

## INDEX

	<i>Page</i>
Rule to Show Cause.....	3
Affidavit .....	4
State of Case.....	7
Conclusions .....	9
Order to Mould Pleadings.....	11
Alternative Writ of Mandamus.....	13
Demurrer .....	19
Rule Overruling Demurrer.....	21
Order to File Pleadings.....	22
Notice of Appeal.....	24
Notice of Argument.....	25
Grounds of Appeal.....	26



AFFIDAVIT.

NEW JERSEY SUPREME COURT

COUNTY OF MONMOUTH, }  
STATE OF NEW JERSEY, }SS:

10 JOHN M. SMITH, being duly sworn upon his oath, deposes and says:

1. That he is, and has been for a number of years, a resident of the Borough of Freehold, Monmouth County, New Jersey. For the past ten years he has been a special investigator and County Detective for the County of Monmouth.

20 2. On July 8th, 1925, I was duly appointed a special investigator and county detective, being the chief of said force, by John J. Quinn, the Prosecutor of the Pleas of Monmouth County. My appointment was made under and by reason of the provisions of Chapter 232 of the Laws of 1922, page 403, the title to which Act is as follows:—

“An Act to amend an Act entitled ‘An Act relating to courts having criminal jurisdiction and regulating proceedings in criminal courts’ (Revision of 1898), approved June 14, 1898, and all amendments and supplements thereto.”

30 Since this date I have been serving as county detective, and my salary has been regularly passed by the Board of Chosen Freeholders of Monmouth County, and paid by the county collector.

3. By an Act of the legislature approved March 29, 1926, Chapter 242, Page 411, entitled:

40 “An Act to amend an Act entitled ‘An Act relating to courts having criminal jurisdiction and regulating proceedings in criminal courts’ (Revision of 1898), approved June 14, 1898, and all amendments and supplements thereto, approved March 13, 1922,”

Affidavit.

the legislature provided by said amendment for the appointment and payment of county detectives in counties of the second class. Said Act covered the appointment and salary of all county detectives in counties having a population of “more than 70,000 and not more than 300,000 inhabitants.” The last sentence of Paragraph two of said Act provided as follows:— 10

“This Act shall not affect counties bordering on the Atlantic Ocean, with a population of over 100,000.”

4. This proviso has the legal effect of eliminating Monmouth County from the class as designated in said Act, and by reason of this Act being an amendment to the Act under which Monmouth County detectives were appointed, entirely abolishes the detective force in Monmouth County. 20

5. On July 21st, 1926, deponent duly presented to the Monmouth County Board of Freeholders and the County Collector, the disbursing officer, his verified voucher for his salary for the month of July, in accordance with the provisions of Chapter 232, Laws of 1922, page 403.

6. The Board of Freeholders of Monmouth County, and the County Collector, refused to pay said salary, claiming that the Act of 1926, page 411, superseded all prior legislation, and Monmouth County being excluded from said Act that the County Collector was without power to pay said salary, and in accordance therewith passed the following resolution:— 30

“WHEREAS, the bills of Leonard Shields and John M. Smith, for one-half month salaries, respectively, for services as Detectives in the Prosecutor’s Office of the County of Monmouth, July 1, 1926, to July 15, 1926, have been duly 40

*Affidavit.*

presented by the Prosecutor to this Board for payment and Counsel of the Board having advised that pursuant to the provisions of Chapter 242 of the Laws of 1926, the Detective Staff in the Prosecutor's Office of Monmouth County has been inadvertently abolished, and that for this reason the Board is powerless and without legal right to honor and pass said bills aforesaid.

10

THEREFORE, BE IT RESOLVED by the Board of Chosen Freeholders of the County of Monmouth that for said reason payment be denied and that the Prosecutor of Monmouth County be furnished with a certified copy of this resolution evidencing the action so taken by the Board of Chosen Freeholders of Monmouth County upon advice of its Counsel, and that said bills be forthwith returned."

20

7. Deponent further says that Chapter 242 of Laws of 1926, page 411, is unconstitutional in that said Act is a special and local legislation and is an undue interference with the internal affairs of counties.

Therefore deponent prays, that a writ of mandamus may issue out of and under the seal of this Honorable Court, directed to C. Asa Francis, county collector, commanding and enjoining him to pay the salary of the said John M. Smith, county detective as aforesaid, and all other detectives of Monmouth County, pursuant to the statute in such case made and provided.

30

JOHN M. SMITH.

Subscribed and sworn to before me this 23rd day of July, A. D. 1926.

(SEAL) S. W. PARMENTIER,  
Notary Public of N. J.

40

STATE OF THE CASE.

NEW JERSEY SUPREME COURT

THE STATE OF NEW JERSEY,  
Ex Rel,  
JOHN M. SMITH,

*Relator,*

*vs.*

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY OF  
MONMOUTH and C. ASA  
FRANCIS, Treasurer of the  
County of Monmouth,

*Respondents.*

*On Motion for  
Mandamus* 10

*On Rule to  
Show Cause*

*State  
of Case*

In lieu of taking depositions under the rule the following facts are stipulated:—

20

John M. Smith was duly appointed a special investigator and county detective for the county of Monmouth, by virtue of the provisions of Chapter 232 of the Laws of 1922. He has since been serving as special investigator and county detective under this appointment. He received a salary until July, 1926, when one-half month's salary became due. He submitted his voucher for his salary to The Board of Chosen Freeholders of the County of Monmouth. The Board refused to pay his salary as set forth in the voucher, on the ground that Chapter 242 of the Laws of 1926, superseded Chapter 232 of the Laws of 1922, and thereby abolished the office of County Detectives in Monmouth County.

30

The population of Monmouth County at the census of 1920 was 104,925. The counties in New Jersey facing on the Atlantic Ocean are Monmouth, Ocean, Burlington, Atlantic and Cape May. The population of Cape May County by the 1920 cen-

40

*State of the Case.*

10 sus was 19,460; the population of Atlantic County was 83,914; the population of Burlington County was 81,770, and the population of Ocean County was 22,155. Monmouth County is the only county in New Jersey bordering on the Atlantic Ocean having a population of over 100,000.

We hereby stipulate and agree that the foregoing Affidavit, Rule to Show Cause and Facts shall be the State of Case.

QUINN, PARSONS & DOREMUS,  
Attorneys for Relator.

20 WILLIAM A. STEVENS,  
Attorney of Respondents, The Board of Chosen Freeholders of the County of Monmouth, and C. Asa Francis, Treasurer of The Board of Freeholders.

30

40

CONCLUSIONS.

NEW JERSEY SUPREME COURT

No. 219, October Term, 1926.

JOHN M. SMITH,

*Relator,*

10

*vs.*

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY OF  
MONMOUTH and C. ASA  
FRANCIS, Treasurer of the  
County of Monmouth,

*On Rule for  
Mandamus*

*Respondents.*

Argued October 5th, 1926; Decided January 19th, 20  
1927.

Before Justices Parker, Black and Campbell.

For the Relator: Messrs. Quinn, Parsons & Doremus.

For the Defendants: Mr. Wm. A. Stevens and Mr. Wm. L. Edwards.

PER CURIAM:

This is a rule to show cause why a peremptory or alternative writ of mandamus should not be issued commanding the Board of Freeholders and the County Treasurer of Monmouth County to pay the salary of the relator, John M. Smith, County Detective, for the month of July, 1926. The relator was appointed a county detective of Monmouth County on July 8, 1925, under the *Act of P. L. 1922, p. 403*. At the last session of the Legislature an *Act P. L. 1926, p. 411*, was passed, which repeals the *Act of P. L. 1922, p. 403*.

30

40

*Conclusions.*

10 The Board of Chosen Freeholders refused to pay the relator's salary, on the ground that the *Act P. L. 1926, p. 411*, had repealed the *Act P. L. 1922, p. 403*. A rule to show cause was allowed why a writ of mandamus should not be issued compelling the payment of the salary on the ground that the *Act P. L. 1926, p. 411*, was unconstitutional, as being in violation of section 7, art. 4, of the State Constitution prohibiting special acts or special legislation.

20 The objectionable part of the statute is contained in the last paragraph, viz.: "This act shall not affect counties bordering on the Atlantic Ocean with a population of over one hundred thousand." It is admitted that Monmouth County is one of the counties in the State bordering on the Atlantic Ocean and it is at present, the only one of such counties over 100,000 population. It would be a hopeless task to review or even attempt to review for the purpose of harmonizing the decisions of our Courts on this most perplexing subject. We think this limitation in the *Act of P. L. 1926, p. 411*, is clearly unconstitutional, as being special legislation. That it may be excised from the act without destroying it seems clear to us under our decision such as:

30 *Johnson v. State* 59 N. J. L. 535; *Iowa Life Ins. Co. v. Eastern Mutual Life Ins. Co.* 64 N. J. L. 340. That being so, a peremptory writ of mandamus should issue forth directing the salary of the relator to be paid according to the prayer of the relator. And if this is not one of the subjects that may be taken to the Court of Errors and Appeals under the Statute *P. L. 1903, p. 381*; 3 *Comp. Sts. of N. J., p. 3216, sec. 6*, the pleadings may be so moulded, under which a final judgment can be entered for an appeal

40 to the Court of Errors and Appeals.

Filed January 19, 1927.

ORDER TO MOULD PLEADINGS.

NEW JERSEY SUPREME COURT

THE STATE OF NEW JERSEY,  
Ex Rel,  
JOHN M. SMITH,

10

*Relator,*

*vs.*

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY OF  
MONMOUTH and C. A S A  
FRANCIS, Treasurer of the  
County of Monmouth,

*Respondents.*

***On Mandamus  
Order to Mould  
Pleadings***

20

The above entitled cause having been heard on affidavit for mandamus, and rule to show cause granted thereunder, and a stipulation of facts, and the Court having allowed a peremptory writ of mandamus, and application now being made to the Court by William A. Stevens, Counsel for the respondents, counsel for relator consenting thereto, to vacate the peremptory writ of mandamus and to allow an alternative writ of mandamus, and to so mould the pleadings as to permit an appeal of the judgment of this Court;

30

It is, on this sixth day of May, A. D. 1927, ORDERED that Counsel for the respondents prepare an alternative writ of mandamus, so framed as upon a demurrer thereto to present the identical questions decided by this Court upon the said rule to show cause, and that the same be prepared and filed within three days from the date of this order, and that upon filing said writ and a demurrer thereto, judgment may be entered overruling the demurrer.

40

*Order to Mould Pleadings.*

And it is further ORDERED that if counsel for the respondents and relator cannot agree upon the form of said pleadings that they apply to this Court for the settlement of the same.

By the Court,

10

FRANK T. LLOYD,  
*J. S. C.*

On motion of  
WILLIAM A. STEVENS,  
*Counsel for Respondents.*

We consent to the entering of the above order.  
QUINN, PARSONS & DOREMUS,  
*Counsel for Relator.*

20

30

40

ALTERNATIVE WRIT.

NEW JERSEY SUPREME COURT

JOHN M. SMITH,

*Relator,*

10

*vs.*

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY OF  
MONMOUTH and C. ASA  
FRANCIS, Treasurer of the  
County of Monmouth,

*Alternative Writ  
of  
Mandamus*

*Respondents.*

WHEREAS, by Chapter 242, Laws of 1926, it was enacted as follows: —

20

“1. Section one hundred and fifty-eight of the act to which this is an amendment is hereby amended to read as follows:

158. The prosecutors of the pleas in the several counties which now have or hereafter may have a population of more than seventy thousand and not more than three hundred thousand inhabitants may appoint suitable persons, not exceeding six in any county, to act as special officers for the detection, arrest, indictment and conviction of offenders against the law. Such persons so appointed shall possess all the powers and rights and be subject to all the obligations of constables and police officers in any county of this State, and before such person shall enter upon his duties as said officer, his appointment shall be approved by the judge of the Court of Quarter Sessions of said county,

30

40

Alternative Writ.

10 and each person so appointed shall receive an annual salary of not less than twenty-five hundred dollars and not more than three thousand dollars; which sum shall be fixed by the judge and prosecutor, to be paid by the county treasurer in equal semimonthly installments out of the funds of the county; *provided*, that the annual salary of the officer designated as chief of county detectives in the aforesaid counties shall be four thousand dollars which sum shall be fixed by the judge and prosecutor to be paid by the county treasurer in equal semimonthly installments out of the funds of the county.

20 2. The special officer or officers named in the next preceding section shall not be eligible to receive any increase in salary over the minimum salary as stated in the next preceding section until he or they shall have served five continuous years as a special officer or officers in the prosecutor's office. No increase in salary, fixed by the judge or prosecutor shall exceed more than one hundred dollars per year for each year of service over five years, and all increases shall cease when the respective maximum sums named in the preceding section are reached; *provided, however*, that any special officer who is now or has been employed in the prosecutor's office as special officer for a period exceeding five years, the judge and prosecutor may fix an increase in salary for any sum equal to one hundred dollars per year for each year of service now served over five years, which total salary shall not exceed the respective maximum sums named in the next preceding section. This act shall not affect counties bordering on the Atlantic Ocean with a population of over one hundred thousand.

30

40

Alternative Writ.

3. All acts and parts of acts inconsistent with this act be and the same are hereby repealed.

4. This act shall take effect immediately. Approved March 29, 1926."

10 and whereas, by Chapter 232, Laws of 1922, it was enacted as follows:—

"1. Section one hundred and fifty-eight of the act to which this is an amendment is hereby amended to read as follows:

158. The prosecutor of the pleas in the several counties which now have or hereafter may have a population of more than seventy thousand and not more than three hundred thousand inhabitants may appoint suitable persons, not exceeding six in any county, to act as special officers for the detection, arrest, indictment and conviction of offenders against the law. Such persons so appointed shall possess all the powers and rights and be subject to all the obligations of constables and police officers in any county of this State, and before such person shall enter upon his duties as said officer, his appointment shall be approved by the judge of the Court of Quarter Sessions of said county, and each person so appointed shall receive, in counties having a population of not less than seventy thousand and not more than two hundred thousand, an annual salary of not less than eighteen hundred dollars and not more than twenty-six hundred dollars, and each person so appointed in counties having a population of not less than two hundred thousand and not

20

30

40

*Alternative Writ.*

10 over three hundred thousand shall receive an annual salary of not less than twenty-two hundred dollars and not more than twenty-six hundred dollars; which sum shall be fixed by the judge and prosecutor, to be paid by the county treasurer in equal semimonthly installments out of the funds of the county; *provided*, that the maximum annual salary of the officer designated as chief of county detectives in the aforesaid county shall be three thousand five hundred dollars, which sum shall be fixed by the judge and prosecutor, to be paid by the county treasurer in equal semimonthly installments out of the funds of the county.

20 2. The special officer or officers named in the next preceding section shall not be eligible to receive any increase in salary over the minimum salary as stated in the next preceding section until he or they shall have served five continuous years as a special officer or officers in the prosecutor's office. No increase in salary, fixed by the judge or prosecutor shall exceed more than one hundred dollars per year for each year of service over five years, and all increases shall cease when the respective maximum sums named in the preceding section are reached; *provided, however*, that any special officer who is now or has been employed in the prosecutor's office as special officer for a period exceeding five years, the judge and prosecutor may fix an increase in salary for any sum equal to one hundred dollars per year for each year of service now served over five years, which total salary shall not exceed the respective maximum sums named in the next preceding section; *provided*,

30

40

*Alternative Writ.*

*further*, if any person shall have served in a regularly organized city police department, or as a justice of the peace, or as a constable, or as a law enforcing officer in the service of any municipality of this State prior to his appointment as a special officer in the prosecutor's office that then and in such case the judge and prosecutor in fixing the salary of such officer, may take into consideration the time of service of said officer as an officer in such previous service the same as if such officer had been continuously in the service of said prosecutor's office.

3. All acts and parts of acts inconsistent with this act be and the same are hereby repealed.

4. This act shall take effect immediately.  
Approved March 13, 1922;"

and whereas, after the enactment of Chapter 232 of the Laws of 1922, John M. Smith had been duly appointed a special investigator and county detective for the county of Monmouth, and had acted under and by virtue of said Chapter 232 of the Laws of 1922; and whereas, thereafter, to wit, after the passage of Chapter 242 of the Laws of 1926, said John M. Smith duly presented to the Board of Chosen Freeholders of the County of Monmouth, his voucher for his salary under Chapter 232 of the Laws of 1922; and whereas, said Board of Chosen Freeholders of the County of Monmouth, refused to pay said salary either under Chapter 232 of the Laws of 1922, or under Chapter 242 of the Laws of 1926, and still does neglect and refuse to pay said salary of said John M. Smith under either of said Laws.

*Alternative Writ.*

We therefore, being willing that due and speedy justice should be done in this behalf, command and strictly enjoin you that immediately after the receipt of this writ you, the Board of Chosen Freeholders of the County of Monmouth, and C. Asa Francis, Treasurer of the County of Monmouth, do  
 10 pay to said John M. Smith, his salary, in accordance with the provisions of the statute in such case made and provided, or cause to us to the contrary to signify lest in your default complaint should come to us repeated; and how you shall execute this our command certify to our Justices of our Supreme Court of Judicature at Trenton, the fifth day of October next, together with this our writ, and this in no wise omit at your peril.

20 WITNESS, WILLIAM S. GUMMERE, Chief Justice of our Supreme Court at Trenton, this fourth day of August, Nineteen Hundred and Twenty-six.

EDWARD J. KELLEHER,  
*Clerk.*

QUINN, PARSONS & DOREMUS,  
*Attorneys for Relator.*

30

40

DEMURRER.

NEW JERSEY SUPREME COURT

THE STATE OF NEW JERSEY,  
 Ex Rel,  
 JOHN M. SMITH,

*Relator,*

10

*vs.*

THE BOARD OF CHOSEN FREE-  
 HOLDERS OF THE COUNTY OF  
 MONMOUTH and C. ASA  
 FRANCIS, Treasurer of the  
 County of Monmouth,

*Respondents.*

*On Mandamus  
Demurrer*

And the said respondents come and say that they should not be compelled to pay the said relator the salary as by said writ, said respondents are com-  
 20 manded to do because they say that the matters contained in the said writ in manner and form as the same are stated and set forth are not sufficient in law for the said relator to have or maintain his aforesaid writ of mandamus against them, the said respondents, and that they, the said respondents, are not bound by the law of the land to obey the  
 30 command of said writ of mandamus to pay said relator his salary as by said writ they are com- manded to do; and the said respondents, according to the form of the statute in such case made and provided, state and declare to the Court here the following causes of demurrer to the said writ of mandamus, that is to say:

That under the provisions of Chapter 242 of the Laws of 1926, and especially the saving clause found therein recited in Section 2 of said act, re-

40

*Demurrer.*

10 spondents have no authority in law to comply with relator's demands to pay his salary, respondents being in doubt as to the legal effect of such saving clause and mandamus not being the appropriate remedy where construction of a statute is so clearly involved. That by Section 2 of Chapter 242 of the Laws of 1926, it was enacted in part as follows:

20 "This act shall not affect counties bordering on the Atlantic Ocean with a population of over 100,000."

and standing as it is in effect abolishes the office held by relator and leaves respondents without authority to recognize the salary claim of said relator, and the said respondents pray judgment that the said writ be set aside and they, the said respondents, be relieved from obeying the said command.

WILLIAM A. STEVENS,  
*Attorney for Respondents.*

30

40

RULE OVERRULING DEMURRER.

NEW JERSEY SUPREME COURT

THE STATE OF NEW JERSEY,  
Ex Rel,  
JOHN M. SMITH,

*Relator,*

*vs.*

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY OF  
MONMOUTH and C. ASA  
FRANCIS, Treasurer of the  
County of Monmouth,

*Respondents.*

10

***On Mandamus  
Rule Overruling  
Demurrer***

This matter being opened to the Court by Messrs. Quinn, Parsons & Doremus, Attorneys for Relator;

20

Whereupon all and singular the premises afore-  
said being seen and by the said Court now here  
fully understood and mature deliberations there-  
upon had, it appears to the Court here that the al-  
ternative writ of mandamus by said relator pre-  
sented, and by the said respondents demurred to, is  
good and sufficient in the law and that the demurrer  
thereto is not well taken and that judgment be en-  
tered in favor of John M. Smith, Relator, against  
the Board of Chosen Freeholders of the County of  
Monmouth and C. Asa Francis, Treasurer of the  
County of Monmouth, Respondents.

30

By the Court,

FRANK T. LLOYD,  
*J. S. C.*

Dated, May 6, 1927.

On motion of

QUINN, PARSONS & DOREMUS,  
*Attorneys for Relator.*

40

ORDER TO FILE PLEADINGS.

NEW JERSEY SUPREME COURT

10 THE STATE OF NEW JERSEY,  
 Ex Rel,  
 JOHN M. SMITH, *Relator,*  
*vs.*  
 20 THE BOARD OF CHOSEN FREE-  
 HOLDERS OF THE COUNTY OF  
 MONMOUTH and C. ASA  
 FRANCIS, Treasurer of the  
 County of Monmouth,  
*Respondents.*

***On Mandamus  
Order to File  
Pleadings***

20 The above entitled cause having been heard on  
 affidavit for mandamus and a rule to show cause  
 granted thereunder, and a stipulation of facts, and  
 the Court having allowed a peremptory writ of  
 mandamus, and application having been made to the  
 Court by William A. Stevens, Counsel for respond-  
 ents, Messrs. Quinn, Parsons & Doremus, Counsel  
 for Relator, consenting thereto, to vacate the per-  
 emptory writ of mandamus and to allow an alterna-  
 30 tive writ of mandamus, and to so mould the plead-  
 ings as to permit an appeal of the judgment of this  
 Court, and further application now being made to  
 file the pleadings as moulded, pursuant to the order  
 of this Court:

It is, on this sixth day of May, A. D. 1927, OR-  
 DERED that Counsel for the Respondents file with  
 the Clerk of this Court, within three days of the  
 date hereof, an order to mould pleadings, alterna-

40

*Order to File Pleadings*

tive writ of mandamus, demurrer and rule for judg-  
ment overruling demurrer.

By the Court,

FRANK T. LLOYD,  
*J. S. C.* 10

On motion of  
WILLIAM A. STEVENS,  
*Counsel for Respondents.*

We consent to the entering of the above order.  
QUINN, PARSONS & DOREMUS,  
*Counsel for Relator.*

20

30

40

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT

10 THE STATE OF NEW JERSEY,  
 Ex Rel,  
 JOHN M. SMITH,  
*Relator,*

*vs.*

THE BOARD OF CHOSEN FREE-  
 HOLDERS OF THE COUNTY OF  
 MONMOUTH and C. ASA  
 FRANCIS, Treasurer of the  
 County of Monmouth,  
*Respondents.*

**Notice of  
Appeal**

20 *To Messrs. Quinn, Parsons & Doremus, Attorneys  
for Relator:*

PLEASE TO TAKE NOTICE that the Board of Chosen Freeholders of the County of Monmouth and C. Asa Francis, Treasurer of the County of Monmouth, Defendants, appeal to the Court of Errors and Appeals in the last resort in all causes from the whole of the judgment entered in this cause.

30 WILLIAM A. STEVENS,  
*Attorney for Defendants.*

Endorsed:  
Service acknowledged,  
Feb. 15, 1927.

QUINN, PARSONS & DOREMUS,  
*Attorneys for Relator.*

40

NOTICE OF ARGUMENT.

NEW JERSEY COURT OF ERRORS AND APPEALS

THE STATE OF NEW JERSEY,  
 Ex Rel,  
 JOHN M. SMITH,  
*Relator,*

*vs.*

THE BOARD OF CHOSEN FREE-  
 HOLDERS OF THE COUNTY OF  
 MONMOUTH and C. ASA  
 FRANCIS, Treasurer of the  
 County of Monmouth,  
*Respondents.*

**Notice of  
Argument**

*To Messrs. Quinn, Parsons & Doremus, Attorneys  
for Relator-Appellee:*

PLEASE TO TAKE NOTICE that the argument of the appeal in the above entitled cause will be moved before the New Jersey Court of Errors and Appeals at the State House, in the City of Trenton, on Tuesday, the 17th day of May, 1927, at eleven o'clock in the forenoon of that day, or as soon thereafter as the Court can attend to the same.

WILLIAM A. STEVENS,  
*Attorney for Defendants-Appellants.*

Endorsed:  
Service acknowledged,  
Feb. 15, 1927.

QUINN, PARSONS & DOREMUS,  
*Attorneys for Relator.*

10

20

30

40

GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS

10 THE STATE OF NEW JERSEY,  
 Ex Rel,  
 JOHN M. SMITH,  
*Relator,*

*vs.*

20 THE BOARD OF CHOSEN FREE-  
 HOLDERS OF THE COUNTY OF  
 MONMOUTH and C. ASA  
 FRANCIS, Treasurer of the  
 County of Monmouth,  
*Respondents.*

*Grounds  
of Appeal*

*To Messrs. Quinn, Parsons & Doremus, Attorneys  
for Relator-Appellee:*

The appellants state the following grounds of appeal:

30 1. Because the Supreme Court held that the limitation in the statute (P. L. 1926, p. 411), namely: "This act shall not affect counties bordering on the Atlantic Ocean with a population of over 100,000," was clearly unconstitutional, as being special legislation.

40 2. Because the Supreme Court held that said limitation in the statute (P. L. 1926, p. 411), might be excised from the act without destroying the statute.

*Grounds of Appeal*

3. Because the Supreme Court directed that a peremptory writ of mandamus should issue as a result of the excision of what it termed the unconstitutional feature of said act.

WILLIAM A. STEVENS, 10  
*Attorney for Defendants-Appellants.*

Endorsed:  
Service acknowledged,  
May 5th, 1927.

QUINN, PARSONS & DOREMUS,  
*Attorneys for Relator.* 20

30

40

**New Jersey Court of Errors  
and Appeals**

---

THE STATE OF NEW JERSEY,  
Ex Rel,  
JOHN M. SMITH,  
*Relator-Appellee,*  
*vs.*

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY OF  
MONMOUTH, and C. ASA  
FRANCIS, Treasurer of the  
County of Monmouth,  
*Defendants-Appellants.*

*On Motion  
for  
Mandamus.*

---

**BRIEF OF THE RELATOR-RESPONDENT.**

---

This is an appeal taken by the defendants from an order of the Supreme Court, awarding a peremptory writ of mandamus. Pleadings have been moulded so that this appeal may be taken. The appeal involves the constitutionality of Chapter 242 of the Laws of 1926.

John M. Smith, was appointed a County Detective for the County of Monmouth, on July 8th, 1925, by virtue of Chapter 232 of the Laws of 1922. He has been serving since that date as a County Detective in Monmouth County. In 1926, the Legislature of this State, by Chapter 242 of the Laws of 1926, passed an Act which repealed Chapter 232 of the Laws of 1922. The only effect of this Act is to raise the salaries of the detectives or special of-

ficers. The last clause of paragraph 2 of this Act, recites as follows:

"This Act shall not affect counties bordering on the Atlantic Ocean, with a population of over 100,000."

On July 1st, 1926, John M. Smith presented to the respondents his verified voucher for his salary. The Board of Freeholders refused to pay his salary, on the ground that the Act of 1926 had repealed the Act of 1922. Monmouth County is one of the five counties in this State bordering on the Atlantic Ocean, and is the only county with a population over 100,000. Two other counties, however, approximate 100,000, namely, Atlantic with 83,914, and Burlington with 81,770.

The Supreme Court, in its opinion, determined that Chapter 242 of the Laws of 1926, applied and excised from the chapter the provision excepting Monmouth County as special legislation, holding that the excision of such provision did not impair the validity of the Act. From this decision this appeal was taken by the respondent.

### INTRODUCTION.

In the affidavit applying for the rule, the prayer of the affidavit is as follows:

"Therefore deponent prays that a writ of mandamus may issue \* \* \* commanding and enjoining \* \* \* to pay the salary of the said John M. Smith \* \* \* and all other detectives \* \* \* pursuant to the statute in such case made and provided." *S. C. page 6.*

The rule to show cause provides that cause should be shown why a peremptory or alternative writ should not issue, commanding the Freeholders to pay the salary of John M. Smith. *S. C. page 3.*

The stipulation of facts gives the reason on

which the Board refused to pay this salary.

"The Board refused to pay this salary as set forth in the voucher on the ground that Chapter 242 of the Laws of 1926 superseded Chapter 232 of the Laws of 1922." *S. C. page 7, lines 30 to 35.*

The resolution of the Board of Freeholders is incorporated in the affidavit, and is set forth on page 5, line 28 to page 6, line 21.

It is interesting to read the preamble to the Resolution on refusing to pay the salaries, which follows:

"Counsel of the Board having advised that pursuant to the provisions of Chapter 242 of the Laws of 1926 the detective staff in the Prosecutor's Office of Monmouth County has been inadvertently abolished, and that for this reason the Board is powerless and without legal right to honor and pass said bills aforesaid."

The opinion of the Supreme Court is found at page 9, *S. C.* This opinion holds that the statute applicable is the Act of 1926, and excises from the Act the last sentence of paragraph two of the Act, and then directs that a peremptory writ of mandamus should issue directing the salary of the relator to be paid.

Pleadings were moulded by consent and with the order of the court, and the alternative writ entered provides as follows, page 17, line 33:

"And whereas, the said Board of Chosen Freeholders of the County of Monmouth refused to pay said salary either under Chapter 232 of the Laws of 1922, or under Chapter 242 of the Laws of 1926."

The writ further proceeds:

"We, therefore \* \* \* command and strictly enjoin you \* \* \* that you \* \* \* do pay to said John M. Smith his salary in

accordance with the provisions of the statute in such case made and provided."

The demurrer is at page 19 of the *S. C.* The demurrer simply challenges the alternative writ and raises the legality of payment under the provision contained in the Act of 1926, setting forth this proviso as follows:

"This Act shall not affect counties bordering on the Atlantic Ocean with a population of over 100,000,"

and appellants base their reason in the demurrer on the ground that the Act of 1926 abolishes the office held by relator.

The grounds of appeal are contained at page 26 of the *S. C.* and involve one point only, namely, the propriety of the excision of the proviso from the Act. (*S. C. pages, 26 and 27.*)

To review concisely the proceedings in this case, a rule is granted directing the Freeholders to show cause why they should not pay the relator his salary, pursuant to the Statute in such case made and provided. Naturally this involved the construction of the Act of 1926. If the Act of 1926 were unconstitutional in toto then the Act of 1922 was revived. If the Act of 1926 was constitutional the relator had no remedy. If, however, the Act of 1926 was constitutional with the excision of the proviso, then the relator should be paid pursuant to the provisions of the Act. The pleadings have been moulded, the grounds of appeal laid both in the demurrer and in the written grounds of appeal so as to raise definitely before this court the issue as to the constitutionality of the Act of 1926, and as to the propriety of the excision of the proviso from this Act.

It will therefore be clearly seen that the crux of the determination of the issues involved in this case is the validity of the Act of 1926. Upon the de-

termination of the Act of 1926 must depend the decision in this case.

Such being the situation the appellants having charged in their grounds of appeal and in their demurrer the Supreme Court with error in determining that the proviso should be excised from the Act of 1926, and that the entire Act be permitted to stand, now present before this court in their argument a most astounding and startling reversal of position. Concisely the appellants argue in their brief two propositions only.

The appellants charge in their brief that the Act of 1926 did not repeal the Act of 1922, and that the relator should be paid his salary under the Act of 1922.

Appellants in the second place assert that if this is not so that the Act of 1926 is unconstitutional in toto, and that the Supreme Court or this Court has no power to excise the proviso from the Act. This is contrary to the original statement of the appellants in their resolution when they decided that the Act of 1926 in effect abolished the office of detectives in Monmouth County. This statement is also contrary to the demurrer to the alternative writ in the moulded pleadings, and is also contrary to the grounds of appeal.

Appellants having from the inception of this case and even prior to the institution of these proceedings, determined that the Act of 1926 was in effect and had repealed the Act of 1922, now come before this Court and reverse their position. Their present argument is in direct contradiction of their former argument. The argument of appellants on this point is very briefly, that, because the Act of 1926 provides that it shall not apply to counties bordering on the Atlantic Ocean having a population of over 100,000, it does not thereby repeal the Act of 1922. Appellants point out that the repealer section repeals Acts or parts of Acts inconsistent, and then argue that this proviso allows the

Act of 1922 to remain in full force and effect with regard to Monmouth County.

This argument is specious and fallacious. Appellants evidently admit that the Act of 1926 is special legislation. They also evidently admit that the Act of 1922 is valid legislation. They then argue that the Act of 1926 does not revive the Act of 1922, but that it revives it only as to Monmouth County. Appellants therefore place themselves in the dilemma of making either the Act of 1922 or the Act of 1926 special legislation. Both cannot stand.

The falsity of appellants' position, however, is greater than this. Appellants evidently omitted to read the entire Act, and were simply content with reading the proviso and the repealer. It is to be noted that the Act begins as follows:

"BE IT ENACTED, by the Senate and General Assembly of the State of New Jersey:

1. Section 158 of the Act to which this is an amendment is hereby amended to read as follows:"

Then follows the body of the Act. There is no dispute as to the effect of such a statute. Section 158 can only read one way. The Act of 1922 by such a provision is entirely abolished and is wiped off the statute books, and is as if it had never existed. Such is the general rule.

In 36 *Cyc.* 1083, it is said:

"Generally speaking where a statute is amended 'so as to read as follows,' the amendatory Act becomes a substitute for the original which then ceases to have the force and effect of an independent enactment."

And in 25 *R. C. L.* 907, it is said:

"Where a section of a statute is amended the original ceases to exist, and the section as amended supersedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there."

The Supreme Court of this State has held to the same effect. Justice Parker in *Vanderveer v. Herbert*, 76 *N. J. L.* 173, held that an amendatory Act

"amending Section 178 of the Elections Act 'so that the same shall read as' provided in said last amendment, the result was to repeal entire the first amendment and substitute for it the further amendment thereby enacted."

Further argument on this point is futile and would serve no useful purpose. Common sense and the law agree and coincide in the statement that the Act of 1926 if constitutional and valid, conclusively, definitely and completely repeals the Act of 1922, and the Act of 1922 is, in the words of the authorities, as if it had never been enacted.

Such being the situation, the startling reversal of position by the appellants has no merit. The essential and vital question before the Court still remains the same question as was before the Supreme Court, namely, is the Act of 1926 constitutional, and may the proviso in the Act be excised without impairing the validity of the Act?

## ARGUMENT.

### I.

#### **The Sentence in Paragraph Two of Chapter 242 of the Laws of 1926, Is Special Legislation, and Therefore Unconstitutional.**

Chapter 242 of the Laws of 1926, is unconstitutional for the reason that it is within the purview of Section 7 of Article 4, of the State Constitution, prohibiting special Acts or special legislation being enacted by the Legislature. A reference to the State of Case reveals the fact that the County of Monmouth is the only county in this State bordering on the Atlantic seaboard which has a population of over 100,000. There are in addition to Monmouth, four other counties which come within the

classification of bordering on the Atlantic Ocean, and two of these counties are within the purview of the 1926 Act, whose validity is now challenged, namely, Atlantic and Burlington, each of which have a population of over 70,000, but slightly under 100,000. The evident object of the Act of 1926, was to raise the salaries of county detectives in all counties in this State, with a population between 70,000 and 300,000, excepting Monmouth County, detectives of which county were to receive the same salary. Unwittingly, however, the Act of 1926 repeals the Act of 1922, so that Monmouth County has no detective force. The Act of 1926, therefore, has a double effect, namely, it raises the salary of all county detectives in this State in counties of between 70,000 and 300,000 except Monmouth County, but it also goes further than this and abolishes the county detective force in Monmouth County. Such is the undisputed state of facts.

The constitutionality of the Act of 1926 is challenged in this action and it would seem that a mere recital of the facts as above set out is enough to overthrow the effect of the Act. It is axiomatic that statutes must be general and not special, and that Acts regulating the internal affairs of counties or other municipalities shall also be general and not special. It is also well settled, however, that the Legislature has the right of classifying general objects which are to be affected by its legislation, and municipalities and counties may be classified according to population, if such classification is necessarily pertinent to the purpose of the legislation affecting such class.

The question arises then, is the classification adopted in this Act pertinent to the purpose of this legislation. It will be noticed that the Act contains two classifications. It first classifies all counties to which the Act applied, namely, counties with populations between 70,000 and 300,000. It then further makes another classification and ex-

cepts from the provisions of the Act counties bordering on the Atlantic Ocean whose population is over 100,000. Under the decisions of this State there can be no dispute but that the first classification, namely, counties between 70,000 and 300,000, is a proper classification.

The population of these counties bears a direct relation to the force necessary to properly maintain law and order and conduct criminal investigations, and no objection can be found to regulating the county detective force in such counties on this basis. But there can be absolutely no relation whatsoever to the proviso in the Act excluding from this classification counties bordering on the Atlantic Ocean with populations of over 100,000. If population forms a proper classification, then by its very foundation and basis all counties within this class necessarily should have detective force of the same standing, caliber and number. Is there any peculiar or distinctive feature that can eliminate a county of a population of over 100,000 bordering on the Atlantic Ocean from those of less than 100,000 but over 70,000 bordering on the Atlantic Ocean, or from counties of over 100,000 that do not border on the Atlantic Ocean? There seems to be no characteristic peculiar to a county of over 100,000 bordering on the Atlantic Ocean, which does permit its exclusion from the general class.

A complete definition of the essentials of a general Act and of the manner in which classifications may be made and yet comply with the Constitution is that of Chief Justice Beasley in *State v. Hammar*, 42 N. J. L., 435, at 440:

“But the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference

to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded, must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restriction of the legislation. \* \* \* \* In the two classes of instances thus exemplified, the basis of the classification of the one would be by a reference to marks of distinction having no connection with the substance of the supposed statute; in the other, the opposite of this would obtain—so that, in the former, the classification would be formal and arbitrary; in the latter, substantial and springing out of the nature of the subject of this legislation.”

This definition has been stated in more general and briefer terms in *Randolph v. Wood*, 49 N. J. L., 85 at 88:

“The law is to be regarded as general when its provisions apply to all objects of legislation distinguished alike by qualities and attributes which necessitate the legislation, or to which the enactment has manifest relation. Such law *must embrace all and exclude none* whose conditions and wants render such legislation equally necessary or appropriate to them as a class.”

Applying these general principles to specific cases, Justice Scudder said in *Clark v. Cape May*, 50 N. J. L., 558 at 560:

“The taking of a class out of the general terms of the statute by exception is obviously as obnoxious to the restraint put on legislation by the Constitution as if a special Act were passed giving it, and it only, the right of removal at pleasure.”

In *Dickinson v. Hudson*, 71 N. J. L., 589 at 592, the Court of Errors and Appeals says:

“Where population is made the basis of

classification for legislative purposes, a law based thereon, which excludes from its operation any county shown to be within the class, by any legally ascertained enumeration of the people, is special.”

In *Zeigler v. Gaddis*, 44 N. J. L., 363, at page 365, this court has said that in order to form classifications upon which general Acts may be based,

“There must be a true, substantial classification, and not a hidden specification.”

Applying these general principles that classifications may be made where they are necessary and pertinent to the objects of legislation that there cannot be excluded from such general classification a single object, nor can there be an illusive and hidden classification or specifications. To the Act under review there can be no question but that this Act is within the operation of the Constitution. The Act itself falls within the very words quoted above, that the classification is illusive; that it is excepted from a general class and that the classification by counties excludes one county alone.

Below are cited a few cases where such Acts have been held unconstitutional:

*Woodruff v. Passaic*, 42 N. J. L., 533.

Act regulating salaries of prosecutors for eight counties.

*Zeigler v. Gaddis*, 44 N. J. L., 363.

Licensing Act applying to only three small towns in one county. Defective through classification.

*Freeholders v. Stevenson*, 46 N. J. L., 173.

Acts regulating salaries of prosecutors in certain counties.

*Hightstown v. Glenn*, 47 N. J. L., 105.

Act relating to boroughs of third class covering licenses is unconstitutional.

*Van Giesen v. Bloomfield*, 47 N. J. L., 442.

Act regulating gas lighting for townships, classifying them by population unconstitutional.

*Clarke v. Cape May*, 50 N. J. L., 558.

Act regulating police force of cities, and excepting from such cities those known as seaside or summer resorts, by such exceptions, is unconstitutional.

*Helper v. Simon*, 53 N. J. L., 550.

Act classifying cities of second class which have a city physician, is void because of illusive classification.

*Bennett v. Trenton*, 55 N. J. L., 72.

Act classifying cities of second class, according to members of common council, void because a special Act.

*Canfield v. Davies*, 61 N. J. L., 26.

Act applying to towns and boroughs having a population of 10,000 or over, unconstitutional as a special Act.

*Crookall v. Matthews*, 61 N. J. L., 349.

Act applying to townships in counties of the first class. Unconstitutional because of impertinent classification.

*Dickinson v. Hudson*, 71 N. J. L., 589.

Act applying to counties of first class for erection of court house is a special Act.

*Harris v. Corker*, 89 N. J. L., 31.

Act applying to counties where a court house has been erected is a special Act.

*Westervelt v. Tenafly*, 133 Atl. 753.

Act applying to police department of cities not in the first class where police force has been in existence at least three years prior to date of Act, is a special Act.

These are only a few of the cases which have been selected at random. In all these cases the courts have uniformly held that such legislation is special.

Chapter 242 of the Laws of 1926 it is respectfully submitted, is a more flagrant and glaring example of special legislation than any Act declared void in all of the above cases. The Act violates the requi-

sites of a general classification. The exclusion of Monmouth County is clearly special legislation. For this reason it is respectfully submitted that the Act, or at least the portion of the Act excluding counties of over 100,000 bordering on the Atlantic Ocean, is unconstitutional.

## II.

### The Sentence Excluding Monmouth County From the Act, May Be Excised Therefrom Without Impairing the Validity of the Act.

Assuming that the relator has proven that the clause excluding Monmouth County from the effect of the Act is unconstitutional, the question then arises whether the validity of the Act as a whole is impaired by the excision of this sentence from the Act. The relator respectfully submits that the validity of the Act will in no wise be impaired by the excision of this clause. Chief Justice Gummere, speaking for the Court of Errors and Appeals, in *Board of Health v. Schwarz Brothers Co.*, 86 N. J. L., 170, at 172, says:

"An Act is not necessarily void because it contains an unconstitutional feature where the main object intended to be effected by it is constitutional and the objectionable feature can be excised without at all affecting that object, it is entirely settled that the statute is operative for all purposes excepting that in which it comes in conflict with the fundamental law. This rule has been so frequently declared and acted upon by the courts of this state as to be familiar to every practitioner."

The reasoning upon which this rule is based is found in *State v. Kelsey*, 44 N. J. L., 1, at page 29. Chief Justice Beasley, speaking for this court, says:

"It has been repeatedly decided in the courts of this State, and is the universally ad-

mitted doctrine, that it does not inevitably follow that because one part of the statute is unconstitutional, that the whole of it is thereby illegalized. The judicial effort always is to uphold every act passed by the legislature, and if the entire Act cannot be sustained, to execute such parts of it as can be reasonably put in force. Whenever an unconstitutionality is apparent in a statute, the inquiry arises, how closely such infirmity is connected with those essential provisions upon which the general legislative scheme is made to depend, and if such infirmity and such provisions are separable, and after the elimination of such illegality the law can be substantially executed, the body of the Act will not be held to be invalid. In such affairs it becomes a question whether it was the legislative design to make the constituent found to be illegal a necessary part of the enactment. The legal rule is clearly expressed by Chief Justice Shaw, in *Warren et al., v. Mayor, etc., of Charleston*, reported in 2 *Gray* 84, 97, his language being as follows: 'If the main objects and purposes of the act are constitutional, they may be carried into effect, although there may be isolated clauses, or separate or independent enactments, obnoxious to the charge of being in violation of the constitution.'

The test to be applied is also explicitly laid down by the Court of Errors and Appeals, speaking through Justice Depue, in *Johnson v. State*, 59 N. J. L., 535, at page 539:

"It is undoubtedly elementary law that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand and that which is unconstitutional will be rejected; but if the different parts of the Act are so intimately connected with and dependent upon each other as to warrant a belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not have passed the residue independ-

ently, and some parts are unconstitutional, all the provisions which are thus dependent upon each other must fail."

Therefore, to determine in the instant case whether the unconstitutionality of the sentence under consideration renders invalid the balance of the Act, its relation to the balance of the Act must be determined. The vital question is, are the remainder of the provisions of the Act inter-dependent with that portion of the Act excluding Monmouth County. A reading of the Act would seem to answer this question without argument. The Act is a general Act and is intended to raise the salaries of the county detectives in all counties with a population of between 70,000 and 300,000. Through one of the vagaries of our Legislature this clause was inserted for the purpose of excluding Monmouth County from the operation of the Act. When the numerous counties affected by this Act are realized it cannot be said that there is any sound reason or just cause, that the Legislature would not have passed this Act but for the exclusion of Monmouth County.

Excising this provision the purpose of the Act is accomplished. Its validity is in no wise impaired. This seems to be elementary in such questions, can the offending paragraph be dropped from the rest of the Act without impairing the remainder? Is the section vital to the sense and purpose of the Act? As has been stated above there can be no relation between the invalid section and the balance of the act. The meaning of the Act and the purpose of the Act is in no way impaired. Several examples of Acts which have been sustained by the courts as in full force and effect, though sections or words have been stricken out because of their unconstitutionality, are cited below:

*State v. Kelsey*, 44 N. J. L., 1;

Provision of Act striking out limitation upon

compensation of Secretary of State, unconstitutional and stricken out of Act.

*State v. Corson*, 67 N. J. L., 178;

Section permitting a commission to regulate taking of oysters stricken from general Act.

*Riccio v. Hoboken*, 69 N. J. L., 649 at 661;

Various sections stricken from School Act of 1902, because of unconstitutionality, but balance of Act permitted to stand.

*State v. Davis*, 72 N. J. L., 345, at 348;

Words in body of Act "or other bird" stricken from section without impairing validity of general Act regarding pigeons and other fowl.

*Meehan v. Excise Commissioners*, 75 N. J. L., 557, (Court of Errors and Appeals);

Fifth section of Bishop's Law stricken out without impairing validity of Act.

"The legislature cannot be deemed to have intended this section, so narrow in its purpose and so local in its application, should be essential to the validity of the previous sections which are wider in purpose and universal in applications."

*Fagan v. Payne*, 75 N. J. L., 851, (Court of Errors and Appeals);

Section 5 of Act relating to cities of first class declared unconstitutional. Balance of Act permitted to stand.

*Blessing v. McGlinden*, 81 N. J. L., 379, (Court of Errors and Appeals);

Clause relating to foreign joint debtors though unconstitutional, does not impair Act as relating to resident debtors.

*Hutches v. Hohokus*, 82 N. J. L., 140;

Act relating to public parks passed in 1906, is not affected by the unconstitutionality of a section regulating condemnation.

*Shultise v. O'Neal*, 85 N. J. L., 15;

Unconstitutionality of eighth section of Poor Act of 1911, would not affect the validity of the

whole statute because it may be readily excinded.

*Board of Health v. Schwarz Brothers Co.*, 86 N. J. L., 170;

Unconstitutionality of section three of the Slaughter House Act of 1910, does not render balance of Act invalid.

*Shaw v. Standard Piano Co.*, 87 Eq. 350, (Court of Errors and Appeals);

Constitutionality of Corporation Act is not affected by the invalidity of section 68 of this Act, because it may be excinded therefrom without impairing the validity of the Act.

*Collins v. Sauer*, 89 N. J. L., 139;

Proviso of Act relating to treasuries of cities though special, will not render balance of Act unconstitutional because proviso may be excinded.

*Stackhouse v. Camden*, 96 N. J. L., 533, (Court of Errors and Appeals);

Proviso of Act relating to recorders of City of Camden, unconstitutional and is excinded from Act, permitting balance to remain in effect.

The appellants argue that the Court cannot excind the proviso because in effect this would be legislation by the Court. It is a settled rule, however, that the Court will attempt to give effect to the intention of the legislature, and it can be safely assumed that the intent of the legislature was to increase the salary of all county detectives within the purview of the Act. It cannot be safely assumed that the Act would not have been passed but for the proviso.

In the leading case of *State v. Kelsey*, supra, the legislature very definitely determined that the Secretary of State was to be paid at a certain rate, for printing, but was to receive no greater sum than a definite amount of \$1,000. The Supreme Court held that this proviso was void and by its decision extended the power given by the legislature to increase the payments paid to the Secretary of State.

In *Collins v. Sauer*, supra, power was given to

certain cities to appoint by the Council, Treasurers. A proviso was excinded from the Act giving all cities powers to appoint treasurers, thus increasing the powers originally given by the Act. After an examination of all the authorities the test is not as laid down by appellants in their brief, but the test generally is: May the proviso be excinded without mutilating the Act?

It is most respectfully submitted that the proviso in the Act of 1926 may be excinded without mutilating the Act in any way nor impairing its validity.

### III. CONCLUSION.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed, and that a writ of peremptory mandamus should be granted, directing that the salaries of the detectives of the County of Monmouth provided for in Chapter 242 of the Laws of 1926, should be paid. In the event that this Court should decide that Chapter 242 of the Laws of 1926 is unconstitutional, it is then respectfully submitted that a writ of peremptory mandamus should be granted providing that the salary provided for in Chapter 232 of the Laws of 1922 should be paid to the relator.

Respectfully submitted,

QUINN, PARSONS & DOREMUS,  
*Attorneys for and of Counsel With Relator.*

THEODORE PARSONS,  
*of Counsel.*

## New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY,  
EX REL,  
JOHN M. SMITH,

*Relator,*

*vs.*

THE BOARD OF CHOSEN FREE-  
HOLDERS OF THE COUNTY OF  
MONMOUTH and C. ASA  
FRANCIS, Treasurer of the  
County of Monmouth,

*Respondents.*

*On Mandamus*

### BRIEF OF RESPONDENTS

#### PRELIMINARY STATEMENT.

This is an appeal from a judgment of the Supreme Court entered on remoulded pleadings resulting from the issuance of a peremptory writ of mandamus.

#### THE FACTS.

The relator, John M. Smith, in 1925 was appointed a County Detective for the County of Monmouth by virtue of Chapter 232 of the Laws of 1922. Under this Act he regularly received his salary.

On July 21, 1926, and in accordance with the Act of 1922, he presented to respondents a verified voucher for salary. Payment was refused upon the ground that Chapter 242 of the Laws of 1926 had repealed the Act of 1922, thus leaving no act applicable to Monmouth County, a county bordering on the Atlantic Ocean with a population of over 100,000.

The pertinent portions of Chapter 242 of the Act of 1926 read as follows:

2. The special officer or officers named in the next preceding section shall not be eligible to receive any increase in salary over the minimum salary as stated in the next preceding section until he or they shall have served five continuous years as a special officer or officers in the prosecutor's office. No increase in salary fixed by the judge or prosecutor shall exceed more than one hundred dollars per year for each year of service over five years, and all increases shall cease when the respective maximum sums named in the preceding section are reached; provided, however, that any special officer who is now or has been employed in the prosecutor's office as special officer for a period exceeding five years, the judge and prosecutor may fix an increase in salary for any sum equal to one hundred dollars per year for each year of service now served over five years, which total salary shall not exceed the respective maximum sums named in the next preceding section. This act shall not affect counties bordering on the Atlantic Ocean with a population of over one hundred thousand.

3. All acts and parts of acts inconsistent with this act be and the same are hereby repealed.

Relator challenged the constitutionality of the 1926 Act, claiming it to be special legislation and violative of Article IV, Section 7, Paragraph 2, of the Constitution of this State.

The attack is directed solely to the clause rendering the Act inapplicable to counties bordering on the Atlantic Ocean with a population of over 100,000.

On the return of the rule relator urged the excinding of the defective portion; and that respondents be directed to pay in accordance with such portion of the 1926 Act as might thereafter remain; or, in the alternative, and in the event that the entire act were held unconstitutional, that payment be made under the Act of 1922.

In allowing a peremptory writ the Supreme Court assumed that the Act of 1926 had repealed the Act of 1922, and held the attacked portion unconstitutional. It was excinded. To this error is assigned.

Respondents on this appeal, while not admitting the unconstitutionality of the act, as originally adopted, have deemed it expedient, for the reasons presently appearing, to confine their arguments chiefly to the impropriety of any excision.

A reading of the Act of 1926 in its entirety leaves no foundation for respondents' original belief that it repealed the Act of 1922.

#### POINT ONE.

THAT THE ACT OF 1926 DID NOT REPEAL THE ACT OF 1922 INsofar AS THE LATTER ACT MIGHT APPLY TO COUNTIES BORDERING ON THE ATLANTIC OCEAN WITH A POPULATION OF OVER 100,000.

The Act of 1922 was repealed only insofar as it related to counties *other* than those bordering on the Atlantic Ocean with a population of over 100,000. The 1926 Act, by its express terms, was never intended to affect such counties.

Section 3 of the 1926 Act reads as follows:

All acts and parts of acts inconsistent with this act be and the same are hereby repealed.

As applied to Monmouth County the two acts are consistent.

If the 1922 Act is to be deemed repealed *in toto*, thus repealing even its application to counties bordering on the Atlantic Ocean, then the 1926 Act would very seriously *affect* such counties by rendering *ineffective* the application of the 1922 Act to them. It was never intended to affect them.

The 1926 Act, not affecting counties bordering on the Atlantic Ocean with a population of over 100,000, cannot be said, with respect to those counties, to be inconsistent with an Act of 1922, which, when passed, unquestionably affected counties bordering on the Atlantic Ocean with a population of over 100,000.

If the 1926 Act repealed the Act of 1922 in its application to Monmouth County, then the 1926 Act would not only *be affecting* counties bordering on the Atlantic Ocean with a population of over 100,000 but would actually repeal an act *not inconsistent* with it. Thus at least two portions of the 1926 Act would be given meanings directly opposed to the only meanings which may reasonably be inferred from the language employed.

It therefore seemingly becomes immaterial whether the Act of 1926 be declared constitutional or unconstitutional. The relator in any event must be paid in accordance with the Act of 1922, the act under which he presented his voucher.

Only if the alleged defective portion of the 1926 statute be excinded is the situation altered.

## POINT TWO.

IN EXCINDING, THE COURT WOULD PERFORM PURELY LEGISLATIVE FUNCTIONS: BY DELEGATING AUTHORITY TO AN AGENT OF THE STATE; AND BY REPEALING THE ACT OF 1922 WHOSE CONSTITUTIONALITY IS NOT QUESTIONED.

The general proposition that a statute is not necessarily void because it contains an unconstitutional feature has so often been dealt with by the courts of this State that it becomes difficult, if not impossible, to adopt a rule sufficiently general to meet all emergencies.

The presumption against the mutilation of a statute has sometimes been overcome; but only when the legislative branch has obviously transgressed its authority and when that transgression can be corrected without the judiciary committing a similar offense.

There is slight danger of the judiciary committing a similar offense where an excision operates merely *to prevent* the vesting of a right.

A county, being a governmental creature of delegated authority, cannot function without authority from the State. When the authority is improperly delegated a duty is cast upon the judiciary to prevent the invocation of such authority by declaring unconstitutional the act or portion of the act which purports to delegate it. In such an instance a court would justify interference by ascertaining the true legislative intent. This intent has usually been discovered in the manner outlined by Mr. Justice Pitney in *Riccio vs. Hoboken*, 69 N. J. L., 649 at 662:

In the absence of any express declaration to the contrary contained in the act itself, the presumption is that the legislature intended any given enactment to be effective in its entirety. *Iowa Life Insurance Co. v. East. Mutual Life In-*

urance Co., 35 Vroom, 340, 346. In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process.

This decision, as well as many others preceding and following it, afford no substantial aid in solving the present problem.

Here, if the attacked portion of the Act of 1926 be excinded, there will be no mere suspension of a right. By excinding, the judiciary will do more than *prevent* the vesting of a right. It will do something very different. It will actually *vest* a right. Indeed, it will *create* a right by delegating to Monmouth County authority which was never delegated by the legislature and which was moreover expressly forbidden by the legislature by the very language which the relator now seeks to have this court excind.

Delegation of authority by the State to a governmental agency is a purely legislative function.

By the Act of 1926 the State delegated authority to certain counties *except* counties bordering on the Atlantic Ocean with a population of over 100,000. By judicial decree, the attempt to confer authority upon those counties first mentioned might, for illustration, be deemed unconstitutional and the right or authority thereby delegated be suspended or prevented from vesting. There would be no usurpation by the judiciary whether the invalid attempt were made by the entire act or only by a portion of it.

The relator does not ask the prevention of authority from vesting; he asks this Court actually to *vest* authority in Monmouth County to pay in accordance with the Act of 1926. A purely legislative function is thus sought by the relator to be extended to the judiciary.

Excinding the portion, which prevents authority being delegated to counties bordering on the Atlantic Ocean with a population of over 100,000, would naturally render the 1926 Act applicable to Monmouth County, but in glaring opposition to language expressly appearing in the act as adopted. By such elimination a right would vest, and an authority would be conferred, which is no different from the judiciary directly vesting a right. In either instance a legislative function is usurped by the judiciary.

There remains another and perhaps more striking reason why the alleged defect, if it is in reality a constitutional defect, must render the entire act void.

To excind the portion would repeal the Act of 1922 in its application to counties bordering on the Atlantic Ocean with a population of over 100,000.

Point I supports the contention that the 1926 Act as adopted, repealed or at least rendered inoperative the Act of 1922 only insofar as it might apply to counties other than those which by the terms of the act itself could not be affected, i. e., counties bordering on the Atlantic Ocean with a population of over 100,000. The 1922 Act, remaining unimpaired and unaffected, continued to operate as to such counties bordering on the Atlantic Ocean with a population of over 100,000.

An excision of the attacked portion of the 1926 Act would render that act applicable to counties bordering upon the Atlantic Ocean and as a consequence render the 1922 Act inapplicable to those counties. Thus the proposed excision would operate as a repeal of an act which the legislature never has repealed in its application to counties such as Monmouth County. This would be brought about not by the legislature but by a court and without that court's declaring the Act of 1922 unconstitutional.

If an excision be allowed what becomes of Section 3 of the 1926 Act providing that all acts, or parts of acts, inconsistent therewith are repealed?

In the absence of any excision, the 1922 Act in its relation to counties bordering on the Atlantic Ocean with a population of over 100,000 is consistent with the Act of 1926. Only by excision it is rendered inconsistent. Does relator under these circumstances propose to allow Section 3 to remain or does he urge that it too be excinded?

It is difficult to ascertain how the relator has the interest legally required to attack by mandamus any portion of the Act of 1926.

That he is entitled to be paid in accordance with the Act of 1922 is not now denied.

For the reasons just advanced the 1926 Act never applied, nor can it apply to counties bordering on the Atlantic Ocean.

Unless the relator can show as a condition precedent that the Act of 1926 as adopted repealed the Act of 1922 in the latter's application to *any* county, his relief should be limited to a writ directing payment under the Act of 1922. Beyond this his interest should not extend.

#### SUMMARY.

- (1) The Act of 1926 did not repeal the Act of 1922.
  - (a) Express provision that the Act of 1926 shall not affect counties bordering on the Atlantic Ocean, etc. The Act of 1922 did affect such counties.
  - (b) As to Monmouth County, the Act of 1926 is not inconsistent with the Act of 1922.

- (2) Attacked portion should not be excinded.
  - (a) Excision would vest in counties bordering on the Atlantic Ocean, etc., authority never delegated to them by the legislature.
  - (b) Excision would repeal the Act of 1922 without that act being declared unconstitutional.

#### CONCLUSION.

It is respectfully urged that relator's relief be limited to payment under the Act of 1922; and that the Supreme Court in deeming the 1922 Act repealed by the Act of 1926 and in excinding the attacked portion of the Act of 1926, be reversed.

Respectfully submitted,

WILLIAM A. STEVENS,  
*Attorney for and of Counsel  
with Respondents.*

