NEW JERSEY

Court of Errors and Appeals.

STATE, EX REL.,

JOHN BUMSTED,
Relator–Defendant in Error,

vs.

ARCHIBALD M. HENRY,
Defendant–Plaintiff in Error.

On Information, &c.

On Error.

STATE, EX REL.,

GEORGE W. DECKER,
Relator–Defendant in Error,

vs.

PHILIP J. DAUDT,
Defendant–Plaintiff in Error.

Brief for Plaintiffs in Error.

These writs of error bring up the judgments and proceedings of the Supreme Court in two cases which were commenced by the filing of informations in the nature of a quo warranto. The proceedings below were brought to test the title of the defendants to the office of Excise Commissioners

for Jersey City. The defendants were appointed Excise Commissioners by the Court of Common Pleas of Hudson County under Section 5 of Chapter 114 of the Session Laws of 1906 (P. L. 1906, pp. 199, 205). The cases were argued before Justices Fort, Reed and Trenchard, and judgment of ouster was given. The opinion, which was delivered by Mr. Justice Reed, is reported in 64 Atl. Rep., p. 475.

The defendants in error gave notice of a motion to be made at the opening day of the present term of this Court to strike out the third and fourth assignments of error, on the ground that such assignments are based upon facts which were not brought to the attention of the Court below. The argument of this motion was postponed by consent until the argument of the case.

The third and fourth assignments (cases p. 11) are that the information ought to have been exhibited and the proceedings brought thereunder at the instance of and in the name of the Attorney General, and that the Court had no authority to determine that the relators were entitled to the office of Excise Commissioners.

The grounds of the motion are first, that the information in the Daudt case was filed under the leave of the Court by an order made *in the presence* of the defendant's attorney, and that no exception was made to the order, and in the Henry case that the information was filed under the leave of the Court by an order made *upon the consent* of the defendant's attorney. It is true that in the former case the order granting leave to file the information was made in the presence of the defendant's attorney, but it was against his protest. It is also true that the order granting leave to file the infor-

mation in the latter case recites that it was upon the consent of the defendant's attorney and counsel for Henry does not intend to attempt to modify by affidavit the recitals of an order; but the fact is that the only consent made was as to the time for the argument. The three justices were sitting at Jersey City to hear the case on certiorari. They dismissed the writ on motion on the ground that the matter was a contest over offices, and the proper remedy was by information in the nature of a quo warranto. Counsel for the prosecutors evidently anticipating this result had prepared petitions and informations and at once made application for leave to file informations. The Court made the order. The only consent made by counsel for Henry was as to the time for argument of the cases on information, and upon such consent the Court fixed the date for argument.

But whether the order was made in the presence of counsel, in one case, or by his consent in the other, is not material. If the information were filed in the name of private relators, when they ought to have been filed in the name of the Attorney General, the fact that they were filed by leave made in the presence of counsel, or by his consent, would not make the order valid.

The second ground of the motion was that the question whether the informations should be filed in the name of private relators, or of the Attorney General, was not brought to the attention of the Court below.

Of course, the rule is well settled that a party shall not be heard in the Appellate Court on a point not taken or a matter not raised or considered in the Court below.

But an Appellate Court will take notice of an ob-

jection raised for the first time on appeal, which would have destroyed the foundation of the action, or where there has been a want of jurisdiction or in case of a void judgment.

Am. & Eng. Enc. of Law, 1st Ed., Vol. 1, p. 624, and cases cited.

Whether the information should be filed by private relators or by the Attorney General is such a question. It is a question of jurisdiction, and one which the Court would take notice of on its own motion, and may be raised here, notwithstanding the fact that it was not raised below. And, furthermore, the demurrer does of itself raise the question.

The informations were filed by private relators. They do not set forth the act under which the relators claim the office, but they do not set forth the appointment and qualification of the defendants as members of the Board of Excise Commissioners under the provisions of Section 5 of the Statute of 1906.

To the information in each case the defendant demurred.

The information should have been filed at the instance of and in the name of the Attorney General.

The ground of the attack upon the right of the defendants to hold the office was that the act under which they were appointed was unconstitutional. In other words the relators attack the legal existence of the office of Excise Commissioners.

When proceedings attack not only the title to office, but also the legal existence of the office itself, the information must be filed in the name of the Attorney General.

State vs. Seymour, 40 Vr., 606.
Holloway vs. Dickinson, 40 Vr., 72.

This principle is established by a long line of decisions. In the case of Holloway vs. Dickinson *supra*, Mr. Justice Pitney holds that members of a *de facto* board of education, organized under the General School Law of 1902, cannot be ousted at the instance of a private relator in quo warranto, on the ground that such board of education has no legal corporate existence. That case was decided on demurrer to an information which was filed under leave of the Court by a private relator.

The relators in the case at bar attack not only the title of the defendants but the legal existence of the office because the statute is unconstitutional. Such an attack, we insist, must be made by the Attorney General acting in his public capacity as a representative of people of the State.

The Supreme Court could not determine under the pleadings that the relators were entitled to the office.

Under Section 12 of the quo warranto Act of 1903, the Court could give judgment that the relators, if they were also claimants, were entitled to the office, provided the writ, return and pleadings were properly framed for the purpose.

Lane vs. Otis, 39 Vr., 656.

The informations in the cases at bar do not set forth the act under which the relators claim the office. They say that the relators were duly appointed Excise Commissioners for the City of Jersey City for terms which had not expired, and that they had duly qualified as such commissioners. It is true that the demurrers admit the facts stated in the informations, but the title of the claimants to the office must appear to enable the Court to determine that the relators are entitled to the office.

The validity of the act of 1906 is assailed for four chief reasons.

The first attack is that the act is unconstitutional because it seeks to impose upon the judiciary an administrative or executive function of Government.

This question is no longer open to discussion in this State. It was decided by the Court of Appeals in Ross vs. Freeholders of Essex, 40 Vr., 291, that the Legislature had constitutional authority to confer upon the Justices of the Supreme Court the power of appointing park commissioners. This case is decisive of the case at bar. The act in question is not invalid for this reason.

The second and third attacks against the validity of the act are that it embraces more than one object, and that the object is not stated in its title.

The title of the act is as follows:

A supplement to an act entitled "An act to regulate the sale of spirituous, vinous, malt and brewed liquors, and to repeal an act entitled 'An act to regulate the sale of intoxicating and brewed liquors,' passed March seventh, one thousand eight hundred and eighty-eight," approved March twentieth, one thousand eight hundred and eighty-nine.

The object of the act of 1889 (P. L. 1889, p. 77), to which the act of 1906 is a supplement, is to *regulate* the sale of liquors. The supplement of 1906 also *regulates* the sale of liquors, and by its fifth section provides the machinery by which the provisions of the supplement are to be carried out.

The ordinary meaning of the word "supplement"

doubtless is "supplying by addition of what is wanting."

In Rahway Savings Institution vs. Rahway, 24 Vr., 48, 51, the word is said to have a special and broader meaning than the ordinary one, and covers every species of amendatory legislation which goes to complete the legislative scheme.

If the title to the act fairly points out the object of the legislation it is sufficient.

Walter vs. Union, 14 Vr., 350.

Van Riper vs. North Plainfield, 14 Vr., 349.

The constitutional clause in question does not compel the means or method of attaining the legislative object to be set out in the title, but will be satisfied if the title fairly indicates the general object.

Bumsted vs. Govern, 18 Vr., 368.

It is only in a plain case that the statute will be declared invalid because its title does not express the object of the law.

Richard vs. Hammer, 13 Vr., 435.

In the case last cited the statute was an act entitled "An act regulating the assessment and revision of taxes in cities of this State," it was held to be competent to include the provisions changing the mode of appointing members of the boards of assessment and revision.

In Warner vs. Hoagland, 22 Vr., 62, under an act entitled, "An act concerning the construction, care and improvement of the public ways, parks and sewers in certain of the cities of this State, and assessment for the same," powers concerning this

subject were conferred upon the Common Council or Board of Aldermen. A section of the statute provides that the office of every officer, commission or board possessing any of the powers mentioned in the act should cease, determine and be abolished. It was held that abolishing the office of other officers having the jurisdiction and power conferred on the Common Council or Board of Aldermen was cognate to the object of the act and that the purpose to abolish such offices need not be expressly mentioned in the title of the act.

See also Boorum vs. Connelly, 37 Vr., 197.

In Riley vs. Trenton, 22 Vr , 498, the title of the act is: "An act to establish an Excise Department in cities of this State." The first section gave the Board the power to regulate and prohibit traffic in liquors. It was held that the title was broad enough to cover any regulation of the liquor traffic.

That fees for licenses when granted and under what circumstances such licenses shall be wholly refused are kindred subjects which pertain to the regulation of the liquor traffic and that they may be dealt with in a single act by the Legislature was held in Paul vs. Gloucester, 21 Vr., 591.

It is respectfully submitted that the title to the act fairly points out the object of the legislation and is sufficient, and further that the statute does not contain more than one object.

The fourth point of attack is that it contravenes the section of the Constitution relative to special legislation and regulating the internal affairs of towns and counties. In other words, the relators contend that the statute is special legislation.

Section 5 of this act provides that, "Hereafter,

in all instances where Excise Commissioners are now, by law appointed by the Mayor or governing body of any municipality in this State, such commissioners shall be appointed by the Court of Common Pleas of the County in which such municipality is located, and the term of office of all such Excise Commissioners now holding office shall cease and terminate at the expiration of twenty days after this act takes effect, and the appointments first made under this act shall be to fill the unexpired term of such Excise Commissioners."

The relators contend that the classification of municipalities for this purpose into those where Excise Commissioners are appointed by the Mayor or governing body and those where the Excise Commissioners are not so appointed is an illegal classification under the Constitntion. Such a classification amounts to the division of municipalities into those where the Excise Commissioners are appointed and into those where they are elected. The legislative purpose in this enactment was obviously to preserve the elective system in those municipalities where it existed under a permissive act (P. L. 1902, p. 628), and to provide a different method of appointment in those municipalities where the appointive system existed. If this classification has a reasonable relation to the purpose of the law it is valid.

It has been settled by the decision of the Court of Errors and Appeals in McArdle vs. Jersey City, 37 Vr., 590, that an Excise law which applies only to cities of the first class is general and not special within the meaning of the Constitution.

It follows, therefore, that some classification of municipalities for the purpose of excise legislation is valid. It is not necessary that the classification shall be on a basis of population. Any other classification which has a reasonable relation to the

necessities or proprieties of municipal government is just as valid.

Richards vs. Hammer, 13 Vr., 435.

The division of municipalities for the purpose of excise legislation into those where excise boards are appointive and into those where they are elective is not illusive or arbitrary. It may be that in the more populous districts the necessities of government would make the appointive system proper and in the less populous districts would render the elective system proper. Such a classification, it seems to us, has a reasonable relation to the subject matter of legislation.

Whether the basis of classification is wise or judicious or whether it will operate as fairly as some other that might be adopted, is a question for the Legislature and not for the Court.

Paul vs. Gloucester, 21 Vr., 585, 595.

But the validity of the act does not necessarily depend upon such classification.

The question before the Court is the judicial construction of the act to ascertain the legislative intent. The presumption is in favor of the validity of the statute. Authorities need not be cited for the rule of construction that the act should be so construed, if reasonably possible, as to render it constitutional rather than to render it violative of the fundamental law.

What is the legislative meaning of the act? Obviously the language is clumsy. But the plain legislative intent is that in all classes of cities where Excise Commissioners are now (at the time of enactment) by law appointed by the Mayor or

governing body they shall be appointed by the Court of Common Pleas. The act is not restricted to those municipalities in which the appointment of Excise Commissioners was made by the Mayor or governing body at the time of its enactment. In other words, the use of the word "now" does not invalidate the act. The Legislature must enact laws for the present conditions, and if it does this by a general law, such legislation is not special.

The act applies to all municipalities which in the future may come into the class which at the time of this enactment had an Excise Board appointed by the Mayor or governing body. It would have been absurd to insert the word "hereafter" after the word "now" so that the act would read: "In all instances where Excise Commissioners are now, or hereafter by law appointed by the Mayor or governing body, they shall be appointed by the Court of Common Pleas." That would have been a contradiction in terms. This act simply repeals by implication all laws authorizing the appointment of Excise Commissioners by the Mayor or governing body, and enacts that in all such instances Excise Commissioners shall be appointed by the Court of Common Pleas.

This was within the legislative power under the constitution.

It was settled In re Haynes, 25 Vr., 6, 26, that the Legislature may pass a valid act authorizing the appointment of one officer in the place of another, and this can be done without enumerating his powers in such an enactment.

See also In re Cleveland, 23 Vr., 188, 195.

Excise Boards appointed under an act of 1906 are vested with the same powers and duties as

those appointed by mayors or governing bodies. These powers are enumerated in the act of 1903.

If the act of 1906 repeals the Elizabeth charter in this particular, it does not make this act local or special.

An act is not local or special if while applying to cities of the first-class it happens to apply to cities of another class whose charters came into existence before the recent amendments to the constitution where there is a departure from the uniform rule which makes the law universal.

In re Cleveland, 23 Vr., 188, 197, Mr. Justice Van Syckel says: "The fact that some cities are not in a condition to accept the act, does not arise out of any special or local character of the act itself, but out of the dissimilarity of the various charters which came into existence before the recent amendments to the constitution."

The act in question affects all appointive Excise Boards.

A careful examination of all the statutes relative to the appointment of excise boards fails to disclose any other method of appointment than by the Mayor or governing body of a municipality or by the Court of Common Pleas.

The Legislature of nineteen hundred and one adopted a uniform scheme relative to the establishment of excise departments in cities and incorporated towns of this State. The first act is entitled "An act to establish an excise department in incorporated towns and cities in this State" (P. L. 1901, p. 239). The act provides that the Common Council or other governing body or city, except cities of the first class, may by ordinance establish an Ex-

cise Board, which shall be appointed by the Court of Common Pleas of the County in which the town or city is located. This act was under review in Schwartz vs. Dover, 41 Vr., 502. It was attacked as special legislation regulating the internal affairs of municipalities, on the ground that it excepted from its operation cities of the first class. But it was upheld.

The second act is entitled, "An act to establish an Excise Department in cities of the first class in this State" (P. L. 1901, p. 408). It established a Board of Excise Commissioners of four persons in cities of the first class and provided for their election. The two persons receiving the highest number of votes were to be elected.

The act was under review in McArdle vs. Jersey City, 37 Vr., 590. It was there held that the excise law which applies only to cities of the first class is general and not special within the meaning of the Constitution. But the act was declared unconstitutional by reason of its elective provision.

By these two statutes the Legislature provided for all classes of towns and cities. It established a uniform system. This uniformity has not been destroyed by subsequent statutes.

In nineteen hundred and two an act was passed entitled "An act to establish excise departments in the cities of the first class in this State" (P. L. 1902, p. 460). It established a board of four Excise Commissioners in cities of the first class, to be appointed by the Mayor.

In the same year (1902) an act was passed entitled "An act to establish an Excise Department

in cities of this State" (P. L. 1902, p. 628), which provided that the Common Council or other governing board *may establish* an elective board of Excise Commissioners, to consist of five members.

This act was under review in Fitzgerald vs. Jersey City, 40 Vr. 152. But the only question decided was that the "other governing body," as applied to Jersey City, was the Board of Aldermen.

In nineteen hundred and three an act was passed (P. L. 1903, p. 369), providing that in all cities of the first class the Mayors, within thirty days after the act took effect, shall appoint a Board of Excise Commissioners, consisting of four members. This act (Section 7) provided that upon the appointment and organization of the Board provided for under the act any other board having charge of excise matters should cease and determine. *This statute re-established the appointive system.*

The next statute pertaining to the appointment of Excise Commissioners is the act of 1906, which, as we have pointed out, simply changes the method of appointment from the Mayor or governing body to the Court of Common Pleas.

The cities of Trenton and Camden have put in operation the provisions of P. L. 1902, 626, which provide for elective Excise Boards. This fact does not destroy the validity of an act providing for the change in the appointment from one power to another.

In the City of Elizabeth, under an amendment to its charter approved March 18th, 1870 (P. L. 1870, 754), the exclusive power to grant licenses to persons to keep *inns and taverns and victualing houses with the privilege of retailing spirituous liquors* within the said city was vested in a Board of Excise to consist

of the Mayor and four persons to be appointed by the City Council.

Chapter 41 of the Laws of 1892 (P. L. 1892, p. 60), repealed the provision of the Elizabeth charter by which the Mayor was a member of the Excise Board.

It is to be noted that the excise board appointed by this provision of the charter has power to grant licenses to keep inns and taverns and victualing houses, with the privilege of retailing spirituous liquors. It has not the power of a general excise board.

The act of 1906 does not destroy the uniformity in the system of legislation relative to such appointments. It re-invests the Court of Common Pleas with its ancient jurisdiction over excise matters. It simply changes in a uniform manner the method of appointment from the Mayor or governing body of the municipality to the Court of Common Pleas of the County in which the municipality is located. If there was lack of uniformity in the appointing power of Excise Commissioners created by other acts, that lack of uniformity is not increased by the statute under review. The act under review takes the appointment from the Mayor or governing body in all such municipalities and vests it in the Court of Common Pleas. It does not destroy uniformity; it tends to preserve it.

If the effect of a law is to lead to uniformity it will be supported.

Bumsted vs. Govern, 18 Vr., 368.

Van Riper vs. Parsons, 11 Vr., 123.

Sutterly vs. Camden Common Pleas, 12 Vr., 495.

Tiger vs. Morris Common Pleas, 13 Vr., 631.

Hines vs. Freeholders of Essex, 16 Vr., 504.

Nothing of a special or local character appears on the face of the law. Its terms embrace all appointments of Excise Commissioners by the Mayor or governing body of the municipality, and includes all appointive Excise Boards.

Where an act is in part constitutional, and in part unconstitutional, if the parts are wholly independent of each other, that which is constitutional may stand and that which is unconstitutional may be rejected.

McArdle vs. Jersey City, 37 Vr., 590.

Section 5 of the act of 1906 is independent of the other provisions of the act, and if they or any of them are invalid it may be held valid.

The judgments of the Supreme Court should be reversed.

March Term, 1907.

JOHN W. QUEEN,
Attorney for Archibald M. Henry.
HOWARD R. CRUSE,
Attorney for Philip J. Daudt.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN BUMSTED, Relator, Defendant in Error, vs. ARCHIBALD M. HENRY, Defendant, Plaintiff in Error.	On Writ of Error to Supreme Court.
GEORGE W. DECKER, Relator, Defendant in Error, vs. PHILIP J. DAUDT, Defendant, Plaintiff in Error.	Brief of Defendants in Error.

These cases were brought before the Supreme Court on informations in the nature of quo warranto, instituted under section 4 of the act relating to informations in the nature of a quo warranto, revision of 1903, approved April 8th, 1903, and the sole question determined by the Supreme Court was the constitutionality of the section of the act under which the defendants were appointed to office, to wit, Section 5, Chapter 114, Laws 1906.

FIRST: The plaintiffs in error have assigned as error that the informations should have been in the name of the Attorney General and the proceedings should have been brought thereunder at the instance and in the name of the Attorney General of the State of New Jersey.

A motion was made at the opening of the present term and was continued until the argument to strike out the assignment upon the grounds

(a) As will appear by the affidavit and the order in the supplemental case, the informations were filed by leave of court obtained in the presence of the defendants and made upon petition of the relators and in the Henry case not only was the order made in the presence of the defendant's counsel but as expressed in the order by his consent.

The object of the information is to get the matter before the Court.

The informations were properly drawn and could have stood as informations filed by the Attorney General if signed by him. If the defendants desired to insist that the informations were exhibited by an improper party, they should have made their objections at the time of the filing of the informations or should have moved to strike them from the files, or at least should have pleaded in abatement.

Davis v. Davis,28 Vr. 82.

The demurrers put in issue the legality of the facts stated in the informations. They do not bring in question the right of the relators to exhibit the informations.

(b) Neither of the defendants raised any question before the Supreme Court as to the right of the relators to exhibit the informations and it is a well settled rule that a party shall not be heard in the appellate court on a point not taken or a matter not raised or considered in the court below.

The point raised by the third assignment does not raise a question of jurisdiction. The Supreme Court has complete jurisdiction to deal with the situation presented by the informations if presented on the relation of the Attorney General or a private relator. Whether they should be presented by the Attorney General or a private relator is a matter of practice and the defect, if any, should have been taken advantage of at the first opportunity.

The assignment should therefore be stricken out.

BUT THE INFORMATIONS WERE PROPERLY PRESENTED ON THE RELATION OF PRIVATE REGULATORS.

The informations were exhibited under section 4 of an act relating to informations in the nature of a quo warranto, revision of 1903, which provides that whenever it is alleged that any person usurps, intrudes into or unlawfully holds or executes any municipal office or franchise within this State, any citizen of this State who believes himself lawfully entitled to such office or franchise may, as relator, file in the office of the Clerk of the Supreme Court, an information in the nature of a quo warranto against such person.

The allegation of the informations are that the relators are citizens of the State and that they were lawfully appointed excise commissioners for the City of Jersey City for a term not to expire until the 28th day of April, 1907; that they duly qualified and exercised the rights and privileges of such office and that the defendants upon the 24th day of July, 1906, having **been appointed excise commissioners to succeed the relators** under an act entitled "An act to regulate the sale of spirituous, vinous, malt and brewed liquors," and

to repeal an act, &c. qualified as members of the excise board, usurped and intruded upon and now unlawfully hold and execute the office of excise commissioners in **the place and stead of the relators.**

The ground of the attack upon the right of the defendants to hold the office was that section 5 of the act under which they were appointed was unconstitutional, **not however as stated by counsel for the defendants in his brief that there was no office of excise commissioner.** Section 5 of the act referred to **does not create or establish the office of excise commissioner.** It merely provides for a different method of appointment to an office already existing and created under previous laws, to wit in Jersey City under Chapter 189 of the laws of 1903.

In the case of the State vs. Seymour, 40 Vr. 606 and Holloway vs. Dickinson, 40 Vr. 72, the existence of the office itself was questioned and Mr. Justice Pitney in the latter case, on page 74 says "It, (that is the information,) nowhere avers in terms that the respondents claim title to membership in that board, nor is such an inference to be derived from the facts averred in the information unless the force of the act of 1902 **is merely to change the personnel of the board of education and not to establish a new corporate body in place of the former one.**" And the Court proceeds to consider the different cases and concludes that the effect of the act of 1902 is not to change the personnel of the board, but (page 76) is to terminate the corporate existence of all public corporations theretofore created for the management and control of the public schools in the Cities of this State.

Section 5 of Chapter 114 of the Laws of 1906 under which the defendants were appointed to office

provides "Hereafter, in all instance, where evcise commissioners are now, by law, appointed by the mayor or governing body of any municipality in this state, **such commissioners** shall be appointed by the Court of Common Pleas in the county in which such municipality is located **and the term of office** of all such excise commissioners now hold ing office shall cease and terminate at the expiration of twenty days after this act takes effect, **and the appointments first made under this act shall be to fill the unexpired term of such excise commissioner.**

There could not have been a more clearly expressed legislative intent than this that the office of excise commissioner was to continue **and the change was merely in the personnel of the board..**

The informations were therefore properly exhibited by the private relators under section 4 of the act concerning quo warrantos.

SECOND: The defendants have assigned for error that the Supreme Court determined that the relators were entitled to the office of excise commissioners of Jersey City.

A motion was made at the opening of the present term and continued to the argument to strike out such assigment upon the ground that the question was not raised in the Supreme Court and cannot be taken advantage of on error.

No question was raised in the court below as to the right of the court to determine that the relators were entitled to the office of excise commissioners nor was any objection made to the form of the judgment. If the defendants desired to raise this question they should have either brought the facts to the attention of the court below or after

the judgment was entered should have moved to reform it.

But the Supreme Court properly determined that the relators were entitled to the office.

The informations alleged that the relators were duly appointed excise commissioners for the City of Jersey City by the mayor for a term not to expire until the twenty-eighth day of April, nineteen hundred and seven. That they had duly qualified and exercised the rights and privileges of such office; that on or about the twenty-fourth day of July, Nineteen hundred and six, the Court of Common Pleas appointed the defendants to succeed the relators under section 5 of Chapter 114 of the Laws of 1906 and that the defendants duly qualified as members of the excise board of Jersey City unsurped, intruded upon and now unlawfully hold and exercises the office of excise commissioner **in the place and stead of the relators,** and the informations, then proceed to set forth the objections to the appointment of the defendants and concludes by avering **that the relators are still rightfully entitled to hold, use and exercise the said office of excise commissioners of Jersey City, and that the said defendants unlawfully hold, use and exercise such office to the exclusion of the said relators.**

It is not necessary that the relators set forth in the informations the specific acts under which they hold office. The allegations are definite and distinct and upon demurrer the relators may rely upon any act under which they could be appointed by the Mayor of the city. The demurrer admits the facts, to wit, that they were appointed by the Mayor for a term not to expire until the twenty-eighth day of April, nineteen hundred and seven and that they were at the time of the appointment

of the defendants lawfully exercising the rights and privileges of the office and that the defendants did usurp and intrude upon such office. The demurrer merely puts in issue the constitutionality of the act under which the defendants were appointed. The relators were appointed as Excise Commissioners under Chapter 189 of the laws of 1903 by the Mayor of Jersey City, and the allegations in the informations are sufficient for the Court to determine that the relators were entitled to the office.

If the informations were not full enough objection should have been made in the Court below and the relators compelled to amend.

The Supreme Court properly determined that the relators were entitled to the office.

THIRD: the first and second assignments of error bring up the question as to whether or not section 5 of Chapter 114 of the laws of 1906 is unconstitutional, and upon that point I respectfully submit the brief submitted in the Supreme Court and rely upon that and the opinion of Mr. Justice Reed in the Supreme Court printed in the Supplemental case.

The cases cited in the brief of counsel for plaintiffs in error were cited by him in the court below and were dealt with by Mr. Justice Reed in his opinion.

The Supreme Court held the act unconstitutional upon two grounds.

1st: Because it segregates the municipalities into a class consisting of those having excise commissioners appointed by the Mayor or governing body and into a class including cities having ex-

cise commissioners not appointed by the Mayor or governing body of the municipality, and the Court said "What can be said to distinguish, in view of the purpose of this legislation, cities having elective boards from cities having appointive excise boards? Reasons based upon population may be imagined for supporting a distinction in the manner in which members of boards of excise shall be elected or appointed. But why in cities of the same population and existing under exactly the same conditions, a board in one should be elective and in another should be appointive seems to be a question which admits of no satisfactory answer." And quoting Justice Dixon in the case of Parker vs. Newark, 57 N. J. L. 85, the Court said "We are unable to see how the fact that heretofore various modes of filling vacancies in the governing bodies of municipalities have existed, can reasonably be a ground for discriminations among them, when the Legislature is proceeding to perform its constitutional duty of prescribing a general rule for the filling of such vacancies. It seems indisputable that a rule proper for one must be proper for another irrespective of previous methods. **Mere difference in local administration under differing laws cannot form a basis for the classification of municipalities, which will, in a constitutional sense, be general.** If they could, plainly all the evils at which the amendment of the constitution on this subject was aimed might be perpetuated in new legislature."

2nd: The Supreme Court also found that the act was unconstitutional because it was limited to those boards whose members are **now** appointed by the Mayor or governing body of the municipality. Under this head I can add nothing to my former brief and the opinion of Mr. Justice Reed.

I respectfully submit that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,
MERRITT LANE,
Of Counsel with
Defendants in Error

March Term 1907.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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Supplemental Case.

INDEX.

NOTICE.

Please take notice that at the opening of the next term of the Court of Errors and Appeals, we shall move the Court to strike out the third and fourth assignment of errors filed herein upon the ground that such assignment of errors are based upon facts which were not brought to the attention of the Court below, and that upon such application we shall use an affidavit, a copy of which is hereunto annexed, and the printed case.

ZIEGENER & LANE,
Attorneys for Plaintiff in Error.

To Howard Cruse,
Atty. for Defendant in Error.
Dated January 18th, 1907.

AFFIDAVIT.

STATE OF NEW JERSEY,
COUNTY OF HUDSON, SS.:

Merritt Lane, of full age, being duly sworn, according to law, upon his oath deposes and says: that he is an attorney and counsellor of the Supreme Court; that he has charge of the foregoing case; that he attended all the hearings before the Supreme Court in said matter; that the case was heard upon information and demurrer to information, and the cause of demurrer argued before the Supreme Court was whether the act of 1906 under which the so-called Court Board was appointed was constitutional; that no other cause of demurrer was argued, and that the case was decided upon the unconstitutionality of said act; that no motion was made to strike the information from the files; that the information was filed as will appear from the order on file herein by order made in the presence of the attorney for said Philip J. Daubt, a copy of which said order is

hereto annexed; that no exception was taken in the Court below to any of the proceedings in this matter; no exception was taken to the judgment; that upon the date set for the argument of said case, all parties appeared before the Court and were fully heard and the only question argued was as to whether on not the act herein mentioned was or was not constitutional; that this will appear also by the rule for judgment, and by the judgment entered herein.

MERRITT LANE.

Sworn and subscribed to before
me this 23rd day of January,
1907.
E. W. Wenner,
Master in Chancery of N. J.

ORDER.

ON MOTION in behalf of George W. Decker upon reading the petition duly verified, in the presence of Howard Cruse, Attorney, for defendant,

IT IS ORDERED that leave be granted to file the information in the nature of a quo warranto in this cause, and due cause being shown why the time for filing pleadings should be shortened,

IT IS FURTHER ORDERED that the said defendant plead or demur to the information within two days, and that any subsequent pleading be filed within one day, of the filing of the next preceeding pleading.

AND IT IS FURTHER ORDERED that the argument be set peremptorily for Tuesday, Au-

gust 7th, 1906, at the Court House in Jersey City, at eleven o'clock in the forenoon.

By the Court,
J. FRANKLIN FORT,
J. S. C.

Entered July 30th, 1906.
On motion of Ziegener & Lane,
Attorneys.

NOTICE.

Please take notice that at the opening of the next term of the Court of Errors and Appeals, we shall move the Court to strike out the third and fourth assignment of errors filed herein upon the ground that such assignment of errors are based upon facts which were not brought to the attention of the Court below, and that upon such application we shall use an affidavit, a copy of which is hereto annexed, and the printed case.

ZIEGENER & LANE,
Attorneys for Plaintiff in Error.

TO
John W. Queen,
Atty. for Defendant in Error.
Dated January 18th, 1907.

AFFIDAVIT.

STATE OF NEW JERSEY,
COUNTY OF HUDSON, SS.:

Merritt Lane, of full age, being duly sworn, according to law, upon his oath deposes and says:

that he is an attorney and counsellor of the Supreme Court; that he has charge of the foregoing case; that he attended all the hearings before the Supreme Court in said matter; that case was heard upon information and demurrer to information, and the cause of demurrer argued before the Supreme Court was whether the act of 1906 under which the co-called Court Board was appointed was constitutional; that no other cause of demurrer was argued, and that the case was decided upon the unconstitutionality of said act; that no motion was made to strike the information from the files; that the information was filed as will appear from the order on file herein and upon the petition of John Bumsted, and upon the consent of the attorney for said Archibold M.Henry,a copy of which said order is hereto annexed; that no exception was taken in the Court below to any of the proceedings in this matter; no exception was taken to the judgment; that upon the date set for the argument of said case, all parties appeared before the Court and were fully heard and the only question argued was as to whether or not the act herein mentioned was or was not constitutional; that this will appear also by the rule for judgment, and by the judgment entered herein.

MERRITT LANE.

Sworn and subscribed to before
me this 23rd day of January,
1907.
E. W. Wenner,
Master in Chancery of N. J.

ORDER.

ON MOTION in behalf of John Bumsted upon reading the petition duly verified, and upon con-

sent of John W. Queen, Attorney for defendant, in his presence,

IT IS ORDERED that leave be granted to file the information in the nature of quo warranto in this cause, and due cause being shown why the time for filing pleadings should be shortened,

IT IS FURTHER ORDERED that the said defendant plead or demur to the information within two days, and that any subsequent pleading be filed within one day of the filing of the next preceeding pleading.

AND IT IS FURTHER ORDERED that the argument be set peremptorily for Tuesday, August 7, 1906, at the Court House in Jersey City, at eleven o'clock in the forenoon.

By the Court,
J. FRANKLIN FORT,
J. C.

Entered July 30th, 1906.
On Motion of Ziegener & Lane,
Attorneys.

OPINION OF SUPREME COURT.

BUMSTED V. HENRY.

DECKER V. DAUDT.

(Supreme Court of New Jersey, Aug. 11, 1906.)

1. STATUTES—SPECIAL LEGISLATOIN CONSTITUTIONAL LAW.

Section fifth of the Act (P. L. 1906, p. 192) provides that in all instances where excise commissioners are now by law appointed by the mayor or other governing body of any municipality, such commissioners shall be appointed by the Court of Common Pleas in the County in which such municipality is located.

Held, that the legislation is unconstitutional because special and regulative of the internal affairs of cities.

(Ed. Note) For cases in point, see vol. 44, Cent. Dig. Statutes, sec. 103, 113.)

2 SAME CLASSIFICATION.

It is special because it selects for classification only such excise commissioners as were then appointed, without including those who were elective. It is further special in narrowing the class of appointive functionaries to such as are now appointed, regardless of the possible coming into

existence of similar appointive officers in the future.

(Ed. Note) For cases in point, see vol. 44, Dig. Statutes, secs. 79-82, 103, 113.)
(Syllabus by the Court.)

Quo warranto by the State on relation of John Bumsted against Archibald M. Henry and by the State on relation of George W. Decker against Philip J. Daudt, Judgment of ouster.

These are two informations in the nature of writs of quo warranto instituted by two members of the Excise Board of Jersey City appointed as such by the Mayor of said city, under the provisions of P. L. 1903, p. 369. The writs are sued out against the defendants who were appointed by the Court of Common Pleas of Hudson County to succeed the relators as Excise Commissioners, the appointments being made by the Court of Common Pleas of Hudson County under color of the provisions of the last section of the Act of 1906, p. 199. Judgments of ouster.

Argued June Term, 1906, before FORT, REED and TRENCHARD, JJ.

Merritt Lane, for relators. John W. Queen for defendant, Archibald M. Henry. Howard R. Cruse, for defendant, Philip J. Daudt.

REED, J. The right of the defendants to hold the positions of Excise Commissioners is challenged upon this single ground, namely: that the fifth section of the Act of 1906 (P. L. p. 192) under the claimed authority of which section the appointment of the defendants was made by the Court of Common Pleas of Hudson County, is un-

constitutional legislation. The section, the validity of which is thus put in question, reads as follows: "5. Hereafter, in all instances where Excise Commissioners are now, by law, appointed by the Mayor or governing body of any municipality in this State, such commissioners shall be appointed by the Court of Common Pleas of the county in which such municipality is located, and the term of office of all such excise commissioners, now holding office, shall cease and terminate at the expiration of twenty days after this act takes effect, and the appointment first made under this act shall be to fill the unexpired term of such excise commissioners." The vices which it is alleged infects this legislation are, first, that the title of the act does not state the object sought to be attained by this section; second, that there is in the section an unconstitutional delegation of power to the Court of Common Pleas; third, that the act is special legislation, regulating the internal affairs of municipalities.

In respect to the first ground of attack it appears that the act of which the fifth is the concluding section, is a supplement to an act entitled "An act to regulate the sale of spirituous, vinous, malt and brewed liquors" and to repeal an act entitled "An act to regulate the sale of intoxicating and brewed liquors," passed March 7, 1888, P. L. 1888, p. 142.) This is the title of the original act approved March 20, 1889 (P. L. 1889, p. 77) of which the act in question is a supplement. It is not contended that the title of the original act of 1889 was not sufficiently broad and definite to support legislation defining the manner in which licenses to sell liquors should be granted, or to support legislation erecting or changing the constitution of any body to whose judgment or discretion the granting of licenses should be committed. The point made is that inasmuch as the original act did not create or name any licensing body, but left in-

tact such licensing bodies as already existed under other legislation, therefore, this supplemental, legislation should have confined itself to subjects dealt with in the original act. It is insisted that, in so far as this supplement assumes to legislate concerning new subjects, the original title is misleading. It is hardly necessary to observe that the very purpose of a supplement is to perfect the original statute by amendments, limiting, enlarging, or changing the provisions of the amended act. If the introduction of some new feature is deemed likely to improve the efficiency of the general scheme indicated by the title, it seems impossible to point out why it may not be introduced into one of any number of supplements. The single question is not whether the act in which it appears purports to be a supplement to some other act, but the query is whether the new matter introduced is within the purpose stated in the title to the original act. We think the purpose of section 5 is sufficiently expressed in the title to the act of 1889.

The second ground upon which the unconstitutionality of the fifth section is rested, namely, that the section provided for a delegation of power for the appointment of excise Commissioners to a County Judge, was not pressed with much vigor upon the argument. Indeed, there seems left nothing to say in view of the recent decisions, first, that of the Court of Errors in Ross vs. Freeholders of Essex, 69 N. J. Law, 291, 55 Atl. 310, followed by the decision in this court in Schwarz v. Dover, 70 N. J. Law 502, 57 Atl. 395. There is no substance in this point. The third ground of attack is that section fifth is based upon an imperfect classification of cities, and therefore is special legislation. The insistence is that the classification is illusory in two particulars: The first particular is that the power conferred upon the Court

of Common Pleas is confined to the appointment of those members of the Board of Excise Commissioners who were by law appointed by the Mayor or governing body of the municipality. The second particular is that the class is further circumscribed by the provision that the Court in making the appointments should be confined to such Excise Commissioners as, in the language of the section, are now appointed by the Mayor or governing body of any municipality. It is to be observed that the power conferred upon the Court of Common Pleas is not restricted to any statutory class or classes of cities. There is no specialization of municipalities of any kind by the standard of population. The section, however, segregates the municipalities into two classes by another standard, namely, into a class consisting of municipalities having excise commissioners appointed. and into a class including cities having excise commissioners not appointed by the mayor or governing body of the municipality. There appears to be much contrariety in the different municipalities respecting the constitution of the bodies invested with licensing power. In some municipalities the common council exercises the licensing power; in others, the court of common pleas of the county in which the municipality is situated; in others, it is confided to excise boards whose members are elected, or appointed by the mayor and common council; and perhaps, in others still by excise boards whose members are appointed by a court of common pleas.

The point to be kept in mind is merely that there are several municipalities in the state whose commissioners are elected; and the question propounded by the situation is: What can be said to distinguish, in view of the purpose of this legislation, cities having elective boards from cities having appointed excise boards? Reason based upon population may be imagined for supporting a distinc-

tion in the manner in which members of boards of excise should be elected or appointed. But why in cities of the same population and existing under exactly the same conditions, a board in one should be elective and in another should be appointive, seems to be a question which admits of no satisfactory answer. The principle respecting the standard of classification essential to confer generality upon statutes of this kind was very early announced by Chief Justice Beasley in the case of New Brunswick v. Fitzgerald, 48 N. J. Law 487, 729. Speaking for the Court of Errors he used this language: "It is plain as these departments (e. g. the police) are common to all cities, any law that affects or regulates them must, by force of our legal system, be a general one. A particular legislative plan prescribes the official terms of such functionaries or the mode of their supersedure, whether such results be affected by the modification of existing regulations or by the introduction of new ones applicable to certain cities only, would be clearly illegitimate." Although in that case another clasuse in the legislation was held to be general yet the accuracy of this language of Chief Justice Beasley in respect to the clause of which he was then speaking has never been questioned. In that case the vice of the legislation thus criticised was that it was confined to cities having a police force holding by a certain tenure. The Vice in the present case is that the appointive power is confined to cities having excise commissioners selected in a certain way. In the former case the further vice of the legislation was that the mode by which officers were superseded applied to one class of officers alone. The vice in this case is that the manner in which officers are appointed does not include the whole class of officers. Since the decision of that case, the decisions illustrative of defective classifications have been too numerous to cite. Loucks v. Bradshaw, 56 N. J. Law, 1, 27

Atl. 939, there came before the Supreme Court for review an act to create county boards of excise commissioners, and to define their powers and duties. The body of the statute, however, restricted the control of the board to counties where licenses were not granted by the court. It was held that this act was unconstitutional because the distinction between those counties in which licenses were granted by a court, and those in which licenses proceeded from some other authority, was a purely arbitrary distinction. and not a proper basis for legislation. In Johnson v Hoover, 58 N. J. Law, 334, 33 Atl. 217, the legislation attempted to divide boroughs into two classes; in one class of which were boroughs having power to grant licenses and in the other class those boroughs having no power to grant license. The attempt was to confer upon citizens of the first class the right to apply either to common council or the court of common pleas, while the citizens of the second class were compelled to apply only to the court of common pleas. The legislation was held to be special. Along the same line are the cases of Tiger v. Morristown, 42 B. J. Law 631; Closson v. Trento, 48 N. J. Law, 438; 5 Atl.323; Trenton v. Closson, on appeal, 49 N. J. Law, 482, 9 Atl. 719; Long Branch v. Sloan, 49 N. J. Law, 365; 8 Atl. 101; Bray v. Hudson, 50 N. J. Law, 82, 11 Atl. 135.

I will not stop to analyze the facts upon which these cases were decided, but will content myself with a more particular reference to the case of Parker v. Newark, 57 N. J. Law, 85, 30 Atl. 186. The situation presented by the facts in that case renders the judgment delivered therein a distinct precedent controlling under the conditions now presented. It appeared in that case that the statute had provided that in any city of the first class, the charter of which provided for a special election to fill a vacancy in the office of alderman,

it should not be necessary to hold such special election, but that the mayor should appoint a resident voter to occupy the office. The act was held to be constitutional so far as it was confined to cities of the first class, but it was held to be unconstitutional because it did not embrace all cities of the first class. The defect in the classification was that it only applied to those cities which had a charter providing for special elections to fill the vacancy of alderman. Justice Dixon remarked "We are unable to see how the fact that heretofore various modes of filling vacancies in the governing bodies of municipalities have existed, can reasonably be a ground for discriminations among them, when the Legislature is proceeding to peform its constitutional duty of prescribing a general rule for the filling of such vacancies. It seems indisputable that a rule proper for one must be proper for another, irrespective of previous methods. Mere difference in local administration under differing laws cannot form a basis for the classification of municipalities, which will, in a constitutional sense, be general. If they could, plainlly all the evils at which the amendment of the Constitution on this subject was aimed might be perpetuated in new legislation". As in that case the power of the mayor to appoint was limited to vacancies which theretofore been filled in a particular way, so, in the present case, the power to appoint is limited to officials theretofore appointed in a particular way, all other appointments being left to be filled as before.

It is urged on behalf of the defendants that the effect of the section is a tendency to produce uniformity, in that it makes all appointive boards appointive by one body. But admitting this, it in no way decides the question of adequate classification; for the act may in a degrree make towards uniformity and yet not accomplish con-

stitutional uniformity because it fails to bring within its operation certain subjects which belong to the class. This is the fault of the present legislation In the cited case of Bumsted v. Govern, 47 N. J. Law, 368, 1 Atl. 835, the legislation tended not merely towards uniformity, but it reached all of the class, and although its immediate effect was confined to one county, it included all the counties in the state. The conclusion seems inevitable that section 5 subjudice does not include all the boards of a class, and must therefore be held to be special legislation.

But it is to be further observed, that the class selected is not even extended to all boards whose members are appointed, but includes only those boards whose members are now appointed, by the mayor or governing body of a municipality. There is a line of familar cases holding that generality requires that the class selected shall include not only all existing objects belonging to the class, but all objects that may thereafter become members of the class. Legislation based upon population, and including only cities now having a certain population, is vicious, because other cities may acquire the same standard of size. Legislation becomes obnoxious to this criticism quite frequently by the use of the word "now" as descriptive of the status of a class. Thus specimens of legislation confined to cities where a board of assessment and revision now exists (Richards v Hammer, 42 N. J. Law, 435), or confined to honorably discharged soldiers now in office (Pierson v. O'Connor, 54 N. J. Law, 36. 22 Atl. 1091) or confined to cities in which there are now by law three members of common council, etc. (Bennett v. Trenton, 55 N. J. Law, 72, 25 Atl. 113) or confined in its operation to any person now occupying oyster grounds (State v. Post, 55 N. J. Law, 264, 26 Atl. 638), have all been ad-

judged unconstitutional because they did not include objects which might thereafter become members of the class.

Now, it appears that there are in the state several general acts by the adoption of the provisions of one of which different municipalities may acquire the right to excise commissioners differently appointed. All cities, except those of the first class, can, by an ordinance, adopt the provisions of the Act of 1901, p. 239, under which a court of common pleas appoints commissioners. So any city can by ordinance adopt the provisions of the Act of 1902, p. 628, by which the members of the excise boards are elected. The ordinances in both instances are repealable. So it seems that any municipality of over 20,000 inhabitants may by popular election adopt the general charter scheme contained in the Act of 1899, p. 283, in which the excise commissioners are appointed by the mayor and common council. So it would seem not improbable that a municipality having an elective board now may, without further legislation, become possessed of an appointive board of excise. But, again, a city of the second class, may grow into a city of the first class. The section of the act of 1906 under consideration, as already remarked, does not classify cities by population, but only by the method in which their members of excise are appointed. It applies to the two cities of the first class, not because they are in that class, but because they have excise commissioners now appointed in the mentioned manner. If any city now existing in which appointments are not now made, shall hereafter grow into the first class it would be unaffected apparently by the fifth section now in question, but would come under the control of the actof 1903, p. 369. Such city would thus assume a shape in which it would have an excise board appointed by the mayor, alongside of a

city of the samec lass having excise boards appointed by the court of common pleas.

But regarless of the effect of the use of the word "now" the classification seems so clearly defective that I am constrained to the conclusion that the legislation relied upon by the defendants in support of their respective appointments is unconstitutional. A judgment of ouster should go in each case.

INDEX.

New Jersey Court of Errors and Appeals.

GEORGE W. DECKER
Defendant in Error,

vs.

PHILIP J. DAUDT
Plaintiff in Error.

On Information, &c.
On Error.

NEW JERSEY, SS.

[L. S.] The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature.

GREETING:

Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaint, was in our said Supreme Court of Judicature, which before you, before George W. Decker, relator, and Philip J. Daudt, defendant, in a proceeding in the nature of a *quo warranto* manifest error hath intervened, to the great damage of the said defendant, as it is said; we being willing that the error, if any there be, should, in due manner be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and

Appeals in the last resort in all causes, at Trenton, on the 17th day of August instant, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right and according to the law and custom of the State of New Jersey ought to be done.

WITNESS, our Chancellor and President Judge of said Court of Errors and Appeals, at Trenton aforesaid, the 13th day of August, nineteen hundred and six.

S. D. DICKINSON,
Clerk.

HOWARD R. CRUSE,
Attorney.

The answer of the Chief Justice and other Justices, within named.

The record and proceedings of the plea whereof mention is within named, with all things concerning the same, to the Court of Errors and Appeals in the last resort in all causes, within specified, at the day and place within contained, I certify in a certain schedule to the writ annexed, as we are within commanded.

WM. S. GUMMERE,
Chief Justice.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, *ex rel.*, GEORGE W. DECKER,
Relator,
vs.
PHILIP J. DAUDT,
Defendant.

On Quo Warranto.

Information.

The relator comes in his own proper person here into the Supreme Court of Judicature of the said State, before the Justices thereof, at the State House, in the City of Trenton, on the thirtieth day of July, one thousand nine hundred and six, desiring to sue and prosecute in this behalf, according to the form of the statute in such case made and provided, and gives the said Court here to be informed and understand that he is a citizen, taxpayer and legal voter of Jersey City, Hudson County, New Jersey, and that he was duly appointed excise commissioner for the City of Jersey City by Mark M. Fagan, Mayor of the City of Jersey City, for a term not to expire until the twenty-eighth day of April, nineteen hundred and seven; that he duly qualified and exercised the rights and privileges of such office, including the right to enjoy the salary, to wit, the sum of one thousand dollars; that on or about the twenty-fourth day of July, nineteen hundred and six, the Court of Common Pleas, in the County of Hudson, appointed Philip J. Daudt as an excise commissioner, in the City of Jersey City, to succeed the relator under an act entitled "A supplement to an act entitled 'An act to regulate the sale of spirituous, vinous, malt and brewed liquors,' and to re-

peal an act, entitled 'An act to regulate the sale of intoxicating and brewed liquor,' passed March seventh, one thousand eight hundred and eighty-eight,' approved March twentieth, one thousand eight hundred and eighty-nine," which said supplement was approved upon the thirteenth day of April, one thousand nine hundred and six; that the said Philip J. Daudt has duly qualified as a member of the excise board for Jersey City, and has usurped and intruded upon and now unlawfully holds and executes the office of excise commissioner in the place of and stead of the relator; that the relator says that the said appointment is null and void for the following reasons:

1. There is no foundation in law for the appointment of excise commissioners in the City of Jersey City by the Court of Common Pleas.

2. That the appointment by the Court of Common Pleas of excise commissioners in Jersey City was unwarranted and illegal.

3. Such appointment as above stated is unwarranted and illegal because the fifth section of an act entitled "A supplement to an act entitled 'An act to regulate the sale of spirituous, vinous, malt and brewed liquors,' and to repeal an act entitled 'An act to regulate the sale of intoxicating and brewed liquors,' passed March seventh, one thousand eight hundred and eighty-eight, approved March twentieth, one thousand eight hundred and eighty-nine," and under which section said appointment was made is unconstitutional and null and void because the said section is special legislation, in that it is within the prohibition of paragraph eleven of section seven of Article Four of the Constitution of the State of New Jersey, it being a private, local and special law to regulate internal affairs of towns and counties and appoint-

ing local officers and commissioners to regulate municipal affairs.

4. That such appointment is unwarranted and illegal because the said fifth section of the aforesaid act and the entire act is unconstitutional and null and void because it is a private and special law within the prohibition of paragraph nine, section seven and article four of the Constitution of the State of New Jersey, in that the said act is a private and special law, and was passed by the Legislature without the conditions of said paragraph being complied with.

5. That such appointment is unwarranted and illegal because the said act above mentioned is unconstitutional and null and void for the following reasons:

(a.) The said law embraces more than one object.

(b.) The object of the act is not stated in its title.

(c.) It embraces provisions of private, special or local character. All within the prohibition of paragraph four of section seven of article four of the Constitution of the State of New Jersey.

6. That such appointment is unwarranted and illegal because the said act and all and every part thereof is unconstitutional and null and void because it is contrary to the Constitution of the United States, in that it deprives persons of the equal protection of the law and takes property without due process of law within the meaning of the fourteenth amendment of the Constitution of the United States.

7. That such appointment is unwarranted and illegal because the fifth section of the said act above mentioned is unconstitutional and null and void in

that it seeks to impose upon the judiciary the right and power belonging to the administrative or executive function of the government contrary to the provisions of the Constitution of the State of New Jersey and the prerogative rights of the Court of Common Pleas.

And finally and for the above and other reasons the said appointments and each of them are illegal and null and void.

The said relator shows that the cities of Camden and Trenton in this State have excise boards elected by the voters in said cities, and the City of Elizabeth has an excise board appointed by the Mayor or governing body.

For all the aforesaid the said relator says that he is still rightfully entitled to hold, use and exercise the said office of excise commissioner of Jersey City, as aforesaid, at Hudson County aforesaid, which said office is a municipal office of said city, and the relator is a citizen of said city and believes himself to be entitled to said office, and which said office the said Philip J. Daudt during all the time aforesaid, upon the State of New Jersey hath usurped, intruded into and unlawfully held, used, exercised, and yet doth usurp, intrude into and unlawfully hold and exercise, to the exclusion of the said relator, to wit, at Jersey City aforesaid, in contempt of the State of New Jersey, and to its great damage and prejudice against its sovereignty and dignity.

Whereupon, the said relator, desiring to sue and prosecute in this behalf, prays the advice of the Court herein the premises and that the said Philip J. Daudt in this behalf be made to answer to the said State by what warrant he claims to hold, use, execute and enjoy the aforesaid office of excise com-

missioner, in the City of Jersey City, and the liberties, privileges and franchises thereto.

ZEIGENER & LANE,
Attorneys for the Relator.

DEMURRER.

And now as yet of the June term of the year nineteen hundred and six, comes the said Philip J. Daudt, by Howard R. Cruse, his Attorney, and having heard the said information read to him, he says that the said Philip J. Daudt ought not to be called upon to answer the said information because he says that the matters and things therein contained are not sufficient in law, and this he is ready to verify, wherefore and because of the insufficiency of the said information, the said Philip J. Daudt, prays judgment, and that he may be dismissed and discharged by the Court here of and from the premises above charged upon him in form aforesaid.

PHILIP J. DAUDT,
Defendant.

HOWARD R. CRUSE,
Attorney for Defendant.

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

PHILIP J. DAUDT, the above named defendant of full age, being duly sworn according to law on his oath says, that he is the above named defendant; that he is about to file a demurrer in the above cause and that the said demurrer is not intended for the purpose of delay; but that he verily believes he has a just and legal defence to said action and information on the merits of the case.

PHILIP J. DAUDT.

Subscribed and sworn to before me this first day of August A. D. 1906.

FRANCIS V. DOBBINS,
Master in Chancery of New Jersey.

JOINDER IN DEMURRER.

And the relator saith that the said information and the matters therein contained, in manner and forms as the same are above stated and set forth, are sufficient in law to impeach and implead the said Philip J. Daudt, and the said relator is ready to verify and prove the same, as the Court here shall direct and award.

Wherefore, inasmuch as the said defendant hath not answered the said information, nor hitherto in any manner denied the same, the said relator prays judgment, that the said Philip J. Daudt was not duly and lawfully appointed to be a member of the Board of Excise Commissioners of Jersey City, and and that George W. Decker is still entitled to hold office; and that the said Philip J. Daudt during all the time since he entered upon the duties of said office, as in the said information stated, had usurped, intruded into and unlawfully held, used and exercised, and yet doth usurp, intrude into and unlawfully hold, use and exercise to the exclusion of the said George W. Decker the office of Excise Commissioner of Jersey City, and the liberties, privileges and franchises thereof, and that the said Philip J. Daudt, do not in any manner, intermeddle with, or concern himself in and about the office, liberties and franchises aforesaid, but that he be absolutely forejudged and excluded from ever exercising or using the same, or any of them, for the future; and that the said George W. Decker, the reator, above mentioned in this behalf, do recover against the said Philip J. Daudt, his costs by him laid out and expended in carrying on this suit in this behalf, according to the statute in such case made and provided.

ZIEGENER & LANE,
Attorneys for Relator.

RULE FOR JUDGMENT.

The information in the above cause having been filed by George W. Decker, a citizen of this State, setting forth that he, the said George W. Decker, believes himself to be lawfully entitled to the office of Excise Commissioner of Jersey City, against Philip J. Daudt, the defendant, for usurping, intruding into and unlawfully holding and executing said office of Excise Commissioner of Jersey City, and the defendant having demurred thereto, and the plaintiff having joined in demurrer, and the writ, return and pleadings having been properly framed so that the title of the relator to the office of Excise Commissioner of Jersey City may be determined, and the cause having been regularly set down and noticed for hearing, and having been argued before the Court by Merritt Lane, of counsel for the relator, and Howard R. Cruse, of counsel for the defendant, and the Court having considered said cause and directed a judgment in favor of the relator and of ouster against the defendant, Philip J. Daudt, from office of Excise Commissioner of Jersey City, and determining that the said George W. Decker is entitled to the said office of Excise Commissioner of Jersey City, and that the said defendant, Philip J. Daudt, pay costs to the relator,

It is ordered, that judgment in favor of the relator and of ouster, with costs to the relator against the defendant, including the costs of printing, and determining that the said relator is entitled to the office of Excise Commissioner of Jersey City, be entered in the above entitled suit.

On motion of

ZIEGENER & LANE,

Attorneys for Relator,

Rule actually entered this 13th day of August, 1906.

JUDGMENT.

And now at this day, to wit, the 13th day of August, in the year of our Lord one thousand nine hundred and six, comes the said relator, George W. Decker, by Ziegener & Lane, his attorneys aforesaid, and the defendant, Philip J. Daudt, by his attorney aforesaid, whereupon all and singular, the premises being seen and fully understood, and mature deliberation being had thereon by said Supreme Court, it appears to said Court here that the said information in the nature of a *quo warranto*, and the matters therein contained, are sufficient in law for the said State of New Jersey and the said George W. Decker to have and maintain the aforesaid information and action thereof against the said Philip J. Daudt; wherefore it is considered and adjudged by the Court here that the said Philip J. Daudt was not duly and lawfully appointed as a member of the Board of Excise Commissioners of Jersey City; and that the said Philip J. Daudt do not in any manner intermeddle with or concern himself in and about the office, liberties, privileges and franchises of a member of the Board of Excise Commissioners of the City of Jersey City aforesaid; and that he be absolutely forejudged and excluded from ever exercising or using the office of Excise Commissioner of the City of Jersey City aforesaid, or all or any of its liberties, privileges or franchises for the future. And it is further considered and adjudged that the said George W. Decker is entitled to the office, liberties and franchises of Excise Commissioner of the City of Jersey City; and that the said Philip J. Daudt, in order to satisfy the said State of New Jersey, for and on account of the usurpation aforesaid, be taken and so forth, and that the said George W. Decker, the relator mentioned in this behalf, do recover against the said

Philip J. Daudt his costs of the suit to be taxed, including the costs of printing, according to the form of the statute in such case made and provided.

ASSIGNMENT OF ERRORS.

Afterwards, to wit, on the fifteenth day of September, in this same term, before the Judges of the said Court of Errors and Appeals in the last resort in all causes, at Trenton, comes the said Philip J. Daudt, by Howard R. Cruse, his attorney, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment in form aforesaid was given for the said George W. Decker against the said Philip J. Daudt, whereas by the law of the land the judgment ought to have been given for the said Philip J. Daudt against the said George W. Decker.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid was given upon a supposed plea that Section 5th of the laws of Chapter 114 of the laws of 1906 was unconstitutional, whereas by the law of the land the said section of said act is constitutional.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid was given on an information in the nature of a *quo warranto* exhibited in the name of the said George W. Decker, whereas by the law of the land the information ought to have been exhibited and the proceedings brought thereunder at the instance of and in the name of the Attorney General of the State of New Jersey.

There is also error in this, to wit, that by the record aforesaid it appears in the form aforesaid

determined that the said George W. Decker was entitled to the office of Excise Commissioner of the City of Jersey City, whereas by the law of the land the said Court had no authority to so determine.

And the said Philip J. Daudt prays that the judgment aforesaid may be reversed and annulled, and altogether held for nothing, and that he may be restored to all things which he has lost on occasion of said judgment, etc.

HOWARD R. CRUSE,
Attorney for and of Counsel with
Plaintiff in Error.

JOINDER IN ERROR.

And the said George W. Decker, by Ziegener & Lane, his attorneys, comes into Court and protesting that the assignment of errors filed in the above entitled cause are not sufficient in law, and that each and every of said assignment of errors are improper, and that there is not sufficient assignment of errors on file in this cause, and that the third and fourth assignment of errors are based upon matters not brought to the attention of the Court below, and should be stricken from the record, and reserving to himself all advantage of exception by reason of the premises, he says that there is no error either in the record and proceedings aforesaid or in the judgment aforesaid, and he prays here that the Court here may proceed to examine as well the ord and proceedings aforesaid at the matte oresaid assigned for error, and that the judg. o aforesaid, in manner aforesaid given, may, in all things, be affirmed, etc.

ZIEGENER & LANE,
Attorney's Defendant in Error.

MERITT LANE,
Of Counsel.