THE "RIPPER" BILL DECISION

To members of the bar interested in procedure in *quo warranto* and in problems dealing with the constitutionality of enactments affecting county and municipal government, the recent opinion by Mr. Justice Campbell for the Court of Errors and Appeals in *McCarthy* v. *Walter*[1] will be of deep interest. The opinion leads to the reversal of the Supreme Court in the same cause.[2] A careful comparison of the two opinions leads to concurrence in the result though not in much of the reasoning of the majority opinion for the Court of Errors and Appeals.

The action was instituted by five relators who claimed to be entitled to the office of Park Commissioners by virtue of appointment by the governor under legislation adopted in 1930. This legislation consisted of three acts, one of which abolished the offices of County Park Commissioners under an earlier act, another of which abolished the offices of Boulevard Commissioners and vested their powers in the County Park Commission, and a third of which provided for the appointment of five persons by the governor, no more than three of whom should be of the same political faith, as Park Commissioners under the thus reconstituted Park Commission act.[3] There were two actions with the same relators in each, the defendants being in the one instance the Park Commissioners under the earlier act, and in the other instance the Boulevard Commissioners. It appeared that the two commissions, the offices in which were abolished by the new legislation, actually existed in but one county of the state, Hudson County, and had there functioned for many years.

The action was instituted under the following section of the *Quo Warranto* act:

> "Whenever it is alleged that any person usurps, intrudes into or unlawfully holds or executes any

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[1] 9 N.J. Adv. Rep. 548 (E & A 1931).

[2] 107 N.J.L. 223 (Sup. Ct. 1931). See also Hartigan v. The Hudson County Park Commission 10 N.J. Misc. 43 (Sup. Ct. 1931).

[3] Chapters 260, 261, 262, Laws of 1930, P. L. 1930, 1092 et seq; Park Act of 1902, P. L. 1902, 811, 3 C.S. Page 4161; Boulevard Act, P. L. 1888, Page 367, P. L. 1898, Page 173, 4 C.S., Page 4503.

> 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, for usurping, intruding into or unlawfully holding or executing any such office or franchise, and may proceed therein in such manner as is usual in cases of informations in the nature of a *quo warranto,* except as is otherwise provided in this act."[4]

The court seems to be on sound ground in holding that under this section the office sought by the relator shall be the same office as that held by the respondent. The act under which the relators claimed office vested them not only with the powers theretofore exercised by the Park Commissioners under the earlier legislation, but with the powers of the Boulevard Commissioners as well. It had already been held by the Court of Errors and Appeals that identity of office was essential in proceedings under this section of the *Quo Warranto* act, and so an attempt by the city clerk of Jersey City under the old charter form of government to question the title of the city clerk under the Walsh Act was held to be not maintainable.[5]

The court would also seem to be sound in holding that under this section the title to the office might alone be inquired into, and not the existence of the office:

> "It is established by a long line of decisions that the scope of this act is confined to cases where there

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[4] Quo Warranto Act, P. L. 1903, Page 379, 3 C.S. 4215.

[5] Morris v. Fagan, 85 N.J.L. 617 (E & A 1914). The opinion in this case was written by Chief Justice Gummere for the Court of Errors and Appeals. The Supreme Court sitting in McCarthy v. Walter was constituted of Chief Justice Gummere and Justices Trenchard and Lloyd. The Supreme Court in Justice Lloyd's opinion in the latter case, upon the contention that the relators are without standing because the offices to which they claim title are abolished, states that while "the offices of the incumbents are abolished * * * the offices in the commission remain and instead of there being four incumbents as theretofore, the number is increased to five by Chapter 262. If the offices, therefore, were abolished, the corporate entity itself would of necessity disappear and there would be no board of commissioners as originally provided * * * Even if in a technical sense it could be said that the office in its present form is abolished, it must of necessity be that the parties are contestants for one and the same office, the one claiming its possession and the other resisting." No reference in this decision is made to Morris v. Fagan. No reference is made as to the increase in functions of the Park Commission under Chapter 261 by the transfer of the powers and duties of the Boulevard Commissioners to the Park Commissioners.

ing from five hundred in the larger counties and communities, to five per cent of the voters in the smaller.[10] It is difficult to distinguish between earlier cases in our Court of Errors and Appeals sustaining legislation with referendum provisions of this type, and the referendum provision in the Hudson County Boulevard and Park acts. While it may be admitted that were this type of referendum coming before the courts for the first time, cogent argument might be presented for the present position of the court, the question has already been passed upon by our highest court. It is difficult to distinguish between the intervention of the will of a mayor by his proclamation as a condition precedent to the submission of a municipal charter act to the voters of a municipality[11] and the intervention of the will of the governing body, expressed through its resolution, as a condition precedent to the submission of a county park act. Yet such a distinction is necessary for the present court to escape from its own earlier decision, which indeed it does not now seek to overrule.[12]

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[10] Civil Service Law, P. L. 1908, Page 235; 3 C.S. 3795; P. L. 1912, Page 497; 2 C.S. Cum. Suppl., Page 2586 et seq; P. L. 1915, Page 45.

[11] In re Cleveland, *supra* note 9, in which Mr. Justice Van Syckle, speaking for the Court of Errors and Appeals said "the fact that it is left by the statute to the discretion of the board of aldermen, or to the common council, or to the mayor of the city, to provide for an election, cannot affect the character of the legislation. That duty must be committed to some tribunal, and so long as the like opportunity is given to all cities, the legislation is general and not special." This statement is quoted by Mr. Justice Campbell in the opinion in McCarthy v. Walter for the Court of Errors and Appeals with the comment, "It must be obvious that the learned Justice who spoke for this court had before him for his disposal a question wholly different from the point decided by this court in Attorney-General v. McGuinness." We confess that we are unable to see any distinction between the points in the two cases, although the facts vary, in the one case the referendum being eventually to the people, while in the other case the referendum was only to the governing body; and In re Cleveland is cited by Mr. Justice Garrison as an example of the so-called "referendum cases" in his learned and exhaustive opinion in Attorney-General v. McGuinness.

[12] Citing Noonan v. Hudson County, *supra* note 9, in the Court of Errors and Appeals, 52 N. J. L. 398 (E & A 1890), which sustains the constitutionality of the Boulevard Act under consideration in the McCarthy case. A careful reading of the opinion of Chancellor McGill would not indicate that the principle which he there asserted was confined to roads. Indeed his reasoning relates rather to the eventual reference of the question to the people than to the intermediate function of the Board of Freeholders in submitting the question to the people, and the authority upon which he relies is that of Paul v. Gloucester, 50 N. J. L. 585 (E & A 1888), which dealt with the question of local option. Assuming, however, that some distinction should be made between local option and road legislation, it would seem that parks partook of the same characteristics which the court in Noonan v. Hudson County alleges as bringing about a stronger case

A final ground assigned by the Court of Errors and Appeals for the sustaining of the plea is that the act vesting in the Park Commissioners the function of Boulevard Commissioners as well is special legislation. Again we are inclined to concur in the conclusion of the Court of Errors and Appeals in this regard, but to question gravely the grounds set up to support the conclusions. It has been long established that the mere fact that a law is operative in only one community does not constitute such law special legislation if its provisions may become applicable to other municipalities of the same class in the same manner as that by which it was established in the municipality adopting it. The vice then lies not in the limited scope of the law in its actual operation, but in the limitation upon its potential scope which prevents its becoming operative in other communities. In the instant case it is apparent that in order to have established a boulevard similar to the well-known Hudson County Boulevard, it would be necessary that the original act be submitted to referendum in the county desiring it, but by virtue of the recent legislation here criticised, were a county presently to adopt the Boulevard Act it would have no administrative agency to construct or maintain the boulevard since the functions of the Boulevard Commission have been transferred to the Park Commission, unless such functions could by judicial construction be deemed vested in the Board of Freeholders. In order, then, that the Boulevard Act might become applicable in any county other than Hudson under the same conditions as in that county, it would be necessary that that county should at the same time adopt the Park Commission act; in short, in order that the Boulevard Commission might function as in Hudson, a Park Commission must also be established. There is thus required for the adoption of the provisions of a single act, the concurrence of the voters in the adoption of the provisions of two acts. No such condition

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"for it submits to the tribunal that it creates a pure question of local improvement, expenditure and taxation. The question can in no sense be considered a general local one. The roads now existing in each county, their character and condition, the present and prospective needs of the county, the pursuits of its inhabitants and the like, are the purely local conditions which must govern the wise determination of it, and the suggestion makes at least the utility, if not the necessity of the local tribunal in this case conspicuous." The same reasoning would seem to apply with equal force to parks in a county.

was imposed upon Hudson County, and in fact the two acts were adopted at widely separated dates. It is this requirement of concurrence in two acts in the case of all counties which might now desire to accept the provision of one of the acts, that makes the legislation, in our opinion, special as to Hudson County. The Court of Errors and Appeals while pointing out the inapplicability of the 1930 act to any county other than Hudson, fails, in so doing, to note the necessity of this dual concurrence as a possible, though certainly not constitutional, condition to another county's establishment of the Hudson County administrative scheme. In its preliminary discussion, leading to its conclusion of the special nature of the legislation it steps wholly outside of the province of the court in a unique chain of reasoning. Citing from an earlier opinion of Chief Justice Beasley,[13] and from its citation in a later cause by Mr. Justice Van Syckle,[14] holding that the object of the constitutional inhibition against special and local regulation of internal affairs of municipalities was "to exterminate root and branch special and local legislation, and to substitute general law in the place of it in every instance in which such substitution could be effected," and adopting the court's conclusion in the latter case that "the court should not be astute to suggest or to countenance nice distinctions where the law is so plainly declared," the court proceeds to find:

1. That the legislation takes from the citizens and tax payers of Hudson County the right to have their moneys expended and their public parks controlled by a bi-partisan board appointed by the local county board and places this expenditure and control in a *politically dominated* board to be appointed by the governor.

2. That it changes the control of boulevards from a commission of three elected at large, to the same politically dominated board.

We frankly are at a loss to understand what business of the court's it is if the effect of the statutes, nay if the design of the statutes, is to accomplish this purpose. It would seem to be a matter of policy within the competency of the Legislature

[13] Van Riper v. Parson, 40 N. J. L. 1 (Sup. Ct. 1873), erroneously cited as 40 N. J. L. 125, which is another case by the same title.

[14] Tiger v. The Morris Common Pleas, 42 N. J. L. 631 (E & A 1880).

to determine, and not within the competency of the court. Indeed by citation the court in effect acknowledges such to be the law,[15] but seems to have regarded this change of control to a politically dominated board as a destruction "of the principles of local self government and home rule," and while in the same breath admitting that these so-called principles are not guaranteed and secured to the citizens of the state by the constitution, it asserts that they are (as we interpret the language of the court) eagerly sought after, demanded and zealously defended to such an extent that attempts to deny or withdraw them are obnoxious to the people and are stubbornly resisted. The sole duty of the courts in relation to legislation is to see that constitutional guarantees are not invaded by legislative enactments. The Legislature, in the absence of a violation of such constitutional guaranties is supreme in matters of policy, yet the court here would appear to regard this search after, demand for, and defense of the so-called principles of local self-government and home rule as so nearly to involve a guarantee of home-rule by the constitution, as to permit an invasion thereof to be taken into consideration as evidence in a judicial inquiry into the *bona fides* and motives of the Legislature. It follows from the reasoning of the court thereafter, (this *bona fides,* having thus been inquired into and having been judicially ascertained not to exist) that statutes may be challenged in the courts, not on the basis of their constitutionality, but by inquiring whether their apparently constitutional form is not in fact "the merest technicality in the obedience to and observance of constitutional requirements and mandates"—in short, a design to evade such mandates. It is under such conditions that our Court of Errors and Appeals has stated that the courts must "not be astute to suggest or to countenance nice distinctions"

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[15] McCarthy v. Walter, *supra* note 1 at page 558, citing from Attorney General v. McGuinness, *supra* note 8 at page 373 as follows:

"The judicial function therefore with respect to the invalidation of a legislative act does not consist merely in comparing the determination evinced by such act with that reached by the court and the substitution of the latter for the former whenever they happen to differ. On the contrary, the ultimate judicial question is not whether the court construes the constitution as permitting the act, but whether the constitution permits the court to disregard the act; a question that is not to be conclusively tested by the court's judgment as to the constitutionality of the act, but by its conclusion as to what judgment was permissible to that department of the government to which the constitution has committed the duty of making such judgment."

to uphold and support legislation. When, however, a court has determined that the legislation is in constitutional form and does not transcend any of the constitutional guarantees, it must follow that it is beyond its competency to inquire into the motives actuating the Legislature, or to pronounce a statute unconstitutional because such motives have been determined by the court to be impure or political in character.[16]

It is to be regretted that the court, in this case, did not vote separately upon the several grounds stated in the opinion for overruling the demurrer to the plea. We believe that had such a procedure been followed in this case, as it was in the case upon which so much reliance has been placed, those members of the court who desired to express concurrence in the result but not concurrence in all grounds might have had the opportunity of so doing without the necessity of writing dissenting opinions. Under such circumstances the apparent harmony among the concurring judges might have seemed less complete. This harmony is the more unfortunate since in the matters last analysed here our highest court has placed upon our books statements of law which seem essentially unsound, but which will none the less be considered as binding upon the lower courts and will require much distinguishing by our highest tribunal before the error can be rectified.

SPAULDING FRAZER.

Newark, N. J.

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[16] Attorney-General v. McGuinness *supra* note 8 as cited in the case under review.