NEW JERSEY

Court of Errors and Appeals.

THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, ex rel. RALPH D. EARLE, JR., *Relator-Appellant*, *vs.* HENRY W. DURHAM, *Respondent.*	*On Appeal from Supreme Court.*

Brief for Appellant.

STATEMENT OF THE CASE.

This is an appeal by the relator, in quo warranto, from a judgment of the Supreme Court rendered in favor of the respondent, upon demurrer to the information.

The fundamental question involved is whether the statutory term of relator for five years, beginning April 7, 1913, in the office of county engineer created by the Road Act (P. L. 1912, ch. 395, sec. 12)—in each county where that Act became applicable, the appointment to which was by the Act vested in the Board of Chosen Freeholders of such County—was cut short by the organization on the first Monday of January, 1916, of a board of chosen freeholders of the County of Bergen elected at the general election in November, 1915, under the Small Board of Freeholders Act (P. L. 1912, ch. 355), adopted in Bergen County at the general election held in November, 1914. If such term was under section 6 of the last named Act cut short, then the appointment of the respondent (for a term

of one year) was legal; otherwise it was not and the relator should have prevailed in the Supreme Court.

The answer to this question requires consideration of the following inquiries:

(1). Does the *title* of the Small Board of Freeholders Act constitutionally extend to the curtailing of terms of officers?

(2). Does the *Act itself* (in section 6) extend to statutory terms of officers?

(3). Does said Act (in section 6) extend any further than to the appointees of the particular Board superseded by the Board elected thereunder?

(4). Is the office of county engineer created by the Road Act within the purview of section 6 of the Small Board of Freeholders Act?

(5). Is not the Road Act in its final form as approved April 15, 1912, paramount to the Small Board of Freeholders Act, approved in its present form April 1, 1912, so far as relates to the office of county engineer?

GROUND OF APPEAL.

The Supreme Court sustained the respondent's demurrer to the information of the relator and gave judgment in favor of said respondent on said demurrer; whereas none of the grounds assigned in said demurrer were sufficient to sustain the same, and said Court should have overruled said demurer and should have given judgment of ouster on said information in favor of the relator and against the respondent.

BRIEF OF THE ARGUMENT.

Prefatory.

I first present chronologically the legislation involved in the case.

There is no provision in any general Act affecting counties (or any class of counties) or boards of chosen freeholders for the appointment of a county engineer. Such an appointment is only authorized under section 4 of the laws of 1885, page 136, as amended in 1886 (P. L., p. 301; Comp. Stat., 503, pl. 108), which reads as follows:

> "Sec. 4. That each and every board of chosen freeholders of the respective counties in this State shall have power to appoint such officers, agents and employes as may be required to do the business of such county, and fix their compensation and term service * * * ."

The Act of 1893 (P. L., p. 417; Comp. Stat., 507, pl. 123), requiring bond from certain officers or employes of a county includes a county engineer, if there be one, but does not create any such office.

In 1902 (P. L., p. 65) was enacted the first Small Board of Freeholders Act, commonly called the "Strong" Act, which provided, if adopted in any county, for a reorganized board of chosen freeholders with reduced membership and for the cutting short of the terms of county officers upon the reorganization of the first board elected under the Act and the appointment of successors for terms of one year only—amended in 1906 (P. L., p. 537) so as to make any subsequent appointments for a two year term. This provision as to officers was judicially held not to be within the title of the Act, but may have been brought within an amended title by Chapter 199

of the Laws of 1909, approved April 20, 1909 (P. L., p. 291), (*Patterson v. Close, 55 Vr., 319*), though this at least doubtful (see infra). On the same day, namely, April 20, 1909, by Chapter 220 of the Laws of that year, there was approved an amendment to "An Act to provide for the permanent improvement of public roads in this State (Revision of 1905)," wherein for the first time appeared a provision for the appointment of a county engineer. Both acts were to take effect immediately, and it is arguable that they are to be considered *in pari materia;* but I take it that for the purpose of inquiry into paramountcy the provision of the Strong Act as to offices is to have relation to the date of its enactment in 1902 (amended in 1906) rather than to the date it perhaps became constitutional. If this be so, the provision of the Road Act as to county engineer is subsequent and paramount to the provision of the Strong Act as to offices. This inquiry is probably unnecessary, because both acts were revised in 1912 and the revised Road Act containing special provisions as to county engineer is unquestionably later in enactment than the revision of the Strong Act, commonly called the "Gill Act"—of which more hereafter

The provision of the Road Act as amended in 1909 is as follows:

> "11. After the first county road shall have been constructed under this act in any county, it shall be the duty of the board of chosen freeholders to appoint some suitable person as county supervisor of roads, and a qualified civil engineer as county engineer, who, before assuming the duty of their offices, shall each make and subscribe an oath or affirmation that he will faithfully perform all the duties of his office to the best of his ability and understand-

ing. Such supervisor and engineer shall hold their offices for three years and until a successor is appointed and qualified. Each shall give bond to the board of chosen freeholders in the penal sum of one thousand dollars, conditioned for the faithful performance of the duties of this office, with such surety or sureties as the board shall approve, and shall receive such compensation for his services as the said Board shall determine. Nothing in this act contained, however, shall affect the term of office of any county engineer having a term of office prescribed by statute. Said supervisor may be submarily dismissed at any time by the board of chosen freeholders or the State Commissioner of Roads whenever in its or his judgment such supervisor is incompetent or neglectful in the performance of his duties, in which event the board of chosen freeholders shall immediately appoint a new supervisor to hold for the unexpired term of the supervisor so discharged. * * *"

On April 1, 1912 (P. L., p. 619), there was approved a revision of the Strong Act—above referred to as the Gill Act — under the same title as that enacted in 1909. This revision, after providing in Section 2 for an organization, on the first Monday of January after the election of chosen freeholders in a county that has adopted the Act, of the board elected under the Act, and (in Section 4) for the expiration of the terms of the previous incumbents provides as follows (precisely as in the original Strong Act):

"6. The terms of office of all officers then holding office under appointment by the board of chosen freeholders existing in any county at

the time of the reorganization of said board under this Act in such county, shall expire with the termination of office of the members of such previous board as aforesaid, notwithstanding that such officers may have been appointed for a longer term; and all offices filled by appointments by such previous boards shall then become vacant; and the boards of chosen freeholders constituted or elected under the provisions of this Act shall forthwith, upon their organization, fill the offices hereby vacated, for the term of one year only. * * *"

On April 12, 1912 (P. L., p. 809), there was approved Chapter 395, being a revision of the Road Act. Section 12 thereof is as follows (the changes in the former Act as above quoted made by this new Act are thus indicated, namely: omissions in brackets, changes and additions in italics:)

"12. After the first county road shall have been constructed under this act in any county, it shall be the duty of the board of chosen free holders to appoint some suitable person as county supervisor of roads and a qualified civil engineer as county engineer, and each of whom, before assuming the duties of his office, shall make and subscribe an oath or affirmation that he will faithfully perform all the duties of his office to the best of his ability and understanding. Such supervisor and engineer shall hold office for *five* years and until his successor is appointed and qualified. Each shall give bond to the board of chosen freeholders in the penal sum of one thousand dollars, conditioned for the faithful performance of the duties of his office, with such surety or sureties as the board shall approve, (and shall receive such compensation for his services as the said board shall

determine. Nothing in this act contained, however, shall affect the term of office of any county engineer having a term of office prescribed by statute). *The said engineer shall receive such compensation for his services as the said board shall determine and said supervisor shall receive a salary and allowance for expenses, both fixed by said board, but said compensation or salary is not to be reduced during the said engineer's or supervisor's term of office.* The said *engineer or* supervisor may be (summarily) dismissed at any time by (the board of chosen freeholders or the state commissioner of roads whenever in its or his judgment such supervisor is incompetent or neglectful in the performance of his duties, in which event the board of chosen freeholders shall immediately appoint a new supervisor to hold for the unexpired term of the supervisor so discharged). *The governing body after a proper hearing upon proof sustaining to the satisfaction of said body charges preferred by the said body or the State Commissioner of Public Roads for incompetency, neglect, disability or other cause; provided, however, that the said engineer or supervisor shall have the right to appeal to the State Highway Commission for hearing, review and final adjudication, from any order of dismissal, within fifteen days of the adoption thereof. In the event of such dismissal the said board shall immediately appoint a new engineer or supervisor to hold for the full term of five years from date of appointment* * * *."

By Chapter 396 of the Laws of 1912 (P. L., p. 828), approved the same day as the last stated revision, it was provided in section 11 that the State Commissioner of Public Roads might employ resident

engineers, who should be whenever practicable consistent with efficiency the county engineers of several counties, and should make a written agreement with the board of chosen freeholders of the county defining the service duties of such engineer, fixing his compensation and the relative parts of the same to be paid by the county and the State, and that such service might be per year or part or parts thereof as need might require.

In the present case the information alleges that, a county road having been constructed in Bergen County, the Board of Chosen Freeholders on April 7, 1913, under Section 12 of Chapter 395 of the Laws of 1912, appointed the relator as County Engineer of the County of Bergen, for the term of five years, and until his successor should be appointed and qualified, at a salary of $5,000 a year, payable in equal monthly instalments, and the relator accepted the office, made and subscribed the statutory oath, which was duly filed, gave bond in a thousand dollars, approved by the Board of Chosen Freeholders of the County, assumed the duties of his office and continued in the performance thereof until ousted by the defendant. The information further alleges that on April 8, 1913, the relator was designated, under Chapter 396 of the Laws of 1912, by the State Commissioner of Public Roads, as Resident Engineer for the County of Bergen, and that on April 21, 1913, the relative parts of the compensation to be paid by the County of Bergen and the State of New Jersey, were agreed upon between the Commissioner of Public Roads and the Board of Chosen Freeholders by this resolution of the date last named.

The information, admitting that Chapter 355 of the Laws of 1912 (the Gill Act), was adopted in

Bergen County, at the election held in November, 1914, and that chosen freeholders were elected thereunder in November, 1915, and organized as a Board on January 3, 1916, further alleges that on the date last named the Board of Chosen Freeholders of the County of Bergen, under color of Chapter 355 of the Laws of 1912, undertook to appoint the defendant County Engineer of the County of Bergen, and that the defendant has ousted relator from such office and is in possession thereof.

The information submits, as a matter of law, that the provision of Section 6 of Chapter 355 of the Laws of 1912 (the Gill Act), is not applicable to the appointment of relator as county engineer, under Section 12 of Chapter 395 of the Laws of 1912, and charges that the defendant usurps relator's office.

To this information the defendant demurred, and the Supreme Court sustained the demurrer.

ARGUMENT.

I.

The title of the Small Board of Freeholders Act does not constitutionally extend to the curtailing of terms of officers.

Concededly the original title did not so extend. The question is whether the title as amended and now extant in the revised Act is sufficiently comprehensive. I submit that the question is still open in this Court. The title of the original (Strong) Act (P. L. 1902, p. 65), was as follows:

"An act to reduce the number of members

> of the Boards of Chosen Freeholders in counties of this State, and to fix the salaries and provide for the election of the members of said boards."

The provisions of the Act were adopted in Monmouth County in 1905, and the first Board thereunder was elected in 1906 and organized the first Monday in Jannary in 1907.

In 1909 the title of the Act was amended (P. L. 1909, p. 294), so as to read as follows:

> "An Act to reorganize the Boards of Chosen Freeholders in the several counties of this State, reducing the membership thereof, fixing the salaries, and providing for the election and terms of office of the members and also for the appointment and terms of office of officers appointed by such boards."

This title was retained in the Revision of 1912 (Gill Act—P. L. 1912, p. 619).

A controversy arose in Monmouth County in 1911 as to the office of Clerk of the Board of Chosen Freeholders of that county, and Section 6 of the Strong (now Gill) Act was invoked by one of the contestants on the claim that the term of the incumbent had thereby been made to expire. The Supreme Court held that the original title of the Strong Act did not embrace its sixth section, and that the Act of 1909 attempting to enlarge such title by amendment was itself defective (under Sawter v. Shoenthal, as decided in this Court), because *its* title did not express its object. *Patterson v. Close, 53 Vr., 160.* On writ of error the judgment of the Supreme Court was affirmed for the reason that the only time the sixth section of the

act could have operated was in January, 1907, at the time of the organization of the Small Board first elected after the adoption of the act in Monmouth County. *Patterson v. Close*, *55*, *319*. Incidentally, Trenchard, J., declared that the reversal of Sawter v. Shoenthal led to the conclusion that the title of the Act of 1909, amending the title of the Strong Act, was constitutionally sufficient; but this was *obiter dictum*; and I doubt very much whether the criterion set up by the Court of Errors and Appeals in the Sawter case was met by the attempted amendment of the title of the Strong Act; but that we need not pause to consider. The Sawter case in E. and A. was erroneously cited by Justice Trenchard. The two decisions are 52 Vr., 197, and 54 Vr., 499.

The dictum of Justice Trenchard was as follows:

> "The Supreme Court was constrained by the authority of Sawter v. Shoenthal, 52 Vroom, 197, to hold that the act of 1909 was not effectual to cure the invalidity of section 6 of the act of 1902. But since the rendition of the opinion in the Court below the case upon which it relied has been reversed in this Court. 53 (54) Id., 499. Upon the authority of that case in this court we hold that the title of the act of April 20th, 1909, sufficiently states the object of the legislation. Upon the authority of the same case we also hold that, upon the taking effect of the act of 1909, section 6 of the act of 1902 became for the first time a valid and constitutional amendment."

This dictum was entirely unnecessary, for even if section 6 had become constitutional in 1909, it was not operative in 1911 as far as Monmouth County was concerned, as Justice Trenchard went on to

demonstrate; and this really was all that was decided by the Court.

Without taking time to discuss whether the first part of the dictum was justified, it seems to me clear that the second part was not, and that Sawter v. Shoenthal afforded no authority therefor. All that could possibly have been argued from Sawter v. Shoenthal would have been that the title of the Strong Act had been constitutionally amended; on the question of whether such amended title fully embraced section 6 of the Strong Act, Sawter v. Shoenthal threw no light whatever. The question being open, I respectfully submit that a title declaring as an object of the enactment "the appointment and terms of office of officers appointed" by such boards, i. e., boards of chosen freeholders to be elected under the Strong Act, does not embrace a provision that existing terms of office shall expire and the offices become vacant. All that the title indicates is that provision is to be made for appointment of officers and the fixing of their terms. This would include new offices to be created by the act and the fixing of terms therefor, and also the appointment to offices that should become vacant and perhaps fixing new terms therefor; but I cannot see how it would extend to the declaring vacant of existing offices, or the cutting short of existing terms of office.

It may be argued that my line of reasoning would prevent the cutting short of the terms of *members of the Board* under Section 5, but this is clearly not so, for whatever may be said as to the original title, the title as amended in 1909 and preserved in 1912 is ample to support Section 5; and I think indeed that the original title would suffice to that end. There could be no reorganization of a Board of Chosen Freeholders by a reduction of

membership without interference with the pre-existing board, but as to appointive officers the case is quite different. In the present case considerable stress was laid by counsel for the respondent in brief and oral argument upon this gratuitour remark of Justice Trenchard in *Patterson v. Close, 55 Vr., 319, 324*, "In other words, the purpose was that there should be a 'clean sweep,' not only of the boards elected under the old system, but of their appointees." Such may possibly have been the purpose of the enactment of Section 6; but such purpose or "object," to use the constitutional word, was not expressed in the title of the act.

There is little analogy between the Strong Act, (or its revision, the Gill Act), and the Walsh Act (P. L. 1911, p. 462), applicable to municipalities; for the provision of Section 2 of the Walsh Act that "the terms of all councilmen or aldermen and all other officers, whether elective or appointive, shall immediately cease and determine" is clearly within the broad title: "An Act relating to, regulating and providing for the government of cities, towns, boroughs and other municipalities within this State;" while the title of the legislation now *sub judice*, as pointed out by Gummere, C. J., in *Patterson v. Close, 53 Vr., 160, 162, 163*, is carefully restrictive.

II.

Section 6 of the Small Board of Freeholders Act does not extend to statutory terms of officers.

The language is that

> "The terms of office of all officers then holding office under appointment by the board of chosen freeholders existing in any county at the time of the re-organization of said board under this act in such county, shall expire with the

termination of office of the members of such previous board as aforesaid, notwithstanding that such officers may have been *appointed for* a longer term."

The term of office of chosen freeholders under P. L., 1905, page 14, begins on January 1 of each year, while the organization meeting of a board organized under the Small Board of Freeholders Act is the first Monday in January. The annual meeting of boards of chosen freeholders remained unchanged by the Act of 1905. *Wright v. Campbell, 45 Vr., 609.* It might well be that an outgoing board, at its previous annual meeting or some subsequent meeting, had appointed an officer for a term co-extensive with its own normal official life, and the purpose of section 6 of the Small Board Act was to cut short terms of that character, not terms *fixed by statute*, as to which the language would be inept. It seems to me that when an appointment to an office with a statutory term falls due it is the right and duty of the board of chosen freeholders in office at that time to fill it, and that the office will not become vacant under Section 6 of the Small Board Act upon the organization of a board of chosen freeholders under that statute. The reason for the enactment of Section 6 of the Small Board Act does not apply to such a case. At the oral argument in the Supreme Court the Chief Justice called attention to the use of the phrase "longer term" in Section 6 as indicating a fixed term either statutory or by delegation of power. I think that the word "term" was used in the section in a colloquial sense as the equivalent of *time*, because it is inconceivable that the Legislature had in contemplation only officers whose terms would expire on the first Monday in January, which the word "longer" would imply if

"term" were used technically. The language is that "the terms of office * * shall expire * * notwithstanding that such officers may have been appointed for a longer term." This implies that the "term" in contemplation was one fixed by the appointing power, because it says "notwithstanding that such officers *may have been appointed* for a longer term"—an inappropriate expression to denote a statutory term. Appropriate language for that purpose would have been "notwithstanding the terms of such officers would otherwise extend beyond that time." Language somewhat similar to this was used in Section 5 with respect to the terms of members of the board.

III.

The Small Board of Freeholders Act (in section 6) does not extend any further than to the appointees of the particular Board superseded by the board elected thereunder.

Section 6 reads as follows:

> "6. The terms of office of all officers then holding office under appointment by the board of chosen freeholders existing in any county at the time of the reorganization of said board under this act in said county, shall expire with the termination of office of the members of such previous board as aforesaid, notwithstanding that such officers may have been appointed for a longer term; and all offices filled by appointments by such previous boards shall then become vacant; and the boards of chosen freeholders constituted or elected under the provisions of this act shall forthwith, upon their organization fill the offices hereby vacated, for the term of one year only; * * ."

The section does not extend to the vacation of all offices the appointment to which had been entrusted to or assumed by boards of chosen freeholders generally, but only to the terms of office of all officers then holding office under appointment by *the board of chosen freeholders existing in any county* at the time of the organization of *said board* under the Act. The word "then" in the first line of the section clearly relates to the first Monday of January next after the election of the members of the new board, on which day (under sections 2 and 5) the terms of office of the members of the board previously existing were to expire and the new board was to organize.

Under P. L. 1887, p. 14 (Comp. Stat., 486, pl. 48), chosen freeholders are elected for two years, but there is a reorganization annually, the terms of a part of the membership then expiring, it having been arranged by lot under the statute which of those originally elected should hold but for one year. The beginning of terms had been changed from the second Wednesday in May to the first day of January at twelve o'clock noon by P. L. 1901, p. 14; Comp. Stat., 632 and P. L. 1905, p. 14; Comp. Stat , 3487. A board of chosen freeholders is not a continuous body. *Gulnac v. Freeholders of Bergen*, 45 *Vr.*, 543, 544.

It might well be and in fact generally is the case that the first day of January is not the first Monday in January, and therefore after the election of a small board under the Small Board Act the old board will continue in office for several days after its own organization meeting on January 1st, for (under Comp Stat., 3489; pl. 130) chosen freeholders to whom no successors have been elected hold over after the expiration of term (*Wright v.* Campbell, *45 Vr., 609; Pierson v. Cady, 55 Vr., 54,*

63); and of course in every case they will continue in office until January 1st. To guard against the possibility of appointments to office by a board of chosen freeholders elected at the same time the Small Board Act is adopted, and especially after an election held under that act and before it is possible to organize the board elected thereunder, section 6 of the Small Board Act provided that the terms of office of all officers, holding officers under appointment by the board of chosen freeholders existing in any county, at the time of the reorganization of said board under the act in such county, should expire with the termination of office of the members of such previous board. In other words section 6 does not deal with board of chosen freeholders in the abstract but it deals with a particular board of chosen freeholders, that is, one existing at the time of the organization of the small board under the Small Board Act. This construction is confirmed by the expressions "previous board" and "previous boards" contained in the section. Except for section 6 it would be possible to hamper the new county government by forcing upon it officers with long terms appointed by a moribund board; this the Legislature meant to prevent and effectually did so by section 6 of the Act. When read in connection with section 5 the meaning of section 6 is very plain and is as I contend. It is unreasonable to apply section 6 to the appointment of the relator of April 6, 1913, to an office having a statutory term of five years. The terms of office of all the members of the Board that appointed him would of necessity expire and in the case in hand, did expire long before the Small Board Act could be adopted and a small board be elected thereunder. In fact said Act was not adopted until the general election of 1914 and the members of the

small board were not elected until the general election of 1915.

Except in his implication that section 6 of the Small Board Act extends to statutory terms (case, p. 9, l. 34, p. 10, l. 10, 22) the learned Chief Justice in the opinion read for the Supreme Court does not deal with the foregoing points at all, although they were presented in the briefs filed for the relator in the Supreme Court. I submit that they are worthy of consideration; but I now proceed to discuss the point that was discussed by the Chief Justice, and as I think erroneously decided. I have left it until now, because that seems the logical sequence, not because I think it weaker than those that have gone before. Indeed, I think it is conclusive in favor of the relator.

IV.

The office of county engineer created by the Road Act is not within the purview of section 6 of the Small Board Act.

If the Road Act be ignored, the county engineer is not an "officer" at all. As appears by the foregoing prefatory statement, there is no provision of any other law for the appointment of a county engineer, who therefore would be a mere "agent or employe under the general Freeholders' Act, the duties pertaining to the employment not being governmental, permanent and certain and assigned to it by law. *Fredericks v. Board of Health, 53 Vr., 200.* This doctrine was applied by the Court of Errors and Appeals (Garrison, J., loq). to the provisions of the Strong Act as applied to the officers provided for by the fundamental law of counties of the first class. *Walker v. Freeholders of Essex, 54 Vr., 695.* In the Supreme Court it seems to have been sup-

posed that it was claimed on the part of the relator that he was not an "officer." This was a misapprehension. If no office was involved, quo warranto was not available to relator. The claim was not that he was not an "officer," but that his office was created by the "Road" Act.

The scheme of the Road Act was to have a "qualified civil engineer" appointed county engineer for a long term under partial control, at least, of the State Highway Commission and the State Commissioner of Public Roads, so that county roads improved with State money should be satisfactorily constructed. Again, by Chapter 396 of the Laws of 1912, provision was made for resident engineers to be appointed by the State Commissioner of public roads, and if a County Engineer was selected as a resident engineer, the salary was to be apportioned between the State and county, which was done as to relator.

I submit that the *title* of the Small Board Act, which is a mere reorganization statute, even if otherwise sufficiently extensive, is not broad enough to extend o the term of an office created by an independent act, although the appointment thereto was vested in the Board of Chosen Freeholders. Apart from this defect of title, it seems to me very plain that the Act was only intended to apply to the structure and machinery of county government, not to cases where offices are created by entirely independent statutes, and the vesting of the appointment thereto has incidentally been placed with the Board of Chosen Freeholders, although it might very well have been placed elsewhere.

On this subject the Chief Justice (case, page 10, l. 3) says:

"This section of the Small Board Act is not

> limited in its operation to such offices as may be called 'County offices.' The test provided by the statute is the method in which the office is filled. If the incumbent holds 'under appointment by the Board of Chosen Freeholders,' then, no matter what the office be called, his term is brought to an end by the organization of the new board and his office becomes vacant instanter."

I submit that this is specious. The test is not what an office may be called; but what is its character. Neither the title nor the enactments of the Small Board Act seem to me to embrace any other offices than those completely under the control of a Board of Chosen Freeholders reorganized by the act. If an office is general in its duties, not limited to purely County affairs, it does not fall within this statute, although the appointment thereto for reasons of convenience may be vested in the Board of Chosen Freeholders.

Take the case of a jail warden appointed under the Act of 1887 (P. L., p. 42; Comp. Stat., 2948). By that Act where a board of chosen freeholders assumes the custody, rule, keeping and charge of a county jail and the prisoners therein, the board is required to appoint by the votes of a majority of all its members, for the term of five years, a jail warden, *who may not be removed except by the affirmative vote of two thirds of the members of the board of chosen freeholders for good cause appearing to them.* Is it conceivable that under section 6 of the Small Board Act the term of a jail warden will expire on the organization of a new board of freeholders, and his successor be appointed for one year? Illustrations might be multiplied.

The office of County Engineer created by the

Road Act is *sui generis* The incumbent has duties prescribed by the Road Act itself in Section 14 and other sections. While his appointment under Section 12 is vested in the Board of Chosen Freeholders his termis fixed at five years, and he cannot be dismissed except for incompetency, neglect, disability or other *cause* on charges preferred by the Freeholders or by the State Commissioner of Public Roads. It is plain that section 6 of the Gill Act does not contemplate an office of this character.

Full effect can be given to the Small Board Act by limiting it to offices within the general range of the statutes constituting boards of freeholders, and limiting it to officers not holding for fixed terms, but who may have been appointed during the life of the previous board or for a specified time within such life not yet expired at the time of the organization of the new board.

Another feature is worthy of consideration. Under section 12 of the Road Act as revised in 1912, above quoted, a county engineer if removed, (which can only be for cause), has the right of appeal to the State Highway Commission for review and final adjudication from any order of dismissal. True, this provision was repealed the next year (P. L. 1913, p. 643), but that repealer has no effect upon the question of the construction of the two Acts of 1912, namely, the Small Board Act and the Road Act, as to whether the office of County Engineer could possibly have, in legislative intendment, been subjected to the provision of section 6 of the Small Board Act.

My final point also was not considered in the Supreme Court, or at least not referred to in the opinion of the Chief Justice.

V.

The Road Act, as to the office of County Engineer, impliedly repeals or at least is paramount to the Gill Act.

The revised Road Act is later in date than the Gill Act, having been approved April 15, 1912, while the Gill Act was approved April 1, 1912. Of course, in revisions, the Courts look to the genesis of the respective acts except as to new matter; but there was very important new matter enacted for the first time in the revised Road Act, and where such matter is inconsistent with the Gill Act it is countervailing thereof. In the quotation from the revised Road Act contained in the prefactory statement in this brief very important changes appear, and this latest expression of legislative intent must prevail. Indeed, a careful comparison, section by section, of the revised Act with the Act which it revised will demonstrate that the main object of the revision was to extend the term of county engineers and supervisors of roads from three to five years, and to secure their tenure of office. In the latter respect the county engineer was for the first time brought within the protection that to some extent already existed in favor of the road supervisor.

The judgment of the Supreme Court should be reversed and judgment in favor of the relator ousting the respondent should be directed to be entered in that Court.

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New Jersey Court of Errors and Appeals

NOVEMBER TERM, 1916.

THE ATTORNEY GENERAL OF NEW JERSEY *ex. rel.* RALPH D. EARLE, JR., *Relator-Appellant,* *vs.* HENRY W. DURHAM, *Respondent.*	*Appeal from Supreme Court.*

Brief for Respondent.

Statement of the Case.

The appellant by his writ challenges the appointment of the respondent to the office of County Engineer by the Board of Chosen Freeholders of the County of Bergen on January 3rd, 1916. The Supreme Court (by the Chief Justice, Justices Swayze and Bergen) sustained respondent's demurrer to the information, and, thereby, his title to office.

The County of Bergen adopted by referendum at the general election in 1914 the act commonly known as the Gill Act, or Small Board Act, and seven freeholders were elected by the county at large in November, 1915, under the provisions of the law so adopted. This Board organized at the time prescribed by the act, on January 3rd, 1916, and proceeded to elect officers to replace those whose places were vacated by Section 6 of the Small Board Act (P. L. 1912, p. 619).

Section 6 of the Small Board Act reads as follows:

> "6. The terms of office of all officers then holding office under appointment by the board of chosen freeholders existing in any county at the time of the reorganization of said board under this act in such county, shall expire with the termination of office of the members of such previous board as aforesaid, notwithstanding that such officers may have been appointed for a longer term; and all offices filled by appointments by such previous boards shall then become vacant; and the boards of chosen freeholders constituted or elected under the provisions of this act shall forthwith, upon their organization fill the offices hereby vacated, for the term of one year only; *provided,* that the person holding the office of county collector in any county at the time of the reorganization of said board in such county under this act, shall continue to exercise the duties of his office until his successor shall have been appointed by the board of chosen freeholders organized under this act, and shall have duly qualified; *and provided further,* that nothing in this section contained shall apply to or in anywise affect any honorably discharged soldier or sailor of the United States or the widow of such soldier or sailor, in office at the time of the the adoption of this act in any such county, but any and all such persons shall continue and remain in their respective offices the same as if this act had not been passed, and shall be removed only for cause."

The appellant, Ralph D. Earle, Jr., was on January 3rd, 1916, holding office under appointment by the Board of Chosen Freeholders of Bergen County existing in the County of Bergen at the time of the reorganization of said Board

under the Small Board Act. Under Section 5 the term of office of Chosen Freeholders theretofore in office in Bergen County expired on the first Monday in January, and by Section 6 the appellant's term of office expired at the same time, notwithstanding that he was orginally appointed for a term not then expired.

The office of County Engineer being thereby made vacant, the respondent, Henry W. Durham, was appointed County Engineer for the term of one year, and has assumed the office by virtue of such appointment.

The appellant was appointed County Engineer on April 7, 1913, under Section 12 of the County Road Act (Revision of 1912, P. L. 1912, p. 809), for a term of five years.

This section provided for the appointment by the Board of Chosen Freeholders of a qualified civil engineer as "County Engineer," and fixed his term of office as five years and until his successor should be elected and qualified. He was to give bond in a prescribed amount and to receive such compensation for his services as the said Board of Chosen Freeholders should determine.

The appellant submits as matter of law that the provisions of Section 6 of the Small Board Act do not apply to the office of County Engineer of the County of Bergen.

The respondent submits by his demurrer that the Section does apply, and thereby vacated the office.

The appellant does not attempt to challenge the constitutionality of the Small Board Act. Such an attack failed in the Supreme Court in the case of *Lohan v. Thompson, 88 N. J. L. 40.*

Nor is there any attack on the formality of the organization of the Small Board, or the regu-

larity of the appointment of the respondent, if a vacancy existed in the office of County Engineer on January 3, 1916.

Nor does appellant claim to be within the proviso in Section 6 protecting honorably discharged soldiers and sailors of the United States.

Therefore, the record presents the legal question:

Did the adoption in November, 1914, of the Small Board Act in Bergen County, and the subsequent election in 1915 of a Small Board, followed by due organization, vacate the office of County Engineer to which appellant was appointed for a term of five years on April 7, 1913, under the provisions of Section 12 of the County Road Act of 1912?

Our argument does not follow in order the points made by appellant, but is arranged in accordance with our views of the logic of the case.

For convenience, the legislative scheme revised by P. L. 1912, p. 619, will be referred to as the "Small Board Act," and the legislative scheme revised by P. L. 1912, p. 809, will be called the "County Road Act."

1. The Small Board Act is the later legislation, and, therefore, repeals, by force of Section 6, so much of Section 12 of the County Road Act of 1912 as prescribed a term of five years for the County Engineer.

A. THE SMALL BOARD ACT TOOK EFFECT ONLY ON ITS ADOPTION; THAT IS, ON NOVEMBER 3, 1914, FOLLOWED BY ELECTION OF A SMALL BOARD THEREUNDER AT THE NOVEMBER ELECTION IN 1915, AND THE ORGANIZATION THEREOF ON JANUARY 3, 1916.

Referendum acts take effect in the localities adopting them, usually by their very terms and always by their very nature *only after adoption.*

The conflict in the present case is between a referendum law, viz., the Small Board Act, and a law with no referendum feature, viz., the County Road Act.

The latter became effective in Bergen County and elsewhere immediately upon its approval by the Governor, April 15, 1912, and repealed all inconsistent legislation.

The former became effective in Bergen County only when adopted by the people of that county and then repealed inconsistent legislation. The only part of the act that became immediately effective throughout the State, on approval of the act by the Governor on April 1, 1912, was the authority to hold the referendum election conferred by the act upon the people of the several counties. Sec. 8, and see *Lohan v. Thompson, supra.*

This Small Board Act is of the type of "referendum statutes," as distinguished from "statutes delegating legislative powers." *Attorney-General v. McGuinness, 78 N. J. L. 346,*

381. It was a complete legislative enactment requiring only acceptance to incorporate its provisions in the scheme of local county government.

The scheme submitted by the Legislature could only become operative in the County of Bergen *upon acceptance,* but *upon acceptance,* the entire scheme and not part of it became effective. The validity of a referendum depends upon the acceptance by the voters of the very act submitted by the Legislature.

Attorney-General v. McGuinness, 78 N. J. L., 346.

Pierson v. Cady, 84 N. J. L., 54, 60.

Section 6, expiring the term of office of all officers then holding office in the County of Bergen, was just as much a part of the act accepted, as the part reducing the number of the freeholders, or as any other part of the act.

It referred to a matter distinctly mentioned in the title of the act, which reads as follows: "An Act to reorganize the boards of chosen freeholders of the several counties of this State, reducing the membership thereof, fixing the salaries and providing for the election and terms of office of the members, and also for the appointment and terms of office of officers appointed by such boards (Revision of 1912)."

The method of submission of the act to the people (P. L., 1914, p. 423, amending P. L., 1912, p. 619 and P. L., 1913, p. 834), required the title of the act to appear upon the ballot.

The people were fully apprised by the title of the purpose of the act, and that such purpose included provision for the appointment and terms of officers appointed by Boards of Chosen Freeholders.

The Legislature, having the power to submit the acceptance of this act to the people of a

county to be affected by it, and having exercised that power, in effect says that it shall take effect in the County of Bergen in November, 1914, and that at the general election in 1915 chosen freeholders should be elected in accordance therewith, and that upon the first Monday in January, 1916, all offices appointive by the board should be vacated. See *Patterson v. Close, 84 N. J. L., 319, 323.*

Appellant, on the other hand, claims through an act which became effective in Bergen County April 15, 1912.

The later act, for all purposes of this case, is the Small Board Act, and it overrides the earlier law by express legislative expression as well as by a general repeal of then inconsistent legislation.

The local option law of 1888 (P. L. 1888, p. 142), sustained in the celebrated case of *Paul v. Gloucester, 50 N. J. L. 585,* provided by its 8th Section that, a majority of votes having been cast in a county against the sale of intoxicating liquors therein, no license should be thereafter granted in the county. The act took effect on May 1, 1888, and carried a repealer of conflicting laws. While the point is not discussed in the case, it is apparent that it was taken for granted that existing conflicting legislation remained unaffected in a county until an election was held resulting in a majority vote against the sale of intoxicating liquors in the county.

Mr. Justice Van Syckel (page 594) refers to the validity of contingent legislation, but does not support the statute of 1888 on that ground. Justice Reed, in his dissenting opinion (page 613), assumes that the Legislature can pass laws to take effect upon the occurrence of a future event —upon an anticipated condition to arise in the future.

While referendum acts are not exactly analogous to statutes taking effect on a contingency named by the Legislature, they resemble such statutes in the respect that they are effective from a future date in the municipality accepting them, and speak in and as to such municipality from the date of acceptance.

While the precise question was not under discussion in *Attorney General v. McGuinness, 78 N. J. L. 346,* sustaining the constitutionality of the Civil Service Law, repeated statements in the opinion justify the view that there was no doubt in the mind of the learned Justice who wrote the opinion (Mr. Justice Garrison) that the law took effect upon acceptance or adoption, and from that time onward controlled the positions in the adopting municipality within its provisions.

So in *Warner v. Hoagland, 51 N. J. L. 62,* the act was similar in structure to the Small Board Act, even to the inclusion of an abolition of the office of every officer, commission or board exercising any of the powers mentioned in the act, and a repealer of inconsistent legislation (P. L. 1888, p. 88). There was, too, a section that the act should take effect immediately only as regards the submission to popular vote. The act was passed February 14, 1888, and an election was held April 10, 1888. While the Court held that the act as to the adopting municipality was not in effect until July 4, under the general statute, there is no suggestion in the opinion that, if the municipality had adopted the act after July 4, it would have been in anywise effective in the municipality until adoption.

In cases arising under the Walsh Act (P. L. 1911, p. 462), it has been assumed without question that the Act became effective as and when adopted by the voters, and that the Act was

then substituted for, and *then* displaced, inconsistent legislation. In fitting the new municipal machinery of the Walsh Act into place with the entire scheme of legislation affecting a municipality adopting it, this articulation seems to have been done with respect to the statutory scheme existing at the time of adoption without regard to the time when the Walsh Act or any of the other *then existing* legislation was passed.

See

Salter v. Burk, 83 N. J. L. 152.
Hirsh v. Burk, Ibid. 146.
Volk v. Burk, Ibid. 204.
Wilson v. Burk, Ibid. 205.
Siegler v. Burk, Ibid. 207.
Del. River Trans. Co. v. Trenton, 86 N. J. L. 48, 679.
Loudenslager v. Heston, 86 N. J. L. 382.
Devlin v. Wilson, 88 N. J. L. 180.
Keffer v. Gaskill, 88 N. J. L. 77.
Brokaw v. Burk 98 Atl. 11.
Feeney v. Burke, 98 Atl. 192.
See also *Hudspeth v. Swayze, 85 N. J. L. 592, 605.*
Attorney-General v. O'Neill, 85 N. J. L. 92; aff'd 86 N. J. L. 377.

In the case of *Salem Hospital v. Olcott, 67 Ore. 448, 136 Pac. Rep. 341,* a statute, passed February 25, 1913, dealt with acts occurring "after June 30th next following the taking effect of this Act." A petition was filed under the provisions of the State Constitution referring this legislation to the people. The referendum was voted on at election held on November 4, 1913, and the act adopted. Held: that June 30, 1914, was the date referred to in the statute.

See also *State v. Carter, 165 S. W. Rep. 773 (Mo.).*

See also *State v. Moore, 145 S. W. Rep. 199 (Ark.).*

See also *City of Jacksonville v. Borden, 46 So. Rep. 769, 773 [9] (Fla.).*

The writer of the text in *36 Cyc. 942* says, of a referendum act:

> "When ordered by the legislature or petitioned for by a certain percentage of the voters of the state, the measure to which it relates does not become a law until approved by a majority of the votes cast thereon."

The Small Board Act, therefore, took effect as a whole, in Bergen County, in 1914.

If a statute is to take effect at a future period, or upon the happening of certain contingencies, or performances of certain acts, a clause therein repealing laws on the same subject does not take effect until the act goes into operation.

Thiel v. City of Philadelphia, 245 Pa. 406, 91 Atl. 490, 492.

See also *Spaulding v. Alford, 1 Pickering 33; McArthur v. Franklin, 16 Ohio St. 193;* and *State v. Paul, 151 Pac. Rep. 114 (Wash.),* an interesting case, in which it is said:

> "The rule seems to be well settled, without exception, that an express repealing clause in a statute does not have any force prior in time to that of other provisions thereof, in the absence of clear expression therein to the contrary." (Citing numerous cases.)

The Small Board Act does, indeed, contain repealers in two sections, 7 and 10. These were construed by Mr. Justice Swayze, in a manner accordant with the above views, in *Lohan v. Thompson, supra.*

The subject of repeal of inconsistent legislation by referendum acts was discussed with ref-

erence to the adoption of the Small Board Act (in 1909, and prior to its revision by the Act of April 1, 1912) by the County of Essex, in *Walker v. Freeholders of Essex, 82 N. J. L. 348.*

Mr. Justice Minturn, speaking for the Supreme Court, held the view that the repealing clause in the Small Board Act, then known as the Strong Act (P. L. 1902, p. 65), could be held to apply only retrospectively, and to repeal "only legislation in existence *at the time of the passage of the original act,*" quoting *Farrell v. State, 54 N. J. L. 421.* The learned Justice further held that the *Civil Service Act,* passed in 1908 (P. L. 1908, p. 235), and adopted by the County of Essex at the same election in 1909 with the Small Board Act, contained in its second section ample evidence of specific intent on the part of the Legislature to repeal anything inconsistent with the effective operation of the Civil Service law. Applying the same rule of construction, the Civil Service law, of later enactment than the Small Board, repealed upon its adoption in Essex the inconsistent provisions of the Small Board Act in existence at the time of the enactment of the Civil Service Act.

The Court of Errors in *Walker v. Freeholders of Essex, 83 N. J. L. 695,* expressly refused to pass upon the question decided by the Supreme Court as to the conflict between the Small Board Act and the Civil Service Act, but affirmed on another point.

The expressions of Mr. Justice Minturn were therefore *obiter,* and the question is open as to the effect of repealing clauses of inconsistent legislation in referendum statutes.

The view of Mr. Justice Minturn, it is respectfully submitted, would lead to the result that the repealing clause becomes effective, not when the

act as a whole first has force as effective legislation, viz., upon adoption, but at a time long anterior thereto. In the case at bar, and in many other cases, the question would be seriously complicated by the revision and amendments of the referendum statute (not to mention revision and amendment of the statute in conflict with the referendum act).

In the Walker case, the fact that *both* statutes were adopted by the people, and thereby became effective, on the same day, necessarily lead to the conclusion that the voters intended both to stand, so far as possible; therefore, following canons of statutory construction, the Court might have come to the decision that the Civil Service Act would have been entirely nugatory unless it prevailed over the Strong Act in respect to the particular points in conflict, and, hence, that the voters intended that the former should dominate.

This view could have been reached without consideration of the respective dates of passage of the two acts.

The view, expressed by Mr. Justice Minturn, that the repealing force of a referendum act applies only to legislation in existence at the time the act was passed, seems to be in conflict with the doctrine uniformly recognized in our cases from *City of Paterson v. Society for Useful Manuf., 24 N. J. L. 384* (1854), to the present time, namely, that such acts take effect in the municipality adopting them, in their entirety, as of the date of adoption, or at such time after adoption as the Legislature may fix. There seems to be no other qualification of the doctrine, nor any other suggestion that the referendum statute takes effect in piecemeal.

B. THE LEGISLATIVE SCHEME EMBODIED IN THE COUNTY ROAD ACT ORIGINATED IN 1891, WHILE THE SCHEME FOUND IN THE SMALL BOARD ACT IS LATER IN DATE, HAVING ITS ORIGIN IN 1902.

History of the County Road Act.

The general scheme found in the County Road Act of today, with its provisions for the permanent improvement of roads under the joint supervision of State and County, at joint expense, the appointment of a temporary supervisor of the construction by a State officer, the appointment of a County Supervisor by the Chosen Freeholders, after the first road is constructed in the County under the Act, and the responsibility of the County for subsequent maintainance and repair, is found almost in entirety in an Act entitled, "An Act to provide for the more permanent improvement of the public roads of this state," approved April 14, 1891 (P. L. 1891, p. 378). Under this Act it was the duty of the Governor to appoint the supervisor of the construction, and those other functions now exercised by the State Commissioner of Public Roads were vested in the State Commissioner of Agriculture. Section 6 provided:

> "That any road constructed under the provisions of this act shall forever thereafter be a county road, and the duty of keeping the same in repair shall devolve upon the county officers as hereinafter mentioned; after the first road shall have been constructed under this act in any county, it shall be the duty of the board of chosen freeholders of any county not having a public road board to appoint a county supervisor of roads, who shall hold his office for three years and until his successor is ap-

pointed, shall give bond to the board of chosen freeholders,'' etc.

By P. L. 1894, p. 409, 4 Comp. Stat. 4625, the office of State Commissioner of Public Roads was created, and the duties of the President of the State Board of Agriculture were transferred to him.

By P. L. 1894, p. 410, the Act of 1891 was amended, and the State Commissioner of Public Roads was vested with the duties formerly performed by the Commissioner of Agriculture and the Governor.

The Statute was revised in 1895 by ''An act to provide for the permanent improvement of public roads in this state,'' approved March 22, 1895 (P. L. 1895, p. 424; 3 Gen. Stat. 2902). The provisions for the appointment of a County Supervisor were carried into Section 7 of this act, and the proviso relating to counties having a public road board was eliminated. Section 19 repealed the act of 1891 with a saving clause.

The legislation was revised again in 1903, by another act of the same title, P. L. 1903, p. 145. The provision for the appointment of a County Supervisor becomes Section 12. Section 18 repeals inconsistent legislation, with a saving clause.

Another revision came in 1905, P. L. 1905, p. 94; 4 Comp. Stat. 4538. The appointment of the Supervisor is provided for in Section 11. Section 19, plac. 316, 4 Comp. Stat. 4545, contains a repealer of inconsistent legislation, with a saving clause.

Chapter 220 of the Laws of 1909, p. 316, approved April 20, 1909, and not containing any repealer, for the first time created the office of County Engineer, as a companion office to that of County Supervisor, by amending Section 11;

4 Comp. Stat. 4542, plac. 308. This act took effect immediately.

There was still another revision in 1912, P. L. 1912, p. 809. Section 12 covers the offices of Supervisor and Engineer, lengthening the term to five years. Section 31 contains the usual repealer of inconsistent legislation and saving clause. The act was approved April 15, 1912, and took effect immediately.

Section 12 was amended by P. L. 1913, p. 646, in a particular not important in this connection.

History of the Small Board Act.

This was originally Chapter 34 of the Laws of 1902, p. 65, 1 Comp. Stat. 509. The title read: "An Act to reduce the number of members of the boards of chosen freeholders in counties of this state, and to fix the salaries and provide for the election of the members of said boards."

The present features of the present law were all embodied in this act.

Section 6, providing for the vacation of the offices of appointees of the previous board, was held unconstitutional by Justice Hendrickson upon the trial at the Monmouth Circuit of the unreported cases of *McCarter, Attorney-General v. Herbert,* and *McCarter, Attorney-General v. Morris* (the latter case involving the office of County Supervisor of Roads), as not within the title of the Act. In 1909 the title was amended by Chapter 199 of the Laws of 1909, p. 294, to read: "An Act to reorganize the boards of chosen freeholders of the several counties of this State, reducing the membership thereof, fixing the salaries, and providing for the election and terms of office of the members and also for the appointment and terms of office of officers appointed by such boards." This act took effect

immediately, and was approved on April 20, 1909, *the same day on which the amendment to the Road Act was approved which created the office of County Engineer.*

See *Patterson* v. *Close, 84 N. J. L. 319-322.*

Section 1 of the statute was amended by P. L. 1908, p. 269, and P. L. 1912, p. 279.

Section 4 was amended by P. L. 1908, p. 271.

Section 6 was amended by P. L. 1906, p. 537.

Section 7 was amended by P. L. 1912, p. 494 (approved April 1, 1912, but not immediately effective).

See also P. L. 1911, p. 183, amended by P. L. 1911, p. 711.

See validating act in P. L. 1912, p. 553.

The statute was revised by Chapter 355 of the Laws of 1912, p. 619 (the Gill Act), approved April 1, 1912.

Section 7 was amended by P. L. 1913, p. 834, and P. L. 1914, p. 423.

The validating acts are in P. L. 1913, p. 14, 16 and 17.

Summary.

The present County Road Act, therefore, is the continuation of a legislative scheme which, in all essential features, has been in existence since 1891. The mere addition of the office of County Engineer in 1909 to the machinery by which the main objects of the County Road Act are to be carried into effect is in no sense new legislation; it indicates no new legislative policy; it makes no radical change in county government; it merely adds a detail to the existent scheme. The effect is the same as if the statute had provided for three supervisors instead of one, or added an assistant supervisor. Clearly,

the supervisor whose office was established in 1891 is subject to the provisions of the later Small Board legislation; and clearly enough the legislature did not intend that the latter should affect differently the offices of Supervisor and Engineer. The provisions respecting the two are so conjoined as to lead to the conclusion that the legislative intent was that they should be likewise affected.

C. IN THE CASE OF THE COUNTY ROAD ACT THE LEGISLATURE HAS SPOKEN, AT THE LATEST, AS OF THE DATE OF THE APPROVAL OF THE AMENDMENT TO SECTION 12 BY P. L. 1913, P. 646, WHEREAS SECTION 7 OF THE SMALL BOARD ACT WAS AMENDED IN 1914, P. L. 1914, P. 423, AND NEW VIGOR WAS GIVEN TO THE REPEALING CLAUSE THEREIN BY THAT AMENDMENT.

Ordinarily, an amendment which repeats the language of the original enactment would not have that effect. This is because the enactment, so far as it repeals inconsistent legislation, operates as of the date of its approval, and then spends its force as a repealer. So the mere repetition in an amendment of language which already has spoken as of a past date is not new legislation, and gives no added force thereto as a repealer. But, it is submitted, the case is different where the repealer is to speak *in the future* upon the adoption of the statute by the voters, which alone makes it effective. When the legislature says, in 1914, that an act, to be *thereafter* effective by adoption, repeals "all acts and parts of acts, both general and special, inconsistent with this act," it means, at the very least, all acts prior to 1914. As of 1914, the

legislature renewed the offer to the people of Bergen to accept a Small Board upon whose induction into office the terms of office of all appointees of the prior board should determine. Even under the views of Mr. Justice Minturn in the Walker case the repealer should operate retrospectively from 1914.

Any other interpretation would lead to infinite confusion. It might lead to the absurd decision that the adoption of the Act in 1914 under a Revision of the Act of 1902, worked a repealer *as of the latter date;* or, if not as of 1902, then as of April 20, 1909, when curing the defective title made Section 6 effective.

II.

The amendment to the County Road Act in 1909, creating the office of County Engineer, and the revision of that Act in 1912, are not inconsistent with the then existing Small Board legislation, and the two statutes can stand together up to the time of the adoption of the Small Board Act, when, for the first time, there is such an irreconcilable repugnancy between them that the latter operates to repeal the former in respect to the term of office of the County Engineer.

An act not in effect in Bergen County on April 20, 1909 (when the amendment to the County Road Act was approved by the Governor), nor on April 15, 1912, when the Revision was approved, but capable of being thereafter made effective in said County by vote of the people of the County in the manner prescribed by the Legislature, cannot logically be repealed in its possible application to said County, by the mere

repealer of inconsistent legislation contained in the County Road Act, so long as the Legislature leaves open the offer to make the Small Board Act effective by subsequent adoption. The legislature not only left open the possibility of adoption of the Small Board Act, but renewed it in 1913 and 1914, by the amendments.

The County Road Act repealed all acts and parts of acts inconsistent with its provisions, but there was then no such act as the Small Board in effect in Bergen County to be repealed for inconsistency. There was an act on the statute book in which, unless and until the Legislature expressly repealed it, there resided a future potential effectiveness in Bergen County by the exercise of the will of the people of that County. Until this potentiality became actuality by adoption there were no provisions of the Small Board Act in force in Bergen County to be affected by the repealer of inconsistent legislation found in Section 31 of the County Road Act.

If there was any repeal of the Small Board Act, as potentially applicable to Bergen County, by the County Road Act, it was not by virtue of inconsistency, but by implication.

Repeals by implication are not favored.

Hotel Reg. Realty Co. v. Stafford, 70 N. J. L. 528.

Terrone v. Harrison, 87 N. J. L. 541.

Newark Express, etc., Co. v. D. L. & W. R. Co., 98 Atl. 472.

There must be clear legislative intent to repeal, and here there is not only no clear legislative intent to repeal the Small Board Act by the County Road Act, but there is positive intention to the contrary.

Of course, the Legislature might have altered the scheme of the Small Board Act with respect to the term of the County Engineer in counties thereafter adopting it. They might have amended Section 6 of the Small Board Act so as to exclude the County Engineer from its operation. They merely added, however, a detail to the scheme found in the County Road Act. How can it be said that by so doing they withdrew or modified the standing offer to the voters to adopt an act which should operate on all county officers? The creation of the office of County Engineer does not even faintly indicate an intention to subtract one iota from the generality of the provisions of Section 6 of the Small Board Act, or to diminish its utmost potential effectiveness upon adoption. The act creating this office does not bear directly on the Small Board Act. Up to the point of adoption the two acts can stand side by side; one providing for the construction and supervision of roads in counties, as a mere incident to which the term of one of the officials charged with these duties is fixed; the other a standing offer in which the opportunity to sweep out of office the board and its appointees is fundamental. By the creation of the office of County Engineer, the legislature, in fine, merely added one more county office which should be subject to the standing provisions of Section 6, if and when adopted.

This is emphasized by the fact that the amendment to the County Road Act in 1909, and the amendment of the title of the Small Board or Strong Act, whereby Section 6 therein for the first time became (constitutionally) operative as legislation, were approved *on the same day. See Patterson v. Close, supra.* That indisputably shows that the two were to stand together so far as possible. They can not be made to

stand together except by the statutory construction which we urge.

That they should stand together up to the point of adoption is also fortified by the amendments of 1913 and 1914 to Section 7 of the Small Board Act. As remarked, these constituted most positive renewals of the offer to the people of the power to depose the larger boards and their appointees, renewals of the opportunity to adopt an act which, upon adoption, should repeal all acts and parts of acts, *both general and special,* inconsistent therewith.

Upon a favorable referendum, Section 6 clearly is repugnant to that incidental provision in the County Road Act prescribing the terms of the Supervisor and County Engineer, and becomes effective. The language is as comprehensive as it could have been made. "The terms of office of all officers then" (*then* refers back to Section 5, namely the first Monday of January next after the election of freeholders under the act; the act does not use a word speaking in the present, but refers to a future event) "holding office under appointment by the board of chosen freeholders existing" (existing also refers to the future) "in *any*" (italics ours) "county at the time" (also future) "of the reorganization of said board under this act in such county shall expire with the termination of office of the members of such previous board as aforesaid, *notwithstanding* that such officers may have been appointed for a longer term; and *all* offices filled by appointments made by such previous boards shall *then* become vacant"; (italics ours).

See *Patterson v. Close, supra.*

As a mere matter of construction, "all offices" includes those created by later statute; the leg-

islature does not differentiate in any way with respect to the length of the tenure, the source of the power of appointment, the duties of the office, or the date of the legislation authorizing the appointment, or the time of the appointment. The statute contemplates a thorough "reorganization" of the government of the county. It cannot be successfully contended that the legislature intended that the adoption of the Act should have a piecemeal and discriminatory operation. To leave in office one appointee of the old board, by the mere chance effect of the date when a statute received the Governor's approval, by a side-wind, so to speak, would violate the express words of the statute, and its policy.

Justice Minturn remarked in *Walker v. Freeholders of Essex, supra,* that the prime object of this Small Board Act was, "as its original title indicated, the reduction of county representation in the boards of freeholders of the State, thus making at once for economy and efficiency of administration, with the question of appointments to employment under the supervision of such boards as a subsidiary and incidental motive."

The act amending the title to include the creation of vacancies and the appointment of officers, as provided in Section 6, would seem to emphasize the "subsidiary and incidental motive." It certainly indicated a legislative intent that the reorganized board should be *the* Board of Chosen Freeholders which should thereafter make appointments to all appointive offices. In aid of that intent the terms of all officers then holding office by appointment of the Board of Chosen Freeholders are vacated whether then expired or not. The legislative intent to give

the new or reorganized board absolute control is clear.

Patterson v. Close, supra.

We think that the policy of the statute goes further. It provides a scheme of county government not only more economical and efficient, but more responsive to, and more easily controllable by, the will of the electors. By decreasing the size of the board, responsibility for county government is more readily fixed; it is centralized in a small number. The small number cannot escape the determination of responsibility, or the influences of public opinion. By making the tenure of executive officers co-incident with the changing personnel of the governing body, those officers are likewise made more responsive to the will of the electorate.

Surely the voters of Bergen cannot have supposed that their adoption of the reorganized government should have a piecemeal operation upon the tenure of the then holders of office.

The adoption at a referendum is an act of acceptance of the very statute referred to the people. *Attorney General v. McGuinness, supra; Pierson v. Cady, supra.* The electors cannot be asked to examine the entire mass of legislation for the purpose of determining whether their act is, after all, not an acceptance of the plain words of the statute submitted, operating according to the plain purport of its language upon a then existing state of affairs, but an acceptance of the statute as modified and overlaid by other provisions which can only be found after patient search of the statute books and decisions, in incidental provisions of legislation dealing with foreign subjects. This would require, as a prerequisite to the intelligent exercise of the suffrage, not only a reading of the

very act submitted, and its supplements and amendments, but, as well, a nice and refined weighing of the provisions of many and diverse statutes, in the light of canons of statutory construction and of the history of such statutes. Voters would come to different conclusions as to the effect of casting a vote one way or the other.

The effect of the adoption of the Small Board Act, as appellant contends, gives Bergen County a government which neither represents Home Rule nor that established as a complete and ordered whole by a legislative enactment; not "a clean sweep," but a sweeping of only some of the rooms of government.

A referendum with such a "string tied to it" would be illusory. If appellant be correct, the ballot voted was illusory; the title of the Small Board Act, printed on it, was deceptive.

It may have been that the voters intended to strike at the office of County Engineer. *Pierson v. Cady, supra, p. 60.* They may have been dissatisfied with the performance of the duties of the office by the appellant, and may have wished to end the term of an officer, who, by reason of a five-year tenure, could not otherwise be reached by the electorate. But in any event they undoubtedly believed that their vote would oust "all officers then holding office" upon the organization of the new board.

These considerations must have moved the legislature to offer the Small Board Act to the voters, and should be weighed in the construction of the Act.

To keep in office a County Engineer appointed by the old board would be in violation of the legislative intent and of the vote.

The repealer of inconsistent legislation by the County Road Board Act does not, therefore, affect Section 6 of the Small Board Act as to the County of Bergen.

On the contrary, the Small Board Act, upon becoming effective in Bergen County, expressly repealed by Section 6 the provisions of the County Road Act prescribing a term of office for the County Engineer.

The effect of the adoption of the Small Board Act, in fine, is that ascribed by the Chief Justice to the Walsh Act in *Devlin v. Wilson 88 N. J. L. 180, 181* (Court of Errors):

> "The city of Bayonne * * * adopted * * * the Walsh Act, and thereby became subject to the provisions of that statute. The primary purpose of the legislation is to substitute government by commission in the place of that provided by the various municipal charters and the general laws of the State regulating municipal affairs; * * *"
>
> (p. 182.) "By virtue of this enactment * * * the theretofore existing municipal government came to an end, as did the terms of all municipal officers elected or appointed thereunder * * *."

See also the opinion of the Chief Justice in the Supreme Court in this case (Record pp. 9 and 10).

The resolution of the difficulties in this case may perhaps be found in the application of the canons of statutory construction pertaining to the relative effect of general and special law.

A law universal in its application does not repeal a law covering a particular locality; nor does a specific law repeal the general except as to the specific field covered by it.

McCarter, Attorney-General v. Lehigh Valley R. R. Co., 78 N. J. Eq. 346, 358.

Vail v. Easton & Amboy R. R. Co. 44 N. J. L. 237.

State, Gorum, Pros. v. Mills, 34 N. J. L. 177, 180.

The County Road Act is general in its application; the Small Board Act relates only to those counties which may accept it. It therefore is specific and when adopted operates to take the specific territory affected out of the operation of the County Road Act in so far as the latter prescribes the term of office of the County Engineer.

There is no difficulty about the co-existence of general and special legislation. The general law governs until the specific comes into operation.

III.

The County Engineer is an officer within the meaning and application of Section 6 of the Small Board Act.

The County Road Act (P. L. 1912, p. 809) provides a scheme of road improvement on the initiation of the Board of Chosen Freeholders and under the administration of the Board of Chosen Freeholders.

Certain provisions of the act extend State aid, and require supervision to some extent by the State Commissioner of Public Roads, but these in no way contradict the basic idea of initiation and construction under the management and control of the Board of Chosen Freeholders.

The County Engineer and the County Supervisor are county officials appointed by the Board of Chosen Freeholders.

The public policy represented by the Small Board Act, allowing counties by referendum to come in under the scheme of that act, is just as applicable to the functions of the Board of Chosen Freeholders in the performance of duties imposed by the County Road Act as in the performance of any other duties imposed upon the board, and the control by the smaller board elected at large from the county over the officials appointed by it is a part of the policy of the law. The legislature turns the county government over to the new board, unhampered by officials chosen by "previous boards" and puts full responsibility on the new board by leaving to the new board absolutely the selection of the agents required in the performance of the duties it was called by the people to perform.

The County Engineer is clearly a county officer, being in the paid service of the county.

Sullivan v. McOsker, 84 N. J. L. 380.

Newark Library Trustees v. Civil Service Commission, 86 N. J. L. 307.

He gives bond to the county. County Road Act, Sec. 12.

He is removable by the freeholders. *Ibid.*

There is no reason for excepting agents employed in the administration of the responsibilities and powers conferred and imposed upon the Board in the improvement of roads. There is every reason to include them.

The appellant, it appears by the information, is also a "resident engineer" under the provisions of the State Highway Act (P. L. 1912, p. 828, Sec. 11). As such he is a State officer and paid by the State. This emphasizes the *county* character of his office of County Engineer, as the State Highway Act expressly provides that the two offices shall not be incom-

patible. His status as a State officer does not change his relation to the County, and upon losing his status as a State officer he remains unaffected as a County officer. His State office is for no prescribed term, but subject to the will of the State Supervisor of Highways. His duties are defined and his compensation is fixed by the State Highway Commission, and his employment is "as need may require." The office of "resident engineer," however, is not in issue in this case.

As *County* Engineer he is appointed by the Chosen Freeholders and his compensation is fixed by the Chosen Freeholders. His term was originally fixed by law at five years, but this term was within the control of the Legislature and the Legislature has seen fit to permit the people of the County of Bergen to adopt a scheme of County management as applicable to the care of roads as to other County activities, which vacates his office and allows the appointment of a successor for one year only.

There is, therefore, no logical support for the claim that the appellant is protected in his office because the office was created by the County Road Act. Many other officers appointed by the Freeholders are filling offices originating in acts more peculiarly and specifically related to the office than the County Road Act. The Small Board Act does not enumerate offices to be vacated, or except any offices from vacation. It reaches all within the appointment of the Board, and the policy of the law in this particular is emphasized by the amendment to the title of the Small Board Act, which made the vacating provision constitutional. There is left no room for doubt as to the legislative intent to reach all officers holding offices filled by appointment by the Board of Chosen Freeholders.

IV.

As to the brief of the appellant in this court.

As already stated we have arranged our argument according to our own views of its logical presentation, and without following in the order of the points presented in the appellant's brief.

Such points are five in number and are stated interrogatively on Page 2 of appellant's brief. To all, except the first point, the argument we have already made is generally responsive without necessity of specific application to the topical divisions adopted by counsel for appellant.

We may, however, repeat that Section 6 of the Small Board Act cannot rightfully be construed to exclude the office of County Engineer because that officer was given by the law of his creation a *statutory term* as contended under Point II of appellant's brief. Without repetition of the argument hereinbefore made we may well direct attention to the very satisfying discussion of the Chief Justice in his opinion below (Record, p. 9) and to the reference in Section 6 to the office of County Collector, who has a statutory term (Comp. Stat. 506, plac. 121). Section 6 vacates all offices filled by appointment by previous boards, and expires the terms of all officers, notwithstanding that such officers may have been appointed for a longer term, with but one exception inserted to prevent an interregnum in the office of County Collector. It is provided that the person holding the office of County Collector "shall continue to exercise the duties of his office until his successor shall have been appointed by the Board of Chosen Freeholders organized under

this act and shall have duly qualified." This point of appellant is also directly negatived by the case of *Patterson v. Close, supra,* which dealt with the office of Clerk of the Board *having a statutory term.* See Comp. Stat. 476, Sec. 8 and note; Comp. Stat. 533, plac. 205.

We may also, without repetition of the argument already made, impress upon the Court that the construction of Section 6 of the Small Board Act limiting its application to the appointees of the particular Board superseded by the Board elected under the Small Board Act, as contended for in appellant's Point III, is at variance with the policy of the act which is not satisfied without a "complete change in the personnel of the county government." To further quote the Chief Justice, in his opinion below, the new Board was to be "unhampered by any condition for the existence of which it was not responsible."

The scheme of the Small Board Act in title and body is perfectly clear and stresses not only the abolition of an old system, but also the adoption of a new system. Counsel for appellant gives too little importance to the induction of the new system, and shuts his eyes to the plain legislative intent that the efficiency of the new system should not be endangered by enforced continuance of the agencies of the old system.

It may be conceded, without detriment to the respondent, that the Board of Freeholders is not a continuous body, in a parliamentary sense, but the Board of Chosen Freeholders has a continuous politic and corporate existence. It is the "County Corporation" and as such continues. Comp. Stat. 474; *Hermann & Grace v. Freeholders of Essex, 71 N. J. Eq. 541, 546,*

aff'd *73 N. J. Eq. 415, 416, 417.* The Small Board Act, when accepted by the County of Bergen, meant a new charter and new management under new Directors from January 1, 1916. The only officer excepted was the County Collector, who, having a three-year term, might have been appointed by a Board other than that in office on the date of reorganization. The fact that the Legislature excluded the County Collector from this sweeping expulsion of officials of itself shows that it was not in the legislative mind to apply the rule of exclusion only to those officials who might have been appointees of the particular Board superseded by the first Board elected under the Small Board Act.

We need not add, in reply to appellant's Point IV, to what we have said under our own Point III, or, in reply to appellant's Point V, to what we have said under our own Point I.

Appellant, under his Point I, has brought forward a point not presented by the pleading, or mentioned in his oral argument below, or on his main brief. It was brought to the attention of the Supreme Court by a supplemental brief filed out of time.

It is doubtful whether the point is before this Court for review.

An examination of the information (Record, page 1 to 4) will disclose no challenge of the validity of the Small Board Act by reason of the invalidity of its title or otherwise. On the contrary, the act, and the proceedings under it, will be found to have been pleaded at great length, and the claim set up that the act was without application to the appellant because of his appointment on April 7, 1913, for a term of five years, under the County Road Act.

But the point is without merit. The title to the act is not defective.

Vreeland v. Pierson, 70 N. J. L. 508, 512.
Schneider v. Atkinson, 86 N. J. L. 392.
Patterson v. Close, supra.

To hold otherwise this Court must reverse itself in the last mentioned case, which involved this very title. Mr. Justice Trenchard, speaking for this Court *(84 N. J. L. 319-322)*, expressly said that the title of the Small Board Act, as amended in 1909, "sufficiently states the object of the legislation."

V.

The office of County Engineer having been vacant at the time of the election of the defendant, Henry W. Durham, he is *de jure* as well as *de facto* incumbent of the office of County Engineer of the County of Bergen, and the judgment below should be affirmed.

CLARENCE MABIE,
Attorney for Defendant.

JOHN R. HARDIN,
WALDRON M. WARD,
Of Counsel.

INDEX

INFORMATION.

(Filed January 13, 1916.)

New Jersey Supreme Court.

THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, EX REL. RALPH D. EARLE, JR., *Relator*, *v.* HENRY W. DURHAM.	*On Quo Warranto.*

John W. Wescott, Esquire, Attorney General of the State of New Jersey, who sues for the State in this behalf, comes in his own proper person here into the Supreme Court of said State, before the Justices thereof, at the State House in the City of Trenton, on the thirteenth day of January, in the year of our Lord, one thousand nine hundred and sixteen, for the said State of New Jersey, at the relation of Ralph D. Earle, Jr., of Hackensack, in the County of Bergen, desiring to sue and prosecute in this behalf, according to the form of the statute in such case made and provided, and gives the said Court here to be informed and understand that on April 7, 1913, under Section 12 of Chapter 395 of the Laws of New Jersey, of the year 1912, entitled "An Act to provide for the permanent improvement and maintenance of public roads in this State (Revision of 1912)," approved April 15, 1912, a county road having been theretofore constructed under said act in the County of Bergen, the Board of Chosen Freeholders of the said County of

Bergen appointed Ralph D. Earle, Jr., relator as aforesaid, a qualified civil engineer, as county engineer for the said County of Bergen for the term of five years and until his successor should be appointed and qualified, at a salary of $5,000 per year, payable in equal monthly instalments; that said relator accepted said office and before assuming its duties made and subscribed an oath that he would faithfully perform all the duties of his said office to the best of his ability and understanding, which oath was duly filed with the Clerk of said Board, and gave bond to the said Board of Chosen Freeholders, in the penal sum of $1,000, conditioned for the faithful performance of the duties of his said office, with sureties that were approved by said Board; that thereupon said relator assumed the duties of his office as such county engineer and continued in the performance thereof until ousted by Henry W. Durham, defendant herein, as hereinafter mentioned; that on April 8, 1913, under Chapter 396 of the Laws of 1912, said relator, county engineer as aforesaid, was designated by the State Commissioner of Public Roads, as resident engineer for said County of Bergen, and on April 21, 1913, the relative parts of the compensation to be paid by the County of Bergen and by the State of New Jersey, were agreed upon between the said Commissioner of Public Roads and said Board of Chosen Freeholders by its resolution adopted on the date last named.

And the Attorney General aforesaid at the relation aforesaid gives the said Court here to be further informed and understand that on January 3, 1916, the Board of Chosen Freeholders of the County of Bergen undertook to appoint the said Henry W. Durham, defendant as aforesaid, county

engineer of the County of Bergen, and the said defendant entered into possession of the said office and excluded said relator therefrom.

And the Attorney General aforesaid at the relation aforesaid gives the Court here to be further informed and understand that for the space of ten days last past the said Henry W. Durham, defendant as aforesaid, has usurped, intruded into and unlawfully held, used, exercised, and yet does usurp, intrude into and unlawfully hold and exercise the office of county engineer of the County of Bergen, to the exclusion of the said relator, to wit, at Bergen County aforesaid, in contempt of the State of New Jersey and to its great damage and prejudice, against its sovereignty and dignity; for though true it is that at the general election held in said County of Bergen in November, 1914, the provisions of Chapter 355 of the Laws of 1912, entitled "An act to reorganize the Boards of Chosen Freeholders of the several counties of this State, reducing the membership thereof, fixing the salaries, and providing for the election and terms of office of the members, and also for the appointment and terms of office of officers appointed by such boards (revision of 1912)," approved April 1, 1912, were duly adopted by vote of the legal voters of said county, and although true it is that at the general election held in said County of Bergen in November, 1915, seven persons were under the act last referred to elected chosen freeholders of said County of Bergen, and on January 3, 1916, did meet for organization and did organize as the Board of Chosen Freeholders for the said County of Bergen, and did elect from their own number a director as presiding officer of said board, and did assume to appoint the said defendant as county engineer as aforesaid

for the term of one year, and although true it is that under Section 6 of the act last referred to the terms of office of all officers holding office under appointment of the board of chosen freeholders existing at the time of the reorganization of the board of chosen freeholders under said act in any county in which the provisions of said act have been adopted should expire with the termination of office of the members of such previous board as aforesaid, notwithstanding that such officers might have been appointed for a longer term, and that all offices filled by appointments by such previous board should then become vacant, and that the boards of chosen freeholders constituted or elected under the provisions of said act should forthwith upon their organization, fill the offices thereby vacated for the term of one year only, under color of which provision the said board of chosen freeholders of the County of Bergen did assume to appoint said defendant County Engineer as aforesaid, yet the said Attorney General at the relation aforesaid gives the court here to be informed and understand and submits as a matter of law that the provisions of said Section 6 Chapter 355 of the Laws of 1912 had and have no applicability to the office of County Engineer of the County of Bergen to which the relator was on April 7, 1913, appointed for a term of five years under and by virtue of Section 12 of Chapter 395 of the Laws of 1912 above referred to.

Wherefore, the said Attorney General for the said State at the relation of the said Ralph D. Earle, Jr., desiring to sue and prosecute in this behalf, prays the advice of the Court here in the premises, and for due process of law against the said defendant Henry W. Durham in this behalf to be made to answer the said State by what warrant

he claims to hold, use, execute and enjoy the office of County Engineer of the County of Bergen, and the liberties, privileges and franchises thereof.

JOHN W. WESCOTT,
Attorney General.

COLLINS & CORBIN,
Attorneys for Relator.

DEMURRER.

(Filed February 5, 1916.)

The respondent, Henry W. Durham, demurs to the above information upon the following grounds:

1. Because the matters contained in said information are not sufficient in law for the said relator to prosecute said information and to call upon this defendant to answer to the State of New Jersey by what warrant he claims to hold the said office of County Engineer of the County of Bergen.

2. Because it does not appear in and by said information that the relator is lawfully and rightfully entitled to the office of County Engineer of the County of Bergen.

3. Because it appears in and by said information that the term of the office of the said relator expired on or before January 3d, 1916, a date prior to the filing of the said information.

4. Because it appears in and by said information that the office of County Engineer of the County of Bergen, became and was vacant on or before January 3d, 1916, a date prior to the filing of the said information, and that the board of chosen freeholders of the County of Bergen, appointed this re-

spondent County Engineer of the County of Bergen on the day and date aforesaid.

5. Because it appears in and by said information that this respondent is lawfully and rightfully entitled to the rights, privileges and franchises of the office of County Engineer of the County of Bergen.

WHEREFORE, and because of the insufficiency of said information, he prays judgment and that he may be dismissed and discharged by the Court hereof and from the premises charged upon him in form aforesaid and that the rights, privileges and franchises of the office of County Engineer of the County of Bergen be allowed and adjudged to him.

CLARENCE MABIE,
Attorney of Respondent.

(Statutory Affidavit Annexed.)

OPINION OF SUPREME COURT.

Argued before Gummere, Chief Justice, and Justices Swayze and Bergen.

For the relator, Gilbert Collins.

Contra, John R. Hardin and Waldron M. Ward.

The opinion of the Court was delivered by Gummere, C. J.

The relator by this writ challenges the appointment of the respondent as County Engineer by the Board of Chosen Freeholders of Bergen County on January 3, 1916.

The voters of this County at the general election held in 1914 adopted the act of 1912 entitled "An Act to reorganize the boards of chosen freeholders of the several counties of this state, reducing the membership thereof, fixing the salaries and providing for the election and terms of office of the members, and also for the appointment and terms of office of officers appointed by said boards" (P. L. p. 619), pursuant to a referendum provision contained therein. This statute is commonly known as the Small Board of Freeholders Act. It provides, among other things, that whenever any County shall adopt its provisions, there shall be elected at the next following general election an entire new board, which shall meet and organize on the first Monday of January next after the election; that the terms of office of Chosen Freeholders of the County then in office shall expire on that day, notwithstanding that members thereof may be chosen or elected for a period extending beyond that date, and that (section 6) the terms of office of all officers then holding office under appointment by the Board of Chosen Freeholders existing in such County at the time of the reorganization of the Board

in such County, "under this act," shall expire with the termination of office of the members of such previous Board, notwithstanding that such officers may have been appointed for a longer term, and that all offices filled by appointment by such previous Board shall then become vacant, and that the Board of Chosen Freeholders, constituted or elected under the provisions "of this act," shall forthwith upon their organization fill the offices thereby vacated for the term of one year.

The new Board elected under this act organized on the 3d of January, 1916, and immediately appointed Mr. Durham, the respondent, as County Engineer to succeed Mr. Earle, the relator, who up to that time was acting as such under a legal appointment made by a prior Board. The latter contends that this procedure by the Board of Freeholders was not authorized by the act of 1912 for two reasons: first, because the County Engineership, of Bergen County, is not an office within the purview of section 6 of the act of 1912; and second, because even if it be an office it does not come within the scope of that section, it having been created by an entirely independent statute, viz.: the Road Act, which provides the term for which the incumbent shall hold, and prescribes the duties and obligations thereof, and that by a supplement to the Road Act, passed in 1912, some ten days later than the Small Board of Freeholders Act, the County Engineer is made a quasi State officer, and not subject to be removed by the Board of Freeholders, except upon the approval of the State Highway Commission.

The amendment of 1909 to the Road Act (P. L. p. 316) makes the County Engineer an officer and requires that "before assuming the duties of his of-

fice he shall take and subscribe an oath or affirmation that he will faithfully perform all the duties of his office to the best of his ability and understanding." If, therefore, the suggestion of the relator is that the County Engineer does not hold an office, it is completely answered by the citation from this statute. If the contention is that, although an office, its incumbent is not effected by the change in the governmental machinery created by the Small Board of Freeholders Act, we cannot concur in that view.

County offices are not all of them created by the act to incorporate the Chosen Freeholders in the respective Counties of the State, or its supplements or amendments, nor are their terms or the duties and obligations of their incumbents fixed thereby. And the Legislature undoubtedly had this fact in mind when it declared in section 6, above cited, that the terms of office of *all officers* then holding office under appointment by Boards of Freeholders should expire when the old Board went out of office and the new Board came in, and that *all offices* filled by appointments by previous Boards should then become vacant. The legislative scheme, as we perceive it, was that whenever the people of a County should adopt the act of 1912 as its charter, there should be a complete change in the personnel of the County government, and that upon the organization of the new Board every officer who had been appointed by a preceding Board should cease to hold his office, without regard to its character or the length of its term, so that the new Board of Freeholders might have in every branch of the County government men of its own selection, and thus be unhampered by any conditions for the existence of which it was not responsible.

What we have said with relation to the first contention of the relator practically disposes of that secondly made by him. This section of the Small Board Act is not limited in its operation to such offices as may be called "County offices." The test provided by the statute is the method in which the office is filled. If the incumbent holds "under appointment by the Board of Chosen Freeholders," then, no matter what the office be called, his term is brought to an end by the organization of the new Board and his office becomes vacant instanter.

It is also suggested on behalf of the relator that the Legislature cannot be presumed to have intended to embrace this particular office in the sweep made by section 6 of the act, because it provides that the new incumbent of any office filled by the Board shall only hold for one year, and thus shortens the length of the term as provided in the Road Board Act. We think the answer is that the first appointees to all offices embraced within the scope of section 6, without regard to the normal length of the term provided by the statutory provisions creating such offices, shall hold their respective offices for the term of one year only. The explanation of this provision of the statute is, as it seems to us that the Legislature appreciated the likelihood of the new Board, in appointing at one and the same time incumbents to so many offices, discovering afterwards that some at least, of their selections, were not up to the standard desired, and so provided for a short original term of equal length for every office holder, leaving it to the Board of Freeholders at the end of the year and when the defects in the governmental machine had become apparent to make such changes in the incumbents of the various offices as their experience should then justify.

We conclude, therefore, that the respondent is entitled to judgment on the demurrer.

RULE FOR JUDGMENT.

The information in the above cause, having been duly filed at the relation of Ralph D. Earle, Jr., relator, and the respondent, Henry W. Durham, having demurred thereto, and said cause having been regularly set down and noticed for argument at the February term, 1916, of this Court, and having been argued before the Court by Gilbert Collins, of counsel for the relator, and Clarence Mabie, John R. Hardin and Waldron M. Ward, of counsel for the respondent, and the Court having considered said cause, and directed a judgment in favor of the respondent on demurrer,

It is ordered, that judgment in favor of respondent with costs to said respondent, against the relator, be entered in the above entitled suit.

Entered June 27, 1916.

On motion of
CLARENCE MABIE,
Attorney of Respondent.

JUDGMENT.

(Entered June 27, 1916).

This cause was heard before our Supreme Court at the February term, 1916, and judgment was rendered in favor of the respondent, Henry W. Durham, and against the relator, Ralph D. Earle, Jr., on the demurrer to the information.

Whereupon it is adjudged that the said

respondent, Henry W. Durham, is entitled to hold, use and enjoy the office of County Engineer of the County of Bergen; and it is further considered that the said relator, Ralph D. Earle, Jr., is not entitled in any way to hold said office; and it is further adjudged that the said respondent, Henry W. Durham, recover of the relator, Ralph D. Earle, Jr., the sum of forty-four dollars and ninety cents ($44.90), costs in said suit.

Judgment entered June 27, 1916.

WM. S. GUMMERE,
C. J.

NOTICE OF APPEAL.

(Filed July 7, 1916).

To Clarence Mabie, Esq., Attorney of Respondent:

Take notice, that the relator appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals on the following grounds, namely, that the Supreme Court sustained respondent's demurrer to the information filed in said cause, and gave judgment in favor of the respondent on said demurrer, whereas none of the grounds assigned in said demurrer were sufficient to sustain the same, and said Court should have overruled said demurrer, and should have given judgment of ouster on said information in favor of the relator and against the respondent.

COLLINS & CORBIN,
Attorneys of Appellant.