

INDEX.

	PAGE
Information	2
Summons	40
Appearance	42
Rule to Plead.....	43
Acknowledgment of Service of Rule to Plead	44
Demurrer, Gaul & Slocum case.....	45
Demurrer, Wright & Knight cases.....	48
Joinder in Demurrer.....	53
Opinion of Court.....	54
Rule for Judgment.....	69
Judgment of Ouster.....	70
Notice of Appeal, Gaul, Slocum and Knight cases	72
Notice of Appeal, Wright case.....	75

THE HISTORY OF THE

REIGN OF

—

1787

1788

1789

1790

1791

1792

1793

1794

1795

1796

1797

1798

1799

1800

1801

1802

1803

1804

1805

1806

1807

1808

1809

1810

1811

1812

1813

1814

1815

1816

1817

1818

1819

New Jersey Supreme Court

THOMAS F. MCCRAN, Attorney-General
of the State of New Jersey,
Informant,

VS.

ANDREW GAUL, JR.,
Defendant.

10

SAME

V.

JOHN W. SLOCUM,
Defendant.

On Quo
Warranto

SAME

V.

GEO. F. WRIGHT,
Defendant.

20

SAME

V.

HARRY L. KNIGHT,
Defendant.

The parties in the cases above named have agreed, with the consent of the Attorney-General, to join in printing the State of the Case. Inasmuch as the opinions rendered by the Supreme Court in the Wright, Knight and Slocum cases merely refer to the opinion rendered in the Gaul case, the record in the latter case has been here printed in full including the opinion, with a note at the bottom of each pleading or other paper showing the respects in which the similar paper in the Wright, Slocum and Knight cases differ from the one printed at length. 40

Information.

Filed October 27, 1920.

Of the June term, in the year one thousand nine hundred and twenty.

MERCER COUNTY, SS.

10 Thomas F. McCran, Esquire, Attorney-General
of the State of New Jersey, who sues for the said
State in a matter of injury to public right, in this
behalf comes in his own proper person here into the
Supreme Court of Judicature of the said State, be-
fore the Justices thereof, at the State House, in the
City of Trenton, on the twenty-sixth day of October,
one thousand nine hundred and twenty, for the said
State of New Jersey, and gives the said Court here
20 to be informed and understand that Andrew Gaul,
Jr., of Ridgefield, in the County of Bergen and
State of New Jersey, for the space of twenty days
and upwards last past, viz., since the thirteenth
day of October, one thousand nine hundred and
twenty, has unlawfully held, used and executed,
and still doth unlawfully hold, use and execute the
office of member of the Board of Public Utility
Commissioners of the State of New Jersey, and its
liberties, privileges and franchises, and he claims
30 to be a member of said Board, and to have, hold,
use, exercise and enjoy the said office, and the lib-
erties, privileges and franchises thereof, without
any legal appointment, warrant or authority what-
soever.

And the said Attorney-General doth further give
the Court here to understand and be informed that
on the first day of May, one thousand nine hundred
and nineteen, the said Andrew Gaul, Jr., was duly
40 appointed and commissioned by the Governor of

Information.

the State of New Jersey, after having taken the oath of office, as in the statute made and provided, and after due nomination and confirmation by the Senate of said State previous thereto, as a member of the said Board of Public Utility Commissioners, for the term of six years from the day of the date of said commission, as provided by law; that said 10 appointment was made by the Governor of the State of New Jersey at the time mentioned for the term specified, under the authority of an act entitled "An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved the twenty-first day of April, one thousand nine hundred and eleven, together with its supplements and amendments, and more particularly by a certain act supplemental thereto approved on the twenty-fifth day of Febru- 20 ary, one thousand nine hundred and eighteen, wherein and whereby the Governor was and is authorized to appoint, by and with the advice and consent of the Senate, such additional persons as is therein provided, constituting the membership of said Board of Public Utility Commissioners, to consist of five instead of three members, with the same qualifications, powers, privileges, compensation, subject to the same limitations, to serve for the 30 same term as provided in the act to which it is a supplement as aforesaid.

That the said Andrew Gaul, Jr., in accordance with said appointment and commission as aforesaid, has, since said time to the thirteenth day of October, one thousand nine hundred and twenty, held and enjoyed said office, with all powers, privileges, fees, perquisites, rights and advantages to the same belonging or appertaining, during and within 40

Information.

the limit of time for which he was appointed for the purposes in the said statute made and provided.

That the Honorable Edward I. Edwards, Governor of the State of New Jersey, on the twentieth day of March, one thousand nine hundred and twenty, gave to the said Andrew Gaul, Jr., a copy of charges against him for neglect of duty and misconduct in office by him as a member of said Board of Public Utility Commissioners of the State of New Jersey, dated March nineteenth, one thousand nine hundred and twenty, which said notice is as follows:

"MARCH 19, 1920.

DEAR SIR:

The Mayor and Aldermen of Jersey City, a municipal corporation of this State, has filed with me as Governor of the State of New Jersey, certain charges against you for neglect of duty and misconduct in office as a member of the Board of Public Utility Commissioners of the State of New Jersey. I herewith send you a copy of the said charges and will afford you an opportunity to be heard upon the same on the thirteenth day of April, 1920, at eleven o'clock in the forenoon, at the State House, in the City of Trenton.

Respectfully yours,

E. I. EDWARDS,
Governor.

Hon. ANDREW GAUL, Jr.,
Ridgefield, N. J."

Information.

and that said charges so given to him as aforesaid were as follows:

TO THE GOVERNOR OF THE STATE OF NEW JERSEY:

The Mayor and Aldermen of Jersey City, in the County of Hudson, and State of New Jersey, a municipal corporation, respectfully request you to remove from office, pursuant to the power vested in you as Governor by the Public Utility Act of 1911 (Chapter 195 of the Laws of 1911), each of the members of the Board of Public Utility Commissioners of the State of New Jersey, John W. Slocum, George F. Wright, Andrew Gaul, Jr., and H. L. Knight, for neglect of duty and misconduct in office, because they have acted, and failed to act, as hereinafter set forth:

1. That the Board has ignored and failed to carry out the principal object and purpose of its creation, to wit: that it should act as an administrative body, representing the public, and acting on its own initiative, as well as on complaint, in behalf of the public to ascertain and enforce the public rights in their relation to public utility corporations; instead of which the Board has assumed itself to be a court and its members judges, and has placed all those by whom relief is asked, and all those against whom relief is claimed, in the position of contending parties before a court.

That it has thereby converted proceedings which were intended by the legislature to be informal, expeditious and inexpensive, into proceedings unnecessarily formal, and unnecessarily prolonged and unnecessarily expensive to all parties to the proceedings before it, and to the public.

A conspicuous example of the results of this

Information.

wrong policy appears in the pending Public Service Rate case. According to the Board's statement, this case really commenced upon the signing of the order of July 10, 1918. It has continued until the present time, and is still unfinished. Over 10,000 pages of testimony have been taken, hundreds of exhibits have been offered, several large municipalities have been compelled to assume the burden of securing and presenting evidence to controvert the claims of the corporation, which burden should have been borne by the Board, at a cost to the municipalities of over \$100,000.

Another example appears in the prolonged delay in the Public Service Electric Company case, hereinafter particularly referred to.

20 2. In the Public Service Zone Fare Rate case the Board showed its bias towards the Railway Company by employing as the Board's own experts to check up and verify the claims of the Company, and to testify on behalf of the Board, three experts who had been extensively employed professionally by public service corporations in various parts of the country to back up their claims in rate cases. In such employment these experts have committed themselves to theories and principles of valuation
30 which are held by public service corporations, and against the principles of valuation which make for the public interest.

In the Emergency Rate case the Public Service Railway Company supported its application for increased fares by the testimony of one A. S. Richey, an expert employed and paid for his services by the company, and who is extensively employed by public service corporations in rate cases.
40 A few months thereafter, in investigating the zone

Information.

fare plan presented by the Public Service Railway Company, which was a continuation of the same case, the Board itself employed the said A. S. Richey to examine and testify on behalf of the Board and of the public with respect to the zone fare plan submitted by the company.

The Board also employed as an expert upon the said zone fare schedule and upon the Cooley valuation of the Public Service Railway Company one Robert M. Feustel, notwithstanding the fact that the said Feustel was the operating head of a street railway corporation in a Western city in which Mr. Randall Morgan, of Philadelphia, one of the leading stockholders and a director and vice-president of the Public Service Corporation and a director of the Public Service Railway Company, is financially interested, and of which he is also a director. Mr. Morgan took the trouble to be present at the hearing at which Mr. Feustel was testifying in the zone fare case ostensibly on behalf of the Board and the public. It is also significant that on cross-examination he so testified as to earn the unqualified commendation of Mr. T. N. McCarter, President of the Public Service Railway Company.

The Board also employed in this same case, and had previously employed in the Public Service Electric Company rate case, one Dugald C. Jackson, an expert whose professional employment is principally in behalf of large public service corporations, such as the Philadelphia Electric Company, the Boston Edison Company and the New York Edison Company. The methods he employed in valuing the property of the Philadelphia Electric Company resulted in a valuation by him of \$50,000,000, although a valuation of \$30,000,000 was finally accepted by the company. The character of Mr. Jack-

Information.

son's work when he is occasionally employed on behalf of the public, appears in his testimony in the Chicago Telephone Company case. He testified in 1910 that the Company was running at a deficit of over \$800,000 a year. Two years later, Prof. E. W. Bemis, an expert for the City of Chicago, showed that the Company could reduce its charges \$700,-
10 000 a year, and still have a fair return remaining, and the company accepted a settlement with Chicago on this basis. The Board employed Mr. Jackson after its attention had been called to the foregoing facts.

3. That the Board has failed to discharge the duty imposed upon it by the provision of Art. I, section 17, par. (f) of the Public Utility law requiring it to ascertain and fix the amount of money to
20 be annually appropriated by each public utility corporation as a depreciation fund, and to compel each utility corporation to set aside that money in a separate fund, and not to use it for any other purpose.

A glaring example of the Board's failure to enforce this provision of the law is found in the fact that the Board allowed the Public Service Railway Company to divert from depreciation reserve fund
30 \$500,000 to pay dividends (and that too upon watered stock). The grave and vital nature of this violation of the law is shown by the Board's own comment upon this action, which appears in its report and order of July 10, 1918, in the Emergency Rate case, viz.:

"The continuous maintenance of safe, adequate and proper service is the paramount duty of a public utility.

40 "Such continuous service can only be as-

Information.

sured by the maintenance of a proper depreciation reserve.

"In the year 1917, the appropriation (of the Public Service Ry. Co.), for depreciation reserve, which should have been credited thereto, was depleted to the extent of over \$500,000 and used to pay dividends.

"To divert to the payment of dividends 10 moneys credited to or which should go to the credit of this reserve, and so destroy the assurance of the continuance of safe, adequate and proper service, is wholly unjustified and a violation of the paramount duty of the utility."

Another example follows:

In the year 1917 the Public Service Gas Company paid \$816,000 in dividends, and thereby created a deficiency of \$225,000 for the year. 20

In that year the Company appropriated for depreciation account only \$68,000, and then demanded that the Board should allow it \$608,000, as an annual depreciation reserve for the next year and the years thereafter. Still another example follows: In the year 1917 the Public Service Electric Company paid \$2,620,000 in dividends, and appropriated only \$813,000 for depreciation, although the company's own estimate of the proper amount required it to set aside \$2,000,000 for this account. 30

4. The Board, knowing the wrongful diversion of money from the depreciation reserve fund by the Public Service Railway Company, the Public Service Gas Company as herein set forth, and Public Service Electric Company, should have at once taken action to compel these companies to restore to their respective depreciation reserve funds 40

Information.

the moneys thus wrongfully diverted, but the Board neglected and still neglects to take such action.

5. That in exercising its powers it has applied, as hereinafter more particularly set forth, one standard or rule to ascertain public utilities and another standard or rule to other similar public
10 utilities; that in so doing it has unjustly and unreasonably discriminated in favor of certain public utilities; particularly the subsidiaries of the Public Service Corporation and against other like utilities of the State.

One example of this charge appears in the action of the Board in using eight per cent. as a just rate of return with respect to the Public Service Electric Company and Public Service Gas Company while limiting other small and uninfluential com-
20 panies to six per cent., and even less.

6. The Board in the case initiated by it relating to the Public Service Electric Company shows its bias towards the company and its neglect of its duty to the public, in the following particulars:

(a) It has permitted unreasonable delay in the conduct of the case. The valuation of the company's property was ordered made by the Board in the
30 summer of 1911, in a proceeding initiated by the Board to inquire into the reasonableness of the existing rates, for which the Board asked of the Legislature a special appropriation. In the year 1916 the Board completed on its own initiative and with its own experts a voluminous and detailed valuation of all the property of the company. This cost the State over \$75,000. The Board should have required the Company to proceed to prepare its own
40 valuation concurrently with the Board's valuation,

Information.

or to have checked up from time to time the work of the Board's experts, so that when the work was finished the Company would be prepared to present promptly its objections to the work of the Board's experts, and its own valuation. The Board not only failed to require the company to so act, but after its own valuation was completed, it allowed the company to delay the presentation of its objection to the Board's valuation during the years 1917, 1918, and 1919, and up until the present time, and is still allowing the said case to drag along unfinished and undetermined. 10

The delay in this case after the Board determined not to hold the Public Service Railway Company to its five-cent municipal contracts, was an especially serious failure and neglect of duty on the part of the Board, because an investigation and determination with respect to the Electric Company's business and property was necessary in order to determine whether the rate for power charged by it to the Railway Company was reasonable, which it was necessary to know before a just rate could be fixed for the Railway Company to charge the public. 20

(b) The Board in valuing the property of this company, and in all other rate valuations, should have adopted, but failed to adopt, the rule followed by the Massachusetts Commission, viz.: that the determining element in ascertaining the value of property for rate making purposes is the amount of capital honestly and prudently invested, and has wholly failed to make any effort to ascertain such capital investment. 30

(c) That the Board not only allowed the Public Service Electric Company to repudiate contracts 40

Information.

with private business concerns before the expiration of the said contracts, which contracts were binding upon the said company until the expiration thereof, according to the terms of the same, without determining that such contracts involved unjust and unreasonable discrimination; but also made the new rates allowed by it to be retroactive to cover
10 power already purchased and consumed by customers under the contracts.

7. That the Board, in acting upon the application of the Public Service Electric Company emergency rate case, did not apply the principle adopted by it in the Public Service Railway emergency rate case, to wit: that the emergency rate permitted should be only sufficient to provide for operating expenses, depreciation, interest and rentals, and
20 that nothing should be allowed for dividends on stock, but instead allowed a rate which permitted a dividend of 8 per cent, on the stock of the Electric Company.

8. The Board has failed to properly conduct the Public Service Railway rate case in the following respects:

(a) The Board improperly delayed the valuation of the property of the Public Service Railway Company. The Board should have undertaken this valuation at the time the Board decided that it would not be bound by the five-cent fare ordinance contracts with the several municipalities made by the said company or its predecessors, and said valuation should have been pushed to a prompt conclusion in order to furnish the necessary basis for fixing a new rate of fare. Such a valuation could have
30 been made more quickly than usual because the
40

Information.

company, before the Board decided to disregard these ordinance contracts, had completed at a cost of \$150,000 an elaborate valuation of its property. This valuation should have been and could have been ordered to be checked up at once by experts employed by the Commission, and such action would have enabled the Board to determine how much money the company was entitled to earn before it made the several orders increasing the rate of fare and inaugurating the zone fare experiments. 10

(b) That the Board should have ascertained the value of the property of the Public Service Railway Company before it increased the rate from the five-cent rate fixed by the municipal ordinance contracts, or at least before it allowed the emergency war rate to continue beyond the duration of the war emergency period, which was the time during which the country was in peril. 20

(c) The Board should have adopted in this valuation the Massachusetts rule of investment cost hereinbefore referred to.

(d) The Board in said rate case should have determined that the company should be entitled to earn not over six per cent. upon the investment value of its property, instead of which it has permitted said case to proceed upon the understanding that the Board intends to allow the company to earn eight per cent. upon a valuation not yet determined upon. 30

(e) That the Board having compelled the Public Service Railway Company at the time of making its order directing the Company to re-establish the special rate for children in Newark, should have compelled the said company to put in force the same rates in the City of Jersey City and in the 40

Information.

other municipalities in which it rendered trolley service.

(f) That the Board at the time it added to its order of July 10, 1918, a condition requiring the Public Service Railway Company to submit a plan for zone fares by January 1, 1919, should have added a condition to said order requiring the company to proceed forthwith to complete its valuation prior to the said time, and should have proceeded immediately on its own initiative to make its own valuation, and should at once have called upon the different interested municipalities to take such part in the valuation proceedings as they might be advised.

(g) That the Board on July 10, 1918, required the said Public Service Railway Company to submit a zone fare plan on or before January 1, 1919 (subsequently extended to March 1, 1919), and proceeded to consider said plan with a view to putting the same into operation before it had made a valuation of the property of the company, and before it had ascertained or fixed the amount of money which the company was entitled to earn, although the emergency created by the danger to the country from war conditions had ceased.

(h) That the Board put into effect by its order of July 30, 1919, a new schedule of rates based upon the zoning system which had been submitted by the company before it had made a valuation of the company's property or had ascertained and fixed the amount of money the company was entitled to earn.

(i) That the zone fare schedule of rates put into effect on September 19, 1919, was received by the public in various parts of the State with profound

Information.

dissatisfaction, accompanied in Camden County with actual riots, and in many places by the refusal of the people to ride in the cars. This resulted in the company's receiving from the operation of its cars under this system a return very much less than the company's experts, or the Board's own experts had estimated, and less than the Board had determined to allow the Company temporarily to collect as fares. Thereupon the Railway Company and the representatives of a large number of municipalities applied to the Board to suspend the operation of the zone system, and to return temporarily at least to the flat fare system. The Board should have granted this request, but refused it. 10

(j) The Board then proceeded on its own motion to make an order requiring the Public Service Railway Company to continue the said zone fare schedule, or to adopt a new schedule of zone fare rates, which it specified, and which had not been made the subject of inquiry by the company, or the municipalities who were parties to the case. Prior to making said order, which in effect established a new zone schedule, the Board refused to allow evidence growing out of the actual experience under the original zone fare order to be presented, to prove that the new zone fare schedule suggested by the Board would bring in even less money than the original zone schedule. 20 30

That the Board should not have made such last mentioned order without giving to the company and to the municipalities interested an opportunity to be heard thereon, and particularly an opportunity to present the evidence from the actual operation of the first zoning fare plan, which evidence was exclusively within the knowledge of said company and the municipalities, and was necessary in order 40

Information.

to enable the Board to make an intelligent estimate of the probable financial and other results of the new zoning fare order.

(*k*) The Board fixed said zoning rates for the Public Service Railway Company without ascertaining whether the rate for power supplied to the
10 Railway Company by the Public Service Electric Company was a just and reasonable rate.

(*l*) That the Board refused the repeated applications of counsel for the municipalities in the several rate cases affecting the Public Service Railway Company, that the Board should first require the company to make formal application to modify existing rates fixed by ordinance contracts or by the Board's own order, and then allow issue to be
20 joined on the rates so applied for, as is required by the Public Utility statute. The failure to make a definite issue in this way makes the whole proceeding uncertain and causes needless expense in preparation.

(*m*) That the Board allowed a schedule of rates to be filed by the company under its order of May 2, 1919, which enabled the company to charge
30 full rates for children in the City of Newark instead of the special rates which the company had been theretofore charging, and which the company was bound by contract to maintain.

(*n*) That the Board fixed zone fare schedules applying uniformly all over the State, although in some parts of the State the local conditions are materially different from other parts of the State, and call for a different schedule of rates, even if the
40 zone fare principle is to be applied.

Information.

(o) That the Board should not have made its orders in the emergency fare cases permitting increases of fares to be charged by the Public Service Railway Company, without having ascertained the amount of the dividends paid by the Public Service Corporation, the holding company, and the amount of money on hand in the treasury of said holding company, and the sources from which said company 10 had received and was receiving its income, and the amount of such receipts. The Board had stated in one of its emergency opinions that in the war emergency the stockholders must share with the public in the burden of carrying the emergency conditions, and the Board knew that the only stockholder of the Public Service Railway Company is the Public Service Corporation.

(p) That the Board in the case of the Public 20 Service Railway Company adopted zone fare schedules upon the principle that it is equitable that car riders should pay in accordance with the cost of the service rendered, while the Board disregarded this principle in the case of the Trenton and Mercer County Traction Company, and compelled the car riders of Trenton to make up in increased fares large deficits incurred by the company in the operation of various suburban lines outside the city. 30

(q) That in its report and order of July 10, 1918, the Board allowed the Public Service Railway Company the sum of \$800,000 as an appropriation to depreciation reserve; that this amount was arrived at by estimating on the basis of the Public Service Railway Company's experience for the five years from 1913 to 1917, inclusive, the amount which should have been appropriated to depreciation reserve in 1916 and applying thereto the fac- 40

Information.

- tor 162.4 per cent. alleged by the Company to be the percentage representing the increased costs of labor and materials in 1918 as compared with 1916 prices; that in applying this or any other percentage to the depreciation appropriation of 1916 to arrive at a proper depreciation allowance for 1918 on account of the increase in the unit costs of labor and materials entering into renewals and replacements, the Board violated its own rules prescribed by the uniform system of accounts then in force and applicable to street and electric railway companies which required the Public Service Railway Company to charge to capital account, and not to depreciation reserve, the additional cost of new articles installed as replacements in excess of the actual or estimated original cost of the articles replaced.
- 10 (r) That in its report and order of July 10, 1918, the Board required the Public Service Railway Company to submit a zone fare plan before January 1, 1919, which was subsequently extended to March 1, 1919; that at or about said time the company also filed a new schedule of rates based upon such zone report, to become effective April 1, 1919; that the Board, in the exercise of its authority under the Public Utilities Law, suspended for
- 20 a period of three months the schedule of rates so filed; that thereupon it proceeded to take evidence as to the value of the property of the Public Service Railway Company with the apparent determination to complete the proceeding, establish a value and fix permanent rates on or before June 30, 1919; that the municipalities were not advised, and had no thought that the filing of this zone report was to be the beginning of a proceeding for the estab-
- 30 lishment of the value of the Public Service Rail-
- 40

Information.

way property and the determination of permanent rates of fare; that when the proceeding took this turn in April, 1919, the municipalities were unable to procure from the Board any clear judgment as to the nature of the proceeding or of the issues involved; that for the reasons stated the municipalities were unprepared, and were unable to ascertain how much time would be allowed to them for the critical examination of the appraisal produced by the Railway Company and in the preparation of their own case; that on account of the repeated refusals of the Board to define the exact nature of the proceeding, and on account of the impossible limitations of time prescribed, the municipalities were unable to organize and prepare their case in a thorough and economical manner and were put to great expense by reason of these facts; that additional time was secured by the municipalities and the Board only through the grace of the company, and that time is still uncertain.

(s) That in the present rate case in April, 1919, when Dean Cooley and Professor Anderson were produced by the company to prove the Cooley appraisal, the Board did not require the introduction in evidence of the supporting data of the appraisal, and did not require the company to produce for cross-examination the land appraisers, whose estimates of land value to the extent of over \$10,000,000 had been accepted by Dean Cooley and incorporated in his summary; that the Board made no effort to check through its own staff or its own experts the value of the 526 parcels of real estate included in the Cooley appraisal, or to ascertain how much of this property was used and useful for railway purposes, or to ascertain the principles of valuation which had been used by the appraisers

Information.

in arriving at its value; that it was left for the municipalities; though greatly hampered for time and funds, to bring out the fact that most of the right of way, amounting to over \$3,000,000 in appraised value, had been appraised by the application of the multiplier $2\frac{1}{2}$ to its estimated market value, and that nearly \$1,000,000 worth of land
10 included in the appraisal was shown by the detailed appraisal books themselves, not previously introduced in evidence, to be vacant or unused; that it was only after the proceeding had been extended over many months, and after the company had been forced by the municipalities to produce the land appraisers and submit them to cross-examination, and only upon the final insistence of the municipalities that they were financially unable to make a
20 valuation of these lands on behalf of the public, that the Board finally announced its intention in February, 1920, to have the value of the company's real estate checked up by its own experts.

(t) That the Board allowed the Public Service Railway Company to charge increased fares by its orders of July 10, 1918, and May 2, 1919, without making any investigation to ascertain whether the company had effected the economies in the operation of its plant which good management required,
30 such as the adoption of one man cars and an increase in the number of cars and trips so as to improve the riding habit, and measures to conserve power.

(u) Other examples appear in the following charges:

9. That when the Board decided to allow the Public Service Railway Company to disregard and
40 violate its five cent municipal ordinance contracts

Information.

for trolley service by its order of July 10, 1918, the Board should have under the bargaining power conferred upon it by Art. II, section 17, par. (h) of the Public Utility Act of 1911, exacted from the company and inserted in said order certain conditions that were necessary to protect the public interest, to wit:

(a) That the Public Service Corporation, the 10 corporation which owns the stock of the Public Service Railway Company, should abandon its claim that because it is a holding company and not an operating company, it is not therefore subject to the jurisdiction of the Board under the Public Utility statute of 1911, and therefore not bound to submit its books and minutes to the inspection of the Board, and to agree that in the future the Board shall have the same rights to ascertain facts in the 20 possession of the holding company which it has in reference to the operating company.

(b) The Board should have compelled the Company to restore to the depreciation account the \$500,000 or more hereinbefore referred to which the said company had wrongfully diverted from the depreciation fund of 1917 for the payment of dividends contrary to law, which diversion was known to the Board at the time of the making of said 30 emergency rate order.

(c) A condition that the company should be relieved of its ordinance contract obligations only during the actual duration of the war.

(d) If the company desired to be relieved from its contract obligations as to the matter of fares, it should have been compelled to negotiate a new contract either with the municipalities affected or with the Board itself, whereby its perpetual right 40

Information.

in the streets granted by the municipalities as a consideration of the five cent fare agreement, should be abrogated and a new arrangement in that respect entered into.

(e) An agreement that no deficiency accruing under the five cent fare contracts based upon a computation of 8 per cent., or any other rate of return, upon the value of the property, should be claimed as a part of the intangible value of the trolley property upon which rates for the future are to be fixed. The importance of this point appears from the fact that the company in the present rate case has put in claims under this point involving over \$30,000,000, which if allowed would be increased annually by compound interest.

(f) An agreement by the company whereby, in consideration of the state giving up its contract right to have service rendered at the contract rate, the company should give up its claimed contract right that it never could be required to render service at less than the contract rate, even if such lower rate would yield a reasonable return.

(g) An agreement by the company whereby in consideration of the State giving up its contract right to have service rendered at the increased rate, the company should give up its claimed right to a franchise value, which right it is asserting in this case with the announced purpose of taking the question to the Supreme Court of the United States.

10. In 1913 the Newark Terminal Railway Company and the Public Service Railway Company (afterward merged) made a contract with the City of Newark pursuant to Chapter 196 of the Laws of 1913, under which the Railway Company was per-

Information.

mitted to change the location of certain tracks and to locate certain new tracks, and agreed to return to certain conditions as to transfers. This contract was submitted to the Board and after certain changes had been made in it by order of the Board was approved by the Board. The contract having been made pursuant to a law in 1913 which was passed after the Public Utility statute of 1911, was not subject to the decision of the court holding that contracts in existence at the time of the passage of the act of 1911 were not binding. The Board in granting permission to the Public Service Railway Company to make certain charges for transfers in the City of Newark and to increase the existing charges for transfer service under its order of July 10, 1918, wrongfully permitted the said Railway Company to violate the terms of the said contract. If a war emergency required the temporary suspension of this contract, it should have only been on condition that it should be suspended only so long as the country was in danger from war conditions.

11. The Board in permitting the Public Service Railway Company to charge full fares for children in Jersey City and other municipalities served by the company, while the same company charged less rates of fare to children in Newark, permitted the company to unreasonably discriminate against a part of the public, contrary to the express provision of the Public Utility law.

12. The Board has allowed funds appropriated to its use by the legislature to be returned to the state treasury, instead of devoting them to the valuation of the properties of the Public Service Gas

Information.

Company, the Public Service Electric Company and other utility corporations.

13. That the Board should have requested the legislature to appropriate funds sufficient to complete a valuation of the gas, electric light and trolley properties of the subsidiary corporations of the Public Service Corporation, and thereby saved Jersey City, Newark and other municipalities from heavy expense in hiring counsel and experts to put before the Board evidence of the valuation of such properties.

14. That the Board should have ascertained the value of the property of the Public Service Gas Company, the Public Service Electric Company and the Public Service Railway Company before it allowed the said companies to charge war emergency rates for gas, electric light and trolley service, or at least before it allowed the war emergency rate increases to continue beyond the time when the country was in danger from war conditions.

15. The Board allowed a certain amount of bonds and a certain amount of stock to be issued and sold to obtain money to put up the Public Service Terminal in Newark. When this terminal was finished the Board should have ascertained whether the entire amount of money so authorized had been expended in the construction of the terminal. This the Board failed to do. Later on, on or about the 6th day of May, 1918, it appeared from a letter from the Public Service Railway Company to the Board that \$536,000 of the money so authorized to be raised had not been expended upon said terminal, and that the company had used this money as working capital, which the company had no right to do.

Information.

It does not appear what action was taken on this letter. The Board should have required the said money to be paid over to the Public Service Corporation, which had purchased the securities of the terminal company, and required the Public Service Railway Company to cancel securities to that amount; or to have set aside said amount as a sinking fund to redeem said securities; or should 10 have deducted said amount from the securities subsequently authorized to be issued. If the Public Service Railway Company, with which the Terminal Company had been merged, required additional money for working capital that application should have been heard and decided upon its merits.

16. That the Board in allowing the Public Service Gas Company to increase its rates for gas service based its decision upon the principle that the 20 company was entitled to a return at the rate of eight per cent., whereas it should have adopted the principle that the company was entitled to a rate of only six per cent., which rate it required other utility corporations to observe in fixing charges.

17. The Board has failed to submit to the legislature, as required by Art. I, Sec. 14, of the Public Utility Law, recommendations for changes in the 30 law to give the Board powers in respect to which the existing law has proved defective, and which additional powers are necessary to protect the public interest. Among such changes are the following:

(a) The Public Service Corporation is a holding company and owns the stock of the subsidiary operating companies, to wit: the Public Service Railway Company, the Public Service Gas Com- 40

Information.

pany, and the Public Service Electric Company. Both the receipts and expenses of the holding company are an essential part of the evidence which the Board should have before it in attempting to fix just and reasonable rates to be charged by the subsidiary companies. The possibility of concealing in the records and accounts of the holding company facts bearing directly upon the earnings and expenses of the operating companies, is obvious. The officers of the holding company have denied the jurisdiction of the Board to investigate the holding company's receipts and expenditures, or any other fact pertaining to the holding company's business, upon the express ground that the Public Utility Act of 1911 gives the Board no jurisdiction over holding companies. Under these circumstances it was the plain duty of the Board to call the attention of the legislature to the fact that the Board's jurisdiction under the law of 1911 was denied, and ask the legislature to so amend the law as to give the Board the same jurisdiction over holding companies as it has over operating companies.

(b) The Board should have recommended to the legislature the passage of laws to meet the conditions which arose out of the decision of the court to the effect that the Board could relieve the public utility corporations from conditions embodied in ordinance contracts with the municipalities which such corporations serve. The statute as passed was supposed by everybody to mean, and was interpreted by the Board to mean, that ordinance contracts were not repealed or affected by the statute, until the decision to the contrary was made by our courts. The Board should have requested the Legislature to pass legislation enabling the Board to compel the corporations seeking to avoid the

Information.

conditions of their ordinance contracts, to submit to new conditions in the nature of a contract to be imposed either by the municipalities affected or by the Board itself, whereby such companies should surrender the rights given to them by the municipalities in such ordinance contracts as the consideration of the company's agreement as to the rate of fare and other contract obligations to be performed from time to time for the benefit of the municipalities. 10

(c) The Board should have asked the legislature for legislation enabling them to impose such conditions as they deem just upon all companies applying for an increased rate of fare under the alleged emergency power of the Board.

(d) The Board should have called the attention of the legislature to the fact, which was brought to its attention repeatedly, that the value of real estate claimed by the public utility corporations in rate making were greatly in excess of the values assessed upon such properties for the purposes of taxation, and asked for legislation providing that valuation of property for rate making should be the same as valuation for taxing purposes, and also that valuations claimed in rate cases should be brought to the attention of the proper taxing authorities. 30

(e) The Board should have asked the legislature for legislation extending the time during which the Board is empowered to suspend rates filed by any public utility corporation from the period of three months, the limit now fixed in the act, to such time as the Board may deem proper in each case. The present limit in important cases operates to the disadvantage of the public in that the bulk of 40

Information.

the time is consumed by the corporation in presenting its case and the people, if represented, are not given sufficient time in which to prepare the answering case. This has repeatedly happened, and the situation has only been saved in several instances by the company agreeing to extend the period of suspension.

- 10 (f) The Board should have asked the legislature for legislation removing the doubt which under the decisions of the courts now attaches to the statutory requirement that no rates fixed by the Board should go into effect until twenty days thereafter. The Supreme Court has held in a particular instance as to one of the Board's orders that this requirement was not necessary, and that decision leaves it in doubt as to whether this twenty-day
20 requirement is ever to be enforced, and if so, under what conditions.

18. That the Board has pursued, particularly with reference to the matters of the Public Service Railway Company, the Public Service Gas Company and the Public Service Electric Company, a vacillating and uncertain policy, which has greatly embarrassed the representatives of the municipalities in presenting their cases, and which has left the
30 exact nature of the proceedings in grave doubt, and which has prevented the joining of a definite issue as between the corporations and the public, to which evidence and argument could be directed. The following are instances of this vacillating and uncertain policy:

- (a) In the matter of the Public Service Railway Company this Board has put into force seven different rates in the space of a little over one year, and
40 is now planning to establish another rate.

Information.

(b) The conduct of the proceedings in the valuation of the Public Service Electric Light Company hereinbefore set forth, with its prolonged delays and its failure to define the basis upon which the rates were fixed.

(c) The failure to frame a definite issue before the two separate zoning schedules were ordered into effect, and the failure to determine before said schedules were ordered, what amount of money the company was entitled to earn, and the failure to state definitely in answer to repeated applications of counsel for the cities, what was the exact proposition that was to be tried out in each instance before the Board, and the failure to follow the requirement of the statute to the effect that no rate fixed by an ordinance contract or by a previous order of the Board could be changed without formal application by the corporation which upon the hearing should constitute the issue involved. 10 20

(d) The failure of the Board to terminate the rates granted upon the theory of a war emergency, when the danger to the country from war conditions had passed, and the general condition of uncertainty in which the whole matter was left by failure to indicate how long the emergency rates were to last.

(e) The Board permitted the company by its order of May 2, 1919, to establish a schedule of rates which compelled children in Newark to pay full fare, and then a short time afterwards compelled the company to change this schedule so as to allow children in Newark to ride at a special rate. This action was not only vacillating, but it left uncertain whether or not the modification of the rates so as to give children in Newark a special rate was an enforcement of the company's ordinance 30 40

Information.

contract with Newark to that effect; and if so, why the Board enforced this provision of the contract and did not enforce the other provisions of the contract, such as the five cent fare; and if the contract was not the reason, then the Board should have explained why it did not compel the company to carry children in Jersey City and other municipalities served by it at the same rate charged to the Newark children.

10

(f) The Board has left entirely uncertain by its various decisions, whether a fair rate of return allowed to the public utility corporations should be eight per cent. or seven per cent. or six per cent. or less, having allowed all of these rates in different cases.

20

(g) The Board by allowing the company to put into effect the rates authorized by the Board's order of May 2, 1919, without waiting for the twenty-day period required by the public utility law, left it uncertain to what extent and under what conditions this twenty-day requirement would apply. On appeal by the Mayor of the City of Newark, the Supreme Court held that in this instance the twenty day period was not necessary. The uncertain and indefinite course pursued by the Board, particularly in the Public Service Railway case, has left it uncertain as to the conditions under which this section of the statute is to apply.

30

Respectfully submitted,

JOHN MILTON,

Corporation Counsel of Jersey City.

MARSHALL VAN WINKLE,

GEORGE L. RECORD,

Special Counsel.

That an opportunity of being publicly heard in
40 person and by counsel in his own defense in ac-

Information.

cordance with said notice was given for the thirteenth day of April, one thousand nine hundred and twenty, which was returnable before the said Governor in person at the State House, in the City of Trenton, in the County of Mercer, in said State, at the hour of eleven o'clock in the forenoon of said day.

That the said Andrew Gaul, Jr., did make answer 10 denying said charges.

That in conformity with said notice, at the time and place aforesaid, and at divers times thereafter by adjournment and upon due notice, the opportunity of being heard was given and hearings in accordance with said notice were had before the said Governor in person at the State Capital and elsewhere in the State of New Jersey, at which said times and places said defendant and his counsel 20 were present and were heard in relation to said charges and legal evidence given in his behalf, and produced against him supporting such charges so made against and given to him as aforesaid.

That at the conclusion of the said hearings the said Honorable Edward I. Edwards, Governor as aforesaid, after due consideration of the evidence produced and proven for and against said defendant by counsel, and the arguments submitted, together with the charges and the answers thereto in 30 behalf of the said defendant and the members composing said Board of Public Utility Commissioners, and each of them, found, on the thirteenth day of October, one thousand nine hundred and twenty aforesaid, that the said defendant had been guilty of neglect of duty and misconduct in office as a member of the said Board of Public Utility Commissioners, and that the said neglect of duty and misconduct in office by him and other of said members of 40

Information.

said Board of Public Utility Commissioners so found was and is as follows:

B I have carefully considered all of the evidence and the arguments of Counsel in support of and in answer to the charges filed, and have come to the conclusion and so find, that each of the defendants has been guilty of neglect of duty and misconduct
10 in office in his acts and failures to act as Commissioner under the Public Utility Statute, as follows:

They have failed to properly carry out the duty imposed upon them by the provision of the Public Utility Statute of 1911, which requires the Board, by order in writing, to fix proper and adequate rates of depreciation for each public utility, and to compel such utilities to set aside the moneys so provided for out of earnings, and carry the same
20 in a depreciation fund, and to prevent the expenditure of this fund for any purpose other than depreciation, improvements, new construction, extensions or additions to the property of such utility. The United States Supreme Court held in the Knoxville water case, decided prior to the passing of the Public Utility Act, that

“Before coming to the question of profit at all, the company is entitled to earn a sufficient sum annually to provide not only for current
30 repairs but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The Company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was in the beginning. It is
40

Information.

not only the right of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation at least, its plain duty to the public. If a different course were pursued the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue 10 of new bonds or stocks."

This plain duty of a corporation to the public is written into the law of this State in express terms, and it is made the duty of the Commission to see that the companies carry out their duty and obligation to the public. They have permitted and allowed some companies to divert from the depreciation fund set aside large sums of money in order 20 that dividends might be paid. They have, up to the present time, taken no steps to compel, nor have they attempted to compel, such companies to refund said money to said depreciation account. The result has been that in the case of some companies the service to the public has become inefficient and impaired. In view of the Board's own statement in one of its orders, that the maintenance of this fund is absolutely essential to render an adequate and efficient service, the failure of the Board to do its 30 duty and enforce this provision of the Act is of itself sufficient to justify their removal.

They have shown undue bias and favoritism and discrimination towards subsidiary corporations of the Public Service Corporation or some of them, and against other smaller similar corporations in other parts of the State, by setting up for such small corporations, as a prerequisite to the granting or maintaining of increased rates, and as a basis upon 40

Information.

which the reasonableness of such increased rates are to be tested, a valuation of the company's property and limiting the said rates so that they will afford not over six per cent. thereon; while they have allowed the Public Service Electric Company to increase rates so as to afford eight per cent. upon its capital stock, without any valuation to determine whether such stock would be entitled to said return if the rule of valuation applied to the other smaller companies was used as a basis in that case; and they have allowed the Public Service Gas Company to earn eight per cent.; and they have allowed the Public Service Railway Company to increase rates and maintain the same for an unreasonable time, without applying to said corporations the test of a valuation.

20 That in the case of some small companies the Board has inserted as a condition of granting rates that the company should waive some of its legal rights and has refused or neglected to insert reasonable conditions to protect the public rights in the orders granting the increase of fares in the cases of the Public Service subsidiary corporations.

30 That they have delayed over a very long period the valuation of the property of the Public Service Railway Company and the Public Service Electric Company, while holding other and smaller companies to a prompt conclusion of their respective valuations.

In fixing electric light rates for the Public Service Electric Company they have allowed said company to make retroactive the rates so fixed.

They have put into force upon the Public Service Railway within one year seven different rates of fare, without any sufficient reason therefore, and without testing any of said rates of six per cent.

40

Information.

upon the valuation which was applied to other corporations, and have thereby caused very great and unnecessary inconvenience to the public using said facilities.

They inaugurated several different zone fare experiments upon all of the street railways of the Public Service Railway Company in the State of New Jersey, without proper reason therefor and one 10 of said zone fare tariffs was put into effect without giving to the public and private parties interested an opportunity to be heard thereon, contrary to the express provisions of the statute.

They have discriminated between different municipalities, or the patrons of the street cars therein, by prescribing varying rates of fare for school and other children.

They have failed to discharge the duty imposed upon them by the Public Utility Statute, of recommending to the legislature such changes in the Public Utility Statute of 1911 as have been shown 20 to be necessary or advisable by their experience in administering the same. The claim made by the Public Service Company that a holding company, like the Public Service Corporation, which owns all of the stock of the subsidiary gas, electric light and street railway corporations, is not a public utility within the definition of the statute, and 30 therefore the Board is unable to compel such corporations to disclose information which will be useful, and may be necessary, in passing upon the reasonableness of the various applications of the subsidiary companies and additional other defects of power in said act which the Commissioners allege should be remedied, are cases in point.

They have allowed moneys raised upon bond issues for the construction of permanent improve- 40

Information.

ments to be diverted to the amount of working capital, instead of compelling the said moneys to be used in cancelling the securities upon which said moneys were raised, and passing upon the propriety of additional working capital in a proper proceeding for that purpose.

10 They have so administered the Public Utility Statute as to establish the practice of unnecessarily long, tedious, expensive processes, instead of administering this act as an administrative body charged with the protection of the public interest, according to the plain intent of such statute as described by Justice Swayze in the O'Brien case, in which he used the following language:

20 "The aim of the legislature was to subject such corporations (public utility and other monopolies) to public control so that a public board, charged with the interests of the public, might have a measure of control over the service to be rendered and the price to be paid therefor." * * *

30 "The difference in the two methods is fundamental. One is the method of litigation, long, expensive, unsatisfactory, necessarily too slow to afford prompt relief, and sure to do injustice by delay to one side or the other. The other we may call the method of agreement, or bargaining, if we choose; prompt and comparatively satisfactory, and resulting, if not always in the abstract justice, yet in a determination, which in the hands of a fairminded man, is likely to be acquiesced in."

They have, knowing the facts, in fixing rates and valuations, employed experts who are unduly biased
40 and committed to the corporations' point of view.

Information.

They have discriminated between corporations in granting promptly the applications of the Public Service Gas Company, and the Public Service Electric Company and the Public Service Railway Company for increased rates, within a few weeks after the said applications were made, while the case of the New York Telephone Company, which was closed in December of last year, is still undecided. 10

The facts disclosed in this case, upon which I have arrived at my conclusion, show not only that these men have been guilty of neglect of duty and misconduct in office, but they explain clearly why these men have lost the confidence of the public. The powers entrusted to this Commission are extensive, and affect not only the rights of the public but the immense investments that have been made in the construction of these properties. The delays and vacillations of these Commissioners have created a serious condition of doubt as to the safety of existing and future investments. It is as important to the capitalists who invest money in the construction of a public utility, and to the financial institutions which lend money upon the securities of public utilities, that there should be a definite rule of law and procedure, promptly and impartially applied, at all times, for the protection of these investments, as that there should be protection for 30 the public against exactions of capital.

That by reason of the said conclusions of the Governor as aforesaid, and the findings as hereinabove set forth, the said Honorable Edward I. Edwards, Governor as aforesaid, on the thirteenth day of October, one thousand nine hundred and twenty, removed the said Andrew Gaul, Jr., from his office as a member of the Board of Public Utility Commissioners, and addressed to and filed with the 40

Information.

Honorable Thomas F. Martin, Secretary of State,
on the thirteenth day of October aforesaid, the fol-
lowing notice

“DEAR SIR:

10 You will please take notice that I have this
day removed John W. Slocum, George F.
Wright, Andrew Gaul, Jr., and Harry L.
Knight as members of the Board of Public
Utility Commissioners.

Said removal is for reasons stated in a mem-
orandum, copy of which I enclose herewith.

Very truly yours,

E. I. EDWARDS,
Governor.

HON. THOMAS F. MARTIN,
Secretary of State.”

E 20 attached to which were the conclusions herein-
above set forth, and at the same time mailed, with
first-class postage, to the post-office address of the
said defendant a copy of said letter, with said find-
ings attached thereto.

30 That by reason of said removal of the said defend-
ant for the reasons so stated, the office of the said
defendant, the said Andrew Gaul, Jr., was termi-
nated and came to an end, as in said statute made
and provided, and the said defendant was thereby
at said time and place removed from office for
neglect of duty and misconduct therein, notwith-
standing that the said defendant had not yet served
out the portion of time remaining to his said term
for which he was appointed.

40 That thereupon the said defendant, Andrew Gaul,
Jr., usurped and intruded into the said office as a
member of said Board of Public Utility Commis-
sioners, and during all the time since the thirteenth

Information.

day of October as aforesaid, upon the State of New Jersey hath usurped, intruded into and unlawfully held, used, exercised, and yet doth usurp, intrude into and unlawfully hold and exercise said office, to wit, at Trenton, county and State aforesaid, in contempt of the State of New Jersey and to its great damage and prejudice, against its sovereignty and dignity.

Whereupon the said Attorney-General, for the said State, on account of the said injury to public right, prays the advice of the Court herein in the premises and for due process of law against the said defendant, Andrew Gaul, Jr., to be made to answer to the said State by what warrant he claims to hold, use, execute and enjoy the aforesaid office of a member of the Board of Public Utility Commissioners, and the liberties, privileges and franchises thereof, and that the said Andrew Gaul, Jr., may be adjudged to be an intruder and to be ousted from said office.

THOMAS F. MCCRAN,

Attorney-General of the State of New Jersey.

NOTE: The information filed in each of the other cases above named is identical with the information in the case in which Mr. Gaul is defendant except for differences in the names and places of residence of the defendants and except that in the Slocum case the information alleges that the defendant was appointed and commissioned by the governor as a member of the Board of Public Utility Commissioners on the 1st day of May, 1915; in the Wright case that the defendant was appointed and commissioned by the governor as a member of said board on the 1st day of May, 1918, and in the Knight case that the defendant was appointed and commissioned by the governor as a member of said board on the 1st of May, 1919.

Summons.

NEW JERSEY SUPREME COURT

THOMAS F. McCran, Attorney-General
of the State of New Jersey,
Informant,

vs.

10

ANDREW GAUL, JR.,
Defendant.

Summons.

Filed, October 29, 1920.

Returnable, November 3, 1920.

NEW JERSEY, ss.

20

The State of New Jersey to the
Sheriff of our County of Bergen,
(SEAL) GREETING:

We command you to summon Andrew Gaul, Jr., to be and appear before the Supreme Court of the State of New Jersey, to be held at Trenton, in and for said State, on the third day of November, one thousand nine hundred and twenty, to answer unto the State of New Jersey, and plead on the rule of the court to the information in nature of a *quo warranto*, filed by the Attorney-General on behalf of the State of New Jersey, and to show by what warrant he claims to hold, use, execute and enjoy the office of member of the Board of Public Utility Commissioners, and the liberties, privileges and franchises thereof; and have you then and there this writ.

Witness, Honorable William S. Gummere, Chief
Justice, at Trenton aforesaid, the 27th day of Oc-

40

ENOCH L. JOHNSON,

Clerk.

NOTE :

20

30

Appearance.

NEW JERSEY SUPREME COURT

THOMAS F. McCRAN, Attorney-General
of the State of New Jersey,
Informant,

vs.

ANDREW GAUL, JR.,
Defendant.

On Quo
Warranto.

10

Appearance.

Filed November 3, 1920.

The defendant's appearance is entered in the
above matter this third day of November, 1920.

20

LINDABURY, DEPUE & FAULKS,
Attorneys of Defendant.

NOTE:

The appearance in each of the other cases is
identical with that above recited except for the
difference in names of defendants and names of
attorneys, Mr. William I. Lewis signing the appear-
ance in behalf of Mr. Wright and Mr. V. Claude
Palmer signing the appearance in behalf of Mr.
Knight.

30

Rule to Plead.

NEW JERSEY SUPREME COURT

THOMAS F. McCRAN, Attorney-General
of the State of New Jersey,
Informant,

VS.

ANDREW GAUL, JR.,
Defendant.

On Quo
Warranto.

10

Rule to Plead.

Filed November 3, 1920.

Information in the above entitled cause having been filed by the Attorney-General on his own motion on the twenty-seventh day of October last and the above named defendant having been brought into Court on the opening of the November term on return of summons issued out of this Court to the Sheriff of the County of Bergen, and duly served on the twenty-eighth day of October, 1920, and this Court being now applied to for a rule on the defendant to plead to the aforesaid information. 20

It is, on this third day of November, 1920, in the presence of the Attorney-General and Josiah Stryker, of Counsel, for the defendant, in open Court ordered that the defendant plead or demur to the information filed herein within fifteen days from the date hereof. 30

Allowed in Open Court.

On motion of

THOMAS F. McCRAN,
Attorney-General.

NOTE:

The Rule to Plead in each of the above cases is identical with that above recited except for the dif- 40

Acknowledgment of Service.

ference in names of defendants and appearance of counsel, it being stated in the case in which Mr. Wright is defendant that William I. Lewis appeared for the defendant, and no appearance being noted in the Rule to Plead in the case in which Knight is defendant.

10

NEW JERSEY SUPREME COURT

THOMAS F. McCRAN, Attorney-General
of the State of New Jersey,
Informant,

VS.

ANDREW GAUL, JR.,
Defendant.

On Quo
Warranto.

20

Acknowledgment of Service.

Filed November 5, 1920.

Service of the copy of rule to plead in the above entitled cause made in open Court on the 3rd day of November, 1920, on motion of the Attorney-General is hereby acknowledged this fourth day of November, 1920.

30

LINDABURY, DEPUE & FAULKS,
Attorneys of Defendant.

NOTE:

The Acknowledgment of Service in each of the above cases is identical with that above recited except for difference in names of defendants and names of attorneys, Mr. William I. Lewis signing the acknowledgment in behalf of Mr. Wright and
40 Mr. V. Claude Palmer in behalf of Mr. Knight.

Demurrer.

NEW JERSEY SUPREME COURT

THOMAS F. MCCRAN, Attorney-General
of the State of New Jersey,

Informant,

vs.

ANDREW GAUL, JR.,

Defendant.

On informa-
tion in Na-
ture of Quo
Warranto.

10

Demurrer.

Filed November 16, 1920.

And now, as yet, of the term of November, in the year 1920, comes the said Andrew Gaul, Jr., the defendant, by Lindabury, Depue & Faulks, his attorneys, and having heard the said information read to him, says that the State of New Jersey ought not to impeach or implead him, the said Andrew Gaul, Jr., by reason of the premises in the said information above mentioned and specified, because he says that the said information and the matters therein contained are not sufficient in law in the following respects:

20

1. The said information shows that the defendant was duly appointed to the office of member of the Board of Public Utility Commissioners of the State of New Jersey, for a term which has not yet expired and that he duly qualified for said office, and fails to set forth any facts showing a lawful removal of said defendant from said office or other termination of the same.

30

2. It appears on the face of said information that the Governor had no jurisdiction, power or

40

Demurrer.

right to remove defendant from his said office for the following reasons:

(a) Section 2 of the Act of the Legislature of the State of New Jersey, entitled "An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April 21, 1911, by virtue of
10 which the Governor attempted to remove the defendant from his said office, as appears by said information, is unconstitutional and void in so far as said Section 2 attempts to confer power upon the Governor to remove a member of the Board of Public Utility Commissioners for neglect of duty or misconduct in office, after notice and hearing as therein prescribed, said provisions of said section being an attempt to confer upon the Governor juris-
20 diction which, by Sections 1 and 3 of Article VI, and paragraph 11 of Article V of the Constitution of this State, is vested solely in the court for the trial of impeachments, and being also an attempt to confer upon the Governor, who is the head of the Executive Department of the State Government, powers which are vested by Article III of said constitution in the Judicial Department of the State Government and which, by said Article III the
30 Governor is prohibited from exercising.

(b) The notice of the charges and hearing thereon, served upon the defendant by the Governor (a copy of which appears in said information) was insufficient in that it failed to charge defendant with any neglect of duty or misconduct in office within the meaning of said act.

3. The facts found by the Governor in the pro-
40 ceedings for the removal of defendant from said

Demurrer.

office under said statute, all of which are set forth in said information, do not show any neglect of duty or misconduct in office on the part of the defendant, within the meaning of said Section 2 of said act and are not sufficient to support the order of removal made by said Governor.

4. It appears from said information that the charges given defendant do not specify or include the alleged neglect of duty and misconduct in office found as a fact by the Governor, on which finding the order of removal was based. ¹⁰

And the said defendant says that, because of the foregoing, he need not, nor is he obliged by the law of the land to answer said information and this he is ready to verify; wherefore, and because of the insufficiency of the said information, the said Andrew Gaul, Jr., prays judgment, and that he may be dismissed and discharged by the court here, of and from the premises above charged upon him, in form aforesaid. ²⁰

ANDREW GAUL, JR.,
Defendant.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant.

30

STATE OF NEW JERSEY, }
County of Mercer. } ss.

ANDREW GAUL, JR., the above-named defendant, of full age, being duly sworn according to law, upon his oath, says that he is the above-named defendant; that he is about to file a demurrer in the above cause; and that the said demurrer is not intended for the purpose of delay, but that he verily believes ⁴⁰

Demurrer.

that he has a just and legal defense to said action and information on the merits of the case.

ANDREW GAUL, JR.

Sworn to and subscribed before me this 16th day of November, 1920.

RALPH N. KELLAM,

10

Master in Chancery of New Jersey.

NOTE:

A Demurrer was filed in the case in which Mr. Slocum is defendant, which is identical with the Demurrer above recited except for difference in the name of the defendant.

The following is a copy of the Demurrer filed
20 in the case in which Mr. Wright is defendant:

NEW JERSEY SUPREME COURT

THOMAS F. McCran, Attorney-General
of the State of New Jersey,
Informant,

vs.

30

GEORGE F. WRIGHT,
Defendant.

On Quo
Warranto.

Demurrer.

Filed November 16, 1920.

And now, as yet, of the term of November, A. D. 1920, comes the said George F. Wright by William 40 I. Lewis, his attorney, and having heard the said

Demurrer.

information read, says that he ought not to be impeached or impleaded by reason of the premises in the said information mentioned and specified, because he says, that the said information and matters therein contained are not sufficient in law, and that he need not, nor is he obliged by the law of the land to answer thereto, and this he is ready to verify.

And defendant specifies the following reasons 10 therefor, and the following causes of demurrer.

1. Because said Edward I. Edwards, Governor of the State of New Jersey, had no jurisdiction, right, power or authority to remove the defendant, as in said information alleged, by virtue of the act of the legislature of the State of New Jersey entitled "An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved 20 April 21st, 1911, nor by its supplements or amendments, nor any of them, nor by virtue of any other law of the State of New Jersey for the reason that nowhere in said act, or its supplements or amendments, or in any law of the State of New Jersey, is such right, power or authority, or color thereof, given to the Governor of the State of New Jersey, save in the last sentence of paragraph 2 of Section 1 of said act of April 21st, 1911, which sentence 30 reads as follows, to wit:

"The Governor may remove any commissioner for neglect of duty or misconduct in office, giving to him a copy of the charges against him and an opportunity of being publicly heard in person or by counsel in his own defense upon not less than ten days' notice,"

and that said sentence of said act is unconstitutional and void and the right, power and authority 40

Demurrer.

thereby given to the Governor of the State of New Jersey is given in disobedience to the provisions of paragraph 1 of Article III of the Constitution of the State of New Jersey and is in conflict therewith and in derogation thereof, in that said sentence of said act provides for the exercise by the executive department of the State of powers properly belonging to the judicial department.

2. Because the hereinbefore quoted sentence of said act of the legislature of New Jersey is unconstitutional and void, not only in that it disobeys, conflicts with and is in derogation of paragraph 1 of Article III, of the Constitution of New Jersey, but also, because it conflicts with and is in derogation of sections 1 and 3 of Article VI and paragraph 11 of Article V of said Constitution in that it grants to the Governor of the State of New Jersey a jurisdiction and power properly belonging to the Court for the trial of impeachments and which by said provisions of said constitution, is exclusively vested in said court.

3. Because the notice of the charges and hearing thereon, served by the Governor upon this defendant, as set forth in the information, was insufficient to confer jurisdiction upon the Governor to hear the same.

4. Because, as appears upon the face of the information, this defendant was not charged by or before the Governor with neglect of duty or misconduct in office.

5. Because it appears upon the face of the information that the defendant has title to the office in question, was duly appointed thereto for a term

Demurrer.

which has not yet expired, and that he duly qualified for said office in the manner provided by law; and fails to show a lawful removal of defendant from said office or other termination of his term therein.

6. Because the facts set forth in the information as being found by the Governor in the proceeding for the removal of defendant from his office under said statute, are not sufficient to justify the order of removal made by said Governor, in that they do not show, nor do they amount to, neglect of duty or misconduct in office on the part of defendant. 10

7. Because it appears upon the face of said information that the Governor's order of removal therein mentioned was based upon a finding of alleged neglect of duty and misconduct in office not mentioned or included in the said copy of the charges served upon this defendant. 20

8. Because it appears upon the face of the information that Edward I. Edwards, Governor of the State of New Jersey, had no right, power or authority to remove the defendant from the office in question. 30

Wherefore, and because of the insufficiency of the said information, he prays judgment and that he may be dismissed and discharged by the court hereof, and from the premises above charged upon him in form aforesaid.

W. I. LEWIS,
Attorney for Defendant.

GEORGE F. WRIGHT,
Defendant.

Demurrer.

STATE OF NEW JERSEY, }
 County of Passaic. } ss.

GEORGE F. WRIGHT, the above named defendant,
 of full age, being duly sworn according to law, upon
 his oath saith that he is the above named defend-
 ant; that he is about to file a demurrer in the
 above cause; and that he said demurrer is not
 10 intended for the purpose of delay, but that he verily
 believes he hath a just and legal defense to said
 action and information on the merits of the case.

GEORGE F. WRIGHT.

Sworn and subscribed be- }
 fore me this 16th day of }
 November, A. D. 1920. }

RALPH N. KELLAN,

Master in Chancery of New Jersey.

20

NOTE:

The demurrer filed in the case in which Mr.
 Knight is defendant is identical with the demurrer
 in the case in which Mr. Wright is defendant except
 for difference in the name of the parties defendant
 and counsel and in the date of filing, and except
 that the word "properly" as it appears between the
 word "power" and the word "belonging" in the
 second specification is omitted in the demurrer
 30 filed by Mr. Knight.

Joinder in Demurrer.

NEW JERSEY SUPREME COURT

THOMAS F. McCRAN, Attorney-General
of the State of New Jersey,
Informant,

vs.

ANDREW GAUL, JR.,
Defendant.

On Quo
Warranto.

10

Joinder in Demurrer.

Filed November 19, 1920.

And now comes the said Thomas F. McCran, Attorney-General of the State of New Jersey, and says that the said information and matters therein 20 contained are sufficient in law for the State of New Jersey to have and maintain its aforesaid inquiry thereof against the said defendant, and the said Attorney-General, for the said State, is ready to verify and prove the same as the court here shall direct and award.

Wherefore, inasmuch as the said defendant hath not answered the said information nor hitherto in any manner denied the same, the said Attorney- 30 General for the said State of New Jersey prays judgment of ouster against the said defendant, besides costs.

THOMAS F. McCRAN,
Attorney-General.

NOTE:

The Joinder in Demurrer in each of the above cases is identical with that above recited except for difference in names of defendant.

40

Opinion.

Filed December 27, 1920.

NEW JERSEY SUPREME COURT.

THOMAS F. McCRAN, Attorney General
of the State of New Jersey,
Informant,

10

vs.

ANDREW GAUL, JR.,
Defendant.

Argued December 9 and 10, 1920; Decided December 27, 1920.

20

SYLLABUS

1. Section 2 of the Public Utility Law (P. L. 1911, p. 374) which provides that "the governor may remove any commissioner for neglect of duty, or misconduct in office" does not attempt to confer upon the governor judicial powers in contravention of Art. III of the constitution; nor does it attempt to confer upon the governor jurisdiction which by Art. V, Par. 11, Art. VI Par. 1 and 3 is vested
30 solely in the court for the trial of impeachments; and such statute, as against such objections, is constitutional.

2. In a proceeding for the removal of a member of the Board of Public Utility Commissioners under Par. 2 of the Public Utility Law (P. L. 1911 p. 374) charges are sufficient which specify the particulars of the neglect of duty and misconduct in
40 office complained of, with such reasonable detail

Opinion.

and precision as to fully inform him of what derelictions of duty are urged against him.

3. In a proceeding for the removal of a member of the Board of Public Utility Commissioners under Par. 2 of the Public Utility Law (P. L. 1911 p. 374) no particular formality is essential so long as, upon the whole, the proceeding is substantially such as ¹⁰ is provided for by the statute.

In Quo Warranto—On demurrer to information.

Before Justices Trenchard, Minturn and Black.

For the Informant, Thomas F. McCran, Attorney General.

For Jersey City, John Milton, George L. Record and Marshall Van Winkle.

For the defendant, Lindabury, Depue & Faulks, Josiah Stryker and Richard V. Lindabury. ²⁰

The opinion of the court was delivered as follows:

This case arises on an information in the nature of a *quo warranto* filed by the Attorney General, to test the title of the defendant to the office of member of the Board of Public Utility Commissioners of the State of New Jersey.

The information sets forth that on May 1, 1919, the defendant was duly appointed, commissioned and qualified a member of the board, for the term of ³⁰ six years, pursuant to the provisions of the Public Utility Law (P. L. 1911, p. 374), and the amendments thereof and supplements thereto; that on March 20, 1920, the governor gave the defendant a copy of certain charges against him for alleged neglect of duty and misconduct in office filed with the governor by the city of Jersey City, and notified him that he would be afforded an opportunity to be heard upon such charges at a stated time and ⁴⁰

Opinion.

place; that such hearing was duly held, and after its conclusion the governor found the defendant guilty of neglect of duty and misconduct in office as a member of the board in his acts and failures to act as commissioner under the Public Utility statutes, in certain particulars stated. The information further alleges that the governor, by reason of such findings, removed the defendant from his
10 office as a member of the board on October 13, 1920, and charges that by reason of such removal his office became vacant, and yet he thereupon usurped and intruded into the same, and prays that the defendant may be adjudged to be an intruder into such office and be ousted therefrom.

A demurrer to this information was filed by the defendant. It challenges the proceedings before the governor and the order for removal upon the fol-
20 lowing grounds:

1. That the provisions of Sec. 2 of the Public Utility Act of 1911 upon which said proceedings and order were based, is unconstitutional and void in that (a) it attempts to confer upon the governor judicial powers in contravention of Article III of the constitution; and (b) in that it attempts to confer upon the governor jurisdiction which by Article V, Par. 11, and Article VI, Secs. 1 and 3 of
30 the constitution is vested solely in the court for the trial of impeachments.

2. That the charges given to the defendant do not accuse him of neglect of duty or misconduct in office.

3. That the findings of fact do not show defendant to have been guilty of neglect of duty or misconduct in office, and are not included within the
40 charges served upon the defendant.

Opinion.

We shall first consider the contention that the statutory delegation of power of removal to the governor was unconstitutional.

The defendant is not a constitutional officer. He was appointed commissioner pursuant to the provisions of Section 1 of the Public Utility Law which provides that members of the Board of Public Utility Commissioners shall be appointed by the governor with the advice and consent of the senate. Section 2 of the act provides that their term shall be six years and that "the governor *may* remove any commissioner for neglect of duty *or* misconduct in office, giving to him a copy of the charges against him and an opportunity of being publicly heard in person or by counsel in his own defense upon not less than ten days' notice."

At the outset we point out that this policy of conferring upon the governor the power of removal *for cause* of statutory state officers *appointed for a fixed term* is not a new one in this state; it did not originate in the Public Utility Law of 1911, and whether constitutional or not, it had been exercised many years before, and frequently since.

Thus in 1891, in creating the State Department of Banking and Insurance, the legislature provided that the commissioner should be appointed by the governor with the advice and consent of the senate, and should hold his office for a *term of three years* "unless sooner removed by the governor *for cause*." P. L. 1891, p. 17.

In 1908 Governor Fort in his inaugural address strongly recommended the enactment of a law empowering the chief executive to remove from office *any state official, appointed under a statute, who refuses or neglects to perform his duty*. In 1909

Opinion.

in his message to the legislature, he repeated that recommendation.

Accordingly, in 1911, the statute here in question was passed.

Later, in 1917, the legislature provided that the State Architect should be appointed by the governor, with the advice and consent of the senate, and should hold his office for the *term of five years*, "unless sooner removed by the governor *for cause*." P. L. 1917, p. 271.

Still later, in 1918, the legislature provided that the Members of the State Board of Institutions and Agencies should be appointed by the governor, subject to confirmation by the senate, for a *fixed term*, and should be "subject to removal by the governor at any time *for good and sufficient cause*."

P. L. 1918, p. 343.

This executive and legislative policy, so strongly urged and so long and frequently exercised, admonishes us not to be too confident that it is an unconstitutional delegation of power, particularly in view of the fact that the constitution itself directs that the governor "shall take care that the laws be faithfully executed." Art. V, Par. 6.

The people in framing the constitution committed to the legislature the whole law-making power of the state which they did not expressly or impliedly withhold; and it is to be noted that the constitution does not expressly prohibit the legislature from providing how and by whom statutory officers may be removed. Indeed in *Sweeney vs. Stevens* (1884) 46 N. J. L. 344, it was said: "The legislature, in creating the office (of jailor) had the right to provide for its vacation in such manner as they saw fit."

The defendant contends, however, that this pro-

Opinion.

vision for removal attempts to confer upon the governor judicial powers in contravention of Article III of the constitution which reads as follows: "The powers of the government shall be divided into three distinct departments—the legislative, executive, and judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly 10 belonging to either of the others, except as herein expressly provided."

The defendant relies mainly upon the case of *Pritchard vs. Police Commissioners*, (1873) 36 N. J. L. 101. But that case is not in point. There the police commissioner had been convicted of crime in the Hudson Oyer and Terminer Court, and the governor had declared his office *forfeited* and had removed him from office without charges or a hearing, and *with no statutory authority for the action*, 20 the power being claimed by the governor to inhere in his office as governor. The decision was that the power did not exist. But Chief Justice Beasley in his opinion was careful to point out that he was dealing with a case *where no power of removal had been conferred by statute*. He says: "How can it be said that they (the police commissioners) are accountable to the governor with regard to their official conduct? By the statute in question, the 30 executive *is not given supervision* over these officials; all the authority it confers upon him, is to fill the office in case of vacancy. *It imparts to him no faculty to declare judicially that such vacancy has occurred*, and if such faculty exists, it must be as an inherent constituent of the executive office. I have not been able to perceive any intimation, not even the least, either in the constitution of this state, its system of laws or legal observances, that 40

Opinion.

this right of superintendency over, or power of removal from public office, *except in instances of statutory specifications*, has been delegated to the executive head of the government."

In view of the care thus taken by that skilled jurist and logician to limit the decision to cases where the power of removal was not conferred by
 10 statute, we are not permitted to regard it as authority in a case where, as here, there was such a "statutory specification." Indeed we are rather justified in inferring from his opinion that the power of removal could be conferred upon the governor *by statute*.

As we have seen, the narrow question presented for solution under this point is, can the legislature create a state office to be filled by the governor for
 20 a fixed term, and clothe the governor as its agent with power to remove him for neglect of duty or misconduct in office after due notice and hearing, without offending against Article III of our constitution?

That Article of the constitution, thus drawn under review, has been considered frequently by our courts, and its boundaries charted.

In *Paul vs. Gloucester County*, (1888) 50 N. J. L. 585, Mr. Justice Van Syckel speaking for the
 30 Court of Errors and Appeals said: "This constitutional clause relates only to those powers which, by the constitution itself, are assigned to, or which, in their nature, pertain to one of the three departments exclusively. * * * But there is a multitude of governmental duties which have never been and cannot possibly be performed, either by the legislature or by the governor and which are certainly not prescribed by the constitution to the judiciary. * * *
 40 The conclusion is inevitable that this multitude of

Opinion.

duties was regarded as lying outside of what were termed the powers *properly belonging* to the executive, legislative and judicial departments, and was left by the constitution to be discharged in such mode as the law should provide."

Again in *Ross vs. Freeholders of Essex* (1903) 69 N. J. L. 293 it was said that "the force of this clause is, not to confine the legislature to powers which are legislative, the governor to powers which are executive, and the courts to powers which are judicial, but merely to forbid each department to encroach upon the powers *properly belonging to another*. The powers properly belonging to each of these departments and, therefore, forbidden to the others, are those assigned under the general terms, legislative power, executive power, and judicial power, and also those specifically delegated by the constitution to the senate and general assembly, or to the governor, or to the courts." This was re-affirmed in *Hudspeth vs. Swayze* (1913) 85 N. J. L. 595.

Now in view of the fact that the constitution vests the legislative power in the senate and general assembly, the executive power in the governor, and the judicial power in the courts, the question comes down to this: Is the power of removal in question a judicial power in the sense that it *properly belongs* to the courts and is forbidden to be conferred by the legislature upon the governor? We think it is not.

While in our state proceedings under statutes conferring quasi-judicial powers upon public boards and the like for the removal of officers entitled to a hearing are said in some of the cases to be "judicial in character," yet it has never been held to be an exclusive judicial function. Many administrative boards exercise "quasi-judicial functions." They

Opinion.

investigate, deliberate and decide; and yet we have said that such "quasi-judicial" functions are not judicial powers in a constitutional sense. See *Erie R. R. Co. vs. Bd. Pub. Utility Commr's* (1915) 87 N. J. L. 443.

In *Ross vs. Freeholders of Essex* (1903) 69 N. J. L. 291 it was held that the legislature had constitutional authority for conferring upon a justice of the Supreme Court the power of appointing Park Commissioners; so too in the *Hudspeth* case it had authority to clothe the Chancellor with power to appoint a citizen jury commissioner. In *Rippel vs. Prudential Ins. Co.*, 85 N. J. L. 395 it was held that the legislature had power to confer upon the Chancellor, as a legislative agent, authority to appoint appraisers to appraise the capital stock of life insurance companies; so, too, in *Re Roebling*, 108 Atl. 359, it was held that the legislature can designate the Ordinary as an agent to pass upon the action of the state comptroller in assessing and levying tax upon the transfer of the estates of decedents.

It thus appearing that the legislature may confer upon the Justices of the Supreme Court and the Chancellor powers of appointment and duties unconnected with their judicial functions, the question presses, can the legislature in a statute creating an office and conferring the appointing power upon the governor, provide therein that the governor may, in his capacity of enforcing the law, remove such officer for a designated cause and by a method of procedure judicial in form, without thus clothing the governor with judicial power forbidden by the constitution? We are bound to say that we think it can. Such a view is at least permissible, and our court of errors and appeals has repeatedly held that an act of the legislature cannot be de-

Opinion.

clared unconstitutional if it can be sustained upon a view of the constitution that is permissible for the legislature to take. *Hudspeth vs. Swayze*, 85 N. J. L. 592; *Atty. Gen'l vs. McGuinness*, 78 N. J. L. 346; *Atty. Gen'l. vs. McKelvey*, 78 N. J. L. 621. Every intendment must be in favor of the legislative power. *Harris vs. Vandever*, 21 N. J. Eq. 440.

We have several statutes authorizing the governor ¹⁰ *in his discretion* to remove statutory officials appointed for a *fixed term* (P. L. 1900 p. 176; P. L. 1900 p. 481; P. L. 1917 p. 35) and that power has been exercised without challenge so far as we are aware. It seems to be conceded that the legislature may create an office with an *indeterminate term* and clothe the governor with power of removal *at his discretion*, and we cannot see why, if that is so, the legislature may not create an office for a *fixed* ²⁰ *term* and attach thereto a condition that the governor *may* remove the incumbent upon ascertaining facts upon which the condition becomes effective, without violating the constitutional provision in question.

While the decisions in other jurisdictions are not harmonious, (as the industry of counsel has shown), yet in many states having constitutional provisions like our own, the courts have held that a statute authorizing a removal by the governor ³⁰ for cause does not constitute an encroachment on the judiciary in contravention of the constitution. See *Donahue vs. Will County*, 100 Ill. 94; *McMaster vs. Herald*, 56 Kan. 231; *State vs. Doherty*, 25 La. Ann. 119; *Fox vs. McDonald*, 101 Ala. 51; *State vs. Oleson*, 15 Neb. 247; *State vs. Hawkins*, 44 Oh. St. 98; *Gilbert vs. Salt Lake City Police Commrs.* 11 Utah, 378; *Gray vs. McLendon* (Ga.) 67 S. E. 859; *State vs. Frazier* (S. D.) 167 N. W. 510.

Opinion.

But the defendant further contends that the power of removal in question is unconstitutional because it attempts to confer upon the governor jurisdiction which the constitution vests exclusively in the court for the trial of impeachments. We think not.

Art. V. Par. II of the constitution provides:
10 "The governor and all other civil officers under this state shall be liable to impeachment for misdemeanor in office during their continuance in office and for two years thereafter." Art. VI, Par. 1 provides that the judicial power shall be vested in certain named courts, among others, a court for the trial of impeachments, and Par. 3 provides that the house of assembly shall have the sole power of impeaching; that all impeachments shall be tried
20 by the senate; and that no person shall be "convicted" without the concurrence of two-thirds of all the members of the senate.

It is quite obvious that the statute does not confer upon the governor the jurisdiction of the court of impeachments.

Under the constitution an officer may be impeached, not only during his continuance in office, but "*for two years thereafter*," and therefore a power vastly different from that of mere
30 removal is conferred. Other considerations will demonstrate that the removal of a commissioner pursuant to powers conferred by the Public Utility Law is in no sense an impeachment. To remove by way of impeachment there must be "misdemeanor in office", an essential element of which is that there shall be an improper motive or purpose. This proceeding is highly penal in its nature, is one to which the pardoning power does not extend after
40 "conviction" (Constitution Art. V. Par. Par. 9

Opinion.

and 10) and is governed by the rules of law applicable to criminal prosecutions (*State vs. Hasty*, 184 Ala. 212 Ann. Cas. 1916 B p. 703) and the judgment may extend "to disqualification to hold any office of honor, profit or trust under this State." Art. VI, Par. 3, Par. 3. On the contrary, the removal by way of the Public Utility law requires only "neglect of duty or misconduct in office," and neglect of duty 10 may be inferred without any finding of improper motive or purpose. *State vs. District Court*, 44 Mont. 318, Ann. Cas. 1913 B 396; *Atty. Gen'l vs. Jochim*, 99 Mich. 358, 23 L. R. A. 699; *Goe vs. Hoffman*, 61 Kan. 265; *Lynch vs. Chase*, 55 Kan. 367; *State vs. Wilcox*, 78 Kan. 597, 19 L. R. A. (n. s.) 224. This proceeding is remedial in character (*State vs. Medler*, 17 N. M. 644) and no penalty follows except that of removal. It is not governed by 20 the rules applicable to criminal proceedings, due notice and a fair hearing being all that is required. *Ayers vs. Newark*, 49 N. J. L. 170; *State vs. Medler*, 17 N. M. 644, Ann. Cas. 1915 B. 1141.

It is true that in the Pritchard case the Chief Justice said that "the function to declare an office forfeited from malfeasance is obviously judicial in its character," and that it "is vested in the court for the trial of impeachments." But there the forfeiture was sought by reason of the officer having 30 committed a *crime*, and the Chief Justice was careful to point out in this connection that there was no statute authorizing the forfeiture, and that "what malfeasance will work a forfeiture is no part of the *lex scripta*; there is no statute upon the subject."

The case at bar is far different from the Pritchard case. Here *the statute* authorized the removal for *neglect* of duty merely (not necessarily a crime) and not necessarily involving improper motive or 40

Opinion.

purpose. We think that the extent of the decision in the Pritchard case upon this head is that in the absence of a statute or a constitutional provision for removal (additional to the impeachment provision) the only method of removal is that provided by the impeachment provision of the Constitution. And it is to be noted in this connection, that the

10 Chief Justice rested his decision, in part at least, upon the declaration that the determination of forfeiture "related to a right of property," and it is further to be noted that later, in *Stuhr vs. Curran* (1882) 44 N. J. L. 188, that doctrine was repudiated or at least modified, (Chief Justice Beasley dissenting), the court of errors and appeals saying: "In this country they (offices) are not held by grant or contract, nor has any individual a

20 property or vested right in them beyond the constitutional tenure and compensation. They are mere agencies of a political nature, created by appointment or election for the discharge of public functions."

From these considerations we think that the governor was granted a different and broader power of removal than that by way of impeachment, and that it was not a grant of power conferred exclusively upon the court for the trial of impeachments.

30 The next contention is "that the charges given to the defendant do not accuse him of neglect of duty or misconduct in office."

The argument in support of this point is thus stated in the defendant's brief: "The charges preferred under the statute are insufficient unless, assuming their truth, they show the defendant to have been individually and personally guilty of neglect of duty or misconduct in office within the meaning

40 of Par. 2 of the Public Utility Act. Failing this, the

Opinion.

governor was without jurisdiction to make the order removing the defendant. * * * An examination of the charges (says the brief) discloses that none of them accuse the defendant personally. * * * They allege certain acts or neglects to act on the part of the Board as a board."

We deem it a sufficient answer to this argument to say that it is mistaken in point of fact. The information shows that the defendant was given a notice addressed to him individually, signed by the governor, setting forth, among other things, that Jersey City had filed with him "certain charges *against you* for neglect of duty and misconduct in office *as a member of the board* of Public Utility Commissioners," that a copy of the charges was given to the defendant, and that the charges requested the governor to remove the defendant for neglect of duty and misconduct in office in certain particulars stated. This we think fairly apprised the defendant that he was accused individually and personally of neglect of duty and misconduct in office as a member of the board. Moreover, the charges specified the particulars of the neglect of duty and misconduct in office complained of, with such reasonable detail and precision as to fully inform him of what derelictions of duty were urged against him, and hence were sufficient.

Finally, the defendant contends that "the findings of fact do not show defendant to have been guilty of neglect of duty or misconduct in office, and are not included within the charges served.

We think this contention without substance. The governor found the defendant guilty of neglect of duty and misconduct in office in his acts and failures to act as commissioner in several particulars set forth in his findings, and these findings are

Opinion.

fairly included within the charges served. In such a proceeding no particular formality is essential, so long as, upon the whole, it is substantially such as is provided for by the statute. *Devault vs. Mayor of Camden*, 48 N. J. L. 433; *Ayers vs. Newark*, 49 N. J. L. 170; *Cavanagh vs. Police Commr's*, 59 N. J. L. 412.

- 10 Of course the question whether or not these findings of neglect of duty and misconduct in office were justified by the evidence, is a question not presented for our consideration in a proceeding such as this; indeed the evidence is not before us. As has been assumed by counsel, our sole duty on this phase of the case is to ascertain whether or not the charges, or any of them, accuse of neglect of duty or misconduct in office; and if they do (as we have found they do), to ascertain whether or not such
- 20 charges were found to be true by the governor, and it is clear that he found that they were true.

The demurrer must be overruled and a judgment of ouster entered against the defendant, with costs.

NOTE:

Per Curiam memoranda were filed by the court in each of the other cases which were as follows:

30 PER CURIAM:

This case in all essentials is similar to that of *McCran, Attorney-General, vs. Gaul*, decided this day, and for the reasons given in the opinion in that case the demurrer in the present case must be overruled and a judgment of ouster entered against the defendant, with costs.

Rule for Judgment.

Filed December 29, 1920.

NEW JERSEY SUPREME COURT

THOMAS F. MCCRAN, Attorney General
 of the State of New Jersey,
 Informant,
 v.
 ANDREW GAUL, JR.
 Defendant.

On Quo
 Warranto
 Rule for
 Judgment 16

The information in the above cause having been duly exhibited and the defendant having demurred thereto, and the cause being set down for argument, and argument had thereon by Thomas F. McCran, Attorney General, Informant, and by Richard V. Lindabury and Josiah Stryker, Counsel for defendant, and the court having considered the same, and directed that the demurrer be overruled and judgment of ouster entered against the defendant, with costs; 20

It is ORDERED that the demurrer so entered on behalf of the defendant be overruled and judgment of ouster of the defendant from his office, as a member of the Board of Public Utility Commissioners, be entered, with costs.

On Motion of

THOMAS F. MCCRAN, 30
 Attorney General.

Rule entered this 29th day }
 of December, 1920. }

NOTE:

The Rule for Judgment entered in each of the above cases is the same as that above recited except for difference in name of parties defendant and their counsel.

Judgment of Ouster in Quo Warranto.

Filed December 29, 1920.

NEW JERSEY SUPREME COURT.

10	THOMAS F. McCRAN, Attorney General of the State of New Jersey, Informant, v. ANDREW GAUL, JR., Defendant.	} On Quo Warranto Judgment of Ouster in Quo Warranto.
----	--	--

And now, on this day, to wit, the 29th day of
 December, in the year of our Lord, one thousand
 nine hundred and twenty, before the said Supreme
 20 Court, at Trenton, comes the State of New Jersey,
 by its Attorney General, Informant, and the defend-
 ant, Andrew Gaul, Jr., by his attorney aforesaid,
 whereupon all and singular the premises being seen
 and fully understood, and mature deliberation had
 thereon by said Supreme Court, it appears to said
 court here, that the said information in the nature
 of a Quo Warranto, and the matters therein con-
 30 tained, are sufficient in law for the said State of
 New Jersey to have and maintain its aforesaid
 information against the said Andrew Gaul, Jr., and
 the defendant not having answered the same;
 wherefore it is considered and adjudged by said
 court here, that the said Andrew Gaul, Jr. be
 ousted from his office as a member of the Board
 of Public Utility Commissioners of the State of
 New Jersey, and that the said Andrew Gaul, Jr.
 do not in an manner, intermeddle with or concern
 40 himself in and about the office, liberties, privileges
 and franchises of a member of the Board of Public

Judgment of Ouster in Quo Warranto.

Utility Commissioners of the State of New Jersey aforesaid, and that he be absolutely forejudged and excluded from exercising or using the office of a member of the Board of Public Utility Commissioners of the State of New Jersey aforesaid, or all or any of its liberties, privileges or franchises. And it is further considered that the informant do recover against the defendant, the sum of \$, 10 costs and charges in and about his suit in this behalf expended.

Judgment entered Dec. 29th, 1920.

WM. S. GUMMERE,
C. J.

Filed Dec. 29, 1920.

ENOCH L. JOHNSON
Clerk

20

NOTE:

The Judgment of Ouster entered in each of the above cases is the same as that above recited except for difference in name of parties defendant.

30

40

Notice of Appeal.

Filed December 29, 1920.

NEW JERSEY SUPREME COURT

10	THOMAS F. MCCRAN, Attorney General of the State of New Jersey, Informant-Appellee	On Informa- tion, etc. Notice of Appeal.
	v.	
	ANDREW GAUL, JR., Defendant-Appellant	

To THOMAS F. MCCRAN, Esq., Attorney General:

PLEASE TAKE NOTICE that the defendant in the
 20 above entitled proceedings appeals to the Court of
 Errors & Appeals from the whole of the judgment
 entered in this cause and states the following
 grounds of appeal:

1. Because the Supreme Court gave judgment
 for the informant when judgment should have been
 given for the defendant.

2. Because the Supreme Court adjudged that the
 30 information filed in said cause set forth facts show-
 ing a lawful removal of the defendant from his of-
 fice as a member of the Board of Public Utility
 Commissioners of the State of New Jersey.

3. Because the Supreme Court adjudged that it
 appeared on the face of said information that the
 governor had jurisdiction, power and right to re-
 move defendant from his said office as a member
 of the Board of Public Utility Commissioners of the
 40 State of New Jersey.

Notice of Appeal.

4. Because the Supreme Court adjudged that the provision of Section 2 of the act of the Legislature establishing said Board, which attempts to confer power upon the governor to remove a member of the Board of Public Utility Commissioners for neglect of duty or misconduct in office, after notice and hearing is not unconstitutional and void as an attempt to confer upon the Governor jurisdiction 10 which by Sections 1 and 3 of Article VI and paragraph 11 of Article V of the Constitution of this State is vested solely in the Court for the trial of impeachments.

5. Because the Supreme Court adjudged that the provision of said Section 2 which attempts to confer power upon the governor to remove a member of the Board of Public Utility Commissioners for 20 neglect of duty or misconduct in office, after notice and hearing is not unconstitutional and void as an attempt to confer upon the Governor powers which are vested by Article III of said Constitution in the Judicial Department of the State Government and which, by said Article III the Governor is prohibited from exercising.

6. Because the Supreme Court adjudged that the Notice of the charges and hearing thereon, served 30 upon the defendant by the governor, a copy of which appears in said information, was not insufficient in that it failed to charge defendant with any neglect of duty or misconduct in office within the meaning of said act.

7. Because the Supreme Court adjudged that the facts found by the Governor in the proceedings for the removal of defendant from his said office and 40

Notice of Appeal.

which are set forth in said information, show neglect of duty or misconduct in office on the part of the defendant within the meaning of Section 2 of the act above mentioned and are sufficient to support the order of removal made by the Governor.

8. Because the Supreme Court adjudged that the charges given defendant specify and include the
10 alleged neglect of duty and misconduct in office found as a fact by the Governor, on which finding the order of removal was based.

9. Because the judgment of the Supreme Court adjudged that the defendant usurped and intruded
• into the office as a member of the Board of Public Utility Commissioners.

20 10. Because the said judgment of the Supreme Court was in various other respects contrary to law.

LINDABURY, DEPUE & FAULKS,
Attorneys of Defendant-Appellant.

[Endorsed—Service of the within notice of appeal is hereby acknowledged this 29th day of Dec., 1920 Thomas F. McCran, Attorney
30 Genl.]

NOTE:

A Notice of Appeal identical with the one above recited, except for the difference in the name of defendant, was filed in the cases in which John W. Slocum and Harry L. Knight are defendants except that the Notice of Appeal in the Knight case was signed by V. Claude Palmer as attorney.

The following Notice of Appeal was filed in the
40 case in which Mr. Wright is defendant:

Notice of Appeal.

Filed December 29, 1920.

NEW JERSEY SUPREME COURT.

THOMAS F. MCCRAN, Attorney General
of the State of New Jersey,
Informant,

vs.

GEORGE F. WRIGHT,
Defendant.

On Information &c.
Quo Warranto. 10

Notice of Appeal.

TO THOMAS F. MCCRAN, Esquire,
Attorney General.

PLEASE TAKE NOTICE that the defendant in the
above stated proceedings appeals from the whole of
the judgment entered in this cause to the Court of
Errors and Appeals and states the following
grounds of appeal: 20

1. Because the judgment of the Supreme Court
adjudged the defendant to have usurped and in-
truded into office as a member of the Board of Pub-
lic Utility Commissioners.

2. Because the judgment of the Supreme Court
adjudged the defendant to have usurped and in-
truded into office as a member of the Board of Pub-
lic Utility Commissioners, and, during all the time
since the thirteenth day of October, 1920, upon the
State of New Jersey, hath usurped, intruded into
and unlawfully held, used, exercised, and yet doth
usurp, intrude into and unlawfully hold and exer-
cise said office, to wit, at Trenton, in the County of
Mercer, in the State of New Jersey. 30 40

Notice of Appeal.

3. Because the judgment of the Supreme Court adjudges defendant to be an intruder into said office and that he be ousted therefrom.

4. Because the said judgment adjudges that Edward I. Edwards, Governor of the State of New Jersey, had jurisdiction, right, power and authority to remove the defendant from said office, by
10 virtue of the act of the legislature of the State of New Jersey entitled "An Act concerning public utilities; to create a board of Public Utility Commissioners and to prescribe its duties and powers" approved April 21st, 1911, its supplements and amendments.

5. Because the said judgment adjudges that Edward I. Edwards, Governor of the State of New Jersey, had jurisdiction, right, power and authority
20 to remove the defendant from said office, by virtue of the act of the legislature of the State of New Jersey, entitled "An Act concerning public utilities; to create a board of Public Utility Commissioners and to prescribe its duties and powers" approved April 21st, 1911, and particularly by virtue of the last sentence of paragraph 2 of Section 1 of said act, which reads as follows:

30 "The Governor may remove any commissioner for neglect of duty or misconduct in office, giving to him a copy of the charges against him, and an opportunity of being publicly heard in person or by counsel in his own defense upon not less than ten days notice."

6. Because the said judgment adjudged that the Governor of New Jersey had power to judicially determine whether defendant had been guilty of
40 neglect of duty or misconduct in his said office.

Notice of Appeal.

7. Because said judgment adjudged that said sentence of said paragraph of said act of the legislature did not conflict with nor violate the provisions of paragraph 1 of Article III of the Constitution of the State of New Jersey, in that said sentence of said act provides for the exercise by the executive department of the state powers properly belonging to the judicial department. 10

8. Because said judgment adjudges that said sentence of said paragraph of said act of the legislature does not disobey, conflict with, or is in derogation of sections 1 and 3 of Article VI and paragraph 11 of Article V of said Constitution of New Jersey, in that said sentence grants to the Governor of the State of New Jersey a jurisdiction and power properly belonging to the Court for the trial of impeachments, and which by said constitution is exclusively vested in said court. 20

9. Because said judgment adjudges that the notice of the charges and hearing thereon, served by the Governor upon this defendant, as set forth in the information, were sufficient to confer jurisdiction upon the Governor to hear said charges. 30

10. Because said judgment adjudges, that it appeared upon the face of the information that defendant was charged by or before the Governor with neglect of duty or misconduct in office.

11. Because said judgment adjudges that it appears on the face of said information that defendant was lawfully removed from his said office, and that his term therein had been lawfully terminated. 40

Notice of Appeal.

12. Because said judgment adjudges that the facts set forth in said information as being found by the Governor in said proceeding for the removal of defendant, were sufficient to justify the order of removal made by said Governor, and that they showed and amounted to neglect of duty or misconduct in office on the part of defendant.

10

13. Because said judgment adjudged that the Governor's order of removal was based upon a finding of neglect of duty or misconduct in office mentioned or included in said copy of charges served upon defendant.

20

14. Because said judgment adjudges that it appeared on the face of the information that Edward I. Edwards, Governor as aforesaid, had right, power and authority to remove the defendant from said office.

15. Because the said judgment of the Supreme Court was, in various other respects, contrary to law.

WILLIAM I. LEWIS

Attorney of Defendant-Appellant.

30 Service of the within Notice of Appeal is hereby acknowledged this 29th day of December, 1920.

THOMAS F. MCCRAN,
Attorney General.

Filed Dec. 29, 1920.

ENOCH L. JOHNSON,
Clerk.

NEW JERSEY Court of Errors and Appeals.

THOMAS F. McCRAN, Attorney-
General of the State of New
Jersey,

Informant-Appellee,

vs.

Defendant-Appellant.

JOHN W. SLOCUM,

THOMAS F. McCRAN, Attorney-
General of the State of New
Jersey,

Informant-Appellee,

vs.

GEORGE F. WRIGHT,

Defendant-Appellant.

THOMAS F. McCRAN, Attorney-
General of the State of New
Jersey,

Informant-Appellee,

vs.

HARRY L. KNIGHT,

Defendant-Appellant.

THOMAS F. McCRAN, Attorney-
General of the State of New
Jersey,

Informant-Appellee,

vs.

ANDREW GAUL, JR.,

Defendant-Appellant.

*On Quo
Warranto.*

On Appeal.

*Brief of
Attorney-
General.*

Justices TRENCHARD, MINTURN AND BLACK.

Statement of Facts.

The "Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April twenty-first, one thousand nine hundred and eleven, together with its supplements and amendments, provides for a commission vested with powers and duties as therein specified, consisting of five persons not under thirty years of age, who are appointed by the Governor, by and with the advice and consent of the Senate, constituted and known as the Board of Public Utility Commissioners. They are appointed for terms of six years each.

The last clause of Section 2 of the statute provides (P. L. 1911, p. 374, S. C. S., 1276), that

"The Governor may remove any commissioner for neglect of duty or misconduct in office, giving to him a copy of the charges against him and an opportunity of being publicly heard in person or by counsel in his own defense upon not less than ten days' notice."

Four such officers of the five provided for by law were in office on March 19, 1920, whose terms had not then expired, nor had they expired on October 13, 1920.

John W. Slocum, full term, commenced May 1, 1915, expires May 1, 1921.

George F. Wright, full term, commenced May 1, 1918, expires May 1, 1924.

Harry L. Knight, full term, commenced May 1, 1919, expires May 1, 1925.

Andrew Gaul, Jr., full term, commenced May 1, 1919, expires May 1, 1925.

These terms, under the statute, for six years may only expire otherwise by removal, death or resignation.

On March 19, 1920, the Governor of New Jersey mailed to each of the defendants charges of neglect of duty and misconduct in office as a member of the

Board of Public Utility Commissioners, which were received by each of them on the day following, together with which was enclosed a copy of the charges and notice that an opportunity to be heard would be given on April 13, 1920, at eleven A. M., at the State House, in Trenton. The charges insofar as they were confirmed by the findings of the Governor subsequently made on October 13, 1920, as set forth in the Information and in the order found are, in effect, as follows:

CHARGE THREE.

That the Board failed to discharge the duty required by Article I, Section 17, paragraph (f) of the statute. Section 17 in the statute, paragraph (f), requires that whenever in the judgment of the Board it may reasonably be required for the protection of stockholders, bondholders or creditors that the Board shall have power, after hearing, upon notice, by order in writing, to require every public utility as defined in the statute to carry a proper and adequate depreciation account in accordance with such rules, regulations and forms of account as the Board may prescribe; that they shall fix proper and adequate rates of depreciation of the property in accordance with regulations or classifications, which rates shall be sufficient to provide the amounts required over and above the expense of maintenance to keep such property in a state of efficiency corresponding to the progress of the industry.

The statute, in the same section, requires each public utility to conform its depreciation accounts to the rates so ascertained, determined and fixed, and requires it to set aside the moneys so provided for out of earnings, and carry the same in the depreciation fund. The income from investment of moneys of the fund is likewise required to be carried in the fund, and the fund is not to be expended otherwise than for depreciation,

improvements, new construction, extensions, or additions to the property of such public utility.

The Governor found, after many public hearings, where witnesses were examined in behalf of each commissioner and for them collectively, after examination and cross-examination, and arguments of counsel, that they had not fixed the amount to be annually appropriated by each public utility as a depreciation fund, and had not required its establishment; that they had allowed the Public Service Corporation of this State to divert from depreciation reserve.

The City of Jersey City charged, and the Governor so found, that the Board had failed to carry out the requirements of the statute in the section suggested, and had not fixed proper and adequate rates of depreciation for each public utility, nor compelled them to set aside the moneys so provided for out of earnings and to carry the same in a depreciation fund, and had failed to prevent the expenditure of this fund for any purpose other than depreciation, improvements, new construction, extensions or additions to the property of any such company.

The charge, furthermore, was in detail to the effect that the Board allowed the Public Service Railway Company to divert from depreciation reserve fund \$500,000 to pay dividends (and that, too, upon watered stock), and that the Board on July 10, 1918, at which time, according to the pleadings, the defendants, Messrs. Slocum and Wright, were members thereof, by order and report found it to be a paramount duty of a public utility for the maintenance of a continuous, safe, adequate and proper service that there be a proper depreciation reserve maintained, and that in the year 1917 the said Public Service Railway Company should have credited to such fund \$500,000 which was not so used, but was depleted for the payment of dividends to that amount, adding: "To divert to the payment of dividends moneys credited to or which should go to the credit of this reserve, and so destroy the assurance of

the continuance of safe, adequate and proper service, is wholly unjustified and a violation of the paramount duty of the utility."

After the hearing as required by the statute, this charge was substantiated, as appears by the finding in which the Governor found that they had taken no steps to compel the refund to this account of the moneys so diverted, to the effect that this was neglect and misconduct in office by the commissioners, as set forth in Charge Four made by the City of Jersey City.

Charge Three further alleged that in 1917 the Public Service Gas Company paid in dividends \$816,000, and thereby created a deficiency of \$225,000 for the year, in which year the Company appropriated for depreciation account only \$68,000, and then demanded that the Board should allow it \$608,000 as an annual depreciation reserve for the next and the following years.

The charge further continued to the effect that in the year 1917, Public Service Electric Company paid \$2,620,000 in dividends and appropriated only \$813,000 for depreciation, although the Company's own estimate of the proper amount required it to set aside \$2,000,000 for this account.

CHARGE FIVE.

The fifth charge was that the members of the Board, in exercising its powers, had applied, as more particularly otherwise set forth in the charges, one standard or rule to certain public utilities, and another standard or rule to other similar public utilities; that in so doing it has unjustly and unreasonably discriminated in favor of certain public utilities, particularly in subsidiaries of the Public Service Corporation, and against other like utilities of the State. As an example, the charge made was that it appears that the action of the Board in using eight per cent. as a just rate of return with respect to

the Public Service Electric Company and Public Service Gas Company, while limiting other small and uninfluential companies to six per cent. and even less, was discrimination, in violation of the statute.

The Governor found that the Board had shown undue bias favoritism and discrimination towards subsidiary corporations of the Public Service Corporation, or some of them, and against other smaller similar corporations in other parts of the State, by setting up for such smaller corporations as a prerequisite to the granting or maintaining of increased rates and as a basis upon which reasonableness of such increased rates is to be tested, that the valuation must be made of such smaller companies' property, and limited the said rates so that they would not afford over six per cent. thereon; whereas they allowed the Public Service Electric Company to increase rates so as to afford eight per cent. on its capital stock, without having made any valuation to determine whether such stock would be entitled to said return if the rule of valuation applied to the other smaller companies was used as a basis in that case; and that they have allowed the Public Service Gas Company to earn eight per cent.; and have allowed the Public Service Railway Company to increase rates and maintain the same for an unreasonable time without applying to said corporations the test of a valuation.

The Governor also found that in the case of some small companies the Board has inserted, as a condition of granting rates, that the companies should waive some of their legal rights, and has refused or neglected to insert reasonable conditions to protect the public rights in the orders granting the increase of fares in the cases of the Public Service subsidiary corporations.

CHARGE NINE.

This charge was that when the Board decided to allow the Public Service Railway Company to disre-

gard and violate its five-cent municipal ordinance contracts for trolley service, by its order of July 10, 1918, the Board should have, under the bargaining power conferred upon it by Article 2, Section 17, paragraph (h), exacted from the company and inserted in said order certain conditions that were necessary to protect the public interest.

(a) That the Board failed to require the Public Service Corporation to abandon its claim that because it is a holding and not an operating company it is not bound to submit its books and minutes to the inspection of the Board.

(b) The Board should have compelled that corporation to restore to the depreciation account the \$500,000 diverted therefrom, as set up in the first finding under Charge Three, *supra*, which diversion was known to the Board at the time the emergency rate order was made by the Board.

(c) That the Company should have been required to accept the condition that its obligations under ordinances granting franchises were not binding during the actual duration of the war only.

(d) That if the corporation desired to be relieved from its obligation as to fares under such franchises, it should have been compelled to negotiate a new contract either with the municipalities affected or the Board, whereby its perpetual right of the streets granted by the municipalities as a consideration of the five-cent fare agreement should be abrogated and a new arrangement entered into.

(e) That a condition should have been imposed that no deficiency based upon an eight per cent. return and a five-cent fare should be used as a basis of intangible value upon which to fix future rates.

(f) That the Board should have conditionally required that upon relinquishment by the State of its right to the rate agreed upon in the ordinances, the company should relinquish its right that it might never be re-

quired to render service for a lower rate than originally provided.

(g) That the Board should not have allowed the increased rate without requiring a waiver of the claim that the franchise had a value.

The Governor found that these charges were substantiated, in that the Board had failed to require the corporation to insert reasonable conditions to protect the public rights in the orders granting the increase of fares in the cases of the Public Service subsidiary corporations, which is in effect a finding under Charge Nine, as above set forth.

CHARGE SIX (a), and CHARGE EIGHT (a)
and (b).

The Board in the case initiated by it relating to the Public Service Electric Company showed its bias toward the company and its neglect of its duty to the public in the following particulars:

(a) Permitted unreasonable delay in the conduct of the case; that while the valuation of the property was ordered made in 1911, in a proceeding initiated at that time to inquire into the reasonableness of the existing rates, yet in the year 1916 the Board, on its own initiative completed a valuation costing the State over \$75,000; whereas the Board should have required the company to prepare a valuation concurrently with that of the Board, or have checked up with the experts, so that at the completion of the work the company would be prepared to make objections to the work of the experts of the Board, and has up to the present time allowed the company to delay the presentation of its objections, and that the matter is still undetermined and unfinished; and the charge was further to the effect that such delay was a serious failure and neglect of duty on the part of the Board, because the determination of the business and

property was necessary to determine whether the rate for power charged by the Electric Company to the Railway Company was reasonable, and a determination was necessary to such a finding before a just rate could be fixed for the Railway Company to charge the public.

The Governor found, by his fourth finding, that the Board had delayed over a very long period the valuation of the property of the Public Service Railroad Company, and the Public Service Electric Company, while holding other and smaller companies to a prompt conclusion of their respective valuations; thus finding bias as charged. (Charge Six, *supra*.)

Charge Eight (a) was that the Board failed properly to conduct the Public Service Railway rate case; that it improperly delayed valuation of the railway property when it should have made the valuation at the time that the Board decided not to consider the five-cent fare ordinances with the several municipalities binding as made by the company or its predecessors; and charged, further, that the valuation should have been pushed to a prompt conclusion in order to furnish the necessary basis for fixing a new rate of fare; that such valuation should have been checked up by experts employed by the Commission in order to determine how much money the company was entitled to earn before the Board made orders increasing the rate of fare and inaugurating zone fare experiments; and in Item (b) the charge was that the Board should have ascertained the value of the property of the Railway Company before it increased the rate from the five-cent rate fixed by the municipal ordinance contracts, or at least before it allowed the war emergency rate to continue beyond the duration of the war emergency period.

The finding of the Governor as to these charges was also comprehended within the fourth finding as to delay, showing bias as above set forth.

CHARGE SIX (c).

The Board allowed the Public Service Electric Company to repudiate contracts with private companies before expiration (though binding until expiration thereof), without determining that such contracts involved unjust and unreasonable discrimination, and allowed new retroactive rates to cover power already purchased and consumed by customers under contract.

The Governor found, in his fifth finding, as to this charge that in fixing electric light rates for the Public Service Electric Company, they allowed said company to make retroactive the rates so fixed; thus finding bias in favor of this particular company.

CHARGE EIGHTEEN (a), and CHARGE EIGHT (f), (g), (h).

That the Board has pursued, particularly with reference to the matters of the Public Service Railway, Gas and Electric Companies, a vacillating and uncertain policy, embarrassing representatives of the municipalities, leaving the exact nature of the proceedings in grave doubt, preventing the joining of a definite issue in such cases as between corporations and the public, particularly that the Board, in the matter of the Street Railway Company has put in force seven different rates of fare in the space of a little over one year, and is planning to establish another rate.

The Governor found, by his sixth finding, that the Public Service Railway Company within one year had put into force seven different rates of fare without any sufficient reason therefor, and without testing any of said rates by the rule of six per cent. upon the valuation, which was applied to other corporations; thereby causing great and unnecessary inconvenience to the public.

CHARGE EIGHT (j), (k), (l)

That the Board failed to properly conduct the Public Service Railway rate case, proceeding on its own motion (after application had been made, and refused to return to the flat fare system from the zone system then in effect), to make an order requiring the Public Service Railway Company to continue the zone fare schedule or adopt a new schedule of zone fare rates which it specified, and which had not been the subject of inquiry by the company for the municipalities interested; that prior to making said order, which order was made subsequent to September 4, 1919, as appears by Item (i) of Charge Eight, the Board, in thus establishing a new zone schedule, refused to allow evidence growing out of the actual experience under the original zone fare order of July 10, 1918, to be presented, to prove that the new zone fare schedule suggested by the Board would bring in even less money than the original zone fare schedule; that the Board should not have made such order without a hearing of the municipalities interested and an opportunity to present evidence as to the actual operation of the first zoning fare plan, which evidence was exclusively within the knowledge of the company and municipalities, and was necessary to the Board that it might make an intelligent estimate of the property, financial and other results of the new zoning fare.

(k) That the Board fixed said zoning rates without ascertaining whether the rate for power supplied to the Railway Company by the Public Service Electric Company was a just and reasonable rate.

(l) That the Board refused the repeated applications of counsel for the municipalities interested, that the Board should first require the company to make formal application to modify existing rates by ordinance or by the Board's own order, and then allow issue to be joined on the rates so applied for, as required by the statute.

The Governor, by his seventh finding, held that they inaugurated several different zone fare experiments upon all of the street railways of the Public Service Railway Company in the State of New Jersey, without proper reason therefor, and one of said zone fare tariffs was put into effect without giving to the public and private parties interested an opportunity to be heard thereon; contrary to the express provisions of the statute, viz.: subdivision (8) of Section 17 of Article 2, which provides that the Board shall have power, on written complaint or upon its own initiative, to hear and determine whether the increase, change or alteration is just and reasonable.

CHARGE EIGHT (m), (p), AND CHARGE
ELEVEN (e).

That the Board allowed a schedule of rates to be filed by the Public Service Railway Company by order of May 2, 1919, enabling the company to charge full rates for children in the City of Newark, instead of the special rates which the company had been theretofore charging, and which the company was bound by contract to maintain; and that

(p) The Board, in the case of the Public Service Railway Company adopted zone fare schedules on the theory that it is equitable that car-riders should pay in accordance with the service rendered, yet disregarded this principle in the case of the Trenton and Mercer County Traction Company, and compelled the car-riders of Trenton to make up in increased fares large deficits incurred by that company in the operation of various suburban lines outside of the city.

And Eleven (e). That the Board permitted the Public Service Railway Company to charge full fares for children in Jersey City while permitting less rates of fare to be charged in Newark; unreasonably discriminating against the public in one community as against another.

The three charges above constituting bias and unjust discrimination.

The Governor held, in finding eight, "They have discriminated between different municipalities, or the patrons of the street cars therein, by prescribing varying rates of fare for school and other children.

CHARGE SEVENTEEN (a).

The City charged that the Board failed to submit to the Legislature, as required by Article I, Section 14 of the Public Utility Law, recommendations for changes in the law to give the Board powers in respect to which the existing law has proved defective and which additional powers are necessary to protect the public interest, particularly.

(a) That the Public Service Corporation, claiming to be a holding company owning the stock of the subsidiary operating companies, should have been required, by new legislation, on recommendation of the Board, to furnish statements of receipts and expenses of the holding company as an essential part of the evidence upon which the Board would be enabled to fix just and reasonable rates to be charged by the subsidiary companies, and the charge further was to the effect that the holding company, viz.: the Public Service Corporation, had denied the jurisdiction of the Board to investigate the companies rates and expenditures, or any other facts pertaining to the holding company's business, on the ground that the statute gives the Board no jurisdiction over holding companies, and that it was the plain duty of the Board to recommend legislation to cure this difficulty.

The Governor found, by his ninth finding, that the defendants failed to discharge the duty required by the statute of recommending to the Legislature such changes in the statute as had been shown to be necessary or ad-

visible by their experience in administering the same, enumerating as an instance, the claim made by the Public Service Corporation that a holding company like it, which holds all the stock of the subsidiary gas, electric light and street railway corporations, is not a public utility within the definition of the statute, and that therefore the Board, as claimed, was unable to compel such corporation to disclose information which would be useful and might be necessary in passing upon the reasonableness of the various applications of the subsidiary companies.

CHARGE FIFTEEN.

The City charged that the Board allowed a certain amount of bonds and stock to be issued and sold to obtain money to put up the Public Service Terminal in Newark. When this terminal was finished it was alleged the Board should have ascertained whether the entire amount of money so authorized had been expended in the construction of the terminal. This the Board failed to do and later on, about May 6, 1918, when to the knowledge of the Board \$536,000 of the money so authorized to be raised, it appeared, had not been so expended, but had been used by the company as working capital, without right so to do, no action was taken on the information conveyed to the Board by the company by letter on said date. It was charged in this connection that the Board should have required the money to be paid over to the Public Service Corporation, which had purchased the securities of the Terminal Company, and should have required the Railway Company to cancel securities to that amount, or should have required that the said amount of \$536,000 should have been set aside as a sinking fund to redeem said securities, or should have deducted said amount from the securities subsequently authorized to be issued, and

that the Railway Company, with which the Terminal Company had been merged, should have applied for additional money for working capital, and been heard on its merits if the money was needed by the Railway Company.

The Governor found, by his tenth finding, that the Commissioners allowed moneys raised upon bond issues for the construction of permanent improvements to be diverted to the account of working capital, instead of compelling said moneys to be used in canceling securities upon which said moneys were raised, and passing upon the propriety of additional working capital in a proceeding for that purpose.

CHARGE ONE.

The City alleged that the Board ignored and failed to carry out the principal object and purpose of its creation to act as an administrative body representing the public on its own initiative and complaint to ascertain and enforce the public rights, but instead assumed itself to be a court and its members judges and placed all before it in the position of contending bodies; thereby converting the proceedings, which were intended to be informal, expeditious and inexpensive, into proceedings to the contrary; citing as an example, the Public Service rate case, which commenced on July 10, 1918, and is still unfinished, after ten thousand pages and over of testimony have been taken, and done in such a manner as to cost the municipalities interested over \$100,000.

The Governor found, by his eleventh finding, that the Commissioners so administered the statute as to establish the practice of unnecessarily long, tedious and expensive processes, instead of administering the act as an administrative body charged with protection of the public interest, which was their duty under the decision

of the Supreme Court in the case of *O'Brien vs. Public Utility Board*, 92 *Law*, pages 44 and 587.

CHARGE TWO.

The City charged that the Board showed bias towards the Public Service Railway Company by employing as its own experts to check up and verify the claims of the company and to testify on behalf of the Board, three experts who had been extensively employed professionally by public service corporations in various parts of the country, to back up the claims of such corporations in rate cases, in which employment such experts had committed themselves to theories and principles of valuation which are held by public service corporations, and against the principles of valuation which make for the public interest. The charges particularized as to A. S. Richey, employed in the emergency rate cases in the application of the Public Service Railway Company for increased fares, who was an expert employed and paid by the company, and who had been extensively employed by public service corporations in such cases.

The Governor found, by his twelfth finding, that the Commissioners knowing the facts, in fixing rates and valuations, employed experts who were unduly biased and committed to the corporations' point of view.

The Governor further found, by his thirteenth finding, that the Commissioners discriminated between corporations in granting promptly the applications of the Public Service Gas, Electric and Railway Companies for increased rates within a few weeks after said applications were made, while the case of the New York Telephone Company, which was closed in December, 1919, was still undecided.

By reason of the findings aforesaid the Chief Executive found that the Commissioners have been guilty of neglect of duty and misconduct in office, affecting

the rights of the public, and the investments of capitalists, and thereupon removed them from office as appears by the notice of removal filed with the Secretary of State and served upon the Commissioners (copy of which is incorporated in the pleadings on and as of October 13, 1920).

RECAPITULATION.

The first finding was that the Board had permitted the misuse of depreciation funds in accordance with Charge Three (a) and Charge Nine (b).

The second finding was that they had permitted discrimination in returns on the investment in public utilities, discriminating in favor of Public Service subsidiaries and against smaller companies, permitting eight per cent. return in the one case and six per cent. in the others, without any valuation to determine whether the Electric Company stock would be entitled to said return of eight per cent. if the rule of valuation applied to the other smaller companies was used as a basis, and that they have allowed the Public Service Gas Company to earn eight per cent., and have allowed the Railway Company to increase rates and maintain the same for an unreasonable time, without applying to said corporations the test of the valuation.

The third finding was that the Commissioners required some small companies, as a condition of granting rates, to waive legal rights, but did not do so as to the Public Service Corporation, or its subsidiaries, in accordance with Charge Nine (a) and (g).

The fourth finding was that the Commissioners delayed in making valuations of the Public Service Railway and Electric Companies, thereby discriminating against smaller companies, holding them to strict valuations, in accordance with Charges Six (a) and Eight (a).

The fifth finding was that they permitted the Public Service Electric Company to make retroactive rates affecting electricity previously consumed, in accordance with Charge Five (c).

Finding number six found that they had permitted seven different rates of fare in railway companies in one year without the test of six per cent. return upon valuation, in accordance with Charges Eighteen (a) and Eight (f), (g), (h).

The seventh finding was that they had experimented by permitting charges as per zone fare service without proper reason, and without adequate hearings, in accordance with Charge Eight (j), (k), (l).

The eighth finding was that they discriminated between municipalities by varying rates of fare for children, that is, permitting Newark children to have the benefit of a lower fare as school children, than in other municipalities, in accordance with Charges Eight (m) and (p), and Eleven (e).

The ninth finding was that they had failed to make recommendations to the Legislature, particularly in failing to request legislation to bring the Public Service Corporation as a holding company clearly within the requirements of the statute as a public utility company, in accordance with Charge Seventeen (a) and (f).

The tenth finding was that the money permitted to be raised by the Public Service Terminal Company by bond issue, was permitted to be diverted to working capital and not funded and paid off in the proper manner, in accordance with Charge Fifteen.

The eleventh finding was that the Commissioners failed to act under the statute as an administrative body, in accordance with the O'Brien case, in which Mr. Justice Swayze, speaking for the Supreme Court, held that the intent of the legislation was to subject corporations to public control, so that the Board charged with the interests of the public might, among other methods pursued, act upon its own initiative in behalf of the public

rather than as a judicial body, in accordance with Charge One.

The twelfth finding was that biased experts were employed by the Board, known to them to be, by reason of previous service and experience, and announced theories as to rate making by public utilities, biased in favor of such corporations, in accordance with Charge Two.

The thirteenth finding was that the Board had discriminated in favor of the Public Service subsidiaries in permitting increased rates to be charged by them for service, while delaying unreasonably in the case of the application of the New York Telephone Company, permission to charge increased rates; which finding may be found as a consequence of and in support of charges of general discrimination as between public utilities permitted and exercised in this State.

I.

Neglect of Duty or Misconduct in Office as Related to the Charges and Findings

Section 2 of the Public Utility Act, S. C. S., 1276, provides "The Governor may remove any commissioner for neglect of duty or misconduct in office * * * "

Article 5, Section 11, of the Constitution provides that impeachments should be for "misdemeanor in office."

Mr. Throop in his treatise on the law relating to public officers, Sec. 856, quoting the authorities therein cited, sets forth that "Every public officer commits a misdemeanor who, in the exercise or under color of exercising, the duties of his office, does an illegal act or abuses any discretionary power with which he is invested by law from an improper motive, the existence

of which motive may be inferred either from the nature of the act or from the circumstances of the case. But an illegal exercise of authority caused by a mistake in the law, made in good faith, is not a misdemeanor within this article." The article referred to is entitled "Criminal Proceedings Against Public Officers."

The provisions in the United States Constitution are that impeachments are for treason, bribery, and other high crimes and misdemeanors.

Mr. Mechem, in Sec. 472 of his work on "Public Offices and Officers," states: that "It seems to be settled that there are no crimes against the United States, except such as are expressly made so by act of Congress." Citing Wharton's Criminal Law, Secs. 163, 164, he further states: "Acting upon this rule, it is maintained by a large class of constructionists that impeachments can be had only for acts which are indictable, and that unless the crime is especially named in the Constitution, impeachments, like indictments, can only be instituted for crimes committed against the statutory law of the United States." Citing Prof. Dwight, 6 *Am. L. Reg.* (N. S.), 257. Continuing, he writes: "But, on the other hand, a more liberal view is maintained with great plausibility and force. The supporters of this view maintain that impeachable crimes and misdemeanors cannot be limited to those only which are expressly made so by statutory enactment, but that, to use the language of one writer, 'An impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government, or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of official oath or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose.'" Citing an article by Judge William Lawrence, of Ohio, 16 *Am. L. Reg.*, 641 (N. S.); and Pomeroy's Constitutional Law, 765.

Acting under the Constitution of the United States on May 19, 1789, Mr. Madison moved, in the House of Representatives, that there should be established in the Executive Department a Department of Foreign Affairs with an officer at the head of it, who should be appointed by the President, by and with the advice and consent of the Senate, and removable by the President. Mr. Smith, of South Carolina, said he had doubts whether the officer could be removed by the President. He apprehended that he could only be removed by an impeachment before the Senate, and that, being once in office, he must remain there until convicted upon impeachment, and he wished the gentlemen would consider this point well before deciding it (*First Lloyd's Cong. Reg.*, pp. 350, 351). Then, as set forth in the opinion of Mr. Justice Peckham, in *Parsons vs. United States*, 167, U. S. 324, on page 329, "there ensued a debate lasting many days, the result of which was that it was established by the legislative department that they had the authority to empower the President to remove from office." Mr. Justice Peckham says, on page 330, that "many distinguished lawyers originally had very different opinions in regard to this power from the one arrived at by this Congress, but, when the question was alluded to in after years, they recognized that the decision of Congress in 1789 and the universal practice of the government under it had settled the question beyond any power of alteration." He quotes Mr. Justice Thompson, *In re Hennen*, 13 Pet. 230, 237, in saying that the power of removal, in the absence of all constitutional provisions, was a statutory regulation, or seemed to be an incident to the power of an appointment.

It is unnecessary to cite examples of removals from office by the President, but to merely call the attention of this court to the fact that such removals take place for other causes than those enumerated, as subject to the power of impeachment under the Constitution of

the United States, but that such removals may be made at the pleasure of the executive, or for the reasons set forth in the statute having reference to such office and appointment thereto and removal therefrom.

Mr. Throop, in Sec. 367, as to removal of officers, says: "Where such an official act or omission has occurred (that is, in his official character), the officer may be removed therefor without reference to the question whether it was done maliciously or corruptly.

In *State vs. Eberhart*, 116 Minn. 316, 30 L. R. A. (N. S.), 788, it is stated that the terms "malfeasance" and "nonfeasance" have no technical meaning in the sense in which they are employed. Conviction of a crime is not essential. General incompetence and neglect of duty constitute sufficient grounds for removal.

Mr. Mechem, in Sec. 457, states: "Misconduct, willful mal-administration or breach of good behavior in office do not necessarily imply corruption or criminal intention. The official doing of a wrongful act or the official neglect to do an act which ought to have been done will constitute an offence, although there was no corrupt or malicious motive."

Under Chap. 239 of the Laws of Kansas for the year 1889, where the Governor was authorized to remove from office, as therein provided, for official misconduct, upon the grounds of corruption, veniality, inefficiency, official misconduct, immorality or inattention to duties, the Supreme Court of Kansas in 1889, in the case of *Yeo vs. Hoffman*, 61 Kansas 265, held that wrongful intent or fraud, on the part of the officers subject to charges and removal, need not be shown. Counsel contended in that case that errors of judgment or negligence, attributed to a misconception of duty without fraud, was insufficient to remove, but the court held otherwise. The court quoted approvingly from the case of *Lynch vs. Chase*, 55 Kansas 367, 368; 40 Pac. 669, as follows: "In a summary proceeding for the removal of officers under the statute the same formality

and precision are not required as in a trial before a court, and the accused cannot claim the benefits, incidents and common law rights pertaining to such a trial.

Misconduct in office is defined in the case of *Etzler vs. Brown*, 58 Fla. 418; 138 Am. St. Rep. 113; to include such acts as amount to a breach of the good faith and of the right action that are tacitly required of all officers.

The statute under consideration in this case, however, provides for removal from office for neglect as well as misconduct.

"To neglect" is defined in the case of the *New York Guarantee and Indemnity Co. vs. Gleason*, 53 How. Prac. 122, 125, to be such neglect as "to omit by carelessness or design (Webst. Dict.), not of necessity, and there can be no possibility of neglecting to do that which cannot be done. The word "neglect" imports something more than the word "omit," and it must be because it imports that the party had opportunity to do the thing which he omitted to do. If he did not have the opportunity to do it, it cannot be said that he neglected to.

Neglect is defined in Words and Phrases, 4740, as that which imports a want of such attention to the nature or probable consequence of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.

In the case of *Attorney-General vs. Jocham*, 99 Mich. 358; 58 N. W. 611, 617; 23 L. R. A. 699; 41 Am. St. Rep. 606; it is said that neglect as applied to a public officer means a failure on his part to do and perform some of the duties of his office, and when such neglect from the gravity of the case or the frequency of the instances, becomes so serious in its character as to endanger or threaten the public welfare, it is gross within the meaning of the law, and justifies interference of the executive upon whom is placed the responsibility of keeping the affairs of the State.

It will be noted that our statute does not make it essential that the neglect or misconduct should be willful, but classes "neglect" to be a neglect or misconduct of the most ordinary kind. "It is not every intentional act that is willful." *Words and Phrases*, 2d Series, 1,295. The word "willful" is a much broader term than the word "intentional." *State vs. DeLisco*, 75 L. 808; 60 A. 218,222.

In *State vs. Martin*, 61 So. 491, it was held that "willful neglect of duty" did not necessarily import evil motive to make the officer guilty thereof. The case was under a statute where an officer might be, among other things, removed for willful neglect of duty, corruption in office, incompetency or intemperance, &c. The Supreme Court of Alabama distinguished between "willful neglect of duty" and "neglect" saying that the sheriff in the case in question was not guilty of willful neglect, but was guilty of neglect, saying that he was patently negligent, that his fault lay in his want of prudence. He did not appreciate the hazard incurred nor realize the elements of his obligations. He was, therefore, negligent in the performance of his duty, but not willfully neglectful thereof. He did not conceive, as a full performance of duty required he should do the great necessity of diligent surveillance of all articles and things entering his jail. The Court further said the most competent may be negligent, and that it, therefore, does not necessarily mean incompetency.

It may be true that the assigned causes for removal in the instant case are to some extent similar to those causes that would constitute "misdemeanor in office" in that they are both prejudicial to the public interests, but it is submitted that the assigned cause for impeachment would involve something penal in its nature, at least would involve an act or acts flowing from a *willful intent*, and it is significant and stress is laid on the fact that the Legislature in assigning the causes that

would justify removal under this statute, *i. e.*, neglect of duty and misconduct in office, refrain from using the word "willful."

The defendant Gaul, in the Supreme Court brief filed in his behalf, cited the case of *State vs. Hastings*, 55 N. W. 774, where the Supreme Court of Nebraska distinguished between impeachable offenses and those not so, making the distinction because of the willfulness with a corrupt intention, or the lack of it, to be the theory of difference. The Court said:

"It may be safely asserted that where the act of official delinquency consists in the violation of some provision of the Constitution or statute, which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty willfully done with a corrupt intention, or where the negligence is so gross and the disregard of duty so flagrant as to warrant the inference that it was willful and corrupt, it is within the definition of a misdemeanor in office; *but where it consists of a mere error of judgment or omission of duty without the element of fraud, or where the negligence is attributable to a misconception of duty rather than a willful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the State.*"

The same distinction was made by the Court below, where it said:

"To remove by way of impeachment there must be 'misdemeanor in office,' an essential element of which is that there shall be an improper motive or purpose. This proceeding is highly penal in its nature, is one to which the pardoning power does not extend after 'conviction,' and is governed by the rules of law applicable to criminal prosecutions, and the judgment may extend to 'disqualification to hold any office of honor, profit or trust under this State.'

On the contrary, removal by way of the public utility law requires only 'neglect of duty *or* misconduct in office,' and neglect of duty may be inferred without any finding of improper motive or purpose. This proceeding is remedial in character and no penalty follows, except that of removal. It is not governed by the rule applicable to criminal proceedings, due notice and a fair hearing being all that is required."

In Words and Phrases, misconduct in office is defined as based on the decision of *Yoe vs. Hoffman*, 61 *Kansas* 265; 59 *Pac.* 351, to be that something which amounts to a breach of the conditions tacitly annexed to the office, and includes any wrongful act or official omission to perform an official duty.

With these legal definitions in mind, we turn to the charges made by the City of Jersey City before the Governor, and his findings consequent thereon as previously set forth in this brief, to consider whether the Chief Executive had jurisdiction to remove the defendants from office for neglect or misconduct in office.

II.

Powers of the Board of Public Utility Commissioners.

Referring to the statute under which the Board was empowered to act, it is the contention of the appellee that the phrase "the Board shall have power," contained in Sec. 16 and Sec. 17, should be construed to be not merely power, but duty or obligation, under the theory that such power is to be exercised for the public good. It is, therefore, not discretionary, but imperative. *Commonwealth v. Marshall*, 3 *Wkly. Notes cas.* 182, 185.

In the case of *Gilmore v. City of Utica*, 121 *N. Y.* 561, 568; 24 *N. E.* 1009, 1011, it was held that "gen-

eral permissive words used in the statutes conferring power and authority upon public officers or bodies will be held to be mandatory where the act authorized it to be done and concerns the public interests or the rights of individuals."

It is further contended that, aside from the express duty placed upon the Board, there is an implied duty to see that the utilities, regulated by the act, shall perform the functions therein required of them and refrain from doing those things which are prohibited. The power in the nature of a duty conferred upon the Board comprehended within the meaning of that term, must be construed in the light of the foregoing, but not merely a power to regulate, but as stated, a duty to supervise, direct and perform.

Subdivision F of Sec. 17, prohibits the use for maintenance of funds which should go into the depreciation reserve to be diverted for other purposes, and the Governor found that such misuse occurred in his first finding under Charges Three (a) and Nine (b), in which charges the report and order of the Commissioners of July 10, 1918, in the Emergency Rate case was cited, wherein and whereby it appears that they called attention to the depletion of the depreciation reserve of the Public Service Railway Co. to an amount exceeding \$500,000, which was used to pay dividends. They deprecated this act, but to the time of the filing of the charges had not required the maintenance of the reserve fund as directed by the statute, and were, in this respect guilty, the Governor so found, of a violation of the statute.

The second finding, under Charge Five (a) was that there was unjust discrimination permitted as to the returns allowed public service subsidiaries, as distinguished from smaller companies, and unreasonable delay without valuation test in the increasing of the rates of the Public Service Railway Co.

Under the eighth finding, Charges Eight (m) and Eleven, unjust discrimination was charged and found in favor of the inhabitants of the municipality of Newark as against the inhabitants of other municipalities in the varying rate of fare permitted to be charged for carriage of school and other children, contrary to the provisions of Section 18 of the statute.

It was charged in Seventeen (a), (f), and by the Ninth finding found to be true that the Commissioners had failed to make recommendations to the Legislature for necessary supplements to the statute to carry out these purposes, as required by the statute itself, particularly with reference to comprehending within these terms the Public Service Corporation which claims exemption by reason of being, as it claims, a holding company and not a public utility.

The Fifteenth Charge and the Tenth Finding was that the money raised by bond issue for a terminal building in Newark was permitted to be diverted to working capital and not required to be restored thereto, contrary to the rules of the Board, which was found to be such neglect and misconduct on the part of the Commissioners as to justify the finding.

The Governor found in Finding Eleven that they had failed to act as an administrative body, as the court in the O'Brien case, pointed out, in violation of their duties, as by Charge One.

In his twelfth finding, under Charge Two, he found them guilty of employing biased experts, which was according to knowledge, as appears by the charges.

These specified findings alone consequent upon the charges in each case are sufficient, under the definitions set forth above, to justify the action of removing for neglect and misconduct within the legal meaning of those terms, as they are distinguishable from misdemeanor in office as applied to the impeachment process.

III.

The Statutory Power of Removal Conferred Upon the Governor Is Not an Exclusive Judicial Power Under the Constitution.

Section 2 of the Public Utility Law provides that the removal must be preceded by giving to the officer a copy of the charges against him and an opportunity of being publicly heard in person or by counsel in his own defense, on not less than ten days' notice.

The Constitution of this State, by Art. III, Sec. 1, provides that the powers of the government shall be divided into three distinct departments—the legislative, executive and judicial; and practically all of the State Constitutions contain a similar provision; and this clause provides that no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as therein expressly provided.

In Art. VI, par. 1, the judicial power is vested in the courts there enumerated, including, after reference to the court of last resort, a provision for a court for the trial of impeachment, the functions of which, in detail, are set forth in Sec. 3 of par. 1 of the same article.

The question for consideration is, has our fundamental law limited the power of removal from office, in cases like the one at bar, to the process of conviction after impeachment by the court provided for the purpose.

In the case of *Paul vs. Gloucester*, 50 *Law* 585, the Court of Errors said, page 610, that the clause in the Constitution as to the distribution of powers, relates only to those powers which by the Constitution itself are assigned to, or which, in their nature, pertain to one of these departments exclusively; and added that "there is a multitude of governmental duties which have never been and cannot possibly be performed,

either by the Legislature or by the Governor, and which are certainly not prescribed by the Constitution to the judiciary. Yet the Constitution vests all the legislative power, of which it here speaks, in the Senate and General Assembly, all the executive power in the Governor, and all the judicial power in the courts. The conclusion is inevitable that this multitude of duties was regarded as lying outside of what were termed the powers properly belonging to the executive, legislative and judicial departments, and was left by the Constitution to be discharged in such mode as the law should provide." Adding, that all three departments of government made contracts for the State and entered into other functions which were not exclusively pertinent to any department, but which, perhaps, in each case contain features pertaining to the functions of all or any other department.

That case was followed by the Court of Errors in the cases of *Ross vs. Freeholders*, 69 *Law* 293, and *Hudspeth vs. Swayze*, 85 *Law*, p. 595.

In the last-named case Chancellor Walker said that the clause of the Constitution in question merely forbade each department to encroach upon the powers properly belonging to another. "These powers," he said, "were those assigned under the general terms legislative, executive and judicial, and also those specifically delegated by the Constitution to the Senate and General Assembly, or to the Governor, or to the courts;" adding that the powers are not narrow and limited, but broad and comprehensive.

A number of States contain constitutional provisions authorizing removals from office by the Governor or by other officials, but the classification of the procedure has been variously denominated as judicial or executive and administrative. In our own State Chief Justice Beasley, in the *Pritchard Case*, in 7 *Vroom*, p. 101 (36 *Law*), held that the function was exclusively judicial. That was a *quo warranto* proceeding where the question of the right of Governor Parker to remove a

State officer without charges or hearing, because of conviction of crime, was under consideration. In that case, as was pointed out in the opinion, the statute which authorized the reorganization of a local city government did not authorize the executive to remove an official, and on advice of Attorney-General Gilchrist he did so because of the criminal conviction referred to. There was no express authority in the fundamental or statutory law authorizing the act of removal in this manner. But although there was no such explicit authority, and the court held, in effect, that because of it the removal had not taken place and judgment was therefore rendered for the officer, nevertheless the Chief Justice discussed the quality of the gubernatorial act for the purpose of demonstrating that it was a judicial function and not one which was properly exercisable by the executive department. He said that when we consider that under the English common law some of the offices under that government were held for life and others in fee, and that most of them have ever been regarded as property of great value, it would certainly be a matter of surprise if we found in a system in which all valuable interests are so jealously guarded, that franchises of such moment should be liable to divestment on the arbitrary judgment of the monarch, but outlined the method of procedure for the forfeiture of an office: citing *Blackstone*, 3 *Comm.*, Chap. 317, and 9 *Rep.* 96, as to the use of the writ of *scire facias*. The Chief Justice went further, however, and said that he was satisfied that there is not the least propriety in the assumption that the authority of our executive over public offices is at all comparable with that of the English king, and that the common law mode of procedure in the cases of official misbehavior is not such mode as is applicable to our political system. He said that the framework of the government of this State has been constructed into different departments and their boundaries accurately and plainly established and in no part of the instrument is the line of division between the re-

spective branches more clearly marked than between the powers of the executive and those of the judiciary, and that the whole judicial power, by Article VI, has been placed in the courts, and not in the executive, and that the decision of the forfeiture of an office was a judicial decision. He pointed to the impeachment power as a judicial power, as set forth in Article VI, Sec. 1. His conclusion was largely based upon the theory that while an office is not a vested right or a franchise, as under the English common law, yet nevertheless it is such a property right as would entitle one to removal by the judiciary by due process of law, under the constitutional clause that no person shall be deprived of life, liberty or property without such process.

The case at bar is entirely distinguishable from the Pritchard case. Since that decision there have been many rulings by this court and the Court of Errors, to the effect that removal from office for cause, after notice, is a judicial function, though such removal took place not by the adjudication of courts in the judicial department, but by the findings of tribunals provided for by statute, such as the Civil Service Act.

In *Bowlby v. Dover*, 68 *Law* 97 (39 *Vroom*), this Court said:

"Proceedings for the removal of officials under statutes entitling them to a hearing before they can be removed, are judicial in character, and in such cases persons to be affected by such official action are entitled to be heard in relation thereto before action is taken."

Citing *Stanley v. Passaic*, 31 *Vr.* 392; *Douglass v. Jersey City*, 24 *Vr.* 118.

This court has uniformly upheld the removals for just cause, after hearing, as a judicial function, but not in a sense that it is an exclusive judicial function within the definitions laid down in the case of *Paul v. Gloucester*, *supra*, and those following it.

In Illinois the Constitution, by Sec. 15, Art. 5, provides that "The Governor and all civil officers of the

State shall be liable to impeachment for any misdemeanor in office," which is a provision similar to that contained in our own Constitution, and the decision of the Supreme Court of Illinois in *Donahue v. County of Will*, 1881, 100 Ill. 94, p. 103, said:

"There is no provision in the Constitution which, in terms, prohibits or provides for the removal of the officers referred to for nonfeasance, misfeasance or malfeasance in office."

This was said in reference to a contention that the General Assembly were without authority to delegate the power to remove in the case in question. The Court cited cases where the same constitutional objections were urged and disallowed, and the result was that it was held that the removing from office under the statute in question was not a judicial act and might properly be performed by the grantee of the power, stating that whether an officer can be removed from office for misfeasance or malfeasance without a judicial sentence, would seem to be of little doubt; such procedure having been upheld by many respectable courts, referring to them.

In the case of *Gudden*, 171 N. Y. 529; 64 N. E. 451, it was said that the power to remove after "giving to such officer a copy of the charges against him and an opportunity of being heard in his defense, is executive and not judicial."

Judicial power was discussed in the case of *Territory of Dakota, ex rel. French, District Attorney v. Cox*, 6 Dak. 501, the Court saying: "What is judicial power? It cannot be brought within the ring fence of a definition. It is undoubtedly power to hear and determine, but this is not peculiar to a judicial office. Many of the acts of administrative and executive officers involve the exercise of the same power. Boards for the equalization of taxes, of public works, of county commissioners, township trustees, judges of election, viewers of roads, all in one form or another hear and determine

questions in the exercise of their functions more or less directly affecting private as well as public rights. It may be safely conceded that power to hear and determine rights of property and of persons between private parties is judicial and can only be conferred on the courts. *Merrill v. Sherburne*, 1 N. H. 199. But such a definition does not necessarily include this case. The incumbent of an office has not, under our system of government, any property in it. His right to exercise it is not based upon any contract or grant. It is conferred on him as a public trust, to be exercised for the benefit of the public. 5 N. E. 232. Such action by administrative or executive officers is not judicial in the sense that it belongs exclusively to the courts. It may be so far judicial that such an officer so exercising judgment and discretion in the determination of controverted questions of fact may be protected in an erroneous determination of matter before him, but not so far judicial that the matter is cognizable by the Courts only."

In *People ex rel, Clay v. Stewart*, 74 Mich 411, 11 Am. St. R. 644, the Court said that the Legislature, acting under constitutional power, was exercising a political and not a judicial function when it delegated the power of removal in the case in question to the executive department; adding that the power conferred is in its nature political and has reference exclusively to the polity of government, which would be inherently defective if no remedy of a summary nature could be had to remove from office a person who, after his election, had been convicted of crime, or who neglected his duty, or who was guilty of malversation in the administration of his office. The Court said that there can be no doubt that the removal of a person from his office for cause involves the exercise of judicial power, page 414, but the exercise of such judicial power did not constitute the removal an exclusive judicial function.

Leading cases to the effect that removals from office are not exclusively judicial when done after hearing for cause, will be found referred to in 23 *Am. and Eng. Encyc. of Laws*, 2d Ed. 428; *Wilcox v. People*, 90 Ill. 186; *Donahue v. Will County*, *supra*; *Lynch v. Chase*, 55 Kan. 367; *McCaster v. Herald*, 56 Kansas 231; 42 Pa. 697; *Keenan v. Perry*, 24 Tex. 255; *Murphy v. Webster*, 131 Mass. 482; *State ex. rel. Attorney-General v. Hawkins*, 44 Ohio St. 98; 5 N. E. 228.

In the last-named case, decided in 1886, as to the exercise of the power, the Supreme Court of Ohio said that the question as to whether the removal was judicial is not to be regarded as an entirely new question. That it undoubtedly is a power to hear and determine, but this is not peculiar to a judicial office. Citing many instances.

While the impeachment tribunal in Ohio is not classified under the decisions construing the constitution to be a judicial tribunal, yet the decision, in discussing the judicial function under its own merits, states that whether a power in a given instance ought to be assigned to the judicial department is ordinarily determinable from the nature of the subject to which the power relates, but that the hearing and determining of the controversy, though in fact a judicial power, is not necessarily the exercise of judicial power in the constitutional sense. The court said that a different view had been taken by some courts, notably the Supreme Court in this State in the Pritchard case, and in other cases there cited, in the States of Kentucky, Pennsylvania and Michigan, but said that these decisions were based upon the ground that an incumbent has a property in his office and that he cannot be deprived of his right without the judgment of a court; adding that this view finds support in the decisions of the common law, which regarded an office as a hereditament, but has no foundation whatever in a representative government like our own. Citing many cases to which the court is respectfully referred, as found on page 113 of the opinion.

The power was said to be *quasi* judicial in *Fox v. McDonald*, 101 Ala. 51, where the court said that the fact that certain powers and duties conferred by the legislature partake of a legislative, executive or judicial nature is not determinative of the department of the government by which such powers and duties are to be exercised, and, on page 66, added that the constitutional provision in regard to the distribution of the powers of government into three departments, and forbidding the exercise by an officer of one department of any act properly belonging to another, "was not intended to declare that every act pertaining to government and the regulation of the social and property rights of the citizen should be exercised exclusively by the legislative, executive or judicial department, or some member of it, according as the act possessed a legislative, executive or judicial character."

Many additional authorities that the exercise of the power of removal is not judicial will be found collated in 12 *Corpus Juris*, p. 809.

In *State, ex rel. Payne, v. District Court*, 53 Montana 350, 165 Pac. 296, the Supreme Court of Montana said:

"Proceedings for the removal of a public officer do not necessarily partake of the nature of a criminal prosecution. Indeed, the power to remove an unfaithful or negligent public official is not essentially a judicial power."

Adding that under the Montana constitution its exercise is left to the legislature itself or to such other authority as the legislature may designate, but the court nevertheless said that such is the general rule in the absence of any constitutional declaration upon the subject. Citing 29 Cyc. 1370, and cases elsewhere referred to in this brief.

In *Eichoff v. Charter Com. of City of Detroit*, 142 N. W. 746, the Supreme Court of Michigan said that under their constitution the legislature might provide for the removal of municipal officers, adding:

"It has certainly never been regarded in this State that the officer or body upon whom this power (of removal) is conferred acts in a purely political, administrative or legislative capacity. Such officer or body acts, and must of necessity act, in a *quasi* judicial capacity, and the method of procedure must be of a *quasi* judicial character."

And in *Lynch v. Chase*, 55 *Kansas* 367, at page 373, the Supreme Court of Kansas said:

"The decided weight of authority is that, while the proceeding to remove from office involves the examination of facts and the exercise of judgment and discretion by the executive officer, his action is *not judicial in the sense that it belongs exclusively to the courts.*"

Citing many cases, among which are those found cited herein.

The Pritchard case cited as its principal precedent by way of authority the case of *Page vs. Hardin*, reported in 8 *Ben. Monroe Reports* 648, *Etc.*, the opinion of which was written by Chief Justice Thomas A. Marshall of Kentucky in 1848. In that case Benjamin Hardin was appointed to the office of Secretary of State of Kentucky in 1845, by Governor Owsley, but on September 1, 1846, the same Governor declared the office vacant, because Mr. Hardin had, he declared, abandoned the office. The Governor, on the same occasion, filled the office which he had declared to be vacant.

The Court of Appeals said that Mr. Hardin had had no notice and hearing, and that he was not properly removable from office on declaration of its vacancy by the Governor, there having been in that case no statutory authority authorizing removals by the executive. The Court held that the facts did not make out a case of actual or legal abandonment, and that therefore there was no showing that the office was vacant, and said that therefore unless the Secretary of State held his office at the will or pleasure of the Governor, which was not

suggested by any one, and which the Court said was plainly contradicted by the terms of the creation of the office in the Constitution, or unless, under the Constitution, though holding his office during the term for which the Governor was elected, if he so long behaved himself well, he is removable by the Governor for cause, that is, on his judgment of misbehavior, we are satisfied that the office was not vacant by abandonment. The Court recited the modes of removal laid down in the Constitution of Kentucky, viz., impeachment for all civil officers for any misdemeanor in office, and judges and justices of the peace liable to removal for any reasonable ground not being sufficient ground of impeachment and the removal for breach of good behavior of clerks of courts by the judges of the Court of Appeals, and then the Court continued:

“These clauses laying down the general rule and the exceptions, seem to provide for the whole subject of removal from office for breach of good behavior, and designating special modes and tribunals for the performance of this function *would seem to exclude any other, so far, at least, as respects the officers who, by the Constitution itself, hold during good behavior.* And it might well be supposed that if it had been intended that the office of Secretary of State should be held subject to any different mode of proceeding by a different tribunal or officer, such intention would have been expressed as in the case of judges and clerks. *If it be conceded that the Constitution is not to be considered as prescribing exclusive modes and tribunals for the removal of officers, still the function of trial and judgment is essentially judicial, and the function of prescribing the modes of proceeding and the cases to which they shall apply, is legislative.* And it would seem, therefore, that any remaining power on the subject, should result rather

to the legislative and judicial departments, than to the executive, *except so far as the Legislature might refer the case of any particular officer to the action and judgment of the Governor, or to some other officer or tribunal.* Even under this view, there should, in the absence of legislation, be a strong and evident necessity arising on the face of the Constitution itself, to authorize the executive to exercise the power of trial, judgment and removal *as to officers holding under the Constitution by the tenure of good behavior, and, therefore, removable for breach of that condition."*

It will be noted by a careful study of the above case of *Page vs. Hardin*, that the Supreme Court of Kentucky excepted cases where the Legislature authorized the Governor to hear and remove after notice, and also seemed to incline to the view that under a constitutional provision as to constitutional officers holding under good behavior, under a tenure set out in the Constitution, power in such case might be given to the Governor to remove for cause on the breach of the condition, viz., the condition upon which the office was accepted; the breach being the breach of a condition subsequent, as is elsewhere commented upon in this brief. The reason that the Constitution of Kentucky, as construed in that case, was held to be exclusive as to its method of removal was because the Constitution there covered clearly other cases than those of impeachment offenses.

It clearly appears from the foregoing that Chief Justice Beasley, in the Pritchard case, took note of the exceptions referred to in the opinion in *Page vs. Hardin*, to the effect that the Legislature could designate authority to the Governor to conduct a hearing as to officers other than constitutional officers, because he said, in referring to the statute under discussion in the Pritchard case:

"By the statute in question, the executive is not given any supervision over these officials; all

the authority that it confers upon him is to fill the office in case of a vacancy. It imparts to him no faculty to declare judicially that such vacancy has occurred, and if such faculty exists, it must be as an inherent constituent of the executive office. I have not been able to perceive any intimation, not even the least, either in the constitution of this State (N. J.), its system of laws, or legal observances, that this right of superintendency over, or power of removal from, public office, *except in instances of statutory specification*, has been delegated to the executive head of the government." (36 *Law*, p. 111.)

And on page 112, the Court said, in effect, that the chief executive is without power to remove a subordinate whose title stands on the same level as his own, viz., from the people, unless such power of removal is expressly or by necessary implication, conferred by the law of our political system.

MICHIGAN CASES.

The case of *Dullam v. Wilson*, 53 *Mich.* 392, is cited together with *Page v. Hardin* and the *Pritchard Case*, supra, as the leading authority on this question. *Dullam v. Wilson* follows the two cases named as authoritative. In that case, which was decided in 1884, the opinion states that the Constitution of Michigan of 1835 vests no judicial power in the Governor. In 1846 a statute was passed containing a provision "that the Secretary of State, Auditor General and the State and county officers, except the State Treasurer and judges, may, for official misconduct or habitual willful neglect of duty, at any time during the recess of the Legislature, be removed and the vacancy supplied during such recess by the Governor."

In 1862 the Constitution of Michigan was amended by Art. 12, Sec. 8, which provided that the Governor, when the Legislature is not in session, shall have power to examine into the condition and administration of any public office, and the acts of any public officer, elective or appointed, and to remove such from office for gross neglect of duty or for corrupt conduct in office, or any other misfeasance or malfeasance therein, either of the following State officers: the Attorney General, * * * or any other officer of the State except legislative and judicial, elective or appointed, and to appoint a successor for the remainder of their respective unexpired terms of office, and report the causes of such removal to the Legislature at its next session.

In 1883 the Governor removed one of the trustees of the Michigan Institution for Educating the Deaf, the Dumb and the Blind, but the removal was effectuated under the statute above recited, passed as stated, before the amendment to the Constitution, and the Court held that the statute was unconstitutional. Nor did the act of removal derive any force from the constitutional amendment by reason of its having been attempted by the force of the statute of 1846. In that case there was no hearing after charges and notice, and was in this respect, similar to the case of *Page v. Hardin* and the *Pritchard* case. It was also similar to those cases in that the statute derived no force of authority from express words in the constitution at the time it was enacted. The removal was set aside, as stated in the opinion, *first and principally* because the officer was entitled to be heard in his own defense before removal for specified causes. The Court cited many cases which upheld the removal after notice and hearing, all of which were, as the opinion stated, to the effect that the action of the Governor in the case under consideration was not a proper exercise of the power conferred on him, that is, undertaking a removal without notice and hearing. The determination in that case that removals from office are

judicial, following *Page v. Hardin*, was based upon a right to property in the office, and that due process of law in respect thereto was only by the exclusive action of courts. *The Michigan Constitution contained full and express provisions for removing local officers. It contained none for removing State officers, except by impeachment, and it confined the judgment, then, to removal, saving the ordinary criminal remedies for the remainder of the punishment, which exclusion of express provisions for removing State officers, as in the case of local officers, gives color to the theory that such provisions would have been included in the Constitution had it been intended that State officers were to be removed in the manner of local officers; whereas, there is no such particularity as to removal of officers in our Constitution.*

The Court said, on page 420 of the opinion:

"There is no foundation in English law for any removal from public office which is not held at will, without a trial by jury, except where Parliament has provided some other mode of trial. A scire facias was necessary to enforce a forfeiture of office held by patent—where the grounds falls short of criminality and is a breach of some express or implied condition."

And the Court added that a misdemeanor is also a ground of forfeiture, and pendency of indictment was ground for an information.

From this last statement it is to be observed that the Court had in mind that there were other methods than impeachment in England for the removal of officers, expressly excepting cases where removal was provided for by Parliament. While it is true that the Parliament is not restricted and confined by a written Constitution, and it is clear that our written Constitution contains no express words authorizing removals by the Executive Department from office, nevertheless there is no warrant for so construing that instrument

in the light of the previous practice in England as to parliamentary removals under an act of Parliament rather than by impeachment, or the other methods stated, and there is nothing to preclude the Executive of this State, under statutory authority, from carrying out removals. And we submit that Chief Justice Beasley, in the *Pritchard* case, and Chief Justice Thomas A. Marshall, in *Page v. Hardin*, and the Supreme Court of Michigan, in *Dudlam v. Wilson*, all excepted from their conclusions those case in which a statutory power of removal was authorized, except that in the last-named case the Constitution of Michigan was so framed as to more clearly express the idea of exclusion of any other method as to State officers, by reason of its having provided another method of removal in that instrument for local officers. It is settled that in the State of New Jersey removals for cause may be carried out, after notice and hearing, by subordinate tribunals in the performance of administrative functions, and that, as stated in the *Bowelby* case, 39 *Vr.* 97 (68 *Law*) and other cases cited elsewhere in this brief, together with that case, the action is judicial in character, but not exclusively so as defined in the cases of *Paul v. Gloucester*, *Ross v. Freeholders*, and *Swayze v. Hudspeth*, elsewhere quoted from herein. In fact, in *People v. Stuart*, 74 *Mich.* 411, the power of removal by the Governor, it was therein stated, involves the exercise of judicial power, but is, in its nature, political.

Another case, and a later one, in Michigan, discusses this question as to the distinction, or the lack of it, between removals by inferior bodies of local or subordinate officers and State officers. In that case, *Fuller v. Ellis*, reported in 57 *N. W.* 33, and decided in 1893, or nine years later than *Dudlam v. Wilson*, the Supreme Court of Michigan, after reciting the constitutional amendment of 1862, above referred to, authorizing removals by the Governor during the recess of the Legislature, said:

"The constitutionality of the act giving power of removal to the Board of Control (over State institutions, similar to our Board of Institutions and Agencies), is also attacked under section two, Article 3, of the Constitution, which divides the powers of government. This is upon the theory that the right to the office where removal is sought for cause can only be tried by some officer belonging to the judicial department under the Constitution. *This subject has been discussed in the case of Dullam v. Wilson, and mentioned in People v. Stuart, but not in any other case was it necessary to decide the question.* It needs no argument to show that constitutional rights cannot depend upon the importance of the office. If it be once admitted that incumbents of public offices created by the Legislature have the constitutional right to have the question of removal determined by the judicial department, the rule must extend to every public officer in the State who is not removed from the operation of the rule by the Constitution itself. These subordinate officers are elected or appointed under laws made by the Legislature which are subject to alteration or repeal at the will of the Legislature, with the Governor's approval, or without it, if a majority of two-thirds can be obtained; and the Legislature may vacate the office directly, as was done by the act of 1891, which was repealed by that in question. Thus under this contention we have a peculiar condition of things, viz., under the settled law the Legislature may remove officers at will, but may only delegate the power to remove for cause to the judicial department. Again, the Legislature has power to provide for State institutions and the election of their officers. It may give the boards of trustees power of appointment and removal of subordinates at will,

but under respondent's contentions a legitimate limitation upon the power of removal requiring removals to be reasonable and not arbitrary, results in the deprivation of the board of all power of removal, upon the theory that the act becomes purely judicial, being for cause. To make this more apparent: the Legislature may remove subordinates at will. It may authorize the Board of Control to do the same, and without notice of reason. But if it requires removals to be heard by the Board only when there is good reason for it, it confers no power of removal at all. Such is the absurd result that is reached when we assume that all removals are acts of such a judicial nature that only the constitutional judiciary can perform them.

"* * * The State (Michigan) has existed nearly sixty years, during all of which time officers and boards have been created with power of appointing and removing subordinates, sometimes at will or pleasure; sometimes with concurrence of others; sometimes for cause; before it was discovered that the constitutional provision that 'no person belonging to one branch of the government shall perform the functions of either of the others' was the limitation of the power of the Legislature in these matters. * * * And to the proposition that removing boards perform acts which are judicial in their nature we readily assent. They must hear and determine when the power is limited to removals for cause. So must boards of review, auditing boards, highway and drain officers, pardon boards, and, in fact, nearly every officer who has duties to perform."

In this connection the Court said that these acts of inferior tribunals are reviewable in the courts, and continued:

"None of them, however, belong to the judicial department of government, nor can they be called judicial officers, though all perform acts in their nature judicial. Their acts are administrative. There are many cases which hold that removals from office for cause are acts of a judicial nature. There are others which hold they can be performed by none but judicial officers. These last are based upon the theory that the incumbent of an office has rights thereto and interests therein, and that removals for cause necessarily involve ignominy and discredit, which forbid the exercise of the power of removal by officers not judicial. So far as applied to removals for the causes mentioned in the Constitution (Michigan—misconduct in office, crimes and misdemeanors), we might for the purpose of this case safely admit the latter, though we reserve the question. As to interest in and right to an office not constitutional in its character, the weight of authority, including Michigan cases, is to the effect that a public office is a trust; that the public interest and rights are paramount; and that all offices not constitutional are taken subject to the vicissitudes of legislative action, among which are removals by the appointing power, whether such power may be exercised arbitrarily or upon investigation and discovery of adequate cause." Citing *Frey v. Mich.*, 36 N. Y. 184.

OKLAHOMA CASES.

There are important decisions as to this matter in the State of Oklahoma. The case which is much appreciated by the Informant-Appellee is that of *Cameron vs. Parker*, decided in 1894, and reported in 2

Okla. 277, 38 *Pac.* 14. The opinion was rendered by the Supreme Court of the Territory. This opinion discussed at great length the use of the writ of mandamus where a prima facie title had been shown and approved of the same, but said that mandamus would not lie to try the title to public office. The Court then said that when the action of a Governor in exercising the power of removal was taken under a statute, that it was not reviewable in the courts, the Governor being the exclusive judge. The Court further held that the bill of rights was not violated in giving power to the Governor to remove his Superintendent of Public Works, after a hearing, for incompetency, neglect of duty or malfeasance in office, without a trial in a court of law, there being no such thing as title or property in a public office within the meaning of the section referring to the protection by due process of law, of life, liberty or property. It held that the power conferred upon the Governor by the statute of 1893, Sec. 5976, is administrative and not judicial, and not in conflict with the organic act conferring judicial power on the courts of the Territory. It was held that no one has a right of property in an office, such as would bar the Executive from removing him for cause presented, where the statute confers that power, and went on to say that even without a statute an executive officer may exercise the power of removal unless expressly prohibited by the power of appointment, for the power of appointment under the law carries with it power of removal under the law. After stating that there was no property right, within the meaning of the bill of rights, in an office, and distinguishing the cases holding that removal must be carried out by a court, because such cases had been decided on the theory that an office is a hereditament, the Court said that there is no contract between the government and the office holder. He is a mere agent in the office for the public good, not for his own. This case is elsewhere cited in our brief. The pur-

pose in referring to it in this connection is because the Defendants-Appellants have referred to the case of *Christy vs. King Fisher*, 13 Okla. 586, 76 Pac. 135, decided in 1904 by the Supreme Court of the Territory of Oklahoma, which they refer to as one repudiating the prior case of *Cameron vs. Parker*, decided in 1894, ten years earlier, because in the Christy case it was said that while the Legislature had power to authorize summary removals by the mayor and city council of any elective or appointive city officer, without notice or hearing, that it had no power to extend to them the right to remove such officer where a hearing was required, because the removal must be for cause, on the ground that such hearing was judicial in its nature, and therefore was an exclusive property of the courts under the organic act of Congress constituting the Territory of Oklahoma, 13 Okla., p. 593.

The fallacy of this reasoning, it is submitted, has already been made apparent in the case of *Fuller vs. Ellis*, of Michigan, above cited from extensively. But it is submitted that the *Christy vs. King Fisher* case cannot be followed in its reasoning by this Court. The opinion cited authorities from text books, to the effect that a hearing leading to removal for cause was judicial in its nature, and a study of these excerpts referred to will disclose the fact that this by no means authorizes the conclusion that such judicial proceedings are exclusively the function of the courts, but are judicial in the sense used in the cases of the removal of officers, as has been decided in our New Jersey courts, elsewhere referred to. The Court cited the case of *Mayor vs. Nichols*, 79 N. Y., as authority for the conclusion that the proceedings are judicial in their nature where notice and a hearing are had and removal is made for cause, and many other cases, among which are the *Pritchard* case and *Page vs. Hardin*. The Court said, as is succinctly stated at the end of the third syllabus,

“The nature of the power is not determined from the mere removal of the officer, but from

the procedure by which his removal is to be effected."

adding, page 603:

"Though an office is not property, because the right to enjoy the honor and emoluments of an office within the limitations stated in the opinion itself are clearly as sacred, it must be conceded that wherever one is entitled to enjoy any right, even though it be not property, he may invoke the aid of the judicial power of the State to protect him in the enjoyment of the same."

and added that as a rule it is the only power that can afford him relief; which theory we have discussed under the heading that removals of the defendants in the case at bar are not in conflict with the bill of rights. The Oklahoma Court also said, page 603, "that it has been repeatedly held that the power to appoint to an office, unless restricted by statute, carries with it the inherent right to remove, and we readily assent to this doctrine, that such removal is not judicial in any sense, but under a statute like ours, for the removal for cause of a city marshal, the officer is entitled to notice and an opportunity to introduce evidence in his defense, after a case has been made out against him, and to be represented by counsel; and the hearing of this evidence, weighing the same and pronouncement of judgment of guilty or not guilty is the exercise of judicial power which cannot be conferred upon a city council in this territory, and without a provision for review in or appeal to the courts of the territory."

It is submitted that the decision was based upon the theory that it is not the final act which determines the nature of the proceeding, but it is the procedure by which the final act is consummated, which eventually determines the nature of the proceeding, and that this is the sole ground upon which the territorial court overruled, by implication, though not in express words, that is by reference to the case of *Cameron v. Parker*, the

doctrine laid down in that case, that the act of removal is an administrative act.

In 1908 the Supreme Court of the United States in the case of *Prentice v. Atlantic Coast Line*, 211 U. S. 210, p. 227, by Mr. Justice Holmes, said:

"The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law, he must know or discover the facts that establish the law. So where the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case."

In *Louisville and Nashville R. R. Co. v. Garrett*, 231 U. S., on page 307, the same Court said:

"The contention is that before the Commissioner makes such an order it is required to exercise judicial functions. It is first to determine whether the carrier has been exacting more than his just and reasonable rate; it is to give notice and a hearing; it is to 'hear such statements, arguments or evidence offered by the parties' as it may deem relevant; and it is, in case it determines that the carrier is guilty of extortion, to prescribe the just and reasonable rate. Still, the hearing and determination viewed as prerequisite to the fixing of rates are merely preliminary to the legislative act. To this act the entire proceeding led; and it was the consequence which gave to the proceeding its distinctive character. Very properly it might be said necessarily, then, without the express command of the statute, would the Commission ascertain whether the former or existing rate was unreasonable before it fixed a different rate, and in such an inquiry for the purpose of prescribing a rule for the future there would be no invasion of the province of the judicial department. Even where it is essential

to maintain strictly the distinction between the judicial and other branches of the government, it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial powers. * * * It is 'the nature of the final act' that determines the nature of the previous inquiry."

That the above must be the correct rule is clear, as is instanced in the case of the levying of a tax and a hearing of the same in review by a taxing board. Judicial functions are used in the inquiry leading to the conclusion which determines the amount of the tax and who shall pay it. Yet the final act, the imposition of the tax, determines the nature of the proceeding.

It is therefore submitted that the case of *Christy vs. King Fisher* in Oklahoma is not based in its conclusions as to the nature of the function of removal of public officers' with reasoning such as may be used as precedent or as a guide by this Court. This Court is not bound by the decision of the Oklahoma Court in any case, and especially for the reason that it is a later case than that of *Cameron vs. Parker*, in the same Territory, but only **turns to these cases in order** that the reasoning which led to the decision may be taken when useful and proper; and it is submitted that the reasoning in the case of *Cameron vs. Parker*, for the reasons stated, leads to a proper conclusion of law.

In the State of Oklahoma, which ceased to be a Territory in 1907, the Supreme Court of the State, which was by its Constitution and enabling act the successor of the Supreme Court of the Territory, in the case of *State vs. Chaney*, decided in 1909, 23 Okla. 788, 796, said that the case of *Christy vs. King Fisher* made no reference to the prior case of *Cameron vs. Parker*, which cited and approved the case of

Territory vs. Cox, 6 *Dakota* 501, and related to an appointive officer and did not involve Section 439 of the organic act, as reported in Wilson's Revision and Annotated Statutes of 1903. Section 439 is found in Section 626, State of Oklahoma, 1893 Statutes, and relates to governments of cities of the first class, where it is provided that upon complaint the mayor, or president or acting president of the council when any marshal or policeman has been intoxicated, or has been gambling, or has abused the power of his office, or has been guilty of a brutal or indecent act, etc. * * * the council shall carefully and honestly inquire as to the truth of such complaint, and if they find the accused guilty, they shall forthwith, by order to be entered in their journal, remove him from office, and he shall not be again appointed to such office, unless as therein provided.

The Supreme Court of the State of Oklahoma elected to follow the case of *Christy vs. King Fisher*, but added that it was not essential, because of the distinguishing features of the Constitution in the case of *Cameron vs. Parker*, to determine whether or not the latter case should be followed, although it did say that because it preferred the authorities cited in the case of *Christy vs. King Fisher*, it would follow the reasoning in that case which as stated, was based upon the doctrine that the procedure and not the final act determines the nature of the proceeding, which we submit is a fallacy.

For the reasons stated, the *Cameron vs. Parker* case is elsewhere cited authoritatively in this brief and should be, it is contended, taken as laying down the proper rule for the guidance of this Court.

The power of removal where the term is not stated, being incident to the power to appoint, and such having been the rule at the common law, clearly classifies the removing function as an administrative function, and that it is only not so unless the provision of the bill of rights would interfere in cases of removal for cause when the tenure is for a time stated, which questions

are otherwise discussed under other headings of this brief.

We have previously under the title of Neglect of Duty and Misconduct in Office, as related to the charges and findings, referred to and cited the case of *Parsons vs. The United States*, 167 U. S. 324, 329, showing that by legislative construction and acquiescence therein by the courts, the President has power of removal which is incident to his power to appoint, aside from the impeachment clause as to removals named in the Constitution or even statutory removals. Such construction has taken place and become settled in the United States prior to the passage of our Constitution in 1787, having been settled by the first Congress.

The debates in question are contained in 1 Annals of Congress, pages 455 to 585. That case in its recitals and the statements in opinions filed by senators of the United States sitting as judges at the impeachment trial of Andrew Johnson, President of the United States, are pertinent.

The Honorable Garret Davis said that it was of an executive nature, as follows:

The power of appointment to office exists necessarily in all governments, and is of an executive nature; and if the Constitution (U. S.) had contained no particular provision on this subject its language, "the executive power shall be vested in a President of the United States of America," would have imported the power of appointing to office, and by implication would have vested it wholly in the President. * * * But the power of removal from office also, as necessarily as the power of appointment, exists in all governments, and is no less an executive power. It is located somewhere in the government of the United States, but being an executive power, it cannot be in Congress, for legislative powers only are vested in that body. It is not established or vested by any express or special provision of the Constitution, but is by the general language:

"The executive power shall be vested in a President of the United States of America."

The Constitution leaves the power of removal just as this general provision vests it, with the President alone. * * *

The power of removal and the power of appointment to office, though both executive, are in their nature distinct and independent of each other—one, the power of appointment, was treated specially and separately from the other in the Constitution, it associating the Senate with the President in its exercise. But for this particular regulation of the power of appointment, it is most probable that no question as to the other distinct power of removal from office would ever have been made; and that all would have silently conceded that both powers being executive in their character, and all the executive power of the government having been vested by the Constitution in the President, they properly appertain to him alone, and he would never have been challenged in the sole and exclusive exercise of either. But however that may be, the truth of this proposition cannot be successfully controverted; the provision of the Constitution associating the Senate with the President in the power of *appointment*, does not invest it with the same, or any connection with the power of *removal*. * * *

But the whole subject of the power of removal from office came up for consideration in the First Congress, on the organization of the Department of Foreign Affairs, in 1789, and elicited a debate of great ability among the ablest men of that body, many of whom had been members of the Convention which framed the Constitution. Congress was divided on the subject, but a majority of both Houses sustained the position that the Constitution conferred on the President the power to remove from office. * * * The supporters of the exclusive power of the President were opposed to any language being used in the act under discussion that

seemed to confer this power on the President, and its opponents accepted the language that conceded and recognized the President's power of removal without expressly deducing it from the Constitution. * * *

From that time every President has claimed and exercised the sole power of removal at all times as an executive power conferred by the Constitution. The great commentators on it, Kent, Story and Rawle, have treated this power as belonging to the President alone by the provisions and effect of the Constitution itself, settled by the acts of Congress of 1789, the uniform and unchallenged practice of the government, and the general acquiescence of the country. The Supreme Court has repeatedly, and without doubt or hesitation, recognized it as an established or constitutional principle; and Chief Justice Marshall many times in his opinions refers to it as he does to the other and unquestioned powers of the President. Hamilton and Madison were among its great authors and firm defenders; it was conceded to be a settled principle by Clay, Calhoun, Benton, Wright, Clayton, and all the statesmen of America down to the passage of the Civil Rights bill; and Mr. Webster maintained, adhered to it and advocated its exercise, while the Senate was in session and at all times, as Secretary of State under President Tyler. No attempt has ever been before made to attest or qualify its unconditional exercise by the President, as well when the Senate was in session as when it was not. The reason of America, guided by principle, authority and experience, was unwilling to divest, unsettle or change this presidential power by act of Congress or alteration of the Constitution because of being satisfied that it was essentially of the nature of an executive power *and absolutely necessary* to enable the President to perform his greatest duty, to see that the laws be faithfully executed. If a controverted constitutional question can ever be settled, the power of the President to remove from office at his own will has been beyond further legitimate question.

Opinion of Hon. Garret Davis, Senator of the United States, at the Impeachment Trial of Andrew Johnson, President of the United States.

Suppl. to Cong. Globe 2 S. of 40th Cong. 1868, p. 439.

The Honorable William Fessenden also said, in the same connection:

It was noticed by them (Members of First Cong.) that the only provision which touched in express terms upon the subject of removals from office was found in the clause which related to impeachment; and it was contended that, consequently, there was no other mode of removal. This idea, however, found no favor at that time, and seems never since to have been entertained. It is quite obvious that, as such a construction would lead to a life tenure of office, a supposition at war with the nature of our government, and must of necessity involve insuperable difficulties in the conduct of affairs, it could not be entertained.

But it was equally obvious that a power of removal must be found somewhere, and it was not expressly given, except in the impeachment clause, it must exist among the implied powers of the Constitution. It was conceded by all to be in its nature an executive power; and while some, and among them Mr. Madison, contended that it belonged to the President alone, because he alone was vested with the executive power, and, from the nature of his obligations to execute the law and to defend the Constitution, ought to have the control of his subordinates, others thought that he could only "appoint" officers "by and with the advice and consent of the Senate," the same advice and consent should be required to authorize their removal. The first of these constructions finally prevailed, as those who have read the debates of that period well know. This was understood and avowed at the time to be a legislative construction of the Constitution by which

the power of removal from office was recognized as exclusively vested in the President.

Opinion of Hon. William Fessenden, Senator of the United States.

Impeachment Trial of Andrew Johnson, President of the United States.

Suppl. to Cong. Globe 2d Sess. of 40th Cong. 1868, p. 453.

The Honorable Charles R. Buckalew also said in his opinion:

As a constitutional question, the executive power to remove from office may be placed upon those two provisions of the Constitution of the United States which declare that *the executive power of the government shall be vested in the President*, and that *he shall take care that the laws be faithfully executed*. The power to remove being executive in its nature, and its exercise upon fit occasions being necessary to the due execution of the laws, it is insisted that it is vested in the President by these provisions of the Constitution. And such was the decision of Congress after full debate in 1789.

Opinion of Hon. Charles R. Buckalew, Senator of the United States.

Impeachment Trial of Andrew Johnson, President of the United States.

Suppl. to Cong. Globe 2d Sess. 40th Cong. 1868, p. 510.

It is submitted that the weight of authority clearly classifies removals from office as executive functions and that the mere fact of judicial procedure in arriving at a removal for cause does not change the nature of the proceeding. The power to compel attendance of witnesses was made the subject of discussion in the matter of *Fenton*, 109 N. Y. Supp. 139 (1908). In the case of *Sears, Roebuck and Company v. Federal Trade Commission*, 258 Federal Reporter 312 (1919), the

United States Circuit Court of Appeals said with respect to the character of the case of the Federal Trade Commission on appeal from one of its orders stopping unfair methods of competition in commerce, that if the act be counted quasi-judicial on account of form with respect to power, it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of a court and is enforceable by execution or other writ of court.

It would therefore seem to be a more logical and legal conclusion to reach that where power of removal for cause is given to executive or administrative bodies, such exercise being inherently an executive function is not changed by reason of the judicial form used to exercise the executive power and that where such boards in this State have been endowed with such power they are not constituted courts for that particular purpose having in themselves or about them no other evidence of a court, but are merely administrative bodies acting judicially by the exercise of discretion for the purpose of effectuating removals in the execution of the laws with due process and a fair trial, and it is submitted that the difficulty in this matter is set forth in the cases of *Page v. Hardin*, *Dullam v. Wilson*, the *Pritchard* case and other cases, as due to the fact that the removals were admitted to be made without notice and a hearing where no such authority was expressly conferred either by the Constitution in the case of constitutional officers or by any statute in the case of statutory officials.

IV.

The Procedure to Remove Is Not in Conflict With the Bill of Rights.

In the case of *Donahue v. Will County*, 100 Ill. 94, the Supreme Court of Illinois said:

"The clause in the Bill of Rights that no person shall be deprived of life, liberty or property without due process of law is not infringed by a statute giving a county board power to remove a county treasurer from office through nonfeasance or malfeasance in office without a trial in a court of law, there being no such thing as title of property in a public office, within the meaning of that provision."

On page 104 it was said that the terms of office are fixed with a view to utility and convenience and not for the purpose of granting emoluments during that period to the officeholder; supported by *Connor v. Mayor of New York*, 1 *Seld.* 285. The Illinois Supreme Court said:

"The prospective salary or other emolument of a public office are not property of the officer, nor the property of the State. They are not property at all. They are like daily wages unearned, and which may never be earned. The incumbent may die or resign, and his place be filled and the wages be earned by another. The right to the compensation rose out of the rendition of services and not out of any contract between the government and the officer that the services shall be rendered by him."

In the case of *Moore v. Strickling* (1900), 50 *L. R. A.* 279, the question of the right of an incumbent to an office was thoroughly discussed and the Supreme Court of Appeals of West Virginia distinguished between common law offices in England and the right to office in this country. The Court said that offices created by statute confer no life estate or irrevocable tenure unless the statute so provides, and cited the seventeenth section of *Throop on Public Officers* to the effect that no office in the United States is a hereditament, but in some cases an office or the right to exercise an office is styled property in an absolute and unqualified sense, and it

has been said that the right to exercise an office is as much a species of property as any other thing capable of possession, but the court added, with respect to this remark, that a learned judge says it was rather a figure of speech than a judgment determining an office to be property. It was a strong mode of expressing the right which one elected to an office has to hold and enjoy it against all intruders and unfounded claims, which is as perfect a right, beyond doubt, as the title of any individual to his property, real and personal, but the nature of that right and its liability to control by legislative action is quite a different thing.

In the case of *State, ex rel. Attorney-General, v. Davis*, 44 Mo. 129, the petitioner claimed to have been ousted unlawfully from the office of circuit attorney, and made his contention upon the doctrine that he had a vested interest and private right of property in the office, and the court said, on page 131:

"This is not true of offices of this description in this country. They are held neither by grant nor contract. The mere legislative office is always subject to be controlled, modified or repealed by the body creating it. In England offices are considered incorporeal hereditaments, grantable by the crown and the subject has vested or private interests. Not so in the American States. They are not held by grant or contract, nor has any person a private property or vested interest in them, and they are therefore liable to such modifications and changes as the law-making power may deem it advisable to enact."

Citing 3 *Kents Com.* 11 Ed. 454, *Note C and cases.*

"An appointment to and acceptance of an office is not a contract. Neither the office nor its emoluments are property, and it is competent for the legislative department of the government to remove the incumbent from of-

fice before the expiration of the term for which he was appointed or elected unless such legislation is interdicted by force of some constitutional prescription "

Kenny vs. Hudspeth, 59 N. J. L. 320.

Hoboken vs. Gear, 27 L. 265.

Stuhr vs. Curran, 44 L. 181.

Uffert vs. Vogt, 65 L. 377.

Ross vs. Freeholders, 90 L. 522.

DUE PROCESS OF LAW.

In *Lynch vs. Chase* (1895), 40 Pac. 666, the Supreme Court of Kansas said, at page 667 :

"The theory that a removal cannot be effected without a judicial trial and upon judgment of the judicial tribunal only prevails where it is regarded that the office is a hereditament or one in which the officer has a property or vested right which cannot be disputed.

* * * In the absence of a constitutional limitation the legislature has ample power to protect the public by providing a speedy and effective method for ridding the public service of officers who are incompetent, irresponsible or dishonest and to that end may prescribe the grounds which will operate as a forfeiture and provide what officer or tribunal shall determine the fact."

Again at page 669, the court said that the procedure (which was summary in that case) "is not like a common law trial nor is the same precision and accuracy required as in a trial before a court," citing, among others, the case of *People vs. Board of Police Commissioners*, 98 N. Y. 332.

In *Ekern vs. McGovern*, 154 Wis. 157, the Supreme Court of that State in 1913 said, at page 240 :

"What is due process of law? There is nothing very technical about it when we view the subject broadly. Due process of law means, in brief, the law of the land—including the unwritten law. It is, simply, that which must be followed in depriving any one of anything which is his to enjoy until he shall have been divested thereof by and according to the law of his country. Whether the proceedings relate to liberty or property, in the technical sense, and be of a strictly judicial nature, or to mere privilege, immunity, status, or anything else of value, which commonly are of a *quasi* judicial nature, incidental to or as a part of administrative authority, and reviewable by courts as to jurisdictional matters, or, of a purely ministerial nature where the thing is a mere creature of the law granted upon condition of being so dealt with, due process of law pervades and rules them all.

"The mistake has influenced some courts, that due process of law calls for the interference of a court—judicial proceedings, in the technical sense, and therefore that it only appertains to property in the sense of things of absolute ownership—things which may be bought and sold and passed by will or inheritance. By or according to the law of the land covers the whole field—everything appertaining to right is to be dealt with according to law—administrative power, such with the concomitant of *quasi* judicial authority, legislative methods, judicial power in the technical sense—each in its proper sphere is due process of law."

and cited the case of *Kennard vs. Louisiana*, 92 U. S. 480, 481, to the effect that due process of law is "due course of legal proceedings according to the rules and forms which have been established for the protection of private rights." The Wisconsin Supreme Court said

it was not doubted in the Louisiana case that the right to an office not terminable at the pleasure of some legislative agency is within the protection of the fundamental law and the methods established in the common law or expressly by statute; including the right of a fair hearing according to the principles of natural justice. The general effect of the decision in the Louisiana case was in harmony with the authorities in general, to the effect that due process of law contemplates legal proceedings of the sort provided by the unwritten law, in case of there being no abrogation thereof by written law, but not necessarily confined to proceedings in courts.

The case of *Attorney-General ex rel. Rich, vs. Jochim*, 99 Mich. 358; 58 N. W. 611, was cited, where the Michigan Court in effect said: "If one accept office from which by the law of the land he is subject to be removed in any particular way, then deprivation that way is due process of law. If he takes an office which is in the power of the legislature to abolish and he is thereby deprived of it, his removal is by due process of law."

In the case of *Ex parte Wall*, 107 U. S. 265, the Supreme Court said, at page 289:

"It is a mistaken idea that due process of law requires a plenary suit and trial by jury, in all cases, where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge, on a writ of *habeas corpus*, using affidavits or depositions for proofs, where facts are to be established. Assessments for damages and benefits occasioned by public improvements are usually made by commissioners in a summary way. Conflicting claims of creditors amounting to thousands of dollars, are often settled by the courts on affidavits or depositions alone. And the courts of chancery, bankruptcy, probate and admiralty administer immense fields of juris-

diction without trial by jury. In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the Dartmouth College case: "By the law of the land is more clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."' ' *Cooley's Const. Lim.* 353."

Mr. Justice Swayze, in the *Harvard Law Review*, Vol. 26, p. 1, on page 24, &c., in discussing due process of law, said: "The decision that due process of law does not necessarily mean judicial process becomes of increasing importance with the increasing complexity of administrative work and the necessity of leaving the final decision of many questions to administrative officers. The decisions of executive and administrative officers acting within powers expressly conferred by Congress are due process of law. Our immigration laws present a striking illustration. The power to exclude aliens is a power affecting international relations, and vested in the political department of the government, to be regulated by treaty or by act of Congress and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute or is required by the paramount law of the Constitution to intervene. The jurisdictional fact in cases under the immigration acts is that the person concerned is an alien. The existence of that fundamental jurisdictional fact must be determined by some tribunal; it might have been decided that in the last resort this question was

for the courts; it was, however, held that Congress has the power to commit the final decision of the question to administrative officers. The importance of the result is shown by contrast with the decisions in rate cases that the determinations of administrative bodies are subject to judicial control. The consequence is that in a probable case the right of a citizen to his liberty and to remain in the country of his birth may be finally determined by an executive officer, and even the writ of *habeas corpus* will afford him no redress."

Mr. Justice Swayze concluded his discussion of this subject on page 29 by quoting from Chief Justice White in the case of *American Land Company v. Zeiss*, 219 U. S. 47, 66, decided in 1910, to the effect that "due process of law does not operate to deprive the States of their lawful power and of the right in the exercise of such power to resort to reasonable methods inherently belonging to the power exerted. On the contrary, the provisions of the due-process clause only restrain those arbitrary and unreasonable exertions of power which are not really within lawful State power since they are so unreasonable and unjust as to impair or destroy fundamental rights."

With reference to this method of procedure, the Supreme Court of Wisconsin in *Ekern v. McGovern*, 154 Wis. 157, cited *Throop on Public Officers* that the "rule is that where an officer holds his office for a certain number of years, if he shall so long behave himself well, he cannot be removed, even for misbehavior, without notice and a hearing. So where he is appointed for a fixed term, and removable only for cause, he can be removed only upon charges, notice, and an opportunity to be heard." *Throop*, section 364. Such is due process of law, the Court said, and cited authorities to be found supporting the determination on page 245 of the opinion in that case.

To the same effect is *Wulzen v. Bd. of Supervisors*, 101 Cal. 15; 40 Am. Stat. Reports 17; *Devault v.*

Mayor of Camden, 48 N. J. L. 433; *Ayres v. Newark*, 49 N. J. L. 170.

In discussing a right to an office as being property, the Court in *Ekern v. McGovern*, 154 Wis. 157, at page 259, uses the following language: "That it (an office) is not property in the sense of the right thereto being protected by the guaranty against deprivation of property without just compensation may be freely admitted. That it is a right held upon condition subsequent, may be freely admitted. Why was not the right to deprive one of an office referred to that condition—which was a perfectly logical reason—instead of to the illogical one that it is not a property right in any sense? In many jurisdictions it is found that the right has been at times spoken of as property, and at others as not property. Many of the citations made to support the position of the non-property idea do not deal with the matter at all, as for example, we find *State, ex rel Kennedy v. McGarry*, 21 Wis. 496, and *State ex rel Willis v. Price*, 45 Wis. 610, cited over and over again. They do not mention the matter, and when rightly understood they have not the remotest bearing thereon. They are merely to the effect that a legislative office is subject to be taken away according to the conditions inhering in the right when it was bestowed and accepted.

That is the logical basis for all to rest upon. Subject to termination of the right by due process of law, it is property. In view of the foregoing it seems best that the broad view of the terms "liberty" and "property" as it must have been entertained in the beginning, should prevail, instead of restricting it for the purpose of supporting the idea of control over legislative office; which needs no support but the simple one that the person who takes such a thing at the hands of the people does so with the condition subsequent inhering in the right. Nothing but that need have been referred to in sustaining the decision in any of the cases where the non-property idea was adopted.

In *Anderson v. Ritterbusch, Treasurer*, 22 Okla. 761, 790, decided in 1908, the Supreme Court of that State said: "It would see mfrom an examination of the authorities that due process of law does not always require judicial hearings, except in matters of purely judicial nature, but not in matters of taxation, or matters purely administrative in their nature," citing *State v. Sponaule*, 45 W. Va. 415; 32 S. E. 283; 43 L. R. A. 727.

V.

The Power to Create Has Power to Remove.

State v. Stevens, 46 N. J. L. 344.

In *Ex parte Wall*, *supra*, 107 U. S. 265, on page 284, Mr. Justice Catron, of the Tennessee Supreme Court is cited from the case of *Smith v. The State*, 1 Yerg. (Tenn.) 228, as saying that: "The principle is almost universal in all governments that the power which confers an office has also the right to remove the officer for good cause."

In the *Jochim case*, *supra*, 24 L. R. A. 703, the Michigan Supreme Court said: "The Legislature may remove officers, not only by abolishing the office, but by an act declaring it vacant (citing instance), and it may lodge the power to remove from statutory offices in boards or other officers, subject to statutory regulations, and while it cannot remove incumbents of constitutional offices it is not because of an inherent difference in the qualities of the office, but because the power to remove is limited to the power that creates.

In *Cameron v. Parker*, 2 Okla. 344, the Supreme Court said:

"The Legislative assembly created the office of territorial superintendent of public instruction *ex officio* auditor and it would be strange

reasoning to hold, in the absence of any constitutional prohibition, that the legislative assembly could not also designate when the term of office should expire, the salary to be paid or the cause of removal. The defendant accepted the office under a statutory provision creating it, and accepted the salary as provided by the Legislature, but now objects to the statutory provision relating to his removal. Can he blow both hot and cold, accept the one and reject the other, take that which pleases him and reject that which does not, when both come from the same source? It seems to us clearly not."

In *Gray v. McLendon*, 134 Ga. 224, the Supreme Court, on page 240, said:

"The office of railroad commissioner being purely of legislative origin and administrative duties the action of the Legislature in reserving the right of removal was not beyond its constitutional power."

In the case of *South v. Commissioners of Sinking Fund*, 86 Ky. 186, 187, the Court said:

"The office in question is not a constitutional one. It is a creature of the Legislature, subject to its will. Proceedings for the removal of an officer for cause belong properly to the judicial power of the State, unless its Constitution or laws provide otherwise. Where, however, the Legislature creates an office it undoubtedly may refer the power of removal to the Governor or other tribunal."

In *State ex rel. Churchill v. Hay*, 45 Neb. 321, 63 N. W. 821, the Nebraska Supreme Court said:

"The Governor's power to suspend or remove at any time for cause is derived from the statute and not from the Constitutional provision that the Governor shall nominate and appoint all officers whose offices are established by the Con-

stitution and which may be created by law and whose appointment or election is not otherwise provided for, and may remove any such officer for incompetency, neglect of duty or malfeasance in office, and therefore the Governor is not confined to the causes of removal specified in the Constitution and is at liberty to adopt such mode as to him shall deem proper."

VI.

Impeachment.

The Governor and all other civil officers in this State shall be liable to impeachment for misdemeanor in office during their continuance in office and for two years thereafter. (Constitution, Art. V, Par. 11.)

Judgment in cases of impeachment shall not extend farther than removal from an office and disqualification to hold or enjoy any office of honor, profit and trust under this State, but the party convicted shall nevertheless be liable to indictment, trial and punishment according to law. (Constitution, Art. VI, Sec. III, Par. 3.)

In the Pritchard case Chief Justice Beasley, after holding that the power of removal as it exists in this State is exclusively judicial in its nature because of the fact that there is a property right involved, and therefore due process of law requires the intervention of a court to carry it out—at a loss for any other court having jurisdiction in the premises—pointed out that Pritchard, and the others being State officers, were such in the constitutional sense and that their misdeeds were therefore cognizable in the court of impeachment set up in the Constitution, but this is based on the theory that all civil officers under this State are but such officers who hold under constitutionally created offices, as he expressly distinguished in the opinion that case from the

cases referred to in this brief, and the case at bar, by reason of the fact that the statute authorized no such removal, and it was therefore proper to conclude, it is submitted, as was done, that no power of removal existed in that case, but the learned Chief Justice did not go so far as to hold that offices when created by a Legislature were beyond the power of the Legislature forever thereafter as to removal of incumbents for cause or otherwise, which position, we think, would be untenable as has been previously set forth in this brief.

In Cooley's Constitutional Limitations, Chap. 5, on page 27, Chief Justice Denio is quoted as saying, "The people in framing the Constitution committed to the Legislature the whole law making power of the State, which they did not expressly or impliedly withhold.' Plenary power in the Legislature for all purposes of the civil government is the rule. A prohibition to exercise a particular power is an exception. In inquiring therefore whether a given statute is constitutional, it is for those who question its validity to say that it is forbidden. I do not mean that the power must be expressly inhibited for there are but few positive restraints upon the legislative power contained in the instrument." *People v. Draper*, 55 N. Y. 532-533.

On page 128, Chief Justice Redfield in the case of *Thorpe v. Rutland and Burlington Railroad*, 27 Vt. 140-142, is quoted as saying that "The American Legislatures have the same unlimited power in regard to legislation as resides in the British Parliament, except where they are restrained by written constitutions."

If therefore, the power to remove, after hearing is exclusively limited as to State officers by the court of impeachment, then the doctrine that the power to create carries with it the power to destroy or remove, does not prevail.

Impeachment for misdemeanor in office, as we have endeavored, and we think successfully, to show, would limit the executive in the carrying out of his constitu-

tional function, as well as the Legislature in delegating the power to him for such purpose, in restricting action to such a small class of serious offenses as to seriously hamper the carrying out of the legislative and administrative functions of government. Removal of State officers by impeachment in this State carries with it the stigma of misdemeanor in office and possible forfeiture of the right to hold office thereafter. To have such a removal based upon a much more serious classification of offense than is comprehended within the meaning of the statute in the case at bar, and in such cases as are found in similar enactments to which reference will be found at the end of this brief, would be a serious impairment of the powers of the executive not expressed in the Constitution.

Under the Constitution of Colorado it is provided that all officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law (Art. III, Sec. 3), and further that the Governor may appoint, with the consent of the Senate, those whose appointments or election are not otherwise provided for and he may remove such officers for incompetency, neglect of duty or malfeasance in office. (Art. IV, Sec. 6.)

Chief Justice Hay, in an opinion in *Trimble v. People*, 15 *Colo.* 187, 34 *Pac.* 981, in discussing these provisions of the Constitution, said: "That the court below assumed that the authority for the removal of the re-lator rests upon this constitutional provision. It was construed as a limitation upon the exercise of the power of removal from office and deprived the Governor of the right of removal, unless there existed one of the three specified reasons (for removal) mentioned therein." The court said, "An analysis of the Constitutional provisions further shows that the officers therein referred to are (1) those whose offices are established by the Constitution, (2) those whose offices are created by law, the appointment or election to which are not other-

wise provided for. The relator's office does not fall under either class mentioned, for while it is true that his office was created by law, his appointment is also provided for by statute, and the same statute provides that such appointment shall be made with power of suspension or removal by the Governor at any time for cause to be stated, in writing, but not for political reasons; the office being one of statutory creation the manner of filling it and the mode of removal and filling of vacancies being also provided by statute, the case falls clearly outside of those offices to which the constitutional provision relates," citing cases.

This case therefore is authority for the view even though there are constitutional provisions as to method of removal, that such are not exclusive methods when the statute creating an office provides a method of removal, for the reason stated in the cases given under the heading as to the power of creation and removal. (*Ubi, supra.*)

The claim is made that Paragraph 11, of Article V, of the Constitution, points out the sole and exclusive way by which a civil officer under this State may be removed from office, but it is submitted that this provision does not expressly so provide, neither is there any other provision of the Constitution providing that impeachment shall be the exclusive way by which a person may be removed from office.

To so construe the Constitution would, it is urged, unnecessarily close the door to the exercise through the legislature of political power inherent in the people, for it will be noted that the single cause for which an officer may be impeached is "misdemeanor in office" and we can readily conceive of cases arising in which it might be desirable and for the public welfare that provisions be made for the removal of persons from public office for other causes than those embraced within the phrase "misdemeanor in office," and it is unreasonable to assume that the framers of the Constitution

intended, excepting in the case of officers referred to in the fundamental law, to so limit the people acting through the legislature in so important a phase of governmental activity.

It is submitted that the impeachment section of the Constitution was not inserted in that instrument primarily to protect the civil officers under this State, but rather this section is one of the *checks* in the Constitution by which those to be governed under the Constitution protect themselves against those by whom they are to be governed, and hence it is urged that this section should not be given a construction that will have the effect of preventing the people, acting through the Legislature, from exercising rights that are not in fact intended to be prohibited by the section of the Constitution in question and that will unduly favor the governing part and unduly restrict the rights of the governed.

The Constitution is an instrument raised by the people to protect themselves against the governing class.

In connection with this point it will be of interest to refer to the Federal Government and inquire what are the constitutional provisions relative to removal from office and the effect which has been given to them: We find that the only clauses bearing on the subject are as follows:

Section 4 of Article II, which reads as follows:

"The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors," and

Section 1 of Article III, which reads as follows:

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the supreme and inferior courts, shall

hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office."

Notwithstanding the above-quoted provisions, there has never been any question, excepting in the cases where the terms of officers are fixed by the Constitution and in the case of members of the judiciary, but that the power which establishes offices under the Federal government may fix the tenure and that other modes of removal than by impeachment were legal.

See *Parsons vs. United States*, 167 U. S. Reports 324.

The removal from office consequent on impeachment is something quite different from the removal provided for in the Public Utility Act.

It is submitted that a removal under the statute is not a proceeding directed primarily against the holder of the office, but it is the method by which the people, acting through the selected agency retake possession of an office. In other words, the prime purpose of the removal of a person from office under this statute is not to punish the holder, but to benefit the public service.

On the other hand, a proceeding by impeachment is an action directed against the holder of the office. The proceedings are penal in their nature and judgment against the incumbent may enter only after conviction before a judicial branch of the Government, and the judgment consequent upon conviction may result not merely in depriving the accused of the right to continue to hold his office, but he may, by the judgment, be further disqualified from holding and enjoying any office of honor, profit or trust under this State. (Constitution, Art. VI, Sec. III, par. 33.) And he cannot be pardoned. (Constitution, Art. V, par. 10.) As an additional indication that the proceedings on impeachment are intended to be a proceeding against the person holding the office, it is significant to note

that such person is liable to impeachment for two years after he ceases to hold the office. See, as to the nature of impeachment, *State vs. Hastings*, 44 N. W. (Neb.) 774.

No matter what construction may be given to the effect of the constitutional provision for removing from office by impeachment in ordinary cases, it is submitted that it should not be held to render illegal the removals in the cases at bar.

An examination of the statute under which the respondents were appointed to office will show that it provides that their tenures to the office may be brought to an end by either of two ways:—(1) By the efflux of time; and (2) by the action of the Governor in removing them for neglect of duty and misconduct in office appearing to him.

The respondents' right to their offices in this case was terminated by the happening of the second of the above named means of termination—that is to say, by the happening of the *condition subsequent*, subject to which they took the office.

It is submitted that the Legislature had the power to create the office subject to this condition subsequent.

In *Kenny v. Hudspeth*, 59 N. J. L. 321, the court said:

“If there be any limitation upon the power of the legislative department of the government over the tenure of public offices, it must be found in a constitutional inhibition arising from the fact that by constitutional prescription the tenure and term of office are put beyond legislative control.”

See also *Ekern v. McGovern*, 154 Wis. 157, at 259.

VII.

The Finality of the Governor's Action of Removal.

The grant of the power, it was stated in the case of *State v. Doherty* (25 La. Ann. 119, 13 Am. Rep. 131),

to the executive to remove an officer for a certain cause implied authority to judge of the existence of that cause. The power vested exclusively in executive discretion cannot be controlled in its exercise by any other branch of the Government. The Governor decided that defendant had failed or refused to do his duty. However erroneous the decision of the Governor as to that question may be, the court said: "We do not think he can under our system of government be examined by the court. The legislature created the office and the law provided that the Governor might make the appointment and for a certain cause remove the officer appointed by him." Here the law invested the Governor with a discretionary power which could alone be employed by him. The decisions of all the courts of the State could not compel him to make the removal. The removal of the defendant for neglect of duty was the exercise of executive discretion. The grant of power to the executive to remove an officer for a certain cause implies authority to judge of the existence of that cause.

In the case of *State v. Doherty*, 25 *La. Ann.*, on p. 120, the court said: "The power vested exclusively in the executive discretion cannot be controlled in its exercise by any other branch of the government," and cited *Wright v. De Frees*, 8 *Ind.* 302, to the effect that "the powers of the departments are not merely equal, they are exclusive in respect to the duties assigned to each," and Mr. Cooley, in his *Constitutional Limitations*, 187, cited authorities supporting the rule that to institute an inquiry as to the correctness of the cause for which the Governor removed the defendant would be an attack upon the independence of the executive.

In *State v. The Governor* (25 *L.*, p. 351), the Supreme Court of this State said: "While it is the acknowledged duty of courts of justice to exert all their appropriate powers for the redress of private wrongs, it is no less a duty sedulously to guard against any encroachment upon the right or usurpation of the powers of the co-ordinate departments of government."

The court cited the case of *Marbury v. Madison* (1 Cranch), and Chief Justice Green quoted the Supreme Court, saying: "An idea has gone forth that a mandamus to a Secretary of State is equivalent to a mandamus to the President of the United States. I declare it to be my opinion grounded on a comprehensive view of the subject that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the Constitution. The Secretary of State acts in two capacities; as the agent of the President he is not liable to a mandamus, but as a recorder of the laws of the United States, as keeper of the Great Seal, and other cases therein mentioned, he is a ministerial officer of the United States."

Chief Justice Marshall was quoted as saying: "Where the head of a department acts in a case in which executive discretion is to be exercised, any application to the court, to control, in any respect, his conduct would be rejected without hesitation, but where he is directed by law to do a certain act affecting the absolute right of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden, * * * it is not perceived on what grounds the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual than if the same services were to be performed by a person not the head of a department," and Chief Justice Green concluded, saying: "The distinction is clearly drawn between the President himself and the head of a department acting in the matter, which, in the opinion of the Court, had passed beyond the control of the President which he had no right to forbid, which therefore it was presumed he had not forbidden."

In *Attorney-General v. Hawkins*, 44 Ohio 98, 5 N. E. 228, the Supreme Court of Ohio said, "The only question which the Court can consider is whether charges

involving official conduct have been preferred, whether the parties had notice, and whether the Governor acted upon the charges of removing the respondent for the reasons stated in the charges."

In the case of *State v. Hay* (45 Neb. 321, 330), the Court in holding that the removal power is an administrative one, rather than a judicial function, citing cases, said that the opposing cases rest upon the assumption that the incumbent had property rights in the office, adding that although the doctrine of the common law has no foundation whatsoever in a representative government where the right to hold office is mere privilege, citing *Connor v. The Mayor of New York* (5 N. Y. 285), *State v. Hawkins, supra*, added, "The limit of judicial interference in all such cases is to protect any officer in his right to a hearing on specific charges or in other words, to require the officer or body claiming the right of removal to keep within his or its jurisdiction."

In *Attorney-General v. Doherty*, 25 La. Ann. 119, 13 Am. Rep. 131, it was held that the action of the Governor in removing for cause implies authority to judge of the existence of the cause, and is not reviewable by the courts.

In *Cameron v. Parker*, 2 Okla. 277, 38 Pac. 14, it was held that the courts cannot inquire into the sufficiency of the proof of charges in the Governor's hearing, and so his findings are not reviewable by any court so long as his action is within the limit of the power conferred by the statute.

In *State v. Johnson*, 30 Fla. 433, 18 L. R. A. 410, the Supreme Court said: "There is but one inquiry which the court can make and that is whether or not the act for which the alleged suspension was made is, as a matter of law, a ground for removal within the grant of power made to the Governor."

In *Cameron v. Parker, supra*, the Court held that so long as the Governor's action in removing an officer is within the limits of the power conferred upon him

by statute, the courts cannot interfere to arrest his action or to review the proceedings before him. He is the exclusive judge, so far as the courts are concerned, of the sufficiency of the proof of the charges and his findings are not reviewable by any court.

This proceeding is by *quo warranto* and the sole purpose is the test of the question as to whether the officers have been removed and their offices terminated for the cause of neglect or misconduct in office, as defined in the statute, and it is not for the purpose of bringing up for review the proceedings in order that the sufficiency thereof as to the discretionary acts of the chief executive may be examined into. In fact the judicial officers who were applied to for writs of *certiorari* to review the proceedings which led to the removal of the officers, denied, in their discretion, the allowance of such writs. The denial by Mr. Justice Swayze was that *certiorari* was a writ issuing to an inferior tribunal and not to a co-ordinate and equal branch of the government, as in the case of the chief executive. To question anything but whether the removal was for the causes mentioned as contained in the charges would be to use the present proceedings to test the exercise of the discretion of the chief executive of the State and to undertake to question the sufficiency of his finding in a collateral and not an appellate proceeding. ✓

In *Davidson v. Whitehill* (Vt.), 89 Atl. 1082, 4 *Dillon Municipal Corporations*, Sec. 1593, and note, was quoted to the effect that at common law *certiorari* lies only to inferior courts and officers exercising judicial powers. While the courts by *certiorari* review a tribunal's discretionary act only to correct a manifest abuse of discretion, it is submitted that this does not apply in this State to anything but the jurisdictional question in a case of removal by the chief executive.

VIII.

**Policy of the Executive and Legislative
Departments of the State
Government.**

The enactment of legislation vesting in the executive a power of removal of statutory officials is not new in our State. As far back as 1891, in creating the State Department of Banking and Insurance, the Legislature provided "The chief officer of said department to be denominated the Commissioner of Banking and Insurance shall be appointed by the Governor by and with the advice and consent of the Senate, and shall hold his office for a term of three years beginning on the first day of April, one thousand eight hundred and ninety-one, and until his successor shall be appointed and confirmed, unless sooner removed by the Governor for cause," (*P. L.* 1891, *p.* 17; 1 *Comp. Stat.*, *p.* 160.)

This statute, enacted nearly thirty years ago, was the first of a series of enactments indicative of a legislative policy that has been pursued to the present time.

Nine years later the Legislature of 1900 by an act entitled "An act to establish and regulate the State Home for Boys" *P. L.* 1900, *p.* 176; 4 *Comp. Stat.*, *p.* 4881), in section four provided—"The trustees of said home shall be six in number and shall be appointed by the Governor with the advice and consent of the Senate as follows:

Two each year for a term of three years; and in case of a vacancy from death, resignation, removal from office or otherwise the vacancy shall be filled for the unexpired term only, and not more than three of said trustees shall belong to the same political party; either by original appointment or by appointment to fill vacancies; provided the Governor may in his discretion remove from office any trustee so appointed."

At the same session there was enacted "An act to establish and regulate the State Home for Girls" (Revision of 1900), (*P. L.* 1900, *p.* 481; 4 *Comp. Stat.*, *p.* 4889), and section four of said act provided:

"There shall be nine trustees of said home, five of whom shall be men and four of whom shall be women, who shall be appointed by the Governor, within thirty days after the passage of this act, * * * The Governor shall have power in his discretion to remove from office a trustee, and in case of a vacancy from death, resignation, removal from office or otherwise, the appointment shall be for the unexpired term only."

By the act to regulate the State Library (4 *Comp. Stat.*, *p.* 4901) it is provided—"That the said commissioners, or a majority of them, shall appoint at the expiration of the term of the present incumbent and every fifth year thereafter a librarian, who shall hold office for a term of five years, unless sooner removed by a unanimous vote of the commissioners; and any vacancy that may occur in said office shall be supplied by a new appointment for the unexpired term of the former incumbent."

The subject of removal of statutory officials was long a matter of executive concern and is best expressed in the inaugural address of the then Governor, the late J. Franklin Fort, to the Legislature of 1908.

"An examination of the statutes of the State of New Jersey discloses the fact that there are no provisions of law empowering the Governor of the State, or any one else, to remove from any office any State official, appointed under a statute, even for cause.

"The Chief Executive should be armed with some power, both for the enforcement of the law, and for the removal of those in public

office who refuse or neglect to perform their duty.

"It may be easily imagined that cases may arise where public officials are shown to have been guilty of either misfeasance or malfeasance in office, and who refuse to resign, and it might be that cases would arise where a public official should not be permitted to resign. In either event there should be some power in the Governor, upon formal charges in writing, to cite any statutory State officer, to show cause why he should not be removed, and if, after hearing and full opportunity to make defense, the Governor should be satisfied that the official has been derelict in the performance of his duty, or guilty of more serious offense, he should then have the power to remove him.

"Of necessity this will entail labor upon the Governor, but the people of the State elect their Governor for that purpose and he should either perform his duties and see that others perform theirs, or he should not assume office.

"If he shall do this and the statute shall confer upon him the power to remove any official, appointed by statutory authority, whom his examination may discover to be derelict in the performance of his duties, or guilty of wrongdoing in office, in any respect, the result will be wholesome as to all departments and institutions of the State.

"I therefore recommend the enactment of a law looking to this end."

In his 1909 message to the legislature Governor Fort again earnestly urged the subject, and in clearly pointing out the distinction between constitutional officers liable to impeachment and statutory officers exercising such powers as are conferred by the legislature, he

recommended the passage of a law which would place in the hands of the executive a power to discipline and remove those who might be guilty of neglect of duty and misconduct in office.

"In my inaugural address I earnestly urged the enactment of a law giving to the Governor the power of removal of public officials, not under the Constitution protected from removal, except by impeachment. I repeat that recommendation.

"It is humiliating for the Chief Executive of a great State to feel that, no matter what the cause nor how derelict in duty a public official may be, there is no power of removal or method to remedy the condition.

"The Governor and other constitutional officers may be impeached and removed from office. A Senator or member of the General Assembly may be expelled and his office vacated by his associates, but there is no way now, except he resign, to get a statutory official out of office, even after conviction of crime.

"Surely this cannot be thought to be right by any reasonable person."

In pursuance of the policy recommended by Governor Fort, which strongly outlines the view of the Executive Department on this subject, the legislature of 1911, in creating the Public Utility Commission, embodied therein a provision for removal of the commissioners for neglect of duty and misconduct in office.

Subsequent legislatures have confirmed the legislative policy so established, and in 1917 there was created a State Highway Department by an act entitled "An act to establish a State Highway Department and to define its powers and duties: investing therein all the powers and duties now devolved by law upon the commissioner of public roads and the existing State Highway and Highway Commission." (*Chap. 15, Laws of 1917; P. L. p. 35.*)

This statute provides that "The members of the State Highway Commission shall be appointed by the Governor, by and with the advice and consent of the Senate, * * * The Governor shall have power to summarily remove any or all members of the commission."

At the same legislative session there was enacted "An act to establish in and for the State of New Jersey a Department of Architecture, to provide for its maintenance, to define the powers and duties of the State Architect," approved March twenty-sixth, one thousand nine hundred and seventeen. (*P. L. 1917, p. 271.*)

This statute provided that "the chief officer of said department, to be denominated the "State Architect," shall be appointed by the Governor, by and with the advice and consent of the Senate, and shall hold his office for a term of five years, * * * unless sooner removed by the Governor for cause."

The legislature of 1918 enacted "An act concerning the charitable, correctional, reformatory and penal institutions, boards and commissions located and conducted in this State, which are supported in whole or in part from county, municipal or State funds," and being Chapter 147 of the Laws of that year.

Section 103 provides the members of the Board (Board of Institutions and Agencies) shall be appointed by the Governor without regard to political belief or affiliation, subject to confirmation by the Senate. They shall be subject to removal by the Governor at any time for good and sufficient cause. (*P. L. 1918, pp. 343-344.*)

The same statute by section 112, pages 346 and 347, provides a Board of Managers for each of the institutions of the State under the jurisdiction of the Board of Institutions and Agencies, "To consist of not less than five and not more than seven members. They shall be subject to removal by the State Board at any time for good and sufficient cause."

The policy of the executive and legislative branches of the government inaugurated by the act of 1891

strengthened by the enactments of 1900 and recommended in the Governor's messages of 1908 and 1909, supplemented by the passage of the Public Utility Act of 1911 and confirmed by the legislative enactments of 1917 and 1918, mark out with distinctness a policy which authorizes and sanctions the removal of statutory officials from office for neglect of duty and misconduct therein.

IX.

**In Declaring a Legislative Enactment
Unconstitutional Such Construction
Must be Free From All Doubt.**

Mr. Justice Van Syckel, in a concurring opinion to that of Chief Justice Beasley, in the case of *Harris, et al. v. Vanderveer's Executor*, 21 Eq. 424, on page 440, in the Court of Errors, said:

"The motion to dismiss this appeal rests upon the unconstitutionality of legislative enactment. Its unconstitutionality must be clear and palpable.

"Every intendment must be made in favor of legislative power. Learned judges have, with great unanimity, laid down a rigid rule on this subject. Chief Justice Marshall, in 6 *Cranch*, 128, Chief Justice Parsons, in 5 *Mass.* 534, Chief Justice Tilghman, in 3 *S. & R.* 72, Chief Justice Shaw, in 13 *Pick.* 61, and Chief Justice Savage, in 1 *Cowen* 564, have, with one voice, declared that 'It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.'"

The Constitution by Implication Authorizes the Procedure in the Instant Case.

The power of appointment as constitutionally distributed is not dissimilar from the power of removal. Article VII, Sec. 2, par. 9, of the Constitution, provides:

“All other officers whose appointments are not otherwise provided for by law, shall be nominated by the Governor and appointed by him, with the advice and consent of the Senate; and shall hold their offices for the time prescribed by law.”

The provision as to impeachment provides the only method for the termination of the tenure of office of constitutional officers, because the Constitution itself provides for the manner of tenure of such offices, and by all proper rules of construction the two provisions must therefore be read in harmony with each other and together. So also, then, must the provision of that instrument in this connection cited be read, that the power of appointment may be otherwise provided for by law for the time prescribed by law, and as has been pointed out herein, the manner of removal from office and the manner of the tenure, if it can be regulated and limited as to time, may also properly be regulated as to method of removal for cause or otherwise. When the Constitution as in this instance provides that appointments may be made for all offices provided by law, as distinguished from those as provided by the Constitution to be for a time by law prescribed, it is clear that constitutionally the Legislature has direct delegated power to prescribe that that tenure may be terminated by some other cause than the lapse of time alone.

The Constitution, by Article III, par. 1, provides for the distribution of the powers of government into three distinct departments, “except as herein expressly provided,” and this clause in the same connection is re-

ferred to in the case of *Ross v. Freeholders*, 40 *Vr.* 297, etc., where Judge Dixon said, speaking for the Court of Errors:

"But there is still another aspect of the matter. If, by the unrestrained force of either the distributive or the prohibitive clause of this article, the power of appointing officers could be considered as assigned exclusively to any one of these departments, their significance is restricted by the closing words of the article, 'except as herein expressly provided.'

"This compels an examination of the rest of the Constitution for express exceptions to the preceding clauses of the article. Such exceptions are readily discoverable. Thus the power remitting fines and forfeitures, and granting pardons, which historically may be deemed a branch of the executive authority, is conferred upon the Governor and certain members of the judicial department; the power to try, convict and pass judgment in cases of impeachment, which is a judicial function, is conferred upon the Senate. But the exception now directly pertinent is found in article 7, section 2, paragraph 9, declaring that 'all other officers, whose appointments are not otherwise provided for by law, shall be nominated by the Governor and appointed by him with the advice and consent of the Senate.' This is an unmistakable recognition of the authority of the law-making department to provide for the appointment of all officers whose appointment is not definitely regulated by the Constitution itself."

By analogy, therefore, it is clear that the same rule of construction applies to the power of removal in offices created by legislative enactment, and if the statute in creating an office provides a term or tenure for the office, it may also provide another method than time for the term-

ination thereof, just as the Constitution has provided a method for the termination of the tenure of office by impeachment in certain cases where an offense exists of misdemeanor in office, and where in non-constitutional offices no other method has been provided.

The only questions before this court are questions of law, and there is no evidence subject to examination in the record. The charges, findings and other jurisdictional matter are set forth in the pleadings, and this court is asked to determine by what right the defendants-appellants, respectively, exercise and usurp the offices from which they have been removed by executive action. It is submitted that if this court finds that the Chief Executive acted within the authority conferred by the power which created the Board of Public Utility Commissioners and removed them from office, the exercise of the authorized discretion or the sufficiency of the evidence is not a question before this court, and that all which remains for this court is the pronouncement of a judgment of ouster. While some of the charges preferred refer to a point of time prior to the incumbency of Commissioners Gaul and Knight, as members of the Board, there are charges and findings which comprehend within their terms all of the present commissioners.

It is submitted that the ouster should be affirmed.

Respectfully submitted,

THOMAS F. McCRAN,

Attorney-General.

New Jersey Supreme Court.

THOMAS F. McCran, Attorney
General of the State of New
Jersey,

Informant,

v.

JOHN W. SLOCUM,
Defendant.

On Demurrer to
information in
nature of quo
warranto.

BRIEF FOR DEFENDANT.

This case arises on an information in the nature of a *quo warranto* filed by the Attorney General to test the title of the defendant to the office of member of the Board of Public Utility Commissioners of the State of New Jersey.

The information in this case (with the exception of its statement of the date of the appointment and qualification of defendant) is identical with that filed in the case of *Thomas F. McCran, Attorney General of the State of New Jersey, v. Andrew Gaul, Jr.* The copy of the charges alleged to have been served on the defendant and the findings of fact of the Governor are identical with those in the Gaul case.

The same demurrer was filed in this case as in the Gaul case.

ARGUMENT.

1. The question of whether the defendant usurps the office of Public Utility Commissioner is properly raised by the demurrer.

2. The provision of Sec. 2 of the Public Utility Act of 1911 under which the information alleges that the Governor removed the defendant from office is in contravention of Article III of the Constitution of this State.

3. The clause of Sec. 2 of the Utilities Act (upon which the removal proceedings were based) is also unconstitutional because it attempts to confer upon the Governor jurisdiction which the Constitution vests exclusively in the court for the trial of impeachments.

For our argument on these points, we respectfully refer the court to Points 1, 2 and 3 in our brief in the case of *Attorney General v. Andrew Gaul, Jr.* Inasmuch as the questions of law involved are the same and both cases are to be argued together it has been considered unnecessary to repeat the argument here.

4. The charges given to the defendant do not accuse him of neglect of duty or misconduct in office.

5. The findings of fact do not show the defendant to have been guilty of neglect of duty or misconduct in office and are not included within the charges served upon defendant.

For our argument on these questions, we respectfully refer the court to points 4 and 5 in the brief in the Gaul case. What is there said is as applicable to Slocum as to Gaul for, as above stated, the charges and findings of fact in each case are absolutely identical. The only possible difference arises from the fact that the information in this case alleges that Mr. Slocum was appointed as a member of the board on the 1st day of May, 1915, while the information in the Gaul case gives the date of Mr. Gaul's appointment as May 1, 1919.

The charges do not state that Mr. Slocum participated directly or indirectly in any of the so-called neglect or misconduct therein referred to or allege any fact from which such participation can be inferred. They do not give the date of Mr. Slocum's appointment as a member of the board or even show that he was such member at the time of the alleged misconduct or neglect. So far as any allegations in the charges are concerned, Mr. Slocum may not have been a member of the board during the period covered thereby, or he may have been absent from the meetings of the board at which the objectionable conduct is said to have occurred, or he may have been present and advised or voted against the action of his colleagues. There is nothing in any of the charges which shows any individual or personal neglect or misconduct on the part of Mr. Slocum or any other member of the board.

The findings of fact in this case are insufficient for the reasons stated at length under Point 5 of

the Gaul brief. It is apparent from these findings of fact that the real basis for the removal proceedings was not any neglect of duty or misconduct on the part of the board or any of its members but merely dissatisfaction on the part of the Governor with the conclusions reached by the board in the due performance of its duty.

We respectfully submit that for the reasons above stated (and stated at length in the brief in the Gaul case) the demurrer to the information should be sustained.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant.

JOSIAH STRYKER,
R. V. LINDABURY,
of Counsel.

New Jersey Supreme Court.

THOMAS F. MCCRAN, Attorney
General of the State of New
Jersey,

Informant,

v.

ANDREW GAUL, JR.,
Defendant.

On Demurrer to
information in
nature of *quo*
warranto.

BRIEF FOR DEFENDANT.

This case arises on an information in the nature of a *quo warranto* filed by the Attorney General, to test the title of the defendant to the office of member of the Board of Public Utility Commissioners of the State of New Jersey.

The information sets forth that on the 1st day of May, 1919, the defendant was duly appointed and commissioned a member of said Board for the term of six years, pursuant to the provisions of an act entitled "An Act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April 21, 1911, and the acts amendatory thereof and supplemental thereto; that the defendant duly qualified for such office by taking the prescribed oath, and that since such appointment and qualification and until October 13, 1920, he duly held and enjoyed said office.

The information further states that on March 20, 1920, the Governor gave to the defendant a copy of certain charges against him for alleged neglect of

duty and misconduct in office, which charges were filed with the Governor by the City of Jersey City on March 19, 1920; that at the same time the Governor gave defendant a notice advising him that he would be afforded an opportunity to be heard upon said charges on April 13, 1920, at 11 o'clock in the forenoon at the State House in Trenton. A copy of the charges and notice are made part of the information.

These charges are voluminous, covering twenty typewritten pages. They refer to the power alleged to be conferred upon the Governor by Section 2 of the above mentioned statute to remove from office members of the Public Utility Board for neglect of duty and misconduct in office and charge the board as a board with neglect to perform the duties imposed upon it by said act and with the performance of such duties in a manner which is alleged to be unwarranted and improper. They cover a period of time commencing in the year 1911, shortly after the organization of the board and long before the appointment of any of the present members. They nowhere specifically connect the defendant with any of the acts or failures to act which are charged against the board as a board.

After reciting the notice and charges, the information states that a public hearing on said charges was held at the time fixed in the notice and at divers other times to which said hearing was adjourned and that on the 13th of October, 1920, after the conclusion of said hearing, the Governor announced that he found the defendant and the other commissioners guilty of neglect of duty and misconduct in office.

A copy of the Governor's findings of fact is incorporated in the information. It includes some findings not referred to or included in the copy of the charges served on defendant, and, like the charges, refers to the acts and failures to act of the

board as a board and not to any individual neglect of duty or misconduct on the part of any defendant.

The information alleges that the Governor, by reason of the above mentioned conclusions and findings, removed the defendant from his office as a member of said Board of Public Utility Commissioners on said 13th day of October, and addressed a notice of such removal to the Secretary of State, to which notice was annexed a copy of the said findings, and that notice of such removal and such findings were also mailed to the defendant.

The information charges that by reason of said removal of the defendant by the Governor, his said office became vacant, and that he thereupon usurped and intruded into the same. It prays that the defendant may be adjudged to be an intruder into said office and ousted therefrom.

A demurrer to this information was filed by the defendant. The demurrer challenges the proceedings before the Governor and the order of removal upon the following grounds:

1. That the provisions of Sec. 2 of the Public Utility Act of 1911 upon which said proceedings and order were based, is unconstitutional and void in that (a) it attempts to confer upon the Governor judicial powers in contravention of Article III of the constitution, and (b) in that it attempts to confer upon the Governor jurisdiction which by Article V, Sec. 1, and Article VI, Secs. 1 and 3 of the constitution is vested solely in the court for the trial of impeachments.

2. That the charges given to the defendant do not accuse him of neglect of duty or misconduct in office.

3. That the findings of fact do not show defendant to have been guilty of neglect of duty or misconduct in office, and are not included within the charges served upon the defendant.

These points will be discussed in the order stated.

ARGUMENT.

I.

The question of whether the defendant usurps the office of Public Utility Commissioner is properly raised by the demurrer.

The Attorney-General did not content himself with simply alleging that the defendant usurped the office and calling upon him to show by what right or title he held the same, but, in accordance with the modern practice, set forth the title of the defendant and the circumstances which he claimed constituted the present holding a usurpation. This relieved the defendant from the necessity of pleading his title and justified him in raising by way of demurrer the question of the sufficiency of the facts pleaded to show usurpation.

Van Riper v. Parsons, 40 N. J. L. 1;
Goldberg v. Dorland, 56 N. J. L. 364;
Attorney-General v. Fox, 72 N. J. L. 6;
State v. Riordan, 75 N. J. L. 16;
Anderson v. Myers, 77 N. J. L. 186;
Attorney-General v. McKelvey, 78 N. J. L. 3; aff. 78 N. J. L. 621;
Bonyng v. Frank (Ct. of Errors & Appeals), 89 N. J. 239;
People v. Goodrich, 87 N. Y. Supp. 114;
 aff. on opinion below, 180 N. Y. 522; 72 N. E. 1148 (1904);
People v. Los Angeles, 133 Cal. 338; 65 Pac. 749 (Sup. Ct. Cal. 1901).

II.

The provision of Sec. 2 of the Public Utility Act of 1911 under which the information alleges that the Governor removed the defendant from office is in contravention of Article III of the Constitution of this State, which reads as follows:

“The powers of the government shall be divided into three distinct departments—the legislative, executive and judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided.”

The provision of Sec. 2 of the Public Utility Act is that:

“The Governor may remove any Commissioner for neglect of duty or misconduct in office, giving to him a copy of the charges against him and an opportunity of being publicly heard in person or by counsel in his own defense upon not less than ten days notice.”

This provision, we submit, amounts to an attempt to confer upon the Governor judicial powers in contravention of the constitutional provision above quoted.

We have not here to do with an office held for an indefinite period or at the pleasure of the appointing power. In such case the power of removal is incident to the power of appointment, and as the latter is administrative, the former is also.

Ex parte Hennen, 13 Peters, 230, 13 U. S. 135, 138;

Reagan v. United States, 182 U. S. 419, 424 (1901).

Here the office is for a fixed term and the incumbent is removable only for cause found. In this class of cases the power of removal is separated from the power of appointment and can only be exercised after notice and a hearing which results in the finding of the specified cause or causes. So far all the cases are agreed. They are not agreed, however, on whether the hearing and finding thus required is judicial or administrative, and whether, therefore, under a constitution like ours, the power to hear and determine can be conferred upon the executive department or is reserved for the courts.

One of the earlier cases is *Page v. Hardin*, 8 B. Monroe, 648 (Ky. 1848). There the Governor had removed the Secretary of State, Hardin, for neglect of duty and declared his office vacant. Later, Hardin brought mandamus proceedings against the State Treasurer to compel the payment of his salary. The Treasurer set up the removal proceedings, and Hardin demurred on the ground that the Governor had no power to remove him.

Chief Justice Marshall, in delivering the opinion of the court, said:

"The Secretary being removable for breach of good behavior only, the ascertainment of the breach must precede the removal. In other words, the officer must be convicted of misbehavior in office. And we shall not argue to prove that in a government of laws, a conviction whereby an individual may be deprived of valuable rights and interests, and may moreover be seriously affected in his good fame and standing, implies a charge and trial and judgment, with the opportunity of defence and proof. The law too, prescribes the duties and tenure of the office, and thus furnishes a rule for the decision of the question involved. Such a proceeding for the ascertainment of fact and law, involving legal right, and resulting in a decision which may terminate the right, is essentially judicial, and has been so considered here and elsewhere."

The attempted removal was held to be ineffective for the reason that no judicial power had been conferred upon the Governor by the constitution.

Another leading case is *Dullam v. Willson*, 53 Mich. 392; 19 N. W. 112 (1884). The defendant Willson had been summarily removed by the Governor from the office of trustee of the Michigan institution for educating the deaf and dumb for official misconduct and habitual neglect of duty. His term was for six years, which had not yet expired. The Governor also on the same day appointed the relator Dullam as Willson's successor, who, upon Willson's refusal to surrender the office, brought *quo warranto*. A statute passed in 1846 provided that all state and county officers with certain named exceptions might be removed by the Governor for official misconduct or habitual or wilful neglect of duty at any time, during the recess of the legislature, and the vacancy filled during such recess. The information alleged that the removal was under this statute. The court held the statute to be invalid because repugnant to the constitution of 1835, which vested no judicial power in the Governor.

It appeared, however, that the constitution had been amended in 1862 so as to confer power upon the governor to remove state officers during the recess of the legislature for gross neglect of duty or corrupt conduct in office, or any other misfeasance or malfeasance therein, and the court held that the reference to the source of the Governor's power in the information might be disregarded and proceeded to inquire whether the removal could be upheld under this amendment. The conclusion was that it could not, because the power conferred by the constitution was judicial in character and therefore required notice and a hearing, which had not been accorded. The court said:

"It will be observed that the section of the constitution under consideration only author-

izes the governor to remove for specified causes. He is not authorized to exercise the power at his pleasure or caprice. It is only when the causes named exist that the power conferred can be exercised. It follows as a necessary consequence that the facts must be determined before the removal can be made. It is also clear that the fact must be determined by some tribunal invested with judicial power for a determination whether specified causes exist is an exercise of judicial functions. Judicial determination of facts must rest upon and be preceded by notice, proof, and hearing. And the first question is, what is the proper tribunal in which such facts are to be ascertained? In my opinion this provision of the constitution requires no legislation to make it effective. Read in the light of the history of the times, and the surrounding circumstances when it was adopted, the grant of power is to the governor coupled with a duty to examine into the condition and administration of any public office, and to examine into the acts of any public officer, and to remove from office for gross neglect of duty, or for corrupt conduct in office, any of the officers specified. The amendment for this purpose clothes him with judicial power."

In *Honey v. Graham*, 39 Texas 1 (1873), the Supreme Court of that State said:

"The right to hold and exercise the functions of an office to which the individual may have been duly elected, may be regarded both as property and privilege, and therefore the incumbent can only be deprived of his office in the manner pointed out in the Constitution. It may be safely admitted that more than one case might occur where the Governor would be authorized in assuming that an office was vacant; but no case can occur under our Constitution wherein the Governor would be authorized to *adjudge* an office *forfeited*.

"Judgment belongs to the judiciary. A charge of forfeiture can only be made out on proof—proof sufficient to satisfy twelve unprejudiced minds,"

In *People ex rel. Mayor v. Nichols*, 79 N. Y. 588 (1880), it is said that where an officer can be removed only for cause upon complaint, the accused is entitled to notice and a hearing, and to be represented by counsel, *and the proceeding for removal calls for the exercise of judicial power.*

In *People ex rel. Clay v. Stuart*, 74 Mich. 411; 41 N. W. 1091 (Sup. Ct. Mich. 1889), it is said:

“There can be no doubt that the removal of a person from his office for cause involves the exercise of judicial power. Holding and exercising an office to which a person has been elected during the term for which he has been elected is a right of which he cannot be deprived without due process of law and this requires notice to the party, a hearing and determination.”

The leading cases opposed to this view are *Donahue v. Will Co.*, 100 Ill. 94 (1881) and *State v. Hawkins*, 44 Ohio St. 98 (1886).

In these cases it was held that proceedings to remove public officers for cause are administrative and not judicial, and that therefore power to remove them can be conferred by the Legislature upon executive officers.

In *Donahue v. Will Co.* a county treasurer had been removed by the board of county supervisors for misfeasance in office after notice and a hearing. The procedure was authorized by a statute of the State. The removal was claimed to be void, among other reasons, because the statute attempted to confer judicial powers upon the board of county supervisors.

The court held that the act of removal was an exercise of executive not judicial power and, therefore, did not intrench upon the powers of the judiciary. The decision seems to have been based rather upon supposed authority than upon any attempt at

close reasoning. The cases cited in its support are the following:

- (1) *State v. McGarry*, 21 Wis. 496;
- (2) *State v. Prince*, 45 Wis. 610;
- (3) *McGregor v. Board of Supervisors*, 37 Mich. 388;
- (4) *Keenan v. Perry*, 24 Tex. 253;
- (5) *Taft v. Adams*, 3 Gray 126;
- (6) *State v. Doherty*, 25 La. Ann. 119;
- (7) *Thompson v. Holt*, 52 Ala. 491;
- (8) *Ex parte Wiley*, 54 Ala. 226;
- (9) *State v. Frazier*, 48 Ga. 137.

Not a single one of these cases supports the conclusion for which it is cited.

In case (1) the removing body was authorized to remove for specified causes *or for other cause satisfactory to it*. Of course, this was power to remove at will and did not, therefore, require a hearing or the exercise of judicial functions, and it was so held.

Case (2) was decided in the same court eleven years later. There the statutory power was to remove for misconduct in office or wilful neglect of duty after notice and a hearing, and it was held that *the proceeding was of a judicial character—the same as before any tribunal having jurisdiction of the subject matter and the parties*. No question was raised or discussed as to the power of the Legislature to confer judicial power upon the removing body.

In case (3) removal proceedings by a county board of supervisors were set aside on *certiorari* for irregularities. There is no discussion of any jurisdictional question. (It will be noted that this case preceded *Dullam v. Willson*, *supra*, in the same court.)

Case (4) simply holds that "where the term of the office is not fixed by the Constitution nor by the law, and there is no provision for removal from office, its tenure is during pleasure". It was therefore held that the appellee was removable from the office of superintendent of the State lunatic asylum by the Governor at will and without notice or a hearing.

Case (5) holds nothing more than that the Legislature may change the date of an election, although the effect may be to shorten the term of a statutory office.

Case (6) upholds the removal of a tax collector by the Governor under a statute which, as construed by the court, empowered the Governor to make the removal as an act of executive discretion. Apparently there was no notice or hearing. No constitutional question is discussed.

Cases (7), (8) and (9) have no bearing whatever on the question under consideration here or with respect to which they are cited in the *Donahue* case.

It will thus be seen that the *Donahue* case has not the weight attached to it in the few cases which follow it.

State v. Hawkins, 44 Ohio St. 98 (1886) follows the *Donahue* case. In the course of its opinion the Court says that what is judicial power cannot be brought within the ring fence of a definition; that the power to hear and determine is not peculiar to the judicial office because many of the acts of executive and administrative officers involve the exercise of the same power, referring to boards of equalization of taxes, of public works, county commissioners, township trustees, judges of election and viewers of public roads, all of whom, it is declared, in one form or another, hear and determine questions in the exercise of their functions more

or less directly affecting private, as well as public, rights.

With respect to the decisions holding the power to be judicial, the opinion says:

"A different view has been taken by the courts of some of the states. *State v. Pritchard*, 36 N. J. Law, 101; *Page v. Hardin*, 8 B. Mon. 672; *Commonwealth v. Slifer*, 25 Pa. St. 28; and *Dullam v. Willson*, 53 Mich. 392. But these decisions have, as a rule, proceeded upon the ground, that an incumbent has a property in his office, and that he cannot be deprived of his right without the judgment of a court. This view finds support in the doctrines of the common law, which regarded an office as a hereditament, but has no foundation whatever in a representative government like our own."

The court declares that the doctrine of these cases is opposed to the view taken by other courts of equal learning and ability, and then cites seriatim the same cases cited in the *Donahue* case, adding only one other, that of *Patton v. Vaughan*, 39 Ark. 211, which latter simply declares the rule that when no definite term of office is prescribed by law, the power of removal is incident to the power of appointment.

There is a powerful dissent in this case by Follett, J., who reviews the cases cited in the majority opinion and points out, as we have done above, that they do not support the conclusion of the court.

A further case much relied on by counsel for Jersey City before the Governor is *Cameron v. Parker*, 2 Okl. 277; 38 Pac. 14 (1894).

It appeared that Parker had been removed from the office of Superintendent of Public Instruction by the Governor, after notice and a hearing, for misconduct in office. Cameron was thereupon appointed in his stead and brought mandamus proceedings to compel Parker to turn over the property in his hands pertaining to the office. The

question was whether the Governor had the power to remove an officer for cause and this depended on whether the act of removal was judicial or administrative. By a vote of three to five it was declared to be administrative.

The Court said:

"If the governor has not the power to hear and determine the charges against an officer, it is upon the theory that such hearing involves a judicial investigation, and consequently belongs to the judicial branch of our government. There are some authorities that hold such a hearing to be judicial, but these authorities all proceed upon the theory that the relator has some property in the office; that it is a hereditament. This was true under the old common law of England, when the courts considered that the possessors of an office had a property right in it that could be inherited. But in this country nothing is more foreign to our law or repulsive to our sense of free government than the idea that an office is created for some person's particular benefit, or that any one should have a property right in it."

The Court then cites *Donahue v. Will Co.* and *State v. Hawkins* and the cases therein referred to, which have already been reviewed. It also cites a number of other cases, among them *State v. Stevens*, 46 N. J. L. 344, which is a fair sample of their general irrelevancy.

Shortly following *Cameron v. Parker* is *Arkle v. Board of Commissioners*, 41 W. Va. 471; 23 S. E. 804 (1895).

In this case the court had before it the question of the validity of an Act of the Legislature authorizing the County Court to hear charges preferred against a Justice of the Peace after having him summoned to answer such charges, and to remove him from office when a proper case was made.

The Constitution provided that all officers elected

or appointed, except in cases therein otherwise provided for, might be removed from office for official misconduct, incompetence, neglect of duty or gross immorality, in such manner as might be prescribed by general law. It contained a provision enumerating the powers of the County Court, which did not include the removal of incumbents from office, and it then provided that such courts might exercise such other powers and perform such other duties *not of a judicial nature* as might be prescribed by law.

The question presented was whether the above statute was void as an attempt to confer judicial powers upon the County Court in addition to the powers prescribed in the Constitution. The Court cited *Dullam v. Willson*, *Page v. Hardin* and many other cases, and held that the jurisdiction attempted to be conferred upon the County Court was judicial in its character and that the Act was, therefore, invalid.

The Court said:

"Our statute (section 7, c. 7) provides for the removal from office of county and district officers, and, after providing that such removal in the case of a justice of the peace shall be made by the county court of the county, it further provides that 'the charges against any such officer shall be reduced to writing and entered of record by the court, and a summons shall thereupon be issued by the clerk of such court, containing a copy of the charges, and requiring the officer therein named to appear and answer the same on a day to be named therein, which summons may be served in the same manner as a summons commencing an action may be served, and the service must be made at least five days before the return day thereof,' and the court may either suspend him or remove him. When a judge or a court of justice, in a suit between parties, ascertains facts, ascertains and applies thereto the law, decides the controversy, and renders judgment,

he has exercised judicial power, and in such exercise has done a judicial act. Now, why is he summoned, and a copy of the charges served upon him, if the object is not to make him aware of what he is accused? And why is he required to appear and answer, if it is not to put in issue the charges? And why put in issue the charges if their truth or falsity is not to be determined as a basis of the action of the court? And if the charges are sustained, and he is removed by the judgment of the court, by what other name can we call this proceeding than a judicial proceeding? There is, unquestionably, a trial and a judgment, and we can but conclude that it is in contravention of section 24 of article 8 of the constitution which provides that 'county courts may exercise such other powers and perform such other duties not of a judicial nature, as may be prescribed by law.' "

The Court referred to *State v. Hawkins*, and *Donahue v. Wills Co.*, as holding that the amotion of a public officer is not a judicial power but is ministerial or executive, but declared that the great weight of authority holds such action to be judicial.

Answering the suggestion that an office is not property and not within the protection of the courts it said:

"We are aware of no right which is clung to with more tenacity, and about which more feeling is engendered, than in regard to the tenure of public office; and in determining the questions arising upon these contests, intricate questions of law must frequently present themselves for determination. An officer has a right to an office to which he has been fairly and legally elected, and to the emoluments arising therefrom, and he should not be deprived of them without an opportunity of raising all proper legal questions for his protection, and having them judicially determined."

Ten years after the decision in *Cameron v. Parker* the Supreme Court of Oklahoma had the same ques-

tion before it again in *Christy v. Kingfisher*, 13 Okl. 585; 76 Pac. 135 (1904). Paragraph 3 of the syllabi in this case (by the Court) is as follows:

"The Legislature of this territory has the power to authorize the mayor and city council of a city of the first class to remove summarily any elective or appointive city officer without notice or hearing, as it may legislate upon all rightful subjects of legislation, provided its acts do not contravene the provisions of the Constitution of the United States or of some act of Congress; but if it attempt to authorize such mayor and city council to remove such officer for specified cause, upon hearing and evidence, while that part which authorizes the removal for the causes named will be upheld, the right of the mayor and city council to try him will be denied, because the procedure called for judicial action, and not the exercise of political power. The nature of the power is not determined from the mere removal of the officer, but from the procedure by which his removal is to be effected."

In its opinion the Court said:

"The Legislature might authorize any executive or administrative officer or legislative body to remove arbitrarily certain officers, in his or its discretion. But if the law authorizes removal for specified causes alone, then the officer is entitled to be heard and to introduce evidence in his defense, and the officer or body trying the matter must weigh the evidence and pronounce judgment thereon; and the hearing of evidence, weighing the same, and arriving at a conclusion therefrom and announcing it, is judicial action, and, under our organic act, the judicial power of the territory is vested in the Supreme Court, district courts, probate courts, and justices of the peace, and the Legislature has not the authority to confer judicial power upon any other court, person, body, or tribunal."

With respect to *Donahue v. Will Co.*, the Court said:

"While several cases can be found which hold that removal of an officer for cause is not a judicial act; the strongest case that can be found on that side of the question is *Donahue v. County of Will et al.*, 100 Ill. 94; but a number of the authorities cited do not support the principle contended for therein, as for instance, several cases hold that the removal of certain officers do not call for judicial action, which we concede, because, under the statute of the states from which these authorities are collated, the removing officer is given the unconditional power to remove, and others cited clearly support the view here contended for.

* * * * *

"The general principles announced by the Illinois court, in the main, are correct, but it proceeds upon the theory that an office is not property; that no one owns an office. If these expressions used are intended to convey simply the idea that no one has such an interest in an office as will prevent the power creating it from abolishing it, or that an office is not the subject of inheritance, we grant it; but we cannot subscribe to the not uncommon theory that an officer, because a public servant, has no rights which are bound to be respected. A public office, while not property, is a position held of right by election or appointment, and all of the courts are quick to protect one in the enjoyment of those rights. They may differ, as on the question now under consideration, as to what his rights are, but, whatever the court conceives them to be, it will protect as quickly and as fully as though it were property."

After citing the text writers and reviewing the cases holding to the contrary of *Donahue v. Will Co.*, the Court concluded as follows:

"But why cite other authorities? On the one side are many well-considered opinions by our ablest courts, as well as recognized text-writers

like Cooley, Dillon, Throop, and Mechem, against which stand the decisions of two or three states, whose opinions announce that the removal of a public officer for cause is not a judicial act, without showing us, by reason or well-considered authority, why, under our system of laws, it has changed from a judicial act to the exercise of executive or political power. Surely not upon the theory that an office is not property, because the right to enjoy the honor and emoluments of an office, within the limitations stated in this opinion, are equally as sacred; and it must be conceded that, wherever one is entitled to enjoy any right, even though it be not property, he may invoke the aid of the judicial power of the state to protect him in the enjoyment of the same, and, as a rule, it is the only power that can afford him relief."

Again the question arose in *State v. Chaney*, 23 Okl. 788; 102 Pac. 133 (1909), and the court considered whether it should follow *Cameron v. Parker* or *Christy v. Kingfisher*. Its conclusion was as follows:

"When we consider the eminent authorities supporting the Christy case, to wit, the highest courts of Michigan, at the head of which was Chief Justice Cooley, New Jersey, New York, West Virginia, Indiana, Pennsylvania, and other states, we do not feel that under the circumstances we would be justified in overruling the same."

In *State v. Eberhart*, 116 Minn. 313; 133 N. W. 857 (Sup. Ct. Minn. 1911), the Governor had removed a county attorney from office under a statute authorizing such removal by the Governor "whenever it appears to him by competent evidence that he has been guilty of malfeasance or nonfeasance in the performance of his official duties". It was held that "proceedings for the removal of a public official by the Governor are clearly of a judicial char-

acter" and are therefore reviewable in the Supreme Court on *certiorari*.

Dillon on Municipal Corporations (4th Ed.), Vol. 1, Sec. 253, declares that proceedings to remove a public official "in all cases where a motion is for cause, is adversary or judicial in its character".

Mechem on Public Officers, Sec. 455, says:

"Proceedings for the removal of an officer for cause are judicial in their nature, and must be had before tribunals clothed with judicial powers."

Throop on Public Officers, Sec. 379, says:

"Where the statute provides that an officer may be removed, but 'only for cause and after an opportunity to be heard,' the power thus granted is not an arbitrary one, to be exercised at pleasure, but only upon just and reasonable grounds, and then not until after notice to the person charged, for in no other way could he have 'an opportunity to be heard.' The proceeding, therefore, must be instituted upon specific charges, sufficient in their nature to warrant the removal, and then, unless admitted, proven to be true. The person charged has also the right to cross-examine the witnesses produced to support the charges, call others in his defence, and in these and other steps in the proceeding be represented by counsel. In no other way could the person sought to be removed have a due hearing, or 'an opportunity to be heard', and this condition must be complied with before the power of removal is exercised. It follows, therefore, that the proceeding is judicial in its character."

In *Cooley on Constitutional Limitations* (7th Ed.), 518, it is said:

"A party cannot by his misconduct so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form. Forfeitures of rights and property cannot be ad-

judged by Legislative act and confiscations without a judicial hearing after due notice would be void as not being due process of law."

Having thus reviewed the decisions in other States and given the views of the leading text-writers on the subject, we come now to a consideration of the rule which obtains in this State. This was declared forty-seven years ago in *State v. Pritchard* (36 N. J. L. 101) and has remained unchallenged up to this time. The decision was rendered in this court and was concurred in by all the judges sitting—four in number. The opinion was by Chief Justice Beasley than whom no greater constitutional lawyer ever sat upon the bench of an American Court.

It appeared in that case that certain police commissioners of Jersey City had been convicted of malfeasance in office in the Hudson County Court of Oyer and Terminer, whereupon the Governor had summarily removed them and appointed others in their stead. The commissioners refused to vacate, and the Governor's appointees brought *quo warranto*. There was no statute authorizing the Governor to remove the commissioners, and it was held that no power of removal inhered in his office. The decision might have stopped there but it did not.

Considering and deciding, as was his wont and his delight, the more important constitutional questions involved, the Chief Justice proceeded as follows:

"But again, the function to declare an office forfeited from malfeasance, is obviously judicial in its character, and this leads to the second inquiry, whether such a function belongs to the governor of this state?

"It has already appeared that the authority to adjudge as to the forfeiture of office did not belong to the British crown—the king could

not seize the office without inquest of office found in his favor, and could not recall his letters patent except upon a judgment to that effect by one of the regular courts.

"The question therefore is, whether the prerogative of the governor of this state, in this respect, overtops that of the British sovereign? If it has this reach, of course the power must be derived from the constitution of the state.

"But the framework of the government of this state has been too carefully constructed to leave so important a matter as this in any doubt, or subject to any uncertainty. Its different departments have been nicely adjusted, and the boundaries of their action have been accurately and plainly set and established. And in no part of the instrument is the line of division between the respective branches more clearly marked than between the powers of the executive and those of the judiciary.

"By Article III, the constitution declares: 'The powers of the government shall be divided into three distinct departments—the legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided.'

"The Vth Article appertains specially to the executive office. Its provisions are perfectly clear and explicit. It declares that the executive power shall be vested in the governor; that he shall take care that the laws be faithfully executed, and grant under the great seal of the state, commissions to all such officers as shall require to be commissioned; that he shall be a member of the court of pardons, and may suspend the collection of fines and forfeitures, and that 'when a vacancy happens during the recess of the legislature, in any office which is to be filled by the governor and senate, or by the legislature in joint meeting, the governor shall fill such vacancy', &c.

"These are all the powers having the least bearing on the subject under consideration,

attached by the organic law to the office of the executive.

"By Article VI, the whole judicial power is placed in the courts.

"It is obvious, therefore, that the governor of this state is not possessed of a particle of judicial capacity. I cannot see that a single one of the powers conferred upon this high office even borders upon such authority. It is true that he is empowered to fill certain vacancies, and in doing such acts he must decide whether or not such vacancies exist. But such decision is in no sense a judicial act. It is a mere assumption of the existence of a certain state of facts on which to base executive action. Such assumptions, or determinations by a chief executive, when they relate to or affect private interests, have no binding force. If the executive should fill an office on the conviction that the incumbent was dead, it is presumed that in the mind of lawyers there would prevail no doubt that if the fact of death had not occurred, the executive action would be void. An estoppel on private right by executive decision is not likely to be pleaded by any well skilled counsel. I think there is no reasonable ground on which to base a claim for the existence of any right of judicature in the governor of the state.

"And there can be as little doubt that the act of declaring that the offices involved in this case had been forfeited, was a judicial decision. It had all the essential elements of such an adjudication. It was a determination of the fact as well as the law, and comprised at once the functions of the jury and the judge, and it related to a right of property. The questions to be settled were, whether the officer had misbehaved; and that was an issue of fact. And whether such misbehavior amounted to a forfeiture of office; and that was an issue of law. The point of fact required the introduction of evidence, and for this purpose the governor had before him the record of the conviction of these defendants in a criminal court. Whether such record would be competent for

the purposes for which it was used, is open as a question of pure law to considerable uncertainty, the usual and inveterate rule being, that a criminal record is not admissible in any suit or proceeding relating to property or the civil rights of persons. But it is enough to denote that here was presented a rule of evidence to be passed upon. In all its parts the proceeding was one of ordinary judicature. And then, too, after the ascertainment of the fact, it became necessary to apply the rule of law. The result was an announcement that the forfeiture had been incurred. And this clearly was an act of judicial discretion. Than the judgment of the judge, there is no other legal test of the effect a certain act of misconduct has upon the right to office. What malfeasances will work a forfeiture is no part of the *lex scripta*. There is no statute upon the subject. It is obvious that it may well be that some convictions in a criminal court may not produce such a result. The point is not met by the suggestion that in this case the crime committed was one *malum in se*, and made highly penal, because if the jurisdiction is vested in the executive on this occasion, it belongs to him in all cases of official misdemeanor. It is not too much to say, that of all the cases where there is room for the use of a graduated standard for judicial judgment, the class of cases which comprises the one now considered is the most prominent. What jurist or judge has ever attempted to define that category of offences which in law are operative to deprive the wrongdoer of a public office? And yet such was the question upon which the executive was called upon to pronounce. These acts were judicial in the most rigorous sense of the term.

* * * * *

"It cannot fail to have been perceived that the question discussed relates merely to the matter of jurisdiction. That an officer who has made use of the opportunity which his position afforded to perpetrate a fraud upon the public should be summarily cashiered, is a prop-

osition entitled to universal assent. But the result to which I have arrived is, that the finding of the fact of misconduct and the graduation of the punishment are judicial, and not, by virtue of our system of laws, executive functions. And I think, upon reflection, there will be few minds that will deny the propriety of the establishment of this power in a judicial depository. Its effect is to put the rights of the citizen under the safeguard of the ordinary tribunals, and to surround them with the protection of those modes of proceeding, trial and supervision which are the best, and, perhaps, only guarantees against error and injustice. To have left such cognizance to the executive branch of the government would have been to make these valuable interests to be dependent on the conclusions of a single mind, unassisted by the usual methods for the elucidation of truth, the responsibility of decision being unrelieved by the consciousness that if the conclusion should be incorrect, the error could be corrected by some supervisory tribunal. Every proceeding to remove an officer for official misconduct or neglect is essentially and thoroughly a judicial proceeding, and has consequently, and with the utmost propriety, been confided to that branch of the state government."

We respectfully submit that this decision, acquiesced in for so long a period of time, and supported, as it is, by the great weight of authority elsewhere, including all the leading text writers, ought to be regarded as settling the question in this state until the rule is changed by the people themselves under their power to amend the Constitution.

But if we are wrong about this, and no regard is to be paid to the stability of our judicial determinations, then we submit that the decision is in strict accord with Constitutional principles, and that the criticisms upon it in the few cases which disagree with it are altogether unsound. These

criticisms are two in number—(1) that the decision mistakenly treats public office as private property, and (2) that the right to hear parties and determine facts is constantly exercised by executive officers and therefore does not pertain alone to the judiciary.

As to the first criticism, it is enough to say, as is said in so many of the cases, that whether the right to hold office and receive the emoluments thereof is property or not, it is at least a right, or privilege, to which the incumbent is entitled and of which he cannot be stripped except by due process of law.

For an extended review of the cases on this subject see *Ekern v. McGovern* (1913), 154 Wis. 157; 142 N. W. 595, at p. 623.

In *Nichols v. MacLean*, 101 N. Y. 526; 5 N. E. 347, Judge Andrews, speaking for the court said:

“The right to hold an office” (till terminated by lawful methods), “is as perfect as the title to real and personal property”. (It is not) “property in the sense that chattels or lands are property of the owner”. (But) “an office has a pecuniary value although primarily it is an agency for public purposes” (as quoted in *Ekern v. McGovern*, 142 N. W. 625).

See also the opinion of Mr. Justice Minturn in *Balling v. Elizabeth*, 79 N. J. L. 197.

As to the second criticism, we need only point out that while executive officers do frequently hear parties and determine facts as the basis of executive action, such determinations do not bind private parties or deprive them of their day in court, which is the effect, if constitutional, of such proceedings as the Chief Justice denounced and as are here involved.

But it may be asked, why if the Legislature can authorize the Governor to remove the incumbent of an office at will, can it not require the Governor

to first give the incumbent a hearing, without thereby ousting him of jurisdiction? So it can if nothing more is required, for the hearing is then merely to inform the Governor's discretion, not to control his judgment, and after the hearing he may still do as he likes. But when, as here, the removal can only be for a specified cause, that is to say, for the wrongful act or neglect of the incumbent, the latter is entitled, and so are the public, to have the existence of the cause determined by one qualified to sit in judgment, and not by one forbidden by the Constitution to do so; to have the determination under the safeguards with which the Constitution has surrounded the courts of justice, not under the influence of the sudden gusts of passion or prejudice which so often control and discredit political action.

Chief Justice Beasley pointed out in the Pritchard case that the power to declare a forfeiture of public office has never been possessed even by the King of England, and it would be strange indeed if the framers of our organic law, fresh from rebellion against the tyrannies of an English king, had intentionally lodged with the successor of the King's prerogative in this State a power so vast, so arbitrary and so liable to be abused. That they did not do so we have already seen, and that they specifically lodged it elsewhere we shall presently see.

If it be said that functions similar to those attempted to be conferred upon the Governor by Sec. 2 of the Utilities Act are constantly being performed by common councils, boards of excise and other non-judicial bodies, under legislative authority, and that, therefore, such functions have by common consent come to be regarded as non-judicial, the answer is that the legislature has power under the constitution to confer judicial functions upon such bodies and the performance of such functions

by such bodies does not, therefore, indicate that they are regarded as non-judicial.

In *Voight v. Board of Excise*, 59 N. J. L. 358, proceedings had been taken under legislative authority by the Board of Excise of the City of Newark to forfeit a liquor license for alleged violations of the excise laws, and it was insisted that the legislature could not confer such power upon the excise commissioners because they were ministerial officers and the power involved the exercise of judicial functions. To this Mr. Justice Gummere, speaking for this court, said:

“If the investigation of such a matter is a judicial function, then, although it is true that, ordinarily, the board of excise commissioners is a ministerial body, the legislature, by requiring the board to make such investigation, has created it a judicial body for that purpose. That such action by the legislature was a legitimate exercise of legislative power cannot be disputed.”

It is said in one of the cases that an act of the legislature authorizing the Governor to remove judicial officers for causes specified, after notice and a hearing, confers executive powers *to be administered judicially*. We submit that this is but another way of saying that judicial functions can be conferred under pretense that they are executive. The constitution cannot be circumvented in that way.

III.

The clause of Sec. 2 of the Utilities Act above quoted is also unconstitutional because it attempts to confer upon the Governor jurisdiction which the constitution vests exclusively in the court for the trial of impeachments.

Article V, Par. 11, of the Constitution provides:

“The governor and all other civil officers under this State shall be liable to impeachment for misdemeanor in office during their continuance in office, and for two years thereafter.”

Article VI, Sec. 1, provides:

“The judicial power shall be vested in a court of errors and appeals in the last resort in all causes as heretofore; a court for the trial of impeachments; a court of chancery; a prerogative court; a supreme court; circuit courts, and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish, as the public good shall require.”

Article VI, Sec. III, reads as follows:

“1. The house of assembly shall have the sole power of impeaching, by a vote of a majority of all the members; and all impeachments shall be tried by the senate; the members, when sitting for that purpose, to be on oath or affirmation ‘truly and impartially to try and determine the charge in question according to evidence’; and no person shall be convicted without the concurrence of two-thirds of all the members of the senate.

“2. Any judicial officer impeached shall be suspended from exercising his office until his acquittal.

"3. Judgment in cases of impeachment shall not extend farther than to removal from office, and to disqualification to hold and enjoy any office of honor, profit or trust under this State; but the party convicted shall, nevertheless, be liable to indictment, trial and punishment according to law.

"4. The secretary of state shall be the clerk of this court."

We submit that the jurisdiction thus conferred upon the Court for the trial of impeachments reaches to a case like the present and is exclusive of any other.

Nothing is better settled than that the legislature cannot subtract from the powers of a constitutional court or confer a part of its jurisdiction upon another court or instrumentality.

Harris v. Vanderveer's Exrs., 21 N. J. E. 424;

Traphagen v. West Hoboken, 39 N. J. L. 232;

Flanagan v. Plainfield, 44 N. J. L. 118;

Central R. R. v. Tunison, 55 N. J. L. 561;

Flanigan v. Guggenheim Smelting Co., 63 N. J. L. 647.

The only question, therefore, would seem to be one of application.

The jurisdiction conferred is to try and determine misdemeanors in office alleged against certain designated officers and upon conviction to remove them from office. Does the term "misdemeanor" as thus used in the constitution comprehend "neglect of duty" and "misconduct in office"? If so, then the very offenses which the legislature has attempted to make triable before the Governor are among those which the Constitution declares shall be tried by the court for the trial of impeach-

ments when the object is the removal of the offending officers.

We submit that the term "misdemeanor" as used in the constitution is not confined to offenses so designated in the Crimes Act but extends to felonies and all other disqualifying offenses whether indictable or not. Demeanor is conduct and misdemeanor is misconduct in a constitutional or parliamentary sense, and it is in this sense that it is used in our constitution.

In *Falloon v. Clark*, 61 Kan. 121; 58 Pac. 990, it is said:

"The only ground of removal by impeachment is 'misdemeanor in office', and these words, we think, are used in a parliamentary sense, and mean 'misconduct in office'. It is something which amounts to a breach of the condition tacitly annexed to the office, and includes any wrongful official act or omission to perform an official duty."

In *State v. Hastings*, 37 Neb. 96; 55 N. W. 774, 791, it is said:

"The word 'misdemeanor' has a common law, a parliamentary, and a popular sense. In a parliamentary sense, as applied to officers, it means maladministration or misconduct, not necessarily indictable."

To the same effect are:

Yoe v. Hoffman, 61 Kan. 265; 59 Pac. 351, 355;

State v. Borowsky, 11 Nev. 119, 124;

State v. Mann, 21 Wis. 684.

It is clear, we think, that the power attempted to be conferred upon the Governor to adjudge a forfeiture of office for misconduct or neglect of duty cannot be supported upon the theory that jurisdiction to try those offenses and upon conviction to

remove the offender from office, has not been conferred upon the court for the trial of impeachments.

Can it be supported upon the theory that utility commissioners are not among the officers designated in the constitution as liable to impeachment for misdemeanor in office? We think not. These officers are not constitutional officers in the sense that they are named in the constitution, it is true, but they are civil officers under the State, and it is such officers, and not merely constitutional officers, who are designated as liable to impeachment. The language of the constitution is not ambiguous and needs no interpretation. We submit that it means what it says.

In discussing this constitutional provision in the Pritchard case, Chief Justice Beasley, after holding that the Governor was forbidden by Article 3 of the Constitution to adjudge forfeitures in office, said:

“Nor in the frame of the state constitution is there wanting an organ appropriate to the exercise of this jurisdiction. I think the authority in question is vested in the court for the trial of impeachments. By section first of Article VI, which effects a distribution of the judicial power, a portion of it is vested in this tribunal. Its constitution is defined by section third, the right to impeach being given to the assembly, and that of trial to the senate.

“The jurisdiction of this important court is not, in express terms, defined. But I think it clear that its cognizance is confined to the misconduct of state officials. In England, as is well known, the jurisdiction of parliament, in this respect, is much more extensive. It is said, that in that kingdom, all the king’s subjects are impeachable in parliament. In practice, however, this kind of prosecution has usually been confined to that class of misdeeds which are particularly injurious by the abuse of important offices of public trust. But such

an extent of jurisdiction in this court would be incompatible with the most cherished notions usually prevalent in this country, with respect to the safeguards necessary to the protection of persons and property. And that the scope of the jurisdiction of the court of impeachments, in this state, is much more limited than this, and is restricted to persons holding office under the state, is convincingly manifest from that provision of the constitution which declares that the judgment, in such cases, 'shall not extend further than to a removal from office, and to a disqualification to hold and enjoy any office of honor, profit, or trust, under this state.' Thus, by imperative implication, the limits of jurisdiction are restricted to the offences of this particular class of persons.

"The only remaining question, therefore, is, whether the office holders now involved in this controversy belong, in the constitutional sense, to this class of state officers of whose misdeeds this court of impeachments takes cognizance. The pertinent provision of the constitution is in these words, viz.: 'The governor, and all other civil officers under this state, shall be liable to impeachment for misdemeanor in office, during their continuance in office, and for two years thereafter.' The present officials are state officers, and I have failed to see how they are to be excluded from the general description of the subjects of impeachment just quoted. The generality of the language, so as to comprise the whole class of state officers, appears to have been designed. In other parts, where the intention was to restrict the effect of a clause to constitutional officers, the language employed is aptly limited. If this comprehensive designation of the objects of the cognizance of this court is not to be fully effectuated, but is to be confined to certain classes of officers, where are the limits to be set? If it does not take in all state officers, which are to be embraced and which excluded? The whole matter would be quite arbitrary. If the executive can try and pronounce upon the

delinquency of the present officials, the extent of his power would seem entirely indefinite and precarious, and no reason is perceived why it would not cover the whole field of misbehavior by these public agents. By force of such a construction of the authority of the governor, the functions of the court of impeachments would be substantially superseded.

"From these considerations I have come to the conclusion that these defendants were impeachable for their alleged official misdeeds, and that it would have been competent for the court of impeachments to remove them from their posts. A vacancy in these offices would have thus been created, and, in my estimation, this cannot be effected by any other power in the state."

This interpretation of the constitutional provision in question has stood unchallenged for nearly half a century. In the meantime the constitution has been twice amended and other attempts to amend it have been made and failed, but no attempt has ever been made to alter the rule thus authoritatively declared.

It is highly important that our judicial system should be stable and should not change from day to day to meet the changing views of the multitude or to accommodate itself to any supposed political exigency. Therefore, whatever view might be taken of the constitutional provision as an original question, we submit that it is too late now to alter our time honored conception of its effect and meaning.

Nor will it do to say that in the Pritchard case the legislature had not attempted to confer the power of removal upon the Governor as a political function; that, therefore, the only power of removal existing in that case was the judicial power possessed by the court of impeachments, and that the opinion of the Chief Justice must be read as holding nothing more than this.

In the first place, the opinion of the Chief Justice

cannot be so read. He declared that the power of forfeiting a public office, that is, of removing the incumbent for cause, is essentially and thoroughly judicial in character and because it is cannot be conferred upon the Governor as a political power; and further, that as to State officers this power is in terms conferred by the constitution upon the court for the trial of impeachments and cannot be lodged elsewhere.

In the second place, the determination that the power of removal, in a case requiring an adjudication of misconduct or misdemeanor in office, is conferred upon the court for the trial of impeachments, carried with it by necessary implication the further determination that, whatever it might be otherwise, the constitution had made the power judicial by conferring it upon a body having no other than judicial power.

No one will deny, we imagine, that under the constitutional provision in question the Utility Commissioners may be impeached and removed for misconduct in office. Would it not be an anomaly in constitutional law if a power thus made judicial and conferred upon a court could also be made political by the Legislature and conferred upon the Governor? Suppose that after removal by the Governor the Utility Commissioners should be impeached and on trial acquitted, which judgment would control?

But it may be argued that the framers of the constitution left the legislature free to create as many offices as it chose and to endow the Governor with power to remove the incumbents of any such offices at will, and therefore, could not have intended to restrain the legislature from providing for removal from such offices otherwise than by impeachment even in cases where it created the offices for a fixed term and secured the incumbents against removal except for misconduct. But the

conclusion does not follow the premise. As we have already seen, the power of removal at common law was an incident to the power of appointment in those cases where the office was held for an indefinite period, or at the will of the appointing power, and the framers of the constitution simply left this power where they found it. But with respect to offices created for a fixed period and made forfeitable only for cause specified, the reverse was the rule and as to these some forum was necessary to determine the existence of the cause before they could be vacated.

The framers of the constitution recognized this, and in creating a court for the trial of impeachable offenses committed by constitutional officers determined to include within its jurisdiction similar offenses committed by officers of the same grade appointed under legislative acts. A forum for the trial of each class being necessary, no reason could have appeared why both should not be tried before the same court. The constitution of 1844 was framed by some of the most distinguished lawyers in the State. At that time there were many civil officers existing under legislative acts, and the phrase "*the Governor and all civil officers under this State*" could not have been chosen by inadvertence.

It is sometimes said that the power to create an office involves the power to provide for its termination. That is true but gets us nowhere, for this power, like every other, is subject to constitutional limitations and the question here is whether such limitations have been imposed. We think we have shown that they have.

There are many decisions in other states dealing with the jurisdiction of courts for the trial of impeachments created under varying constitutional provisions. One or two of these construe the term "state officers" or "civil officers of the state" as

used in their constitutions to comprehend only constitutional officers. For the most part, however, they deal with the question whether officers appointed for or elected within some subdivision of the state are to be considered as civil officers of the state, and on this they differ. They generally hold, however, that only officers having state-wide powers are to be regarded as state officers.

Thus, *In re Opinion of the Justices*, 167 Mass. 599; 46 N. E. 118, it was held with some hesitation and expression of doubt that a county commissioner was not subject to the jurisdiction of the court of impeachments whose authority was to hear and determine impeachments against "any officer or officers of the commonwealth", upon the ground that his office was local.

Again, in *Donahue v. Will Co.*, 100 Ill. 94, already referred to in another connection, it was held that a county treasurer was not liable to impeachment under a constitutional provision declaring that "the Governor and all civil officers of this state shall be liable to impeachment for any misdemeanor in office" because he was a county and not a state officer, although named in the constitution. In discussing this question the court said:

"The framers of that instrument" (the constitution) "were careful to provide the manner of removing all state officers, for misdemeanor, from office but they seemed to have been equally studious not to limit the general assembly in its power to provide the necessary means for the removal of officers below the grade of state officers, except by the judiciary article, where a forfeiture and removal is provided for by impeachment or a judicial proceeding. This is a strong circumstance to show that other officers, whose impeachment, conviction and removal are not provided for by that instrument, were intended to be left in the discretion of the general assembly as to the mode."

We do not think it would aid the court to proceed further with a discussion of the cases in the courts of other states relating to this subject. They depend upon the varying phraseology of the clauses of their constitutions creating the court of impeachments and defining its jurisdiction, read in the light of more or less qualifying clauses found in other parts of such instruments. Here we have the plain and comprehensive language contained in Article V, paragraph 11, of our constitution unqualified by any other article or paragraph contained in that instrument. And we have also the unanswerable argument of Chief Justice Beasley contained in his opinion in the *Pritchard* case. On these we confidently rest our case.

IV.

The charges given to the defendant do not accuse him of neglect of duty or misconduct in office.

Under Section 2 of the Public Utility Act of 1911, the governor has no power to remove the defendant from office for any cause other than neglect of duty or misconduct in office and then only after having given him a copy of the charges against him and an opportunity of being publicly heard in person or by counsel in his own defense upon not less than ten days' notice.

While the statute applies only to official neglect or misconduct, it is clear that such neglect or misconduct in order to justify removal, must be that of the individual who is charged therewith. There is nothing in the statute which indicates a legislative intent to make a member of the board liable to removal because of the acts or failures of his colleagues or on account of the collective actions

or failures of the board as a board in which he has not participated and for which he is not individually responsible.

The charges preferred under the statute are insufficient unless, assuming their truth, they show the defendant to have been individually and personally guilty of neglect of duty or misconduct in office within the meaning of Section 2 of the Public Utility Act. Failing this, the governor was without jurisdiction to make the order removing the defendant from office, even upon the theory that his act was administrative and not judicial.

In *People v. Therrien*, 80 Mich. 187; 45 N. W. 78 (1890), the court, quoting from the opinion of Mr. Justice Champlin, in *Dullam v. Willson*, *supra*, said:

“There must be charges specifying the particulars in which the officer is subject to removal. It is not sufficient to follow the language of the constitution. The officer is entitled to know the particular acts of neglect of duty or corrupt conduct, or other acts relied upon as constituting malfeasance or misfeasance in office;”.

In the above case, the court further said, quoting from Mr. Justice Campbell's opinion in *Dullam v. Willson*:

“It has always been held that general conclusions, or conclusions on general charges, were not enough, but the facts on which the judgment was based must appear, either in specific charges or in specific findings, on which the party has been heard on legal proofs,” (citing cases) * * * “These cases not only require a proper hearing on proper charges, but hold that those charges must consist of distinctly stated facts, and not general charges of wrong or neglect, so that it can be determined as a matter of law whether what the removing body treats as wrong is within the legal quality of wrong.”

In *Village of Kendrick v. Nelson*, 13 Idaho, 244; 89 Pac. 755 (1907), it is said:

"So far as we have been able to examine the authorities, it has been uniformly held that, where the statute provides that an officer may be removed for specified cause or upon doing or failing to do some specific act, the board or body making the removal and declaring the vacancy must first find the existence of the fact which entitles them to make such removal and declare such vacancy, and that until they have first done so, they have no jurisdiction or authority to remove the officer or appoint his successor."

To the same effect is *Ekern v. McGovern*, 154 Wis. 157; 142 N. W. 595 (1913).

An examination of the charges in this case discloses that none of them accuse the defendant personally of any act or omission. It will be noted that, without exception, they allege certain acts or neglects to act on the part of the board as a board and nowhere charge that the defendant acted or failed to act as a member of the board or otherwise, in any way whatsoever.

It is not shown in the information, or in the proceedings before the Governor, how many members constituted the board at any given time, but the Act of 1911 provided for a board of three members, and this number was increased by the supplement of February 25, 1918, to five.

By Section 13 of the act of 1911, it is provided that any order of the board may be made by a majority vote. Every allegation contained in these charges may, therefore, be true and yet the defendant, Mr. Gaul, may not have participated in or been in any way responsible for any of the alleged misconduct or neglect. He may have been absent from the meetings at which the objectionable conduct occurred or he may have been present and advised or voted against the action of his colleagues. In fact,

the charges do not even state when Mr. Gaul became a member of the board or show that he was a member thereof at the time any of the alleged misconduct or neglect occurred.

The information, however, does show that Mr. Gaul was appointed on the 1st day of May, 1919. Most of the charges served upon defendant fail to specify the date of the alleged neglect or misconduct. In view of this omission, it cannot be assumed that these charges refer to a date subsequent to the date of the defendant's appointment. No date is named in such part of Charge No. 1 as is sustained by the findings; in Nos. 2, 5; in such part of 6 as appears to have been sustained by the governor's findings of fact (with the exception of subdivision (a)); in such part of 8 as appears to have been sustained by the governor's findings (except subdivision (h)); in charges bearing the Nos. 11 and 14; in such part of 17 as appears to have been sustained by the governor's findings, or in subdivision (a) of charge 18.

The alleged misconduct referred to in charge 3 is stated to have occurred in the year 1917, more than a year prior to the defendant's appointment. Charge 6 refers to delay in the valuation of the property of the Public Service Electric Company, which is said to have been commenced in 1911, nearly 8 years before the defendant was appointed. It does not appear that subsequent to his appointment this matter was ever brought to his attention or that any delay occurred during his incumbency, which could, under any circumstances, be regarded as neglect of duty or misconduct in office for which he was responsible. Charge 9 refers to something which occurred on July 10, 1918, nearly ten months before the defendant was appointed, while charge 15 refers to alleged misconduct which is said to have happened on May 6, 1918, which also was prior to the defendant's appointment.

The only charges which are specifically stated to refer to acts of the board subsequent to May 1, 1919, are subdivisions (*h*) and (*j*) of charge 8 and subdivision (*e*) of charge 18, and as above stated, these charges, as well as all the others, fail to allege that the defendant participated in the conduct of the board which is therein referred to or even that he was a member of the board at that time.

Even though it be assumed, therefore, that the charges sufficiently allege neglect of duty or misconduct in office on the part of the members of the board who participated in the acts or neglects set forth, they are insufficient as to Mr. Gaul because they neither aver that he participated in such acts or neglects or state any facts which show that he was in any way connected therewith.

V.

The findings of fact do not show the defendant to have been guilty of neglect of duty or misconduct in office and are not included within the charges served upon defendant.

It will be noted that the governor did not sustain the charges as made but restricted his findings of fact to those stated in the conclusions filed by him, which conclusions are incorporated in the information. It may be assumed that he found the defendant not guilty as to any charges not covered by the findings of fact.

If the facts as found by the governor do not show that the defendant has been guilty of neglect of duty or misconduct in office within the meaning of Sec-

tion 2 as charged in the charges served, the order of removal of the governor as to him has no validity.

People v. Therrien, 45 N. W. 78; 80 Mich. 187 (1890);

Village of Kendrick v. Nelson, 89 Pac. 755 (Sup. Ct. of Idaho, 1907);

Ekern v. McGovern, 142 N. W. 595 (Sup. Ct. of Wisc. 1913);

State v. Roth, 144 N. W. 339 (162 Iowa, 638, 1913);

State, Hart, Prosecutor, v. Common Council (Sup. Ct. of Minn.), 55 N. W. 118.

The findings of fact, like the charges, all refer to the official acts and failures of the board as a board and not to individual acts or failures. Most of these findings are based upon the manner in which the board has exercised the discretion vested in it by the statute. None of them indicate any intentional or willful neglect or wrongdoing on the part of the board or any of its members.

The board is an administrative body, created by a statute which defines its powers and duties. This statute makes it the duty of the members of the board to conduct hearings, to weigh evidence and to apply the law to the facts as found by them. In the performance of such a duty the ablest and most upright persons sometimes err. It certainly was not the intention of the act to authorize the governor to remove the members of this board merely because he disagreed with their findings of fact or their view of the law, even though it be assumed that his judgment and discretion may be sounder and better than theirs.

Under Point 3 of this brief it is shown that the words "neglect of duty or misconduct in office" as used in this statute are equivalent to the words "misdemeanor in office" as used in paragraph 11 of Article V of our constitution. They include such

acts as amount to a breach of the good faith and right action that are tacitly required of all officers.

See

Etzler v. Brown, 50 So. 416 (Sup. Ct. of Fla., 1909);

Ekern v. McGovern, 154 Wis. 157; 142 N. W. 595 (1913).

In *State v. Hastings*, 55 N. W. 774 (Sup. Ct. of Neb.), the court, in the course of a well considered opinion, used the following language:

"It may be safely asserted that where the act of official delinquency consists in the violation of some provision of the constitution or statute which, if denounced as a crime or misdemeanor, or where it is a mere neglect of duty, willfully done, with a corrupt intention, or where the negligence is so gross, and the disregard of duty so flagrant, as to warrant the inference that it was willful and corrupt, it is within the definition of a misdemeanor in office. But where it consists of a mere error of judgment, or omission of duty, without the element of fraud, and where the negligence is attributable to a misconception of duty, rather than a willful disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the state."

See also *State v. Roth* (Sup. Ct. of Iowa, 1913), 144 N. W. 339, 344.

It is, we believe, quite clear that none of the findings of fact contained in the governor's conclusions show that the defendant has been guilty of any neglect of duty or misconduct in office within the meaning of this statute. These findings of fact will be separately considered in the order in which they appear in the conclusions.

The first finding of fact is that the defendants have failed to properly carry out the duty imposed

upon them by the provision of the Public Utility Statute which requires the board, by order in writing, to fix proper and adequate rates of depreciation for each public utility and to compel such utilities to set aside the moneys so provided for out of earnings, and carry the same in a depreciation fund, and to prevent the expenditure of this fund for any purpose other than depreciation, improvements, new construction, extensions or additions to the property of such utility.

Section 17 of the Act of 1911 provides:

“The board shall have power, after hearing, upon notice, by order in writing, to require every public utility as herein defined:

* * * * *

“To carry, whenever in the judgment of the board it may reasonably be required, for the protection of stockholders, bondholders or creditors, a proper and adequate depreciation account in accordance with such rules, regulations and forms of account as the board may prescribe. The board shall from time to time ascertain and determine, and by order in writing after hearing fix proper and adequate rates of depreciation of the property of each public utility, in accordance with such regulations or classifications, which rates shall be sufficient to provide the amounts required over and above the expense of maintenance to keep such property in a state of efficiency corresponding to the progress of the industry. Each public utility shall conform its depreciation accounts to the rates so ascertained, determined and fixed, and shall set aside the moneys so provided for out of earnings and carry the same in a depreciation fund. The income from investments of moneys in such fund shall likewise be carried in such fund. This fund shall not be extended otherwise than for depreciation, improvements, new constructions, extensions or additions to the property of such public utility.”

The act does not in terms provide that the board shall compel the utility to obey this section. It is, however, expressly made the duty of the board to ascertain and determine and by order in writing after hearing, fix proper and adequate rates of depreciation of the property of each public utility. As we understand the governor's finding of fact, he did not determine that the board had failed to perform this duty and if he did so determine, such determination was not included within the charges filed, for these charges are restricted to the specific instances therein mentioned, of diversion of money from the depreciation fund, and do not set out any failure of the board to fix and determine proper and adequate rates of depreciation.

The governor finds that the board has permitted and allowed some companies to divert from the depreciation fund set aside large sums of money in order that dividends might be paid. Inasmuch as the names of the companies which were permitted to divert such funds are not stated in the governor's finding, it is impossible to ascertain therefrom whether such finding is within the charges served upon the defendant. It is clear that the defendant, Mr. Gaul, was not responsible for permitting or allowing any of the diversions charged in the complaint, for they were alleged to have occurred in 1917, prior to his appointment as a member of the board.

The governor further finds that the board has failed up to the present time to take steps to compel the companies to refund said money to said depreciation account. There is nothing in the act which requires the board to take such steps.

Circumstances might readily exist which, in the judgment of the board, would make it inadvisable and in fact, impossible, to compel a company to restore funds unlawfully taken from its depreciation account. For example, the financial condition

and credit of a company might be such that it could not obtain funds to use for this purpose. The board could not compel the stockholders to restore the dividends paid them, and if the earnings of the company were barely sufficient to meet expenses and its credit were exhausted, restoration could not be made. The governor contents himself with finding as a fact, that no such steps have been taken, without finding facts which show that under all the circumstances of the case such steps should have been taken or might, if they had been taken, result in the restoration of the fund. It is submitted that as to the defendant, who certainly did not permit or allow the original diversion of the fund, no neglect of duty or misconduct is shown merely by finding that the board took no steps to compel the restoration of the fund without showing the existence of other facts which would cast that duty upon the board. It cannot be assumed that the board's failure to act in this respect was neglect or misconduct, if, under any possible view of the facts consistent with the governor's finding, such failure might have been justified.

The next finding of fact is that the board has

“shown undue bias and favoritism and discrimination towards subsidiary corporations of the Public Service Corporation or some of them, and against other smaller similar corporations in other parts of the State, by setting up for such small corporations, as a prerequisite to the granting or maintaining of increased rates, and as a basis upon which the reasonableness of such increased rates are to be tested, a valuation of the company's property and limiting the said rates so that they will afford not over six per cent. thereon; while they have allowed the Public Service Electric Company to increase rates so as to afford eight per cent. upon its capital stock, without any valuation to determine whether such stock would be entitled to said return if the rule of valuation applied

to the other smaller companies was used as a basis in that case; and they have allowed the Public Service Gas Company to earn eight per cent.; and they have allowed the Public Service Railway Company to increase rates and maintain the same for an unreasonable time, without applying to said corporations the test of a valuation."

A large part of this finding of fact is not included within any of the charges served upon the defendant. In fact, the only charge which deals with the subject matter of this finding is charge 5. The first paragraph of this charge is so indefinite that it fails to charge the defendant with anything, while the second paragraph is based upon the fact that the Public Service Electric Company and the Public Service Gas Company were permitted to earn 8 per cent., while other companies had been restricted to 6 per cent. or less.

The finding of fact recites an additional alleged discrimination, namely, the requirement of a valuation of the company's property in the case of the smaller companies and the failure to require such valuation in the case of the Public Service. This alleged discrimination is not within the charges and, of course, cannot support the order of removal.

This finding deals with the manner in which the board has exercised its discretion, and while the governor charges it with bias, favoritism and discrimination, he does not find any facts which show the existence of any such attitude on the part of the board.

In view of the fact that the courts of this state have held that not only the value of the property of the company but the value of the service rendered may be considered in fixing a rate, it may well be that the board was required, in the performance of its duty, to restrict some companies to

a rate which would not produce 8%. See *Public Service Gas Co. v. Public Utility Board*, 84 N. J. L. 463, aff. 87 N. J. L. 705. The action of the board in allowing the Gas Company 8% was sustained by this court in the case last cited.

The governor's finding that in some cases the board required a valuation of property as a prerequisite to an increase in rates and in other cases such valuation was not required, fails to show any misconduct or neglect on the part of the board or its members. This course, we believe to be in entire accord with the opinion of this court in *O'Brien v. Public Utility Board*, 92 N. J. L. 44; affirmed on appeal, *Id.* 587. Under the doctrine of that case the board has the right in the exercise of its discretion to approve a rate without a valuation of the property of the utility, and it also has the right to require a valuation. The facts and circumstances under which in some cases valuations were required and in other cases such requirement was not insisted upon, are not found by the governor. No facts appear in this entire finding which enable the court to say that the board has exhibited any bias, favoritism or discrimination or any other abuse of the discretion vested in them.

The next finding of fact that in the case of some small companies the board has inserted as a condition of granting rates, that the company should waive some of its legal rights, is not within any allegation contained in the charges filed.

The finding that the board has refused or neglected to insert reasonable conditions to protect the public rights in the orders granting the increase of fares in the cases of the Public Service subsidiary corporations, is broader than any charge referring to this matter and must of course be restricted so as to bring it within charge 9 (the only charge covering this subject). This charge refers only to the increase granted the Public Service

Railway Company and to the refusal of the board to annex to it *certain conditions therein set forth*. It cannot be seriously contended that the board was guilty of neglect of duty or misconduct in office because of its refusal to annex these conditions to its approval of a reasonable rate. Under subdivision (h) of Section 16 (Supp. Com. Stat., p. 1278), it is made the duty of the board to approve an increase, change or alteration in a rate upon being satisfied that the same is just and reasonable. It may well be doubted if the board has power to annex conditions to the approval of such a rate but if such power exists it would not extend to the exaction of conditions of the kind specified in charge 9. Furthermore, this finding, it will be noted, can have no application to Commissioner Gaul for the reason that the increase in rates occurred prior to his appointment.

The next finding of fact relates to delay in the valuation of the property of the Public Service Railway Company and the Public Service Electric Company. This evidently refers to subdivision (a) of charge 6 and to subdivision (b) of charge 18 and subdivision (a) of charge 8. No duty is imposed by the statute upon the board to value the property of any of these corporations unless in its judgment such valuation is necessary or advisable. This finding of fact, which merely states that the valuation of the property of these two companies has been delayed for a very long time, does not state that this delay was without justifiable cause or whether it operated in favor of or against the interests of the public.

The finding that other companies were held to a prompt conclusion of their respective valuations is not included within any of the charges.

The next finding that the board allowed the Public Service Electric Company to make new rates retroactive, evidently refers to subdivision (c) of

charge 6. It does not appear whether by "retro-active" it is meant that such rates were permitted to apply to current consumed previous to the filing of the rates or previous to the approval of the rates by the board. If the latter, the action of the board was of the kind approved in *Edison Storage Battery Co. v. Public Utility Board*, 93 N. J. L. 301.

The finding that the board had put into force within one year seven different rates of fare upon the Public Service Railway without any sufficient reason therefor and without testing any of said rates of six per cent. upon the valuation which was applied to other corporations is evidently based on subdivisions (a), (b) and (d) of charge 8 and subdivision (a) of charge 18. It does not appear from this finding whether the so-called putting into force of these different rates resulted from the filing of rates by the utility and the approval thereof by the board or whether the board required the utility to adopt rates which it had fixed. In either event the fixing or approval of rates to be charged, was committed by law to the judgment and discretion of the board, subject to review by this court. The fact that the action of the board in fixing or approving these rates, was without sufficient reason in the opinion of the governor is entirely immaterial. The governor has not found as a fact that there was no evidence in the rate fixing proceedings to support the action taken by the board or that in fixing or approving these rates the board abused the discretion vested in them by the statute.

The above remarks apply with equal force to the next finding of fact concerning the zone fare experiments. This refers to subdivision (j) of charge 8. Both the charge and the finding of fact fail to allege sufficient facts to enable the court to say that under the circumstances alleged in this paragraph the public or the private parties interested should have had an opportunity to be heard.

In the absence of such allegations of fact, it cannot be assumed that the alleged denial of this opportunity was misconduct.

The next charge in effect, is that the board has prescribed varying rates of fare for school and other children in different municipalities. This too, is a matter within the discretion of the board. The mere fact that in different municipalities under varying conditions, children may have been carried for different rates, shows no unlawful or improper discrimination and this is all that the finding of fact establishes.

The next finding of fact that the board has failed to recommend to the legislature the changes in the public utility statute therein specified, shows no misconduct nor neglect of duty. This finding of fact is based upon charge 17. This charge is in turn based upon Section 14 of Article I of the act which merely requires the board to make such recommendations in its report to the governor as it may deem proper. The charge does not allege that the board failed to submit recommendations to the governor for changes in the law which the board deemed proper but merely that it failed to recommend certain specified changes which the City of Jersey City deemel proper, which is a very different thing.

The next finding of fact which is to the effect that the board has allowed moneys raised upon bond issues for the construction of permanent improvements, to be diverted to the account of working capital, is apparently intended to be based upon charge 15, as no other charge covers this subject. It will be noted, however, that charge 15 differs from the finding of fact and merely alleges that the Public Service Railway Company advised the Board that money raised by terminal bonds had been used as working capital, and then states that "it does not appear what action was taken on this

letter" so that the charge fails to allege either that the board failed to take action or that it took improper action and the finding of fact by the governor, that the board has allowed moneys raised upon bond issues to be diverted is not within the charge.

The next finding that the board has so administered the Public Service Statute as to establish the practice of unnecessarily long, tedious, expensive processes instead of administering the act as an administrative body, quoting from the language of Mr. Justice Swayze in *O'Brien v. Public Utility Board, supra*, is based solely upon a misapprehension of the law and the opinion of this court in that case.

Justice Swayze in this opinion referred to two different kinds of procedure under two different sections of the act. The procedure under Section 16, par. c, was described as

"The method of litigation, long, expensive, unsatisfactory, necessarily too slow to afford prompt relief, and sure to do injustice by delay to one side or the other."

The procedure under paragraph (h) of Section 17 was described as

"Prompt and comparatively satisfactory, and resulting, if not always in abstract justice, yet in a determination, which in the hands of fair-minded men, is likely to be acquiesced in."

An examination of the act shows that the prompt and comparatively satisfactory procedure under subdivision (h) of Section 17 can only be initiated by the filing of a rate by the utility, while the procedure under Section 16 may be initiated by the board. It is apparent that where the procedure is commenced by the board, the method of litigation must be followed, while where the procedure is instituted by the filing of a rate, the shorter method may be pursued.

The next finding of fact that the commissioners, knowing the facts, have in fixing rates and valuations, employed experts who were unduly biased and committed to the corporations' point of view, is broader than charge No. 2 upon which it is apparently based. It will be noted that the finding does not designate the experts so employed. If, however, it can be assumed that the experts referred to in the finding are the ones named in the charges (and if they are not the finding is not within the charges) the charges contain no statement that any of these experts were unduly biased or that the board had any knowledge of such bias.

The charge with regard to Mr. Richey is that he had previously been employed by the Public Service and subsequently was employed by the board in another matter. This does not show any bias, undue or otherwise.

The charge referring to Mr. Feustel is that he was connected with a street railway corporation in a western city, one of the directors and stockholders of which was Randall Morgan, who was also a director of the Public Service Corporation. It is not charged that the board knew the above facts at or during the time he was employed.

With regard to Mr. Jackson, the charge is that he valued the property of the Philadelphia Electric Company at \$50,000,000 and that the company accepted a valuation of \$30,000,000, without stating which figure represented the true value of the property; that he testified that the Chicago Telephone Company was running at a deficit of \$800,000 a year and that two years later when conditions may have entirely changed, it was shown that the company could reduce its charges \$700,000 a year and still have a fair return. It is not charged that this testimony was false. It is charged that the board employed Mr. Jackson after its attention had been called to this fact, but it is not charged that

Mr. Jackson was either biased or inefficient. The finding of the governor that these experts were unduly biased and that the board employed them with knowledge of the bias is not within the charges served.

The next finding of the governor that the board has discriminated between corporations in granting promptly applications of certain public service companies for increased rates, within a few weeks, while the case of New York Telephone Company, which was closed within the last year, is still undecided, is not based upon any charge served upon the defendant. The defendants in the charges served are neither accused of promptness in granting the applications of the Public Service companies nor delay in dealing with the application of the telephone company, and so far as this proceeding is concerned, this finding of fact is one which the governor had no jurisdiction to make.

We submit that not one of the Governor's findings of fact supports his conclusion that the defendant is guilty of neglect of duty or misconduct in office.

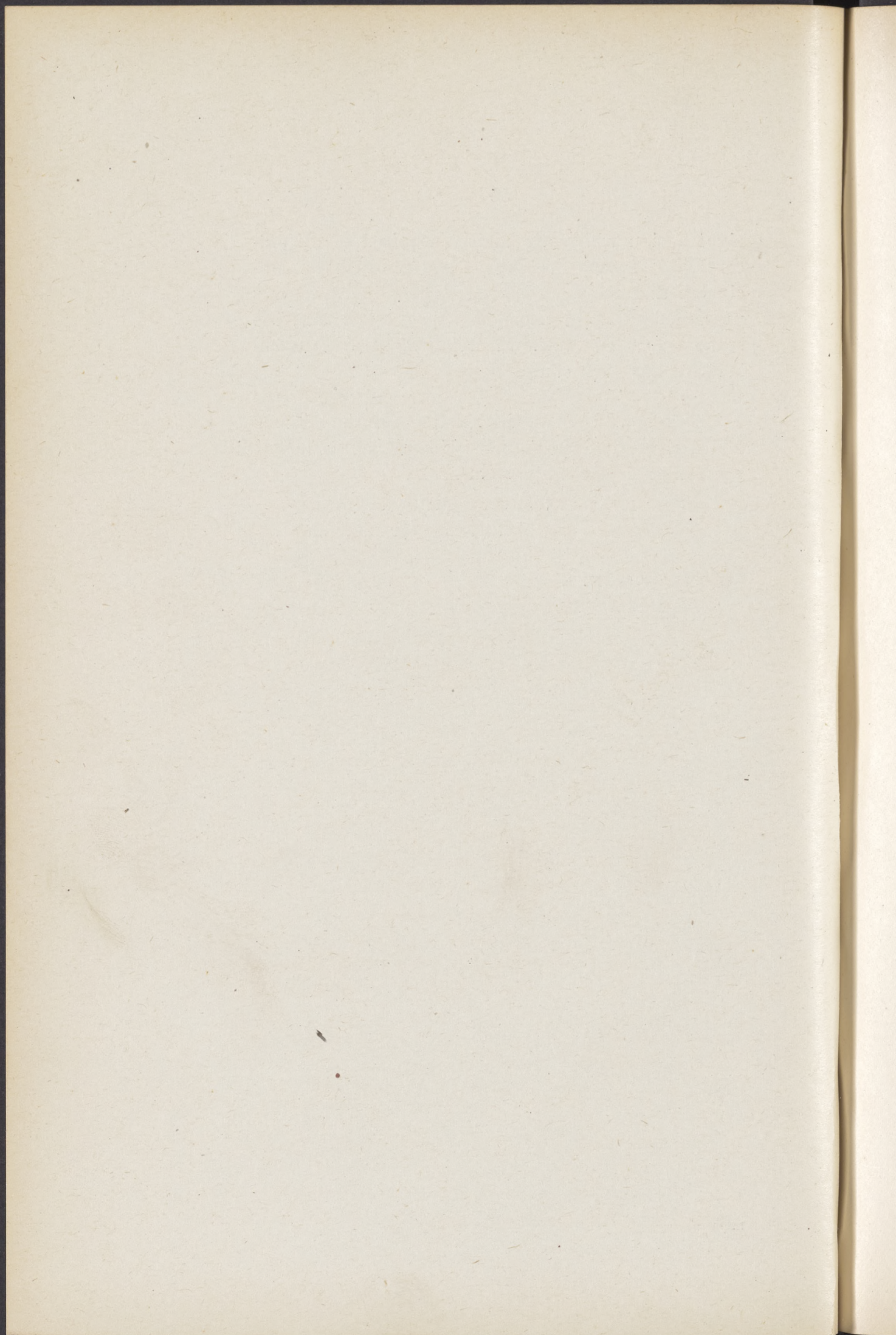
As above shown, the Board in the discharge of its statutory duties conducts hearings, determines facts from evidence produced before it, and applies the law as understood by it to these facts. In the course of these proceedings, the rights of opposing interests are necessarily affected. The Governor's findings as well as the charges clearly show that the real basis for the removal proceedings was not any actual neglect of duty or misconduct on the part of the Board, or any of its members, but merely dissatisfaction on the part of the Governor with the conclusions reached by the Board in the course of the due performance of its duty. The Governor has attempted to remove the members of the Board, not because of any act or omission which amounts to "a breach of the good faith and

right action which are tacitly required of all officers", but merely because he has reached the conclusion that the Board erred in deciding questions presented to it for decision. We submit that the statute does not authorize removal of these members for any such cause.

It is respectfully submitted that for the reasons above given the information is insufficient and that the demurrer should be sustained.

LINDABURY, DEPUE & FAULKS,
Attorneys for defendant.

JOSIAH STRYKER,
R. V. LINDABURY,
Of Counsel.



NEW JERSEY

Court of Errors and Appeals

THOMAS F. MCCRAN, Attorney
General of the State of New
Jersey,

Informant-Appellee,

vs.

GEORGE F. WRIGHT,
Defendant-Appellant.

On Informa-
tion, &c.
Quo War-
ranto.

**BRIEF FOR
DEFENDANT-APPELLANT**

The Attorney General, without leave of the Court first had, and under his common law authority, filed this information against the defendant, and, thereupon, served a summons upon him to answer unto the State of New Jersey and plead on the rule of the Court to the information aforesaid. Upon the return day of the summons defendant entered his appearance, whereupon a rule to plead was allowed by the Court and served on the defendant. Thereafter defendant demurred to the information, and set forth, in the demurrer, the causes thereof.

The information after alleging generally that for the space of twenty days and upwards next following the 13th day of October, 1920, the defendant had unlawfully held, etc., the office of member of

the Board of Public Utility Commissioners of the State of New Jersey and had claimed to be a member of said Board, though he had no legal appointment, warrant or authority therefor; proceeds to further allege, among other things:

(a) That on May 1, 1918, defendant was duly appointed, commissioned and qualified as a member of said Board, by the Governor of the State of New Jersey, after due nomination and confirmation by the Senate of the State for the term of six years from the date of the commission; that said appointment was made by the Governor under the authority of an act entitled "An act concerning public utilities; to create a Board of Public Utility Commissioners and to prescribe its duties and powers," approved April 21, 1911, together with its supplements and amendments, and particularly by a supplemental act of February 25, 1918, which provided for a fifth Commissioner in addition to the four provided for by the original act: that defendant lawfully held and enjoyed said office up to October 13, 1920.

(b) That the Governor of New Jersey on March 20, 1920, gave to defendant a copy of charges against him dated March 19, 1920, for neglect of duty and misconduct in office by him, and that a copy of the charges are set forth in the information (for which copy of charges see the information).

(c) That an opportunity of being publicly heard in person and by counsel in his own defense, on April 13, 1920, and divers days thereafter, was given to defendant and that he made answer denying the charges, and appeared, and was heard in relation to said charges, and evidence was produced for and against him.

(d) That at the conclusion of the hearings the Governor "after due consideration of the evidence produced and proved for and against said defendant by counsel, and the arguments submitted, together with the charges and the answers thereto in behalf of the said defendant and the said members composing said Board of Public Utility Commissioners, and each of them, found, on the thirteenth day of October, one thousand nine hundred and twenty, aforesaid, that the said defendant had been guilty of neglect of duty and misconduct in office as a member of the Board of Public Utility Commissioners," and that the neglect and misconduct by him "and other of said members of said Board of Public Utility Commissioners so found was and is" as thereafter set forth in said information (prout, the same).

(e) That by reason of said conclusions and findings, in said information set forth at large, the said Governor removed defendant from his said office and addressed a notice to that effect and filed the same with the Secretary of State of New Jersey, together with the conclusions and findings aforesaid, and also mailed a copy of said letter, conclusions and findings to the defendant.

(f) That by reason of the "said removal of the said defendant for the reasons so stated the office of the said defendant * * * was terminated and came to an end * * * notwithstanding that the said defendant had not yet served out the portion of time remaining to his said term for which he was appointed." And that thereupon the defendant usurped and intruded into the said office, etc., etc.

To this information the defendant filed a demurrer containing and disclosing the causes there-

of. As those causes are sufficiently set forth in the points hereinafter made, they are not now stated.

The Supreme Court overruled the demurrer and directed a judgment of ouster against defendant, which was duly entered (Case, p. 20). From this judgment, defendant appeals, and served notice thereof, stating the grounds (Case, p. 75).

The controversy before the Court may be divided into two phases: One, concerns the power of the Governor to remove the defendant. The defendant denies that the Governor has such power and asserts that the statute under which he claims to act is void, in respect of such power, because it violates the Constitution of the State. The other phase appears upon an assumption of the constitutionality of the statute, and regards the execution by the Governor of the power given him by the statute; it being contended that the charges heard by the Governor were not the kind of charges which the statute authorized him to hear, and if they were, that he failed to convict the defendant upon such charges and that the conviction was upon matters concerning which no charges had been made. While the second phase of the controversy will not be argued in this brief, yet the underlying points are adhered to and the Court is respectfully requested to apply to these points the argument and brief in behalf of Messrs. Slocum and Gall in the proceedings against them.

Points.

1. The demurrer properly raises the issue in this proceeding as to whether defendant usurps his office.

2. The Governor had no right to remove the defendant by virtue of the acts of the Legislature mentioned in the information, because the right of removal given to him by the act is void in that it is granted by the Legislature in violation of the interdict of Article 3 of the Constitution of New Jersey.

3. Because the power of removal granted by the said act violates said Constitution in that it attempts to grant to the Governor a jurisdiction and power properly belonging to the Court for the trial of impeachments, and is therefore unconstitutional and void.

4. Because the notice of the charges and hearing thereon were insufficient to confer jurisdiction on the Governor.

5. Because it appears that no charges of neglect of duty or misconduct in office were made against defendant.

6. Because no lawful removal of defendant is shown.

7. Because the facts found by the Governor do not show, or amount to, neglect of duty or misconduct in office.

8. Because the Governor's order of removal was based upon a finding of alleged neglect of duty and misconduct in office not mentioned in the charges served upon defendant.

ARGUMENT.

POINT I.

The demurrer properly raises the issue in this proceeding as to whether defendant usurps his office.

Haight v. Love, 39 N. J. L., 14, 476.

Anderson v. Myers, 77 N. J. L., 186.

Dunham v. Bright, 85 N. J. L., 391.

Civil Service Com. v. O'Neill, 85 N. J. L., 92.

Bonynge v. Frank, 89 N. J. L., 239.

Browne v. Hagan, 90 N. J. L., 423.

S. C., 91 N. J. L., 544.

6 *Went. Pl.*, tit. *Quo Warranto*.

In the cases cited, the issues of usurpation therein were raised by demurrer. In *Bonynge v. Frank*, Mr. Justice Swayze indicates the exception to the rule in *Davis v. Davis*, 57 N. J. L., 203, *i. e.*, that the demurrer admits the usurpation, and says:

“On the case of the pleadings the relator would be entitled to judgment of ouster unless there is some defect in the information which prevents the result. As to Moses there is such a defect. The information shows his term has not expired. As to him the averments are inconsistent and he is entitled to judgment.”

The rule just quoted applies to the case at bar. We contend that the facts set forth in the information to show the ending of defendant's term of office are not efficient for that purpose; consequently, if the Court holds them to be inefficient, the allegation of usurpation is inconsistent with the facts upon which it is predicated.

POINT II.

The Governor had no right to remove the defendant by virtue of the Acts of the Legislature mentioned in the information, because the right of removal given to him by the Act is void in that it is granted by the Legislature in violation of the interdict of Article 3 of the Constitution of New Jersey.

Article 3 of the Constitution reads as follows :

“The powers of the government shall be divided into three distinct departments—the legislative, executive and judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided.”

This same distribution of powers among the departments of government, coupled with the same prohibition upon their exercise, is found in most of the States of the Union. In some constitutions it appears *verbatim et literatim*, and in the others with but verbal changes. There seems to be no such express distribution of the powers of government in the States of Delaware, Georgia, Kansas, New York, North Dakota, Ohio, Pennsylvania, South Carolina, Washington, or Wisconsin, as their respective constitutions are shown, as of 1916, in Mr. Kettleborough's compilation; nor is there in the Federal Constitution.

The New Jersey Constitution of 1776 made no distribution of the powers of government. Its only prohibition respecting such powers was contained in Section 20, which forbade any of the justices

of the supreme or other court, sheriffs, or any person possessed of any post of profit under the government, other than justices of the peace, from sitting in the assembly.

This Constitution blended the powers of government more than did those of any other State except possibly Pennsylvania and Delaware.

It was to that class of State constitutions which Mr. Madison referred when he said:

“I am fully aware, that among the many excellent principles which they exemplify, they carry strong marks of the haste, and still stronger of the inexperience, under which they were framed.”

During the period intervening between the adoption of the Constitution of 1776 and the adoption by the Convention of that of the United States in 1787, and particularly during the pendency of the adoption of the latter by each of the States, public interest in the correct expression of the fundamental principles of free government had been greatly stimulated by the teachings of the great statesmen of that day. Perhaps none of those principles was more carefully regarded than that which required the distribution of the powers of government. Montesquieu, long before, had declared, “There can be no liberty where the legislative and executive powers are united in the same person or body as magistrates”; or, “if the power of judging be not separated from the legislative and executive powers.” And during the stormy period which immediately followed the adoption of the United States Constitution by the Convention, Mr. Madison said: “One of the principal objections inculcated by the more respectable adversaries to the constitution is its supposed violation of the politi-

cal maxim, that the legislative, executive and judiciary departments, ought to be separate and distinct." Such a violation, he says, "may justly be pronounced the very definition of tyranny." *The Federalist*, No. 47.

At the time Mr. Madison wrote, the principle in question was not so carefully guarded as it afterwards was in New Jersey; not only in the proposed Federal Constitution, but in those of all the other States, except Virginia, Massachusetts and Maryland. Massachusetts had already placed in her Constitution a distribution which, while not as rigid as that adopted by the State of New Jersey more than half a century later, yet sufficed to very clearly segregate the powers of government, "to the end," as the clause concludes, "it may be a government of laws and not of men."

The defense of the Federal Constitution consisted not in denying the absolute necessity of a proper division of powers, but in asserting that such division was accomplished by its first three articles. Nevertheless, in *Marbury v. Madison*, 1 Cr., 137, the constitutionality of the act of Congress, therein declared to be unconstitutional, was supported in argument of counsel upon the theory that the grant of power to the Supreme Court, being couched in affirmative phrase, did not forbid the Legislature to grant to it other powers than those specified. It was only by judicial construction of the grant that a contrary conclusion was arrived at and the legislative attempt to nullify the assignment by the Constitution, itself, of judicial powers, in the judicial department, was rendered abortive.

In this case too, as previously in New Jersey, in the great case of *State v. Parkhurst*, 4 Hal., 427, was set at rest the fears of Hamilton and Madison, expressed by the latter by the interrogatory, "Will it be sufficient to mark, with precision,

the boundaries of these departments, in the Constitution of the Government, and trust to these parchment barriers against the encroaching spirit of power?" And that trepidation was ended by the elaborated application by Chief Justice Kirkpatrick and Chief Justice Marshall of the thought contained in the following words of Hamilton:

"To what expedient then shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the Government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."

The Federalist, No. 51.

The "parchment barriers" between the different departments of government were not erected in New Jersey until 1844, and then the great Jersey men, including Henry W. Green, Joseph C. Hornblower, Peter D. Vroom, Abraham Browning, and many others of their kind, who sat in the convention of that year, saw to it that those barriers should not only be erected but a warning given to those who would break them down. Chief Justice Beasley said in *Maxwell v. Goetschius*, 40 N. J. L., 383, 390:

"Not content with a distribution of the powers of government to the three departments, there is superadded a prohibition against either infringing on the other, a circumstance bearing the semblance of an

admonition to guard against such a perversion."

The proceedings of the convention of 1844 indicate that no matter considered by them was regarded as of greater moment than the distribution of the powers of government. Some of the speeches then delivered are instructive upon the matter now in hand.

In the convention of June 4th, as reported in the *Newark Daily Advertiser*, June 6th, Mr. Hornblower, continuing the discussion, said:

"If we understand anything in the science of government; if experience has taught us any principle which may be regarded as an axiom it is that the great departments of government, the executive, legislative and judicial should be kept separate and distinct. The proposition to erect a legislative body, elected solely upon political grounds into a judicial tribunal which is to decide matters affecting everything that is dear to us in life and that goes to make up the sum of human felicity is to my mind most extraordinary.

* * * The court has become a by-word—and was not long since christened by eminent counsel, not the court for the correction of errors but the court of high errors! And what else can be expected of men who, however pure and honest, are elected to carry out political principles."

Mr. Ogden, speaking in support of the committee report, said:

"In my judgment the court framed by the committee has many advantages over the present court. It will be more permanent

which will secure uniformity in its decisions. It will from its construction be more independent. No members are elected by the public. Sir, our Chancellor is to be selected by some appointing power. Our judges of the Supreme Court and other courts are to be selected by the appointing power. Nay, we hesitate to lodge the choice of surrogates with the people because they exercise *some judicial function*, and yet under the old constitution we have trusted the choice of members of our highest court to political popular election. Sir, this is an error in juridical economy and ought to be corrected."

Mr. Ryerson offered an amendment that the governor, chancellor, justices of the supreme court, and the oldest class of senators shall compose the Court of Errors. Mr. Narr moved to strike out the governor. Agreed. Mr. Hornblower objected to the amendment.

"The whole force of his argument would remain, that of uniting the judicial and legislative branches of government. These Senators are elected as politicians but never as judges, except in the case alluded to by the gentleman from Passaic for their influence in some particular case."

After stating objections to the amendment, Mr. Browning said:

"But, Mr. Chairman, I have a greater objection to the amendment than this. It proposes a direct connection between the legislative and judicial branches of government which in my humble opinion should be kept distinct. Any connection between the differ-

ent branches of government is improper for the power to make the law and expound it is tyranny. * * * I submit, Mr. Chairman, that no connection should exist between the several branches of government. I hope to see such an article introduced into our constitution. I find it in several of the state constitutions. Let the powers of government be kept separate and let no individual belonging to one branch participate in the others. I have no belief in universal genius, one man excelling in all things. I hope in my heart the amendment will not prevail."

The amendment was lost.

Thus, New Jersey by 1844 had provided a concrete solution of the tremendous problem presented to the founders, and had not only created strong and visible barriers between the three great departments, but had provided a means of maintaining them, in giving to this Court the power to repel any attempt to throw them down by declaring any such attempt unconstitutional, so that it is now settled in New Jersey that

"When the inquiry is whether the legislature or any other body or officer has violated the regulations of the constitution, it is entirely plain that the decision of that subject must rest exclusively with the judicial department of the government."

State v. Rogers, 56 L., 480, 616.

If we seem to have unnecessarily dwelt upon the development leading to the Third Article of our Constitution, we hope to find our excuse in the admonition in the Declaration of Rights of the Massachusetts Constitution, wherein it is said:

"A frequent recurrence to the fundamental principles of the constitution * * * are absolutely necessary to preserve the advantages of liberty, and to maintain a free government."

The right of the Governor to remove is attempted to be justified by the Public Utilities Act of 1911 (P. L. 1911, p. 374). The only provision of that act from which such power can be pretended to be derived is the last sentence of paragraph 2 of Section 1 of the act, which reads as follows:

"The Governor may remove any commissioner for neglect of duty or misconduct in office, giving to him a copy of the charges against him and an opportunity of being publicly heard in person or by counsel in his own defense upon not less than ten days notice."

(a)

Unless this provision of the act shall be held to have given the Governor power to remove the defendant, under the circumstances set forth in the information, his term of office has not expired and he should have judgment for him in this proceeding. For, unless the Governor is given power by the statute, it is the settled law of New Jersey that he is without power to remove this defendant. He has no such power ex officio.

State v. Pritchard, 36 N. J. L., 101.

Murphy v. Freeholders of Hudson, 92 L., 244.

Haight v. Love, 39 N. J. L., 14, 21; affirmed, *id.*, 476.

In *State v. Pritchard*, Chief Justice Beasley says:

"I have not been able to perceive any intimation, not even the least, either in the constitution of this state, its system of laws, or legal observances, that this right of superintendency over, or power of removal from public office, except in instances of statutory specification, has been delegated to the executive head of the government."

In *Murphy v. Freeholders*, the Board of Freeholders of Hudson County had removed the county counsel, who held an office for a term fixed by law, before the expiration of his term, without notice or hearing. The Court of Errors said:

"The power to remove officers having a fixed term is not incident to the power of appointment. *People v. Healy*, 231 Ill., 629. The power of removal is incident to the power of appointment, only to those cases when the office is held at the pleasure of the appointing power. *Collins v. Tracey*, 36 Tex. 546." * * *

"The Supreme Court of Michigan said: 'We have not found any case where an officer who was appointed for a fixed term (and where the power of removal was not expressly declared by law to be discretionary) has been held to be removable except for cause, and wherever cause must be assigned for the removal of the officer he is entitled to notice and a chance to defend.' *Hallgreen v. Campbell*, 82 Mich. 255; 9 L. R. A. 408.

"This principle, as applied to the removal of public officers, has been discussed and recognized in a long line of cases in our own

courts: *Clarke v. Ennis*, 45 N. J. L. 69; *State v. Pritchard*, 36 Id. 101, 111; *Haight v. Love*, 39 Id. 14, 21; affirmed Id. 476."

In *Haight v. Love*, the defendant had been appointed to the office of city collector on April 6, 1876, by a municipal board, which, on April 13, 1876, rescinded his appointment and appointed a successor. Justice Dixon said:

"The relator further insists that the rescission of the defendant's appointment on April 13, 1876, terminated his rights under it. This contention also must fail. What I have already said shows my conviction that the choice of the Board of Finance was alone necessary to the appointment of the defendant, and the language of Chief Justice Marshall, in *Marbury v. Madison*, 1 *Cranch*, 137, 157, is here applicable: 'Some point of time must be taken when the power of the executive over an officer not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act required from the person possessing the power has been performed.'"

Obviously, such power cannot be exercised by the Governor under the somewhat vague powers incident to his duty to "take care that the laws be faithfully executed," if the execution of any particular law be expressly and exclusively confided by the Constitution to another department of government; nor can he see to such execution, if in so doing he must exercise a power forbidden to him by the Constitution; *e. g.*, the judicial power. Nor

can he exercise any sort of political power confided exclusively to another department of government.

In *State v. Wrightson*, 56 N. J. L., 126, 187, the constitutionality of the Act of 1891, dividing counties into assembly districts, was under judicial scrutiny to the end that its constitutionality might be determined. The Court said :

“The contention of counsel in resisting the allowance of this writ is that the question is a political question, and not subject to judicial review. The constitution delegates to the legislative department of the government the function of providing for the election of members of the assembly in the manner and subject to the restrictions prescribed by the constitution. A statute in the performance of that function is the exercise of a legislative and not of a political power, and the constitutionality of the act by which that legislative power is exercised is a subject of judicial inquiry.”

In *Bott v. The Secretary of State*, 63 N. J. L., 289, the same principle was recognized, and the case was afterwards followed in *McConaughy v. Secretary of State*, 106 Minn., 392.

So, whatever may be said elsewhere, in other states, it seems settled in New Jersey that the power to remove officers having fixed terms is not incident to the power of appointment, whether such power be vested in the Governor or in a municipal board ; and that no power of removal inheres in the Governor. The theory that such power is inherent in the executive, adopted in cases like *Parsons v. U. S.*, 167 U. S., 324, has no place in the jurisprudence of New Jersey and has been distinctly repudiated by its courts.

The act in question is ineffectual to give him power to remove the defendant, because the exercise of such power is conditioned upon his prior exercise of a power properly belonging to the judiciary and consequently violates said Article 3.

State v. Pritchard, supra.

Murphy v. Freeholders of Hudson, supra.

Clark v. Ennis, 43 N. J. L., 69, 78.

Moreau v. Monmouth, 68 N. J. L., 480, 482.

Clifford v. Hellar, 63 N. J. L., 105, 118.

The question before the Court is, whether the power given to the Governor to remove a commissioner for neglect of duty or misconduct in office, provided, the Governor, (1) give the commissioner a copy of the charges, (2) give him an opportunity to be publicly heard, in his own defense, is a power "properly belonging" to the judicial department of government, and inhibited to the executive.

The orderly sequence in applying the power is, first, a charge against the commissioner; second, a default or an appearance on his part; third, a hearing, upon which there must be some evidence to support the charge and in which there may be a defense denying the truth of the charge as matter of fact, or challenging its sufficiency as matter of law; fourth, the finding, by the Governor, whether the charge is sustained by the evidence, and, whether it amounts, in law, to neglect or misconduct (this finding, in its nature, is the same as the verdict of a jury or the conclusions of a judge); fifth, the judgment, that the commissioner be removed, if guilty; or, if not guilty, that the charges be dismissed.

It is a proceeding in every essential respect similar to a proceeding in *quo warranto* for the forfeiture of an office. It is *in its nature* judicial. If

it be so, it is a power belonging to the judiciary and inhibited to the executive; for, as is said in *Paul v. Gloucester*, 50 N. J. L., 585, 610:

“The constitutional clause relates * * * to those powers which, by the constitution itself, are assigned to, *or which in their nature pertain* to one of these departments exclusively.” (The elision and italics are ours.)

Paul v. Gloucester decided that the ordering of a “special election, when the conditions exist which legally require it, and the setting a day for holding it are included in this large class of acts which may be performed indifferently by any department.”

But, before leaving this case, it is to be noticed that the opinion of the Court expressly recognizes that the proceeding for forfeiture of an office is judicial. To the objection that the interposition of a judicial act between the passage of a law and its execution would render it unconstitutional, the Court, in refusing to sustain it, said:

“The test of constitutionality thus contended for seems to exclude every criminal statute; or, to take more similar instances, it would exclude statutes which provided that on forfeiture of his office by any officer, a special election should be held to choose his successor.”

In *Ross v. Freeholders*, *supra*, it was determined that the power to appoint officers could be vested in any department of government, because such power was not in its *nature* appurtenant to any particular branch of government; but the Court was not satisfied to rest its conclusions on that point alone; it rested it, upon the additional reason,

that the Constitution authorized the legislature to place the power of appointment where it willed, under the exception to the prohibitive clause of Article 3, reading, "except as herein expressly provided."

Hudspeth v. Swayze, 85 N. J. L., 595, involved nothing usefully pertinent to the present inquiry. It decided that the legislature might constitutionally enact a law to become operative upon the contingency or condition that a majority of the voters of the state should vote in favor of its adoption; such delegation of power to the people not being a delegation of legislative power. The act in no way involved the bestowal of the powers properly belonging to the legislature upon any one of the two other departments of government. The right to clothe the Chancellor with the power of appointment had been previously settled. *Bowlby v. Dover*, 68 L., 97, *Stanley v. Passaic*, 60 N. J. L., 392, nor *Douglas v. Jersey City*, 53 N. J. L., 118, distinguish the present case from *State v. Pritchard*, *supra*, as contended by the Attorney General. They were all cases in which the judicial power was conferred upon inferior tribunals—as the Constitution expressly provides (*Article VI*, sec. 1, par. 1). *Voight v. Board of Excise*, 59 L., 358, 360. But the Governor is not a tribunal, nor can he be endowed with the powers of a judge.

In *Bowlby v. Dover*, the power of a common council to remove a chief of police was involved.

The *Douglas* case involved the dismissal of a detective by the board of police commissioners without notice or opportunity to be heard.

The statutes in the *Bowlby* and *Douglas* cases, giving power to remove, are substantially the same

as in the present case, and the power in each was held to be judicial.

It is not questioned that the legislature may confer judicial power upon new or old tribunals; nor upon inferior tribunals; nor that it can endow administrative officers or bodies with the functions of tribunals. But it cannot make the Governor a tribunal; the Constitution expressly forbids it.

Rippell v. Ins. Co., 85 N. J. L., 395, nor *In re Roebling*, 188 At., 359, it is respectfully submitted, are in point. The Court below seem to regard the first case as justifying the legislature in constituting the Chancellor a legislative agent, but the principle applied is that of *Ross v. Freeholders*. *In re Roebling* in no way justifies the idea that the act there in question gave any power of legislation to the Chancellor. The power given him was that of an appellate tribunal, and the power of the legislature to "create statutory agencies as tribunals to review the action of taxing authorities," so long as the Supreme Court is not deprived of its constitutional authority to review is recognized. Really, the only question in the *Roebling* case concerned the propriety of the proceedings to review.

Clifford v. Heller, *supra*, affords a striking instance of the care taken to prevent the exercise of a judicial power by the Governor. Clifford had been convicted of murder and been sentenced by the Court. He was reprieved by the Governor under his constitutional power to reprieve for a period not exceeding ninety days. The statute of April 16, 1846, authorized the Governor to issue his warrant to the sheriff commanding him to execute the sentence at such time as shall therein be appointed and expressed. The statute was held unconstitutional for the reason that

"If the governor can intervene and have execution by virtue of his warrant, the prisoner will be deprived of the right of a judicial determination of matters, which in law are subjects of judicial cognizance."

Thus, what might well be argued to be a mere administrative power in the Governor, to warrant to further procedure in a matter which he had constitutionally stayed, was declared to be judicial, and denied him.

In *Moreau v. Freeholders*, 68 L., 480, a legislative attempt to confer legislative powers on the judiciary was frustrated. The opinion adjudges certain powers to be judicial or quasi judicial, in the following language:

"To determine how conflicting easements are to be enjoyed (*Delaware, Lackawanna & Western Railroad Co. v. Erie Railroad Co.*, 6 C. E. Gr. 298; *Palmyra v. Pennsylvania Railroad Co.*, 17 Dick. Ch. Rep. 601; S. C. 18 Id. 799), to decide a dispute between contending boards of chosen freeholders as to the location of a bridge connecting their counties (*Somerset County v. Hunterdon County*, 23 Vr. 512), to ascertain the compensation due to an officer of the court appointed to aid the court in performing its functions (*Lindabury v. Ocean County*, 18 Id. 417) are all judicial or quasi judicial questions."

But it declared that the powers conferred upon a justice of the Supreme Court to determine whether the convenience of the public required a new court house, the locality of the court house, the style of it and the amount to be expended were not judicial.

The foregoing cases deal but generally with the distribution of powers, but it is submitted, both upon reason, and upon adjudication in New Jersey, that the power of removal given by the Public Utility statute, now before the Court, is in contravention of the constitutional provision now discussed.

The power of removal given by the act cannot stand alone. It is inextricably bound with the necessity of finding the officer guilty of neglect of duty or misconduct in office. The condition cannot be exercised from the power of removal. There can be no pretense that it was the legislative intent that one should stand without the other. Under such circumstances, the well established rule is that the whole must fall.

Cooley's Con. Lim., 246.

The case of *State v. Pritchard*, *supra*, states so fully the principles applicable to the present case that but one citation is made from it. Further quotation is therefore omitted with confidence that the Court will consider the whole. The following, however, upon the question of what is judicial power, or power which is such in its nature, is so apt, that it is copied:

“And there can be as little doubt that the act of declaring that the offices involved in this case had been forfeited, was a judicial decision. It had all the essential elements of such an adjudication. It was a determination of the fact as well as the law, and comprised at once the functions of the jury and the judge, and it related to a right of property. The questions to be settled were, whether the officer had misbehaved; and that was an issue of fact. And whether such misbehavior amounted to a forfeiture of office;

and that was an issue of law. The point of fact required the introduction of evidence, and for this purpose the governor had before him the record of the conviction of these defendants in a criminal court. Whether such record would be competent for the purposes for which it was used, is open as a question of pure law to considerable uncertainty, the usual and inveterate rule being, that a criminal record is not admissible in any suit or proceeding relating to property or the civil rights of persons. But it is enough to denote that here was presented a rule of evidence to be passed upon. In all its parts the proceeding was one of ordinary judicature. And then, too, after the ascertainment of the fact, it became necessary to apply the rule of law. The result was an announcement that the forfeiture had been incurred. And this clearly was an act of judicial discretion. Than the judgment of the judge, there is no other legal test of the effect a certain act of misconduct has upon the right to office. What malfeasances will work a forfeiture is no part of the *lex scripta*."

In *Clark v. Ennis, supra*, a motion had been made to set aside the service of a summons upon the ground that the sheriff's office had been vacated by reason of his default in filing his bond within the statutory period, and, therefore, the service was void.

The tenth section of the Sheriffs' Act provided that upon a failure of the sheriff to give bond at the times limited "the office of such sheriff shall immediately expire and be deemed and taken to be vacated," and, also, that all his subsequent acts should be void and that he should be liable to a fine therefor.

The thirty-seventh section provided that the county judges, upon knowledge of such vacancy, should direct the county clerk to certify the same to the Governor, who should forthwith fill the vacancy.

But the Court held such proceeding would not be conclusive upon the right of the sheriff to his office, and said:

"The existence of some tribunal to declare the default is inherent. It would be as reasonable to assert that the statute imposes upon Forsyth the fine denounced in the tenth section, without previous trial and judgment, as to say that it is self executing in vacating his office. In the absence of statutory provision, the only mode in which an office can be deemed and taken to be vacant is by proceedings in the nature of *quo warranto*."

This case, it is submitted, clearly holds that a proceeding to remove an officer which is conditioned upon the existence of certain facts is judicial and in the nature of a *quo warranto* proceeding. If so, the Governor cannot be an agency in such proceeding. It is quite clear, that the use of the words, "In the absence of statutory provision," are not intended to imply that such statutory substitute for a proceeding in *quo warranto* would not be judicial in its nature.

Finally, in the case of *Murphy v. Freeholders*, *supra*, this Court, itself, has adjudged a proceeding to remove an officer to be judicial, and requiring the interposition of a tribunal. The *Pritchard* case is cited therein with approval, and the language of the Court, in *Clark v. Ennis*, above quoted, is referred to with approval.

It is submitted that by no logical process of reasoning can the effect of the above decisions be de-

stroyed by saying that the proceeding to remove is not judicial, but quasi-judicial. To apply the language of *Paul v. Gloucester*, it is a power which *in its nature* belongs to the judiciary. Or, as is said in *Bowlby v. Dover*, 68 *Law*, 97 :

“Proceedings for the removal of officials under statutes entitling them to a hearing before they can be removed, are judicial in character.”

In view of the last mentioned case, it was argued below on behalf of the State that the *Pritchard* case may be distinguished from the present one because, as stated in the brief in the Supreme Court,

“Since that decision there have been many rulings by this court and the Court of Errors, to the effect that removals from office for cause, after notice, is a judicial function, though such removals took place not by the adjudication of courts in the judicial department, but by the findings of tribunals provided for by statute, such as the Civil Service Act.”

It is submitted, such rulings in no way distinguish the *Pritchard* case from this. “The tribunals provided by statute” referred to, are such as the Constitution expressly permits the legislature to create, and which may, of course, pass upon questions of a judicial character. But the *Governor* cannot be created a statutory tribunal. *He* cannot be empowered to pass upon questions of a judicial character.

It is no answer, it is respectfully submitted, that the legislature has passed, and that one executive has urged the passage, of laws conferring a power of removal on the Governor, to be exercised by him

on notice and hearing. It is an old adage that two wrongs don't make a right; or, not to clothe the principle in homely phrase, the language of the Court in the great case of *State v. Wrightson*, 56 N. J. L., 126, cited with approval in *Virtue v. Freeholders*, 67 N. J. L., 146, is appropriate:

“Although contemporary and practical construction is entitled to great weight in the construction of constitutional provisions, where the words are of doubtful signification, or the meaning is obscure, yet, where the meaning of the constitution, interpreted by its letter and in its spirit is ascertained, such extraneous construction cannot be allowed to abrogate the text or to fritter away its obvious meaning.”

In the *Wrightson* case the practice, under legislative authority, of more than forty years standing, of electing members of the assembly by assembly district smaller than the county, was declared unconstitutional. In the *Virtue* case, a statute in force for nearly half a century, and assumed, *sub silentio*, in five cases before the higher courts of this state to be constitutional, was declared unconstitutional.

It is further respectfully submitted, that the Court below made no inference of pertinence to this case, in assuming that the chief justice, in the *Pritchard* case, when he said: “How can it be that they are accountable to the governor with regard to their official conduct? By the statute in question the executive *is not given supervision* over these officials; all the authority it confers upon him is to fill the office in case of vacancy. *It imparts to him no faculty to declare judicially that such vacancy has occurred*, and if such faculty exists, it

must be an inherent constituent of the executive office. I have not been able to perceive any intimation, not even the least, either in the constitution of this state, its system of laws, or legal observances, that this right of superintendency over, or power of removal from public office, *except in instances of statutory specifications*, has been delegated to the executive head of the government" (italics from the opinion of the Supreme Court), intended to indicate that it was his opinion that *the power of removal* could be conferred upon the Governor by statute. No question is made by us upon that point. But, the Court below disposed of the *Pritchard* case by that mere comment upon it. It is impossible, we think, to consider the *Pritchard* case as holding that such power of removal can be conferred on the Governor, *when it is conditioned* upon his exercise of judicial power. The contrary clearly appears in various portions of the opinion; for instance:

"By Article VI, the whole judicial power is placed in the courts" (p. 114).

Again:

"It is obvious, therefore, that the governor of this state is not possessed of a particle of judicial capacity" (p. 114).

Again:

But the result to which I have arrived is, that the "finding of the fact of misconduct, and the graduation of the punishment are judicial, and not, by our system of laws, executive functions. And I think upon reflection there will be few minds that will deny the propriety of the establishment of this power in a judicial depositary. Its ef-

fect is to put the rights of the citizen under the safeguard of the ordinary tribunals, and to surround them with the protection of those modes of proceeding, trial and supervision which are the best, and, perhaps, only guarantees against error and injustice. To have left such cognizance to the executive branch of the government would have been to make these valuable interests to be dependent on the conclusions of a single mind, unassisted by the usual methods for the elucidation of truth, the responsibility of decision being unrelieved by the consciousness that if the conclusion should be incorrect, the error could be corrected by some supervisory tribunal. Every proceeding to remove an officer for official misconduct or neglect is essentially and thoroughly a judicial proceeding, and has consequently, and with the utmost propriety, been confided to that branch of the state government" (p. 116).

Our view of the true construction, effect and application of *Paul v. Gloucester*, *supra*, *Ross v. Freeholders*, *supra*, and *Judspeth v. Swayze*, *supra*, cited in the opinion below, has been already given.

The case of *Erie R. R. v. Utility Commissioners*, 87 L., 443, cited in the opinion below for the proposition that proceedings for the removal of officers entitled to a hearing, though of a judicial character, are not exclusive judicial functions, fails to support it. The case had no relation to the question. The matter there decided was that the conferring upon the Utility Board of a police power to require the placing of a flagman at railway crossings, did not deprive the Court of Chancery of its

exclusive power to regulate conflicting easements.

The Court below declares that the method of procedure, before the Governor, provided by law, is "judicial in form," but that the act does not clothe the Governor with "judicial power forbidden by the constitution." We have already shown, we think, that the power given the Governor is, *in its nature*, judicial, and therefore forbidden.

The decisions of the courts of other courts than ours are conflicting. A reference to some of them follows:

Congress can exercise no function which is judicial, unless it be by the Constitution conferred upon it.

Kilburn v. Thompson, 103 U. S., 168.

That a law of the character now being considered confers judicial power was adjudged in *Page v. Hardin*, 47 Ky., 648, wherein he says: The Secretary of State

"being removable for breach of good behavior only, the ascertainment of the breach must precede the removal. In other words, the officer must be convicted of misbehavior in office. And we shall not argue to prove that in a government of laws, a conviction whereby an individual may be deprived of valuable rights and interests, and may moreover be seriously affected in his good fame and standing, implies a charge, a trial and judgment, with the opportunity of defense and proof. * * * Such a proceeding * * * is essentially judicial."

In *Dullum v. Wilson*, 23 Mich., 592, the decision in *Page v. Hardin*, *supra*, was sustained in a very learned and elaborate opinion.

The State of Texas has a Constitution, Article 2 of which contains a prohibitory clause substantially the same as our Article 3. In the case of *Honey v. Texas*, 39 *Tex.*, 1, the Court said:

“No case can occur under our constitution wherein the Governor would be authorized to adjudge an office forfeited.”

In *People v. Nichols*, 79 *N. Y.*, 588, it is held that in a proceeding for removal of an officer for cause the officer is entitled to notice and a hearing and the proceeding is judicial. New York's Constitution contains no express prohibition of the exercise of the powers of one department by the other.

The case of *In re Guden*, 171 *N. Y.*, 530, was cited in the brief below as authority for the proposition that the power to remove an officer, in that case a sheriff, was an executive function. But in that case it appeared that the Constitution of New York contained a provision that “The Governor may remove any officer, in this section mentioned, within the term for which he shall have been elected; giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense.” The sheriff, among other officers, was mentioned in the section; nevertheless, Mr. Justice O'Brien was careful to say:

“Inasmuch as the accused officer is entitled to make a defense and be heard in his own behalf before the removal can be ordered, the proceeding is judicial in nature and character. Any proceeding in which a party is entitled to make a defense and to be heard necessarily involves a judicial inquiry.”

The principal cases holding that the power to remove an officer for cause is not judicial are *Donohue*

v. *County of Will*, 100 Ill., 94, and *State v. Hawkins*, 44 Ohio St., 98. The reason given for the decisions, it is submitted, is completed, analyzed and refuted in the dissenting opinion of Judge Follett in the latter case. It is to be borne in mind, too, that the case in Illinois grew out of the removal of a county treasurer by a county board, and not by the Governor, and could be fully sustained by the power of the legislature to delegate judicial power to inferior tribunals, as was done in upholding the powers in that respect of the Newark Board of Excise (*Voight v. Board of Excise*, 59 N. J. L., 358, 361; *Moreau v. Monmouth*, *supra*). While the Ohio case involved the removal of a commissioner by the Governor, Ohio's Constitution contains no prohibitory clause as ours does.

The power of removing an officer, though conditioned upon a prior exercise of judicial power, has been upheld in the case of *Clay v. Stuart*, 74 Mich., 411, where a change in the Constitution provided that "the legislature shall provide by law for the removal of any officer elected by a county * * * in such manner and for such cause as to them shall seem just and proper." But, the Court expressly held "there can be no doubt that the removal of a person from his office for cause involves the exercise of judicial power," and it would have declared the statute void had it not been for the express constitutional authority therefor.

The Courts of the State of Oklahoma at various times have held variant opinions upon the question before the Court. They are set forth against us in the early case of *Cameron v. Parker*, 2 Okl., 277, and for us in the case of *Christy v. Kingfisher*, 13 Okl., 585. Both cases and many of the authorities are reviewed in the last case, *State v. Chaney*, 23 Okl., 788, which follows the rule in the *Pritchard* case, and the Court says

“when we consider the eminent authorities supporting the Christy case, to wit, the highest courts in Michigan, at the head of which was Chief Justice Cooley, New Jersey, New York, West Virginia, Indiana, Pennsylvania, and other states, we do not feel that under the circumstances we would be justified in overruling the same.”

POINT III.

The power of removal granted by the said Public Utilities Act conflicts with and violates the Constitution of New Jersey in that it attempts to grant to the Governor a jurisdiction and power properly belonging to the Court for the trial of impeachments.

The relevant provisions of the Constitution are as follows:

ARTICLE V—Paragraph 11.

The governor and all other civil officers under this State shall be liable to impeachment for misdemeanor in office during their continuance in office, and for two years thereafter.

ARTICLE VI—Section I.

The judicial power shall be vested in a court of errors and appeals in the last resort in all causes as heretofore; a court for the trial of impeachments; a court of chancery; a prerogative court; a supreme court; circuit courts, and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may

alter or abolish, as the public good shall require.

ARTICLE VI—Section III.

1. The house of assembly shall have the sole power of impeaching, by a vote of a majority of all the members; and all impeachments shall be tried by the senate; the members, when sitting for that purpose, to be on oath or affirmation, "truly and impartially to try and determine the charge in question according to evidence," and no person shall be convicted without the concurrence of two thirds of all the members of the senate.

2. Any judicial officer impeached shall be suspended from exercising his office until his acquittal.

3. Judgment in cases of impeachment shall not extend farther than to removal from office, and to disqualification to hold and enjoy any office of honor, profit or trust under this State; but the party convicted shall, nevertheless, be liable to indictment, trial and punishment according to law.

4. The secretary of state shall be the clerk of this court.

The power of impeachment is vested by the above quoted sections of the Constitution in the House of Assembly; the power to try, in the Senate.

It is well settled in New Jersey that the legislature cannot take away the powers of a constitutional court, nor confer any portion of its jurisdiction upon another court or person.

Traphagen v. West Hoboken, 39 N. J. L.,
232.

Flanigan v. Smelting Co., 63 N. J. L., 647,
following a number of cases.

Consequently any attempt to confer the jurisdiction of the Court of Impeachments upon the Governor must be void under the provisions cited, if neglect of duty or misconduct in office be a misdemeanor in office, and if this defendant be a civil officer under this State.

State v. Pritchard, *supra*.

Page v. Hardin, *supra*.

In the case first cited the defendant was held to be a civil officer under the State, although his power was to be exercised in municipal functions within the territory of New Jersey City. For a better reason, the defendant is such civil officer under the State, for the power of the board to which he belongs, extends through the whole State, and the emoluments of his office are derived directly from the State.

Though not a constitutional officer it would seem to be beyond cavil that he is a civil officer under the State. Pritchard was not a constitutional officer, but the Chief Justice had no doubt that he was such civil officer as referred to in paragraph 11 of Article 5 (Opinion in Pritchard case, p. 118).

It would seem clear that neglect of duty or misconduct in office is misdemeanor in office.

Throop, Public Officer, Sec. 855.

It is there said, "Every officer commits a misdemeanor, who wilfully neglects to perform any duty, which he is bound, either by common law or by statute, to perform," etc., which statement is prefaced by the following: "The liability of a public officer, at common law, to indictment and pun-

ishment, for neglect to perform, or misconduct in the performance of his official functions, is stated in some of the books in very broad terms."

The following is taken from 15 *Am. & Eng. of Law*, page 1068:

"The cases, then, seem to establish that impeachment is not a mere mode of procedure for the punishment of indictable crimes; that the phrase 'high crimes and misdemeanors' is to be taken, not in its common-law, but in its broader parliamentary sense, and is to be interpreted in the light of parliamentary usage; that in this sense it includes not only crimes for which an indictment may be brought, but grave political offenses, corruption, maladministration, or neglect of duty involving moral turpitude, arbitrary and oppressive conduct, and even gross improprieties, by judges and high officers of state, although such offenses be not of a character to render the offender liable to an indictment either at common law or under any statute. Additional weight is added to this interpretation of the Constitution by the opinions of eminent writers on constitutional and parliamentary law, and by the fact that some of the most distinguished members of the convention that framed it have thus interpreted it."

We submit that the power to try and remove defendant on a charge of neglect of duty, or misconduct in office is vested by the Constitution in the Court for the Trial of Impeachments.

POINTS IV, V, VI, VII and VIII.

As heretofore stated, these points are urged on behalf of the defendant; but the Court is respectfully requested to consider them in connection with their argument in the case against Mr. Gall and others heard herewith.

It is, however, submitted, assuming the statute to be constitutional, that the charges made to or by the Governor must amount to neglect of duty or misconduct in office; that defendant must be convicted by him upon those charges, or some of them, and not upon others; and that the matters upon which they are convicted must amount to such neglect or misconduct.

It is respectfully submitted that the demurrer should be sustained.

WM. I. LEWIS,
Of Counsel with Defendant.

THE
LIBRARY OF THE
MUSEUM OF NATURAL HISTORY
AND
ZOOLOGY
OF THE
CITY OF LONDON
1870

THOMAS F. McCRAN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY Informant—Appellee,	}	ON QUO WARRANTO
vs.		BRIEF FOR DEFENDANT
HARRY L. KNIGHT, Defendant—Appellant.	}	

The information in this case, filed by the Attorney General of the State, challenges the right of the defendant, Harry L. Knight, to hold, occupy, use and enjoy the office of a Member of the Board of Public Utility Commissioners of the State of New Jersey, to which office the said defendant was duly appointed by the Governor of the State of New Jersey, and his appointment confirmed by the Senate for a term commencing on the 18th day of February, 1919, which term has not yet expired.

The present controversy had its origin in certain charges filed by the City of Jersey City, in its corporate capacity, with the Governor of New Jersey, charging against the defendant and other members of the Board of Public Utility Commissioners, certain things, which, it was alleged, amounted to neglect of duty and misconduct in office. The defendant together with the other members of the Board of Public Utility Commissioners duly filed answers to said charges and hearings were held thereon during the year 1920. On October 13, 1920, the Governor found the defendant guilty of Neglect of Duty and Misconduct in Office, and served upon him a notice removing him from his office as a Member of the

Board of Public Utility Commissioners. The defendant together with the other members of the Board continued to perform his duties as a member of said Board and is still so acting. Thereupon the Attorney General filed the information in this case to which the defendant has filed a demurrer specifying various grounds for demurrer.

I desire first to discuss briefly the findings of facts of the Governor as to the charges of neglect of duty and misconduct in office, in their application to this particular defendant. The Governor finds that **they** (presumably meaning each and every member of the Board) failed to properly carry out the duty imposed upon them by the provisions of the Public Utility Statute of 1911, in that they did not compel the subsidiaries of the Public Service Corporation to set aside a sufficient sum of money out of the earnings for depreciation fund and permitted said subsidiaries of the Public Service Corporation to use the money that should have been set aside for this depreciation fund for the payment of dividends, and have since failed to order the return of said money to said depreciation fund. The charges upon which its conclusions are based cited two instances where such diversion of funds was permitted. The answer to this so far as this defendant is concerned is that he was not a member of the Board of Public Utility Commissioners at the time of the alleged diversion of these funds. The answer so far as this defendant is concerned to that part of the findings of fact of the Governor that the Board failed to order the return of this money to the depreciation fund is that the said companies have not been in a position and have not had the money wherewith to make good this diversion,

by reasons of their lack of income, at any time since this defendant has been a member of the Board, so that an order for the return of this money to the depreciation fund would have been utterly useless had it been made.

The next finding of fact by the Governor relates to the alleged bias, favoritism and discrimination shown by the Board of Public Utility Commissioners toward the subsidiary companies of the Public Service Corporation, but without specifying any details or without specifying any instances of such discrimination, except as the same is 10 based upon the allowance of rates of fare and rates to be charged for electricity and gas, without first requiring a valuation to be made of the physical property of the said Utility Companies.

The answer to this is that the records of the Board, which were offered in evidence, and presumably considered by the Governor, show no such discrimination, favoritism or bias as is alleged. And the instances in which the Board permitted increases of rates without valuation of the physical property of the companies, have all been 20 sustained by the Supreme Court and Court of Appeals of this State.

The next finding of fact is that the Board in some instances required so called Small Utility Companies to waive some legal right as a condition upon granting of increases in rates. This was denied by the answer, and no findings were presented before the Governor to sustain this finding, so that the finding is entirely without foundation as a matter of fact.

The next finding of fact relates to alleged long delay 30 in completing valuations of physical properties of Utility

Companies asking for increases in rates. This was fully answered by the Board and resulted chiefly from war conditions in the past three years which made it impossible to secure this work to be done. In no instances presented in the testimony before the Board, has there been any unusual delay except such cases where the war conditions prevented the work.

The next finding of fact relates to the Board's permitting various rates of fare to be put into effect upon the 10 trolley lines of the Public Service Railway Company, and the permitting of the use of the "Zone System" for the collection of fares, the basis of the complaint being that a number of changes in rates of fare were permitted without due and proper experimentation and trial. The Zone Fare System is so well known to every citizen of this state that it is unnecessary to discuss the facts. It need only be said that the only way in which to determine the practicability of any of these plans was to experiment with them by putting them into effect. There can be no 20 finding of neglect of duty or misconduct in office based upon what the Board did in this rate case, for the very simple reason that when the collection of the rate of fare was found to be impractical for any reason, it was promptly changed by the Board.

The next finding of fact relates to the failure of the Board to recommend to the Legislature various changes in the Public Utility Law. The changes that it is alleged the Board should have asked for relate entirely to things which are properly a matter of policy of the Board, and 30 not to any things that can be said to result in neglect of duty by reason of their failure to ask for the changes.

This charge relates only to questions of policy to be followed by the Board and the policy that they did adopt seems to have conflicted with those which the charges would have had them pursue. This simply means a difference in opinion as to what amendments, if any, should have been proposed or made to the Utility Act.

The next finding of fact relates to the use of the money permitted to have been raised by the Board for improvements and extensions by bond issues, to have been diverted to the capital account of the company after the completion of the work when there was a surplus. The answer to this, so far as this defendant is concerned with the instances cited in the charges, is that it took place before he was a member of the Board.

The next finding of fact relates to the manner in which the Board has conducted its hearings, and the Governor finds that their method has resulted in making the hearings assume the nature of a controversy in the courts, with parties upon different sides and the Board acting as a judge. An examination of the Utility Act will show that this method is the one contemplated by the law. And no other method could have been safely adopted which did not provide for the giving of notice to all parties interested, and giving them a chance to be heard and to offer testimony. In addition to this the Board, itself, has, through its experts, conducted independent examinations of controversies before it, and had its experts testify in the hearings. The very magnitude of the work in some instances has necessarily taken considerable time, and the character of the hearings is necessarily such that it is impossible to conduct them day after day continu-

ously. It seems almost foolish to argue against this method of conducting their hearings.

The next finding of fact relates to the employment by the Board, as experts in the fixing of rates and valuations, of men entirely biased and commended to the corporations' point of view in rate matters. It seems unnecessary to discuss this in view of the extremely high standing and character of the men employed by the Board. While it is true that some of them had at some time in
10 their experiences served corporations in the capacity of making valuations for rate making purposes, an examination of the testimony and of the qualifications possessed by these experts makes it too clear for argument, to suggest for a moment that they were prejudiced. They were men eminent in their profession, broad in their experience and qualified beyond peradventure. It is a curious fact to note that Mr. Fuestal, one of the engineers and experts attacked in these charges, has within the last few days signed a contract to represent the City of Philadelphia in
20 its valuation of the physical property of the Philadelphia Rapid Transit Company.

The last finding of fact states that the Board has promptly granted relief to the subsidiaries of the Public Service Corporation when it has unnecessarily delayed findings for other corporations. This is so inconsistent with the attack against the Board on the question of the valuation of the physical property of the subsidiaries of the Public Service Corporation that it seems ridiculous. In one breath they say that the Board has long neglected
30 the valuation of the Public Service subsidiaries and in the next breath say that it has promptly granted these com-

panies relief when delaying relief to other corporations.

But, if we assume that the members of the Board of Public Utility Commissioners have done all the things that the Governor finds they have done, none of them, nor all of them could amount to neglect of duty or misconduct in office. The record of the testimony in its early stages before the Governor contained a statement by counsel for the City of Jersey City that in no instances would there be a charge or even suggestion of bribery, corruption or personal profit to any of the com-10 missioners in any of their acts. In other words the complainants admitted that the personal integrity and standing as well as the public work of the members of the Board at no time showed a suggestion of any malfeasance. It is impossible to see, in view of conditions and in view of the admission on the record, how any of the things found by the Governor to be true can be said to be neglect of duty or misconduct in office. No definition of these terms in any of the books, nor in any case that I have been able to find where the charge of neglect of duty 20 and misconduct in office was sustained, bears the slightest resemblance to the findings in this case. So I think it may be safely said, that if all the things found by the Governor were absolutely true, they do not amount to neglect of duty and misconduct in office as against the defendant, Harry L. Knight.

This brings us to a consideration of the reasons specified in the demurrer as to the right of the Governor to exercise the judicial function in conducting the hearing and making the order of removal, in view of the constitu-30 tional provisions dividing the powers of the said Govern-

ment. And the further constitutional question of whether or not the Governor had any right to remove the defendant in view of the constitutional provisions providing for the impeachment of all Civil Officers.

Both these questions have been so ably discussed and decided in the case of *State vs. Pritchard*, 36 N.J.L. page 101, that any further discussion of them would seem to be unnecessary.

It cannot be denied, that the members of the Board of
10 Public Utility Commissioners are such Civil Officers. If they are such Civil Officers they certainly come within the constitutional provisions for their removal by impeachment. The constitution provides the method and machinery for the removal of said officers. It provides what persons are subject to the provisions of said machinery, namely All Civil Officers of the State. The language is plain, the meaning clear and its interpretation in the case of *State vs. Pritchard* beyond controversy. And I can do no more than quote to the Court from the
20 opinion of Chief Justice Beasley in the above stated case:

“And there are other noticeable features of the affair. A matter of fact was to be investigated and settled, and yet the testimony of witnesses could not have been compelled, and oaths could not have been administered. The defendants, whose rights were involved, were not summoned, had no hearing, and were condemned in their absence. Citizens were deprived of valuable civil rights, which they had not the least opportunity to vindicate, and when the decree of deprivation had been pronounced, they
30 had not even the right of appeal. The arbitrary character of such a jurisdiction would of itself be sufficient to dem-

onstrate that it does not exist by force of the constitution of this state. The power of adjudging the question of the forfeiture of office is the capacity of a judge, and does not in any degree appertain to the executive authority.

"It cannot fail to have been perceived that the question discussed relates merely to the matter of jurisdiction. That an officer who has made use of the opportunity which his position afforded to perpetrate a fraud upon the public should be summarily cashiered, is a proposition 10 entitled to universal assent. But the result to which I have arrived is, that the finding of the fact of misconduct and the graduation of the punishment are judicial, and not, by virtue of our system of laws, executive functions. And I think upon reflection, there will be few minds that will deny the propriety of the establishment of this power in a judicial depositary. Its effect is to put the rights of the citizen under the safeguard of the ordinary tribunals, and to surround them with the protection of those modes of proceeding, trial and supervision which are the 20 best, and, perhaps, only guarantees against error and injustice. To have left such cognizance to the executive branch of the Government would have been to make these valuable interests to be dependent on the conclusions of a single mind, unassisted by the usual methods for the elucidation of truth, the responsibility of decision being unrelieved by the consciousness that if the conclusion should be incorrect, the error could be corrected by some supervisory tribunal. Every proceeding to remove an officer for official misconduct or neglect is essentially and 30 thoroughly a judicial proceeding, and has consequently,

and with the utmost propriety, been confined to that branch of the state government.

“Nor in the frame of the state constitution is there wanting an organ appropriate to the exercise of this jurisdiction. I think the authority in question is vested in the court for the trial of impeachments. By section first of Article VI, which affects a distribution of the judicial power, a portion of it is vested in this tribunal. Its constitution is defined by section third, the right to impeach
10 being given to the assembly, and that of trial to the senate.

“The only remaining question therefore is, whether the office holders now involved in this controversy belong, in the constitutional sense, to this class of state officers of whose misdeeds this court of impeachments takes cognizance. The pertinent provision of the constitution is in these words, viz: ‘The governor and all other civil officers under this state shall be liable to impeachment for misdemeanor in office, during their continuance in office,
20 and for two years thereafter.’ The present officials are state officers, and I have failed to see how they are to be excluded from the general description of the subjects of impeachment just quoted. The generality of the language, so as to comprise the whole class of state officers, appears to have been designed. In other parts, where the intention was to restrict the effect of a clause to constitutional officers, the language employed is aptly limited. If this comprehensive designation of the objects of the cognizance of this court is not to be fully effectuated, but
30 is to be confined to certain classes of officers, where are the limits to be set? If it does not take in all state of-

ficers, which are to be embraced and which excluded? The whole matter would be quite arbitrary. If the executive can try and pronounce upon the delinquency of the present officials, the extent of his power would seem entirely indefinite and precarious, and no reason is perceived why it would not cover the whole field of misbehavior by these public agents. By force of such a construction of the authority of the governor the functions of the court of impeachments would be substantially superseded."

The opinion of the Supreme Court in this case seems to 10 go under the assumption that the provision of the constitution for the impeachment of Civil Officers applies only to such offices as were created by the constitution. And it stresses the point that it has been the policy of this state for a number of years to make provision for the removal of officers created by the legislature by some other method than that reposing in the Court for the trial of impeachments. The fact that successive legislatures have so provided can scarcely be regarded as an argument in favor of the constitutionality of such pro-20 visions. It is not, by any means unknown to the history of our jurisprudence, that some legislative enactment has for years gone along without being questioned. And a number of instances might be cited where the legislation has been declared unconstitutional after it had been in operation for a considerable number of years. A notable instance of this is the legislative enactment exempting the Volunteer Firemen from the payment of personal property tax to the extent of Five Hundred Dollars. That act was enforced for a number of years before its constitu-30 tionality was raised, and when the matter came before

the Courts the act was declared unconstitutional.

Another argument made before the Supreme Court and passed over in its opinion with no comment is that when the people provided in the constitution for the removal of officers by impeachment and made it apply to all Civil Officers of the state, it thereby took from the legislature all its power and authority to provide for the removal of Civil Officers by any other method. If we assume for the sake of argument that the power to provide for the removal of all Officers reposed in the legislature, subject to constitutional provisions, then when the constitution made provision for the method of impeachments it necessarily took from the legislature all its power to make any provision for the removal of officers. If the constitutional provision for impeachment of Civil Officers is to be limited to those created by the constitution, then of course the legislature would have the power to provide for the removal of offices created after the adoption of the constitution. But the very language of this constitutional provision would seem to argue to the contrary. It says "All Civil Officers." There is no limitation or suggestion of limitation to constitutional officers. In fact, the very language, by the use of the word "All," would seem clearly to mean that it was not to be limited to such offices as were then in existence, but that it was intended to provide a method of removal for "All Civil Officers" thereafter created.

If any different construction is to be given to this language, then there must be drafted into the constitution an interpretation far beyond and different from that which the plain language of the document would indicate.

The opinion of the Supreme Court attempts to distinguish the case of State vs. Pritchard from the present one, and by its reasoning finds that it has no application to the present case. But in reaching that conclusion the Court seems to have entirely overlooked and disregarded the very pertinent language and features of that opinion. And it overlooks that very significant part of the opinion wherein the Chief Justice showed that the officials then under consideration were State Officers, and that the constitutional language in the use of the words "All Civil Of- 10
ficers" was very comprehensive, and where he pointed out that it was impossible to draw a line and say that one officer did not come within that designation and that other officers did. And concluded that part of his opinion by stating that if the Governor were given authority to remove officers, the functions of the Court of Impeachments would be substantially superseded. It is hard to see how in the face of this opinion and the language therein used, it can now be argued that the constitution was intended to mean something radically different from what 20
this plain language imports.

It is true that the opinion cites a number of New Jersey cases dealing with the provisions of the constitution with reference to the distribution of the respective powers of government among the legislative, executive and judicial bodies created by it. But it will be observed that all of these cases relate either to the removal of some officer who is not a civil officer of the state or the giving to some subordinate branch of the government power to hear and determine the question of removal as an act judicial in its 30
quality. Or that the power of the legislature to confer up-

on some person, whether a Justice, Chancellor or anyone else, authority as a legislative agent to do some particular thing or make some particular appointment properly comes within the power of the legislature. There can be no doubt whatever of the truth of the doctrine in these cases. But they have no application whatever to the question of the control of the power of the Governor to remove a State Officer. The legislature in attempting to delegate to the Governor this power of removal, could not give
10 to him as its agent, power and authority over Civil Officers of the State, which power and authority had already been vested in the court for the trial of impeachments.

If the theory of the opinion of the Supreme Court is right, it can result in but one condition, namely, that the power of impeachment as provided in the constitution, may eventually be confined entirely to constitutional officers. For, if the legislature has the power to delegate to the Governor or to any other person as its agent power of removal of officers created by the legislature, then it may,
20 and probably will, give to some one either the Governor or some other person power and authority to remove, either with or without a hearing, every official holding a state office, which office has been created since the adoption of the constitution. In other words, the legislature will have power to do the very thing that the Chief Justice in the Pritchard case foresaw, namely, power of nullifying the constitutional provision for impeachments by restricting it only to officers created by the constitution.

30 The easily discernible and ever increasing trend of present-day legislative enactments to make them responsive

to every whim of public clamor presented by any body of men of sufficient size to make itself heard, has caused the various state legislatures to place upon our statute books legislation of a character far beyond the contemplation and purview of the constitution. This is what has been termed response to the cry of the people. The very passage of such legislation placed upon the statute books tends more and more to take us away from the secure and safe anchorage of our various state constitutions. It is the swing of the pendulum toward socialism 10 and paternalism. And if such legislation is to be declared valid and constitutional by the Courts the functions of the various departments of government as created by the constitution are going to be usurped by other departments and their legislative agencies. And as the Chief Justice in the Pritchard case said, this power so delegated is going to place in the hands of some legislative agent power to destroy, power to control and make precarious the existence of offices and the rights of the office holders to an extent which cannot be foreseen. 20

The ever increasing trend in recent years of the usurpation by executives of the power of legislation and interpretation of laws and the placing in the heads of various departments and bureaus the powers of interpretation of statutes, is going to give, in the course of time, power to its agents far beyond any contemplation of constitutional provisions. We are to be swept on a wave of more or less public clamor for practical nullification of constitutional provisions, and where our government in all its branches is to have no secure place under constitutional 30 provisions, but is to be administered entirely in response

to the public clamor existing at the time.

The attempted removal of these Public Utility Commissioners is a concrete illustration of the wave sweeping the world, that where an officer sworn to do a certain duty, and in the performance of that duty runs contrary to a sufficient number of people, then he must be removed to make way for others who will do this thing for which there is an outcry. And when that particular phase has subsided and another arises, then in turn that official must go in order that another may take his place.

And to do these things the public needs but a responsive legislature and the powers of the constitution will be swept away.

It is respectfully submitted that the opinion of the Supreme Court in this case should be reversed and the demurrer to the information filed by the defendant should be sustained.

V. CLAUDE PALMER,

Attorney for Harry L. Knight.

© 1900 by
George A. ...

Copyright

1900

by

George A. ...

Printed by

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

Donnerstag