act, Gen. Stat., p. 366, Sections 7 and 10. The Federal Census was to be taken five years later.

In re sewer assessment for Passaic, 25 Vr., 156. The fifth section of the act provides how ballots shall be printed in cities in the first class in 1895. The

general election act provided then and now provides for the printing of ballots, and this section was and is wholly unnecessary. It is impossible to conceive that the Legislature meant to continue the appointive system in cities coming into the first class in virtue of a subsequent enumeration of the people.

Under the act of 1891, elective officers were ousted and appointed officers substituted in Newark, while an appointed Board of four members in Jersey City was ousted and an appointed Board of five substituted. This was constitutional. In re Haynes, 25 Vr., 6. Under the act of 1894, all appointive Boards were ousted, and it was provided that the people should elect these officers at the next city election and thereafter. No decision of this or the Supreme Court casts a doubt upon the constitutionality of doing this. But it being provided that, between ouster and election, temporary Boards should be appointed, this pro-

vision is assailed because it made no provision for such appointments in cities that should come into the first class, although, by the law of the land, none such could arrive until all Boards became elective. This "vice," being the failure to provide for the impossible—the omission of the unnecessary—is held to be one that "inheres in the act as a whole."

The act of 1894, in its fourth section, provides a complete scheme for an elective Board in each city of the first class, here or to come, and section 23 of the act of 1891 provides that "no more than one Board of Street and Water Commissioners shall at any time be established in any city of this State" (Gen. Stat., p. 374,) while section 24 provides that "in case for any reason, any section or provision of this act shall be questioned in any court, or shall be held to be unconstitutional or invalid, the same shall not

affect any other section or provision of this act."

What is the "vice" in the other sections of the act of 1894 that "inheres" in section four?

Let it be taken that the almost impossible could happen. Legislators are supposed to act in the light of existing law. But let it be supposed that, by some means not discoverable in April, 1894, or since, a city could have come into the first class, after the day fixed for mayors to make ad interim appointments. The law would have provided the same procedure furnished for cities in the first class on the 25th of May, 1894. The Mayor would have appointed members of the Board of Street and Water Commissioners and, no matter how the wording of his commission, the terms of these appointees would, by section 23 of the act of 1891, read with section 4 of the

act of 1894, have expired on the first Monday in the May succeeding the next municipal election.

ALLAN L. MCDERMOTT,

Counsel for Plaintiff in Error.

June Term, 1904.

NEW JERSEY

Court of Errors and Appeals.

In the Matter of the Petition of Mark M. Fagan, Mayor of Jersey City.	
Robert G. Smith et als., *Plaintiffs in Error,* v. John C. Payne et als., *Defendants in Error.*	*In Error to the Supreme Court.*

Brief for Defendant in Error.

STATEMENT.

About April 1, 1891, the then Mayor of Jersey City appointed a Board of Street and Water Commissioners under Chapter 134 of the Laws of 1891 (General Statutes, page 465). On May 25, 1894, the act in question in this suit was passed (General Statutes, page 478). By this act the Board of Street and Water Commissioners was declared to be abolished, and the then Mayor of Jersey City appointed a new Board under the act of 1894, to hold office until the first day of May, 1895; and at the charter election in Jersey City, in April, 1895, a new Board of Street and Water Commissioners was elected to succeed the last mentioned Board. Said Board and their successors held office until January 1, 1903, on which date the Mayor of Jersey City, the petitioner herein, having been advised that the act of

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1894 was unconstitutional, appointed a new Board of Street and Water Commissioners under the act of 1891. The Mayor of the city, by petition, brought into the Supreme Court the dispute between the Board appointed by the petitioner and the existing Board, being the successors of the Board elected in the year 1895, under the act of 1894, as to which Board is entitled to hold the offices in question, and said Court rendered judgment thereon in favor of the new Board appointed by Mayor Fagan and ousted the elective Board.

POINT I.

It is insisted onbehalf of the Mayor and the Board appointed by him, the defendants in error, that the act of 1894 is invalid, in that it falls within the category of acts which have been declared unconstitutional by our Courts, because of the impossibility of any city not of the class designated in the title or body of the act at the time of the passage thereof, taking advantage of the same when such city should by increase of population come within the proper classification. That acts subject to this defect are invalid has been settled by numerous cases hereinafter cited.

An examination of the act of 1894 will show that the act is subject to the defect mentioned.

Section 1 terminates immediately upon the passage of the act the terms of office of the members of every Board of Street and Water Commissioners appointed under the act of 1891. It is plain that this section can only apply to cities of the first class as they existed at the time of the passage of the act.

Section 2 provides that within five days from the passage of the act the Mayor shall appoint five persons who shall constitute the Board of Street and

Water Commissioners for their respective cities until the first Monday in May, *one thousand eight hundred and ninety-five, and until their successors shall have been elected as thereinafter provided*, and shall have qualified. It is plain that no city of the second class, at the time of the passage of this act, could subsequently, upon coming into the classification of first class cities, take advantage of this section of the act.

Section 3 provides that the said Boards of Street and Water Commissioners as constituted under Section 2 of the act "shall be substituted for such Boards as now constituted, and shall be vested with all the authority, powers and rights now vested in such Boards of Street and Water Commissioners and perform all the duties now imposed upon such Boards." This section operates to vest in the Board appointed under Section 2 all the powers and rights which have theretofore been vested in the Board appointed under the act of 1891 which was abolished by Section 1. Broadly speaking, this section vests in the Board appointed under Section 2 all of the powers and duties which are set at length in the act of 1891, and by said act vested in a Board of Street and Water Commissioners as therein created.

So far we have a Board established by Section 2, and equipped with full powers by Section 3, which Board confessedly cannot be made applicable to any city thereafter coming into the classification of first class cities.

Section 4 provides that at the next municipal or charter election to be held in each city of the first class, there shall be elected five members of the Board of Street and Water Commissioners for the said city, two of whom shall be elected for the term of one year, two for the term of two years, and one

for the term of three years, and that at each municipal or charter election thereafter, there shall be elected the member or members of the Board of Street and Water Commissioners *to succeed the members whose term then expires* for the term of three years.

It is plain that this is the Board which is referred to in Section 2, in the words, "until their successors shall have been elected, as hereinafter provided." That this was the intention of the Legislature is too clear for argument. If this is so, then the meaning of the words, "next election," must be that it is the election next after the passage of the act, and therefore this section cannot be taken advantage of by any city which may hereafter come into the first class.

Section 5 provides that upon the ballots to be used at the charter election to be held in the cities of the first class in the year *one thousand eight hundred and ninety-five*, the designation of the office to be filled shall be as follows: "For members of the Board of Street and Water Commissioners for the term of one year;" "For members of the Board of Street and Water Commissioners for the term of two years;" "For members of the Board of Street and Water Commissioners for the term of three years," and that at each charter election thereafter the designation of the office to be filled shall be as follows: "For member of the Board of Street and Water Commissioners," or "For members of the Board of Street and Water Commissioners." The plain meaning of this section is to reinforce the already plain contention that it was the purpose of this Legislature to start the machinery of the act in the year 1895, and at no other time.

The plain intent and purpose therefore of this act, taken as a whole, is that it should apply to cities of the first class which were within that classification at the time of the passage of the act. No act which has formed the basis of the decisions hereinafter cited discloses any clearer intention on the part of the Legislature to exclude from its operation cities not then within the appropriate classification than does this act in question.

POINT II.

The attempt may be made to support the validity of this act in either one of the following ways:

That the act of 1891, to which it is a supplement, provides that the original act shall apply to cities then of the first class as well as to cities to which the act may afterwards become applicable, and that this general qualification is extended to this supplement as a part of the original act. To this the sufficient answer is that the act of 1891 does not contain language capable of such construction. The language in question, in Section 1 of the act of 1891, is that, "In all cities of the first class in this State, the Mayors thereof respectively within ten days after this act shall take effect, or shall become applicable to any city, shall appoint five suitable persons to be known as Street and Water Commissioners." This language is restricted therefore to appointment of the Commissioners provided for in the said act of 1891. The act of 1894 immediately upon its passage ended and determined the terms of the persons appointed under the act of 1891, and by necessary implication forbids the appointment of any other Commissioners under that act, because it proceeds immediately in express terms to provide a new Board to take the place of the Board abolished;

but the time for the appointment of the new Board is in express terms limited to five days after the passage of the act. This provision of the act of 1894 cannot be harmonized with the provision for appointment in the act of 1891. The only way in which this theory could be logically worked out would be to construe the two acts together in such a way as to require that any city of the second class coming into the classification of first class cities, should within ten days thereafter create, by appointment at the hands of its Mayor, a Board of Street and Water Commissioners, under Section 1 of the act of 1891, and then to abolish the said Board under Section 1 of the act of 1894 and to establish a temporary Board under Sections 2 and 3 of the act and bring in the permanent board by the charter election in the succeeding year. On no other theory can the establishment of a temporary Board in cities hereafter coming into the classification be justified. But a moment's consideration will show that this theory is untenable, for the reason that Section 2 limits by express terms the time for the appointment of the temporary Board to the period within five days from the passage of the act, and terminates the terms of the persons so appointed on the first Monday in May, one thousand eight hundred and ninety-five, or when their successors shall have been elected, which would be, according to Sections 4 and 5, on said first Monday in May, 1895.

The words, therefore, which extend the time of appointment of the original Board, under the act of 1891, to cities not then in the classification, can by no possibility be reconciled with the express language of Sections 1, 2 and 3 of this act of 1894.

POINT III.

It may be claimed that Section 2 and Section 3 and Section 5 are unconstitutional, but that they

can be dropped from the act without affecting the validity of the remaining sections, by virtue of Section 24 of the act of 1891, which provides, "In case, for any reason, any section or provision of this act shall be questioned in any Court, or shall be held to be unconstitutional or invalid, the same shall not affect any other section or provision of this act;" and that having dropped from the act Section 2, the word "next" shall be interpreted as meaning not only the election to be held in the year 1895, but the next election after the act shall become applicable to cities in the classification at the time of the passage of the act. To this contention there are various insuperable objections.

(a) In the first place, such was not the *intent* of the Legislature, as the opinion of Chief Justice Gummere in the Supreme Court says:

"In the present case, however, the body of the supplement, exclusive of Sections 4 and 5, does not justify the conclusion that the great purpose of the act was to provide a change in the method of selecting members of the Board of Street and Water Commissioners, both in cities then in the first class, and in cities which should thereafter come into that class. On the contrary, the prime object which appears in those portions of the statute which precede Sections 4 and 5 is the immediate ousting from office of the various members of the Board of Street and Water Commissioners in those cities which were in the class specified at the time of the passage of the act, namely, Jersey City and Newark, and to fill those offices with other incumbents. Section 4, instead of plainly enlarging this object on its face, has the same limited scope. Although containing words similar to those construed in the Park Commissioners case, it provides a means for carrying into effect statutory provisions which are not gen-

eral, but limited, in their scope. No reason, therefore, appears for giving those words a construction different from, or more broad than, their ordinary meaning. The difficulty with the incumbents' case is that it has no application to the statute under consideration. The vice of the supplement of 1894 is not confined to any particular section or sections. It inheres in the act as a whole. To expunge from it those provisions which limit its scope, and thus make it applicable to municipalities which were not intended to be included in the legislative scheme, would be an act of legislation, not of judicial interpretation."

(b) Sections 2 and 3 cannot be omitted from the act without also omitting Section 4, because Section 4 is tied to Section 2 by the provisions in Section 2, that the Board in that section authorized shall be *succeeded* by the Board to be elected under Section 4. These sections are, therefore, inseparable.

(c) Such a construction would leave the city without any municipal government in the department covered by the act of 1891 for the period of one year, because Section 1 of the act abolishes the then existing Board. It is inconceivable that the Legislature could have contemplated the entire absence of municipal goverment for one year in our largest cities in the most important department affecting the welfare of the city, the department having control of streets, sewers and the water supply. If Section 1 is also for this reason treated as unconstitutional and dropped from the act, then the act is still subject to the following remaining objections:

(d) In order to apply Section 4 after the dropping of Sections 1, 2 and 3, it is necessary to construe the word "next" in Section 4 other than in its plain and ordinary meaning, and to construe the words, "in the year eighteen hundred and ninety-

five" in Section 5 other than in their plain and ordinary meaning. It may be sought to accomlish this construction by terming these words directory only. There are several insuperable objections to such construction of these words. In the first place, statutes which are construed as directory only are statutes which prescribe the time when certain official duties by public officials shall be performed. As for instance, it is made the duty of the State Board of Assessors to do certain acts at certain times, and it is made the duty of taxing officials to prepare their annual tax levy on or before certain dates. These statutes are properly held as directory only in the sense that, if through any unforeseen contingency the duty is not performed within the time required, the performance of that duty at a later date shall not be invalid. In such cases the duty is always one to be performed at frequent and constantly recurring intervals, and the Legislature can therefore reasonably be assumed to have intended to mean that no single variation from the exact date named in the law should invalidate the act in question. But this is a very different thing from affirmatively saying that an election specifically directed to take place in the year 1895, may take place an indefinite number of years thereafter. In determining the meaning of the word "next" and the words "in the year eighteen hundred and ninety-five," we are to consider what was the plain and obvious meaning of the Legislature. It is not within the jurisdiction of the Court to legislate. That the word "next" in Section 4 means the election in the year 1895 is not only conclusively proved by the whole context of the act, but particularly by the use of the words "in the year eighteen hundred and ninety-five," in Section 5, as the year in which the first election shall take place, and also by the provisions

of Section 2, which provides that the Board elected at the next election shall take office on the first Monday of May, 1895. Even if these sections are dropped from the acts their presence there is a clear and a positive indication of the meaning attached by the Legislature to the word "next," and the words, "in the year eighteen hundred and niney-five."

(e) the interpretation of the word "next" and the words "in the year eighteen hundred and ninety-five," as meaning something different from this obvious meaning, upon the principle of directory construction, when analyzed, means, and can only mean, that the Court reads into the act, after the word "next," the words "after this act takes effect or shall become applicable in any city," and also reads into Section 5, after the words "in the year eighteen hundred and ninety-five" the words "or in the year after this act first becomes applicable in any city." We submit that the reading into these two sections of these words, or their equivalent, is not only legislation by the Court and contrary to the clear intent of the Legislature in this case, but that the interpolation of such words, or the interpretation of existing words as though equivalent interpolated words were in the acts, would result in validating every act which has been set aside by the decisions of our courts upon this point. Such a principle of construction would reverse every decision in the cases hereinafter cited.

In Bennett vs. Trenton, 26 Vr., 74, the Court set aside an act of the Legislature (P. L. 1892, page 96), because the act limited its provisions to "all cities of the second class in this State in which there are *now* by law three members of the common council," holding that this prevented any city then of the second class and thereafter coming into the

classification of first class cities from taking advantage of the act. On the principle now suggested of directory interpretation of words, the Court would read into the provision above quoted after the word, "now" the words "or at the time this act becomes applicable," making the provision read, "all cities of the second class in this State in which there are now (or at the time this act becomes applicable) by law three members of the common council." Can any reason be assigned for the directory interpretation of the words "next" in the act in question which would not equally justify the interpolation of equivalent words after the word "now" in the statute held invalid in Bennett vs. Trenton?

In Parker vs. Newark, 28 Vr., 83, the act reviewed (P. L. 881, page 475) is expressly limited to any city of the first class the charter of which provides for a special election to fill a vacancy in the office of Alderman. This act was held invalid because it was held to apply only to cities having this qualification at the time of the passage of the act. This objection would be cured by applying this theory of directory construction and inserting after the word "which" the words "at the time this act becomes applicable in any city," the provision then reading, "any city of the first class the charter of which (at the time this act becomes applicable) provides for a special election to fill a vacancy," etc.

In Couteiri vs. New Brunswick, 15 Vr., 58, the Court declares invalid a law (P. L. 1878, page 148) providing in its first section "that hereafter it shall not be lawful for the Mayor or the members of the Common Council of any of the incorporated cities of this State, which, according to the last census, have less than 20,000 inhabitants," etc., holding that the words "last census," limited the act to cities within the classification at the time of the passage of the act.

This defect would be entirely obviated by applying to it the principle of directory construction here suggested and making an interpolation, so that the words should read as follows: "Hereafter it shall not be lawful for the Mayor or the members of the Common Council of any of the incorporated cities of this State, which, according to the last census (before this act becomes applicable), have less than 20,000 inhabitants," etc.

In the case of Pavonia Horse Railroad Company vs. Jersey City, 16 Vr., 297, the Court passes upon the validity of an act (P. L. 1882, page 247), an act limited to cities having a population of over 12,000 according to the last census of the United States. The same principle would apply to this decision as in Couteiri vs. New Brunswick.

In Richards vs. Hammer, 13 Vr., 435, the Court set aside as invalid an act (P. L. 1878, page 329), because it is limited to "any city of this State where a Board of Assessment and Revision of Taxes *now* exists." Applying the theory of directory construction to this language, and making it read, "any city of this State where a Board of Assessment and Revision of Taxes now (or at the time this act becomes applicable) exists," would reverse the decision of the Court in this case.

In Pearson vs. O'Connor, 25 Vr., page 36, the Court set aside two acts (P. L. 1887, page 231; P. L. 1889, page 101), each of which limited its benefits to those members, a designated body of men, who held office at the time of the passage of the act.

In *De Hart v. Atlantic City, 34 Vr., 233*, the act held void by the Court of Errors and Appeals provided for a District Court in any city of 20,000 or less inhabitants, "which shall by resolution of city

council adopt this act within three months from the date of the passage thereof." If we might add, "or from the date when this act becomes applicable," the Court could not hold, as it did, that the benefit of the act was denied to cities coming into the class after three months. The same comment may be made upon the case of *Ross v. Watson, 35 Vr., 488.*

In *Chrystie v. Bayonne, 35 Vr., 191*, a municipal act was made, subject to adoption in second class cities, "at the next municipal election after its approval." It was held void: but manifestly on the directory theory would be valid if we might add, "or after this act becomes applicable."

In State vs. Trenton, 25 Vr., 544, the Court set aside an act (P. L. 1889, page 260) limited to all cities in which a newspaper printed in the German language shall have been published at least once a week for a period of not less than three years prior to the passage of the act.

In State vs. Rost, 26 Vr., 264, the Court decrees the invalidity of an act (P. L. 1890, page 280) because it provides, "That any person or persons, citizens of this State, now using or occupying any lands lying under the tide waters of this State," on the ground that this language limited the classification to the class of persons existing at the time the act was passed. This objection would be cured by a directory construction of the word "now" so as to make the sentence read, "That any person or persons, citizens of this State now (or at the time this act becomes applicable) using or occupying any lands lying under the tide waters of this State."

(f) Another reason why the plain meaning of the word "next" should not be enlarged by a construction which would not confine the election to the

election next after the passage of the act, is found in the line of reasoning adopted in the recent case of Renner vs. the Hudson Freeholders, decided at the November term of the Supreme Court (53 Atl. Rep.) In that case the Court interprets the words "next election" to mean the election next after the passage of the act, because the first section of the act limiting the time when the referendum clause of the act could be availed of to a specific date, indicated the intention on the part of the Legislature to entrust the discretion of submitting the act to the people to a specific board of freeholders.

The same reason is the true foundation for the decision in all of the cases above cited, and applies equally to the case in hand. The act in question provides that at the next election thereunder the people shall have the power of electing all five members of the new Board of Street and Water Commissioners, and thereafter the people at any subsequent election can never elect more than two of the said members in any one year, and sometimes only one. The Court cannot say that the Legislature did not have this fact in mind. It is a matter of common knowledge that the Legislature is influenced by such conditions in passing political acts like this.

Another insuperable objection to attempting to uphold Sections 4 and 5 by disregarding the special provisions of Sections 1, 2 and 3, is found in the fact that there is no section vesting any powers in the Board to be created solely by the provision of Sections 4 and 5. Sections 1, 2 and 3 expressly vest in a particular Board a definite set of powers and indicate a clear intention on the part of the Legislature to abolish the Board created by the act of 1891 and substitute in its place another Board. If these sections are eliminated from the act, no

such intention appears as to the Board created by Section 4, and if the machinery of election can be set in motion in order to produce a Board of Street and Water Commissioners under this act with the elimination of Sections 1, 2 and 3, not only is the Board appointed under the act of 1891 not abolished, but the new Board thus created under Section 4 is destitute of all power, unless the abolition of the old Board and the powers of the new are to be derived from inference. Upon what principle of construction can the abolition of the old Board and the grant of powers to the new Board be implied? It is a principle of law that in the grant of powers from the Legislature to municipalities, the grants should be construed strictly; perhaps not as strictly as in a grant of power to a private corporation, but nevertheless that nothing shall be taken as passing except by fair or unavoidable inference. If this act consists only of Sections 4 and 5, why is it not a fair inference to assume that it was the intention of the Legislature to add to the Board created under the act of 1891 an additional quota of members to be elected by the people, making thus a Board composed partly of appointees and partly of elective members? That such a system is unusual in our politics is no reason why it may not have been contemplated by the Legislature, nor can any good reason be given why such a Board would not be equally efficient as a Board elected solely by the people. The suggestion of such an interpretation, however, is in itself a strong argument why the Court should not attempt to say what was in the minds of the Legislature in reference to the Board to be created under Section 4 in the absenee of plain evidence of such intent expressed in the language of the section itself. If this act commenced with Section 4 and ended with Section 5, even interpreted on

the principal of directory construction, it would be a barren act, creating a Board without power and void for ambiguity and uncertainty. That such an act could not be passed through our Legislature is obvious, and for the Court to attempt the construction of this act shorn of the vitalizing Sections 1, 2 and 3, is to attempt a forced, strained and unnatural construction of a very simple and plain statute.

POINT IV.

It may be contended that Sections 1, 2 and 3 are applicable only to cities of the first class which existed at the time of the passage of the act, and are machinery appropriate to then existing first class cities, and that having served that purpose they are no longer needed, and that cities of the second class subsequently coming into the classification of first class cities can take advantage of the remaining machinery of the act. Some of the objections heretofore urged apply to this construction of the act. If Sections 1, 2 and 3 are retained in the act for any purpose, they absolutely control the meaning of the word "next" in Section 4 and the words "1895" in Section 5. How can any reason be given for providing the temporary machinery mentioned in Sections 2 and 3 for first class cities, attempting to take advantage of the act? On the contrary, it is plain that this machinery was not needed at all in existing first class cities, as they had Boards which could continue in existence without inconvenience until the new Board should be elected, and this fact is very significant as showing that the prime object of the act was to change the personnel of the Board in Jersey City and Newark, the existing first class cities. But an insuperable objection to such construction is that no Board can be created under Section 4 except it derives its powers as successor of the temporary Board provided for in

Sections 2 and 3. The grant of power to the temporary Board is either a valid or invalid grant; if it is valid, then every succeeding Board must derive its power through the temporary Board. If invalid, then the act fails for the reasons hereinbefore stated.

POINT V.

Every line of reasoning, therefore, I submit, leads logically to the interpretation of this act according to its plain intent and meaning, viz., that it should apply only to first class cities as they were constituted at the time of the passage of the act, and that it should abolish the Board created by the act of 1891, and substitute in its place a temporary Board to last for a year, vested with accurately defined powers, and to be succeeded by members elected first in the year 1895, and thereafter at succeeding elections as their terms should expire, by elected members. The act so construed is a coherent, plain and easily understood expression of the legislative will, but is invalid according to the decisions of our Courts above quoted. No other construction accords either with reason, the decisions of the Court or with legal principles.

The paramount inquiry must be, what did the Legislature intend to accomplish by the act? Can there be a doubt that to them the "next election" mentioned in Section 4 meant the "next election" after the passing of the act in the first class cities then existing, and did not mean the first election to be held in any city coming into the class. To give it a broader meaning is to make a law which the Legislature did not make.

However harmless this may appear in this case, it is a precedent which might cause great evil in the next case to which the interpretation might be applicable. As a matter of fact the act of 1894 was

special legislation, enacted to suit political exigencies in Jersey City and Newark. As such it was not only unconstitutional, but it was contrary to the general term of municipal legislation in the direction of enlarging the powers of, and fixing responsibility upon, the Mayors of cities.

Judge Dillion well says of this point:

"Experience with us has also demonstrated the "*necessity of more power and more responsibity in* "*the executive head* of our municipal institutions. "Too often the duties of the Mayor or executive "officers are only nominal, and to these he gives "but little attention, a natural result of his want "of importance, and of his inability to control the "administration of municipal affairs. If the office "were clothed with dignity and real authority; if "the Mayor were invested with the veto power, if "he had the sole right to appoint and the unre- "stricted power to suspend or remove subordinate "officials or heads of departments, then the citizens "could justly demand of him that he should be in- "dividually responsible for the proper conduct of "the concerns of the municipality, and if griev- "ances exist, they would know to whom to apply "for remedy, or upon whom to fix the blame."

The setting aside of the act of 1894, therefore, will not only be in harmony with all the decisions of our Courts, but will be in line of the development of efficient and responsible municipal government, from which the act of 1894 was a distinct departure.

Respectfully submitted,

GEORGE L. RECORD,
Attorney for Mark M. Fagan,
Mayor of Jersey City,
Petitioner.

COLLINS & CORBIN,
Of Counsel.

MacCrellish & Quigley, Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals.

In the Matter of the Petition of Mark M. Fagan, Mayor of Jersey City,
Robert G. Smith et al.,
Plaintiffs in Error,
vs.
John C. Payne et al.,
Defendants in Error.

} In Error to Supreme Court.

Brief for John C. Payne and others, Defendants in Error.

The provisions in the act of 1894 (*G. S. p. 478*), for a temporary Board were not provisions necessary for the purpose of providing for a change in the method of appointment. The act of 1894 legislated out of office the Commissioners who had been appointed under the act of 1891 (*G. S., 465*), and empowered the Mayor within five days to appoint a new Board, who should have the same powers as the old Board, until the election in eighteen hundred and ninety-five, when an election should be held for the whole Board. It is manifest that the first three sections and the fifth and sixth sections were limited to existing cities.

As to section four, it is admitted by counsel for the incumbents that if the "next election" means "then next," the act is void.

The question is one of intent. Did the Legislature intend to apply the act of 1894 to cities thereafter coming into the first class? The substantial question is not how these provisions could be used if they did apply to cities coming into the first class, but whether the Legislature meant the act so to apply. To show that the act could be utilized in part, in new cities by piecing it out with other statutes, does not at all indicate that the Legislature meant it to apply. There is much legislation relating to second class cities which could be used in the government of first class cities, but we never think of so using it because we know that the Legislature did not so intend.

On the other hand, it is highly instructive to study the practical operation of the act in cities which may hereafter come into the class, because this throws light upon the intent. If we find that much of the act must be disregarded in such cases, this fact is a strong argument that the Legislature did not mean that the act should apply to such cities, because the Legislature cannot be supposed to have meant to direct impossible things done. If the Legislature had expressly provided that the Act of 1894 should apply to cities coming into the first class and we were now considering how to adapt it, we would be constrained to set aside more than half the act as inapplicable or impossible of application, and this goes to show that the act, as a whole, was never intended to apply to such cities. It certainly does not in clear terms extend to any cities except those existing. In view of the provisions applicable to existing cities only, and not to future cities of the class, the fair inference is that it is the existing cities only which were contemplated. There is nothing in any section of the act to indicate that different classes of cities are referred to in the different sections, and we must conclude that

as existing cities only are referred to in some of these sections, the same cities are those referred to in the other sections.

Thus, there is nothing in Section 4 to indicate that any other cities are referred to than those mentioned in Sections 1, 2, 3, 5 and 6, which are evidently existing cities. On the contrary, the reference in Section 4 to the "next election" tends to confirm the limitation. We do not question the decision in the *Essex Park Case, 55 Atl. Rep., page 310,* to the effect that the words "next election" may be regarded as merely directory in the absence of other indications in the act limiting to existing members of the class. In this case we have other provisions which show that the intent was to limit, and the case controlling here is the *Renner Case, 39 Vr. 192.* The only reasonable inference to be drawn from the act is that in Section 4, the Legislature were considering the same existing first class cities referred to in the other sections, and we ought not to make by inference an act which the Legislature did not intend to make.

It would defeat the purpose of the Constitution if we give the statutes a meaning which could not have been given to them before the amendment of 1875, for the sake of evading the constitutional restraint. General and special acts were well known when the amendment was passed and were published separately in our Pamphlet Laws. The act in question is one which would then have been classed as a special act limited to two cities. We annul the Constitution and defeat its purpose when we change the interpretation which would have been given to an act in 1875 for the sake of taking the act out of the constitutional prohibition. The first duty of the Court is to maintain the Constitution, and the obligation to maintain the statute is secondary.

C. L. CORBIN,
Counsel for Defts. in Error.

CHAPTER 340.

Laws of 1894, (p. 524).

A Further Supplement to an act entitled "An act concerning cities of the first class in this state, and constituting municipal boards of street and water commissioners therein, and defining the powers and duties of such municipal boards, and relating to the municipal affairs and departments of such cities placed under the control and management of such boards and providing for the maintenance of the same," approved March twenty-eighth, one thousand eight hundred and ninety-one.

Terms of present board ended

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*, That the terms of office of the members of every board of street and water commissioners heretofore appointed under the provisions of the act to which this is a supplement shall end and be determined immediately upon the passage of this act, notwithstanding that such members may have been appointed for a longer term.

Mayors shall appoint new boards to serve until successors are elected.

2. *And be it enacted*, That within five days from the passage of this act the mayor of each city of the first class in this state shall appoint from the citizens of such city, five persons, who shall, immediately upon their appointment and qualification, constitute the board of street and water commissioners for their respective cities until the first Monday in May, one thousand eight hundred and ninety-five, and until their successors shall have been elected as hereinafter provided and shall have qualified.

Authority, powers, &c., of new boards.

3. *And be it enacted*, That the boards of street and water commissioners of cities of the first class, as constituted under the second section of this act,

shall be substituted for such boards as now constituted, and shall be vested with all the authority, powers and rights now vested in such boards of street and water commissioners, and perform all duties now imposed upon such boards.

Terms for which members shall hereafter be elected.

4. *And be it enacted*, That at the next municipal or charter election to be held in each city of the first class there shall be elected five members of the board of street and water commissioners for said city, two of whom shall be elected for the term of one year, two for the term of two years, and one for the term of three years, and that at each municipal or charter election thereafter there shall be elected a member or members of the board of street and water commissioners, to succeed the member or members whose term then expires, for the term of three years.

What the ballots shall contain.

5. *And be it enacted*, That upon the ballots to be used at the municipal or charter election to be held in such cities in the year one thousand eight hundred and ninety-five, the designation of the office to be filled shall be as follows: "for members of board of street and water commissioners for term of one year;" "for members of board of street and water commissioners for term of two years;" "for member of board of street and water commissioners for term of three years," and that at each municipal or charter election thereafter the designation of the office to be filled shall be as follows: "for member of board of street and water commissioners," or "for members of board of street and water commissioners."

Newly appointed boards shall organize immediately.

6. *And be it enacted.* That the members of the board of street and water commissioners appointed pursuant to the provisions of the second section of this act, shall organize in their respective cities as boards of street and water commissioners immedi-

ately upon their appointment or as soon thereafter as they shall have been qualified, and that in each succeeding year said boards shall organize on the first Monday in May.

Mayor shall have power to remove for cause.

7. *And be it enacted*, That the mayor of each city of the first class shall have the power to remove from office for cause, and after opportunity to be heard, any member of the board of street and water commissioners of such city.

Vacancies shall be filled for unexpired term.

8. *And be it enacted*, That whenever a vacancy shall happen in the office of member of the board of street and water commissioners otherwise than by expiration of the term of a member, such vacancy shall be filled by the mayor of the city in which it happens by the appointment of a qualified voter, resident in such city, who shall hold office for the unexpired term and until his successor is elected and shall have qualified.

Repealer.

9. *And be it enacted*, That all acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed, and that this act shall take effect immediatly.

Passed May 25, 1894.

INDEX.

WRIT OF ERROR.

NEW JERSEY, ss.

The State of New Jersey to our Justices
[L.S] of our Supreme Court of Judicature
of the State of New Jersey;

GREETING:

Because in the record and proceedings and also in the giving of judgment in a plaint which was in our said Court before you, upon the petition of Mark M. Fagan, Mayor of Jersey City, which said record and proceedings now remain before you, as it is said, manifest error hath intervened, to the great damage of Robert G. Smith, James S. Nolan, Anthony Hauck, Ferdinand Heintze and John Sullivan, as by their complaint we are informed,

We being willing that the error, if any there be, should in some manner be corrected and full and speedy justice done to the parties in this behalf,

Do command you, that if judgment be thereupon given, then you cause the record of the said judgment and all things touching and concerning the same to be brought before our Court of Errors and Appeals in the last resort in all causes, at the State House in Trenton, on the ninth day of April, one thousand nine hundred and four, to our said Court of Errors and Appeals in the last resort in all causes, together with this writ; that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon what of right and according to the Constitution and laws of the State of New Jersey ought to be done.

WITNESS, William J. Magie, Esquire, Chancellor and President Judge of our said

Court of Errors and Appeals, at Trenton aforesaid, the twenty-first day of March, one thousand nine hundred and four.

S. D. DICKINSON,
Clerk.

ALLAN L. MCDERMOTT,
Attorney.

RETURN.

The answer of the Justices of the Supreme Court of the State of New Jersey, within named;

The record and proceedings whereof mention is made within, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE, [L. S.]
Chief Justice.

PETITION.

To Honorable William S. Gummere, Chief Justice.

The petition of Mark M. Fagan respectfully shows:

1. That he is Mayor of the city of Jersey City, and has been such since the first day of January, nineteen hundred and two.

2. That on the twenty-eighth day of March, eighteen hundred and ninety-one, the Legislature of this State passed an act entitled "An act concerning cities of the first class in this State, and constituting municipal boards of street and water

commissioners therein, and defining the powers and duties of such municipal boards, and relating to municipal affairs and departments of such cities, placed under the control and management of such boards, and providing for the maintenance of the same." Said act was approved by the Governor of this State on the date last aforesaid and became by its terms immediately operative.

3. That in pursuance of the provisions of the said last mentioned act, the then Mayor of Jersey City appointed a Board of Street and Water Commissioners of said city, which Board continued in office until on or about the twenty-fifth day of May, eighteen hundred and ninety-four.

4. That on said twenty-fifth day of May, eighteen hundred and ninety-four, the Legislature of this State passed an act entitled, "A further supplement to an act entitled, 'An act concerning cities of the first class in this State, and constituting municipal boards of street and water commissioners therein, and defining the powers and duties of such municipal boards, and relating to municipal affairs and departments of such cities, placed under the control and management of such boards, and providing for the maintenance of the same,' approved March 28, 1891." Said act was approved by the Governor of this State on the twenty-fifth day of May, eighteen hundred and ninety-four. By the terms of said last mentioned act the terms of office of the members of the said Board of Street and Water Commissioners theretofore appointed under the provisions of the said act of eighteen hundred and ninety-one were immediately ended and determined. That on or before the first day of June, eighteen hundred and ninety-four, the then Mayor of Jersey City appointed a new board of street and water commissioners, composed of

five citizens of said city, under and pursuant to section two of the said act of eighteen hundred and ninety-four.

5. That at the municipal or charter election held in Jersey City on the ninth day of April, eighteen hundred and ninety-five, there was elected a board of street and water commissioners, for said city, composed of five members, pursuant to the provisions of section four of the said act of eighteen hundred and ninety-four. That by the provisions of the said act of eighteen hundred and ninety-four, the last mentioned elected Board succeeded the said Board appointed under section two of the said act of eighteen hundred and ninety-four.

6. That by the provisions of section four of the said act of eighteen hundred and ninety-four, it was provided that of the said five members of the Board of Street and Water Commissioners to be elected in said city, two members thereof should be elected for the term of one year, two members thereof should be elected for the term of two years, and one member thereof should be elected for the term of three years, and at each municipal or charter election thereafter there should be elected the member or members whose terms then expired for the term of three years. That by virtue of the terms of the said act of eighteen hundred and ninety-four, and also by virtue of the provisions of an act of the Legislature, approved on the twenty-eighth day of February, nineteen hundred and one, entitled, "An act relative to the time of election and appointment, and terms of office of officers elected or appointed in cities in this State," whereby the terms of the said Street and Water Commissioners were made to expire upon the first day of January following the date of the expiration of such terms as fixed by the said act of eighteen hundred and ninety-four, successors to the

elective Board of Street and Water Commissioners, created by virtue of section four of said act of eighteen hundred and ninety-four, and have been from time to time elected in said city, and upon the first day of January, nineteen hundred and three, the persons composing the said Board of Street and Water Commissioners, and their respective terms, were as follows: Robert G. Smith, whose term expires on the first day of January, nineteen hundred and five; Ferdinand Heintze, whose term expires on the first day of January, nineteen hundred and six; John Sullivan, whose term expires on the first day of January, nineteen hundred and six; Anthony Hauck, whose term expires on the first day of January, nineteen hundred and four, and James S. Nolan, whose term expires on the first day of January, nineteen hundred and four.

7. That on the first day of January, nineteen hundred and three, your petitioner was advised by the Corporation Counsel of Jersey City, that the said act of the Legislature of eighteen hundred and ninety-four, under which the aforesaid Board of Street and Water Commissioners held office, was unconstitutional and void; and that it was the duty of your petitioner to appoint a new Board of Street and Water Commissioners, by virtue of the terms of said act of eighteen hundred and ninety-one. That your petitioner thereupon, on the first day of January, nineteen hundred and three, appointed a Board of Street and Water Commissioners under the said act of eighteen hundred and ninety-one. The members of the said Board, and the terms for which they were appointed, were as follows: Stephen Cornell, for the term ending January first, nineteen hundred and five; Thomas P. Connolly and John Doscher, for the term ending January first, nineteen hundred and six, and John C. Payne and James

Lindsay, for the term ending January first, nineteen hundred and seven. That said appointees are suitable persons, legal residents of the said city of Jersey City, and are in every way qualified to be commissioners as aforesaid. That your petitioner subsequently duly commissioned said commissioners and the required oath of office was duly administered to them, and the said commissioners took and subscribed the same and furnished bonds with good and sufficient sureties for the faithful performance of their duties. And your petitioner thereupon approved said bonds and caused the same to be filed with the Comptroller of said city of Jersey City. All of which actions of your petitioner and said commissioners aforesaid were done and performed in accordance with the provisions of the said act of eighteen hundred and ninety-one.

8. Your petitioner further shows that the commissioners appointed and commissioned by your petitioner as aforesaid and qualified as aforesaid, did, in obedience to a call signed by each of the said commissioners, on Monday, the fifth day of January, nineteen hundred and three, meet at the office of your petitioner at the City Hall of Jersey City, and did duly organize as the Board of Street and Water Commissioners of the said city of Jersey City, and did then and there elect John C. Payne President of said Board, and Joseph O'Connor Clerk *pro tem*, of said Board, and did then and there transact other business regarding the management and control of the bu iness in the control of the said Board in accordance with the provisions of the act of eighteen hundred and ninety-one aforesaid.

9. That said appointees are ready and about to enter upon the discharge of their duties as the Board of Street and Water Commissioners of said city by virtue of the said act of eighteen hundred

and ninety-one in lieu of the Board of Street and Water Commissioners of said city heretofore existing by virtue of the provisions of the act of eighteen hundred and ninety-four, and notwithstanding the appointment and qualification of the said commissioners appointed by your petitioner, the former Board of Street and Water Commissioners of the said city, consisting of Robert G. Smith, Ferdinand Heintze, John Sullivan, Anthony Hauck and James S. Nolan, are proceeding with the work of the city connected with the department created by virtue of the act of eighteen hundred and ninety-one, and are preparing to perform all the work for the said department for the ensuing year, and they threaten openly to retain possession of their present offices, notwithstanding the appointment and qualification of the said new Board of Street and Water Commissioners by your petitioner as aforesaid, and they refuse to surrender the books, papers, matters and things in their possession appertaining to said department of the said Board of Street and Water Commissioners.

10. Your petitioner therefore shows that a dispute or controversy has arisen and now exists in the city of Jersey City concerning the title of the said Street and Water Commissioners of the city of Jersey City as hereinbefore set forth, in accordance with the said act of eighteen hundred and ninety-one.

Your petitioner therefore prays that, the premises considered, your Honor will, under and by virtue of the twenty-fifth and twenty-sixth sections of the said act of eighteen hundred and ninety-one, entitled "An act concerning cities of the first class in this State, and constituting municipal boards of street and water commissioners therein, and defining the powers and duties of such municipal

boards, and relating to municipal affairs and departments of such cities, placed under the control and management of such boards, and providing for the maintenance of the same," approved March 28, 1891, appoint a special term of the Supreme Court of the State of New Jersey, to try and determine the title and rights of the persons appointed by your petitioner in the manner aforesaid under the provisions of the said act, approved March twenty-eighth, eighteen hundred and ninety-one, and to determine all disputes and controversies which have arisen or may arise concerning the rights and titles of all persons appointed to office in said city of Jersey City, otherwise than by the appointment of your petitioner under said act, approved March twenty-eighth, eighteen hundred and ninety one, and in particular, the right and title of the said John C. Payne and the said James Lindsay, John Doscher, Thomas P. Connolly and Steven Cornell to the said offices and members of the Board of Street and Water Commissioners of the said city, and also that your Honor will make such orders as may be deemed necessary to bring into Court all persons claiming any right, title or interest to any office affected by said act of March twenty-eighth, eighteen hundred and ninety-one, and to prescribe as to within what time all pleadings and papers shall be filed therein, and also to prescribe the manner in which persons may be made parties to said proceedings, and the manner and time of service of rules and orders and other papers, and whether by publication or otherwise; and also that your Honor will make such orders as may be deemed proper concerning the taking of testimony, and such further orders and rules concerning such actions, and all papers and pleadings therein connected therewith,

as shall be necessary to have the same determined at such special term.

MARK M. FAGAN,
Mayor of Jersey City.

GEORGE L. RECORD,
Att'y of Petitioner.

STATE OF NEW JERSEY, } ss.
COUNTY OF HUDSON, }

MARK M. FAGAN, of full age, being duly sworn according to law, on his oath says, that he is the petitioner named in the foregoing petition; that he has read the said petition, and that the matters and things therein set forth, so far as they relate to his own acts, are true, and so far as they relate to the acts of others he believes them to be true.

MARK M. FAGAN,
Mayor of Jersey City.

Subscribed and sworn to this 19th day of January, A. D. 1903, before me,

FORREST A. HEATH,
Notary Public of New Jersey.

ORDER.

Upon reading and filing the petition of Mark M. Fagan, Mayor of Jersey City, New Jersey, whereby it appears that a dispute or controversy exists in said city concerning the right and title of certain persons therein mentioned, appointed to office by the said Mayor under provisions of an act of the Legislature of this State, entitled "An act concerning cities of the first class in this State, and constituting municipal boards of street and water commissioners therein, and defining the powers and duties of such municipal boards, and relating to

municipal affairs and departments of such cities, placed under the control and management of such boards, and providing for the maintenance of the same," approved March 28, 1891;

It is, on this twentieth day of January, nineteen hundred and three, by William S. Gummere, Chief Justice of the Supreme Court of the State of New Jersey, ordered and appointed, that a special term of the Supreme Court of the State of New Jersey, be held at the State House in Trenton, on Tuesday, the seventeenth day of February, nineteen hundred and three, at eleven o'clock in the forenoon, to hear and determine such action, proceeding, dispute and controversy.

And it is further ordered, that a copy of the petition filed therein by the Mayor as aforesaid, together with a copy of this order, be served upon Robert G. Smith, Ferdinand Heintze, John Sullivan, Anthony Hauck and James S. Nolan, the members of the Board of Street and Water Commissioners elected under the act of eighteen hundred and ninety-four, mentioned in said petition, within two days after the making of this order. Said copies so to be served need not to be certified and may be served personally upon the said persons, or by leaving the same at their places of residence or with their attorneys.

And it is further ordered, that all answers, duly verified, of the several persons as herein provided, or who may come in in the manner herein provided, shall be filed with the Clerk of the said Supreme Court within ten days after the service of this order in case of service, and in case of persons coming in to answer, as herein provided, who have not been served, within ten days after filing this order with the Clerk of the Supreme Court. The answers filed shall in all cases set out the claim of

title or right to the office or to the exercise of the functions of the office, which in whole or in part is made by the answering claimant and the grounds of the objection to the claim of any other person to said office or to the exercise of the functions of said office, and a copy of all answers filed shall be served within two days after the filing thereof upon George L. Record, attorney of the said petitioner. Joint claimants to any office, or joint objectors to claims of any other persons to an office, or to the exercise of the functions of an office, may file joint answers to said petition.

And it is further ordered, that any person or persons, or any official not specifically named therein, and directed to be served with a copy of the said petition and this order, the titles or functions of whose office are in any way affected in whole or in part by the provisions of the said act, may come in and file an answer to said petition within the time herein stated, but in such case any official or person coming in shall serve upon George L. Record a true but uncertified copy of his answer within two days after the filing of the same.

And it is further ordered, that the right of the persons mentioned in said petition who claim to hold the office of Street and Water Commissioner aforesaid, so appointed by the said Mayor under the authority of the said act of eighteen hundred and ninety-one, shall be tried and determined, as well as the right of any or all persons whose office or official authority is by the act of the Mayor in making said appointments, or by the act of the said commissioners appointed by him in any wise affected who may come in as herein provided.

And it is further ordered, that any person now or hereafter becoming a party to this proceeding may

apply to the Chief Justice at the State House on the third day of February, nineteen hundred and three, at ten o'clock in the forenoon, without further notice, for such orders concerning the taking of testimony, papers and pleadings herein, the framing of issues and the conduct of the proceeding as shall be necessary to have the same heard and determined at the special term of the Supreme Court appointed as aforesaid.

And it is further ordered, that any party to this proceeding may apply to the Chief Justice for a modification of this order on one day's notice to the attorneys of all other parties who have appeared or shall appear in this proceeding.

WM. S. GUMMERE,
C. J.

ANSWER.

And now come the said Robert G. Smith, Ferdinand Heintze, John Sullivan, Anthony Hauck and James S. Nolan, by Allan L. Mc Dermott, their attorney, and answering the petition heretofore filed in this proceeding by Mark M. Fagan, Mayor of Jersey City, say that each of them was duly and legally elected a member of the Board of Street and Water Commissioners of Jersey City, under and by virtue of the provisions of the act of 1894, mentioned in said petition, and that each of them has duly qualified for the performance of the duties of a member of said Board and is now performing said duties.

ALLAN L. McDERMOTT,
Attorney for Robert G. Smith, Ferdinand Heintze, John Sullivan, Anthony Hauck, and James S. Nolan.

STATE of NEW JERSEY, } ss.
COUNTY of HUDSON, }

Robert G. Smith, Ferdinand Heintze, John Sullivan, Anthony Hauck, and James S. Nolan, each being duly sworn before me, says that the answer above made is true.

ROBERT G. SMITH,
FERDINAND HEINTZE,
JOHN SULLIVAN,
ANTHONY HAUCK,
JAMES S. NOLAN.

Sworn and subscribed to before me }
this 26th day of January, 1903. }

WM. A. TOLSON,
Commissioner of Deeds, New Jersey.

ANSWER

And now come the said John C. Payne, James Lindsay, John Doscher, Thomas P. Connolly, and Stephen Cornell, by Collins & Corbin, their attorneys, and answering the petition hertofore filed in this proceeding by Mark M. Fagan, Mayor of Jersey City, say that Robert G. Smith, Ferdinand Heintze, John Sullivan, Anthony Hauck and James S. Nolan, were not, nor were either of them, duly and legally elected members of the Board of Street and Water Commissioners of Jersey City, because they say that the act of 1894, under which they claim to to have been elected to said office, is unconstitutional, for the reasons set forth in the petition filed herein.

And we further come and say that on the first day of January, 1903, we were each duly appointed by

Mark M. Fagan, Mayor of Jersey City, a member of the Board of Street and Water Commissioners of Jersey City, and thereafter each of us duly and legally qualified as members of such board, as stated in said petition, and each of us is ready to perform the duties of member of the Board of Street and Water Commissioners of Jersey City, and have been since the time of our appointment and qualification, as stated in said petition.

COLLINS & CORBIN,

Attorneys for John C. Payne, James Lindsay, John Doscher, Thomas P. Connolly and Stephen Cornell.

STATE OF NEW JERSEY, } ss.
COUNTY OF HUDSON, }

John C. Payne, James Lindsay, John Doscher, Thomas P. Connolly and Stephen Cornell, each being duly sworn before me, says that the answer above made is true.

JOHN C. PAYNE,
JAMES LINDSAY,
JOHN DOSCHER,
THOMAS P. CONNOLLY,
STEPHEN CORNELL.

Sworn and subscribed before me at Jersey City, on this 6th day of February, A. D. 1903.

ISAAC F. GOLDENHORN,
Master in Chancery,
of New Jersey.

JUDGMENT.

This cause coming regularly on to be heard at a certain term of this Court appointed for that purpose, at which the right of the several claimants to

the office of member of the Board of Street and Water Commissioners of Jersey City, was tried, and counsel having been heard, and the Court having taken time for consideration, and being of the opinion that Chapter 340 of an act of the Legislature of this State, of the year 1894, is unconstitutional and void, and that the persons recited as having been appointed by the Mayor to said offices in the petition of the Mayor of Jersey City, filed in this matter, were at the date of filing of said petition entitled respectively to the office of member of the Board of Street and Water Commissioners of Jersey City, and that persons claiming title to said office under cover of an election by virtue of said unconstitutional act of the Legislature have no rightful claim of title to said office;

It is by this Court adjudged and determined that John C. Payne, James C. Lindsay, Stephen Cornell, Thomas P. Connolly, and John Doscher are, and each of them is entitled to the office of member of the Board of Street and Water Commissioners of Jersey City, and that Ferdinand Heintze, Robert C. Smith, John Sullivan, Anthony Hauck and James F. Nolan, be, and each of them is ousted from the said office, and that they do not in any manner intermeddle with or concern themselves about the said office in the liberties and privileges and franchises thereof, but that they be excluded from exercising or using the same or any of them in the future.

Entered Mar. 19, 1904.

On motion of

GEORGE L. RECORD,

Atty.

OPINION.

GUMMERE, C. J. This a contest over the title of rival claimants to office as members of the Board of Street and Water Commissioners of the city of Jersey City. By the provisions of the act creating such board, approved March 28, 1891 (Gen. St., p. 465), the regulation and control of the streets and water supply in cities of the first class (that is, cities having a population of 100,000 or more) was placed in the hands of a board created by the act. This statute applied not only to cities which were then in the class designated, but to all those which should thereafter come into the class. It was therefore, under our decisions, a general law, and so constitutional, although it regulated the internal affairs of cities. By the provision of the first section of the act, power was conferred upon the Mayor to appoint the members of the board. In 1894, however, the Legislature passed a supplement to this act, by the terms of which the power to appoint members of the board was taken from the mayor, and the office of Street and Water Commissioner was made elective. Gen. St., p. 478. The first section of the supplement enacted that the term of office of the members of every board, theretofore appointed under the provisions of the act of 1891, should end and be determined immediately upon the passage of the supplement. Section 2 enacted that, within five days from the passage of the supplement, the Mayor of each city of the first class should appoint five persons, who should, immediately upon their appointment and qualification, constitute the Board of Street and Water Commissioners until the first Monday in May, 1895, and until their successors should have been elected, as provided in a later section of the supplement, and should have qualified. Section 3 enacted that

the Boards of Street and Water Commissioners, as constituted under section 2, should be substituted for such boards as were then constituted, and should be vested with all the authority, powers, and rights of such boards. Section 4 is a follows: "That at the next municipal or charter election to be held in each city of the first class there shall be elected five members of the Board of Street and Water Commissioners for said city, two of whom shall be elected for the term of one year, two for the term of two years, and one for the term of three years, and that, at each municipal or charter election thereafter, there shall be elected a member or members of the Board of Street and Water Commissioners, to succeed the member or members whose term then expires, for the term of three years." By section 5 it was enacted: "That upon the ballots to be used at the municipal or charter election to be held in such cities in the year 1895, the designation of the office to be filled shall be as follows: 'For members of Board of Street and Water Commissioners for term of one year;' 'for members of Board of Street and Water Commissioners for term of two years;' 'for member of Board of Street and Water Commissioners for the term of three years;' and that at each municipal or charter election thereafter the designation of the office to be filled shall be as follows: 'For member of Board of Street and Water Commissioners,' or 'for members of Board of Street and Water Commissioners.'" The incumbents were elected under the supplement of 1894. The claimants were appointed by the Mayor of Jersey City, under the provision of the original act, upon the ground that the supplement of 1894 is unconstitutional because it is a special law. The sole point presented for decision is whether the provisions of this supplement are limited to cities which were in the designated class at the time of

its passage, or whether they also embrace all cities which should thereafter come into the class.

Much stress is laid by counsel of both sides upon the language used in sections 4 and 5 of the supplement, as determining the scope which the act, by true construction, has. The contention on the part of the incumbents is that, in construing these provisions, the Court is controlled by the decisions of the Court of Errors and Appeals in the case of Ross v. Essex County Park Commissioners, 55 Atl., 310. In that case the Legislature, having provided a comprehensive scheme for the laying out and maintaining of public parks in counties of the first class, provided that the act should not take effect in any county of the class until the question of its acceptance or rejection should be submitted to the popular vote of the citizens of the county, and that such submission should be made "at the next election, whether general, municipal or special, wherein the people of all the county, qualified to vote, are authorized to vote for local officers;" and then proceeded to point out the method by which this question should be submitted to the voters of the respective counties, by directing the County Clerk, at least ten days before any such election, to give public notice by publication in certain newspapers, that such submission would be made at such ensuing election, and to provide ballots in sufficient quantities for the legal voters, and to make distribution thereof, and to place upon such ballots either the words "For the new park bill" or the words "Against the new park bill." The Court of Errors, from a consideration of the whole park act, found that its prime purpose was to tender to the voters of every county having the required population the right of accepting the benefits thereby conferred; that it was in order to insure this purpose the statute imposed

the duties specified upon the County Clerk, and pointed out the time for their performance; that the provision for submitting the matter to the people at "the next election" was directory in character, and not an absolute limitation upon the right of the people to accept the benefits conferred by the act that this right could not be destroyed by the conduct of the local officers in refusing or neglecting to perform the duties imposed upon them at the time fixed by the statute, but would continue until such duties were actually performed. These facts brought the Court to the conclusion that, by the true construction of the act, the question of accepting or rejecting its benefits was to be submitted to the people of those counties which were then in the class, at the election next ensuing after the passage of the act, and to the people of those counties which should thereafter come into the class, at the election which should ensue next after the happening of that event. The principle underlying the the disposition in the Park Commissioners Case, as it seems to us, is that, in ascertaining the scope of an act of the Legislature regulating the internal affairs of a municipality, the fact that the steps provided for carrying into effect the legislative scheme are directed to be taken "at the next election" is not of itself decisive of the legislative intent that the provisions of the act should only be applicable to such municipalities as should be in the class at the election held next after the passage of the act, and that when a consideration of the whole of the act, except the provisions which designate the method of putting it into operation, leads to the conclusion that the statute was not intended to be so limited, such provisions do not justify a different conclusion. In the present case, however, the body of the supplement, exclusive of sections 4 and 5, does not justify the conclusion that the great pur-

pose of the act was to provide a change in the method of selecting members of the Board of Street and Water Commissioners, both in cities then in the first class, and in cities which should thereafter come into that class. On the contrary, the prime object which appears in those portions of the statute which precede sections 4 and 5 is the immediate ousting from office of the various members of the Board of Street and Water Commissioners in those cities which were in the class specified at the time of the passage of the act, namely, Jersey City and Newark, and to fill those offices with other incumbents. Section 4, instead of plainly enlarging this object on its face, has the same limited scope. Although containing words similar to those construed in the Park Commissioners Case, it provides a means for carrying into effect statutory provisions which are not general, but limited, in their scope. No reason, therefore, appears for giving those words a construction different from, or more broad than, their ordinary meaning. And even if the true meaning of the provision contained in that section, when considered in connection with what precedes it, is left in doubt, a reference to the language used in section 5 clears up that doubt. In that section the election referred to is expressly declared to be that to be held in the year 1895, and the ballots to be cast at that particular election are the only ones which by their form are adapted to the filling up of the whole Board with members having varying terms of office. The subsequent sections of the act suggest no different idea from that expressed by those who have been already referred to. Section tion 6 prescribes that the members of the Board appointed pursuant to the provisions of section 2 shall organize immediately upon their appointment and qualification, and that in each succeeding year said Board shall organize on the first Monday in May.

Section 7 authorizes the Mayor of each city of the first class to remove members of the Board for cause, and after a hearing section 8 confers upon the Mayor the power of appointment to fill a vacancy. The provisions of the supplement of 1894, being limited to those cities which were in the first class at the time of the passage of the act, and not being applicable to those cities which might thereafter come into the class, must be declared to be unconstitutional under the rule laid down by the Court of Errors in the case of De Hart v. Atlantic City, 63 N. J. Law, 223; 43 Atl., 742.

We have not overlooked the contention that the statute of 1891, and its supplement of 1894, are, in contemplation of law, but one enactment, and that, as the twenty-fourth section of the original act provides that the unconstitutionality of one or more of its sections shall not invalidate the whole act, but that such sections shall be rejected and the rest of the act permitted to stand, it is the duty of the Court to reject only such sections of the supplement of 1894 as are unconstitutional, and give effect to the remainder of its provisions. The soundness of the abstract proposition contained in this contention may be admitted. The difficulty with the incumbents' case is that it has no application to the statute under consideration. The vice of the supplement of 1894 is not confined to any particular section or sections. It inheres in the act as a whole. To expunge from it those provisions which limit its scope, and thus make it applicable to municipalities which were not intended to be included in the legislative scheme, would be an act of legislation, not of judicial interpretation.

The result is that the method of filling the office of member of the Board of Street and Water Commissioners in the city of Jersey City is that provided

by the original act of 1891, and the appointees of the Mayor are, each of them, entitled to hold the office to which they were respectively appointed.

ASSIGNMENT OF ERRORS.

And now at this day come the said Robert G. Smith, James S. Nolan, Anthony Hauck, Ferdinand Heintze and John Sullivan, plaintiffs in error, by Allan L. McDermott, their attorney, and assign the following causes of error:

First—That the said Supreme Court decided an act of the Legislature of the State of New Jersey entitled "A further supplement to an act entitled 'An act concerning cities of the first class in this State, and constituting municipal boards of street and water commissioners therein, and defining the powers and duties of such municipal boards, and relating to the municipal affairs and departments of such cities placed under the control and management of such boards, and providing for the maintenance of the same, approved March twenty-eighth, one thousand eight hundred and ninety one,'" passed May 25th, 1894, to be unconstitutional and void, whereas the said Supreme Court should have decided said act to be constitutional and valid.

Second—That the said Supreme Court decided that the said Robert G. Smith, James S. Nolan, Anthony Hauck, Ferdinand Heintze and John Sullivan were not entitled to hold office as members of the Board of Street and Water Commissioners, a municipal board in the city of Jersey City, whereas, by the law of the land, the said Supreme Court should have given judgment that each of said per-

sons was entitled to hold office as a member of said Board.

Third—That the said Supreme Court decided that said John C. Payne, Stephen Cornell, James C. Lindsay, John Doscher and Thomas P. Connolly were entitled to hold office as members of the Board of Street and Water Commissioners of Jersey City, whereas the judgment of said Court should have been that the appointment of said John C. Payne, Stephen Cornell, James C. Lindsay, John Doscher Thomas P. Connolly by Mark M. Fagan, Mayor of Jersey City as aforesaid, was null and void.

Fourth—That said judgment is in divers other respects contrary to law.

Therefore the said Robert G. Smith, James S. Nolan, Anthony Hauck, Ferdinand Heintze and John Sullivan, plaintiffs in error, pray that the said judgment may be reversed, set aside, and for nothing holden, etc.

ALLAN L. McDERMOTT,
Attorney of Plaintiffs in Error.

Joinder in Error in Common Form.