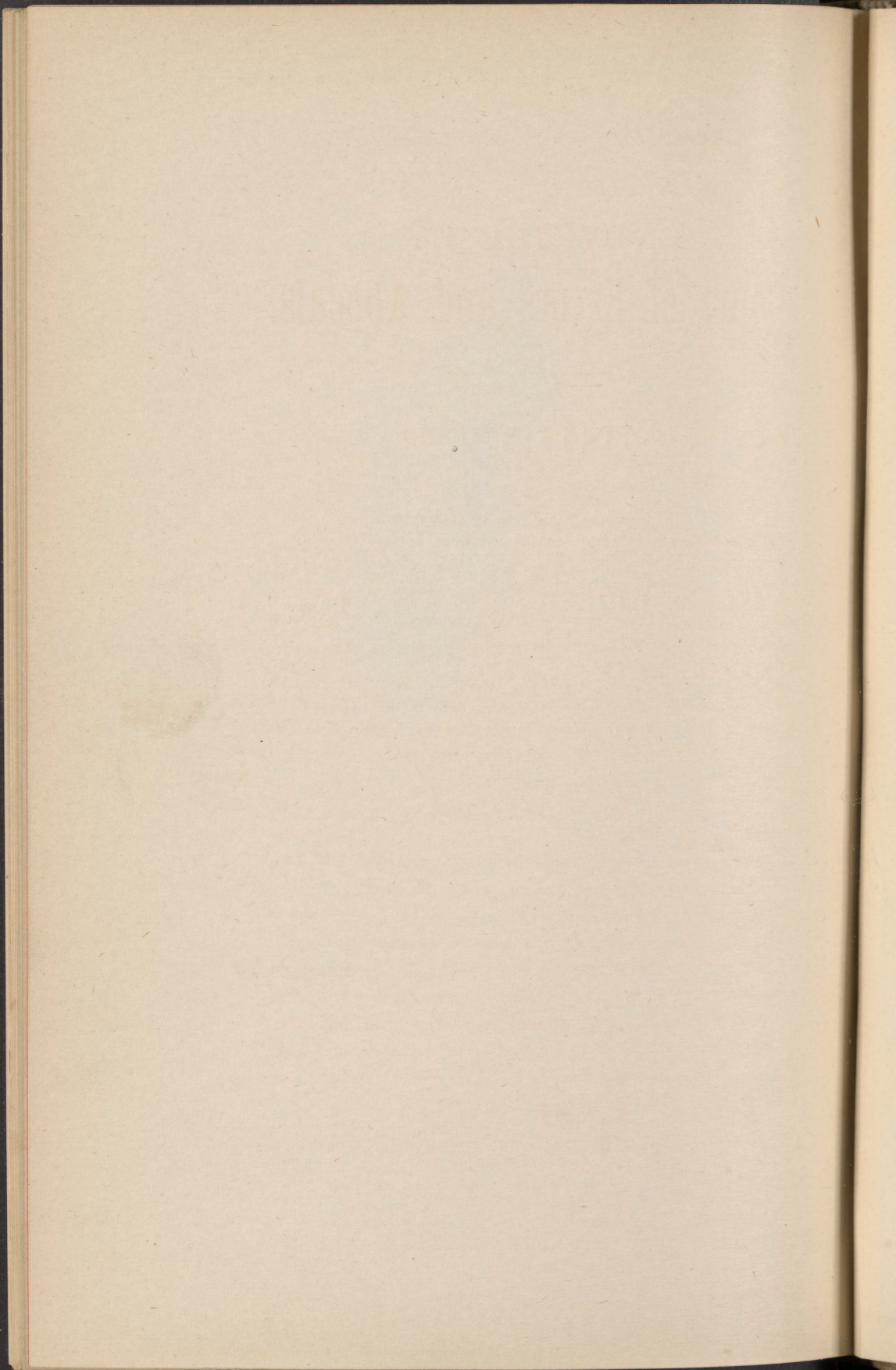


INDEX.

	PAGE.
Writ of Certiorari,	1
Return to Writ,	2
Stipulation (Adoption of Walsh Act),	6
Stipulation (Cities That Have Not Adopted the Act),	7
Reasons (Supreme Court),	8
Opinion,	9
Judgment,	16
Notice of Appeal and Reasons (Supreme Court),	17
Notice of Appeal and Reasons (Court of Errors and Appeals), ...	18
Notice of Argument,	20
Joinder,	20

APR 1 1910
New Jersey State Library



NEW JERSEY
Court of Errors and Appeals.

WRIT OF CERTIORARI.

(Filed May 4, 1914.)

NEW JERSEY, ss.: The State of New Jersey to the inhabitants of the city of Trenton, GREETING:
[SEAL.] We being willing for certain reasons to be certified of a certain ordinance entitled "An ordinance to authorize the issuance of bonds for the improvement of certain park lands owned by the city," passed by the Board of Commissioners of the City of Trenton on the fifteenth day of April, nineteen hundred and fourteen, together with all matters and proceedings of the said Board of Commissioners of the City of Trenton touching and concerning the said ordinance. 10

We command you that the ordinance entitled "An ordinance to authorize the issuance of bonds for the improvement of certain park lands owned by the city," and all proceedings touching and concerning the same, to our Supreme Court of Judicature, at Trenton, on Monday, the fourth day of May, nineteen hundred and fourteen, you certify and send, together with this writ, that therein may be done what of right and according to the laws and constitution of this State ought to be done. 20

Witness, William S. Gummere, Chief Justice of our Supreme Court, at Trenton, this thirtieth day of April, in the year of our Lord, one thousand nine hundred and fourteen.

WM. E. BLACKMAN, WM. C. GEBHARDT,
Attorney. *Clerk.*

RETURN TO WRIT.

(Filed May 4, 1914.)

10 *To the Honorable, the Chief Justice and Associate Justices of the Supreme Court:*

The record and proceedings touching and concerning the enactment of an ordinance, entitled "An ordinance to authorize the issuance of bonds for the improvement of certain park lands owned by the city," passed April 15, 1914, together with all matters and proceedings of the Board of Commissioners of the City of Trenton whereof mention is within made, we do hereby certify and send, under the corporate seal of

20 *The Inhabitants of the City of Trenton, as within we are commanded.*

At a regular meeting of the Board of Commissioners of the City of Trenton held on the first day of April, nineteen hundred and fourteen, five commissioners being present, an ordinance entitled "An ordinance to authorize the issuance of bonds for the improvement of certain park lands owned by the city," was introduced, read, ordered to be printed and laid over until April 15, 1914. Copy of said ordinance is hereunto

30 *attached and made a part of this return.*

That at a regular meeting of said Board of Commissioners held on the fifteenth day of April, nineteen hundred and fourteen, five commissioners being present, said ordinance was read a second time, considered by sections, and agreed to, and upon motion ordered to

have a third reading. Read a third time, and passed by the unanimous vote of all commissioners.

That said ordinance was complete in the form in which it was finally passed when introduced, and that it remained on file with the City Clerk for public inspection for at least two weeks before its final passage.

That said ordinance was published at least twice before passage, in a newspaper published and circulated in the city of Trenton for at least ten years preceding the date of such publication, and that such publication included the names of the Commissioners who signed it. 10

That said ordinance was again published, after its final passage, for at least one insertion in a newspaper published and circulated in the city of Trenton for at least ten years preceding the date of such publication, and that such publication included the names of the Commissioners who signed it.

In conformity with the requirements of Chapter 366 of the Laws of 1912, said ordinance was recorded in a book provided for that purpose, and signed by a majority of all the Commissioners. 20

That no petition, protesting against the passage of said ordinance was presented to said Board of Commissioners within ten days after the final passage thereof.

In witness whereof, I, Edward W. Lee, Acting Mayor of the City of Trenton, have set my hand and affixed the corporate seal of said city, and caused the same to be attested by Frank Thompson, City Clerk of said city, this thirtieth day of April, nineteen hundred and fourteen. 30

EDWARD W. LEE,
Acting Mayor.

Attest:

FRANK THOMPSON, [SEAL.]
City Clerk.

An ordinance to authorize the issuance of bonds for the improvement of certain park lands owned by the city.

THE BOARD OF COMMISSIONERS OF THE CITY OF TRENTON DO ORDAIN :

1. That the City Treasurer be and he is hereby authorized and directed to issue bonds, under the corporate name of the City of Trenton, to an amount not exceeding the sum of twenty thousand dollars (\$20,000), payable in thirty (30) years from the date thereof, with interest at a rate not exceeding four and one-half per centum ($4\frac{1}{2}\%$) per annum, payable semi-annually.
2. Said bonds shall be designated on their face "Park Bonds," and shall be sealed with the city seal, signed by the Mayor, Comptroller and Treasurer, and attested by the City Clerk. The bonds hereby authorized may be registered or coupon bonds, and shall be numbered and a register of such numbers, and the date of such bonds, and the date of issuing, and time of payment of the same shall be made by or under the direction of the City Treasurer, in a book provided for that purpose; if registered bonds they shall only be transferred by duly executed instrument by the holders thereof, as they shall appear on said book, and an entry of such transfer shall be made in such book; if coupon bonds they shall have interest coupons attached, signed with the fac-simile signature of the City Treasurer, the delivery of which to the City Treasurer shall be a sufficient voucher to him for the payment of the interest thereon specified; provided, however, that if said bonds or any of them shall be issued in coupon form, they may be surrendered at any time to the City Treasurer, by the owner or owners thereof, with a written request to have the remaining coupons cut off and destroyed and said bonds converted into registered bonds, both as to principal and interest, and an entry of such conversion shall be made by the City Treasurer on said bonds and in the books of his office.

3. Said bonds shall be of the denomination of one hundred dollars or multiples thereof, and shall not be sold for less than par value.

4. The proceeds of the sale of said bonds shall be applied to the improvement of the lands owned by the city and located upon the water front of the Delaware river, in such manner as the Board of Commissioners of the City of Trenton may by ordinance prescribe.

5. The interest and principal of said bonds shall be raised and paid in the following manner, to wit: A sum equal to the interest and one-thirtieth of the principal shall be added yearly and every year to the sum to be raised by taxes in said city, for the period of thirty years from the date of issuing said bonds, and said portion of the principal so raised each year shall be paid yearly to the Commissioners of the Sinking Fund, to be used exclusively for the liquidation of said bonds at maturity, provided, however, that whenever the amount of moneys in the hands of said commissioners, standing to the credit of said bonds, shall be sufficient for their redemption, no further sum shall be raised by taxation for that purpose. 10 20

EDWARD W. LEE,
WM. F. BURK,
G. B. LA BARRE,
J. R. FELL,

STIPULATION.

ADOPTION OF WALSH ACT.

(Filed May 7, 1914.)

NEW JERSEY SUPREME COURT.

HARRY F. SMITH,
Prosecutor,
vs.

THE INHABITANTS OF THE
 CITY OF TRENTON,
Respondents.

} On certiorari.
 } Stipulation.

- 10 It is hereby stipulated and agreed that the qualified voters of the City of Trenton, at an election held on the twentieth day of June, nineteen hundred and eleven, adopted the provisions of an act of the Legislature of this State entitled "An act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by Boards of Commissioners or Improvement Commissions in this State," approved April 25th, 1911, the title of the act having been amended to read as herein
- 20 set forth by an act approved April 2d, 1912, and that this fact be admitted on the argument of the Writ of Certiorari in the above-entitled cause, with the same force and effect as if due proof thereof had been made by deposition taken on notice.

WM. E. BLACKMAN,
Counsel of Harry F. Smith.

CHAS. E. BIRD,
*Counsel for the Inhabitants of the
 City of Trenton.*

- 30 Dated Trenton, N. J., May 6th, 1914.

STIPULATION.

CITIES OF THE SECOND CLASS THAT HAVE NOT
ADOPTED WALSH ACT.

(Filed May 7, 1914.)

NEW JERSEY SUPREME COURT.

HARRY F. SMITH,	}	On certiorari. Stipulation.
<i>Prosecutor,</i>		
<i>vs.</i>		
THE INHABITANTS OF THE CITY OF TRENTON, <i>Respondents.</i>		

It is hereby stipulated and agreed that the provisions of an act of the Legislature of this State entitled "An act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by Boards of Commissioners or Improvement Commissions in this State," approved April 25th, 1911, the title of the act having been amended to read as herein set forth by an act approved April 2d, 1912, have not been adopted by the qualified voters of the City of Paterson, the City of Camden, the City of Elizabeth, or the City of New Brunswick, cities of the same class as the City of Trenton, to wit, the second class; and that this fact be admitted on the argument of the Writ of Certiorari, in the above-entitled cause, with the same force and effect as if due proof thereof had been made by depositions taken on notice.

WM. E. BLACKMAN,
Counsel for Harry F. Smith.
CHAS. E. BIRD,
*Counsel for the Inhabitants of the
City of Trenton.*

Dated Trenton, N. J., May 6th, 1914.

REASONS.

SUPREME COURT.

(Filed May 6, 1914.)

NEW JERSEY SUPREME COURT.

HARRY F. SMITH,
Prosecutor,
vs.

THE INHABITANTS OF THE
 CITY OF TRENTON,
Respondents.

On Certiorari.
 Reasons.

10

The Prosecutor presents the following reasons for setting aside the ordinance and proceedings brought before this Honorable Court by the Writ of Certiorari in the above-entitled cause.

1. Because Chapter 91 of the Laws of 1910 and Chapter 150 of the Laws of 1904, upon which the respondents rely for authority to issue the bonds authorized by the enactment of the ordinance brought up for review, are made inapplicable to the City of Trenton by reason of the enactment of Chapter 144 of the Laws of 1914.

2. Because the respondents are without statutory power to issue and sell the bonds authorized by the enactment of said ordinance.

3. Because the proceedings are in divers other respects irregular, illegal, unjust and oppressive to the Prosecutor.

WM. E. BLACKMAN,
Attorney for Prosecutor.

20

NEW JERSEY SUPREME COURT.

HARRY F. SMITH,)
Prosecutor, ()
vs. ()
THE INHABITANTS OF THE CITY ()
OF TRENTON, ()
Respondents. ()

Submitted May 15, 1914: Decided May 22, 1914.

Before Justice Trenchard.

On Certiorari.

For the Prosecutor, William E. Blackman.

For the Respondents, Charles E. Bird and Alfred Reed.

Per Curiam.

The ordinance brought up for review was enacted pursuant to the powers conferred upon the City of Trenton by P.L. 1910, p. 140, and by P.L. 1904, p. 283.

The sole objection to the ordinance has been disposed of in an opinion this day filed in Delaware River Transportation Company vs. Inhabitants of the City of Trenton.

The ordinance will be affirmed, with costs.

NEW JERSEY

HARRY F. SMITH

Prosecutor,

HAB

vs.

THE INHABITANTS OF THE CITY

THE
C

Respondents.

10

Submitted May 15, 1914: Decided May 22, 1914.

T

setti

fore

the

I.

Cha

spon

ized

20

revis

by r

of 1

2.

pow

enac

3.

spec

Pro

03

OPINION.

(Filed May 22, 1914.)

NEW JERSEY SUPREME COURT.

DELAWARE RIVER TRANSPORTATION COMPANY,	}
<i>Prosecutor,</i>	
vs.	}
INHABITANTS OF THE CITY OF TRENTON,	
<i>Respondents.</i>	

Submitted May 15th, 1914; decided May 22d, 1914.

SYLLABUS.

10

The act known as the "Hennessy Act" (Chap. 144, P. L. 1914), approved April 9th, 1914, did not divest the city of Trenton, which had theretofore adopted the "Walsh Act" (P. L. 1911, p. 462), of the powers conferred upon the city by the "Harbor Act" (P. L. 1911, p. 233), since the "Hennessy Act," in so far as it provides that all municipalities that have adopted the Walsh Act, "shall not be subject to any laws of this State except laws applicable to all municipalities of this State other than counties and school districts," contravenes Art. 4, par. 7, par. 11, of the Constitution prohibiting special laws regulating the internal affairs of municipalities.

20

On certiorari.

Before Justice Trenchard.

For the prosecutor, *Peter Backes* and *Gilbert Collins*.For the respondent, *Charles E. Bird* and *Alfred Reed*.

The opinion of the court was delivered by

TRENCHARD, J.

This writ brings up for review proceedings taken on behalf of the City of Trenton for the condemnation of lands.

30

The proceedings were taken under the grant of power to condemn lands for harbor purposes found in P. L. 1911, p. 233, known as the "Harbor Act."

The order appointing commissioners was reviewed in this court by certiorari, and was affirmed.

Delaware River Trans. Co. v. Trenton, 90
Atl. Rep. 5.

Since this affirmation the Legislature has passed the act known as the "Hennessy Act" (Chap. 144, P. L. 1914), entitled "An act to amend and explain an act entitled 'An act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by boards of commissioners or improvement commissions in this State,' approved April twenty-fifth, one thousand nine hundred and eleven; as amended as to both its title and body by an act approved April second, one thousand nine hundred and twelve." This act was approved April 9th, 1914.

20 The act which the "Hennessy Act" purports to "amend and explain" is the act known as the "Walsh Act," found in P. L. 1911, p. 462. This act provides for the government of cities, towns, townships, boroughs, villages and municipalities, by boards of commissioners; and by the terms of the act it was to apply to such municipalities as should by popular vote adopt it. The "Walsh Act" was adopted by the City of Trenton on June 20th, 1911.

30 The act thus adopted contains a provision that wherever the word "city" or "cities" appears therein it shall be construed to mean "town" or "towns," "borough" or "boroughs" or other "municipality" or "municipalities."

It also provides in paragraph 8 that cities adopting it shall have power to enact ordinances, etc., and "shall have all powers necessary for its government not in conflict with the laws applicable to all cities of this State or the provisions of the Constitution."

There was thus left in operation in the city of Trenton all pre-existing statutes thereto applicable, including the "Harbor Act" of 1911.

Later there was an amendment (see P. L. 1912, p. 643) to the title and body of this "Walsh Act." In paragraph 3 of this amending act of 1912, paragraph 4 of the "Walsh Act" was amended so as to provide that "all acts, general or special, relating to such city, shall, except so far as inconsistent with this act, apply to such city, and such city shall have and exercise the powers and duties thereby conferred or imposed." 10

The previous situation still existed, namely, that all acts which had theretofore applied to the city of Trenton were still applicable; and so the "Harbor Act" upon which the proceedings brought up rest, was in full force.

Then, on April 9th, 1914, the "Hennessy Act" was approved, the effect of which, it is insisted by the prosecutor, is to strip the "Harbor Act" of all force within the limits of the city of Trenton.

The "Hennessy Act" by paragraph 1 amends paragraph 1 of the "Walsh Act" so that it provides that all municipalities, except counties and school districts, that have heretofore adopted or shall hereafter adopt the "Walsh Act" "shall be, and are hereby declared to be, a distinct class of municipalities, and shall not be subject to any laws of this State except laws applicable to all municipalities of this State other than counties and school districts." 20

Inasmuch as the "Harbor Act" is not applicable to all municipalities, it is contended by the prosecutor that by force of the terms of the "Hennessy Act" the "Harbor Act" has ceased to be in force in the city of Trenton, or in any other city which has adopted the "Walsh Act." 30
And that is not all. It is contended with equal force that the effect is to deprive all such commission governed municipalities of the powers that they respectively theretofore had by virtue of that great body of statutes applicable only to the class of which the several municipalities were respectively members.

The language of the "Hennessy Act" is clear and unambiguous. It declares that commission governed municipalities "shall not be subject to any laws of this State except laws applicable to all municipalities." There is, therefore, no occasion for construction or interpretation, but the act must be given effect by the courts, if constitutional. On behalf of the city of Trenton it is urged that, in respect to that provision, it is unconstitutional for several reasons. I think it is un-

10 constitutional for the reason I will now state:

I think that an attempt to restrict the operation of statutes theretofore operative in the city of Trenton, and all other cities, to those cities which had not adopted the "Walsh Act," and *pro tanto* repeal those acts so far as respects the adopting cities, contravenes Art. 4, par. 7, par. 11 of the Constitution prohibiting special laws regulating the internal affairs of municipalities.

It goes without saying that the Legislature could not constitutionally have selected those cities which afterwards adopted the "Walsh Act" and legislate for them exclusively as a class. That would have been a glaring instance of special legislation.

20 The generality, in a constitutional sense, of the "Walsh Act" rested upon the clause which permitted all of a class to vote upon the question of adoption of the act.

Warner v. Hoagland, 22 Vr. 62, 72.

In re Cleveland, 22 Vr. 319.

Paul v. Gloucester County, 21 Vr. 585, 604.

30 While, however, the right of all of a class to adopt the "Walsh Act" rendered that statute general, the vote upon the question of adoption, if favorable, did not bring into existence a group of municipalities which was general for all purposes of legislation. The fact that they were governed by Boards of Commissioners did not make them a class for all purposes of legislation.

Ross v. Winsor, 19 Vr. 96.

Dobbins v. Long Branch, 30 Vr. 146.

Nor does the fact that the Legislature in the "Hennesy Act" has declared that the municipalities which adopted the act should be a class, solve the question whether all statutes applying exclusively to this group are specimens of general legislation.

The declaration by the Legislature in this instance is no more conclusive than was its creation of an artificial classification theretofore existing; and of this classification Mr. Justice Depue said, in *Wanser v. Hoos*, 31 Vr. 482, 532, when speaking of the statute in question in that case: "That the cities or municipalities to which it applies had been properly classified for general municipality purposes, does not of itself furnish a sufficient reason for sustaining such legislation. Otherwise the elaborate reasoning in *Ex parte Hayne*, 25 Vr. 25; *Mortland v. Christian* 23 Vr. 521, and similar cases was superfluous. The court should simply have said: 'These cities have been legally classified, and the Legislature may deal with their internal affairs in its discretion.' "

So in *Calvo v. Westcott*, 26 Vr. 78, Mr. Justice Garrison said (p. 80) that the classification act (P. L. 1882, p. 47) "was a mere formula, a convenient method by which to avoid the repetition of words and numerals when legislating for or interpreting enactments concerning municipalities. Beyond this it is incapable of exercising any controlling effect either upon the Legislature or the courts. * * * Its employment will not in the least degree tend to legitimize legislation otherwise vicious in a constitutional sense.

That classification can exist which will afford a foundation for generality for one class of statutes, and not for another, is conspicuous in the well known group of cases in which statutes dealing with the structure of government, although based upon a classification by population, are sustained; while statutes based on the same classification, but dealing with other questions of charter powers, have been discredited.

Now, as already observed, when a new group of adopting municipalities sprang into existence by popular vote in the several places, each member of the group retained all the powers which had been possessed by the governing body of the old municipality. Aside from the provision dealing with the structure of government merely, the body of statutory and ordinance legislation covered by the old and the new, coincided. There was no change in the physical condition or in the substantive grant of power to the municipality brought about by the change in the form of government. The only features in which the new under the "Walsh Act" differed from the old were governmental.

While it may well be that a statute changing the method of electing the Board of Commissioners, or the division of the duties of the members of the board, or in other respects affecting the machinery or government in a manner peculiar to this group would be general legislation, it is difficult to see how a statute which deals with a power common to all cities, both those which did and those which did not accept the "Walsh Act" can now be dealt with solely with respect to those which did adopt it, or in respect to those which declined to adopt it.

If the view be entertained that by the adoption of the "Walsh Act" the adopting cities become a class, so that legislation for all purposes confined to that class would be regarded as general, the result likely to flow from this view would be quite remarkable. The Legislature, instead of framing an entire charter and submitting it for adoption to a vote of a class, might, as it often does, pass a law applying to a single unimportant feature of the municipal government; and those of the class who adopted that insignificant change would spring into a class and be freed from the requirement that legislation should apply to all the old class to conform to the constitutional requirements.

For instance, an act making the mayors of cities of

the second class hold a term for five years might be submitted to cities of that class. If adopted by one city, the Legislature immediately on the heels of its adoption, could modify or destroy all the charter powers of that single city by an act applying to it alone.

So, in the present case, after the electors had voted only upon the question whether the scheme of government proposed by the new statute was likely to be wiser and more efficient than the old system, the Legislature seized upon the result of that vote to pass an act which radically changed all the powers of the new group without a popular vote and without applying the legislation to all cities invested with the powers thus affected. This, I think, was special legislation. With respect to the prosecutor's suggestion that if the view be taken that the adopting municipalities do not form a class in respect to the "Hennessy Act" it would render the scheme unalterable except by another referendum, it is sufficient to say that I do not think such result necessarily follows. Without deciding that question it may be proper to suggest that in addition to the referendum, the Legislature could pass acts including all cities of the old class from which the new group sprang, and so avoid the vice of special legislation. Moreover, as herein pointed out, it may well be that statutes affecting the machinery of government in a manner peculiar to this group of adopting cities would be general legislation.

The result is that the proceedings brought up for review will be affirmed, with costs.

JUDGMENT.

(Entered May 26, 1914.)

NEW JERSEY SUPREME COURT.

HARRY F. SMITH,

*Prosecutor,**vs.*

INHABITANTS OF THE CITY

OF TRENTON,

Respondents.

}	On Certiorari.
	Rule Affirming
	Proceedings, &c.

10

The court having heard the argument of counsel and duly inspected the Ordinance and proceedings removed by the Writ of Certiorari in this cause, and duly considered the Reasons filed—

It is Ordered that the said Ordinance and proceedings be, and the same are hereby, affirmed, with costs.

Entered May 26th, 1914.

On motion of

CHARLES E. BIRD,

Attorney of Respondent.

20

NOTICE OF APPEAL AND REASONS.

(Filed in the office of the Clerk of the Supreme Court,
May 27, 1914.)

NEW JERSEY SUPREME COURT.
APPEAL TO THE
NEW JERSEY COURT OF ERRORS AND APPEALS.

HARRY F. SMITH,
Prosecutor-Appellant,
v.s.
THE INHABITANTS OF THE
CITY OF TRENTON,
Respondents-Appellees.

On Appeal.
Notice of Appeal
and Reasons.

Charles E. Bird, Attorney of Respondents-Appellees.

Take notice, that the Prosecutor appeals from the whole of the judgment entered in this cause in the Supreme Court, on the following grounds: 10

1. Because the judgment should have been for the Prosecutor and not for the Respondents.

2. Because Chapter 144 of the Laws of 1914, approved April 9th, 1914, does not contravene Article IV, paragraph 7, paragraph 11 of the Constitution of this State.

3. Because said act is not a special law regulating the internal affairs of municipalities.

4. Because Chapter 91 of the Laws of 1910, and Chapter 150 of the Laws of 1904, upon which the respondents rely for authority to issue the bonds authorized by the enactment of the ordinance brought up for review, are made inapplicable to the City of Trenton by reason of the enactment of Chapter 144 of the Laws of 1914. 20

5. Because the respondents are without statutory power to issue and sell the bonds authorized by the enactment of said ordinance. 30

6. Because the proceedings are in divers other respects irregular, illegal, unjust and oppressive to the Prosecutor.

WM. E. BLACKMAN,
Attorney for Prosecutor.

Service of a copy of the above-stated Notice of Appeal and Reasons is hereby acknowledged this twenty-sixth day of May, nineteen hundred and fourteen.

CHAS. E. BIRD,
Counsel of Respondents-Appellees.

10

NOTICE OF APPEAL AND REASONS.

(Filed May 27, 1914.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

HARRY F. SMITH,
Prosecutor-Appellant,
vs.
THE INHABITANTS OF THE
CITY OF TRENTON,
Respondents-Appellees.

} On Appeal.
} Notice.

Charles E. Bird, Attorney of Respondents-Appellees.

Take notice, that the Prosecutor appeals from the whole of the judgment entered in this cause in the Supreme Court, on the following grounds:

1. Because the judgment should have been for the Prosecutor and not for the Respondents.
- 20 2. Because Chapter 144 of the Laws of 1914, approved April 9th, 1914, does not contravene Article IV, paragraph 7, paragraph 11 of the Constitution of this State.
3. Because said act is not a special law regulating the internal affairs of municipalities.

4. Because Chapter 91 of the Laws of 1910, and Chapter 150 of the Laws of 1904, upon which the respondents rely for authority to issue the bonds authorized by the enactment of the ordinance brought up for review, are made inapplicable to the City of Trenton by reason of the enactment of Chapter 144 of the Laws of 1914.

5. Because the respondents are without statutory power to issue and sell the bonds authorized by the enactment of said ordinance.

6. Because the proceedings are in divers other respects irregular, illegal, unjust and oppressive to the Prosecutor. **10**

WM. E. BLACKMAN,
Attorney for Prosecutor.

ACKNOWLEDGMENT OF SERVICE.

I hereby acknowledge service of a copy of the Notice **20** of Appeal in the above-entitled cause, this twenty-sixth day of May, nineteen hundred and fourteen.

CHAS. E. BIRD,
Counsel of Respondents-Appellees.

NOTICE OF ARGUMENT.

(Filed May 27, 1914.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

HARRY F. SMITH, <i>Prosecutor-Appellant,</i>	} On Appeal. Notice of Argument.
<i>vs.</i>	
THE INHABITANTS OF THE CITY OF TRENTON, <i>Respondents-Appellees.</i>	

SIR—Please take notice that I shall move the argument of the appeal filed in this cause, and for judgment thereon, before the Court of Errors and Appeals, at the State House, in the City of Trenton, on Tuesday, the sixteenth day of June, nineteen hundred and fourteen, at the opening of the court on that day, or as soon
10 thereafter as counsel can be heard.

Respectfully yours,
 WM. E. BLACKMAN,
Counsel of Prosecutor-Appellant.

To Charles E. Bird, Esquire, Counsel of Respondents-Appellees.

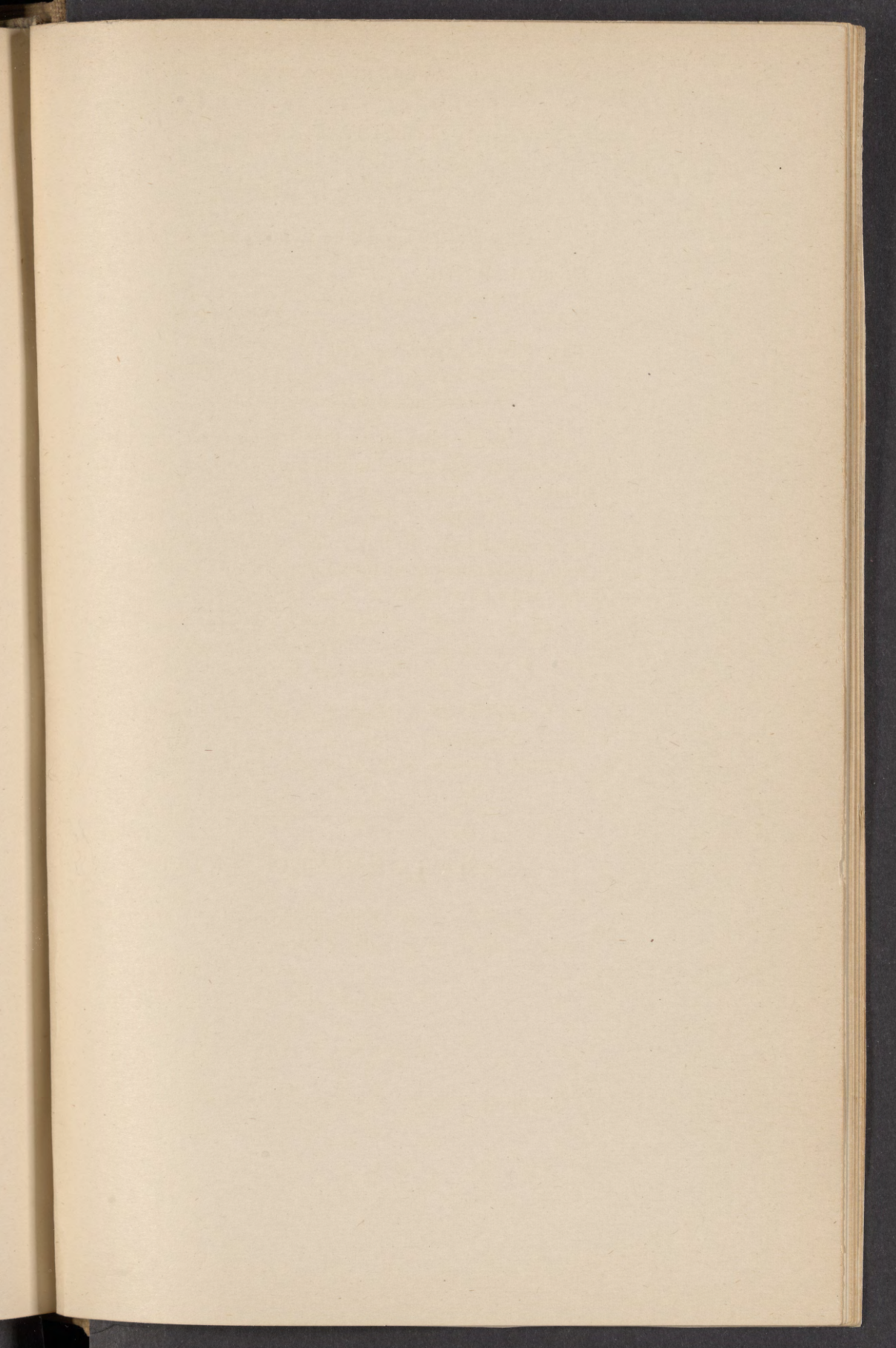
Dated Trenton, N. J., May 26th, 1914.

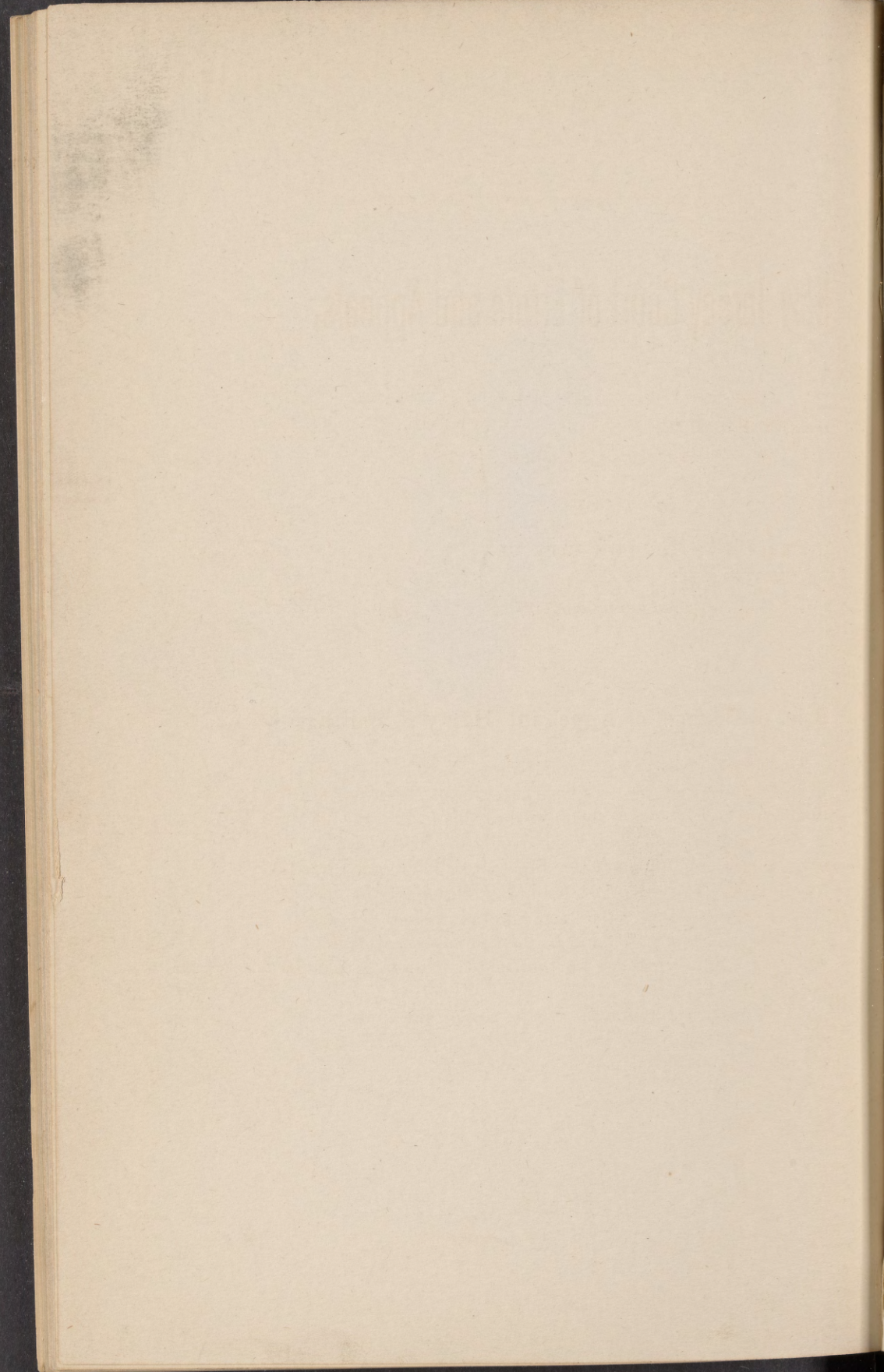
 ACKNOWLEDGMENT OF SERVICE.

20 Service of a copy of the above notice of argument acknowledged the 27th day of May, 1914.

CHAS. E. BIRD,
Counsel of Respondents-Appellees.

Common Joinder. Filed May 28th, 1914.





New Jersey Court of Errors and Appeals,

HARRY F. SMITH,
Prosecutor-Appellant,

vs.

INHABITANTS OF THE CITY OF
TRENTON,
Respondents-Appellees.

Brief of Counsel of Appellant, Harry F. Smith.

The constitutionality of the Hennessy Law will be defended by counsel for the Delaware River Transportation Company in cases to be argued at this term. So far as the power of the city to issue bonds is concerned, the opinion rendered to the City Treasurer of Trenton, by the firm of Hawkins, Delafield & Longfellow, of the New York bar, applies to the question raised by the prosecutor in this case, and I therefore present it for consideration. In discussing that question those gentlemen said:

“The questions involved are so important and far-reaching, that we deem it desirable to explain with care the reason for the conclusions reached by us.

"In this opinion we shall refer to the act relating to, regulating and providing for the government of cities, &c. (*P. L. 1911, chap. 221*), with all amendments enacted prior to 1914, as the Walsh act, and we shall refer to the amendatory act, approved by the governor on April 9th, 1914 (*P. L. 1914, chap. 144*), as the Hennessy act.

10 "It has been urged that the effect of the enactment of the Hennessy act has been to affect the power of those municipalities which have accepted the Walsh act to borrow money and to issue long-term negotiable bonds therefor. The question to be considered is whether, in view of the Hennessy act, we can give an unqualified opinion affirming the validity of the street improvement bonds of the City of Trenton above referred to.

"In approaching this question it is necessary that attention should be given to certain provisions to be found in section 4 of the Walsh act. The provisions thus referred to are as follows:

20 "4. The board of commissioners shall have and possess all administrative, judicial and legislative powers and duties now had and possessed and exercised by the mayor and city council and all other executive or legislative bodies in said city, and have complete control over the affairs of the city adopting the provisions of this act. * * *

30 "The corporate existence of any city accepting the provisions of this act shall be continued, and its corporate name and seal shall not be changed by such acceptance, and all acts, general or special, relating to such city, shall, except so far as inconsistent with this act, apply to such city, and such city shall have and exercise the powers and duties thereby conferred or imposed.' (This paragraph was added to the original act by *P. L. 1912, ch. 366.*)

"The provisions thus quoted thus clearly indicate that prior to the Hennessy act it was the intention of the legislature that any municipality which should accept the Walsh act should possess all of the powers thereto-

fore vested in it by any statute, whether local or special on the one hand, or general on the other, except in so far as the exercise of such powers was inhibited either expressly, or by necessary implication, by the terms of such act.

“But these provisions did not operate as a re-enactment of such statutes, or add anything to their legal force or effectiveness. They operated as an express declaration that such statutes remained applicable to the particular municipality and that was all. Such statutes were in many instances purely local or special—as for instance city charters enacted before the constitutional amendment of 1875—and, of course, under such constitutional amendment, it was not competent for the legislature to breathe new life or effectiveness into any statute which it was powerless to enact. Such special and local statutes were valid because enacted before the constitutional amendment, and they remained effective until repealed. But, at the time when the legislature enacted the Walsh act, it had no power to re-enact such special or local statutes. Such provisions must be viewed, therefore, as mere saving clauses inserted in the Walsh act to avoid any possible contention that the enactment of that statute had deprived the municipalities which accepted it of their pre-existing powers. They cannot be construed as a new and independent grant of powers to such municipalities.

“Section 8 of the Walsh act (as amended by *P. L. 1912, ch. 366*), did contain a certain very general grant of power and a proviso. The pertinent portions of that section, as they stood immediately prior to the Hennessy act, were as follows:

“Sec. 8. All cities adopting the provisions of this act shall be and are hereby vested with the general powers and authority to enact and enforce by imposition of reasonable fines or by imprisonment or both all ordinances necessary for the protection of life, health and property; to declare and prevent and summarily to abate nuisances; to preserve and enforce the good government and general welfare, order and security of such city, and

shall have all powers necessary for its government not in conflict with the laws applicable to all cities of this state or the provisions of the constitution. Provided, however, that no ordinance or resolution increasing the net bonded indebtedness of the city to a sum in excess of fifteen per centum of the assessed valuation of all property within said city shall be valid unless the same shall be first submitted, by a special election, to the voters of the city and receive the approval of a majority
 10 of the voters actually voting at such election.' * * *

“Of the proviso, thus quoted, limiting the bonded debt, it may be observed that since power to issue bonds was conferred upon most, if not all, of the municipalities of the state by earlier statutes which remained unaffected by the Walsh act, such proviso had a legitimate function to perform in limiting the exercise of such power, and its insertion in the Walsh act (as originally enacted) affords no basis for the implication that the very general
 20 grant of power to be found in the Walsh act itself is to be construed as supplying legislative authority for the issue of such bonds. That some power was conferred upon such municipalities as should accept the Walsh act by the earlier sentences of the section from which we have quoted, is undoubtedly true, and we shall consider the effect of such sentences (as amended and re-enacted by the Hennessy act), in a later portion of this opinion.

“It is, however, a fact, that until the enactment of the Hennessy act, all earlier statutes applicable to such municipalities as accepted the Walsh act, remained in full
 30 force; that all powers exercised by such municipalities (including the power to issue bonds) were believed to rest upon such earlier statutes, and that the Walsh act was viewed both by the courts and by the bar as a statute creating new governmental machinery for such municipalities as should accept it, and not as a grant of municipal power.

“Thus, notwithstanding the general grant of power contained in the Walsh act, the Supreme Court of New Jersey held that the commission of the City of Trenton

could not elect a city clerk for an indefinite term because, under an earlier statute, a definite term of three years was given to that officer. *Salter v. Burk*, 83 *Atl. Rep.* 973. Justice Voorhees, who wrote for the court, said:

“But the terms of the act disclose that it was not intended in any sense to be a charter or grant of municipal power, except in a most general way. The management of municipal affairs is intrusted to a board of commissioners, but it largely leaves the mechanism of the city’s government and the provisions of the charter untouched. 10
It does not alter general laws or charter provisions relating to the government of the city, except when inconsistent with its provisions. Its effect is to impose upon the board of commissioners the duty to fill existing offices, made vacant by the adoption of the act and the organization of the board, under the laws and ordinances then in existence. Authority for this statement is sufficiently contained in the above-noted sections of the act. That the city clerk to be hereafter elected by the commissioners must be elected for a term of three years must therefore 20
be conceded; for neither the statute of 1900, above cited, nor the act of 1911, page 679, making the term three years, and until a successor shall be appointed and qualified, was legislation inconsistent with the Walsh act. Hence an unqualified election of a city clerk would have constituted the selected person such for the term then prescribed by law, namely, three years.’

“And, in *Istvan v. Naar* (85 *Atl. Rep.* 1012), it appears to be held that the Trenton commission elected under the Walsh act, although authorized to make the necessary appointments, had no power, under the Walsh act, 30
to abolish the local board of health provided for by *P. L.* 1887, p. 83 (2 *Comp. Stat.*, p. 2662).

“The effect of the Hennessy act, approved by the governor on April 9, 1914, next invites consideration.

“The act begins with a preamble reciting that it was the intention of the Walsh act to provide for a new and distinct class of municipalities in this state and to give such municipalities the benefits of home rule with power

to do any act or thing which the governing body thereof might deem necessary or desirable, unless forbidden by the constitution of this state or by laws applicable to all municipalities of this state * * * but doubts have arisen as to whether the language of said act sufficiently expresses such intention.'

"It then proceeds to amend section 1 of the Walsh act by adding at the end thereof the following sentence which refers to all municipalities in the State of New Jersey
 10 which may have adopted, or shall hereafter adopt, the Walsh act, namely: 'Such municipalities shall be, and are hereby declared to be, a distinct class of municipalities, and shall not be subject to any laws of this state except laws applicable to all municipalities of this state other than counties and school districts.'

"Section 2 of the Hennessy act then proceeds to amend section 8 of the Walsh act. The material portion of such section, as thus amended, is as follows:

"'8. All cities adopting the provisions of this act shall
 20 be and are hereby vested with the general powers and authority to enact and enforce by imposition of reasonable fines or by imprisonment or both all ordinances necessary or proper for the protection of life, health and property; to declare and prevent and summarily to abate nuisances; to secure, advance, preserve and enforce the good government and general welfare, order, prosperity and security of such city; and shall have all powers which it shall deem necessary or convenient for its government or for its welfare and prosperity not in
 30 conflict with the laws applicable to all cities of this state or the provisions of the constitution; which powers shall be exercised by the board of commissioners subject to the provisions of this act. Provided, however, that no ordinance or resolution increasing the net bonded indebtedness of the city to a sum in excess of fifteen per centum of the assessed valuation of all property within said city shall be valid unless the same shall be first submitted, by a special election, to the voters of the city and receive the approval of a majority of the voters actually voting at such election.'

“Assuming the constitutionality of the Hennessy act, we can see no escape from the conclusion that the amendment (first above quoted), which it has engrafted upon section 1 of the Walsh act, renders inapplicable to such municipalities as have adopted the Walsh act, all earlier statutes, whether general or special, except such as are applicable to all municipalities of the state other than counties and school districts. Thus, for instance, in the case of the City of Trenton, which has accepted the Walsh act, it seems clear that its charter, which is a local act, 10 has been superseded, and the Street Improvement act of 1898 (*P. L.* 1898, *p.* 466), under which it was proposed to issue these bonds, which is a general statute but relates to less than all of the municipalities in the state, has been rendered inapplicable, whereas the Water Supply act of 1910 (*P. L.* 1910, *p.* 546; *Comp. Stat.*, *p.* 5803), which is a general statute, applicable to all of the municipalities of the state, is unaffected by such amendment, and is expressly declared to be applicable by these sentences of the fourth section of the Walsh act, which we 20 have quoted earlier in this opinion.

“Therefore, in order to ascertain whether any municipality that has accepted the Walsh act has power to borrow money and issue municipal bonds, we must inquire:

“First—Whether such power is conferred upon the municipality by a statute applicable to all municipalities of this state other than counties and school districts, or, if there be no such statute;

“Second—Whether such power is conferred upon such municipality by the terms of the Walsh act as amended 30 by the Hennessy act.

“If a statute, ‘applicable to all of the municipalities of the state other than counties and school districts’ (such, for instance, as the Water Supply act of 1910), authorizes all such municipalities to borrow money and to issue bonds, there can be no question that a municipality subject to the Walsh act may exercise such powers, and we can see no reason why such bonds should not be approved.

“The difficulty arises in those cases where there is no such statute. In such cases we are confronted, first, by the question whether the Walsh act (as amended by the Hennessy act), contains within its four corners a grant of authority to borrow money and to issue bonds; and, second, by the further question whether, even if it is believed that the courts may ultimately find that such power exists, it can be said that the proposition is so clear that we can unqualifiedly state to investors that such bonds
10 are, in our opinion, legal and binding obligations.

“Upon a most casual inspection of the Walsh act as amended by the Hennessy act, it will be seen that no express power to borrow money or to issue long term negotiable bonds is conferred upon such municipalities as have subjected themselves to its operation, and if any power to borrow money and issue negotiable bonds is to be found in the Hennessy act, it can only be because of some implication raised by the language of the proviso with which section 8 concludes. The proper function of
20 a proviso is to limit an earlier grant of power. A proviso is not a grant of power, but a grant of power may be implied from a proviso, in those cases where, in the absence of such implication, the limitation of the proviso would be meaningless. In this case, however, the proviso has a legitimate office to perform as a limitation upon the bond issuing capacity conferred upon the city by those general laws, applicable to all municipalities, which are not rendered inapplicable by the Hennessy act. Therefore, the insertion of this proviso does not give rise
30 to a necessary implication that it was the intention of the statute that municipalities subject to its terms might issue negotiable bonds whenever they saw fit. Moreover, the proviso was re-enacted without change from the Walsh act, and the re-enactment of such a provision is not ordinarily construed as enlarging its legal effect.

“In considering the effect of the Hennessy act it must be remembered that statutes granting powers to municipal corporations are strictly construed; that no powers are conferred by such a statute except such as are granted

in express terms or by necessary implication; that the power to borrow money and the power to issue negotiable bonds are not inherently municipal powers, and that the existence of any doubt whether the legislature intended to grant such powers is fatal to their existence.

“The rule was announced by the Supreme Court of New Jersey in *Town of Hackettstown v. Swackhamer* (37 N. J. L. R. 191). In his opinion—as if foreseeing the exact language used in the Hennessy act—Chief Justice Beasley wrote:

“I am at a loss to perceive how it can be inferred that a power to borrow money is an appendage to the usual franchises given to municipal corporations. Such a right cannot, in any reasonable sense, be said to be necessary within the meaning of that term as clearly defined.”

“And in *Knapp v. Hoboken* (39 N. J. L. Rep. 394), Justice Depue cited the foregoing case and also *Mayor v. Ray* (19 Wall. 468), and said: ‘In both these opinions ground is taken decidedly against the power of municipal corporations to invest their obligations with the character and incidents of commercial paper so as to render them, in the hands of *bona fide* holders, unassailable by defences to which they would be subject in the hands of the immediate parties unless such power is conferred by legislative enactment, either express or clearly implied.’

“Again, in *Brenham v. German-American Bank* (144 U. S. 173), where a city had express legislative authority ‘to borrow for general purposes,’ the Supreme Court of the United States held that the grant of such power did not imply the power to issue negotiable bonds, Mr. Justice Blatchford writing: ‘It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and, under the well settled rule that any doubt as to the existence of such power must be determined against its existence, it ought not to be held to exist in the present case.’ The same doctrine is stated in most emphatic terms in *Dillon, Mun. Corpor.* (5th ed.), ss. 289, 290.

10

20

30

“We are of the opinion that, even if the constitutionality of the Hennessy act be assumed, it cannot be said to contain a clear grant of power to borrow money and to issue negotiable bonds, and the existence of such doubt necessarily precludes the ability to give an unqualified opinion that any such bonds issued under such statute are valid.

“It may well be that if section 8 of the Walsh act, as amended by the Hennessy act, is found free from the
 10 taint of unconstitutionality, the courts of New Jersey will hold that it operates as a grant of all inherently municipal powers, but, as we have pointed out, the power to borrow money and the power to issue negotiable bonds are not powers which are inherent in municipal corporations. Moreover, it must be remembered that many of the purposes for which municipalities have been authorized to borrow money by the statutes now rendered inapplicable—such, for instance, as the construction of municipal markets, the building of docks and the improve-
 20 ment of harbors—are not inherently municipal purposes, and, in such cases, we can see no reasonable ground for the belief that the power to borrow money and issue bonds may be implied.

“It is true that, after granting certain police powers and such powers as are essential to the general welfare, the section under consideration declares that any municipality affected by it ‘shall have all powers which it (the municipality) shall deem necessary or convenient for its government or for its welfare and prosperity not in
 30 conflict with the laws applicable to all cities of this state or the provisions of the constitution; which powers shall be exercised by the board of commissioners subject to the provisions of this act.’

“Reading this section in connection with the title and the preamble of the act, it might be claimed that it was the intention of the legislature to delegate to such municipalities the power to grant themselves power to such extent as such municipalities deemed it ‘necessary or expedient’ to possess such powers. If such was the actual

intention of the statute, it is clearly unconstitutional. *Booth v. McGuinnis*, 75 *Atl. Rep.* 455. Under the constitution of New Jersey the legislature may leave it to the electors of a municipality to determine whether they will accept the provisions of a general statute granting powers; or it may, by a general statute, grant powers to municipalities and leave it optional with the municipalities whether to exercise such powers or not; but it cannot delegate to a municipality the legislative function of granting powers to itself. Such a result can only be effected by a constitutional amendment. And the fact that, on April 9th, 1914, a concurrent resolution was adopted providing for a constitutional amendment granting extraordinarily wide powers to adopt 'home rule' charters to the inhabitants of municipalities indicates that the legislature was aware of the fetters placed by the present constitution upon its power to delegate its legislative functions. 10

"It is not to be assumed, of course, that, in enacting the Hennessy act the legislature intended to transcend its powers, and if it be possible to disregard the exact phraseology of that act and to construe the provision which we have quoted merely as evincing a legislative intention to grant entire latitude of action to the municipality within the limits of the powers elsewhere conferred upon it, we think that such construction must be preferred. It is possible, however, that the courts may feel bound by the exact phraseology of the act, and, if so, the strong probability that such construction would lead to a declaration that the statute is unconstitutional imparts an additional element of doubt and uncertainty. For it would be possible to condemn section 8 as being unconstitutional while still supporting the repealing provisions of section 1 (as amended by the Hennessy act) as a valid exercise of legislative authority. 20 30

"The conclusions reached by us are as follows:

"First—That the Hennessy amendment of the Walsh act probably renders the 'act to authorize the improvement of streets and highways,' &c. (*P. L.* 1898, *p.* 466), inapplicable to the City of Trenton.

“Second—That there is probably no statute other than the act of 1898, above referred to, which confers power upon the City of Trenton to issue the bonds now in question.”

Respectfully submitted,
WILLIAM E. BLACKMAN,
Counsel of Prosecutor-Appellant.

