NEW JERSEY
COURT OF ERRORS AND APPEALS

ELLEN F. HAYES, Plaintiff-Respondent, vs. THE MAYOR AND COUNCIL OF THE CITY OF HOBOKEN, a Municipal Corporation, Defendant-Appellant.	Action at Law. On Appeal from Hudson County Circuit Court.

BRIEF IN FAVOR OF THE PLAINTIFF-RESPONDENT

(1)

Statement of the Case.

The appeal by the defendant in this case was taken to review a judgment for $1,302, in favor of the plaintiff in an action wherein the plaintiff sued to recover the amount of a pension which she claimed was due from the defendant because she was the widow of Patrick J. Hayes, deceased, who was a member of the Hoboken Police Force at the time of his death, and for 22 years prior thereto. The case was tried before Circuit Judge Luther A. Campbell, without a jury, on an agreed statement of facts (p. 23, et seq.; p. 34, 11. 25-30), with the exception that certain of the facts contained in paragraph 4 of the stipulation were objected to by the defendant, on the ground that they were immaterial and irrelevant (p. 28, l. 30). This objection is not worth anything to the appellant because it was not laid before the trial judge for a ruling

and the ruling challenged by noting an exception thereto. Nothing of that sort appears in the printed case. The case was argued at large before Judge Campbell and subsequently he filed a memorandum of his decision in favor of the plaintiff and against the defendant (p. 34). Thereafter judgment was entered for $1,302 (p. 37) and it is from this judgment that the present appeal is taken (p. 3).

The grounds of appeal urged by the appellant are nine in number but they may be considered under two heads, namely, first, that the statutes under which the respondent claimed she was entitled to pension are unconstitutional, and second, if the plaintiff was entitled to the pension under the said statutes, her remedy was by mandamus. For convenience we shall hereinafter refer to the respondent as the plaintiff and to the appellant as the defendant.

The grounds of appeal do not raise the point that no appropriation was made to cover this pension nor is it discussed in the brief of appellant. It may therefore be considered as abandoned. *Aakjer* v. *Mair,* 84 N. J. L. 502. However, Sec. 5, Chap. 72, P. L. 1911, makes full and complete provision for such a contingency (P. 35, l. 30).

(2)

Statement of the Facts.

Although the facts are contained in the written stipulation of facts contained in the state of case at page 23, yet as the stipulation, by reference only, has made certain paragraphs of the complaint part thereof we will, for the purpose of clearly presenting the facts in concise form, give a chronological resume thereof.

The plaintiff is the widow of Patrick J. Hayes,

who died on April 19, 1915, his death being caused by a tumor in the bladder. At the time of his death he was a member of the police force of the defendant and had been continually for 22 years prior thereto.

In 1911 the Legislature by "An Act providing for the pensioning of police officers and policemen in certain municipalities of this State," approved March 30, 1911, title of which act was by Chapter 26 of the Laws of 1917 amended so as to read, "An Act providing for the pensioning of police officers and policemen, their widows, minor children and dependent parent or parents in certain municipalities of this State," enacted among other things that in all municipalities of this State other than cities of the first class, the widow of any member of the police force of such municipality who should have lost his life in performance of his duty should, so long as she remain unmarried, receive a pension equal to one-half of the salary of such member of said police force at the time of his death.

By a supplement to said Act, approved March 17, 1916, the title of which supplement was amended by Chap. 27 of the Laws of 1917 to conform to the amended title of the original act set forth *supra*, it was provided that the widow of every member of the police force in any municipality of this State to which the original act is applicable where such member should have paid or should thereafter pay into the fund provided for by the original act, the full amount of the annual assessments or contributions, and who should have died or should thereafter die from causes other than injuries received in the performance of his duty, and who should have served at the time of his death nine years as a member of such police force, should so long as she remain unmarried, receive a pension equivalent to one-half of the pay of her deceased husband.

The defendant is a city of the second class and at a meeting of its Board of Police Commissioners held on April 11, 1912, it passed a resolution adopting the provisions of the Act of 1911, *supra* (Ch. 72 of the Laws of 1911) and of the amendment thereto approved April 3, 1912 (Ch. 373 of the Laws of 1912). At the same meeting, and after the passage of the said resolution, the then Mayor of the defendant presented to the said Board the names of the four men whom he had appointed as members of the Police Pension Commission under the said statutes to serve for the term of four years until their successors should be appointed. Under the statute, the appointment by the Mayor was subject to the approval of the Board of Police Commissioners. That Board, therefore, at the same meeting passed a resolution approving of the appointments made by the Mayor. Thereafter numerous pensions were granted by the said Board of Police Commissioners and its successors, to various members of the Police Department of the defendant, under and by virtue of the statutes, among whom were the following:

(a) John Flattery, who was retired on June 25, 1912;
(b) George Dittes, who was retired on April 25, 1914;
(c) Julius Nelson, who was retired on December 14, 1914.

On June 30, 1915, the Board of Commissioners of the defendant, which body had superseded the Board of Police Commissioners, having been elected under the so-called Commission Government Act, viz., Chap. 221 of the Laws of 1911, said Act having been adopted in the City of Hoboken on February 9, 1915, passed a resolution appointing a Police Pension Commission of four members, in

accordance with Chap. 72 of the laws of 1911 and Chap. 373 of the laws of 1912, *supra*. Thereafter the Board of Commissioners granted pensions under said statutes to divers persons, among whom were the following:

(a) David V. Fall, who was retired on May 17, 1916;
(b) David H. Walsh, who was retired on May 24, 1916;
(c) Nora L. Dougherty on December 20, 1916, because she was the widow of one William A. Dougherty, deceased, who died on August 11, 1916, "from sunstroke" which he received on August 6, 1916.

The stipulation of facts beginning at p. 29, l. 20 shows that over $20,000 has been paid in pensions under these statutes.

After the pension Acts of 1911 and 1912, *supra,* were adopted by the defendant the plaintiff's deceased husband continually from the year 1912 to the time of his death in 1915, paid and was compelled to pay into a so-called pension fund created by the said acts, the full amount of the annual assessments or contributions which it was his duty to pay in order to have the benefits of said statutes, and indeed these assessments or contributions were deducted from the check which he received monthly in payment of his salary as a police officer. The plaintiff is still unmarried.

After the death of the plaintiff's husband she filed a petition with the defendant praying that she be allowed the pension provided for by the acts referred to. The petition was referred to the Corporation Attorney of the defendant, namely, John J. Fallon, Esq., for his opinion and thereafter he submitted to the Board of Commissioners of the

defendant a written opinion, copy of which is annexed to the complaint and marked "B" (p. 12, et. seq.), in which he stated (p. 14):

> "I advise your Honorable Body that under the provisions of the aforesaid act, said Ellen F. Hayes is entitled to receive a pension equal to one-half of the pay of her deceased husband, so long as she remains unmarried, and you are obliged to make payment thereof to her."

Notwithstanding the opinion thus given by the legal adviser of the defendant, the Board of Commissioners refused to pay the said pension, although they were, as appears *supra,* continually paying pensions to other persons under the acts in question. Thereafter this suit was brought by the plaintiff.

(3)

Brief of the Argument.

I.

The judgment should be affirmed because the record of the pleadings, trial and judgment below contains no error and no ruling of the trial Court on matter of law excepted to, and therefore the record presents no case for reversal.

The state of case contains the pleadings, the written stipulation of facts, the defendant's motion for nonsuit and for judgment, the court's written decision, the rule for judgment and the judgment. The motions for nonsuit and for judgment appear at p. 33 and are as follows:

> "At the close of the case counsel for plaintiff moved for a judgment in favor of the plaintiff and against the defendant, and counsel for the defendant moved for a judgment of non-suit and moved for a judgment in favor of the defendant and against the plaintiff."

No objection or exception was taken to the court's ruling in favor of the plaintiff and of course none appears in the printed state of case. The rule is well settled that where the state of case shows no objection to the court's ruling complained of and no request for any finding and no objection or exception to the finding of the trial court that there is nothing to be reviewed.

Kargman vs. *Carlo,* 85 N. J. L. 632, 636;
Webster vs. Freeholders of Hudson, 86 N. J. L. 256;
Lams vs. *Fish,* 86 N. J. L. 321;
Nygren vs. *Freeholders of Hudson,* 86 N. J. L. 364;
Blanchard Bros. vs. *Beverage,* 86 N. J. L. 561;
Standard Combed Thread Co. vs. *P. R. R.* 87 N. J. L. 712;
Sulzberger vs. *Miller,* 87 N. J. L. 720;
Wayne Contracting Co. vs. *Allendale,* 88 N. J. L. 397, 398;
Daly vs. *Ewald,* 88 N. J. L. 707, 708;
Tuttle vs. *Apgar,* 88 N. J. L. 742;
Clark vs. *Hudson & Manhattan R. R. Co.,* 89 N. J. L. 708;
Christafides vs. *Brunswick Motor Co.,* 90 N. J. L. 313.

The leading case on the proper way to object or except to a trial court's ruling so as to make it a ground of appeal since the abolition of "bills of

exception" by Sec. 25 of the Practice Act of 1912, is *Kargman* vs. *Carlo,* 85 N. J. L. 632, supra, which holds that after the trial judge has ruled that counsel in order to make the ruling a ground of appeal must note an objection or exception to the trial court's ruling. This court, speaking through Trenchard, J., at p. 636, said:

> "Perhaps no better form of expression can be devised to advise the judge that his ruling is to be made the subject of review than have counsel say 'I desire to note an exception'."

This rule has been strictly followed in all of the other cases cited *supra.*

In *Blanchard Bros.* vs. *Beverage,* 86 N. J. L. 561, supra, this court speaking through Walker, J., said:

> "The case was tried on a stipulation of facts, and one of the facts stipulated was that at the time the partner wrote the letter mentioned she had never seen the original contract or a copy and believed it had been entered into and executed by the manager, who had been discharged previous to its date. The judge of the District Court gave judgment for the plaintiff, and that judgment was reversed by the Supreme Court upon the ground that there was no evidence to support the trial court's finding.
>
> "The appellant, plaintiff below, contends that as the state of the case presented to the Supreme Court showed no objection to evidence, no request for any finding, and no objection to the finding of the trial court, there was nothing for that court to review. This is correct.
>
> "The court, in *Simmons Pipe Bending*

Works v. *Seymour,* 80 N. J. L. 465, upon the authority of an earlier case in the Supreme Court, held—

"'The state of the case fails to show that any legal question was presented to the trial court. There is no objection to evidence, no request to find, and no exception to the actual finding. There is, therefore, no determination of the District Court in point of law or upon the admission or rejection of evidence for us to review. *O'Donnell* v. *Weiler,* 72 N. J. L. 142."

"As the cause at bar was submitted to the trial court on an agreed state of facts, it may be that objections could not well have been made upon the trial—for want of a trial, so to speak—but it was certainly incumbent upon counsel to request the court to make a finding or findings of law or fact, or law and fact, and to except or object to an adverse finding, when made, in order to lay the foundation for a review on appeal. This not having been done, there was no record before the Supreme Court upon which it could reverse the judgment of the District Court; and, therefore, the Supreme Court's judgment must be reversed, to the end that the District Court's judgment shall be allowed to stand."

In *Wayne Contracting Co.* vs. *Allendale,* 88 N. J. L. 397, 398, *supra,* this court in a *per curiam* opinion said:

"This case was tried before Judge Silzer in the Passaic Circuit Court without a jury, who gave judgment in favor of the plaintiff, and defendant appealed.

"The record brought up fails to show any

> request to the trial court, by the appealing party, to make a finding or findings of law or fact, or law and fact, or any objection or exception to the adverse finding made. On this record there is nothing to be reviewed."

In *Tuttle* vs. *Apgar*, 88 N. J. L. 742, *supra*, this court said:

> "This case was tried before Judge Lloyd in the Middlesex Circuit Court without a jury, who gave judgment in favor of the plaintiffs, and defendants appealed.
>
> "The record brought up fails to show any request to the trial court, by the appealing party, to make a finding or findings of law or fact, or law and fact, or any exception or objection to the adverse finding made. On this record there is nothing to be reviewed."

Most of the decisions cited *supra* were cases that were tried before a circuit judge without a jury, upon an agreed state of facts, where the case was argued at large and subsequently the judge filed a memorandum of his decision, and no exception or objection was noted to the trial court's ruling; and it has been uniformly held that when this is so, the ruling of the trial court is not subject to review. These cases, therefore, are direct authority, both on the law and the facts in the case at bar; for here the case was submitted to a circuit judge, without a jury, upon an agreed state of facts, with the one exception hereinafter noted, and it was argued at large before the circuit judge and he subsequently filed a memorandum of his decision, and, therefore, an appeal was taken without any objection or exception being taken to his ruling.

It is true that the stipulation of facts shows (p. 28, l. 30) that with respect to some of the facts

set forth in paragraph 4 thereof, the admission of the facts contained therein was made subject to the defendant's right to object to their introduction in evidence on the ground that those facts were irrelevant and immaterial; but as above stated, this objection contained in the written stipulation of facts is of no value at this time as the court was not asked to make specific findings of fact; and as there was no specific finding of fact it cannot be ascertained whether the court considered the facts which the defendant contends are irrelevant and immaterial. Assuming that they were considered, there is no objection or exception noted to their admission in evidence. This very situation was considered by this court in the case of *Webster* v. *Freeholders of Hudson*, 86 N. J. L. 256, *supra*, where Parker, J., speaking for this court said:

> "The case was submitted to the trial court without a jury by consent. The evidence was put in partly by stipulation of facts between the parties with a note of objections to the relevancy and competency of some of these facts having been reserved, and partly by testimony taken *de bene esse* by consent apparently in the office of one or another of the counsel and without the presence so far as appears of a Supreme Court commissioner or other officer. Certain objections to evidence are noted in the stenographic transcript of these depositions. These objections, as well as those entered on the stipulation, should normally have been made before the trial judge for a ruling, and the ruling challenged by noting an exception thereto. Nothing of the sort appears. On the contrary, it would seem that all this evidence in written form was handed up to the judge, the case argued at large if at all, and

> subsequently he filed a short memorandum of his decision. There is not only no challenge of any ruling on a matter of law, but no such ruling made or asked for except so far as is involved in the rendering of judgment for the plaintiffs below, which turned on questions of fact as well as of law."

We respectfully submit that for these reasons the ruling of the trial judge in favor of the plaintiff is not subject to review and therefore the judgment should be affirmed, because, as stated in the Webster case, *supra,*

> "A record of pleadings, trial, and judgment below containing no error in the strict record, and no ruling of the trial court on matter of law excepted to, presents no case for reversal."

II.

The plaintiff has the right to enforce her claim to the pension by a common law action and is not limited to mandamus.

The defendant's ninth ground of appeal is as follows:

> "If plaintiff was entitled to a pension under said statutes, her remedy was by mandamus proceedings to compel the police pension (Commission), or the tribunal which had jurisdiction thereof in the City of Hoboken, to grant her the same."

We submit there is no merit in this contention that mandamus is the only remedy by which the plaintiff can compel payment of the pension to her.

No case can be found to support that view. If the plaintiff is entitled to a pension she may proceed by mandamus, but she is not compelled to resort to that remedy. If the plaintiff were a policeman seeking retirement as well as a pension, then mandamus would be the exclusive remedy, for there is no other proceeding known to the law wherein judgment could be rendered compelling retirement. In the case *sub judice* the plaintiff is not seeking any such relief and therefore there is no necessity for a writ of mandamus. If the pension is legally due it can be enforced in an ordinary common law action, as it has been in this case. If mandamus had been applied for and this court in its discretion had refused the writ it is clear that the plaintiff could even then have pursued her common law remedy. See last paragraph of decision in *Clarke* v. *Jersey City,* 42 N. J. L. 94, 97.

This ground of appeal is subject to the objection made to all of the grounds of appeal in Point I, namely, no objection or exception has been taken to the court's finding in favor of the plaintiff, and therefore, the trial court's ruling is not subject to review. We desire this statement to apply to all of the other grounds of appeal which we shall proceed to argue.

III.

The defendant cannot attack the constitutionality of Chapter 72 of the Laws of 1911, or the acts amendatory thereto or supplementary thereof.

The statement of facts, *supra,* show that in 1912 the defendant, acting by and through its Board of Police Commissioners, the body having control of its Police Department, adopted Chapter 72 of the Laws of 1911, and the amendment to said Act ap-

proved April 3, 1912; the then Mayor, with the advice and consent of the Board of Police Commissioners, thereafter appointed a Police Pension Commission, consisting of four members for a term of four years, in accordance with the provisions of the Act; a pension fund was created and the control and investment thereof given to the Police Pension Commission, the said fund being maintained in part by monthly contributions and annual assessments which the policemen of the department were compelled to make and pay; the Treasurer of the city, who is required to give bond, was given the possession of the fund. When the Board of Commissioners, under the Commission form of Government Act, succeeded the Board of Police Commissioners they then appointed a Police Pension Commission and both the Board of Police Commissioners and the Commissioners under the Commission form of Government have from time to time granted pesions to various police officers under and in accordance with the provisions of the Act of 1911, as amended and supplemented. The Police Pension Commission, appointed by the City Commissioners, was and still is acting as such and will continue to so act under this appointment for four years until some time this year (p. 26). Over $20,000 has been paid in pensions by the department to the various policemen, or their widows, thus pensioned under this statute.

The Board of Police Commissioners was provided for by the charter of the defendant and when the Board of Police Commissioners in 1912 adopted the provisions of Chapter 72 of the Laws of 1911, as amended by Chapter 373 of the Laws of 1912, it, in effect, amended the charter provisions to that extent. This, of course, is also true with regard to the adoption of the Commission Government Act in Hoboken in 1915 when the City Commissioners superseded the Board of Police Commissioners, and proceeded to exercise the powers which the

Board of Police Commissioners had theretofore exercised. All of the municipal bodies and officials mentioned *supra* have acted on the assumption that Chapter 72 of the Laws of 1911 was a valid and enforceable law in the city of Hoboken, properly adopted therein; and in accordance with that law these municipal bodies and officials have paid out over $20,000 in pensions and are continuing to pay pensions thereunder.

We, therefore, maintain that the questions with regard to the constitutionality of the Act of 1911 cannot be raised by the defendant in this action but should have been raised in a direct proceeding by the Attorney General in the nature of a *quo warranto.* It is well settled that every statute, however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment and, if thought unconstitutional, resisted, but must be received and obeyed as the law until questioned and declared unconstitutional by the courts. This principle is essential to the existence of law and order in society, and the courts refuse to permit the legality of the existence of such laws to be called into question except by the state itself, through its Attorney General, and they hold that, so long as the state does not see fit to interfere and terminate the existence thereof by a direct proceeding brought by the Attorney General, a municipal corporation, the powers of which are in whole or in part granted by an unconstitutional statute, may exercise upon the citizen, through its officers, the powers conferred upon it by the statute as fully and completely as if it was created by a valid law in every particular. These propositions are well settled in this state.

Attorney-General v. *Dover,* 62 N. J. L. 138;

Lange v. *Bayonne,* 74 N. J. L. 455, 459;

Harrison v. *Madison,* 81 N. J. L. 21, 23;
In re Public Utility Board, 83 N. J. L. 303, 306;
Jackson v. *Miller,* 84 N. J. L. 189, 190;
Morris v. *Fagan,* 85 N. J. L., 617, 620;
State v. *Toth,* 86 N. J. L. 247, 249;
Devlin v. *Wilson,* 88 N. J. L. 180, 182;

In *Attorney-General* v. *Dover,* 62 N. J. L. 138, *supra,* the Supreme Court speaking through Van Syckel, J., held (headnote):

> "A municipal government which is organized under an act of the legislature, which is subsequently adjudged to be unconstitutional, is a government *de facto,* and its officers are officers *de facto,* and its authority must prevail and be respected until the Attorney-General interposes by *quo warranto,* and secures the actual ouster and removal of the incumbents in office."

In *Lang* v. *Bayonne,* 74 N. J. L. 455, 459, *supra,* this Court, speaking through Gummers, C. J., held (headnote):

> "An officer appointed, under authority of a statute, to fill an office created by that statute is at least a *de facto* officer and acts done by him antecedent to a judicial declaration that the statute is unconstitutional are valid, so far as they involve the interests of the public and of third persons."

At page 459 the court said (italics ours):

> "The vice of the doctrine of *Norton* v. *Shelby County,* as it seems to me, is that it fails to recognize the right of the citizen, which is to accept the law as it is written,

and not to be required to determine its validity. The latter is no more the function of the citizen than is the making of the law. Each of these functions has been delegated by the constitution, the one to the judicial and the other to the legislative branch of the government. And it is to be observed that the judicial function of determining the validity of statutes is confined within a very narrow scope. Courts are not vested with the general supervision of legislation. They have received no authority from the people to inspect each statute, as it comes from the hands of the legislature, and declare whether or not it infringes constitutional limitations. The function of the judicial department with respect to legislation deemed unconstitutional is not exercised *in rem,* but always in *personam, Allison* v. *Corker,* 38 Vroom 596. Only such statutes as affect the rights of parties to judicial proceedings are ever subjected to the scrutiny of the courts. And these are comparatively few. Of the twenty-four hundred and more acts of the legislature passed in this state during the last ten years, less than four hundred have received judicial consideration. The remaining two thousand which are upon the statute book (except those which have been repealed by the legislature) are accepted and enforced as a part of the law of the land. And this, in my judgment, is the only way in which a government such as ours can be safely administered. *To require the citizen to determine for himself, at his peril, to what extent, if at all, the legislature has overstepped the boundaries defined by the constitution in passing this mass of statutes would be to place upon him an intolerable burden, one which it would be absolutely impossible for*

him to bear—a duty infinitely beyond his ability to perform. In my opinion the provisions of a solemn act of the legislature, so long as it has not received judicial condemnation, are as binding upon the citizen as is the judgment of a court rendered against him so long as it remains unreversed."

At page 462 the court said (italics ours):

"This excerpt not only demonstrates that the learned Chief Justice intended to lay down his proposition as broadly as he stated it, but is convincing of its soundness. So necessary to the successful carrying on of a republican form of government is the principle which I understand the Chief Justice to have laid down, namely, that a statute which creates an office and provides an officer to perform its duties must have the force of law until condemned as unconstitutional by the courts, and that in the meantime the officer so provided is an officer *de facto,* that it is impliedly recognized and acted on, almost universally (so far as my examination has disclosed), in the case of municipal corporations which have been created by unconstitutional laws. *Such corporations are declared* to be *de facto* corporations. *Dill Mun. Corp.*, sec. 43a; *Burt* v. *Winona, &c., Railroad Co.*, 31 Minn. 472, and cases cited. *And not only so, but courts refuse to permit the legality of their existence to be called through its Attorney-General, and hold that, so long as the state does not see fit to interfere and terminate the existence thereof by direct proceeding brought by the the Attorinto question, except by the state itself, ney General, a municipal corporation which has been created by an unconstitutional*

statute may exercise upon the citizen, through its officers, the powers conferred upon it by the statute as fully and completely as if it was created by a law valid in every particular.

"And yet, if it be true that there cannot be such a thing as a *de facto* officer unless there be a *de jure* office, on what theory can the acts of such officers be recognized as valid? How can it be true that a law of this character, the validity of which no one but the Attorney-General can challenge, and which is permitted to be enforced to the fullest extent against the public, 'confers no rights, imposes no duties, affords no protection, creates no office, and is, in legal contemplation, as inoperative as *if it had never been passed?' It may be said that, strictly speaking, the law does not recognize a municipality so created as an existing corporation; that it does not recognize the acts of its pretended officers as valid; but that it merely refuses to permit the right of such officers to exercise their functions to be challenged in order that a government which exists in fact may not be overthrown until another is provided. But this, it seems to me, is a mere verbal distinction. The fact remains that the acts of the incumbents of such so-called officers are as potent, so far as the public is concerned, as are the acts of any de jure officer who performs the duties of a legally existing office.*

"In my judgment, the same public policy which requires obedience from the citizen to the provisions of a public statute which creates a municipality, and provides for its government, even though unconstitutional, so long as it has not received judicial con

demnation, equally justifies his obedience to every other law which the legislature has seen fit to enact until such law has been judicially declared to be invalid.

"I conclude that an officer appointed under authority of a statute to fill an office created by the statute is at least a *de facto* officer, and that acts done by him antecedent to a judicial declaration that the statute is unconstitutional are valid, so far as they involve the interests of the public and of third persons; that the doctrine promulgated by the Supreme Court in *Flaucher* v. *Camden* rests upon an unsound basis and should not be followed."

In *Jackson* vs. *Miller,* 84 N. J. L. 189, 190, a Deputy Fish and Game Warden was sued for false imprisonment of the plaintiff and the plaintiff attempted to justify his theory that the defendant, the Game Warden, had no right to arrest him on the ground that the Fish and Game Act under which the warden was appointed was unconstitutional. The Supreme Court, speaking through Minturn, J., said:

"The question of the constitutionality of the Fish and Game Act we do not consider is before us and we find it unnecessary to enter into any discussion concerning it."

In the case of *Morris* vs. *Fagan,* 85 N. J. L. 617, 620, *supra,* this Court held:

"If one municipal officer can be ousted from his office by a private relator on the ground that the corporation has no life, so can all the other functionaries of the municipality, and thus the local government, for all useful purposes, be brought to an end.

> Public policy will not permit the dismemberment of a municipality, and its consequent practical dissolution, at the instance of a private person. So long as the state itself does not see fit to interfere and terminate its existence by direct proceedings brought by its attorney-general, a *de facto* municipal government may exercise upon the citizen, through officers appointed by it, all the powers conferred by the legislature upon the municipality as fully and completely as if the legality of its existence was beyond question. *Lang* v. *Bayonne,* 45 Vroome 462."

In *State* v. *Toth,* 86 N. J. L. 247, 249, *supra,* this Court held:

> "The decision of the Supreme Court was the law of the state until reversed by the Court of Errors and Appeals, and acts done by officials in pursuance of the law thereby declared, prior to such reversal, are valid so far as they involve the interests of the public or third persons. *Flaucher* v. *Camden*, 56 N. J. L. 244; *Lang* v. *Bayonne,* 74 Id. 455. And, as we have pointed out, the decision of the Supreme Court was not reversed until January 23rd, 1914."

In *Devlin* v. *Wilson,* 88 N. J. L. 180, 183, this Court said:

> "In the cast of *Attorney-General* v. *Town of Dover,* 62 N. J. L. 138, 140, the principle is thus stated: 'No private citizen can challenge the legal existence of organized municipal government. It can be successfully assailed only by the attorney-general. Until he intervenes to controvert its authority, and until he institutes proceedings by which

> it is overturned and suppressed, the public functions with which it is charged can be lawfully exercised by its officials as *de facto* officers.' "

The case of *Jackson* v. *Miller, supra,* is analogous to the case at bar for that suit was likewise a suit for damages, one of the parties to which attempted in a collateral way to raise the question of the constitutionality of the Act under which the plaintiff asserts his right to recover. Indeed, the right of the plaintiff in the Jackson case to raise the question of the constitutionality of the Act under which the game warden was appointed was greater than the right of the defendant in this case for there the plaintiff's right to personal liability, a right guaranteed by both the Federal and State Constitutions, was involved and yet this court held, in effect, that that question could not be raised except in a direct proceeding by the Attorney-General.

Not only is the legality of the existence of the Board of Police Pension Commissioners attacked by the defendant, but defendant necessarily also attacks the legality of the powers conferred on the Board of City Commissioners and the powers of the City Treasurer.

The effect of declaring Chapter 72 of the Laws of 1911 and its amendment and supplements unconstitutional would be to declare that the Board of Police Commissioners had no authority to adopt its provisions, and that, therefore, the attempted modification of or addition to the powers conferred by the City Charter upon the Police Commissioners was illegal and unconstitutional; that the action of the Mayor and the Board of Police Commissioners, in appointing a Police Pension Commission at various times and later the appointment of such a body by the City Commissioners, was unauthorized; that the payment by the plaintiff's deceased

husband of one per centum of his salary each month to the pension fund was a voluntary payment and not as a result of compulsion by the officials of the department, even though that amount was deducted from the pay of each policeman each month as required by the statute; that the Police Pension Commission in fact never existed and all the acts performed by it were illegal; that the taxing authorities in raising large sums of money each year for the pension fund were acting illegally; that the granting of pensions by the Board of Police Commissioners and by the present Board of Commissioners was without authority; that the fines and other moneys paid into the fund were illegally paid, and that the Treasurer of the city had no right to receive the funds which came into his possession. In other words, all of these officers and municipal bodies were acting under an unconstitutional statute insofar as they did anything with regard to pensions, and, therefore, since they had no authority, their acts were illegal.

It is clear that the rule laid down in the cases *supra*, namely, that an attack on the constitutionality of such a statute must be made by the state itself in a direct proceeding by the Attorney-General, was for the very purpose of preventing such a condition of chaos as would result in the present case if Chapter 72 of the Laws of 1911 were to be declared unconstitutional. The present attack is made on the legal existence of a part of an organized municipal Government, that is, on one or more of the municipal bodies or officers in regard to all or part of their powers. The law is settled that organized municipal Governments or the powers of one or more municipal bodies or officers, cannot be challenged except by the Attorney-General. Until he intervenes to controvert the authority thus exercised and until he institutes proceedings by which it is overturned and sup-

pressed, the public functions with which a municipal body or officer is charged can be lawfully exercised by such body or officer as *de facto* officers.

We, therefore, respectfully submit that counsel for the defendant cannot in this action raise the constitutional questions which he desires to raise but that they can only be raised by the Attorney-General in a direct proceeding by him in the nature of a *quo warranto.*

The defendant has time and again granted pensions under this statute, the last pension having been allowed as late as December 20, 1916 (as shown by the stipulation of facts, p. 27, l. 10). The City Commissioners who allowed that pension are still in office and we understand have since allowed further pensions under the same statute. The present suit was instituted in September, 1917. If the question of constitutionality could be considered in an action of this kind then the City Commissioners are in a position where when they choose to do so they can give a pension to a person who comes within the terms of the statute and when they do not care to do so they can refuse, and when a suit is brought to enforce the rights of the person who believes that he is entitled to the pension because he has complied with all the provisions of the statute under which the city is working in taking his money, the city can set up these alleged constitutional questions as a bar and defeat his recovery. In other words, the whim of the City Commissioners will determine who is to have a pension. Such a situation should not be tolerated for a moment.

If we are right in this contention, then it is not necessary to consider the constitutional questions which counsel for the defendant has raised. However, there is no substance in those questions and we shall, therefore, briefly consider them.

IV.

The title of Chapter 72 of the Laws of 1911 expresses the object of said law so as not to contravene Subdivision 4 of Section 7, Article IV of the Constitution.

The said sub-division 4 provides among other things, that "every law shall embrace but one object, and that shall be expressed in the title." The title of the original act of 1911 was "An Act providing for the pensioning of police officers and policemen in certain municipalities of this State." The contention made by counsel for the defendant is that the title is not broad enough to cover that part of the body of the act which provides for a pension for widows of policemen. The supplement of 1916, chap. 144 has the same title. The titles of both of these acts were amended by chapters 26 and 27 of the Laws of 1917, so as to read "An Act providing for the pensioning of police officers and policemen, their widows, minor children and dependent parent or parents * * *." As stated by the Court of Errors and Appeals in the case of *Sawter* v. *Shoenthal*, 83 N. J. L. 499, 503, speaking through Swayze, Jr:

> "Under our decision in *Allison* v. *Corker*, 67 N. J. L. 596, it is permissible for the legislature to validate an unconstitutional statute by subsequent legislation, provided that it is not attempted by an amendment, of the title to important incongruous legislation into the existing statute."

We do not for a moment admit that Chapter 72 of the Laws of 1911 had a defective title as originally enacted. The title as amended is undoubt-

edly more expressive as to the object, but the cases construing this section of the Constitution do not require the Legislature to follow any hard and fast rule. In determining whether the title expresses its object, there should be attributed to the words used as indicating the object thereof, such a meaning as they had then acquired in common and legislative usage.

State v. *Twining*, 73 N. J. L. 683, Affirming 73 N. J. L. 3.
Griffith v. *Trenton*, 76 N. J. L. 23.

The title of an act is aptly expressive of its object, if it contain a mention of the subject-matter generally, together with a succinct indication of the legislation respecting it. *Mortonlands* v. *Christian*, 52 N. J. L. 521. The leading subject of a law should be fairly expressed in the title, but the means or instruments by which the general purpose is to be attained, or matters merely incidental to it are not a necessary part of a title.

Onderdonk v. *Plainfield*, 42 N. J. L. 480;
Bumstead v. *Gevern*, 47 N. J. L. 368.

The general object of the act being ascertained, the Legislature may include in it provisions of a multiform character which are not incompetent with or foreign to the general object of the act. *Railroad Co.* v. *Railroad Co.*, 52 N. J. L. 267. Reference will be found to a great many cases in which the titles of statutes were held not to violate this prohibition of the constitution, at page lxxiii of Volume 1 of he Compiled Statutes 1910.

In the case of *State* v. *Union* 33, N. J. L. 350, it was held that the unity of the object of the legislature must be sought in the end which the legislative act purposes to accomplish, and not in the details provided to reach that end. That case also

held that the degree of particularity which must be used in the title of an act, rests in legislative discretion. Also that case holds that there are many cases where the object might, with great propriety, be more specifically stated, yet the generality of the title will not be fatal to an act, if by fair intendment, it can be connected with it.

In *State, Doyle* v. *Newark,* 34 N. J. L. 236, an act entitled "A further supplement to the act entitled 'An act to revise and amend the charter of the City of Newark,'" etc., containing references to an assessment made by the city, providing for a new assessment, and for other assessments, and conferring power upon the council in reference to laying out and opening streets, and containing provisions relating to taxation, it was held not to violate the statutory prohibition. Thus showing the wide latitude permitted the legislature in making titles of statutes general and to include within a general title all matters incidenal thereto.

Anciently, acts of the English Parliament had no titles; the practice of entitling them probably commenced in the reign of Henry the Third. Titles were then prefixed by the clerk of the House which originated the bill and did not possess the importance that constitutional provision in many of the states has now given them. The language employed in our constitution clearly defines the evils intended to be guarded against. It reads:

> "To avoid improper influences which may result from intermixing, in one and the same act, such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

As stated in the case of *State* v. *Union,* 33 N. J. L. 350, 352, the object of this provision is to pre-

vent surprise upon legislators by the passage of bills, the object of which is not indicated by their titles.

The cases showing by analogy that the title of Chapter 72 of the laws of 1911 is not unconstitutional are:

Deegan v. *Morrow,* 31 N. J. L. 136;
State v. *Elvins,* 32 N. J. L. 362;
State v. *Haight,* 36 N. J. L. 54;
Richards v. *Hammer,* 42 N. J. L. 435;
Van Riper v. *North Plainfield,* 43 N. J. L. 349;
Bank v. *Union,* 44 N. J. L. 599;
Paul v. *Gloucester County,* 50 N. J. 5. 585;
Davis v. *Cherry,* 53 N. J. L. 173;
In re Sewer Assessment, 54 N. J. L. 156;

Such general titles as the following have been sustained: An act relative to statutes (including provisions relating to the matter of taking effect of criminal statutes).

State v. *Crusius,* 57 N. J. L. 279.

Also an act entitled "An act concerning cities."

State v. *Camden,* 58 N. J. L. 515.

"An act concerning evidence," authorizing the court on application in an action for personal injuries to order a physicial examination of plaintiff by physicians and surgeons so as to qualify them to testify on the trial as to the injury.

McGovern v. *Hope,* 63 N. J. L. 76.

"An act entitled "A supplement to, etc. 'An act to provide for the appointment of police justices

in cities of the first class," containing provisions conferring jurisidiction over violations of city ordinances, and as to the form of conviction.

Sharp v. *Sweeney,* 74 N. J. L. 428.

Other recent cases are:

McMahon v. *Riker,* 104 Atl. 289;
Crucible Steel Co. v. *Polack,* 104 Atl. 324;
Gillard v. *Ins. Co.,* 104 Atl. 707.

The title of Chapter 72 of the Laws of 1911 as originally drawn was "An act providing for the pensioning of police officers and policemen in certain municipalities of this State." This title contains the mention of the subject matter generally of the statute; the leading subject of this law is expressed in the title and it was not necessary to state that as incidental to the pension for the policeman his widow in the event of his death would be entitled to the pension. In other words, the widow stands in the position of her deceased husband, for if he is living she would not be entitled to a pension and it is only by reason of his death that the pension goes to her. We are unable to find any case which holds that such a title is unconstitutional and as stated in *Attorney-General* v. *McGuiness,* 78 N. J. L. 346, 369, 370, 371, quoting from other leading cases:

> "To doubt the invalidity of an act was to sustain it, since its validity must be presumed, until its violation of the constitution is proved beyond all reasonable doubt."

Again

> "The court said that in no doubtful case would it pronounce a legislative act to be contrary to the constitution."

Again

> "For weighty considerations, it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court and every court of reputation in the United States that an act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt."

V.

Chapter 72 of the Laws of 1911 is Not Special Legislation.

Sub-division 11, Section 7, Article IV. of the Constitution provides among other things that:

> "the Legislature shall not pass private, local or special laws * * * regulating the internal affairs of towns and counties; * * *."

Chapter 72 of the Laws of 1911 relates to all municipalities other than cities of the first class. The case of *Warner* v. *Hoagland,* 51 N. J. L. 62 held that such a statute was unconstitutional. See opinion of Court at page 66.

The title of Chapter 72 of the Laws of 1911 reads: "An Act providing for the pensioning of police officers and policemen *in certain municipalities of this State.*" Paragraph 1 clearly defines what municipalities are intended by the title for it says:

> "In all municipalities of this State, *other than cities of the first class,* any member of the police force," etc.

Since Chapter 72 of the Laws of 1911 was adopted by the Board of Police Commissioners in 1912, we are not interested in the amendent of 1914 which provides a different mode of accepting Chapter 72 of the Laws of 1911 as amended. We understand our adversary's contention to be that the amendment of 1912, viz., Chapter 373 of the Laws of 1912, is special legislation in that Section 8 provides that it may be accepted by common council, board of aldermen or board of police commissioners or other body having charge of the Police Department. He cites no authority for this proposition and none can be found so far as we know. The Board of Police Commissioners under the charter of the City of Hoboken was appointed by the Mayor, with the approval of the common council, and of course was subject to their authority at all times and indirectly at least the common council had control of the Police Department for if the Board of Police Commissioners did not perform their duties properly they were subject to dismissal by the Mayor and Council. We are unable to understand how Section 8 of Chapter 373 of the Laws of 1912 can be said to make the act special legislation, and since counsel for the defendant has not advanced any good reason or authority for his contention, we submit that this court will not declare Chapter 72 of the Laws of 1911, or Chapter 373 of the Laws of 1912 unconstitutional for this reason. It is clear that the act applies to all cities except cities of the first class, and it is also clear that it can be adopted by any city of the second class that has any form of government at all and whether the governing body be a common council, a board of aldermen, a board of police commissioners or any other body, and the act correctly says that the body having charge of the Police Department is the body that should adopt the act if it is to be adopted.

VI.

Chapter 72 of the Laws of 1911 does not delegate legislative powers.

The objection which counsel for the defendant makes under this head is that the referendum contained in the Act of 1912 is unconstitutional. It will be remembered that the Board of Police Commissioners adopted Chapter 72 of the Laws of 1911 after it had been amended by Chapter 373 of the Laws of 1912 and Section 8 of Chapter 373 of the Laws of 1912 provides:

> "The board of aldermen, common council, board of police commissioners or other body having charge of the police department of any such municipality of this State may adopt the provisions of this act by an ordinance or resolution duly adopted by the board of aldermen, common council, board of police commissioners or other body having charge of the police department of such municipality."

The contention made is that under the case of *Attorney-General* v. *McGuinness,* 78 N. J. L. 346, the Court of Appeals held that the legislature may impose its will as law upon municipalities, but, if some other will is to intervene, it must be that of the people who are to be governed by such municipal law and not an alien will, even though it be that of the governing body for the time being of such municipality. Assuming that he is right in this contention, which we do not admit—see

Worth v. *Town of Westfield,* 81 N. J. L. 301;
Riley v. *Trenton,* 51 N. J. L. 498;

Featherstone v. *Lambertville,* 50 N. J. L. 507—

still this question cannot be raised in this kind of a suit by the defendant. Before we proceed to consider this question we desire to call the attention of the court to the fact that the distinction between the case at bar and that of a pure referendum was adverted to in the McGuinness case upon which counsel for the defendat relies at page 382. See also *Worth* v. *Westfield,* 81 N. J. L. at p. 303. The cases showing that the defendant cannot raise this question in this way are the following:

State v. *Tolan,* 33 N. J. L. 195, 201, wherein the Supreme Court speaking through Depue, J., said:

> "It was urged on the argument, that a majority of the common council having been elected in an unlawful manner, its acts will be void, and that, permitting the council thus constituted to maintain the semblance of a city government and attempt to exercise its functions, will tend to introduce confusion into the affairs of the city. We have no apprehension of any such consequences. Premising that an officer *de facto* is one who exercises the duties of an office under a color of right, by virtue of an appointment or election to that office, as distinguished on the one hand from a mere usurper of an office, and on the other from an officer *de jure*, the acts of an officer *de facto* are valid so far as the rights of the public or third persons are concerned; and neither the title of such officer, nor the validity of his acts, as such, can be indirectly called in question in a proceeding to which he is not a party. *Town of Plumouth* v. *Painter,* 17 Conn. 585; *The Mayor & C.* v. *Tucker;* 1 Daly's Rep. 107;

Hoagland v. *Culvert, Spencer*, 387; *The People* v. *Collins*, 7 J. R. 550; *The People* v. *Stevens*, 5 Hill 617-630; *The People* v. *White*, 24 Wend. 525.

"This principle applies with increased force where the officer is a member of the legislative department of a municipal corporation, having only public duties to perform. The validity of the official acts of such a body cannot be called in question in any collateral proceeding, by showing that its members, who are *de facto* members, are not members *de jure*, because of an irregularity or illegality in their election; nor will the court, on a *certiorari* brought to review the official proceedings of the common council, permit the inquiry to be instituted, whether the individuals who, *de facto*, compose the common council have been legally elected. *State* v. *Van Winkle*, 1 Dutcher 73; *State* v. *Donahay*, 1 Vroom 404; *The People* v. *Bartlett*, 6 Wend. 422; *The Trustees of Vernon Society* v. *Hills*, 6 Cow. 23; *In Matter of Election of Directors of M. & H. R. R. Co.*, 19 Wend. 125."

State v. *The Collector of Ocean Township*, 39 N. J. L. 75, 79, wherein the Supreme Court speaking through Knapp, J., said:

"The only question presented under this reason necessary to be considered is, whether in this collateral way, on a *certiorari* to review the validity of a tax levied for the purposes of a municipal corporation, and by a body legally empowered to impose such taxes, the legal validity and regularity of the appointment of those who are acting as members of that body, can be inquired

into—whether a taxpayer can, to defeat a tax otherwise legal, be permitted to show that one or more members of the taxing body, holding office under a colorable appointment, is not in office by valid legal title?

"This question is settled against the right so to do. Reference need be made to the single case of *State, ex rel. Mitchell* v. *Tolan*, 4 Vroom 195, and cases there cited, as authority upon the point.

"The acts of such an officer are, so far as the rights of third persons or the public are concerned, conclusive."

Worthley v. *Steen*, 43 N. J. L. 542, 544, the Supreme Court speaking through Van Syckel, J., said:

"The relator, in the next place, insists that the supplemental act is void because it is an unlawful delegation of legislative power of the people of the borough.

"It is unnecessary to discuss this proposition, because the act of 1878, under which the borough was erected, is subject to the same objection. If the relator is right in his contention in this respect, the borough has never had a legal existence, and the defendant, whose power is derived exclusively under this act, is without authority.

"In the case presented here, an express act of legislation has extinguished the municipal corporation, and with it the office of mayor, and the mayor refuses longer to exercise the functions of the office. Under such circumstances a *mandamus* will not be ordered. If he had continued, notwithstanding the adverse legislation, to exercise his office, a *mandamus* would not be granted to

compel him to desist. The remedy would be by *quo warranto.*

"*Mandamus* is not a mode in which title to office can be tried."

Hines v. *Freeholders,* 45 N. J. L. 504, 507, the Supreme Court speaking through Dixon, J., held:

"The county is not constituted the guardian of the rights of its creditors against the state, and so long as these creditors acquiesce, the county authorities must exercise their political powers in such manner as their political superior, the legislature directs. *Gilman* v. *City of Sheboygan,* 2 Black 510; *State, Hall, pros.,* v. *Parker,* 4 Vroom 312.

"The mandamus prayed for should be awarded."

The case of *State* v. *Paterson,* 32 N. J. L. 177 is directly in point. In that case Depue, J., speaking for the Supreme Court held (italics ours):

"The person thus appointed having become an officer, *de facto,* and elections of trustees having been regularly held under the incorporation, from 1862 to 1866, and the relators not claiming the office themselves, but coming in as private individuals, the court held that it would not, even at their instance, declare the incorporation void, as against the respondents, *even if the vacancy should have been filled by an election of the people, and not by appointment of the two trustees.*"

It is clear that the defendant in this kind of an action cannot raise this question but that it can only be raised in a proceeding in the nature of a

quo warranto as it was raised in the case of *Attorney-General v. McGuinness,* 78 N. J. L. 346, the case relied on by counsel for the defendant. The question must be raised in a direct proceeding and cannot be raised collaterally which counsel for the defendant is attempting to do. In short, the defendant says it is true that the Board of Police Commissioners accepted Chapter 72 of the Laws of 1911 as amended by Chapter 373 of the Laws of 1912; that the Board of Police Commissioners duly constituted under said statutes was in existence and acted by virtue thereof up until the time that the Board of Police Commissioners were superseded by the Board of City Commissioners under the Commission form of Governors. It is also true that the Board of City Commissioners by virtue of the Commission form of Government act, have taken over the powers of the Board of Police Commissioners and have been exercising them ever since, and it is true that the Board of City Commissioners are now the Board of Police Commissioners, but the Board of City Commissioners and its predecessors had no right to act because the legislation giving them the authority to act is unconstitutional; we submit that the defendant cannot be heard in this proceeding on that question that it must be raised in a proceeding in the nature of a *quo warranto.* It was also admitted that a Police Pension Commission, consisting of four members, was created by the Board of Police Commissioners as provided by Section 6, Chapter 72 of the Laws of 1911, and that the present Board of Commissioners have appointed a Police Pension Commission since they took office, as shown by the stipulation. The only purpose of the Police Pension Commission, which consists of four members, is to take care of the pension fund created by the Acts of 1911 and 1912. The title to their office is therefore involved in this proceeding and it is clear

that it is collaterally attacked and not directly because the men composing the Police Pension Commission are not before the court. If the City desired to attack the constitutionality of these statutes it should have done so, as stated, by a proceeding in the nature of a *quo warranto*. Assume for a moment that a policeman in 1912, on the strength of the adoption of this legislation by the City pays into the Pension Fund his monthly dues as provided by the statute, and at the end of 25 years applies for his pension and the City says that it cannot pay the pension because the statute which the City has adopted was unconstitutional. It is clear that under such circumstances the proceedings in the nature of a *quo warranto* cannot be sustained and yet counsel for the defendant attempts in this proceeding to raise that very question as against a widow who of necessity stands exactly in the position of the policeman by virtue of the amendment of 1916.

In the case of *Van Dyke* v. *Long Branch*, 88 N J. L. 492, the Supreme Court by mandamus compelled the payment of a pension under the Act of 1911, and the question of constitutionality was not even suggested, probably because the proceeding was not by the attorney-general.

VII.

Chapter 114 of the Laws of 1916 does not contravene Section 19, Article I of the Constitution.

Section 19, Article I, provides as follows:

> "No city shall hereafter give any money or property to or in aid of any individual association or corporation, * * *."

Section 19 is ambiguous because there is no punctuation mark between the words "individual association" and therefore it is questionable whether that section applies to individuals. However, it is not necessary in this case to rely on the lack of punctuation for assuming that a judicial tribunal will read into that section a comma between the words "individual" and "association" so as to make it apply to an individual, still the law is settled that the statutes above referred to do not violate this section of the Constitution.

Chaper 72 of the Laws of 1911 (p. 104) as amended by Chapter 373 of the Laws of 1912 (p. 669) as supplemented by Chapter 144 of the Laws of 1916 (p. 298) provides:

> "1. The widow of every member of such police force in any municipality of this State in which the act to which this is a supplement is applicable, where such member shall have paid or shall hereafter pay into the fund provided for the act to which this act is a supplement the full amount of the annual assessments or contributions, who shall have died or shall hereafter die from causes other than injuries received in the performance of duty, and who shall have served at the time of his death nine years as a member of such police force, shall, so long as she remains unmarried, receive a pension equivalent to one-half of the pay of her deceased husband * * *."

In the case of *Van Dyke* v. *Long Brach,* 88 N. J. L. 492, it was held that the Act of 1911 as amended by the Act of 1912 was retrospective as well as prospective, the headnote saying:

> "The Pension Act of March 30th, 1911 (Pamph. L., p. 104), is retrospective as well as prospective."

Trenchard, J., speaking for the Supreme Court at p. 494, said:

> . First. The City contends that 'the Pension act of 1911 is not retrospective.'
>
> "But the case of *Pearce* v. *Board of Education of Brick Township*, 89 Atl. Rep. 1026, is authority to the contrary. There this court said. 'The statute (Pamph. L., 1912, p. 89) declares that "any teacher, principal or superintendent who shall have been employed," and clearly applies to persons in that class when the law was adopted. *It is retrospective as well as prospective,* and to limit it to prospective cases, as the contention of the defendant would require, because there was then none within the class, would not, in our opinion, carry out the legislalative intent, and such a construction should be put upon the statute as will best answer the intention of the makers.' In view of this declaration, it seems clear that the contention of the city, that the act of 1911 now *sub judice* is prospective only, is not well founded. The statutes are similar in phraseology, and the doctrine of *stare decisis* controls in this court. Accordingly we hold that the Pension act of 1911 (page 104) is retrospective as well as prospective.
>
> "*Secondly.* The only other contention made by the city is this: 'If the act be deemed to be retrospective, it cannot be said that the legislature intended it to include service rendered as an officer of the "Long Branch Commission," prior to the date of the passage of the incorporating act of the City of Long Branch.'
>
> "We think there is no merit in this contention, for reasons we will now state."

In that case the twenty years service on which the relator claimed that he was entitled to a pension began in 1895, *eleven years before the legislature passed the act of 1911, under which he claimed to be entitled to his pension.* In other words, the court held he was entitled to a pension which, of course, was not in contemplation when he began his service and to which he had no more right on any contractual ground than the plaintiff has in the case at bar and yet counsel for the respondent city did not even suggest to the court that this pension could be regarded in the nature of a gratuity coming within Section 19 *supra.* It will also be noted that Mr. William L. Edwards and Mr. William A. Stevens appeared for the city in that case and Mr. Gilbert Collins for the relator.

Chapter 144 of the Laws of 1916, *supra,* is clearly retrospective for it provides that the widow of every member of such police force in any municipality of this State where such member *shall have paid or shall hereafter pay* into the fund provided for the full amount of the annual assessments or contributions, *who shall have died or shall hereafter die, and who shall have served at the time of his death* nine years as a member of such police force, shall receive a pension so long as she remains unmarried. This language is as strong, if not stronger than the language contained in the statute in either the Van Dyke or the Pearce case *supra* which provided that the person *"who shall have been employed* should be entitled to pension." If the legislature can lawfully and constitutionally provide the pension for a person based on years of service by that person prior to the time of the enactment of the statute giving the pension, and such pension is not a gratuity within Section 19 *supra,* then it follows as a matter of logic that the widow of such a person can likewise be granted a pension under similar circumstances.

There is still another ground upon which such a pension can be sustained which has been recognized by the Court of Errors and Appeals in the case of *Morris and Essex R. R. Co.* v. *Newark,* 76 N. J. L. 555, wherein that court speaking through Vredenburgh, J., said (headnote):

> "The payment by the city of a recognized moral obligation assumed by it for services rendered at its request is within the legislative power to authorize, and does not constitute a donation or appropriation of the public funds within the prohibition of either Section 19 or Section 20 of Article 1 of our state constitution."

Also at page 560, Vredenburgh, J., said:

> *"Second.* The purpose recited in the statute of securing the safety of the lives and properties of the citizens, sought to be accomplished by this work, was a beneficent and important public object and was, it must be admitted, the performance of a highly moral duty of the city towards its inhabitants. The payment of a recognized moral obligation assumed for services rendered has been held repeatedly by this court to be within the legislative power, and its discharge does not constitute a donation of the public funds. *Rader* v. *Township of Union,* 10 Vroom 509; *Rutgers College* v. *Morgan, Compt'r.* 41 Id. 460, 474. These authorities seem to be conclusive of this point."

It can likewise be said in the case at bar that the purpose of having a police department is to secure the safety of the lives and properties of the citizens, and a policeman having been so employed,

and having conrtributed toward the pension fund, in accordance with the statute, there was to say the least, a recognized obligation upon the part of the municipality to see that the widow of such policeman should be provided with some means of continuing her existence after his death, especially where the policeman had served for twenty-two years continuously. Of course the statute in the case at bar only provides for a continuous service of nine years, but that is sufficient, and the very fact that the Legislature provided that there should be a certain number of years service shows that it had this in mind. Another case in point is *Bonney* v. *Reid,* 31 N. J. L. 133, wherein an act of the legislature legalizing the proceedings of a Township directing money to be borrowed to pay volunteers the sum of $300. each, who were accepted and mustered into the service of the United States during the Civil War, as a bounty, was construed and held to be retroactive and valid. A late case in point is *Lyons* v. *Freeholders of Morris,* 86 N. J. L. 206, decided by the Court of Errors and Appeals wherein that court speaking through Garrison, J., held (headnote):

> "1. The legislature has the power to compel a purely public corporation to pay a debt which, although not legally enforceable, has the force of a moral obligation.
>
> "2. The act of May 27th, 1913 (Pamph. L., p. 810), which provides for the compensation and reimbursement of persons returned as elected to office under an invalid statute, is constitutional legislation by which the purely moral obligation of a public corporation is turned into a legally enforceable one."

It is therefore clear both upon authority and reason that the Act of 1911 as amended by Chap-

ter 144 of the Laws of 1916, *supra,* is constitutional and not violative of Section 19 of Article 1 of the New Jersey Constitution as amended. It would indeed be a sad commentary on our law if it could be said that the legislature could not in any event provide for the widows of deceased policemen after such policemen had served for twenty-two years. If such legislation could not be sustained on any other ground than an exercise of the police power, we think that the courts would be justified in sustaining it on that ground, for the police power of the state is very broad and comprehensive and surely includes the regulation of police departments which exist for the sole purpose of protecting the public health, peace and welfare in general.

Submitted June Term, 1919.

COLLINS & CORBIN,
Attorneys for Plaintiff-Respondent.

GILBERT COLLINS,
GEORGE S. HOBART,
EDWARD A. MARKLEY,
Of Counsel.

[3811]

A. J. Doan & Son, Printers, 94 Montgomery St., Jersey City, N. J.

INDEX

NOTICE OF APPEAL AND GROUNDS

(Filed March 28th, 1919)

Hudson County Circuit Court

ELLEN F. HAYES, *Plaintiff,* *vs.* THE MAYOR AND COUNCIL OF THE CITY OF HOBOKEN, A MUNICIPAL CORPORATION, *Defendant.*	*Action at Law, Notice of Appeal and Grounds.*

To Collins and Corbin,
Attorneys of Ellen F. Hayes, Plaintiff:—

Take notice that the defendant, the Mayor and Council of the City of Hoboken, a municipal corporation, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause, on February 17th, 1919, on the following grounds:

1. Because the Hudson County Circuit Court rendered a judgment in favor of the plaintiff.

2. Because the Hudson County Circuit Court did not render a judgment of nonsuit against the plaintiff and in favor of the defendant when thereunto moved by counsel for the defendant.

3. Because the statutes under which the plaintiff sought recovery and was permitted to recover said judgment are unconstitutional, null and void.

4. Because the statutes upon which plaintiff obtained said judgment do not apply to the City of Hoboken, the said defendant, and were never legally adopted by the defendant city.

5. Because chapter 72, laws 1911, was never accepted by a popular vote in the City of Hoboken, and said act as amended was never accepted by a popular vote in said city.

6. Because chapter 72, laws of 1911, and chapter 144, laws of 1916, are unconstitutional, null and void.

10 7. Because chapter 72, laws of 1911, and chapter 144, laws of 1916, did not become operative nor valid constitutional enactments until their respective titles were amended in 1917.

8. Because the Hudson County Circuit Court decided that the defendant could not attack the constitutionality of said acts in said suit.

9. If plaintiff was entitled to a pension
20 under said statutes, her remedy was by mandamus proceedings to compel the police pension, or the tribunal which had jurisdiction thereof in the City of Hoboken, to grant her the same.

HORACE L. ALLEN,
Attorney for Defendant.

30

COMPLAINT

Served on Deft. Sept. 21, 1917

(Filed Sept. 26, 1917)

Hudson County Circuit Court

ELLEN F. HAYES,
Plaintiff,
vs.
THE MAYOR AND COUNCIL OF THE CITY OF HOBOKEN, A CORPORATION,
Defendant.

Action at Law.
Complaint.

Plaintiff, ELLEN F. HAYES, residing at 263 Fourth Street, in the City of Hoboken, County of Hudson, State of New Jersey, for complaint says that:

1. She is the widow of Patrick J. Hayes, who died on April 19, 1915, his death being caused by a tumor in the bladder.

2. Said Patrick J. Hayes at the time of his death had served as a member of the police force of the City of Hoboken continually for 22 years; and at the time of his death was a sergeant of police.

3. By "An Act providing for the pensioning of police officers and policemen in certain municipalities of this State," approved March 30, 1911, the title of which act was by Chapter 26 of the Laws of 1917 amended so as to read, "An Act providing for the pensioning of police officers and policemen, their widows, minor children and dependent parent or parents in certain municipalities of this State," it was enacted among other things that in all municipalities of this State other than cities of the first class, the widow of any member of the police force of such municipality who

should have lost his life in the performance of his duty should, so long as she remain unmarried, receive a pension equal to one-half of the salary of such member of said police force at the time of his death.

4. By a supplement to said act, Approved March 17, 1916, the title of which supplement was amended by Chapter 27 of the Laws of 1917, to conform to the amended title of the original act set forth in paragraph 3 hereof, it was provided that the widow of every member of the police force in any municipality of this State to which the original act is applicable where such member should have paid or should theerafter pay into the fund provided for by the original act, the full amount of the annual assessments or contributions, and who should have died or should thereafter die from causes other than injuries received in the performance of his duty and who should have served at the time of his death nine years as a member of such police force, should so long as she remain unmarried, receive a pension equivalent to one-half of the pay of her deceased husband.

5. Said Patrick J. Hayes, deceased, continuously after the enactment of the said Act of 1911, did pay into the fund provided by said act the full amount of the annual assessments or contributions which it was his duty to pay, in order to have the benefits of said act.

6. Plaintiff still remains unmarried.

7. Hoboken is a city of the second class of this State and said act and its supplements and amendments apply thereto.

8. On May 2, 1917, a duly verified petition, copy of which is annexed hereto and made a part hereof marked "A" was presented to the Board of Commissioners of the City of Hoboken by plaintiff and referred by the said Board of Commissioners

to the Director of the Department of Public Safety.

9. On May 14, 1917, the said petition having been presented to John J. Fallon, Corporation Attorney of said City of Hoboken for his opinion, he submitted to said Board of Commissioners a written opinion in which he stated that plaintiff was entitled to receive under the said act aforesaid, a pension equal to one-half of the pay of her said deceased husband, Patrick J. Hayes, so long as she remained unmarried, and that defendant is obliged to make payment thereof to plaintiff, copy of said opinion is hereto attached and made a part hereof marked "B."

10. The said Patrick J. Hayes at the time of his death was receiving a salary from the defendant at the rate of $1,600 per year.

11. Plaintiff is therefore entitled to receive a pension at the rate of $800 per annum from March 17, 1916, until such time as said pension is terminated by the happening of one or more of the conditions stated in said act aforesaid.

12. Plaintiff in this action sues for that part of the pension due from March 17, 1916, to September 17, 1917, a period of one and one-half years, or $1,200, and expressly reserves her right to such further sums as may be due on said pension in the future.

13. Although duly demanded no part of said pension has been paid, but on the contrary the defendant has refused to pay the same.

14. Plaintiff demands as damages the said amount of $1,200, together with lawful interest and costs of suit.

COLLINS & CORBIN,
Attorneys of Plaintiff.

"A."

To the Honorable, the Board of Commissioners, of the City of Hoboken.

The humble petition of ELLEN F. HAYES, of 263 Fourth Street, in the City of Hoboken, respectfully represents that:

1. Your petitioner is the widow of Patrick J. Hayes, to whom she was married and who died April 19, 1915, his death being caused by a tumor in the bladder.

2. Said Patrick J. Hayes at the time of his death had served as a member of the police force of the City of Hoboken continuously for twenty-two years; and at the time of his death was a sergeant of police.

3. By "An Act providing for the pensioning of police officers and policemen in certain municipalities of this State," approved March 30, 1911, the title of which Act was by Chapter 26 of the laws of 1917 amended so as to read, "An Act providing for the pensioning of police officers and policemen, their widows, minor children and dependent parent or parents in certain municipalities of this State," it was enacted that in all municipalities of this State other than cities of the first class the widow of any member of the police force of such a municipality who should have lost his life in the performance of his duty should, so long as she should remain unmarried, receive a pension equal to one-half of the salary of such member of said police force at the time of his death; and it was further enacted by said Act that a fund should be created for the purpose of paying pensions under said Act by deducting from every payment of salary to each member of the police force in such municipalities one per centum of the amount thereof, and by adding thereto fines imposed upon any member of the police force and all moneys

given or donated for the purpose of the fund, and one-half of all rewards paid to the police force or any member thereof for the apprehension of criminals or for other purposes, and that in case at any time there should not be sufficient money in the pension fund provided for in the Act to pay such pensions, the governing body of the municipality should so long as necessary include in the tax levy a sum sufficient to meet the requirement of said fund.

4. By a supplement to said Act approved March 17, 1916, the title of which supplement was amended by chapter 27 of the laws of 1917 to conform to the amended title of the original Act, it was provided that the widow of every member of the police force in any municipality of this State to which the original Act is applicable, where such member should have paid or should thereafter pay into the fund provided for by the original Act the full amount of the annual assessments or contributions, and who should have died or should thereafter die from causes other than injuries received in the performance of his duty and who should have served at the time of his death nine years as a member of such police force, should, so long as she remained unmarried, receive a pension equivalent to one-half of the pay of her deceased husband.

5. Said Patrick J. Hayes continuously after the enactment of the said Act of 1911 did pay into the fund provided by said Act the full amount of the annual assessments or contributions which it was his duty to pay in order to have the benefits of said Act.

6. Your petitioner still remains unmarried.

7. Hoboken is a city of the second class of this State.

Your petitioner therefore prays that she may receive pension so long as she shall remain unmarried equal to the half of the pay or salary her husband was receiving at the time of his death, which was at the rate of $1,600 per year.

ELLEN F. HAYES,
Petitioner.

10

STATE OF NEW JERSEY,
COUNTY OF HUDSON. } ss:

ELLEN F. HAYES, of full age, being duly sworn according to law on her oath, says that she is the petitioner above named, and that the facts, matters and things in the foregoing petition stated are true.

ELLEN F. HAYES.

Subscribed and sworn to before me at Hoboken, N. J., this 30th day of April, A. D. 1917:

WILLIAM C. BROWN,

(Seal) Commissioner of Deeds of Hudson County and State of New Jersey.

"B."

May 14th, 1917.

To the Honorable, the Board of Commissioners, of the City of Hoboken.

Gentlemen:—The City Clerk has submitted to me the petition of Ellen F. Hayes, widow of Patrick J. Hayes, a former member of the Police Department of the City of Hoboken, for pension.

The petition is evidently based upon the provisions of Chapter 144 of the Laws of 1916, as amended by Chapter 27 of the Laws of 1917.

The petitioner recites that her late husband, Patrick J. Hayes, was a member of the Police Force of the City of Hoboken continuously for twenty-two years, and at the time of his death was a Sergeant of Police; that she was married to her said husband on September 20, 1887, and that he died April 15, 1915, his death being caused by a tumor in the bladder.

The petition recites that said Patrick J. Hayes continuously after the enactment of "An Act providing for the pensioning of police officers and policemen in certain municipalities of this State," approved March thirtieth, one thousand nine hundred and eleven, to which the aforesaid Act of 1916 was a supplement, paid into the pension fund provided by said act the full amount of the assessments or contributions which it was his duty to pay in order to have the benefits of said Act.

The petition further recites that the petitioner still remains unmarried.

Petitions were last year presented to your Honorable Body by said Ellen F. Hayes, and others who were widows of police officers who died shortly prior thereto, praying for a pension under the aforesaid Act of 1916.

Under date of October 10th, 1916, I advised your Honorable Body that you could not lawfully grant said pensions under the provisions of the aforesaid Act, particularly for the reason that said Act was in my opinion unconstitutional, in that it was violative of the Constitutional provision of our State which requires a law to embrace but one object, and that to be expressed in its title.

At the recent session of the Legislature an Act was passed P. L. 1917, p. 56, correcting the title of the Act of 1916, so that said Act now reads as follows:

"An Act providing for the pensioning of Police Officers and Policemen their widows, minor children and dependent parent or parents in certain municipalities of this State," approved March 17th, 1917.

The aforesaid Act of 1916 provides as follows:

"The widow of every member of such police force in any municipality of this State in which the act to which this is a supplement is applicable, where such member shall have paid or shall hereafter pay into the fund provided for the act to which this act is a supplement the full amount of the annual assessments or contributions, who shall have died or shall hereafter die from causes other than injuries received in the performance of duty, and who shall have served at the time of his death nine years as a member of such police force, shall, so long as she remains unmarried, receive a pension equivalent to one-half of the pay of her deceased husband; and in case there be no widow or said widow shall remarry, and there be minor children under the age of sixteen years, their maintenance and support shall be provided for the division among such minor children of said pension in equal shares under the supervision of the police pension commission provided for in the act of which this is a supplement. If, however, such

member shall leave neither widow nor children him surviving, then the parent or parents of such member, if dependent on him for support shall receive from such pension fund a sum equal to one-half of the salary received by such member. If such dependent parent shall remarry after such member's death, he or she shall cease to be entitled to a pension thereafter.

I advise your Honorable Body that under the provisions of the aforesaid act, said Ellen F. Hayes is entitled to receive a pension equal to one-half of the pay of her deceased husband, so long as she remains unmarried, and you are obliged to make payment thereof to her.

Respectfully submitted,

(Signed) JOHN J. FALLON,
Corporation Attorney.

Answer, Filed Oct. 25th, 1917.

Hudson County Circuit Court

ELLEN F. HAYES, *Plaintiff* vs. THE MAYOR AND COUNCIL OF THE CITY OF HOBOKEN, A Corporation, *Defendant*	Action at Law *Answer*

Defendant, The Mayor and Council of the City of Hoboken, a municipal corporation of the State of New Jersey, says:

1. As to the statements in the first paragraph, defendant has not any knowledge thereof sufficient to form a belief.
2. It admits the second paragraph.
3. It admits the enactment of said statute, but says that the same is unconstitutional, invalid, does not apply to the defendant and creates no legal obligation or liability whatsoever on the part of said defendant.
4. It admits the enactment of said statute, but says that the same is unconstitutional, invalid, does not apply to the defendant and creates no legal obligation or liability whatsoever on the part of said defendant.
5. As to the statements in the 5th paragraph, defendant has not any knowledge thereof sufficient to form a belief.
6. As to the statements in the 6th paragraph, defendant has not any knowledge thereof sufficient to form a belief.
7. It admits that Hoboken is a city of the second class, but denies that said Act and its supplements and amendments apply thereto.

8. It admits the 8th paragraph.

9. It admits the 9th paragraph.

10. It admits the 10th paragraph.

11. It denies the 11th paragraph.

13. It admits that no pension has ever been awarded or paid to the plaintiff.

By way of separate defenses to said action, defendant says:

First, separate defense.

Defendant will object that the complaint discloses no cause of action.

Second, separate defense.

Chapter 72, Session Laws of the State of New Jersey of 1911, is unconstitutional and contravenes Sections 19 and 20 of Article 1, and sub-divisions 4 and 11 of Section 7, Articles IV., of the Constitution of the State of New Jersey as amended. Said Act is special and its object is not expressed in its title.

Third, separate defense.

Chapter 72, Session Laws of the State of New Jersey of 1911, was never adopted by the governing body of said defendant and does not apply to the City of Hoboken.

Fourth, separate defense.

Chapter 144, Session Laws of the State of New Jersey of 1916, is unconstitutional and contravenes Sections 19 and 20 of Article 1, and sub-divisions 4 and 11 of Section 7, Article IV., of the Constitution of the State of New Jersey as amended. Said Act is special and its object is not expressed in its title.

Fifth, separate defense.

Chapter 144, Session Laws of the State of New Jersey of 1916, is not applicable to the defendant city. The Act was not mandatory and the city had not by ordinance provided for such a pension.

Sixth, separate defense.

No pension was ever voted, allowed or awarded said plaintiff by the Board of Commissioners of the City of Hoboken, or any governing body of said city, or by any competent authority representing said city.

Seventh, separate defense.

No appropriation was ever made or could legally be made for the purpose of providing and paying said plaintiff said pension.

Defendant demands that this complaint be dismissed with its costs.

HORACE L. ALLEN,
Attorney of Defendant.

Amended Answer, Filed Dec. 6th, 1918

Hudson County Circuit Court

ELLEN F. HAYES, *Plaintiff* vs. THE MAYOR AND COUNCIL OF THE CITY OF HOBOKEN, A Corporation. *Defendant*	Action at Law. *Amended Answer.*

Defendant, The Mayor and Council of the City of Hoboken, a municipal corporation of the State of New Jersey, says:

1. As to the statements in the 1st paragraph, defendant has not any knowledge thereof sufficient to form a belief.

2. It admits the 2d paragraph.

3. It admits the enactment of said statute, but says that the same is unconstitutional, invalid, does not apply to the defendant and creates no legal obligation or liability whatsoever on the part of said defendant.

4. It admits the enactment of said statute, but says that the same is unconstitutional, invalid, does not apply to the defendant and creates no legal obligation or liability whatsoever on the part of said defendant.

5. As to the statements in the 5th paragraph, defendant has not any knowledge thereof sufficient to form a belief.

7. It admits that Hoboken is a city of the second class, but denies that said Act and its supplements and amendments apply thereto.

8. It admits the 8th paragraph.

9. It admits the 9th paragraph

10. It admits the 10th paragraph.

11. It denies the 11th paragraph.

13. It admits that no pension has even been awarded or paid to the plaintiff.

By way of separate defenses to said action, defendant says:

First, separate defense.

Defendant will object that the complaint discloses no cause of action.

Second, separate defense.

Chapter 72, Session Laws of the State of New Jersey of the year 1911 and the acts amendatory thereof and supplemental thereto are unconstitutional and invalid upon the following grounds, viz.:

1. They contravene sections 19 and 20, Article 1, of the Constitution of New Jersey, as amended. The payments which the statutes contemplate making to the widows of members of the police force who die from causes other than injuries received in the performance of duty are mere gratuities or gifts to certain individuals.

2. They contravene sub-divisions 4 and 11 of Section 7, Article 4, of the Constitution of New Jersey, as amended.

3. They are made to take effect in municipalities upon their adoption by the Board of Aldermen, Common Council, Board of Police Commissioners or other body having charge of the police department of any such municipality.

Third, separate defense.

Chapter 144, Session Laws of the State of New Jersey of the year 1916 is not applicable to the defendant city. The Act was not mandatory and the city never legally provided for such a pension.

Fourth, separate defense.

No pension was ever voted, allowed or awarded said plaintiff by the Board of Commissioners of the City of Hoboken, or any governing body of said city, or by any competent authority representing said city.

Fifth, separate defense.

No appropriation was ever made or could legally be made for the purpose of providing and paying said plaintiff said pension.

Defendant demand that this complaint be dismissed with its costs.

HORACE L. ALLEN,
Attorney of Defendant.

Reply, Filed Feb. 28th, 1918

Hudson County Circuit Court

ELLEN F. HAYES, *Plaintiff* vs. THE MAYOR AND COUNCIL OF THE CITY OF HOBOKEN, *Defendant*	*Reply*

Plaintiff, Ellen F. Hayes, for reply, says that:

1. She denies that the said statute referred to in paragraph 3 of the answer is unconstitutional and invalid, and she denies that it does not apply to the defendant, and denies that it creates no legal obligation or liability on the part of the defendant.

2. Chapter 72 of the Laws of 1911 is not unconstitutional and does not contravene sections 19 and 20 of Article 1 and subdivisions 4 and 11 of section 7, Article 4, of the Constitution of the State of New Jersey as amended. Said Chapter 72 is not special and its object is expressed in its title. Said Chapter 72 was adopted by the defendant and does apply to the said defendant. The payments which said statute contemplates to the widows of members of the police force who die from causes other than injuries received in the performance of duty, are not mere gratuities or gifts.

3. Chapter 144 of the Laws of 1916 is not unconstitutional and does not contravene Sections 19 and 20 of Article 1 and subdivisions 4 and 11 of section 7, Article 4, of the Constitution of the State of New Jersey as amended. Said Chapter 144 is not special and its object is expressed in its title. Said Chapter 144 was adopted by the defendant and does apply to the said defendant.

4. She denies that an appropriation could not legally be made for the purpose of providing and paying plaintiff said pension.

COLLINS & CORBIN,

Attorneys of Plaintiff.

10

STIPULATION OF FACTS.

Filed, Dec. 6th, 1918

Hudson County Circuit Court

ELLEN F. HAYES, *Plaintiff* vs. THE MAYOR AND COUNCIL OF THE CITY OF HOBOKEN, A Corporation, *Defendant*	Action at Law *Stipulation of Facts*

1. The answer to the complaint herein admits paragraphs 2, 8, 9, 10 and 13 of the said complaint.

2. The defendant now admits as true paragraphs 1, 5 and 6, and it is agreed by both parties hereto that said death was in no wise occasioned as a result of the performance of his duties as a police officer of the City of Hoboken, and that said Patrick J. Hayes did not lose his life in the performance of his duty.

3. Paragraphs 3 and 4 of the complaint plead certain statutes of the State of New Jersey, the enactment and passage of which are admitted in the answer of defendant, but defendant claims that said statutes, or one or more of them are unconstitutional and inapplicable to the City of Hoboken.

4. The defendant admits in its answer that the defendant city is a city of the second class of this State, as alleged in paragraph 7 of the complaint, and further admits that at a meeting of the Board of Police Commissioners of the defendant city, held on April 11, 1912, it passed the following resolution for the adoption of the following statutes:

> *Resolved,* "That the Board of Police Commissioners of the City of Hoboken, having charge of the Police Department of said city, hereby adopts the provisions of 'An Act providing for the pensioning of police officers and policemen in certain municipalities of this State,'

approved March 30, 1911, and the amendment to said Act approved April 3, 1912."

Also at said meeting of said Police Commissioners a communication was received from the then Mayor Martin Cooke, as hereinafter set forth, and that the following action was taken thereon: the communication was as follows:

"Hoboken, N. J., April 11, 1912.

"To the Honorable Board of Police Commissioners, Hoboken, N. J.

"Gentlemen—Pursuant to the provisions of Chapter 72 of the Laws of New Jersey, Session of 1911, entitled, 'An Act providing for the pensioning of police officers and policemen in certain municipalities of this State,' approved March 30, 1911, and the amendment to said Act, Chapter 373 of the Laws of New Jersey, Session of 1912, and subject to your advice and consent, I hereby appoint Patrick Hayes, Jr., Chief of Police of the City of Hoboken, John Hildemann, a patrolman of the Police Department of the City of Hoboken, and Martin Daab and Edward Hunter, citizens of the City of Hoboken, members of the Police Pension Commission, to serve for the term of four years, or until their successors are appointed and duly qualified. Respectfully,

MARTIN COOKE,
Mayor."

The action taken by the said Commissioners was as follows:

"On motion of Commissioner Hayes the communication was received and the advice and consent of the Board given to the appointments, by the following vote:

"Ayes—Commissioners Capelli, Hayes and President Cooke.

"Nays—None."

(For the Minutes of the said Commissioners, containing the above see printed Minutes for the year 1912, page 17.)

It is further admitted to be a fact by the defend-

ant that thereafter pensions were granted by the said Board of Police Commissioners to various members of the Police Department of the said defendant city, under and by virtue of the provisions of the aforesaid statutes, among which were the following pensions:

A pension to one, John Flattery, who was Captain of Police at the time when he was retired on June 25, 1912. The resolution granting said pension was as follows:

> "Whereas, John Flattery, Captain of Police, has honorably served upon the police force of the City of Hoboken, for over twenty years and has attained the age of sixty years and over, and has applied to the Board of Police Commissioners of the City of Hoboken to be retired upon half pay, and said Board of Police Commissioners being of the opinion that the application of said Captain of Police, John Flattery, should be granted, and that he should be retired from active service as provided by law; therefore be it
>
> "Resolved, That John Flattery be and he is hereby retired from the police force of the City of Hoboken upon half pay, said retirement to take effect on the first day of July, nineteen hundred and twelve, and his position as Captain of Police, by reason of said retirement, is hereby declared vacant from and after that date; and be it further
>
> "Resolved, That the said John Flattery, from and after the first day of July, nineteen hundred and twelve, be placed on the pension roll of said department on half pay, to wit: The sum of one thousand dollars ($1,000) per year; and be it further
>
> "Resolved, That a copy of this preamble and resolution be forwarded to the Police Pension Commission."

At a meeting of the said Board of Police Commissioners held on April 27, 1914, one George Dittes, Sergeant of Police, was granted a pension under and by virtue of said statutes of 1911 and

1912 (See p. 22 of the Minutes of said Board of Commissioners for the year 1914.)

At a meeting of the said Board of Police Commissioners held on December 14, 1914, one Julius Nelson, Captain of Police, was granted a pension, in accordance with the said statutes of 1911 and 1912.

On June 30, 1915, the Board of Commissioners of the City of Hoboken, which had superseded the Board of Police Commissioners of the defendant city, elected under the so-called Commission form of Government Act, hereinafter referred to, viz., Chapter 221 of the Laws of 1911 (p. 462), passed a resolution appointing a Police Pension Commission, in accordance with said statute supra, of 1911 and 1912, said resolution being as follows:

> "Pursuant to the provisions of Chapter 72 of the Laws of New Jersey, Session of 1911, entitled, 'An Act providing for the pensioning of police officers and policemen in certain municipalities of this State,' approved March 30, 1911, and the amendments to said Act, Chapter 373, of the Laws of New Jersey, Session of 1912.
>
> "Resolved, That the following named be and they are hereby appointed as members of the Police Pension Commission, to serve for the term of four years, or until their successors are appointed and duly qualified:
>
> "Patrick Hayes, Jr., Chief of Police of the City of Hoboken; John Hilderman, a patrolman of the Police Department of the City of Hoboken, and Edward Hunter and Herman Pruser, citizens of the City of Hoboken.
>
> "By B. N. McFEELEY.
>
> June 30, 1915. Presented and read and adopted." D. A. HAGGERTY, *City Clerk.*"

(See printed Minutes of the Board of Commissioners of the defendant city for June, 1915, p. 18.)

At the meeting of the Board of Commissioners of the said defendant city of May 17, 1916, a reso-

lution was passed granting Roundsman David V. Fall, who was retired, a pension of $755 per annum, to take effect at once. (See printed Minutes of the Board of Commissioners of May, 1916, p. 16.)

At a meeting of the Board of Commissioners of the said defendant city held on May 24, 1916, Patrolman David H. Walsh was retired from active service of the Police Department and given a pension of $650 per annum, to take effect June 1, 1916. At a meeting of the Board of Commissioners of the said defendant city, held on December 20, 1916, the following resolution was duly passed:

"*Whereas,* Nora L. Dougherty, presented a petition to the Board of Commissioners of the City of Hoboken on October 4, 1916, praying that she be granted a pension in accordance with the provisions of Chapter 72 of the Session Laws of New Jersey for the year 1911 and reciting in said petition that her husband, William A. Dougherty, was duly appointed a patrolman in the Police Department of the City of Hoboken on May 28, 1896, and served as such patrolman until the date of his death, August 11, 1916, and reciting further that she was lawfully married to said William A. Dougherty, February 11, 1904, and that five children were born to them as the fruit of said marriage, all of whom now survive and whose names and ages are as follows:

Daniel Dougherty, born April 23, 1905.
William Dougherty, born July 4, 1908.
Vincent Dougherty, born January 22, 1910.
Ellen Dougherty, born April 25, 1912.
Dennis Dougherty, born October 1, 1915.

Al of whom are now under the age of 16 years, and reciting further that said William A. Dougherty was in god health until the sixth day of August, 1916, when, while in the performance of his duty as patrolman he suffered a sun-stroke which resulted in his death on August 11, 1916, and

"*Whereas,* The Board of Commissioners, as a Committee of the Whole, in conjunction with

the Corporation Attorney, considered said petition and the proofs submited and said Committee have reported that in their opinion the prayer of said petitioner should be granted; and

"Whereas, In the opinion of the Board of Commissioners the said patrolman William A. Dougherty lost his life in the performance of his duty.

"Resolved, That pursuant to the provisions of an Act entitled, 'An Act providing for the pensioning of police officers and patrolmen in certain municipalities of this State,' approved March 30, 1911, known as Chapter 72 of the Session Laws of 1911, a pension be and is hereby granted equal to one-half of the amount of the salary of said late patrolman, William A. Dougherty in accordance with the provisions of said Act.

(Signed)

P. R. GRIFFIN,
HARRY L. SCHMULLING,
JAMES H. LONDRIGAN,
GUSTAV BACH.

Indorsement:

Presented, read and adopted, Dec. 20, 1916.

D. A. HAGGERTY,
City Clerk."

Notwithstanding the aforesaid admission defendant objects to their introductions in evidence contending that the issuance of said pensions is irrelevant and immaterial.

5. It is further admitted by the defendant that the City of Hoboken adopted the so-called Commission Government Act, which is Chapter 221 of the Laws of 1911, of the State of New Jersey (p. 462), and supplements thereto and amendments thereof, on the 9th day of February, 1915.

6. At the time of the passage of the resolution of April 11, 1912, by the then Board of Police Commissioners of the defendant city adopting Chap-

ter 72 of the Laws of 1911 (p. 104) and Chapter 373 of the Laws of 1912 (p. 669), the said Board of Police Commissioners was a municipal body, having charge of the Police Department of the defendant city, and that the Common Council was the governing body of said city and after the adoption of the Commission Government Act by the defendant city as aforesaid the charge of the Police Department of said city was given over to the Commissioners elected under said Act.

7. It is admitted that the following is the Financial report of the Police Pension Commission of the City of Hoboken, from the date of its inception to the end of the fiscal year, May 1, 1918:

Financial report of the Police Pension Commission of the City of Hoboken, from the date of its inception to the end of the fiscal year May 6, 1917:

MAY 1st, 1912, to MAY 1st, 1913.—

Receipts.

Assessments	$1,510.14	
Donations	175.00	
Sale of Junk	59.93	
Fines	76.58	
Interest on deposits	9.66	
Total receipts for year	$1,831.31	
Payments.		
Pensions		$833.30

MAY 1st, 1913, to MAY 1st, 1914.

Receipts.

Assessments	$1,534.40	
Donations	37.50	
Fines	163.56	
Interest on deposits	40.41	
Total receipts for year	$1,775.87	
Payments.		
Pensions		$999.96

*MAY 1st, 1914, to JULY 1st, 1915.

Receipts.

Assessments	$1,814.53	
Donations	35.00	
Fines	64.28	
Sale of Junk	13.40	
Interest on deposits	89.78	
Total receipts for period	$2,016.99	
Payments.		
Pensions		$2,685.91
Total of all receipts	$5,624.17	
Total of all payments		$4,519.17
Balance of fund		1,105.00
	$5,624.17	$5,624.17

*New Commission appointed—advent of Commission Government.

Balance brought forward	$1,105.00

JULY 15th, 1915, to May 1st, 1916.

Receipts.

Asessments	$1,400.43
Donations	125.00
Sale of Junk	25.22
Monies from Prisoners	119.26
Interest on deposits	3.52
Appropriation City	1,130.20
	$2,803.43

Payments.

Pensions	$3,624.78

MAY 1st, 1916, to MAY 1st, 1917.

Receipts.

Assessments	$1,736.94
Donations	75.00
Interest on deposits	9.26
Appropriation City	4,704.76
Total reecipts for year	$6,525.96

Payments.		
Pensions		$5,885.71
Total receipts and balance	$10,434.39	
Total payments		9,510.49
Balance of fund		923.90
	$10,434.39	10,434.39

RECAPITULATION:

Total of all receipts for period	$14,953.56
Total of all payments for period	14,029.66
Balance as above	923.90

BOARD OF POLICE COMMISSIONERS

Herman H. Pruser, *President,*
Patrick Hayes,
ohn Hildeman,
Edward Hunter, *Secretary.*

MAY 1st, 1917, to MAY 1st, 1918.

Receipts		
Balance on hand, May 4, 1917		923.90
Assessments	1,698.59	
Appropriations	4,253.84	
Interest	18.59	
Fines	264.00	
Total	6,235.02	
Payments.		
Pensions		6,561.94
Total of receipts and balance.	$7,158.92	
Total of payments		$6,561.94
Balance of fund, May 1, 1918.		596.98
	$7,158.92	$7,158.92

EDWARD HUNTER,
EDWARD HUNTER,
Secretary.

8. It is admited that no pension was ever award-

ed, voted or allowed the plaintiff by the Board of Commissioners of the City of Hoboken, and that no action, favorable or unfavorable to the plaintiff, was taken by the Board of Commissioners of the City of Hoboken, upon her said petition.

9. It is admitted that no appropriation was ever made by the Board of Commissioners of the City of Hoboken to provide for a pension for the plaintiff.

10. Chapter 72, Laws of 1911, or as amended, was never adopted by a vote of the people of the City of Hoboken.

Dated, December 6, 1918.

COLLINS & CORBIN,
Attorneys of Plaintiff.

HORACE L. ALLEN,
Attorney of Defendant.

Payments.		
Pensions		$5,885.71
Total receipts and balance	$10,434.39	
Total payments		9,510.49
Balance of fund		923.90
	$10,434.39	10,434.39

RECAPITULATION:

Total of all receipts for period	$14,953.56
Total of all payments for period	14,029.66
Balance as above	923.90

BOARD OF POLICE COMMISSIONERS

Herman H. Pruser, *President,*
Patrick Hayes,
ohn Hildeman,
Edward Hunter, *Secretary.*

MAY 1st, 1917, to MAY 1st, 1918.

Receipts		
Balance on hand, May 4, 1917		923.90
Assessments	1,698.59	
Appropriations	4,253.84	
Interest	18.59	
Fines	264.00	
Total	6,235.02	
Payments.		
Pensions		6,561.94
Total of receipts and balance.	$7,158.92	
Total of payments		$6,561.94
Balance of fund, May 1, 1918.		596.98
	$7,158.92	$7,158.92

EDWARD HUNTER,
EDWARD HUNTER,
Secretary.

8. It is admited that no pension was ever award-

ed, voted or allowed the plaintiff by the Board of Commissioners of the City of Hoboken, and that no action, favorable or unfavorable to the plaintiff, was taken by the Board of Commissioners of the City of Hoboken, upon her said petition.

9. It is admitted that no appropriation was ever made by the Board of Commissioners of the City of Hoboken to provide for a pension for the plaintiff.

10. Chapter 72, Laws of 1911, or as amended, was never adopted by a vote of the people of the City of Hoboken.

Dated, December 6, 1918.

COLLINS & CORBIN,
Attorneys of Plaintiff.

HORACE L. ALLEN,
Attorney of Defendant.

MOTIONS FOR JUDGMENTS

At the close of the case counsel for plaintiff moved for a judgment in favor of the plaintiff and against the defendant, and counsel for the defendant moved for a judgment of non suit and moved for a judgment in favor of the defendant and against the plaintiff. 10

JUDGE CAMPBELL'S DECISION.

(Filed, February 11th, 1919)

Hudson County Circuit Court

ELLEN I. HAYES
vs.
THE MAYOR AND COUNCIL OF THE CITY OF HOBOKEN.

Collins & Corbin, Esqs., for plaintiff.
Horace L. Allen, Esq., for defendant.

CONCLUSIONS.

CAMPBELL, J.

This is an action to recover $1,200, being amount alleged to be due for pension from March 17, 1916, to September 7, 1917, to plaintiff as the widow of a policeman, who died April 19, 1915, from natural causes not occasioned as the result of performance of duties or from injuries received while in performance of duty.

The facts are all settled by a stipulation filed in the cause. There are therefore no finding of facts other than fixed by such stipulation.

By consent of parties the cause was tried without a jury.

The defenses are entirely questions of law and three in number, viz:

(1) The statutes under which the recovery is sought are unconstitutional.

(2) Mandamus is the only remedy.

(3) The action cannot be maintained because no appropriation has been made to meet the payment.

First. The statutes involved are:

1911, Chapter 72
1912, chapter 373

1914, chapter 127
1916, chapter 144
1917, chapter 26
1917, chapter 27

I am of the opinion that the constitutionality of these acts cannot be attacked in this action but only by direct attack by the State through the Attorney-General.

Attorney-General vs. Dover,	62 N. J. L. 138
Lange vs. Bayonne,	74 N. J. L. 455-459
Jackson vs. Miller,	84 N. J. L. 189-190
Morris vs. Fagan,	85 N. J. L. 617-620
State vs. Toth,	86 N. J. L. 247-249
Deolin vs. Wilson,	88 N. J. L. 180-182

The holding of all these cases is that a private citizen could not so attack these statutes, and in reaching the conclusion I have expressed above I am assuming that the municipality, having undertaken the duties prescribed by the acts, cannot in a proceeding of this character free itself of continued performance by such an attack.

But if in this respect my reasoning is incorrect, the constitutional infirmities of these statutes, if any exist, are not so clear as to warrant this court in pronouncing the acts unsound.

Second. Mandamus is not the exclusive remedy. The performance of no act is necessary to fix the right or amount of recovery that cannot be reached or effected by the present action.

Third. That no appropriation has been made does not preclude or bar this action.

Sec. 5, Chap. 72, R. L. 1911, makes full and complete provision for such a contingency.

Plaintiff is therefore entitled to judgment for $1,200, with interest and costs to be taxed.
Dated February 10, 1919.

LUTHER A. CAMPBELL,
Judge.

RULE FOR JUDGEMENT.

Hudson County Circuit Court.

ELLEN F. HAYES, *Plaintiff* vs. THE MAYOR AND COUNCIL OF THE CITY OF HOBOKEN— A Municipal Corporation, *Defendant*	Action at Law *Rule for Judgment*

This action having been tried before Judge Luther A. Campbell, without a jury, in the presence of counsel of the respective parties, on December 6, 1918; and the Court having considered the same,

It is on this *17th day of February, 1919, ORDERED,* that judgment, final, be entered in favor of the plaintiff and against the defendant for the sum of $1,302, and the plaintiff's costs to be taxed.

LUTHER A. CAMPBELL,
Judge.

Rule, entered this 17th day of February, 1919, on motion of

COLLINS & CORBIN,
Attorneys of Plaintiff.

JUDGEMENT.

Hudson County Circuit Court.

ELLEN F. HAYES, *Plaintiff* vs. THE MAYOR AND COUNCIL OF THE CITY OF HOBOKEN A Municipal Corporation, *Defendant*	*Judgment Entered Feb. 17, 1919.* Damages, $1,302.00 Costs, 52.22 Total, $1,354.22 *Collins & Corbin, Attorneys*

Judgment on trial by the Court without a jury in the above entitled cause was entered in this court on the *seventeenth day of February, in the year of Our Lord one thousand nine hundred and nineteen,* in favor of the plaintiff, Ellen F. Hayes, and against the defendant, the Mayor and Council of the City of Hoboken, a municipal corporation, in a plea of action at law, for the sum of thirteen hundred and two dollars and fifty-two dollars and twenty-two cents, costs of suit.

Judgment entered and signed this 17th day of February, 1919.

LUTHER A. CAMPBELL,
Judge.

Min. 63, page 439.

New Jersey Court of Errors and Appeals.

ELLEN F. HAYES, *Plaintiff, Appellee.* VS. THE MAYOR AND COUNCIL OF THE CITY OF HOBOKEN, A MUNICIPAL CORPORATION, *Defendant, Appellant.*	*Action at Law, on Appeal from Hudson County Circuit Court.*

BRIEF OF HORACE L. ALLEN, ATTORNEY FOR DEFENDANT-APPELLANT.

Abstract of Case.

This is an appeal from the judgment of the Hudson County Circuit Court rendered in favor of the plaintiff, Ellen F. Hayes, against The Mayor and Council of the City of Hoboken, in a suit brought by the widow of Patrick J. Hayes, a former member of the police force of Hoboken, whose death was caused by a tumor in the bladder (Case p. 8, L. 12), for a pension.

In the stipulation of facts submitted, it was agreed that the death of plaintiff's husband was in no wise occasioned as a result of the performance of his duties as a police officer of the City of Hoboken, and that he did not lose his life in the performance of his duty (Case p. 23, L. 15 to 20). Said Hayes was at the time of his death receiving from the City a salary of $1,600 per annum; had been a member of the force for 22 years and had paid into the pension fund of said City continuously from 1911 to the date of his death one per cent. of his salary, the full amount of his annual assessments as provided for in the acts hereinafter referred to.

This suit was brought for $1,200, the amount of

a pension for one and one-half years from March 17th, 1916, to September 17th, 1917, the equivalent of one-half of the salary her husband would have received if alive during that period. She reserved the right to sue for such further sums as may become due on said pension. Her claim rests upon Chapter 72, Laws of 1911, p. 104, as amended by Chapter 373, Laws of 1912, p. 669, as further amended by Chapter 127, Laws of 1914, p. 219, and principally upon a supplement to Chapter 72 of the Laws of 1911, to wit: Chapter 144, Laws of 1916, p. 298.

The title to Chapter 72, Laws of 1911, was amended by Chapter 26, Laws of 1917, p. 55, and the title to Chapter 144, Laws of 1916, was amended by Chapter 27, Laws of 1917, p. 56.

The original title of Chapter 72, Laws 1911, was "An Act providing for the pensioning of police officers and policemen in certain municipalities of this State."

This Act applied to all municipalities in the State other than cities of the first class, and the fourth section thereof provided that the widow or children of any member of such police force who shall have lost his life in the performance of his duty shall, so long as such widow remains unmarried or so long as such children or any of them remain under the age of sixteen years, receive a pension equal to one-half of the amount of the salary of such member of said police force at the time of his death; provided, however, that if such police officer leaves a widow and children, said pension shall be paid to the widow so long as she remains unmarried, and in case such member of said police force shall leave children and no widow, then such pension shall be paid to such children who have not attained the age of sixteen years, in equal shares.

The fifth section thereof provided for a fund created by deductions of one per cent from every

payment of salary to each member, all fines imposed, moneys donated, one-half of all rewards paid to police force for apprehension of criminals. It was therein provided that *"In case at any time there shall not be sufficient money in such pension fund created as provided in the Act to pay such pensions, the Common Council or other governing body shall include in every tax levy a sum sufficient to meet the requirements of said fund, and such sum shall be raised by tax levy no longer than is necessary to meet the requirements of such pension fund."*

Section 8 provided that "The Board of Aldermen, Common Council, or like governing body of such municipality of this State may adopt the provisions of this act by an ordinance duly adopted by the Board of Aldermen, Common Council, or other like governing body of any such municipality."

The 1912 amendment to Section 8, authorized the adoption of the 1911 Act by the Board of Police Commissioners or other body having charge of the police department, as well as the Board of Aldermen, Common Council or like governing body of any such municipality of this State.

On April 11th, 1912, the Board of Police Commissioners of the City of Hoboken adopted a resolution purporting to adopt Chapter 72, Laws 1911.

It will be noted that as the Act stood when adopted by the Board of Police Commissioners, a widow of a policeman was entitled to a pension *only in the event of losing his life in the performance of his duty.*

The 1914 amendment to the Act (Chapter 127, Laws 1914, p. 219) further amends said Section 8 by permitting the adoption of the act by a popular vote of the people.

In 1916 the Legislature passed "A supplement to an Act entitled 'An Act providing for the pensioning of police officers and policemen in certain

municipalities of this State,' approved March 30th, 1911," known as Chapter 144, Laws of 1916, p. 298.

Section 1 provides "The widow of every member of such police force in any municipality of this State in which the act to which this is a supplement is applicable, where such member shall have paid or shall hereafter pay into the fund provided for the act to which this act is a supplement the full amount of the annual assessments or contributions, *who shall have died or shall hereafter die from causes other than injuries received in the performance of duty,* and who shall have served at the time of his death nine years as a member of such police force, shall so long as she remains unmarried, receive a pension equivalent to one-half of the pay of her deceased husband; and in case there be no widow or said widow shall remarry, and there be no minor children under the age of sixteen years, their maintenance and support shall be provided for by the division among such minor children of said pension in equal shares under the supervision of the police pension commission provided for in the act of which this is a supplement."

Conceiving the titles to both of these acts to be bad, they were amended on March 15th, 1917, as hereinbefore set forth.

It was agreed in the stipulation of facts that Chapter 72, Laws of 1911, or as amended, was never adopted by a vote of the people of the City of Hoboken (Case p. 32, L. 11 to 13).

Upon the passage of the resolution by the Board of Police Commissioners, the Mayor of the City appointed a Police Pension Commission as provided for in said Act. When Hoboken adopted Commission Government, the Board of Commissioners likewise appointed a Police Pension Commission.

The Police Pension Commission has since its creation in 1912, retired members of the police force who had attained the requisite age upon a pension of half pay, and in the case of the widow of William A. Dougherty *who lost his life in the performance of his duty* (Case p. 28, L. 6 to 9) allowed her a pension.

In the year July, 1915, to May 1st, 1916, the City had to appropriate $1,130.20 (Case p. 30, L. 29) including it in the tax levy to meet the requirements of the fund.

In the year July, 1916, to May 1st, 1917, the City had to appropriate and include in the tax levy the sum of $4,704.76 to meet the requirements of the fund (Case p. 30, L. 39).

In the year May, 1917, to May 1st, 1918, the City had to appropriate and include in the tax levy to meet the requirements of said fund the sum of $4,253.84 (Case p. 31, L. 23). On May 1st, 1918, the balance in said fund was but $596.98 (Case p. 31, L. 33).

The plaintiff on April 30th, 1917, presented a petition to the City requesting a pension under Chapter 72, Laws of 1911 and Chapter 144, Laws of 1916, but the Pension Commissioners took no action whatever upon her application and did not award, vote for or allow her pension (Case p. 31, L. 40, p. 32. L. 1 to 5).

The City resists the payment of pensions to widows of policemen who die from natural causes other than from injuries received in the performance of their duty, and in its answer to this suit alleges that said acts are:

(A) Unconstitutional.

(B) That they do not apply to the City of Hoboken and create no liability on its part.

(C) That no pension was ever awarded plaintiff, and

(D) No appropriation made therefor.

BRIEF OF ARGUMENT.

POINT 1.

Chapters 72, Laws 1911, and 144, Laws 1916, contravene Section 19, Article 1 of the State Constitution as follows:

"Sec. 19. Municipal Aid to Private Corporations.—No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for or be directly or indirectly the owner of any stock or bonds of any association or corporation.

BUSH v. BD. OF SUPERVISORS, (N. Y. Ct. of Appeals) 159 N. Y. 2152, 45 L. R. A. 556.

WHITE v. INEBRIATES HOME, 141 N. Y. 123.

SUN PRINTING & PUB. ASSOC. v. N. Y. 152, N. Y. 257, 37 L. R. A. 788.

BROWN v. MARYLAND, 12 Wheat. 419, 6 L. Ed. 678.

FALCONER v. BUFFALO & J. R. Co. 69 N. Y. 491.

PEOPLE v. HETFIELD & FORT EDWARD TRUSTEES 70 N. Y. 28.

The levy of such a tax as these acts authorize and this judgment will require is an abuse of the power of taxation, and unconstitutional.

COOLEY, CONST. LIM. 6th ed. 280;

COOLEY TAXN. 2d ed. 137;

PEOPLE, PEAKE VS. COLUMBIA COUNTY SUPERS, 43 N. Y. 130;

FREELAND VS. HASTINGS, 10 Allen, 570;

MEAD VS. ACTON, 139, Mass. 341;

PERKINS VS. MILFORD, 59 Me. 315;

MOULTON VS. RAYMOND, 60 Me. 121;

KELLY VS. MARSHALL, 69 Pa. 319;

FERGUSON VS. LANDRAM, 1 Bush. 548;

JOHNSON VS. CAMPBELL, 49 Ill. 316;

WASHINGTON COUNTY vs. BERWICK, 56 Pa 466;
SUSQUEHANNA DEPOT vs. BARRY, 61 Pa. 317;
AMITY TWP. vs. REED, 62 Pa. 442;
MILLER vs. GRANDY, 13 Mich. 540;
FREY vs. FOND DU LAC, 24 Wis. 204;
OPINION OF JUSTICES, 52 Me. 595. Appx.;
THOMPSON vs. PITTSTON, 59 Me. 545;
COMINS vs. EDDINGTON, 64 Me. 65;
MERCER vs. FLOYD, 24 Misc. 164;
CROWELL vs. HOPKINTON, 45 N. H., 9;
BOWLES vs. LANDAFF, 59 N. H. 164.

They select the widows of policemen who die from causes other than injuries received in the performance of the public duty and give to this class a pension to be raised by taxation.

From a legal point of view the widow is entitled to a pension under these acts if (to suppose an extreme case) the policeman commits suicide, or is executed for murder or meets death through his own gross carelessness, and the property owners will be taxed to provide a pension for his widow or children.

To lay with one hand, the power of the government on the property of the citizen and with the other to bestow it upon favored individuals, to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislation forms.

CITIZENS SAV. & LOAN ASSN. vs. TOPEKA, 87 U. S., 20, Wall, 655-663; 22 L. Ed. 445-461.

BERTHOLF vs. O'REILLY, 74 N. Y. 509, 30 Am. Rep. 323;

SPENCER vs. MERCHANT, 100 N. Y. 585;

LOWELL vs. BOSTON, 111 Mass. 454, 15 Am. Rep. 39;

WILLIAM DEERING & CO. vs. PETERSEN (Minn.), 77, N. W. 568;

ALLEN VS. JAY, 60 Me. 124, 11 Am. Rep. 185;
GUILFORD VS. CHENANGO COUNTY SUPERS, 13 N. Y., 143;
BREWSTER VS. SYRACUSE, 19 N. Y., 116;
BALDWIN VS. NEW YORK, 2 Keyes, 387;
WEISMAR VS. DOUGLAS, 64 N. Y. 91, 21 Am. Rep. 586;
RE JACOBS, 89 N. Y. 98, 50 Am. Rep. 636;
RE BURNS, 155 N. Y., 23;
MARION TWP. BOARD OF EDUCATION VS. STATE, 51 Ohio St., 531, 25 L. R. A., 770.

An attempt through the guise of the taxing power to take one man's property for the private benefit of another is void. An act of spoilation and not a lawful use of legislative or municipal functions.

COLE VS. LA GRANGE, 19 Fed. Rep. 871.
PEOPLE VS. MORRIS, 13 Wend. 328.

Of course the Legislature cannot levy taxes for anything but public purposes as, for instance, to assist a private person in his business or even to aid him in misfortune from fire or flood or other casualty. It will be insisted that the declared burden is for a public purpose in that it is levied for the benefit and compensation of those and the families of those whose lives have been or may be imperiled or lost in pursuing the arduous and dangerous duties of policemen, that the public demands the highest degree of skill, diligence and good faith from these servants, and that this degree is best attained by holding out to them the certainty of care when injured and family supported when age, disease or death comes upon them.

This theory, however, has not been adhered to.

HENDERSON V. LONDON & LANCASHIRE INS. CO. 20 L. R. A. 827.

While this insistment may, with some degree of logic be addressed to the granting of a pension to

the widow of a policeman, who looses his life while in the performance of his duty, it cannot be used where the policeman dies from ordinary causes such as confront and must be met by all persons. Death from natural causes disconnected with the performance of the public duty or death even connected with the violation and abuse of the public duty, will not confer any legal or equitable claim against the city. The plaintiff has no greater claim against the city than has the widow of any official servant or employee of the city, or in fact any widow has, whose husband dies from natural causes. The sorrow we have for every widow, whom the grim reaper has visited will not justify a pension to be raised by taxation.

Legislation of this character has often been questioned in the Courts and quite uniformly condemned.

FABER VS. ERIE CO. SUPERS, 131 N. Y. 432.
PERKINS VS. MILFORD, 59 Me. 315.
MOULTON VS. RAYMOND, 60 Me. 121.
FREELAND VS. HASTINGS, 92 Mass. 570.
MEAD VS. ACTON, 139 Mass. 341.
KELLY VS. MARSHALL, 69 Pa. 548.
FERGUSON VS. LANDRUM, 1 Bush. 548.

Payment of a claim for injuries to a person in the employ of the State occasioned by negligence of his superior officer for which the State is not liable on general principles of law or under any prior statute is a "gift" within the prohibition of Const. Art. 4, Sect. 31, 32, against making gifts of public money.

BROWN VS. HART, Cal. Sup. Ct. 15 L. R. A. 431.

A legislative appropriation for the benefit of sufferers from a flood is in violation of Const. Art. 4, Sect. 31, prohibiting the gift of public money or thing of value to any individual.

PATTY VS. COLGAN, Cal. Sup. Ct. 18, L. R. A. 744.

Similar Constitutional provisions were held in Synod vs. South Dakota, 14 L. R. A. 418, to apply whether the appropriations were made as a donation or in payment for services rendered the State by such school.

See also Wasson vs. Wayne Co., Comrs. (Ohio), 17 L. R. A. 795.

POINT 2

The 1911 Act upon which plaintiffs' claim rests is unconstitutional and violates sub-divisions 4 and 11 of Section 7, Article 4, of the State Constitution.

Chapter 72, Laws 1911, is entitled "An act providing for the pensioning of police officers and policemen in *CERTAIN* municipalities of this State."

Reading this title as it stands, then the object of the act, as expressed in its title, was applicable only to CERTAIN municipalities. This can by no means be construed to extend to or include all such municipalities. It strikes the natural mind that it must necessarily exclude some of the class to which it refers, and it does not by any fair or reasonable intendment indicate with any degree of clearness to what classes of the municipalities of this state the act is intended to apply. No municipality would know by reference to this title alone whether it was included or excluded from the provisions of the act.

SNEATH VS. MAGER, 64, N. J. L. 94, 99.

The title of Chapter 72, laws 1911, does not disclose a purpose of providing a pension for the widows and children of policemen, and consequently restricts the enacting part of such statute as to that subject matter. (Sect. 4.)

The pensioning of widows and children of policemen has nothing to do with pensioning policemen, and legislation dealing with that subject is not permitted by the constitutional provision

which requires the title of an act to be broad enough to express the general object sought to be accomplished.

PATTERSON VS. CLOSE, 82, N. J. L. 160, 162.
HENDRICKSON VS. FRIES, 16 Vr. 555.
DOBBINS VS. NORTHAMPTON, 21 Vr. 496.

The body of this act (excluding first class cities) authorizes its adoption by the governing body of any municipality by ordinance. (Sect. 8.)

By Chapter 373, Laws 1912, Sect. 8, was amended so that the acceptance of the act could no longer be made by the governing body of the City (the popular elective branch thereof), but delegated it to the Board of Police Commissioners or the body having control of the police department.

The effect of thus amending Sect. 8 was to make the act special.

The common council of Bayonne, a second class city, controlled the police department and therefore could adopt the act.

KEEGAN VS. BAYONNE, 81, N. J. L. 120.

The common council of Hoboken, a second class city, not having the control of the police department, could not adopt the act.

POINT 3

The referendum clause in said act renders same unconstitutional under the decision in Attorney-General vs. McGinness, 49 Vr. 346.

The change in the referendum limited the adoption to such Board of Alderman, etc., or other body as had charge of the police department.

The Board of Police Commissioners of the City of Hoboken, adopted Chapter 72, Laws 1911, as amended on April 11th, 1912. This act was never accepted by popular vote of the people, nor was it

ever accepted by the Common Council, the popular elective branch of the municipal government.

No decision can be found in this State upholding the acceptance of a statute by a municipal board or department such as the Board of Police Commissioners.

On the contrary the decision in DeHart vs. Atlantic City, 33 Vr. 586, has been overruled by the Court of Errors in the case of Attorney General vs. McGuinness, 49 Vr. 346, 385; and it is the established law of this State that "The legislature may impose its will as law upon municipalities, but if some other will is to intervene, *it must be that of the people who are to be governed by such municipal law*, and not an alien will, even though it be that of the governing body for the time being of such municipality.

Therefore, the judgment of this court that Chapter 72, Laws 1911 as amended by Chapter 373, Laws 1912, is not a constitutionally enacted law, and, consequently, null and void, must be put upon the ground of stare decisis. It requires no original consideration by this court.

This applies to the 1911 act before as well after its amendment and all the more so after the change in the referendum.

On April 8, 1914, Section 8 of said act was further amended by Chapter 127, Laws 1914, so as to provide an alternative referendum, viz.: an acceptance either by the Board having control of the police department, or by a vote of the people.

The 1914 amendment did not provide a double referendum, such as was upheld in Noonan vs. Hudson Co., 23 Vr. 398, where after action upon the subject matter was had by the one body a popular election was held, the concurrent affirmation of the voters being the sina qua non to the adoption of the act.

On the contrary by providing for the adoption of the act, either by the action of the Board of Police Commissioners, or by the voters, no concurrent affirmation was required, to which the popular vote is essential and the amendment therefore is null and void under the authority of

ATTY.-GENL. VS. MCGUINNESS (IBID).

The amendment of 1914 takes effect from April 8, 1914 and changes said Section 8 from that date.

POINT 4.

Chapter 144, Laws of 1916, is a supplement to Chapter 72, 1911, and by its provisions an attempt is made to pay a pension to the widow of a policeman who dies from causes OTHER THAN INJURIES RECEIVED IN THE PERFORMANCE OF DUTY.

It is unconstitutional because:

1. Its title does not express the object of the act.

2. It creates an illegal class and is special legislation providing for a pension for certain widows and certain children in certain cities, to wit: In only those in which the act to which this is a supplement is applicable. In those cities in which, prior to March 17, 1916, Chapter 72 of the Laws of 1911 had been accepted in the manner specified, the widow of a policeman who committed suicide, or met his death through his own gross carelessness, or who died from causes other than injuries received in the performance of duty, is to receive a pension. In similar municipalities, alike in every respect except that the 1911 act had not been therein accepted, such a widow is not to receive a pension.

Such a classification is illusory and will not sustain exclusive legislation.

GOLDBERG VS. DORLAND, 27 Vr. 365.

TETRAULT VS. ORANGE, 26 Vr. 99.
LONG BRANCH VS. SLOANE, 20 Vr. 356.
HELFER VS. SIMON, 53, N. J. L. 550.

This act must fail under authority of

Keffer vs. Gaskill, 88, N. J. L. 77, 78.

Moreover the act only applies where the 1911 act is at that time applicable. It does not apply to the municipalities where the act to which it is a supplement *MAY THEREAFTER* be applicable.

This renders the act hopelessly void.

BENNETT VS. TRENTON, 55 N. J. L. 72.
STAHL VS. TRENTON, 25 Vr. 444
PIERSON VS. O'CONNOR, 25 Vr. 36.
COUTERI VS. NEW BRUNSWICK, 15 Vr. 58.
PAVONIA HORSE R. R. Co. 16 Vr. 58.

3. The legislature could not by such a supplement make such a material change in the legislative scheme of pensioning policemen, which had been theretofore accepted by the Police Commissioners, and thereby add such an onerous burden on the taxpayers.

4. It provides a mere gratuity or gift to certain individuals. This beyond and outside the scope of the cases wherein exists a moral duty to pay a policeman or fireman for injuries received while discharging a duty imposed.

STATE EX REL. HEAVEN VS. ZIEGENHEIM, 144 Mo. 283, 45, S. W. 1,099.
MEAD VS. ACTON, 139 Mass, 341, 1, N. E., 413.
MAHON VS. BOARD OF EDUCATION, 171 N. Y. 263.

POINT 5

Conceiving the titles to Chapter 72, Laws of 1911, and Chapter 144, Laws of 1916, to be bad, they were amended by Chapter 26, Laws of 1917, and Chapter 27, Laws of 1917.

By these changes in their titles the 1911 act and the supplement of 1916 became on March 15, 1917, if at all, *for the first time,* a valid and constitutional enactment and to all intents and purposes the situation was as if Chapter 72, Laws of 1911, and Chapter 144, Laws of 1916, had been first passed on March 15th, 1917. This also is *stare decisis,* for so it was held by the Court of Errors in PATTERSON VS. CLOSE, 84, N. J. L. 319, 322, 323.

POINT 6

If plaintiff is entitled to a pension her remedy is by mandamus proceedings to compel the tribunal created by law to act upon her petition and to grant her a pension. The Board or Tribunal considering the plaintiff's petition has not disposed of her case. Here exists a police pension commission, a statutory office, whom the plaintiff wishes to comply with a statutory regulation

Mandamus is the proper remedy by which to compel a statutory officer to comply with a statutory regulation.

O'HANLON VS. CALVERT, 88 N. J. L. 33.

Mandamus was the remedy sought in Dyke vs. Long Branch, 88 N. J. L. 492.

Also in

KEEGAN VS. BAYONNE, 81 N. J. L. 120.

McGURTY VS. NEWARK, 90 N. J. L. 103.

SCOTT VS. JERSEY CITY, 39 Vr. 687.

The case of Scott vs. Jersey City cannot be cited as authority for this suit as this point was not raised or passed upon therein.

* * *

No appropriation providing for said pension has yet been made or could have have been made without the police pension commission awarding such pension.

* * *

POINT 7

The Judge of the Circuit Court was of the opinion that the defendant could not set up the unconstitutionality of said acts in defense to the plaintiffs' suit, and relied upon

ATTY.-GENL. VS. DOVER, 62 N. J. L. 138.
LANGE VS. BAYONNE, 74, N. J. L. 455-459.
JACKSON VS. MILLER, 84 N. J. L. 189-190.
MORRIS VS. FAGAN, 85 N. J. L. 617-620.
STATE VS. TOTH, 86 N. J. L. 247-249.
DEOLIN VS. WILSON, 88 N. J. L. 180-182.

These decisions were rendered in mandamus and quo warranto suits, where private citizens and relators attempted to impugn the corporate existence of a governing body, or to call into question the legality of the existence of an office or its incumbent. This the Courts refused to permit, except through the State itself, through its Attorney-General.

In these cases there was involved a matter of State policy. Until the Attorney-General intervenes to contest its authority and institute proceedings for the purpose of overturning and suppressing a de facto municipal government, the continued discharge of governmental functions by such body cannot be arrested.

This doctrine does not apply to her suit for the amount of an alleged pension, which has no legal foundation, where no award was made to her, where there is no money in the Pension Fund to pay her, and where she seeks to have her claim and judgment paid by taxation.

She has issued execution and served same upon the Hudson County Tax Board in order that the amount thereof be raised by taxation in the taxing district of the City of Hoboken, pursuant to Sect. 505, Chapter 236, Laws 1918, P. 865.

Her claim is founded upon unconstitutional acts, which confer no right and are as inoperative as

though never passed. In any event they were never legally adopted by the City of Hoboken and are therefore not applicable.

It is respectfully submitted that the judgment of the Hudson County Circuit Court be in all things reversed with costs.

Respectfully submitted,

HORACE L. ALLEN,

Attorney for and of Counsel with Defendant-Appellant.

Comunidad 23

Southern Road