

## New Jersey Court of Errors and Appeals.

ANDREW ALBRIGHT,  Plaintiff in Error,  <i>vs.</i>  SUSSEX COUNTY LAKE AND PARK COMMISSION, <i>et al.</i> ,  Defendants in Error.	}	On Writ of Error.
---	---	----------------------

### **Brief for Defendants in Error.**

The Act of the Legislature, the constitutionality of which is challenged by the plaintiff in error, is modeled upon the frame of the Act entitled, "An Act to Establish Parks in Certain Counties of this State," approved March 5, 1895 (Laws of 1895, page 169), known as the "Essex Park Bill." Several of the reasons assigned by the prosecutor are similar to the objections urged against the constitutionality of the Essex Park Bill and disposed of by the judgment of this Court in the case decided May 2, 1903 (not yet reported).

As I understand it, that case held that the Park Act was not unconstitutional by reason of the fact that it directed the election under the referendum clause to be held "at the next election wherein the people of the county are authorized to vote for local officers"; the opinion of the Court being in

that case, as was the opinion of the Supreme Court in this case, "that with respect to imposing a duty upon the County Clerk and election officers to prepare for and hold an election, the effect of the Act is immediate and imperative, and the duty continues until it is performed; that it is not essential that the question shall have been submitted at the election held next after the passage of the Act, the referendum clause being mandatory in so far as it directs that the Act shall be submitted to a popular vote substantially in the method prescribed, but directory with respect to the time of such submission."

The prosecutor filed no reason and made no objection in the court below as to the constitutionality of the provision of the Act in question requiring the commissioners to be appointed by a Justice of the Supreme Court; hence that question cannot be raised upon this argument.

## I.

### **The object of the Act is sufficiently expressed in the title.**

The principal purpose of the Act was to acquire for public use the right of fishing in fresh water lakes, and the use of lands adjoining thereto, and, as incidental to such acquirement, to regulate the same.

The creation of a corporation to assist in effectuating the principal purpose of the statute is a mere incidental provision forming a part of the machinery by which the purpose of the act is carried into effect. The same may be said as to the provisions of the act which define the powers of the Commissioners, all of which are ordinary and usual and adapted to the object which the Legislature had in view.

The title of the bill is more comprehensive than that of the statute relative to public parks, and, in view of the large degree of generality permitted under the decisions of this Court in the expression, by their title, of the objects of statutes, it seems unnecessary to dwell particularly upon this objection.

*Newark v Mt Pleasant Cemetery Co.* 29 Vt. 168, 172  
*Easton & R.R. Co v Central R.R. Co* 23 Vt. 267  
*Anderson v Seaboard* 29 Vt. 575.

## II.

**The Act, being one regulating the internal affairs of counties, is general, and not local or special.**

The plaintiff in error criticises the act because it does not apply to all counties, but only to such as contain within their limits fresh water lakes over one hundred acres in area.

The classification adopted is neither artificial, illusory, nor shifting, but is reasonable, substantial, and natural. It would be an unreasonable exercise of legislative authority to extend a provision of this kind to counties which do not possess fresh water lakes of adequate size to afford in a reasonable manner public privileges of fishing. The Legislature considered that a lake exceeding in area one hundred acres was necessary to justify the establishment of a county lake and park commission, and the purchase or condemnation of fishing rights for public use. The classification commends itself as wise and judicious, and is one which ought to be, on precedent and principle, sustained. The object of this classification was not to embrace counties which, from natural reasons, ought not to be embraced, or to exclude those which, from natural reasons, ought to be embraced, but to include all having the same natural, substantial characteristics in respect to the objects of the act and the purposes to be accomplished thereby. If the act had used the natural features

referred to as a basis for classification in an attempt to regulate the number of chosen freeholders or the manner of their election, of course the classification would have been bad, because it would not have included all the counties similarly situated with respect to the very object of the law; but this act does include all counties similarly situated in respect to the thing to be effected, namely, the acquirement of the right of fishing for public use.

It is admitted that nine of the twenty one counties of the State have lakes and ponds over one hundred acres in area. These counties differ in population and other characteristics, but they are all similar in this respect—namely, that they all possess fresh water lakes of an area which, in the judgment of the Legislature, would render it reasonable and proper to establish therein the right of public fishing under the methods provided by this act; such classification certainly meets all the requirements of the Constitution.

### III.

**It is further objected that the right of fishing in fresh water lakes in the State of New Jersey is a private right, and not a public use.**

This is undoubtedly a correct statement of the law. Had it been otherwise, it would not have been necessary to pass this act. The very object of the act is to transform private rights into public rights, open to all the citizens of the State.

There could be no doubt of the validity of an act which authorized the acquisition of the entire property in a lake, including the land under water and the right of fishing therein for public use; and as the right to take all implies the right to take a

part, it follows that the acquisition of the right of free public fishery in a particular lake is a just and proper exercise of the legislative power, and the right of eminent domain may be exercised to acquire such privilege by condemnation.

The act does not differ in principle from those which authorize the establishment of public parks, in which are provided conveniences for public amusements, such as rowing, cricket, baseball, football, etc.; nor does it differ in principle from the establishment of public libraries, reading rooms, gymnasiums, or public swimming baths. Healthful outdoor exercise is quite as much an object to be encouraged by public authority as mental exercise and study.

As to the objection that the power to exercise the right of eminent domain given by the act is an unconstitutional provision, it may be said in passing that this is only an incidental means of carrying out the purposes of the law. The right of public fishery may be acquired by the commissioners by grant or purchase, and it may never be necessary to exercise the power of eminent domain. Such objection cannot be raised by this prosecutor at this time, even if it would avail him, which we deny, if raised at a proper time.

The counsel for the prosecutor suggests that this right of fishery is not a public use, because each fisherman has a right to take away the fish that he catches; but it is impossible to see how this circumstance in any way differentiates this public use from many other common uses in private property. The right to cut and carry away turf, the right to pasture cattle, the right to gather fire wood, are illustrations of similar rights existing under English law, of course, each one presupposing a grant, but nevertheless existing as a matter of fact.

The judgment of the Supreme Court should be affirmed.

GRIGGS & HARDING,  
Counsel for Defendants in Error.

The  
file  
con

## New Jersey Court of Errors and Appeals

ANDREW ALBRIGHT,

*This appendix is  
filed and submitted by consent of solicitor and  
counsel of plaintiff in error filed herein.*

*16*

### Appendix to Brief of Defendant in Error.

Reply to the point raised for the first time in the argument before this court, with reference to the effect of the language of the proviso in Section 2 of the act.

First. The proviso at the end of Section 2 does not regulate or affect in any way the standard of classification contained in Section 1.

The act applies to all *counties* having fresh water lakes having an area exceeding one hundred acres, without regard to the use to which such lakes are now put.

The proviso at the end of Section 2 applies to *lakes*, not to counties, and limits merely the power of the commission, so that it shall not divert lakes already devoted to one public use to another public use. This proviso will not



## New Jersey Court of Errors and Appeals

---

ANDREW ALBRIGHT,  
*Plaintiff in Error,*  
*against*  
SUSSEX COUNTY LAKE AND  
PARK COMMISSION,  
*Defendant in Error.*

---

### Appendix to Brief of Defendant in Error.

Reply to the point raised for the first time in the argument before this court, with reference to the effect of the language of the proviso in Section 2 of the act.

First. The proviso at the end of Section 2 does not regulate or affect in any way the standard of classification contained in Section 1.

The *act* applies to all *counties* having fresh water lakes having an area exceeding one hundred acres, without regard to the use to which such lakes are now put.

The proviso at the end of Section 2 applies to *lakes*, not to *counties*, and limits merely the power of the commission, so that it shall not divert lakes already devoted to one public use to another public use. This proviso will not

come into operation until the commission is constituted in any county, and then it will operate as a limitation upon their powers as conferred in the preceding part of Section 2.

The exception or limitation in this proviso is a proper one, the reasons of which are obvious, and have nothing to do with the subject of classification.

It was not essential that the commission should be given power to take *all lakes* in the county; the legislature had a right and it was its duty in such instances as this, to exempt certain lakes.

But in classifying *the counties* it could properly adopt the standard of the existence of lakes of a certain area, and make it apply to all counties having lakes of that size, even if by subsequent provisions it prohibited the acquisition of some of the lakes of that area.

The exemption of the proviso is a limitation upon the power of the commission, and not upon the standard of classification.

Nor does it appear, and as a matter of fact it is not true, that the proviso will make any difference in the number of counties to which the act applies. In Sussex county, for instance, there are more than half a dozen lakes of one hundred acres in area, and only one used as a source of water supply. The effect of the proviso is to prevent the latter from being taken and to leave all the others subject to the power of the commission.

Second. If the proviso means that lakes which are now the source of water supply, and which

may be abandoned for that purpose, are excluded from the operation of the act in the future, this construction of the proviso does not make the act special, because :

(a) The act is not special if the classification is so made as to include all the lakes that will probably or with reasonable expectancy come within the class.

When population is the basis of classification applied to municipalities of a given number of inhabitants, legislation which excludes those whose number of inhabitants may thereafter reach the given number is special.

The reason for which is stated by Justice Pitney (page 23) as follows : "Inasmuch as most, if not all of our towns and cities, normally increase in population from year to year, it is constantly to be held in view in classifying municipalities with respect to population, that in order to insure uniformity, provision must be made for those that shall hereafter attain the requisite number of inhabitants, as well as those already possessing it."

In short, there is a probability that others will come into the class, but in our case the probability is the other way. The probability is that the use of any lake, exceeding 100 acres in area, now used for a water supply will not be abandoned.

The probabilities that municipalities will grow in population adds to the probability that any municipality which is now using a lake of over one hundred acres in area will not abandon it. The fact that a lake of this size is used for a

water supply indicates that it is the supply of a municipality of considerable importance, and that it has been chosen as the best lake for that purpose, and that any change in the water supply will be an increase and addition to that in use.

The mere possibility that such lake may be abandoned as a source of water supply ought not to disturb the classification. It is conceivable that a volcanic disturbance might in the future cause the formation of a lake of the size and character of those in the class, but the legislature can make a classification without including every object which may by any possibility at any time come into existence.

(b) The foregoing statement (a) is made upon the assumption that any lake which may be abandoned for a water supply, will naturally be of the same class as those not so used.

But a lake which has been used by a municipality for a water supply, may not have the same qualities as a lake which has never been so used, and may not naturally belong to the same class when considered for use as a fishing lake.

We understand that the usual regulations made by municipalities respecting lakes used for a water supply, places such lakes in a condition less suitable for the purpose of propagating fish than they were in their natural state. For the purpose of procuring pure water, municipalities ordinarily remove the vegetation, decaying timber and other objects from the bed of the lake and from the immediate vicinity of the lake. These natural objects are considered as a

cause of impurities for drinking water, but the same objects afford the natural food supply for fish, and are naturally adapted for the breeding, protection and maintenance of fish. It is recognized that such natural objects are the source of *larvæ*, the natural food supply for the smaller fish, which smaller fish are in turn the food supply of the larger ones. It is also known that lakes and reservoirs which have been used for drinking water by municipalities for a considerable length of time after they have been changed from their natural condition are not suitable for the propagation and maintenance of fish.

Again, the water of these lakes used for municipal purposes may be drawn for municipal use into reservoirs at particular times, so that the fish may be destroyed, and at the time of their supposed abandonment for water supply the lakes would be of no use for fishing purposes. It is true they might be again stocked with fish, but the point is, that the municipal use would be likely to change the character of the lake for fishing purposes, so that there would be a natural distinction between such lakes for the purpose of fishing. The legislature had a right, if it saw fit, to exclude such lakes from the class it set apart for this purpose.

If this is a legitimate classification the legislature had a right to make it and the court will not inquire into the wisdom of making such classification.—*Paul v. Gloucester County*, 21 Vr., 585, 592.

Again, the legislature may have had in mind that a lake once used for a water supply to a municipality, even if it should be disused for that

purpose, would probably be needed again for use as a water supply. The legislature had the right to permanently exclude such water from use for fishing purposes under this act, *and maintain such a lake for a water supply*, in case it might be needed again for the same use. It is submitted, that the legislature may have made a legitimate classification, if it had placed lakes which were so located as to be naturally needed for a water source in one class, and those which were naturally adapted for fishing into another class, and have provided that the lakes in the first class should not be used for the purpose of the other class. Why then could not the lakes which had once been used for a water supply be excluded from the fishing class and kept for a water supply? The legislature had a right to say that the preservation of a water supply for a municipality was more important than the establishment of a fishing resort.

Third. The court will be inclined to construe the proviso liberally and so that the act will not be within the constitutional objection. In *Ross v. Essex Freeholders* (not reported) Judge Dixon says: "But the courts never approve an interpretation of a statute which will defeat its purpose, if there be any reasonable construction which will uphold it." By a liberal and reasonable construction of the proviso the act may apply to a lake which is now used for a water supply, but which use may be afterwards abandoned.

It is noticeable that the proviso does not say, in terms, that "a lake which is now used as a

source of water supply *shall never be taken*, or *shall not hereafter be taken*," but it says "that this act shall not *apply* to any fresh water lake which is now used as a source of water supply." The legislature in this proviso was only considering the *application* of the act to its objects, without regard to the *particular time* of its application.

The legislature provided that the act should take effect immediately, as regards its submission to popular vote, and probably contemplated that the duty of submitting the act to the people would be performed immediately, so that the reference to "lakes now used" was naturally made by the legislature as descriptive of the lakes to which the act would not probably apply, if the election should occur at the time of the passage of the act. But since the *construction* put upon this act is that the provision ordering elections was directory merely so that at any time in the future the act may apply to the lakes, the construction ought to follow that the phrase "lakes now used" has reference only to those lakes so used when the election should take place immediately after the passage of the act.

The proviso therefore really means no more than it would if "now" had been transposed thus: "Provided that this act shall not *now* apply to any lake which is used," &c. or "while" or "as long as used," &c. The word "shall" in this proviso has no force with reference to tense. Its object is to express a mandate and the real object of the legislature would have been as well expressed thus:

“Provided that this act *does* not (at the present time) apply to any lake which is now used,” &c.

In the following cases such construction has been put upon similar language :

State v. Troth, 5 Vr., 377, 382.

Butler v. Montclair, 38 Vr., 432.

Wood v. Atlantic City, 27 Vr., 232.

Perrine v. Farr, 2 Zab., 356.

In the case of State v. Troth, 5 Vr., 382, Judge Depue says : “The words ‘heretofore erected’ refer to the time of the laying of the road and not to the time of the passage of the act.”

It is observed, that if regard is to be paid to strict grammatical construction, there was as much difficulty in holding that the phrase “heretofore erected” did not refer to the time of the passage of the act, as there is in holding that the phrase “now used,” does not refer to the time of the passage of the act.

Since the argument, our attention has been called to the fact that the opinion of Justice Pitney, contained in the printed case, is not the corrected opinion on file, but is a copy taken from the original draft, evidently by a mistake. The corrected opinion is found in 39 Vr., 541.

Respectfully submitted,

GRIGGS & HARDING,

*Counsel for Defendant in Error.*

NEW JERSEY  
**Court of Errors and Appeals**

---

ANDREW ALBRIGHT,  
*Plaintiff in Error,*  
*against*  
SUSSEX COUNTY LAKE AND PARK  
COMMISSION,  
*Defendant in Error.*

**Brief for Plaintiff in Error.**

The judgment under review affirms an appointment of commissioners by a Justice of the Supreme Court under Chapter 161 of the Laws of 1901 (*P. L. 1901, p. 333*). The questions involved are the validity of the act and the validity of the election adopting it.

The act embraces several purposes, all to be accomplished by a commission appointed by a justice of the Supreme Court, to be paid for by county bonds and tax. *First*—The commission shall acquire and maintain public rights of fishing, common to all, in fresh-water lakes having an area of water surface exceeding one hundred acres, in any county having such lakes where such commission is appointed. *Second*—They shall also acquire land adjoining the lakes not exceeding ten acres. *Third*—They shall take land for a public road connecting the land on the lake with the nearest public road, and shall assess the cost of opening the road on the owners benefited, and make sales of land for such assess-

ments. *Fourth*—The commission shall construct and maintain the public roads thus opened.

## I.

*A common right to fish is not a public use, and the act is void because it requires taxation and condemnation.*

The act involves the taxing power as well as the power to condemn; it requires the issue of bonds to be paid by taxation. *P. L. 1901, page 346, Sec. 14.* The taxing power as well as the power to condemn requires a public use to support it. "There can be no lawful tax which is not laid for a public purpose." Miller, Judge, in *Loan Assoc. v. Topeka, 20 Wall. 655.* A common right to fish exists in tidal waters but can hardly be said to be a public use, and whatever it is, is a right not known in any fresh waters of the State of New Jersey. The lands under the tidal waters belong to the State which permits all to fish there. As proprietor the State could exclude all or any from the privilege. All the lands under fresh waters in New Jersey are the subject of private ownership.

The right to fish may be granted by the owner of the soil, but is not an estate or an easement or any interest in land. It cannot be acquired by the public by dedication or grant, but it may be granted to a private person by the owner just as the right to enter and take wood may be given without an estate. *Cobb v. Davenport, 3 Vr. 369; 4 Vr. 223.* When created by grant it is on the same footing as a privilege of hunting. *Id., 3 Vr. 387.*

In *Albright v. Cortright, 35 Vr. 338,* this Court likens the right to fish to a right to take berries or gather nuts on the lands of another. Such a right in the general public, while the fee of the land belongs to an individual, is unknown to the law. *Turner v. Hebron, 61 Conn. 175; 22 Atl. 951, 952.* If the present act is upheld it will create an entirely novel interest in land. The question is whether such a right can be taken for the use of the public. Is the right to fish

common to all in private waters a public use so that it can be taken by eminent domain? This is a judicial question. "The courts must determine whether the use is of a public nature." *Olmsted v. Morris Aqueduct*, 18 Vr. 311, 329. (Ct. Er. & Appls.)

The rule to determine whether a use is public has never been formulated with precision, and probably cannot be. The best statement is that of Cooley in his work on Constitutional Limitations, p. 533: "The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the government is supplying its own needs or is furnishing facilities for its citizens in regard to those matters of public interest, convenience or welfare, which, on account of their peculiar character and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful and needful for the government to provide."

The fishing right does not come within this principle. There is nothing in the reason of the case or in the settled practice of free governments, or any other governments, to hold that the right to go on another man's land and catch fish is one which it is needful or useful that the government should provide. Common rights of fishing and of pasture are well known at common law, and were in effect private rights, usually common only to the tenants of the manor. No legislature ever before attempted to condemn a right to fish, or the similar rights to hunt or to gather berries or nuts. The case of *Cobb v. Davenport*, 4 Vr. 227, has been repeatedly cited with approval in this State. There an attempt was made to establish a public right of fishery by dedication, and, if such right can be condemned for public use, it would seem to follow that it could be devoted to the public by dedication. If it cannot be devoted by dedication, then it would seem that it could not be a public use for which property could be taken. In that case Depue, J., said, speaking of dedication to public uses:

"As applied to uses which are strictly public, as promotive of the intercourse of travel in the community, or afford-

ing public parks for health or recreation, the doctrine is well enough. Beyond that, to give it a wider range, so as to include practically the divesting the owner of the fee of the substantial benefits incident to the ownership of lands, for the benefit of others as members of the community, *for uses which are in no sense public*, without the intervention of the ordinary assurances for creating interests or rights in lands, would be an unwarrantable invasion of the right of private property, and subversive of the principles of the common law."

The mere fact that it might promote the enjoyment of persons in the county of Sussex to be able to fish on Mr. Albright's lake does not prove that a common right to fish there is a public use. It might promote their enjoyment to be allowed to enter his orchard and pick his apples, and that right is of the same character. It might promote their enjoyment to milk his cows, or collect his eggs, or kill his chickens. Those who catch the fish would find it convenient to take his wood to cook the fish with. That would be a common of *estovers*. All these things are done now, but are regarded as trespasses. Would these farmers of Sussex who desire some of these privileges against Mr. Albright be willing to concede the others as against themselves?

The Supreme Court seems at one point to reason that because a park may be taken and may include a right to fish, therefore the right to fish may be taken alone. (Case, p. 34-35. 20 to 26.) But this is unsound. When land is lawfully condemned many incidents of ownership go with it, but it does not follow that each incident is a public use for which alone a taking is warrantable. Thus a railroad company may lease a house and lot on its right of way, but could not condemn for such use.

If we reject the guarded statement of Judge Cooley, what shall we substitute for it? We are dealing with a fundamental power of government and a fundamental right of property, and principles must be laid down with great caution. No doubt it would be satisfactory to a logical mind to have a sharp definition of a public use. The Supreme Court

in the opinion below says: "Under this scheme every citizen of the county would have an equal right to resort to the lakes and parks and to enjoy the fishing privileges. \* \* \* *That this constitutes a public use is entirely well settled.*" (Case, p. 33, l. 25.) Evidently the Supreme Court definition is this: *A public use is anything taken for the use of the whole public.* Is this a sound definition? And if so, is the proposed taking within it? We think not.

(a.) It is not the spirit of our law to discard the experience of ages in favor of a syllogism, as it is said that the French do. The reverse is the spirit of the common law, of which Judge Cooley's statement of a public use, above quoted, is a good illustration. Our constitutional restraints must all be read in the light of usage. True, we extend our takings to promote the new modes introduced by modern invention, but we do it to serve established public uses. Thus the practice of taking land for highways and for village greens is ancient and is reasonably extended to cover railroads and parks. Our own reports show the practical judgment with which our courts deal with this question. The question "What is a public use?" is for the Court, and the Court deals with it, as a jury, taking each case on its own merits.

In *Scudder v. Trenton Del. Falls, Sax. 694, 729*, the Chancellor said that the Court would not attempt to lay down a general rule to guard against legislative encroachment: "What shall be considered a public use or benefit may depend somewhat on the situation and wants of the community for the time being."

In *Tide Water Co. v. Coster, 3 C. E. G. 518, 521*, in this Court, Chief Justice Beasley said that the legislative discretion was final "if the public interest be involved to any substantial extent, and if the project contemplated can in any fair sense be said to be promotive of the welfare or convenience of the community.

The illustrations given by him are those of railroads and streets, and the case before the Court was one of reclaiming a large tract of land by diking. The views of Chief Justice Beasley were further expressed in this Court *In re Pequest*

*Drainage*, 12 Vr. 175, 178, where he said that the drainage scheme there in question was not a public use, distinguishing it from an extensive scheme like that considered in the case of the Tide Water Co., where the unreclaimed land was in a condition detrimental to public health. The Pequest case is instructive because it asserts the power and duty of the Court to look, in a practical manner, into the public utility of the enterprise, and also because it puts great emphasis upon ancient usage as fixing the boundaries of the power of eminent domain.

In *Olmsted v. Morris Aqueduct*, 18 Vr. 311, this Court reasserted the power of the Court to first decide whether the use was public (p. 329) and cites, with approval, the language of Chief Justice Cooley above quoted (p. 331).

In *Talbot v. Hudson*, 16 Gray 417, 424, the validity of a statute giving power to condemn in order to provide for an extensive reclaiming of marshes by a State commission, was sustained expressly on the ground of the merits of the special case. The Court held that the geography of the territory was properly within the judicial knowledge of the Court, and the opinion continues: "The improvement of so large a territory, situated in several different towns and owned by a great number of persons, by draining off the water and thereby rendering the land suitable for tillage, which could not otherwise be usefully improved at all, would seem to come fairly within the scope of legislative action and not to be so devoid of all public utility and advantage as to make it the duty of this Court to pronounce a statute which might well be designed to effect such a purpose invalid and unconstitutional. The act would stand on a different ground if it appeared that only a very few individuals or a small adjacent territory were to be benefited by the taking of private property."

The Court cites also the ancient practice of the State to condemn for similar purposes.

We think these cases illustrate the soundness of the statement made by Judge Cooley, and show that it is the nature and importance of the proposed use that makes it public, that public utility is the chief element to consider, that

ancient usage is the guide to what is of public utility, and that it is not sufficient to constitute a public use that the property taken is to be open for the use of all the public.

(b.) If, however, we were to concede that property taken for the use of all the public is thereby taken for public use, we submit that it would not suffice to justify the proposed taking. A right of fishing is of such a nature that it cannot be taken for the use of the public. There is a fallacy in the assumption that a right of fishing can be made common to all. A right of fishing means a right to catch fish, and the number of fish in any New Jersey lake is limited; under color of a right common to all, the right is given really to those only who first catch the fish. If a farmer had one hundred sheep, and a right common to all should be given to take sheep on that farm, it would mean only that such right was given to the first takers and not to the public. At most, it would be given to one hundred men. The fallacy of calling such a right a public use would be manifest.

What is the difference in principle between condemning a right of sheep caption in a limited territory and a right of fish caption? In effect in each case it is condemning the right to give one person the property of another.

It is true we cannot tell in advance which person will be the first to catch the fish, but the act gives the right to make an exclusive appropriation of property in fish to the first taker. It leaves the designation of the favored individuals to be determined by fisherman's luck, but all the same the fish are given to individuals and not to the public. It is like taking property to be given to individuals selected by lot, or at best by a game of mixed skill and chance. The property of one is therefore taken for the private use of others and not for the benefit of the public, and the taking is not for a public use. It is, therefore, in violation of constitutional right.

In *Turner v. Hebron*, 61 Conn. 175; 22 Atl. 951, 952, the Court said that while a right of fishing might be granted to an individual, yet in its nature it could not be granted to the public. "A deed or devise to the unorganized public by that name would be void for uncertainty."

The uncertainty is not avoided by the creation of a commission to take the right and make it common to all. The uncertainty is in the designation of the beneficiaries. A statutory grant to the general public is as indefinite as a grant by deed or devise, and the nature of the right is such as to make its common enjoyment impossible.

## II.

*The act was not adopted at the election for local officers, as prescribed by the act.*

The election prescribed for adoption is "the next election, whether general, municipal or special, wherein the people of the county qualified to vote are authorized to vote for local officers."

We think that the Court must take notice that in Sussex county there is a town (Newton), which held its election April 9th, 1901, and townships whose local elections are held on the second Tuesday of March. As the act in question was approved March 22d, 1901, the next election for local officers in towns was April 9th of that year, and in townships was in March, 1902. The act did not require that all the towns and townships should vote on the same day, and there was no difficulty in the way of compliance with the act. Whether practicable or not, it seems clear that those were the elections prescribed, and that the election in November was not. Both the popular and the legal meaning of the term "local officers" applies it to township and town officers. They are so described in our statutes; for instance, see *G. S.*, p. 1331, *Sec. 225*; *P. L. 1898*, p. 238, *Sec. 2*.

The November election is defined by the statute fixing it as "the general election" (*P. L. 1898*, p. 238, *Sec. 1*), and the elections for local officers are called "local elections" (*P. L. 1898*, p. 280, *Sec. 85*.)

County officers are not local officers.

*State v. Milwaukee County*, 21 *Wis.* 449.

The proposition of the Supreme Court that an election may be held by common consent at a date not authorized by the statute (p. 35, l. 30), would have some basis if the voters had legislative power. An irregularity in the exercise of a granted power will not always vitiate it. But the voters had no legislative power; their constitutional right of suffrage is limited to a vote for officers. It may be the case that an election of officers may be held by mistake on the wrong date, and the Court may refuse to disturb it. But such an election as is involved here is a very different thing. Here is no exercise of any power except that conferred by the act itself. It is a mere compliance with a statutory condition. A vote in November does not comply with the condition that before the act goes into effect it must be adopted at an election for local officers.

### III.

*The object of the act is not expressed in the title.*

The title of the act is as follows: "An act to acquire rights of fishing common to all in fresh water lakes in certain counties, to acquire lands adjoining thereto for public use and enjoyment therewith, and to regulate the same."

The object not expressed is the opening and improvement of roads which are to be laid out, not upon the lands taken adjoining the lake, but to connect the nearest and most convenient public road with said lands. (*P. L. 1901, p. 335.*)

Sections 6 to 13 of the act relate solely to the opening and improvement of said roads, with elaborate provisions for condemnation, assessment for benefits and sales of land for such assessments.

These roads may well be the most expensive feature of the scheme, and are to be "forever kept and maintained" by the commissioners (Sec. 16); yet no reference to roads is found in the title of the act. The power to locate these roads is practically unlimited; they are to "connect the

nearest and most convenient public road" with the land taken on the lake, but this connection need not be made by the shortest route. The land taken adjoining the lake may be ten acres; but this need not be in one parcel, but may be in several parcels all around the lake, with a separate road to each one. What might be acquired would include a drive around the lake. These roads are evidently essential to the plan which the Legislature had in view, and, for that reason, the whole act must fail if these provisions for roads are excluded by the title. It is not consistent argument in the opinion under review to say that these roads are necessary to the parks, and that, therefore, the provisions for them are embraced in the title, and then to go on any say that the provisions for them may be excluded from the act without vitiating the residue (Case, p. 19). No doubt the laying out of roads within a park is fairly included in the object to lay out a park, but these roads are not within a park, nor is there any plain provision for a park at all. It is too much to say that the acquiring of lands adjoining lakes which is named in the title includes the right to open public roads through other lands and assess for benefits. Even if we might imply from the right to acquire the land adjoining the lake, a right to acquire access to such land, still that would not warrant the power to lay out a public highway and the power of assessment for benefits and sale of assessed property to enforce collection. We can no more find such an object to condemn, assess, construct and maintain public roads within the title than we can find the object of constructing railroads and taking tolls. The statute contemplates something quite different from a mere right of way for access. What is there in the title to apprise any landowner within striking distance of the lake that his land may be made liable under this act to be assessed for benefits for roads? The title manifestly fails to give any suggestion of such an object. The road scheme is an independent object not expressed in the title.

In *Rader v. Township of Union*, 10 Vr. 509, 514, the question was whether under the title "An act in relation to streets" the power could be given to lay out parks, and

Beasley, C. J., said: "The making and control of streets is a thing entirely different from the making of parks; the two have no connection, and neither is an adjunct to the other. It is impossible, as it seems to me, to logically hold that a description of one embraces both." This opinion was approved on all points by this Court in *12 Vr. 617, 621*.

The Supreme Court criticises the opinion above quoted on the ground, in effect, that while roads do not include parks, yet parks include roads (Case, p. 20); this is no doubt correct as to roads within the parks, but not as to outside roads laid out not merely to give access, but as public roads for every purpose, or as to assessments for benefits therefor, or as to their perpetual maintenance by a commission.

## IV.

*The act is local and special.*

(a.) The act relates to the internal affairs of counties, because it provides for county indebtedness, and bonds and taxes (Sec. 14). The classification in the act with which we are concerned is not of lakes, as supposed by the Supreme Court (Case, p. 21, l. 30), but is of counties. The fact that lakes are classified in the act does not prove that counties are not. The title refers to lakes "in certain counties." The statute applies solely "in any county in this state wherein are fresh water lakes having an area of water surface exceeding one hundred acres" (*P. L. 1901, p. 333*). That this means counties wherein there now are such lakes is the natural construction, and is shown by the provision in Section 18 that the act shall be submitted at the "next election," and shall not take effect in any county until submitted "as herein provided." No distinction is made by the act between natural and artificial lakes. Natural lakes may be increased in size by dams, or decreased by drainage, and artificial lakes may be created by dams. The act is invalid because it does not embrace all counties which may in the future acquire the characteristics of the class.

(b.) The act is special because it delegates to a commission the care of certain public roads.

The word "local" as used in our constitution has been much considered, but perhaps not the word "special." When the constitutional amendments were adopted, "special commissions" were familiar modes of enjoying choice bits of public patronage. By the act in question public roads are to be opened and constructed for public travel. The county is to pay for the construction and to provide the fund for the maintenance, but the commission is to take charge of this particular road for all time, merely because it reaches to a fishing ground. It differs in no respect from other public highways. On no defensible ground can this public road be severed from the general control of the county or local authorities. Such roads are not a class. The laying out and working of roads are among the subjects to be provided for by general laws, and a special road commission cannot be created by tying it up with a fishing scheme. Suppose the act had been passed without the road provisions, would the Court have sustained a supplement adding those provisions to the act?

(c.) The act is local and special because limited to counties whose voters may adopt it at the next election after the passage of the act.

Whether the act is limited to adoption at the next election is a question of legislative intent. The legislature might have made the act operative immediately and unconditionally; instead, it is provided that it shall take effect only on a certain condition. It cannot be given effect as an expression of legislative intent, unless that condition is complied with. We cannot say that the intention was to give it effect on other terms, in face of an express declaration in the act to the contrary. It provides (Sec. 18), that it is not to take effect in any counties until "submitted as herein provided to a popular vote; such submission shall be made and the vote hereinafter provided for taken *at the next election*, whether general, municipal or special, wherein the people of the county qualified to vote are authorized to vote for local officers." The county clerk is to give at

least ten days' notice and ballots shall be distributed, and the "acceptance or rejection of the act shall be determined by the result of *such election*," and if a majority shall then vote in favor of the act "then this act, *but not otherwise*, shall take effect immediately in said county." Sec. 2 bears on the intent, and we will discuss it later. We now take up Sec. 18.

This act contemplates one election and one only, and the result of that election is made final. Once adopted the act cannot be rejected, and once rejected it cannot be adopted by another vote. The natural result is to make not only one class of the nine counties having such lakes, but to subdivide that class. Those counties in which the act was adopted are permanently separated from those in which it was rejected or was not adopted, and the classification is founded upon the irrelevant consideration that an adoption did not take place in the year 1901. The voters in the year 1901, in any county, might regard the act as premature, for financial or other reasons; ten years later, because of increase of population and wealth, it might be desirable to adopt it, but the option to adopt it will then have lapsed. The classification thus made is unsound on two grounds: first, it puts out of the class to which the act can be made applicable those counties which have neglected to vote upon it at all at the required election; second, it puts out of the class those who have voted to reject it. Neither the neglect or the rejection constitutes a sound basis to classify.

The case of *De Hart v. Atlantic City*, 34 *Vr.* 223, 225 (*Ct. Er. & App.*), is based on this defect. See, also, *Christie v. Bayonne*, 35 *Vr.* 191; *Ross v. Passaic City*, 35 *Vr.* 488.

The Supreme Court in their opinion below do not consider at all the faulty classification which necessarily results from the power to reject the act, although the reasoning in the *De Hart* case applies fully to such cases.

The Supreme Court argues that the time fixed for the election is directory, and that counties coming thereafter into the class may vote at their first election; that, however, fails to meet the objection stated in the *De Hart* case that existing counties which do not now come into the class

never can. There cannot be two elections. The provisions is express that "the acceptance or rejection of the act shall be determined by the result of *such election*," and if adopted "then this act, *but not otherwise*, shall take effect immediately in such county." The fact not considered by the Supreme Court, that one election only is provided for, seems to be a conclusive answer to the argument that the fixing of the time is directory. By what authority can an election be held at any other time or any second election be held? Admitting that the Legislature might delegate the power to appoint a date, yet, if they have not done so, who shall assume it? Perhaps there are some features of the election that may be held directory. The act itself designates the time and place for the election, of which all must take notice. If the clerk neglects to give the additional notice required by advertisement, or to provide the ballots, yet it may well be that the voters could at that time and place provide their own ballots and vote. But if any provisions are to be treated as peremptory they are those that fix the time when the vote shall be taken. The act directs that it shall not take effect until "submitted as herein provided," and, in the next sentence, provides that the submission shall be made *at the next election*. How can it be possible to say that the time of the election is not a part of the submission "herein provided"? How can we say that what is to be "submitted as *herein provided*" means "provided as to place and manner," and does not mean "provided as to time"? In this act we submit it clearly means provided as to time and place, whether it does or does not mean provided as to manner.

If the voters chose to exercise their privilege to vote they could do so at the time and place specified in the act, and their election would not be defeated by default of the clerk; on the other hand, if they do not care to vote in any county, they fail to comply with the terms essential to put the act into operation. The entire absence of any delegation of power to fix a date for the election manifests that the Legislature itself meant to fix the date by the definite words "next election."

The Supreme Court is not clear whether the act calls for

a submission at "any election" or at "every election," but the result is the same; if we say that "next election" means *any election*, there is no limit to the number of elections that must be held. If there is authority conferred on the clerk to give notice for such election, it must be a duty; if the clerk is charged with that duty, he has no discretion whether to order an election or not. In the absence of any discretion to select any one date, it would be his duty to submit at every election until the act is adopted. The absurdity of this shows that the Legislature had no such intention, but meant that the vote should be taken at the next election and no other. The fatal defect of the act is that by its terms either a failure to vote or a rejection of the act severs such county from other lake counties which have adopted the act and makes them a class on the inadmissible basis that a particular vote was taken or not taken or that the act was rejected at the next election after the adoption of the act.

It is no answer to say that all of the nine counties in the class may have adopted the act. The validity of the act here, as in the case considered in *De Hart v. Atlantic City*, must be tested by its terms; it was valid or not on the day it passed, and the cases cited establish its invalidity. Besides, in the absence of evidence, we cannot assume any such adoption, but must presume the continuance of the original status.

The legislative intent is our only guide. Did the Legislature intend that any vote should be taken except at the next election? If this question had arisen before the year 1875 no one would argue that the vote could be taken after the next election following the passage of the act. It is only to save the act that any other meaning is given. But the meaning of the words has not changed. The Legislature meant in 1901, just what they would have meant by the same words in 1874. We nullify the Constitution itself when, to escape its force, we alter the interpretation of statutes within its condemnation. The paramount duty is to enforce the Constitution, not to save the statute.

The decisions do not support the directory interpretation of the words "next election." The first Essex Park case was controlling in the second case relating to the same statute, but can have no weight in other cases because the point now in question was not considered. It was considered in this Court in *De Hart v. Atlantic City*, 34 Vr. 223, 225. There the time to adopt a District Court act was limited to three months. We call attention to the reasoning which condemned that act. "Its benefit is denied to then existing cities, whose necessity may at any time after the three months have demanded or may hereafter demand a District Court. \* \* \* The effect of the limitation is a restriction of the class to which the law may be applied." The Cleveland case was overruled. The Court did not hold the limitation of three months directory.

*Christie v. Bayonne*, 35 Vr. 191, is closely in point. An act provided that its provisions should be submitted to the voters in second class cities "at the next municipal election after its approval" (*G. S.*, p. 520, *Sec. 203*). The Court held the act special because the time for its adoption was thus limited. It was not suggested that the words "next election" could be treated as permitting an election at any other time. A similar decision is *Ross v. Passaic*, 35 Vr. 488.

The Essex Park case, decided at March term, is not a controlling precedent here not only for the reasons above stated, but for the further reason that here, as in the case of *Renner v. Holmes*, 53 *Atl. Rep.*, p. 76, the intention to limit the scope of the act to existing counties having conditions now existing, and to a single election, appears not only from the use of the phrase "next election," but from other provisions. Section 2 of the act in question provides "that this act shall not apply to any fresh water lake which is *now* used as a source of water supply," etc. If, therefore, we say that "next election," means any election or every election, we have this situation, that counties whose lakes are at the time of the act all used for water supply, are not in the class to which the act applies, and can never come into that class, although the lakes may

cease to be so used, while those whose lakes may hereafter be all devoted to such use will remain in the class. The fact is clear that the legislature contemplated no change of conditions from those now existing, because it was meant that the election should be speedily held, and, therefore, it was not necessary to provide for the case of future public uses of lakes for water supply. Had a continuing power of adoption been intended then the water supply of the lakes for the future would have been guarded as well as those of the present day.

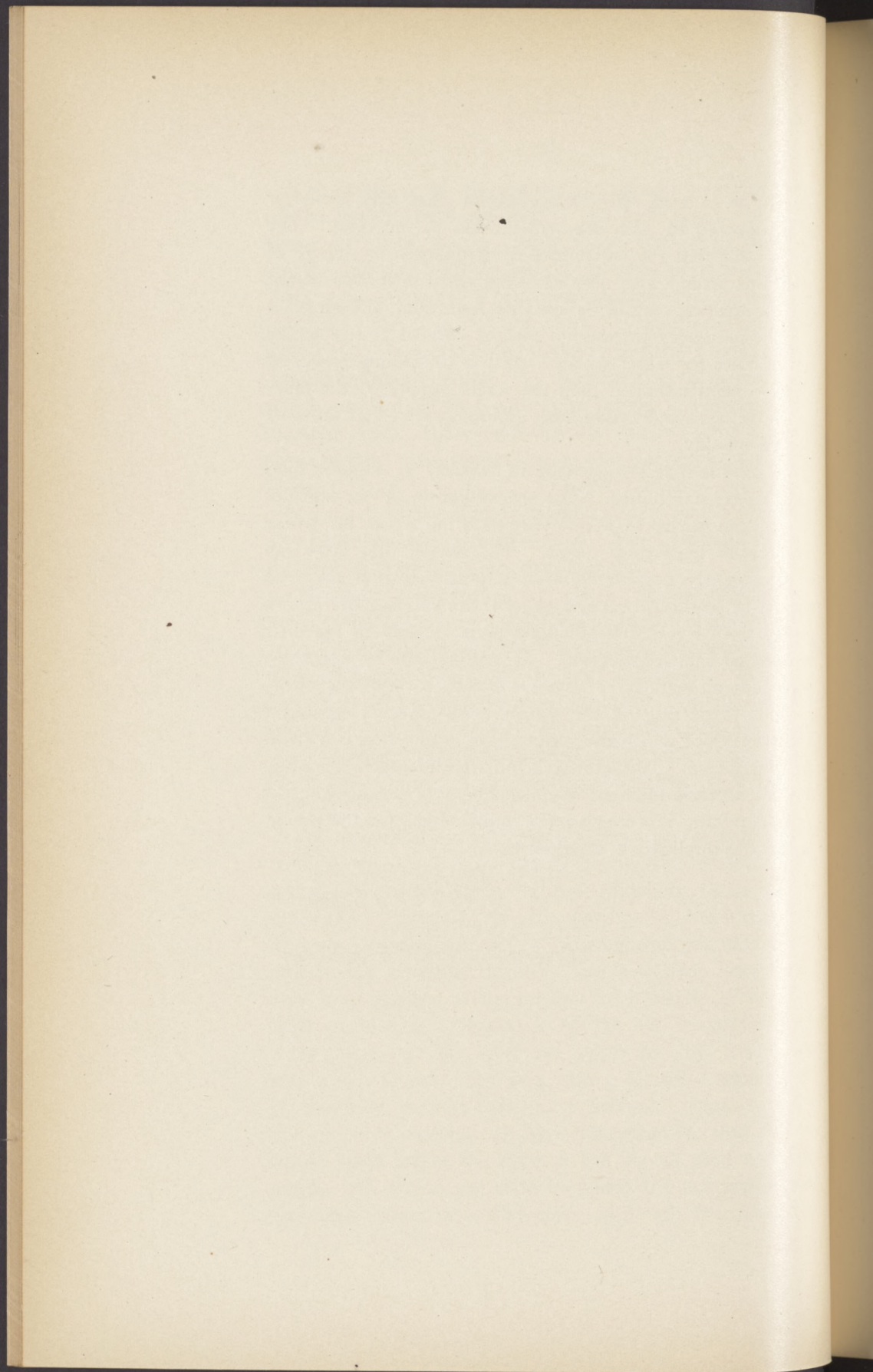
We submit that the decision in *DeHart v. Atlantic City* ought to be maintained. The specialization of our statutes through the device of a referendum is an abuse, far worse than special legislation direct. The notion that laws can be intelligently considered at a popular election finds no support in reason or experience, and the shifting of responsibility from legislature to voters is an evasion of the duty imposed by the Constitution. If it is too late to stop these references altogether, it is not too late to stop the cheap methods of putting on the statute books special legislative eccentricities of which the statute now in question is a striking illustration. An act which must be left open for adoption for all time must be taken much more seriously in the legislature, and is a much more valuable act for the public, saving the duplication of legislation.

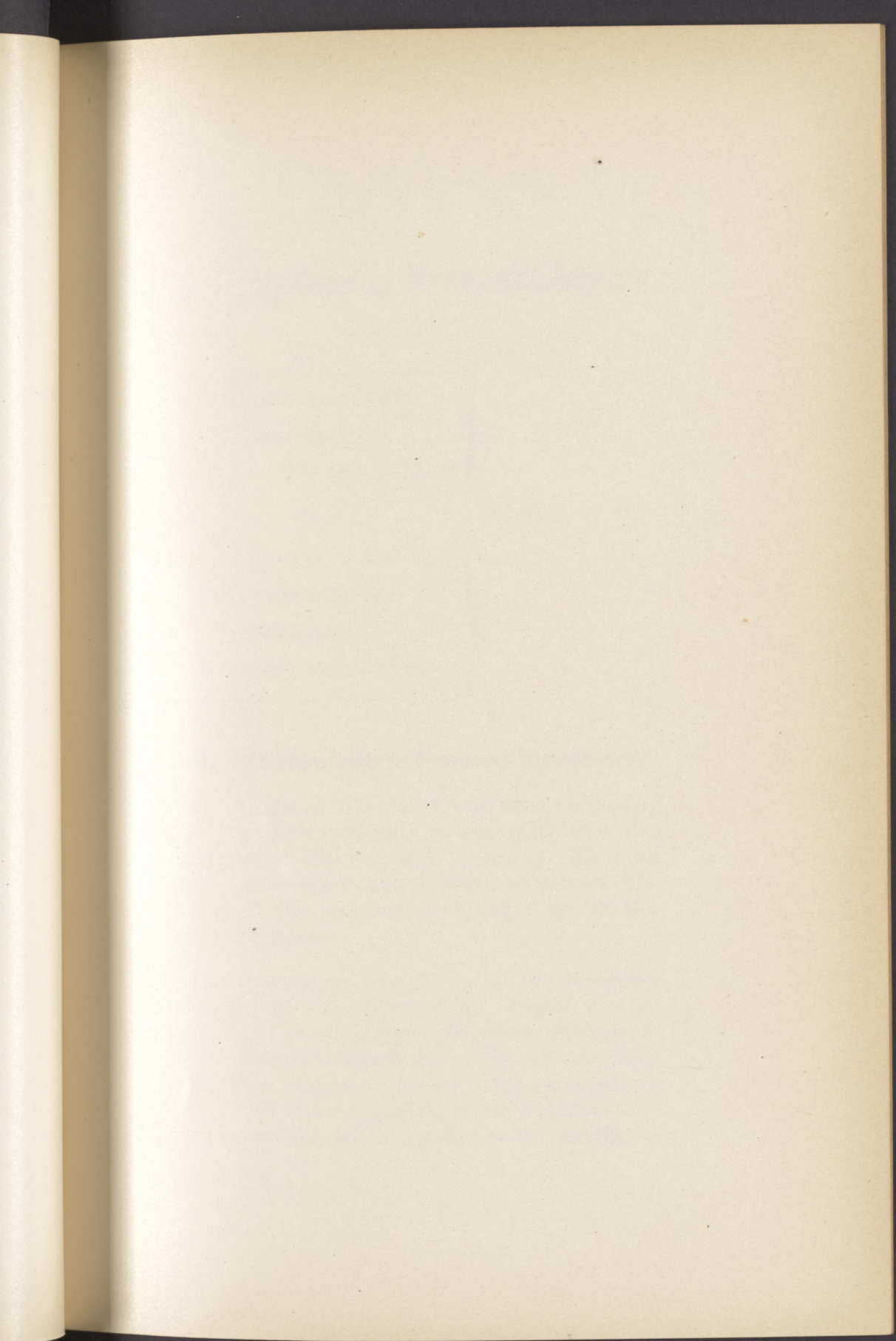
C. D. THOMPSON,

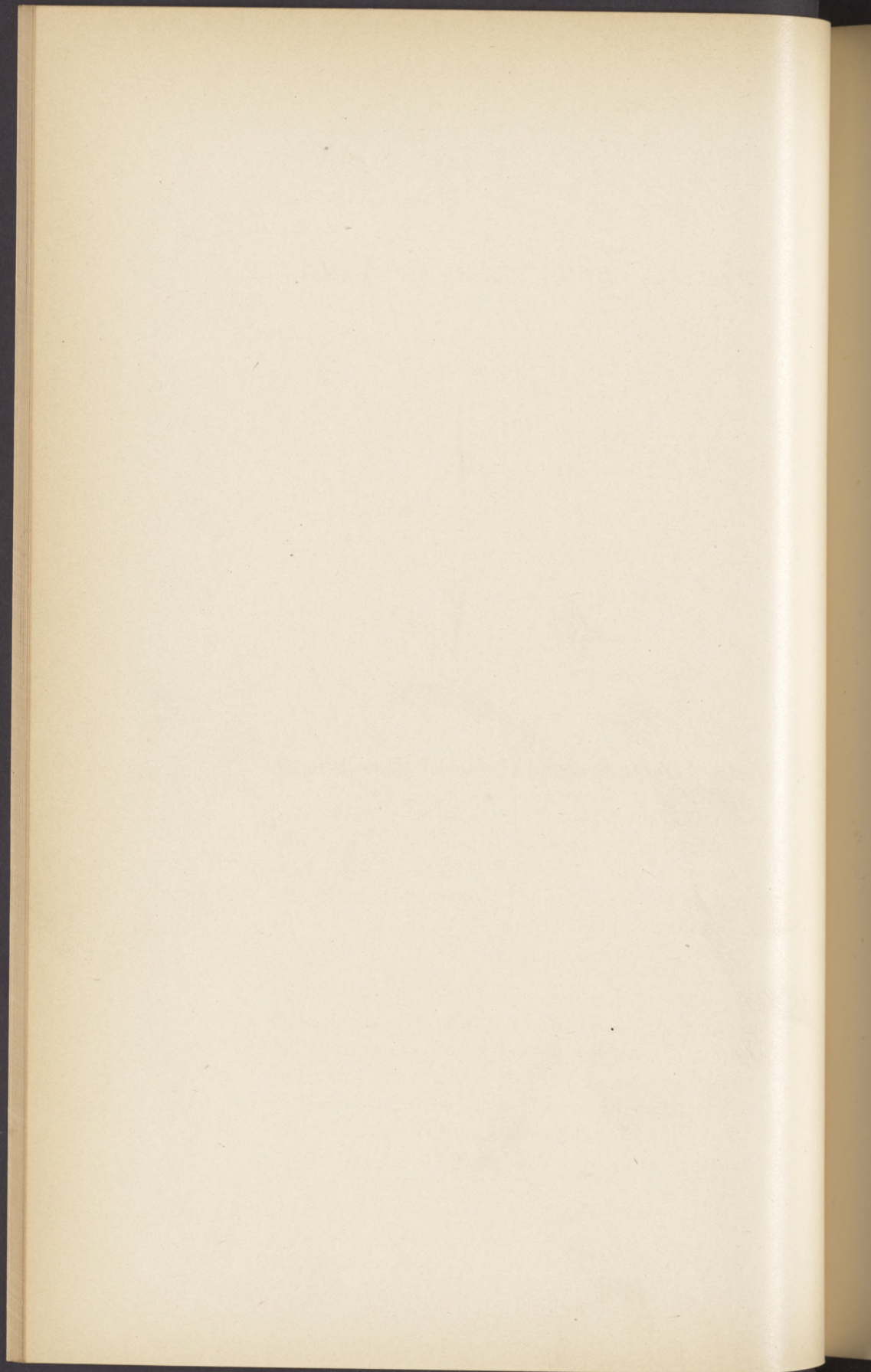
*Att'y for Pl'tff in Error.*

C. L. CORBIN,

*Counsel for Plaintiff in Error.*







## New Jersey Court of Errors and Appeals

---

ANDREW ALBRIGHT, <i>Prosecutor,</i> <i>Plaintiff in Error.</i>	}	<i>On Writ of Er- ror.</i>
<i>vs.</i>		
SUSSEX COUNTY LAKE AND PARK COMMISSION et al., <i>Defendants,</i> <i>Defendants in Error.</i>	}	

---

### ***Briefs of Defendants in Error on Reargument.***

An opinion of this court was filed on February 29th, 1904, whereby it was held that the judgment of the Supreme Court in this case should be reversed, and a judgment entered setting aside the proceedings brought up by the writ of certiorari.

The proceedings brought up by the certiorari consisted of the order of his Honor Justice Abram Q. Garretson appointing these defendants in error commissioners under the act entitled, "An act to acquire rights of fishing common to all in fresh water lakes in certain counties, and to acquire lands adjoining thereto for public use

and enjoyment therewith, and to regulate the same," approved March 27, 1901.

The main questions argued in the Supreme Court and before this court related to the constitutionality of the act, not in regard to the power of the commission to take the property by condemnation, but in regard to the act as special legislation.

The decision of this court, reversing the judgment of the Supreme Court, is based upon a discussion of the question as to whether the act is constitutional so far as it authorizes the commissioners to take by eminent domain the right of fishing in Swartswood lake, which belongs to the plaintiff in error.

In the opinion it is stated: "Under this statute a commission has been appointed in Sussex county and is attempting to take by eminent domain the right of fishing in Swartswood Lake which belongs to the plaintiff in error." It is respectfully suggested that this court was acting under an erroneous understanding of the nature of the order made by Mr. Justice Garretson and supposed that the commission was attempting to take the property of the prosecutor for the purposes of the act.

But there is no proof in the case that it is the purpose of the commission at any time to take Swartswood Lake, they having, as a matter of fact, never considered or acted upon that question, and since there are ten lakes in Sussex county to which the act applies (printed case, p. 11) it should not be presumed that the commis-

sion were attempting to take Swartswood Lake.

If the judgment is to be entered according to the opinion, it will nullify the whole act and destroy all of the powers of the commission.

The proposition of law found in the decision is that the right of fishing on Swartswood Lake can not be taken by eminent domain. Without attacking this proposition of law as an abstract proposition, we contend that the judgment should not be entered according to the decision. Against the entry of such judgment we submit the two following propositions which should be considered together :

First. Admitting that the fishing rights of the prosecutor can not be taken by eminent domain, and that the act is unconstitutional to that extent, nevertheless, such unconstitutional feature is separable from the rest of the act, and the rest of the act should stand and be put in force.

Second. Since part of the act is valid, the prosecutor has no standing, at present, to question the right of the commission to take his fishing rights by eminent domain because the commission has done nothing and may never attempt to carry out that part of the act.

### I.

**If the objectionable feature of taking fishing rights by eminent domain is separable from the rest of the act, the rest will be put in force.**

“The judicial effort is always to uphold every statute, and, if it can not be sustained in its entirety, to execute such parts of it as can be

reasonably put in force provided the objectionable feature is separable as a distinct thing from the body of the statute, and it does not appear to have been the legislative design to make it a necessary part of the enactment."

McCullough v. Franklin, 30 Vr.,  
106, 107.

Rader v. Township of Union, 10 Vr.,  
510, 514.

State v. Kelsey, 15 Vr., 29.

Chamberlin v. Cranbury, 28 Vr.,  
605.

The test is not whether the void and valid parts are contained in the same section, for the distribution into sections is purely artificial; but rather whether they are essentially and inseparately connected, as it would be inconsistent with all just principles of constitutional law to adjudge enactments not obnoxious to any just constitutional exceptions, void, because they are associated in the same act but not connected with or dependent on others which are unconstitutional.

American & English Enc. of Law,  
(First Ed.) Vol. 23, page 225, citing

Com. v. Hitchings, 5 Gray, 482.

Fisher v. McGin, 1 Gray, 1.

People v. Kenny, 96 N. Y., 294.

Deryee v. New York, 96 N. Y., 477.

Black on Interpretation of Laws, p.  
96, citing

Mayor v. Dechert, 32 Md., 369.

Applying the principles of these authorities to the present case, all of the act should stand except the power to take fishing rights by eminent domain.

The objectionable clause may be discarded without destroying the general plan and purpose of the act. The general purpose of the act is that the commission may acquire a resort, consisting of land not exceeding ten acres, and fishing rights.

Neither the land nor fishing rights were to be acquired solely by eminent domain. On the contrary the power of eminent domain was to be exercised only secondarily and conditionally upon the commission's failure to agree with the owner as to terms of purchase. Sec. 4.

In this respect this provision is similar to the usual legislation respecting condemnation of property, under which it is well settled that the failure to agree is a condition precedent to the right to condemn.

The legislature by this express provision must be deemed to contemplate the probability of acquisition by purchase rather than eminent domain, so that it can not be believed that the legislature would not have given the power to acquire by purchase which it thus expressly provided for, before condemnation, irrespective of the power to condemn.

The legislature probably contemplated, that

the fishing rights could be purchased from some owners of the numerous lakes to which the act applies so that the general purposes of the act would be accomplished.

But the general purpose of the act is to *acquire* such resorts for the public. The *means* of acquiring is secondary and incidental. The act contemplates the possibility of the commission *acquiring* the land and the fishing rights "in fee or otherwise" either "by purchase, gift, devise or eminent domain." Sec. 2.

It is not unlikely, and the legislators probably thought that in some cases persons owning the lakes might think it to their advantage, to donate to the commission both the fishing rights and land described in the act. It is quite likely that owners of such lakes who might wish to run a hotel or have their land developed, would receive a sufficient benefit in having people attracted to the lake, on account of the management of the commission, whose duty is to preserve and care for the rights of fishing and preserve and care for laying out and improving the lands.

Indeed, it is not improbable that such rights might be given to the commission without advantage to the owner, like any other public gifts, so that, as provided in Section 4 of the act, "the titles thereto shall pass from the said owners and parties interested to the said board in trust for the said county." In such a case it is essential that there should be some trustee to take and hold for the public. (See opinion of Judge Pitney in Supreme Court.) This com-

mission is altogether proper for the purpose of such trust and it is not unreasonable to believe that the legislature would have given the commission this power, irrespective of the other powers.

Again, the decision of this court does not deny that the fishing rights may be *given, devised or purchased*, and the *land* may be taken by eminent domain.

All these powers may be carried out notwithstanding the decision of the court that the *rights of fishing* cannot be acquired by *eminent domain*.

## II.

**If, as we have argued, the act is valid with respect to powers other than the power held to be void, then at this time the judgment of the Supreme Court should be affirmed.**

Since the prosecutor may never be affected, he has no *status* to prosecute the writ at this time, and his remedy cannot mature until the commission shall attempt to enforce the objectionable part of the law. This, we understand, is the established rule applied to a prosecutor in certiorari, who objects to proceedings under a law which is partially objectionable, before any steps have been taken to enforce the objectionable parts, so that the prosecutor's interests may never be affected. This rule has been applied in case of municipal ordinances and for the same reason to acts of the legislature.

In *Penna. R. R. Co. v. Jersey City*, 18 Vr., 286, this court held that, if an ordinance was unreasonable only in its application to one or two streets, the entire ordinance on that account would not be vacated; and that the remedy of the prosecutor was to resist its enforcement in such localities. In this case Beasley, C. J., says: "Such a vice would not render it generally, but only specially inefficacious—that is, the court would not vacate the entire ordinance, but merely refuse to put it in effect in that part of it that was thus unreasonable. If the complaint of the plaintiff in error be well founded therein, the remedy is to object to the validity of the ordinance *in the penal suits for the obstruction of the streets referred to* and in that mode place before the courts the *limited question* whether the ordinance be not a nullity with respect to that particular locality. But the ordinance in its general effect is unobjectionable and therefore it cannot be totally set aside, and the consequence is, the judgment of the Supreme Court should be affirmed."

Previous to this case of *Penn. R. R. Co. v. Jersey City*, it had been held in some cases, that the remedy by certiorari to annul an ordinance was open to the prosecutor in advance of any action taken under its provisions.

But in these cases the ordinance or law was entirely void, and it was presumed, that when official action was taken under the law, such as the appointment of officers to enforce it, something would be done under the law, and, if anything should be done under a law altogether void, the prosecutor's rights would necessarily be af-

fected and that he ought not to be required to wait till they were actually attacked. But the reason for the rule of such cases does not extend to our case. It is not to be presumed from the mere appointment of the commissioners that they will execute the objectionable power, when they have valid powers to execute. This distinction and the previous state of the law on this subject is recognized by the Supreme Court in *Hamblet v. Asbury Park*, 32 Vr., 503, wherein Justice Garrison in his opinion says: "The remedy by *certiorari* to annul this ordinance is not, in my opinion, open to the prosecutor *in advance* of any action taken against him under its provisions. In reaching this conclusion, I am aware that the opposite view receives countenance from some, and confirmation from other cases decided in this court. A review, however, of our domestic law of *certiorari* from the time when we departed from the rule of English practice will show that, after some vacillation, the correct rule was finally declared by our court of last resort in the case of *Penn. R. R. Co. v. Jersey City*, 18 Vr., 286. A more recent decision to the same effect is *Gaslight Co. v. Rahway*, 29 Vr., 510. The case of *Penn. R. R. Co. v. Jersey City* must be taken to supplant the prior cases in this court that held to the contrary." In *State, Morris and Essex Railroad Co. v. Hudson Tunnel Co.*, 9 Vr., 558, decided in the Court of Errors and Appeals, prosecutor took a *certiorari* to review the appointment of commissioners to take lands of the prosecutors'. The prosecutors objected to the legality of the proceedings, because they

had a grant and lease of land made by the State to the prosecutors in which the State covenanted with them that "the State will not make or give away any grant or license, power or authority affecting lands under water front of lands so granted." The opinion of the court stated: "The contention is that the tunnel enterprise will be wholly nugatory, by reason of the fact that this contract with the State imposes an impassable barrier to the power of the Hudson Tunnel Co. with the assent of the prosecutor to acquire the right to pass under the water in front of their lands, and, therefore, the present application, which is practically without any useful result, and should be denied. \* \* \*

A sufficient answer to the objection is that, at this juncture, it is manifest, that it cannot be assumed that the tunnel company may not secure the assent of the plaintiffs to the construction of the tunnel under the river—it can not be said to be impossible to do so. With such consent the State's contract imposes no obstacle to secure the right of way."

Applying this language to our case it may also be said that, at this juncture, it can not be assumed that the commission may not secure even the rights of the prosecutor himself, so as to avoid any objection he might have. But the objection in our case, unlike that in the case quoted, only goes to one of the powers given by the act.

The principles of the cases which are quoted, apply whether we consider the prosecutor as the owner of Swartswood lake or as a taxpayer.

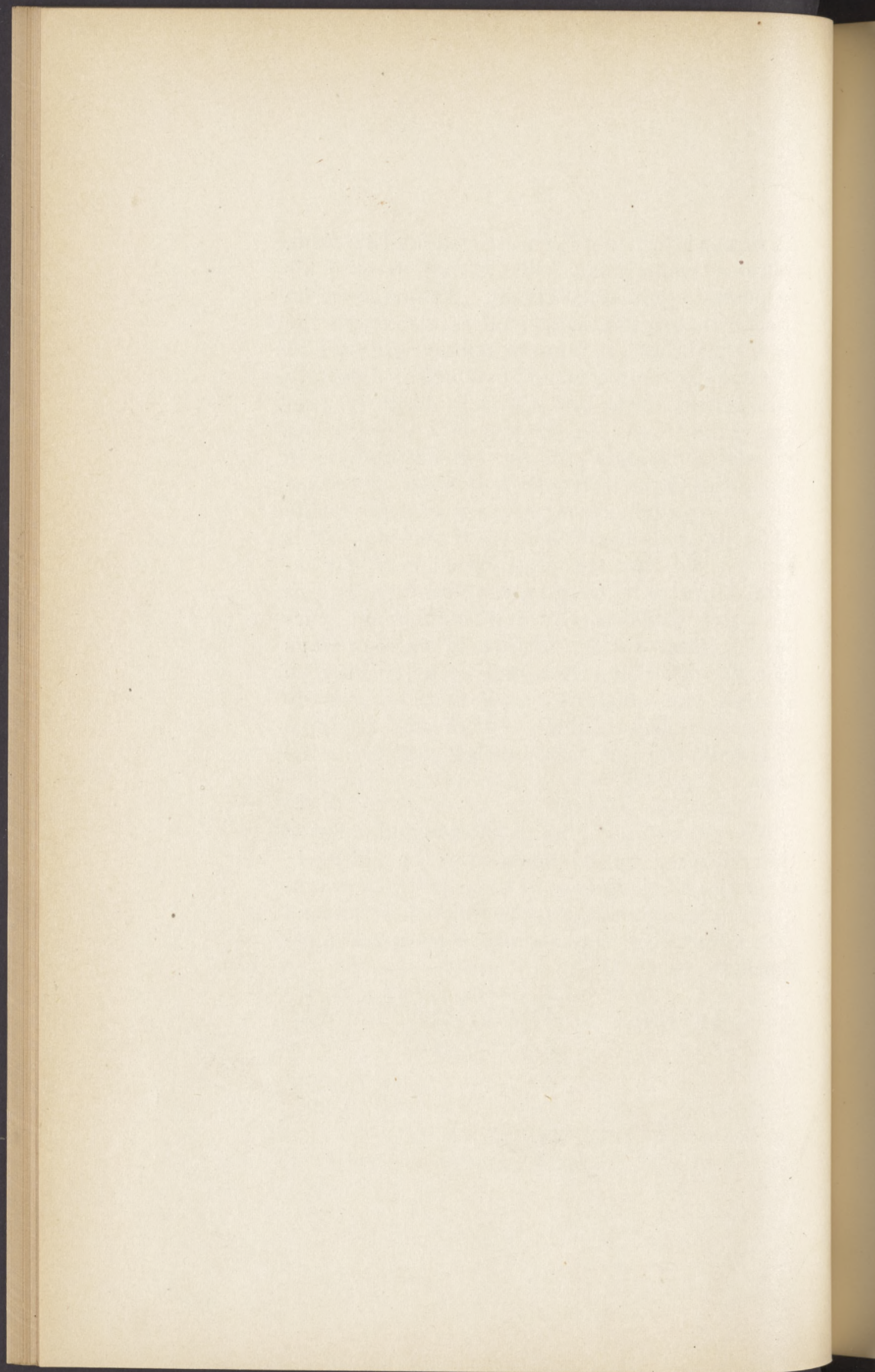
As owner it can not be presumed at this time, that the commission will attempt to take his property by eminent domain. As taxpayer, he has no better standing, since as a taxpayer he would not be affected unless fishing rights are to be taken by eminent domain which is the only void feature of the law, and it is not to be presumed that the commissioners will now attempt to acquire fishing rights by eminent domain in any of the lakes. He can not object as a taxpayer to contribute for any expenditure made under the <sup>void</sup> objectionable part of the law. It is not decided that the commission may not acquire all property mentioned in the act, except the rights of fishing, by eminent domain, purchase, gift or devise, so that in various ways that the different rights and property may be secured, the prosecutor as a taxpayer has no status to object, until the commission attempts to execute the one objectionable feature of the law.

We respectfully submit that the judgment of the Supreme Court should now be affirmed; otherwise the judgment of the court will be rendered upon a moot question which has not and may never arise as a concrete or practical question.

GRIGGS & HARDING,

HENRY HUSTON,

*Of Counsel.*



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

---

---

NEW JERSEY  
Court of Errors and Appeals

JUNE TERM, 1904.

---

ANDREW ALBRIGHT,

*Plaintiff in Error,*

*vs.*

THE SUSSEX COUNTY LAKE AND

PARK COMMISSION,

*Defendant in Error,*

---

**Brief on Rehearing for Plaintiff in Error.**

The point to be considered on re-argument we understand to be as follows: This Court has held that Chapter 161 of the Laws of 1901 is invalid, for the reason that the principal purpose for which the Park Commission is created, namely, to acquire and maintain a common fishery, does not constitute a public use. We understand that the Court adheres to that proposition. The defendant in error now points out that the Commissioners have power to acquire property by purchase, and may never need to exercise the power of eminent domain, and argues that therefore a public purpose is not essential, and that the power of the Commissioners to condemn

may fail, and yet so much of the act as remains may be carried into effect.

Suppose it is true that the power of eminent domain is not absolutely essential to the operation of the act, the questions remain, first, whether the power of *taxation* is essential, and second, whether the Legislature intended the act to be carried into effect without the power of eminent domain, and to promote a private purpose.

### I.

*Taxation is an essential part of the Act, and requires a public use to support it.*

The argument now presented was not overlooked by counsel for plaintiff in error on the former argument. Point I of the brief begins as follows:

“A common right to fish is not a public use, and the act is void because it requires taxation and condemnation. The act involves the taxing power as well as the power to condemn; it requires the issue of bonds to be paid by taxation. (*P. L. 1901, 346, Sec. 14.*) The taxing power, as well as the power to condemn, requires a public use to support it. ‘There can be no lawful tax which is not laid for a public purpose.’ *Miller, J., in Loan Assoc. v. Topeka, 20 Wall. 655, 664.*”

In the same case, which is a famous one, the Court said: “In deciding whether in the given case, the object for which the taxes are assessed falls upon the one side or the other of the line, courts must be governed mainly by the course and usage of the Government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the Government.” *20 Wall., p. 665.*

When the Court decided that the fishing rights described both in the title and in the body of the act, as those which the Commission was formed to acquire, did not

constitute a public use, the whole act failed, because the acquiring of fishing rights and the raising by taxation of money to make those rights permanently available, are essential parts of the act, and this taxing power requires a public use to support it. Money must be raised and paid at every step of the work contemplated.

*Section 1* requires that the expenses of the Commissioners shall be allowed and *paid*, and that the Board of Commissioners shall choose certain officers and determine their *compensation*, and shall have an office.

*Section 2*, fishing rights and lands adjoining shall be acquired, and the Board shall preserve, and care for, and improve the same, and acquire lands to construct roadways.

By *Section 3* the Commissioners shall cause maps and surveys made before they acquire lands.

*Sections 4* and *5* provide for condemnation for purposes of parks and fishing rights, and *Sections 6* to *13* provide for laying out roads and making compensation for land and assessments for improvements. The Commissioners must forever maintain these roads.

*Section 14* provides that the expenses incurred under the act shall be paid by the freeholders, who shall borrow money on county bonds, and pay the interest and principal of the bonds by *taxation*.

*Section 15* also provides for taxation to raise a sinking fund to pay the principal of the bonds.

It will be seen that it is impossible for the Commissioners to perform the duties contemplated by the act without taxation. The Legislature did not contemplate that any part of the act could go into operation without that power. It is also clear, both from the title and the body of the act, that the acquiring and enjoying of fishing rights are the principal objects for which the power to tax, as well as the power to condemn, is conferred. As this purpose is not a public use, no lawful tax can be laid for it, and the whole act must fail.

Cooley states the Constitutional Law of Taxation as follows:

“When the Legislature assumes to impose a pecuniary burden upon the citizen in the form of a tax, two questions may always be raised; first, whether the *purpose* of such burden may properly be considered public on any of the grounds above indicated; and second, if public, then whether the burden is one which should properly be borne by the district upon which it is imposed. If either of these questions is answered in the negative, the Legislature must be held to have assumed an authority not conferred in the general grant of legislative power, and which is, therefore, unconstitutional and void.”

*Cooley's Const. Lim., 7th Ed., 704.*

In *Cooley on Taxation, 3d Ed. (1903), p. 181*, scores of recent decisions are cited for the proposition that “taxes can be levied for public purposes only.” In the same work Cooley says: “For the most part, the term ‘public purposes’ is employed in the same sense in the law of taxation and in the law of eminent domain.” But Cooley goes on to say that in the case of taxation there is no compensation except the general public benefit, and continues: “A more liberal construction of public purposes is consequently admissible in the law of eminent domain, where an error in the direction of too great liberality could not be seriously detrimental, than in the law of taxation, where a like error would result in injustice which might be seriously harmful.”

*Cooley on Taxation, 3d Ed. (1903), p. 192; see, also, Judson on Taxation (1903), Sec. 351.*

Burroughs, in his work on Taxation, Section 4, adopts a definition given by Judge Dillon, as follows:

“Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for *public purposes*, or to accomplish some governmental end.”

Burroughs further says (*Section 13*): “Whether the purpose is a public one is a question for the courts, and is *precisely similar to the question of public use in the exercise of the right of eminent domain.*”

*Judson*, in his work on Taxation, says: "Due process of law in State taxation requires that the tax shall be levied for a public purpose and upon persons or property within the jurisdiction of the State."

*Judson on Taxation (1903), Sec. 340.*

Two instructive opinions on the power of taxation were given by the Massachusetts Supreme Court on application of the Legislature. The question in the first case was whether the Legislature could authorize towns to manufacture and distribute gas and electricity in their own territory. This was answered in the affirmative.

Opinion of Justices, *150 Mass. 592.*

The question in the second case was whether they could authorize towns to buy and sell fuel for their inhabitants. This was answered in the negative on like grounds with those stated in the opinion in this court in this case.

The Court said: "Constitutional questions concerning the power of taxation necessarily are largely historical questions. The Constitution must be interpreted as any other instrument, with reference to the circumstances under which it was framed and adopted" \* \* "We know of nothing in the history of the adoption of the Constitution that gives any countenance to the theory that the buying and selling of such articles as coal and wood for the use of the inhabitants was regarded at that time as one of the ordinary functions of the Government."

(Opinions of Justices, *155 Mass., p. 602.*)

It is needless to multiply authorities to support so plain a proposition; when once admitted that a fishing right is not a public use, the power to tax fails, and, therefore, the act must be held void.

## II.

*The power to condemn is essential to the act.*

If it were necessary we might rest on the proposition that the power to condemn is vital to the act. The num-

ber of lakes of more than one hundred acres in any county is limited. There could hardly be any such thing as competition among lake owners to sell to the Commission; therefore, the Commission, if without power to condemn, in order to exercise its functions, must pay any price which the owner of the desired lake may demand. The Legislature did not contemplate the creation of a Commission which would be at any such disadvantage. Nor did they contemplate that the county should be bonded and taxed for any price fixed in that wasteful manner. A Commission with power to condemn is a very different body from one without such power, and the Court ought not to set up the latter where the Legislature did not intend to do so.

The argument of the defendant in error that the act can be sustained without power to tax or to condemn, if sustained, would have this result that a body created for public purposes would be turned into a purely private corporation, organized under a law which would give no powers other than such as would be held by a corporation formed for private purposes. The property acquired not being held for public use would be subject to annual taxation, and the whole scheme would be turned into a private enterprise managed by a corporation whose members were named by a judge. Such a corporation would not be clothed with any of the important powers necessary to carry out the legislative purpose, and would be a corporation widely different from that contemplated by a statute.

### III.

*The act is special and the title is defective.*

In our former brief we attacked this act on several other grounds not considered in the opinion, which may be enumerated briefly, but we ask the Court to refer to the brief.

(a) The object of the act is not expressed in the title.

The object not expressed is the opening and improvement of roads, to be laid out, not on the lands adjoining the lake, but to connect the nearest public roads with said lands. As we then argued, the title might include park roads, but could not reasonably include roads exterior to the park. *Rader v. Township of Union*, 10 Vr. 509, 514, approved 12 Vr. 617, 621.

(b) The act is local because limited to counties now having lakes. It does not embrace all counties which may in the future acquire the characteristics of the class.

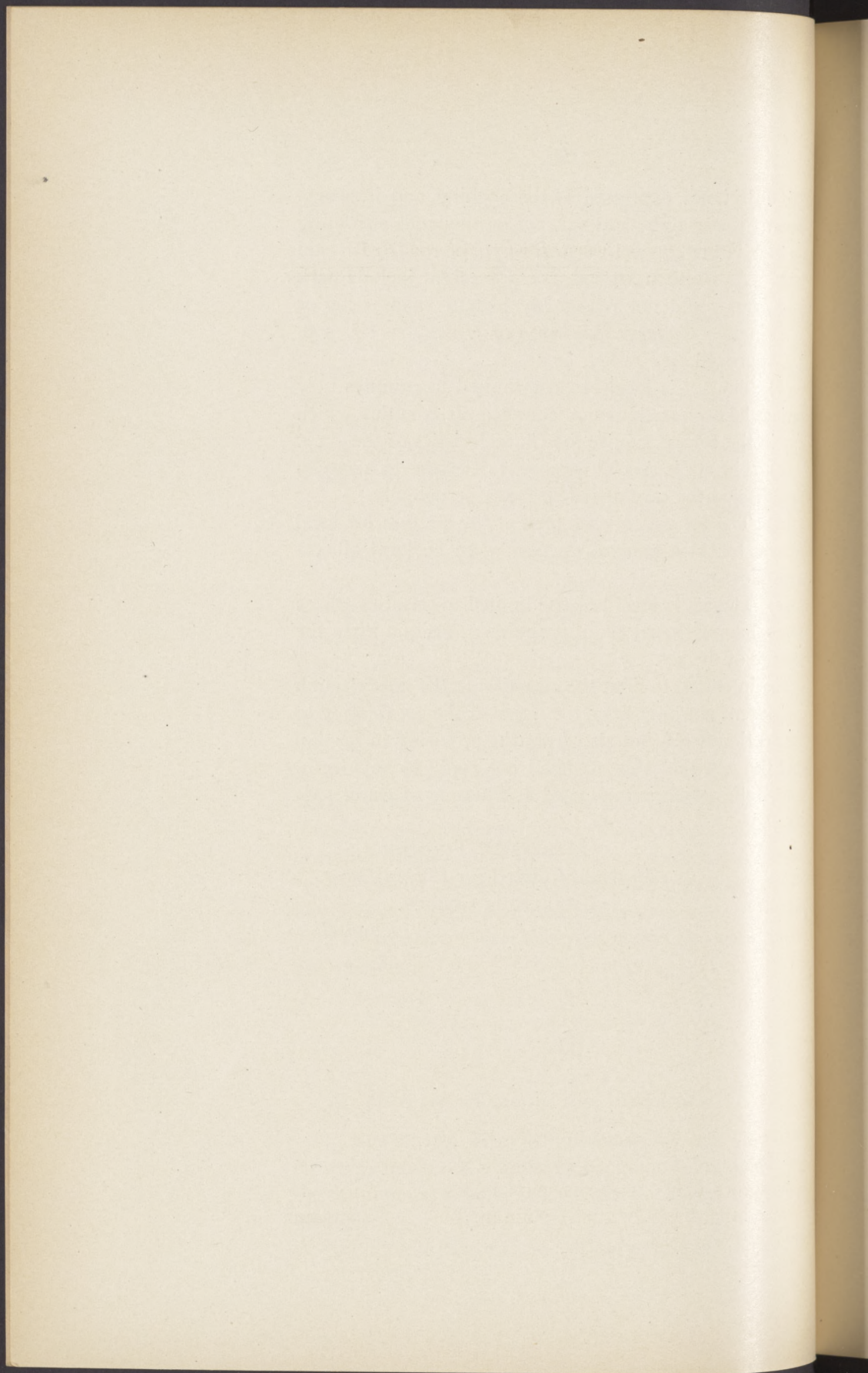
(c) The act is special because it delegates to a special Commission the care of public roads perpetually.

(d) The act was not adopted at the election for local officers, but at a general election when no local officers were chosen.

(e) The act is local because limited to counties whose voters happen to adopt it at the next election after the passage of the act.

The intention to limit the adoption to the next election is apparent not only from the terms of the act relating to the election itself, but also from the provision in Section 2 of the act, that this act shall not apply to any fresh-water lake which is *now* used as a source of water supply.

CHARLES D. THOMPSON,  
*Atty. and Counsel for Plff. in Error.*  
 CHARLES L. CORBIN,  
*Counsel.*



## AS TO THE QUESTION OF TAXATION.

### I.

Admitting for the purpose of argument that the taxing power generally requires the same public use to support it that the power of eminent domain requires, the circumstances of this case present a different situation.

If the act merely provided for taking fishing rights by purchase, to be paid for by taxation, we may admit that the reason of the decision might extend so as to deny the power of paying for it by taxation. But that is not this case. The act does not merely provide for acquiring fishing rights, but land and other rights for a resort, with the enjoyment of lakes adjacent to it. The acquisition of fishing rights with such resort is not the only purpose, but is incidental as one means of enjoyment of the whole thing, like any other sport or enjoyment.

Now, it is admitted that the land and all other rights except rights of fishing may be acquired either by eminent domain or purchase raised by taxation. In such case the purchase of such fishing rights by taxation, when they are not to be used separately, but only as part of, or incidental to, the other property conceded to be taken for public use, gives these incidental rights the same character of public use as the rights to which they belong.

### II.

But the reasoning of the decision of the court holding that, with respect to the power of *eminent domain*, the taking of these fishing rights is not a public use, does not extend so as to hold that it is not a public use in the sense that such rights could not be acquired and paid for by taxation.

The reasoning of the court applies strictly to the taking by eminent domain, and the reasoning is based upon considerations involving the difficulty of taking fishing rights separate from the ownership of the land, not for utility, but mere sport and pastime, and because the property is so small as to be incapable of meeting public demand, and because there is a serious question as to such right being capable of estimation so that compensation may be awarded them which shall be just with respect to both the private owner and to the public purchaser.

The difficulties that are suggested in the opinion against taking the fishing rights alone by eminent domain have particular regard to the established rights of the owner with respect to taking those fishing rights against his will, but have no application to the case where the owner is willing to sell. The decision practically admits that if the law had provided for the taking of the fee in the land covered by the lake, it would have been a public use.

In that case the fishing rights would no more be taken for private use than they would be when ten acres in fee should be taken by eminent domain and the fishing rights by purchase.

### III.

Public use may have a different meaning with respect to the powers of eminent domain and taxation. In *People v. Salem Township Board*, 20 Mich. 452, 4 Am. Rep. 400, Judge Cooley distinguished the two powers—eminent domain and taxing—and holds that the public purpose within the law of eminent domain does not necessarily come within the law of taxation.

“The important consideration in eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, the power being akin to the police power, rather than that of taxation. In respect to taxation, the criterion is not necessity, but public policy, for

while some taxes are strictly matters of necessity, others are purely matters of policy and enlightened discretion."

Judge Cooley, in that case, further says: "The term 'public purpose,' in the law of taxation, has no relation to the urgency of the public need (as in the law of eminent domain) or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification to distinguish the objects for which, according to settled usage, the government is to provide from those which by like usage are left to private inclination, interest or liberality."

Notice at this a distinction made in the opinion by Judge Dixon between the phrase "public purpose" and "public use," as mentioned in our constitution with respect to eminent domain. The term "public purpose" is the term commonly and aptly used when applied to taxation, and is so used by Judge Cooley in the case above quoted, and Judge Dixon indicates in the opinion that if the constitution phrase had been "public purpose," the act would have been unobjectionable.

*Holt et al. v. Town of Antrim*, 9 Atl. Rep. 389  
(Supreme Court of New Hampshire, March 11th, 1887).

In the case of a tax for building a school-house to be leased to an academy corporation for school purposes, the test of the public use is not a right of enjoying the property wholly at the public expense, but a common and equal right, free from unreasonable discrimination. The court says that exaction of tuition does not make the use private. "The legislature could require the tuition in the common schools. Land taken for a public use, whether the use is free as ordinary roads and bridges built by towns, or subject to tolls, as in other highways (turnpikes, toll bridges, ferries, railroads and canals). Land may be taken for public grist mills, though toll is to be paid," &c.

“In these instances, the legal test of the public character of the use is not a right of enjoying the use of the land wholly at the public expense, but a common and equal right, free from unreasonable discrimination.”

*Perry v. Keeny*, 56 N. H. 514.

*Cooley on Taxation* (2 ed.), 119-124.

#### IV.

The authorities, such as *Loan Association v. Topeka*, 20 Wall. 655, is not pertinent to the situation in this case.

That case held that a tax laid for the purpose of merely giving bonds to a private manufacturing corporation, not even *quasi* public, like a railroad, was not a public use.

This case is altogether different. No private person is to have the right to fish exclusive of others, but the public at large will enjoy them as far as the nature of the subject admits.

#### V.

See discussion of the title to the fish in the petition for reargument on its application to the questions involved.

## INDEX.

	Page
Writ of Certiorari. ....	1
Return. ....	3
Order Appointing Commissioners. ....	4
Statement of Result of Election. ....	6
Reasons. ....	8
Stipulation of Counsel. ....	10
Opinion of Pitney J. ....	12
Rule for Judgment. ....	37
Writ of Error. ....	38
Assignment of Errors. ....	39

---



# New Jersey Supreme Court

---

ANDREW ALBRIGHT,  
*Prosecutor,*

*vs.*

ORA C. SIMPSON, CLERK OF SUSSEX  
COUNTY, AND THE SUSSEX COUNTY  
LAKE AND PARK COMMISSION,  
*Defendants.*

---

## WRIT OF CERTIORARI.

Returnable December 9, 1901.

THOMPSON & HALL,  
Attorneys of Prosecutor,  
1 Exchange Place,  
Jersey City, N. J.

I allow this writ. Let it be sealed.

A. Q. GARRETSON,  
J. S. C.

NEW JERSEY, to wit:

[L.S.] The State of New Jersey to Ora C. Simpson, Clerk of the County of Sussex, and William D. Ackerson, Luther Hill and J. Anson McBride, the Sussex County Lake and Park Commission.

## GREETING:

We being willing for certain reasons to be certified of a certain order dated November twentieth, nineteen hundred and one, appointing William B. Ackerson, Luther Hill and J. Anson McBride, the Sussex County Lake and Park Commission, in accordance with the terms and provisions of an act of the Legislature of the State of New Jersey, entitled "An Act to acquire rights of fishing common to all in fresh water lakes in certain counties, and to acquire lands adjoining thereto for public use and enjoyment therewith, and to regulate the same," approved March 27, 1901, and which said order was filed in the office of the County Clerk on the said twentieth day of November, nineteen hundred and one;

We do command you that the aforesaid order, signed by the Justice of the Supreme Court presiding in the County of Sussex, on the twentieth day of November, nineteen hundred and one, together with the record of the certificate of the Clerk of an election held prior thereto, together with all things touching and concerning the making and signing of said order and of the acts of the said Board of Commissioners in connection therewith as before you, the said Clerk of the County of Sussex, may remain, to our Justices of the Supreme Court of Judicature at Trenton, on the ninth day of December next, you do certify and send, together with this writ, that therein may be done what of right and according to the law of this State should be done.

WITNESS, William S. Gummere, Esq., Chief Justice of our Supreme Court at Trenton, this twenty-second day of November, nineteen hundred and one.

WILLIAM RIKER, JR.,  
Clerk.

THOMPSON & HALL,  
Attorneys of Prosecutor.

## NEW JERSEY SUPREME COURT.

<p style="text-align: center;">ANDREW ALBRIGHT, <i>Prosecutor,</i> <i>vs.</i></p> <p style="text-align: center;">ORA C. SIMPSON, CLERK OF THE COUNTY OF SUSSEX, AND OTHERS, <i>Defendants.</i></p>	}	<i>On Certiorari.</i>
--	---	-----------------------

**RETURN.**

To the Honorable, the Justices of the Supreme Court  
of the State of New Jersey.

I respectfully make return to the within writ as  
Clerk of the County of Sussex, so far as the within  
mentioned records appear on file in the office of the  
Clerk of the County of Sussex or in the records and  
minutes of said office.

ORA C. SIMPSON,

Clerk of the County of Sussex.

Dated December 3, 1901.

---

IN THE MATTER OF "THE SUSSEX  
COUNTY LAKE AND PARK COM-  
MISSION."

---

*Order Appoint-  
ing Commis-  
sioners.*

The Clerk of the County of Sussex having, on the eleventh day of November, nineteen hundred and one, delivered to me, Abram Q. Garretson, the Justice of the Supreme Court presiding in the Courts of Sussex County, a certified copy of the tabulated statement of the return and canvass of the votes cast in all the election districts of the County of Sussex, under the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act to acquire rights of fishing common to all in fresh water lakes in certain counties, to acquire lands adjoining thereto for public use and enjoyment therewith, and to regulate the same," approved March 22, 1901, and of the certificate upon such tabulated statement of the number of votes cast for the acceptance of said act and the number of votes cast against the acceptance of said act, from which tabulated statement and certificate it appears that said act has been accepted in said County.

I, Abram Q. Garretson, the Justice of the Supreme Court presiding in the Courts of Sussex County, do, on this twentieth day of November, in the year nineteen hundred and one, by virtue of the authority conferred upon me by said act, appoint Luther Hill, of the township of Andover; William D. Ackerson, of the town of Newton, and John A. McBride, of the township of Wantage, all of the County of Sussex, a board of commissioners to be known as "The Sussex County Lake and Park Commission;" the said Luther Hill shall hold office for the term of one year, the said William D. Ackerson shall hold office for the

term of two years, and the said John A. McBride shall hold office for the term of three years from the date of this order.

A. Q. GARRETSON,  
Justice of the Supreme Court  
presiding in the Courts of Sussex County.

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

I, ORA C. SIMPSON, Clerk of the County of Sussex, and also Clerk of the Circuit Court and the several other Courts of Record in and for said County, do hereby certify:

That the foregoing is a true, full and correct copy of an order made by the Honorable Abram Q. Garson, the Justice of the Supreme Court of the State of New Jersey presiding in the Courts of said County of Sussex, appointing the said Luther Hill, William D. Ackerson and John A. McBride a board of commissioners to be known as "The Sussex County Lake and Park Commission," as fully as the same remains on file in my said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said  
[L.S.] Courts and County, at Newton, this 25th day of November, A. D. 1901.

O. C. SIMPSON,  
Clerk.

A STATEMENT of the result of an election held in the County of Sussex and State of New Jersey, on the fifth day of November, in the year of our Lord one thousand nine hundred and one, for the acceptance or rejection of the new lake and park bill, authorized by an act of the Legislature of New Jersey entitled, "An Act to acquire rights of fishing common to all in fresh water lakes in certain counties, to acquire lands adjoining thereto for public use and enjoyment therewith, and to regulate the same." Approved March 22d, 1901. [L. s.]

SUSSEX COUNTY CLERK'S OFFICE,

Filed November 9th, 1901,

O. C. SIMPSON,  
Clerk.

NAMES OF THE TOWNSHIPS, BOROUGHs AND DISTRICTS, AND THE NUMBER OF VOTES CAST IN EACH.

	Andover	Branchville	Byram	Frankford	Green	Hampton	Hardyston	Hopatcong	Lafayette	Montague	Newton—1st District	Newton—2d District	Sardyston	Sparta North	Sparta South	Stillwater	Sussex	Vernon	Walpack	Wantage North	Wantage South	Whole number of votes in the County	Whole number of votes cast for and against the bill
FOR																							
The New Lake and Park Bill..	91	152	128	189	62	158	220	24	103	59	372	341	188	130	97	216	133	148	38	101	86	3,036	Three thousand thirty-six
AGAINST																							
The New Lake and Park Bill .	105	8	70	64	71	55	178	12	85	79	176	139	66	46	139	66	132	132	48	119	134	1,924	Nineteen hundred twenty-four
Number of names on poll book	222	166	247	277	154	227	511	38	198	151	575	538	266	205	254	298	300	301	118	231	272	5,549	Fifty-five hundred forty-nine
Number of ballots rejected....	5	1	7	5	3	3	16	1	5	6	9	16	12	2	11	3	3	7	..	2	11	128	One hundred twenty-eight

I, ORA C. SIMPSON, Clerk of the County of Sussex,  
do hereby certify:

That the foregoing is a true, full and correct statement of the result of the election above mentioned, as the same is exhibited by the statements produced and laid before me, according to law, and that the same exhibits the number of the names of the voters in the poll books of the townships, boroughs and districts, respectively, and of the ballots rejected, the whole number of the names of the voters in the poll books of the several townships, boroughs and districts, the whole number of votes cast for the new lake and park bill, and the whole number of votes cast against the new lake and park bill, in each township, borough and district, as they appear by the statements so produced and laid before me.

In witness whereof, I have hereunto set my  
hand and affixed the seal of the said  
[OFFICIAL County, at Newton, this 9th day of November,  
SEAL.] in the year of our Lord one thousand  
nine hundred and one.

O. C. SIMPSON,  
County Clerk.

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

I, ORA C. SIMPSON, Clerk of the County of Sussex,  
and also Clerk of the Court of Common Pleas and  
the several other Courts of Record in and for said  
County, do hereby certify that the foregoing is a true,  
full and correct copy of the tabulated statement of the  
votes cast at an election held in the said County of  
Sussex, on the fifth day of November, one thousand  
nine hundred and one, as fully as the same remains  
on file in my said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said  
 [SEAL.] Courts and County, at Newton, this 25th day of November, A. D. 1901.

O. C. SIMPSON,  
 Clerk.

---

NEW JERSEY SUPREME COURT.

---

ANDREW ALBRIGHT,

*vs.*

SUSSEX COUNTY LAKE AND PARK COM-  
 MISSION AND O. C. SIMPSON,  
 CLERK.

---

*On Certiorari.*

**REASONS.**

The prosecutor assigns the following reasons for setting aside the appointment of commissioners under Chapter 161 of the Laws of 1901, brought up by the return in this case:

1. Because said act is unconstitutional and special.
2. Because the title of said Chapter 161 of the Laws of 1901 is defective, in that it does not express all of the objects embraced in the act.
3. Because said act is unconstitutional, in that it is local and special, the adoption of the act is limited to such counties as shall adopt the same at "the next election, whether general, municipal or special, wherein the people of the County qualified to vote are authorized to vote for local officers."

4. Because said act is unconstitutional, in that it is a local or special law, and is an attempt to regulate the internal affairs of the counties to which it would apply.

5. Because said act is unconstitutional, in that it applies only to counties having fresh water lakes with an area exceeding one hundred acres, which classification is illusory and shifting, and not a true basis of classification.

6. Because said act is unconstitutional, in that it provides for the exercise of the power of eminent domain to take the right of fishing, which is not a public use.

7. Because the acceptance or rejection of said act was not submitted to popular vote at the next election, whether general, municipal or special, wherein the people of the County qualified to vote are authorized to vote for local officers.

8. Because the said act and the proceedings thereunder are in divers other respects unconstitutional, irregular and void.

Dated January 7, 1902.

THOMPSON & HALL,  
Attorneys of Prosecutor.

## NEW JERSEY SUPREME COURT.

<hr/> ANDREW ALBRIGHT, <i>Prosecutor,</i> <i>vs.</i> SUSSEX COUNTY LAKE AND PARK COM- MISSION AND OTHERS, <i>Defendants.</i> <hr/>	}	<i>On Certiorari.</i>
---	---	-----------------------

## STIPULATION OF COUNSEL.

It is stipulated and agreed by and between the counsel of the respective parties in the above entitled cause that the following facts are admitted as if proved before the Court by the deposition of witnesses:

*First*—That Andrew Albright, the prosecutor, is the owner of Swartswood Lake, in the County of Sussex, and a taxpayer in said County.

*Second*—That the lakes to which the act may apply, and the counties in which the same are situated, are contained in the following statement prepared by the Assistant State Geologist in response to a request for such a statement:

“According to the topographical survey made by this organization in 1885, and following years, the fresh water lakes and ponds of the State, over 100 acres in size, are as follows: The list as you see includes mill ponds formed by damming streams:

Atlantic County—Mays Landing mill pond, 333 acres; Weymouth mill pond, 205 acres.

Burlington County—Hanover Furnace pond, 103 acres; Harrisville mill pond, 101 acres.

Cumberland County—Millville mill pond, 926 acres; Willow mill pond, 118 acres.

Monmouth County—Deal Lake, 144 acres.

Morris County—Budd's Lake, 475 acres; Denmark pond, 172 acres; Green pond, 460 acres; Hopatcong Lake, 2,443 acres; Split Rock pond, 315; Stickle pond, 110.

Passaic County—Greenwood Lake, total area 1,920 acres; Pompton Lake, 196 acres; Macopin Lake, 299 acres.

Salem County—Alloway mill pond, 122 acres.

Sussex County—Cranberry reservoir, 154 acres; Culver's pond, 486; Little pond at Swartswood, 100 acres; Long pond near Culver's Gap, 299; Long pond near Andover, 117; Losee pond, 137; Morris pond, 136; Stanhope reservoir, 339; Swartswood Lake, 505; Wawayanda Lake, 240.

Warren County—Green's pond, 117 acres.

I do not know whether the mill ponds would come within the meaning of the law, but the above is a list of all the fresh water bodies (not rivers) within the State of over 100 acres. These areas were determined by careful surveys and are essentially correct.

I am, yours very truly,

HENRY B. KUMMEL,

Assistant State Geologist in charge.

Dated January 15, 1902.

THOMPSON & HALL,

Attorneys for Prosecutors.

JOHN W. GRIGGS,

Attorney for Defendants.

THE UNIVERSITY OF CHICAGO

NEW JERSEY SUPREME COURT.

November Term, 1902.

10

_____	0		
ANDREW ALBRIGHT,	)		
	)		
Prosecutor,	)		
	)		
vs.	)		
THE SUSSEX COUNTY	)	Opinion.	20
LAKE AND PARK COM-	)		
MISSION, et als.,	)		
	)		
Defendants.	)		
_____	0		

ARGUED FEBRUARY 19, 1902.

30

DECIDED NOVEMBER 10, 1902.

SYLLABUS.

(1.) The Act approved March 22, 1901, entitled,  
 "An act to acquire rights of fishing common to all in  
 "fresh water lakes in certain counties, to acquire 40

"lands adjoining thereto for public use and enjoyment therewith, and to regulate the same," (Laws 1901, p. 333), is constitutional.

(2.) The act in question (Laws 1901, p. 333), has but one object, which is to establish places of public resort upon the fresh water lakes, with public rights of fishery as the prominent and attractive feature. This object is sufficiently expressed in the title, as required by the Constitution, Art. IV, Sec. VII, pl. 4.

(3.) The act in question (Laws 1901, p. 333), is a general law, and not local or special within the prohibition of the Constitution, Art. IV, Sec. VII, pl. 11.

(4.) Subject to a referendum, the act provides for establishing, in every county of the State that has fresh water lakes exceeding one hundred acres in area, a system of free public fisheries in the fresh water lakes having the area mentioned.

HELD, that the resulting classification has direct and natural reference to the purpose that gives rise to the legislation, and is valid under the Constitution.

(5.) It was competent for the legislature, in authorizing the establishment of public fisheries in fresh water lakes, to distinguish between the larger and the smaller sheets of water, and to draw the line of distinction according to a specified area of water surface. The act in question (Laws 1901, p. 333), applies this distinction not for the purpose of classifying counties; but only for the purpose of classifying lakes.

This is permissible.

(6.) Where a number of counties possess the requis-

ite features to bring them within a classification valid under the Constitution, discriminations resulting from the effect and operation of a referendum do not make the classification special.

(7.) The referendum clause contained in Section 18 of the act in question (Laws 1901, p. 333), is substantially as follows:

“That none of the foregoing provisions shall take<sup>10</sup>  
 “effect in any county nor shall the commissioners be  
 “appointed in any county, until the acceptance or re-  
 “jection of this act shall have been submitted as here-  
 “in provided to a popular vote; such submission shall  
 “be made at the next election, whether general, mu-  
 “nicipal or special, wherein the people of the county  
 “are authorized to vote for local officers, and it shall  
 “be the duty of the County Clerk to give public no-  
 “tice of the election, provide and distribute ballots,<sup>20</sup>  
 “etc., and the duty of the election officers to hold the  
 “election and ascertain and certify the result; the ac-  
 “ceptance or rejection of this act shall be determined  
 “by the result of such election; and if there be a ma-  
 “jority of ballots in favor of this act, then this act but  
 “not otherwise, shall take effect in such county.”  
 Section 19 provides that the act shall take effect im-  
 mediately as regards the submission thereof to a pop-  
 ular vote.

HELD, (a) That with respect to imposing a duty<sup>30</sup>  
 upon the County Clerk and election officers to pre-  
 pare for and hold an election, the effect of the act is  
 immediate and imperative, and the duty continues  
 until it is performed.

(b) For other purposes the act does not take effect  
 in any county until the question of its acceptance or  
 rejection shall have been submitted to the people in  
 the manner contemplated by the act.<sup>40</sup>

(c) It is not essential that the question shall have been submitted at the election held next after the passage of the act. The referendum clause is mandatory in the requirement that the act shall be submitted to the people substantially in the method prescribed; it is directory with respect to the time of such submission.

10 (d) The neglect or failure of the County Clerk and election officers to perform their duties in such manner as to test the sense of the people at the precise time contemplated by the legislature, cannot defeat the will of the legislature or deprive the people of the option of acceptance granted by the act.

20 (e) In counties having the necessary features to bring them within the class, where by reason of the failure of the public officials to perform their duty, or for other reasons, the people have not yet voted upon the question of accepting the act, it is still in order to submit the question of acceptance or rejection to the people, and a mandamus would lie to require the proper officials to advertise, prepare for and conduct the election.

(8.) It must be very plain language that would justify the courts in so construing a referendum clause as to put it within the power of a ministerial officer to nullify the act; especially where the same construction must lead to the conclusion that the referendum is illusive, and the entire act for that reason unconstitutional.

(9.) The right of fishing in the fresh water lakes of this State is prima facie in the owners of the soil covered by the water, and while so owned is private property; but it is quite within the competency of the legislature to authorize the taking of that private property for the public use. In this respect the right of fishing stands on the same basis with other private

property, and is subject to the eminent domain.

(10.) Under the act in question (Laws 1901, p. 333), the rights of fishery when acquired by the public trustees designated by the act, will be open to the use of all citizens subject only to reasonable regulations to be prescribed by the trustees, and to the general laws of the State for the protection of fish. This constitutes a public use.

10

(11.) The establishment of a public park with public rights of fishery as an appurtenance or incident, is a purpose that justifies the exercise of the power of eminent domain.

(12.) As the Constitution (Art. I, p. 16), authorizes private property to be taken for public use, the authorization includes the taking of any interest in such property less than the whole. It includes the taking of a right of profit a prendre in lands.

20

(13.) The act in question (Laws 1901, p. 333), by its referendum clause requires that the question of acceptance be submitted at an election participated in by the voters of the entire county.

---

### ON CERTIORARI.

30

Before Justices Fort, Hendrickson and Pitney.

For the Prosecutor, Thompson & Hall and Charles L. Corbin.

For the Defendants, John W. Griggs.

The opinion of the Court was delivered by Pitney, J.

40

This certiorari brings before us for review an order bearing date November 20th, 1901, made by Mr. Justice Garretson, appointing certain citizens of Sussex County as members of a Board of Commissioners to be known as the "Sussex County Lake and Park Commission." The order was made under the authority of an act of the legislature approved March 22nd, 1901, entitled, "An Act to acquire rights of fishing common to all in fresh water lakes in certain  
 10 "counties, to acquire lands adjoining thereto for public use and enjoyment therewith. and to regulate "the same," (Laws 1901, p. 333). It appears that the question of the acceptance or rejection of this act was submitted to a popular vote in the County of Sussex at an election held on the first Tuesday of November, 1901, at which 5,088 votes were cast. Of these 3,036 were in favor of the acceptance of the act, 1,924 were opposed, and 128 ballots were rejected. The result of the election having been ascertained  
 20 and determined in the manner prescribed by Section 18 of the act, and having been certified to Justice Garretson, the order appointing commissioners was thereupon made pursuant to the act.

The reasons assigned by the Prosecutor for setting aside the appointment of Commissioners may be reduced to two, viz: First, that the statute in question is unconstitutional, and secondly, that the acceptance or rejection of the act was not submitted to  
 30 popular vote at the next election wherein the people of the County were authorized to vote for local officers as provided by Section 18.

The unconstitutionality of this statute is urged upon several grounds.

First, it is insisted that the object of the act is not sufficiently expressed in its title. The argument is that the title specifies three objects, viz: (a) to acquire  
 40 rights of fishing common to all in fresh water

lakes in certain counties; (b) to acquire lands adjoining thereto for public use and enjoyment therewith; (c) and to regulate the same. It is insisted that the act embraces the following additional objects, viz: (d) to create a corporation to be known as the \_\_\_\_\_ County Lake and Park Commission; (e) to authorize the corporation to acquire fishing rights and lands; (f) to authorize the corporation to lay out, improve and regulate roadways leading from such lands to the nearest highway; (g) to condemn lands for such road- 10 ways and assess the benefits upon the lands benefited; (h) to require the board of freeholders to issue bonds to provide for the expenses incurred under the act; (j) to authorize the construction of steam and other railroads over the lands or roadways.

A careful examination of the act, however, will show that it has but one principal object, which is to establish places of public resort upon the fresh 20 water lakes, with public rights of fishery as the prominent and attractive feature. The phrase contained in the title, viz., "to acquire rights of fishing common to all in fresh water lakes," is somewhat elliptical, but its meaning is entirely plain. The word "acquire" is used in a broad sense, involving the permanent vesting in trustees for the public benefit, of common rights of fishing in fresh water lakes; meaning, not such rights as are already common to all, but such rights as shall be, after acquisition, common 30 to all. In view of the established rule of property in this state, that the soil under the waters of fresh water lakes and the right of taking fish therefrom, are private property (Cobb vs. Davenport, 3 Vr. 369; Albright vs. Cortright, 35 Vr. 330) the first clause of the title is not only free from any ambiguity, but expresses perhaps, in as brief a phrase as possible, the main object of the legislation, which is to acquire this private property and devote it to public use.

The other purposes mentioned in the title, as well as those embraced within the act but not mentioned in the title, are all incidental to the principal object. If the principal object is supportable under the constitution, the others are supported at the same time, for in the judgment of the legislature they were necessary to enable the public to enjoy the common fishing rights, and there is nothing from which this court can say that they are not reasonably necessary for such enjoyment. Granting the propriety of establishing a common fishery in fresh water lakes, it is of course necessary to acquire lands adjacent to the lake, in order that the public may enjoy the fishery. The creation of a corporation authorized to acquire the fishing rights and the lands, and to maintain the rights and lay out and improve the lands, is simply the machinery by which the public trust is to be preserved and executed.

20 The power to lay out roads leading from such lands to the nearest public highway, is obviously necessary. The power to condemn lands for the roadways is equally so. The authorization that the benefits may be assessed upon the lands peculiarly benefited is a matter within the legislative discretion, and is disposed of according to a method frequently adopted. And if no lands are specially benefited, none will be assessed. If there were doubt of the constitutionality of the assessment for benefits, it  
30 might be eliminated from the act without impairing the remaining provisions. The bonding provisions are plainly incidental to the main object.

There is nothing in the act empowering the Commissioners to construct steam railroads or other railroads. The objection refers to Section 16, which provides that no steam or other railroad shall be laid out, maintained or operated upon any portion of the lakes, lands or roadways laid out and located under this act, except at such places and in such manner as  
40 the Board of Commissioners shall in writing duly ap-

prove. This is prohibition, not authorization.

Nor does the inclusion of roads and parks in a single act make the statute void, as embracing more than a single object.

In *Rader vs. Township of Union*, 10 Vr. 514, the late Chief Justice Beasley said: "The making and control of streets is a thing entirely different from  
10 "the making of parks; the two have no connection, "and neither is an adjunct to the other, and it is impossible, as it seems to me, to logically hold that a "description of one embraces both." In that case the question was, whether an act which by its title related only to streets, could constitutionally embrace provisions for the laying out, opening and improving of public parks. The language quoted was pertinent to this inquiry, but it has no bearing upon a statute  
20 such as the one now before us. In the *Rader* case the parks were not needed for the enjoyment of the streets, and a complete system of streets would have been quite feasible without the laying out of a single park. But in the statute now before us, the establishment of fishing parks is the principal object, and the streets are authorized not for the purpose of laying out a system of highways, but only for the purpose of giving access to the parks. The two purposes thus have an intimate connection.

30 The second constitutional objection is that the statute is a local or special law, regulating the internal affairs of the Counties to which it applies. As the act places the burden of expense upon the County, by providing that the expenditures shall be met out of the proceeds of County bonds, it must be treated as an act regulating the internal affairs of Counties under the decision of the Court of Errors and Appeals in *Freeholders of Passaic vs. Stevenson*,  
40 17 Vr. 173.

The argument that it is local and special is based in part upon the fact that the act has applicancy only to Counties having fresh water lakes, in area exceeding one hundred acres, and in part upon the contention that its operation is limited to such Counties as shall adopt the same at the next election, whether general, municipal, or special, where in the people of the County, qualified to vote, are authorized to vote for local officers; the insistent being that the  
 10 time within which it might be adopted expired with the election held next after its passage.

The limitation to Counties having fresh water lakes of the requisite area, results in a classification that has direct and natural reference to the very feature which gives rise to the legislation. It is the existence of fresh water lakes having considerable area, and for that reason adapted to the propagation of fish, and to the enjoyment of the fishing privilege by  
 20 the use of boats or otherwise, which, in the judgment of the legislature, makes it feasible and proper to adopt in certain Counties a system of fishing parks. It was for the legislature, in its wisdom, to draw the line between the smaller and the larger sheets of water, and we cannot say that an area of one hundred acres results in an unreasonable or illusive classification. By the terms of the act, the smaller lakes are excluded from the scheme, even in those counties that adopt the act. In short, the distinction is ap-  
 30 plied, not for the purpose of classifying counties, but only for the purpose of classifying lakes. To this, there exists no constitutional objection.

The proviso in Section 2, "that this act shall not apply to any fresh water lake which is now used as "a source of water supply for any city," etc., has the effect of limiting the class of lakes that are subject to the operation of the act but not of limiting the class of counties that are subject thereto. The purpose  
 40 is, to prevent a body of water that is already impress-

ed with one public use, from being subjected by virtue of this act to another public use inconsistent with the first; a perfectly reasonable restriction upon the operation of the act, not rendering the legislation special. The same may be said of the restriction contained in the same Section, that the act shall not apply to any lake not being wholly within the bounds of a single county; the obvious purpose of which is, to prevent the people of one county from being taxed for a public work that would enure equally to the benefit of the citizens of another county. These restrictions are analagous to that which excludes from the operation of the act those bodies of water having an area of less than one hundred acres; are plainly matters that lie within the legislative discretion; and do not result in a classification of counties. 10

The case shows that nine of the twenty-one counties of the State have lakes and ponds over one hundred acres in size. Sussex County is one of the nine. 20 It does not appear how many of these counties, other than Sussex, have voted either to accept or reject the statute. For all that appears before us, each one of the nine counties may have voted upon it. But, if it be assumed that no county, except Sussex, has voted upon the question, this cannot affect the question of constitutionality. If the legislation is such as to fairly give the opportunity to accept, to each county having the requisite topographical features, the act is in this respect general. 30

If one of these counties accepts it, the right of that county to enjoy the benefits of the act cannot be defeated by the rejection of the proposition in other counties, or by the failure of other counties to act upon the question. It is settled by the decision of our Court of last resort that the discriminations necessarily resulting from the effect and operation of the REFERENDUM itself, do not make the classification special. In *Re Cleveland*, 23 Vr. 188. 40

But it is objected that the effect of the provisions contained in Section 18 of the Act, is to confine the operation of the act to those counties only which shall accept it within a limited time. Upon this point the decision of the Court of Errors and Appeals in *De Hart vs. Atlantic City*, 34 Vr. 223, is cited. The statute in question in that case, (Laws 1898, p. 15), provided for the creation of a District Court in every city having 20,000 inhabitants or less, which  
10 should by resolution of city council adopt the act within three months from the date of its passage, and it was held that this created an unconstitutional classification. See also *Christie vs. Bayonne*, 35 Vr. 191; *Ross vs. City of Passaic*, 35 Vr. 488; and *Renner vs. Holmes*, 53 Atl. Rep. 76, recently decided in this court. But, there are important distinctions between those cases and the one now before us. In the *De Hart*, *Ross* and *Renner* cases, the statutes in question, while in other respects  
20 applicable to a designated class of municipalities, were made special by the requirement that within a limited time after the passage of the act, a local municipal board, not chosen by the people for the purpose, should take affirmative action upon the proposition. And in the case of other statutes that have come under the ban of the courts, the legislature has assumed to classify municipalities with respect to population, but has either in terms or by the operation of a REFERENDUM limited in time, re-  
30 stricted the class to those municipalities possessing, at the time of the enactment, the requisite population, ignoring the growth of municipalities in the future. *Bennett vs. Trenton*, 26 Vr. 72. Inasmuch as most, if not all, of our towns and cities, normally increase in population from year to year, it is constantly to be held in view in classifying municipalities with respect to population, that in order to insure uniformity, provision must be made for those that shall hereafter attain the requisite number of inhab-  
40 itants, as well as for those already possessing it.

But the present statute deals with a distinctive topographical feature, that is in its nature fixed and not variable. There is no normal change necessarily to be anticipated in the future with respect to the possession by the several counties of the distinctive feature, which the courts can say must be within the contemplation of the legislature, so that a classification, not taking it into account, would, for that reason, be special. If, therefore, the present act did require that the submission to the people should be at the 10 next election after the passage of the act, and could not be at any later election, we are not prepared to say that the act for this reason would be unconstitutional. Would it be beyond the competency of the legislature to say, "We will now create a class of counties for the purpose of this experiment in public and common fresh water fisheries, and will embrace in the class those counties, now having the requisite topographical features which promptly and on reasonable opportunity embrace the provisions of the 20 act, leaving out all other counties?"

But if any constitutional consideration requires that the act should make provision for counties not now possessing, but which may hereafter come to possess fresh water lakes, having an area exceeding 100 acres, the statute is quite susceptible of a construction that will admit such counties to its benefits. In view of the mandatory provisions of the first and succeeding sections of the act requiring the crea- 30 tion of this public agency, for the purposes mentioned, in every county having fresh water lakes of the requisite size, the supposed limitation being found in section 18, it is significant that there is nothing in either section 18, or elsewhere in the act, which, in terms, or by necessary construction, limits its operation to those counties now possessing lakes. Section 18 prescribes that the submission of the act to popular vote shall be done at the "next" election. If the legislature had intended by this to mean that 40

it must be done at the next election held after the passage of the act, it would have been quite easy to say so. Indeed, had such an intent existed, it was comparatively easy to specify a date for a special election to be held in all counties, or to designate a general election that would be common to all counties. Therefore, in support of the constitutionality of the act, it is quite within the bounds of fair construction, to take the words "next election" as applying to the first general election that shall be held in any county, not now possessing the distinctive features, after it shall hereafter acquire those features. In view of the fact that section 18 provides for public notice to be given to the electors in advance of the election, the submission to counties hereafter acquiring the physical features, would be accompanied by sufficient publicity.

Nor, with respect to those counties that now possess the bodies of fresh water contemplated by the act, is the option of acceptance limited by time. The emphatic portion of Section 18 is, "that none of the foregoing provisions shall take effect in any county until the acceptance or rejection of this act shall have been submitted, as herein provided, to a popular vote." The words "as herein provided" plainly refer to the method of submission which is prescribed by the same Section with some particularity, and do not refer to the date of submission. The Section proceeds to provide, that "such submission shall be made and the vote hereinafter provided for taken, at the "next election, whether general, municipal or special, wherein the people of the county, qualified to vote, are authorized to vote for local officers,"—then proceeding to impose upon the County Clerk the duty of giving public notice, preparing and distributing ballots, etc. And further on in the same Section, it is provided that "the acceptance or rejection of this act shall be determined by the result of such election."

Section 19 provides, that "this act shall take effect immediately as regards the submission thereof to a popular vote as aforesaid."

The provision that the act shall not take effect until the people have voted yes or no, is obviously and necessarily mandatory. The insistment of the Prosecutor is, that the next following clause, viz: That calling for a submission at the next election, is mandatory, so that submission at that particular time is 10 essential. This insistment overlooks the fact that it is rhetorically impossible to adopt a mandatory sense both for the requirement that the act shall be submitted in the manner prescribed, and also for the requirement that the act shall be submitted at the next election. For, to say that the act shall not take effect until submitted, and at the same time to say that it has taken effect and its force has been spent because not submitted within a limited time, is a manifest contradiction. 20

We hold that with respect to imposing a duty upon the County Clerk and election officers to prepare for and hold an election, the effect of the act is immediate and imperative, and the duty continues until it is performed. For other purposes the act does not take effect in any county until that duty has been performed and the question of acceptance or rejection has been submitted to the people in the manner contemplated by the act. It is not essential that the 30 question shall have been submitted at the appropriate election held next after the passage of the act. The REFERENDUM clause is mandatory in the requirement that the act shall be submitted to the people substantially in the method prescribed; it is directory with respect to the time of such submission. It must be very plain language that would justify the courts in so construing a REFERENDUM clause as to put it within the power of a ministerial officer to nullify the act; especially where the same con-40

struction must lead to the conclusion that the REFERENDUM is illusive and the act is therefore special, and for that reason unconstitutional and totally void. No language requiring such a construction is to be found in this act. We therefore hold that the neglect or failure of the County Clerk and election officers in any county to perform their duties in such manner as to test the sense of the people at the precise time contemplated by the legislature, cannot defeat the will of the legislature, or deprive the people of the option of acceptance granted by the act. Undoubtedly the reference to the "next election" is designed to secure prompt submission of the question to the people at the next election after the act, with respect to those counties then possessing the requisite features, and at the first available election with respect to such counties, if any, as may be afterwards, come to possess the requisite features. The section, however, requires not only a prompt submission of the question to the people, but it requires that such submission shall be after adequate advertisement and the preparation of an adequate number of official ballots and their distribution among the proper election officers so as to reach the people. A bona fide submission of the question to the people, and its actual acceptance or rejection, are what the legislature contemplated. It is quite conceivable that owing to accident or design, an election might be held in such manner as not fairly to test the sense of the County in the manner provided by the Act; and in a plain case such an election might be declared void. Such an abortive election would hardly be construed as debarring the people from subsequently availing themselves of the option, if they saw fit to do so. But, without discussing this question, we are clearly of the opinion that section 18 has not the effect of absolutely requiring that the submission to a vote shall be at the next general election after the adoption of the act, nor has it the effect of excluding

from the class those counties that have not heretofore acted upon the question. In those counties now having the necessary features to bring them within the general class, where by reason of the failure of the public officials to take the necessary steps, or from any other cause, the voters have not yet voted pro or con upon the question of adoption, it is still in order for the act to be submitted to the people, and a mandamus would lie at the instance of persons interested, requiring the proper officials to <sup>10</sup> advertise, prepare for and conduct the election.

Before leaving this branch of the case, it is proper to remark that the statute now under consideration, in its general features, and especially in the provisions respecting submission of the question of adoption or rejection to a popular vote, is hardly to be distinguished from the "Act to establish public parks in certain counties of this State," approved March 5, 1895, (Laws 1895, p. 169; Gen. Stat., p. 2618; supplements in Laws 1898, p. 19; Laws 1899, p. 92.). It is <sup>20</sup> a matter of judicial history that under this statute at least one of the great counties of the State has voted to adopt the system of parks therein provided for; that the Park Commission thereupon created, has exercised with the sanction of our court of last resort, its power to require the Board of Chosen Freeholders of the County to issue bonds to the amount of a half million dollars, in order to meet the expenses incurred by the Commission, (Freeholders of Essex vs. Park Commission, 33 Vr. 376), and that <sup>30</sup> the Commission has acquired lands by resorting to the powers of condemnation conferred by the act. (Rimback vs. Essex Park Commission, 33 Vr. 494.)

And although this great enterprise has been carried on at public expense, under circumstances requiring contentions litigation to enforce the authority of the Commission, it seemingly has not occurred, heretofore, either to the Bench or to the Bar, or to any of the numerous class of persons interested in obstructing the enforcement of the act, that the statute was <sup>40</sup>

null and void by reason of the supposed limitation of time fixed for its adoption. Yet in the mandamus case (33 Vr. 376) the question turned upon the validity of an election held under the REFERENDUM clause of the supplement of 1898, where the term "next election" is used without any express language accompanying it to extend its construction.

- 10 In the recent case of *Renner vs. Holmes*, 53 Atl. 76, Mr. Justice Dixon, speaking the views of this Court, drew attention to the distinction between the Park Act of 1895, on the one hand, and the statutes that were condemned in the *De Hart* and *Renner* cases on the other.

The next ground of attack upon the constitutionality of the present act is, that it makes invalid delegation of municipal powers. The cases cited in support of this contention (*Bingham vs. Camden*, 11 Vr. 156; *Alexander vs. Elizabeth*, 27 Vr. 71; *Hammer vs. Richards*, 15 Vr. 667), are not pertinent. They touch rather upon the point that legislation of the character now under examination must be general in its operation, a point already sufficiently covered. If the statute before us confers powers that may properly be called municipal powers, they are conferred upon a new body politic whose limited functions are to be performed within and for an existing political  
 20  
 30 division. It is not perceived that any objection can be suggested to this scheme on constitutional grounds, that will not be found fully met and answered in the recent decision of the Court of Errors and Appeals in *Allison vs. Corker*, 52 Atl. Rep. 362.

It has already been observed that the creation of a body corporate seemed necessary, in the wisdom of the legislature, to carry out and execute the public trust contemplated in the act. Indeed, there may be room for the contention that without the inter-  
 40 vention of such a trustee, the legal title to the rights

in question could not be acquired or held. A right of fishery is a right of profit a prendre, and the underlying reason for the established rule that such rights cannot be claimed by the public under a custom is that such a custom would be void for indefiniteness with respect to the persons entitled to enjoy the right. Such rights are said to lie in grant, and a claim to their enjoyment resting on ancient usage was at common law necessarily made under a prescription, which pre-supposed a grant that had 10 been lost. Inasmuch as the history of this State does not extend back to time immemorial, (*Albright vs. Cortright*, 35 Vr. 332, and cases cited), a common-law prescription is impossible with us. By analogy to our statutes of limitation, however, the same result is reached by a plea expressly setting up a lost grant, the averment being supported by an adverse user for more than twenty years under appropriate conditions. But it will be seen that whether under the common-law prescription, or under our plea of lost grant, 20 there is a qualification inherent in the subject-matter of a profit a prendre; that is, it rests in grant, and so must be pleaded under a grant, actual or supposed, and supported either by production of the deed or by evidence consistent with a lost deed.

The foregoing considerations apply not only to a common of fishery, but also to a common fishery, which is a very different thing; the former being a right held by an individual in common with the own- 30 er of the soil covered by the water in question (*Co. Litt-122, a.*), the latter being a public or common right, which is or may be exclusive of the owner of the soil, *Bennet vs. Costar*, 2 Moore 83; 8 Taunt. 183, *Bac. Abr.*, title "Pischary." Sir William Blackstone, indeed, while he classified the "common fishery" among the rights of profit a prendre that are capable of being held by private grant or prescription, (2 *Com.* 34), seems inclined to treat a "free-fishery" as a species of royal franchise, conferring upon a citizen 40

an exclusive right of fishing in a public river (2 Com. 39, 40). But in this he is criticised by Mr. Hargreave in Co. Litt. 122, A, Note 7, who seems to think the term free-fishery may appropriately be used to designate a common or public fishery.

Certainly the sort of fishing rights that were attempted to be set up in *Cobb vs. Davenport* and *Albright vs. Cortright*, were common rights in the  
 10 sense of being open to the inhabitants in general; and it was rights of this sort that the Court decided could not be claimed under a custom, but must arise by grant or prescription. In either of the latter modes of acquiring title there arises the necessity for a grantee capable of accepting the grant. A mere easement may be acquired by the public by custom or dedication, which needs not a certain grantee. But with a right of profit a prendre, public or private, it is otherwise. The English law upon the subject  
 20 is to be found principally under the head of "prescription," because actual grants were the rare exception; grants presumed from long user the rule. It was early recognized, that while a custom of profit a prendre laid in the inhabitants of a district was void for uncertainty and unreasonableness, a prescription laid in a body politic or corporate was good, and would justify a user of the right by any member of the corporation.

30 Co. Litt. 113, C.

Washb. Eas. & Serv. p. No. 73, et seq., p. No. 82, p. No. 125, et seq. *Constable vs. Nicholson*, 14 C. B. (N. S.) 230, 32 L. J. C. P. 240; and Eng. Rue. Cas. 337.

There being in esse a corporation clothed by law with the power to take the rights in question and hold them for the benefit of the inhabitants, or  
 40 others of the public entitled thereto, the trust is en-

forceable as a public use, notwithstanding any legal or technical indefiniteness in the beneficiaries. The "public use," and the "charitable trust," are in this respect closely analogous. Pom. Eq. Jur. Sec. 1018, et seq.

It is next insisted that the right of fishing in the fresh water lakes of this State is a private right and not a public use. A concise answer to this contention is, that the manifest purpose of this act is to im-<sup>10</sup>press a public use upon this private right, or rather to extinguish the private right and replace it with a public right. In *Arnold vs. Mundy*, 1 Halst. 1, it was held that the tidal waters of this State are public property and the right of fishery therein is common to all the people. In *Cobb vs. Davenport*, 3 Vr. 369, it was held that the soil under the fresh water lakes was formerly in the proprietors, and not in the State, and may be acquired by individual owners under grant from the council of proprietors; and with re-<sup>20</sup>spect to these waters it was held that the exclusive right of fishery was not common property, and could not be acquired by the general public by custom; that prima facie this right belongs exclusively to the owner of the soil covered by water, but may be acquired separate from the ownership of the soil by grant or prescription. The law thus laid down has been placed beyond dispute in this State by the decision of the Court of Errors and Appeals in *Albright vs. Cortright*, 35 Vr. 330. But the discussion in these cases<sup>30</sup> related to the question whether the ownership of the right of fishery in the non-tidal waters of the lake is prima facie in the owner of the soil covered by the lake. The question whether it is within the competency of the legislature to take that private property for public use is an entirely different question, and of course is beyond dispute.

The next question is whether the use to which the rights of fishery and the property held in connection<sup>40</sup>

therewith are to be devoted, under the scheme proposed in this statute, amounts to a public use. So far as this is a judicial question it is in our judgment not debatable. The title of the act shows its main purpose to be the acquisition of "rights of fishing common to all," a phrase which, as already explained, relates to the status of the rights after acquisition, and indicates with the utmost clearness the purposes for which they are acquired. The commissioners  
10 provided for by the act are created a body politic, the members are to serve without compensation, their expenses and disbursements are to be paid for out of the public funds. By section 2 they are authorized to acquire, maintain and make available to the inhabitants of the county, and to the public, rights of fishing common to all, in fresh water lakes within that county having an area of water surface exceeding 100 acres, and lands not exceeding ten  
20 acres adjoining thereto and within the county, for public use and enjoyment therewith. And it is made the duty of the commissioners to preserve and care for the rights of fishery, and to care for and improve the lands adjoining the lakes. For these purposes they are invested with the powers of purchase and condemnation. That under this scheme, any and every citizen of the county would have an equal right to resort to the lakes and parks, and to enjoy the fishing privileges therein, subject only to reasonable regulations to be prescribed by the commissioners,  
30 and to the general laws of the State for the protection of fish and game, admits of not the slightest doubt. That this constitutes a public use, is entirely well settled.

Whether, for a given public use, the legislature will authorize the exercise of the power of eminent domain, is a legislative question, and not a judicial one.

Olmsted vs. Proprietors of Morris Aqueduct, 18 Vr. 311-329.

If private lands may be taken for a public use as a park for general purposes of popular recreation, it is perfectly plain that they may be taken for purposes of a park with the incidental rights of a public fishery.

Mr. Randolph's treatise on the law of Eminent Domain, (Secs. 41, et seq) and other recent text books on the subject, contain ample reference to the great variety of public uses for which the power of eminent domain has been called into play.

The argument urged here that the right to take fish is not an easement, but a profit a prendre, goes only to the question, what interest in lands may be taken for the public use. A right to take the very products of the soil is, of course, a greater interest than a mere easement such as a right of passage or the like. But as the Constitution authorizes land to be taken, the authorization necessarily justifies a taking either of the fee, or of any interest in land less than the fee. A limitation of the interest taken, to that which the public use requires, is manifestly just and constitutional.

Hepburn vs. Jersey City, 50 Atl. Rep. 598;  
52 Atl. Rep. 1132. 30

This disposes of all the objections that were raised concerning the constitutionality of the act.

The final reason relied upon for reversal of the order appointing Commissioners, is that the acceptance or rejection of the act was not submitted to popular vote at the next election, whether general, municipal or special, wherein the people of the county, qualified to vote, were authorized to vote for local

officers. The statute was approved March 22, 1901, and by Section 19, it took effect immediately with respect to the submission thereof to popular vote. The regular township elections in Sussex County were held April 9, 1901. The act was not submitted to popular vote until the general election of November 5, 1901. At the township elections officers local to the township are elected. (Laws of 1899, p. 373, Sec. 4; Laws 1899, p. 427; Laws of 1901, p. 49). It is quite true that these township elections are local elections. And if there are any incorporated towns or boroughs in the County of Sussex they doubtless held local elections at some time between the passage of the act and the fifth of November. But Section 18 of the act before us, provides, as we think, for the submission of the question at an election, whether general, municipal or special, wherein the people of the County are authorized to vote for local officers. This refers, we think, to officers which are local to the county, and not those which are local to a township or other municipality within the county. The purpose was to have the act submitted at the first election held throughout the county, in which the entire voting population of the county would be interested. The machinery of the act is the county machinery, and the expenses are to be borne from the county treasury.

But for the reasons already given, we deem it quite unnecessary to pursue the inquiry whether the people of Sussex County correctly chose the date upon which this matter should be submitted to the popular vote. The facts show conclusively that they have in good faith expressed themselves. The population of the county, according to the last federal census, is 24,134, and the case shows that 5,088 ballots were cast upon this question, of which only 128 were rejected for informality or otherwise. There is not the slightest suspicion that the will of the people has not

been fully and fairly expressed in accordance with the letter and spirit of the act.

The order brought up for review by this writ, will be affirmed with costs.

---

10

20

30

40

## NEW JERSEY SUPREME COURT.

	o	
ANDREW ALBRIGHT,	)	
vs.	)	
10 SUSSEX COUNTY LAKE	)	On Certiorari.
AND PARK COMMIS-	)	Rule for Judg-
SION and ORA C. SIMP-	)	ment.
SON, Clerk.	)	
	o	

This cause coming on to be heard before the Court, at February Term, 1902, and having been argued by  
 20 Charles D. Thompson and Charles L. Corbin, Esqs., of Counsel for Plaintiff, and by John W. Griggs, Esq., of Counsel for Defendant; and the Court having taken time to consider the same and advise thereon, and being now of opinion that the order made by the Hon. A. Q. Garretson, Justice of the Supreme Court, presiding in the Courts of Sussex County on the 11th day of November, 1901, which by the writ in this cause was brought before this Court for review,  
 30 is not for any of the reasons assigned by the plaintiff unconstitutional, illegal, or void, and that the same ought not to be set aside or held to be illegal, irregular, or void; it is thereupon

ORDERED that judgment be entered for the defendant, and the said writ of certiorari be dismissed, with costs to be taxed against the plaintiff.

Entered December 26, 1903, on motion of

GRIGGS, DILL & HARDING,

Attys.

A true copy.

40 WM. RIKER, Jr., Clerk.

NEW JERSEY, to wit:

The State of New Jersey to our  
(L. S.) Justices of our Supreme Court,  
GREETING:

Because in the record and proceedings, and also in the giving of the judgment in a plaint, which was in our said Supreme Court before you, between Andrew Albright, Prosecutor, and Ora C. Simpson, Clerk of Sussex County, and William D. Ackerson, Luther Hill and J. Anson McBride, Sussex County Lake and Park Commission, defendants, on a certiorari issued out of our said Supreme Court directed to the said defendants and tested on the Twenty-second day of November, Nineteen Hundred and One, manifest error hath intervened to the great damage of the said Prosecutor, as by his complaint we are informed; we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you that, if judgment be thereupon given, then you send distinctly and openly under your seal, the record and proceedings and plaint aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals before the judges thereof at Trenton on the Nineteenth day of February next, together with this writ, in order that the record and proceedings aforesaid being inspected we may cause to be further done thereupon what of right and according to law ought to be done.

WITNESS his Honor, William J. Magie, our Chancellor, and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the Thirty-first day of January, in the year of our Lord One Thousand Nine Hundred and Three.

S. D. DICKINSON,  
Clerk.

THOMPSON & HALL,  
Attys.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

<hr/>		0	
	ANDREW ALBRIGHT,	)	
10	vs.	)	
	SUSSEX COUNTY LAKE	)	On Error.
	AND PARK COMMIS-	)	Assignment.
	SION and ORA C. SIMP-	)	
	SON, Clerk.	)	
	<hr/>	0	

20

Afterwards, that is to say, on the Nineteenth day of February, 1903, before the Court of Errors and Appeals in the last resort to all causes, comes Andrew Albright, by Thompson & Hall, his attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the judgment aforesaid of the Supreme Court, the order brought up before the Supreme Court by its writ of certiorari was affirmed, whereas by the law of the  
30 land the order should have been set aside.

And there is error in this also, that the Supreme Court, by its judgment aforesaid, dismissed the said writ of certiorari, whereas the same should have been sustained.

And there is error in this also, that the Supreme Court denied the petition of the plaintiff in error for a re-hearing, whereas the same should have been al-  
40 lowed.

And there is error in this also, that the Supreme Court did by its said judgment aforesaid, declare the said statute entitled, "An Act to acquire rights of fishing common to all in fresh water lakes in certain counties, to acquire lands adjoining thereto for public use and enjoyment therewith, and to regulate the same, Laws 1901, Chap. 161, to be constitutional, whereas the same should have been declared unconstitutional.

10

Wherefore the plaintiff in error prays that the judgment aforesaid, by reason of said errors and of other errors appearing in the record, and proceedings aforesaid, may be reversed, annulled and for nothing holden, and that the plaintiff in error may be restored to all things which he has lost by occasion of said judgment.

---

20

30

40

