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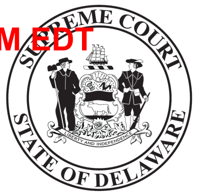

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY S. CHRISTOPHER,	:	**No. 201,2013**
	:	
Plaintiff Below Appellant,	:	
	:	
v.	:	**ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY C.A. NO. S12C-05-018 THG**
SUSSEX COUNTY, a political subdivision of the State of Delaware; MICHAEL H. VINCENT, Sussex County Council President; SAMUEL R. WILSON, Sussex County Council Vice President; JOAN R. DEAVER, Sussex County Council Councilwoman; GEORGE B. COLE, Sussex County Councilman; VANCE C. PHILLIPS, Sussex County Councilman; TODD F. LAWSON, Sussex County Administrator; and the STATE OF DELAWARE	:	
	:	
Defendants Below Appellees	:	

<u>AMENDED</u>

<u>ANSWERING BRIEF OF APPELLEE, SUSSEX COUNTY, DELAWARE</u>

MOORE & RUTT, P.A.

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Dated: July 9, 2013

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NATURE OF PROCEEDINGS

On August 9, 2012, Plaintiff, Jeffrey S. Christopher, Sheriff of Sussex County, Delaware, filed his Second Amended Complaint in the Superior Court of the State of Delaware naming as Defendants, Sussex County, a political entity, and its individual Council persons, to wit, Michael H. Vincent, Samuel R. Wilson, Joan R. Deaver, George B. Cole and Vance C. Phillips, and the County Administrator, Todd F. Lawson, all in their representative capacity. Collectively, these Defendants shall hereafter be referred to as "Appellee Sussex." The Sheriff shall hereafter be referred to as "Appellant Sheriff." Appellant Sheriff also named the State of Delaware as a Defendant, which shall be hereafter referred to as "Appellee State." The Complaint sought a declaratory judgment regarding the powers of the sheriff in Delaware and particularly the sheriff in Sussex County. It also sought a determination that recently enacted House Bill (HB 325) was unconstitutional.

All parties filed Cross Motions for Summary Judgment. Oral argument was held in Superior Court on March 8, 2013. On March 19, 2013, the Superior Court issued a Memorandum Opinion granting the summary judgment motions of Appellee Sussex and Appellee State and denying the summary judgment motion of Appellant Sheriff. Appellant Sheriff has appealed the lower Court's decision to this Court.

STATEMENT OF FACTS

The facts before the Court on this matter are minimal. It has been agreed the case involves strictly legal issues, and in particular, the constitutionality of HB 325, and the powers flowing to the Sheriff as a "conservator of the peace" as the term is used in the Delaware Constitution. Below, the Appellant Sheriff also argued actions of Sussex County infringed on his ability to perform his job. Those arguments have not been made in this appeal.

It is undisputed Jeffrey Christopher is the duly elected sheriff of Sussex County. Appellant Sheriff contends that his powers and authority exceed the traditional functions of a sheriff in the State of Delaware. He sought a declaratory judgment that he was vested with all colonial common law rights of a sheriff, that he was the chief law enforcement officer in Sussex County with control and authority over all other law enforcement officers in the County, that he should have complete access to all statewide law enforcement information sources, that Sussex County should fund a fully staffed and equipped Sheriff Department to serve his desires, that he be granted authority unfettered and undiminished by any other governmental entity, and that HB 325 be declared unconstitutional.

The Complaint alleged two basic issues. The first issue was that actions by Appellee Sussex had encroached upon the authority of Appellant Sheriff as a

constitutional officer and had stripped him of his authority as a conservator of the peace under the Delaware Constitution. The second issue raised by Appellant Sheriff was that recently enacted House Bill 325 (HB 325) was unconstitutional averring it improperly limited by statute inherent common law duties of a sheriff as a conservator of the peace.

The Superior Court by Memorandum Opinion dated March 19, 2013, found that:

> "…Delaware's Constitution recognizes the office of sheriff but does not enumerate any specific power or authority held by the office. The Court concludes that the common law authority and responsibilities of the Sheriff are subject to modification and restriction in the legislature. The 2012 legislation extinguishing the Sheriff's law enforcement powers is valid. Appellant Opening Brief Attachment, p. 9.[1]

The Court concluded and declared a sheriff in Delaware is not vested with law enforcement powers and was not to act in any capacity as a police or peace officer. That ruling according to the Court below mooted the allegations against Sussex County regarding funding and attempts to control the sheriff's actions. OB Attachment A, p. 10.

[1] Appellant Opening Brief hereafter referred to as OB.

SUMMARY OF ARGUMENT

1. Sussex County specifically denies the Summary of Argument stated on page 4 of Appellant Sheriff's Opening Brief. House Bill 325 does not violate the Delaware Constitution by eliminating the sheriff's arrest powers and thus prohibiting his obligation to serve as a conservator of the peace. It is specifically denied that:

(a) The Court below erred in upholding the constitutionality of HB 325 and finding no conflict with Article XV, Section 1 of the Delaware Constitution of 1897.

(b) The Court below erred in upholding the constitutionality of HB 325 and finding no conflict with Article XV of the Delaware Constitution of 1897.

(c) The Court below erred in upholding the constitutionality of HB 325 and finding no conflict with Article III of the Delaware Constitution of 1897.

2. The Constitution does not support the position or assertion that a conservator of the peace is a constitutional officer. A sheriff in Delaware is grouped with other constitutional officers in an undefined class named conservators of the peace. Under common law or by statute in Delaware, neither sheriffs nor conservators of the peace have arrest powers.

3. Historically, the sheriff in Delaware has had his duties defined by statute. Though now identified in the Delaware Constitution as a County officer, the General Assembly has the power to define his duties. Appellant Sheriff has failed to offer any evidence that in 1776 the Sheriff was a conservator of the peace vested with common law arrest powers.

4. Delaware sheriffs have been an arm of the Courts since colonial times with no independent constitutional power. The 1897 Constitutional Convention delegates recognized the value of drafting the Constitution in minimal terms and authorizing the legislature to enact laws to effectuate the constitutional mandates. No such laws have given the sheriff arrest powers.

5. In enacting HB 325, the General Assembly properly exercised its powers to define a sheriff's duties. This Court has ruled in regard to the Attorney General, another conservator of the peace, that in the absence of powers enumerated in the Constitution, the General Assembly has the power to enact laws, to amend prior statutes, or to codify or overrule common law regarding the duties of the Attorney General.

6. Appellant Sheriff has waived all issues against Sussex County by his failure to address them on appeal.

MERITS OF THE ARGUMENT

I. HB 325 DOES NOT VIOLATE THE DELAWARE CONSTITUTION BECAUSE THE CONSTITUTION DOES NOT DEFINE THE DUTIES OF A SHERIFF PERMITTING SUCH DUTIES TO BE DEFINED BY THE GENERAL ASSEMBLY

A. Question Presented: Whether HB 325 violates the Delaware Constitution because it strips the sheriff of arrest powers, thereby prohibiting the sheriff from fulfilling his constitutional obligation as a "conservator of the peace?"

Answer: No.

B. Standard of Review: On appeal from the grant of summary judgment the Supreme Court reviews the order *de novo*. Sternberg v. Nanticoke Memorial Hos. Inc., 62 A.3d 1212 (Del.2013).

When this Honorable Court must review a statute to determine its constitutionality, "In the final analysis, the interpretation of the Constitution, in the light of the presumption of the constitutionality that cloaks all legislative acts, is an inherent judicial responsibility." Opinion of the Justices, 385 A.2d 695, 703 (Del. 1978). Courts will not, however, consider the constitutionality of a statute unless a decision cannot be reached on any other basis. Collison v. State ex. rel. Green, 2 A.2d 97, 108 (Del. 1938). If the Constitution does not contain a limitation on the area of the General Assembly's action, the statute must be presumed valid. Opinion of the Justices, 295 A.2d 718, 720 (Del. 1972). It is presumed that

statutory language is reasonably and suitably defined and that the legislature did not intend "an unreasonable, absurd or unworkable result." Id. at p. 722. If there are two possible meanings to the constitutional provision at issue, one contended by the complainants and the other meaning taken by the General Assembly, the rule is:

> That the acts of a state Legislature are to be presumed constitutional until the contrary are shown; and it is only when they manifestly infringe some provision of the Constitution that they can be declared void for that reason. In case of doubt, every presumption, not clearly inconsistent with the language or the subject matter, is to be made in favor of the constitutionality of the act. The power of declaring laws unconstitutional should be exercised with extreme caution and never where serious doubt exists as to the conflict.
>
> When the Legislature has once construed the Constitution, for the courts then to place a different construction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise of another of power committed to the latter. The courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary.
>
> Opinion of the Justices, 385 A.2d 695, 713 (Del. 1978).

Thus, this Court has determined it must uphold the constitutionality of a statute enacted by the General Assembly unless it is certain it conflicts with the Constitution, and any conflicting meanings must tilt in favor of the statute being constitutional.

C. Merits of Argument

1. HB 325 IS CONSTITUTIONAL BECAUSE ARTICLE XV, SECTION 1 OF THE DELAWARE CONSTITUTION OF 1897 DOES NOT DEFINE CONSERVATOR OF THE PEACE NOR ATTACH ANY DUTIES TO THAT TITLE.

A. A Conservator of the Peace is not a Constitutional Officer

Appellant Sheriff argues in his Opening Brief that a conservator of the peace is a constitutional office. OB, p. 6. There is nothing in the Delaware Constitution of 1897, nor any of the prior adopted Constitutions of this State, that confers the title of a constitutional office on the term "conservator of the peace." Appellant Sheriff misconstrues the meaning and actual language in the Constitution to reach a conclusion that actually has no basis in the law.

First, in the four Constitutions adopted by Delaware, the term conservator of the peace has been used to group together actual constitutional officials into a generic class. The Delaware Constitution of 1776, Article 12, states:

> The Members of the Legislative and Privy Councils shall be Justices of the Peace for the whole state, during their continuance in trust; and the Justices of the Courts of Common Pleas shall be Conservators of the Peace in their respective counties.

The only mention of the sheriff in the Delaware Constitution of 1776 is in Article 15 where it is stated they shall be elected with prohibitions on further election. Thus, in 1776, the sheriffs were not conservators of the peace under the

Constitution as argued by Appellant Sheriff. Yet, the argument is made that in 1776 the sheriffs became conservators of the peace cloaked with powers that became constitutional powers and not common law powers, citing Article 25 of the Delaware Constitution of 1776. OB, p. 6.

Appellant Sheriff argued the Superior Court erred in holding the powers of the sheriff were common law powers subject to control by the General Assembly. OB, p. 7. Below, the Sheriff pled he had all common law rights, duties and prerogatives inherent in the office of sheriff. See Complaint, Paragraph 29 (A-19)[2] and Prayer for Relief (A-20). In his briefing below, Appellant Sheriff cited cases from throughout the country to support his position he was vested with the power of arrest and the powers of a peace officer or police officer. See Appellant Sheriff briefing below at A-64 through A-72 and A-90 through A-101. Conspicuous by their absence were cases decided by Delaware courts regarding the meaning of duties, if any, of what is a conservator of the peace. As Judge Graves pointed out to Sheriff's counsel below, decisions in other jurisdictions are not very helpful and that the focus had to be on what is the law in Delaware (A-164). In the Opening Brief before this Court, little help is given in this regard.

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[2] (A-___) Appellant Appendix with page reference.

Appellant Sheriff parced the words of Article 25 of the Delaware Constitution of 1776 to argue that it is repugnant to the rights and privileges of a conservator of the peace to declare that sheriff has no arrest powers. OB, p. 7. The argument ignores the fact in 1776 the sheriff was not deemed a conservator of the peace. More importantly, all of Article 25 must be read. It states:

> The common law of England, as well as so much of the statute law as have been heretofore adopted in practice in this state, shall remain in force unless they shall be altered by a future law of the Legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution and declaration of rights…and agreed to by this convention. (Emphasis added.)

Thus, in 1776, there was not only the adoption of common law, but also of existing statutory law. More importantly, the Constitution reserved to the Legislature the right to amend both the common law and the statutory law in effect unless it was repugnant to the Constitution. Appellant Sheriff would have the Court believe HB 325 is repugnant to the alleged rights and privileges of a nonexistent and undefined officer, to wit, a conservator of the peace.

Appellant Sheriff argues that being designated a conservator of the peace is essentially a vested constitutional right equal to the right of an individual accused of a crime to a trial by jury. OB, pp. 7-8. That is not a valid analogy. Conservator of the peace as used in the Delaware Constitutions is merely a term attached to various offices throughout history, whereas a trial by jury is a fundamental right

enumerated in Article I, Section 4, Bill of Rights of the Delaware Constitution of 1897. The right to a trial by jury is clear and defined. Not so the meaning of a conservator of the peace under Delaware law or in its historical context.

In 1854, the Superior Court had to determine whether a magistrate who made an error while acting within his jurisdiction was legally responsible for trespass and false imprisonment. In reviewing the law and history regarding judicial acts, the Court *in dicta* noted that justices of the peace named in an English statute had been included therein, "…because a large number of their powers are merely ministerial; such are their powers as conservators of the peace…" Bailey v. Wiggins, 1854 WL 844 (Del. Super.) Brief Exhibit A, at page 5 (Court emphasis). Thus, here is recognition in Delaware case law that the functions of someone identified as a conservator of the peace are strictly ministerial in nature.

In his Opening Brief at page 8, Appellant Sheriff admits the sheriff was a statutory officer in 1776. He then argues that it being statutory had no bearing because of the fluidity of what was a constitution in Great Britain. That ignores the fact that in 1776, whatever statute existed regarding the sheriff in Delaware became part of our jurisprudence and henceforth was to be considered when analyzing a sheriff's duties. It is incumbent, therefore, to determine the duties of a sheriff when Delaware became a state and not a colony.

B. The Sheriff in Delaware has Historically Been a Servant of the Courts

Delaware was originally settled by the Swedish and Dutch, but within decades came under the rule of England. In particular, in 1664, the forces of the Duke of York assumed control of Delaware which became a dependent of the larger colony of New York. H. Clay Reed, The Early New Castle Court, Vol. IV, Delaware History, pages 240-245 (1950-1), B(SC)-46.[3] Professor Reed's research of the origins of the Court in New Castle revealed that after the Duke of York became protector of the Delaware colony he restructured the then existing court in Delaware and by ordinance changed the role of the sheriff:

> The ordinance of 1676 made the "high sheriff" of the river an English sheriff instead of a Dutch schout, as Lovelace's order of 1672 had failed to do. Upon resuming his office in 1674, Captain Cantwell was still referred to as "Sheriff or Schout." In August, 1676, however, the council in New York, considering "how inconvenient it was for the Sheriff to preside, and be Judge in a Court, whose Orders and Warrants he is to execute" (as the Dutch schout did), resolved that henceforth the Delaware sheriff, "whose duty it is to represent matters to the court, and to execute the law or court orders," should not preside over or have any vote in the court. The sheriff's new status was confirmed by the ordinance of the following month, which also authorized him to select an "under Sheriffe or Marshall" to be approved by the court. Thus the sheriff became the servant, rather than the master of the court."
>
> B(SC)-50 (footnotes omitted).

[3] B(SC), Appendix (Sussex County)

Thus, as early as 1676, or one hundred years before Delaware became a state, the role of a sheriff was greatly reduced by an ordinance, not common law. The sheriff became the servant, rather than the master of the court. Professor Reed wrote when William Penn acquired Delaware in 1682, he made no changes in the New Castle court as it existed. B(SC)-52. Under Article 25 of the Delaware Constitution of 1776, statutes "…herefore adopted in practice in this state, shall remain in force." Appellant Sheriff has agreed the office of sheriff existed by statute. As such, the role and duties of the sheriff were subject to statutory changes. Nothing Appellant Sheriff has argued proves otherwise.

To support his position, Appellant Sheriff has cited dictionary definitions claiming they were contemporaneous with ratification of the Constitution. All of the dictionaries relied upon were dated well after ratification. They also were generic definitions and do not define what a sheriff, conservator of the peace, police officer or peace officer was in Delaware. These may be interesting and a starting point, but clearly dictionary definitions cannot be the basis for declaring a duly enacted statute unconstitutional. Rather, it is incumbent on Appellant Sheriff to direct the court to legal precedence, historical references or statutes that existed when the various versions of the Delaware Constitution were adopted to support his argument. He has failed to do so.

C. Appellant Has Failed to Present Proof that When the Delaware Constitution of 1776 was Ratified the Sheriff was a Conservator of the Peace with Arrest Powers

The Sheriff was not deemed a conservator of the peace in the 1776 Constitution. The term conservator of the peace has never been defined in any of the Constitutions adopted in this State. Rather, its mention has been solely by grouping various constitutional offices under that banner. The term has been included in the Constitutions as follows:

> 1. The Members of the Legislature and Privy Councils shall be Justices of the Peace for the whole state, during their continuance in trust; and the Justices of the Courts of Common Pleas shall be Conservators of the Peace in their respective counties. Del. Const., Art. 12 (1776).
>
> 2. The members of the Senate and House of Representatives, the Chancellor, the Judges of the Supreme Court, and the Court of Common Pleas, and the Attorney General, shall by virtue of their offices, be conservators of the peace throughout the state; and the Treasurer, Secretary, Clerks of the Supreme Court, prothonotaries, Registers, Recorders, Sheriffs, and Coroners, shall, by virtue of their offices, be conservators thereof, within the counties respectively in which they reside. Del. Const. Art. VIII, Sec. 1 (1792).
>
> 3. The members of the Senate and House of Representatives, the chancellor, the judges, and the attorney general shall by virtue of their offices, be conservators of the peace throughout the State; and the treasurer, secretary, prothonotaries, registers, recorders, sheriffs and coroners, shall by virtue of theirs offices be conservators thereof within the counties, respectively in which they reside. Del. Const. Art. VII, Sec 1 (1831).

> 4. The Chancellor, Judges and Attorney-General shall be conservators of the peace throughout the State; and the Sheriffs and coroners shall be conservators of the peace within the counties respectively in which they reside. Del. Const., Art. XV, Sec. 1 (1897).

The inclusion of the term conservator of the peace in Delaware Constitutions has been questioned by commentators.

In the treatise published by the Del. State Bar Association, The Honorable Randy J. Holland, Editor in Chief, The Delaware Constitution of 1897, The First One Hundred Years (1997), the authors noted that "Delaware's unusual tradition of constitutionally designating conservators of the peace formally began with its first constitution adopted in 1776." See Treatise, page 187. Pages 187 and 188, the text, and pages 266 and 267, the footnotes, to the Treatise are attached as B(SC)-pp.66-70. The authors further commented:

> At common law, conservators of the peace appear to have had important powers, including the power to arraign and try offenders.[3] But while the concept of conservator of the peace finds its earliest roots in medieval England, there is no history as to the reasons for inclusion of the concept in our constitution. [4]
>
> The "conservator of the peace" provision has received scant judicial attention in the more than two hundred years it has been, in one form or another a part of the constitution.[5] The list of offices it contains is clearly not exclusive. Article XV, Section 1 seems to have outlived its usefulness since the General Assembly has by statute favored persons performing a variety of

> functions with the title “conservators of the peace,” [6] and, whether or not they are called “conservators of the peace,” persons with law enforcement authority are now invested with that authority by statute. [7] B(SC)-67,68.

The footnotes are telling. Delaware’s Constitution is unique throughout the United States in identifying so many public officers as conservator of the peace. In fact, very few states use this archaic phrase. See footnote 2, B(SC)-69.

The term conservator of the peace has received scant mention in Delaware case law or in the Delaware Code. In particular, it has never been defined. Appellant Sheriff quotes from State v. Mitchell, 212 A.2d 873 at page 878 (Del. Super. 1965) at Opening Brief page 13 for the proposition that the sheriff was a conservator of the peace and had arrest powers. That is a misreading of the language quoted. The Superior Court noted that the system of criminal procedure, or keeping “The King’s Peace” was the legal name of the normal state of society and that, “This prerogative was exercised at all times through officers collectively described as conservators of the peace…the ordinary conservators of the peace were the sheriff, the coroner, the justices of the peace and the constable each in his own district.” (Emphasis added.) As Mitchell went on to note:

> The discretionary power of the Sheriff was ill defined, and led to great abuses, which were dealt with by the Statute of Westminister the First (3 Edw 1, c. 12, A.D. 1275).

Thus, whatever rights sheriffs had in old England were prescribed by statute, and if any such statutory rights existed in 1776, they became part of Delaware law and subject to revision by the legislature.

D. The Power to Arrest is Statutory and not a Constitutional Right Automatically Conferred on the Sheriff

Appellant Sheriff argues that Delaware courts have implicitly recognized a fundamental right of a peace officer to conduct an arrest. OB, p. 16. For that proposition, Sheriff cites State v. Brown, 5 Del. 505 (Del. 1854) and State v. Wyatt, 89 A. 217 (Gen. Sess., 1913). Both of those cases addressed the right of a constable or bailiff to arrest someone under authority of the ordinances of the Town of Harrington. Though the cases *in dicta* mention that historically peace officers such as constables or sheriffs had a right to make an arrest, these were not cases with precedential value. The issue before the Court in neither case dealt with the role of the sheriff or of a conservator of the peace under the Delaware Constitution. Conspicuous by their absence in Appellant Sheriff's arguments are any other cases that suggest the sheriff has arrest powers.

2. THE SHERIFF'S ROLE UNDER THE DELAWARE CONSTITUTION OF 1897 HAS BEEN MINISTERIAL AND AS AN ARM OF THE COURTS

The Delaware Constitution as it has evolved has always provided for the office of sheriff, but the duties of that office have never been defined. As noted in

the Delaware Constitution of 1776, the Sheriff is mentioned only in Article 15, and that solely for purposes of stating how the sheriff is chosen. Beginning in 1792, the sheriff was identified as a member of the class of conservators of the peace. Neither a sheriff nor a conservator of the peace has defined duties.

In 1897, the delegates to the Constitutional Convention reviewed what was Article VII, Section 1, under the Delaware Constitution of 1831 which identified what officers were conservators of the peace. The Convention record reads:

> "ARTICLE __.
>
> "Section 1. The Chancellor, Judges and Attorney-General shall be conservators of the peace throughout the State; and the sheriffs and coroners shall be conservators of the peace within the counties respectively in which they reside."
>
> EDWARD G. BRADFORD: I move that section 1, as read, be adopted.
>
> JOHN BIGGS: I second the motion.
>
> MR. BRADFORD: This section 1 covers the subject of section 1 of article VII of the existing Constitution but is a departure from that section in that it omits certain officers, who are therein designated, as conservators of the peace. Section 1 of article VII, in the existing Constitution, provides that "The Members of the Senate and House of Representatives, the Chancellor, the Judges, and the Attorney-General shall by virtue of their offices, be conservators of the peace throughout the State; and the Treasurer, Secretary, prothonotaries, registers, recorders, sheriffs and coroners, shall by virtue of their offices be conservators thereof within the counties respectively in which they reside".

> The Committee on Phraseology and Arrangement, upon a careful consideration of that section, came to the conclusion that a considerable portion of it is a dead letter and that it would be very well to restrict the functions of conservators of the peace to the Chancellors, Judges and Attorney-General and to the sheriffs and coroners; omitting from the number the members of the Senate and House of Representatives, the Treasurer, Secretary, prothonotaries, registers, and recorders. They therefore have recommended, in the language of section 1, that "the Chancellor, Judges and Attorney-General shall be conservators of the peace throughout the State; and the sheriffs and coroners shall be conservators of the peace within the counties respectively in which they reside.

Vol. III, Debates and Proceedings of the Constitutional Convention of the State of Delaware, (1897) at pages 2264-5, B(SC)-64,65. The amendment was to shrink the members of the class of conservators of the peace to strictly constitutional officers who were part of the judicial system.

Again, the term conservator of the peace was not defined in the Constitution or detailed in the debates. However, a sense of the policy of the delegates on how they approached the rewriting of the Constitution can be found in discussions on establishing the sheriff's salary. It was clear sheriffs were not held in high regard by the delegates who commented on the "extraordinary methods" and means by which people attempted to be elected due to the perceived bloat and graft coupled with the position. Rather than try to set salaries in the Constitution itself, the delegates believed that should be left to the legislature. Delegate William Saulsbury stated:

> WILLIAM SAULSBURY: I don't believe that the salaries of these officers should be named in the Constitution, but rather should be left to the Legislature, for the reasons which I will state. It is desirable that this Constitution shall be made as short and simple as possible. It should not be loaded down with anything which is not absolutely necessary to be in it. The shorter and simpler it is, the more easily understood and the more convenient it will be for reference.
>
> We can safely trust a great many things to the Legislature, and the Legislature meeting every two years, could easily make whatever corrections it might be necessary to make in the salaries of the offices commensurate with the amount of work they have to do. If it is inserted in the Constitution, the only possible way to change it will be by an amendment to the Constitution, and it would make difficult a change in these officers.

The discussion on this topic is set forth in the excerpts of Vol. I of the Debates at B(SC)-pages 56-62. The value of these proceedings has been recognized by this Court. Claudio v. State, 585 A.2d 1278 (Del. 1991).

The intent of the delegates clearly was to craft a constitution that was not bogged down with details concerning various offices but to leave those details to the Legislature. This is in keeping with the philosophy of this Court, and one espoused by Judge Graves during oral argument below, A-161, that our Constitution is a "living document." In the case of State v. Cannon, 190 A.2d 514 (Del. 1963) at pages 516-517 this Court stated:

> It is, we think, generally accepted that constitutional law to some extent may be likened to a progressive science. This means that when construction of the provisions and safeguards of a Constitution is

> required, the words employed are not necessarily static in meaning, but grow and change as the conditions of modern society and knowledge grow and change with the passage of years.
>
> * * * *
>
> We accept unquestionably that Constitutions are living documents in the sense that the phraseology used in them grows and changes with the passage of time (citations omitted).

Historically, the convention delegates had granted great leeway to the legislature. Each constitution contained a means by which the legislature could enact laws to fit the times and circumstances. This was accomplished as follows.

> The common law of England, as well as so much of the statute law as have been heretofore adopted in practice in this state, shall remain in force, unless they shall be altered by a future law of the Legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights, *& c.* agreed to by this convention. Del. Const. Art. 25 (1776) (emphasis added).
>
> All the laws of this state, existing at the time of making this constitution, and not inconsistent with it, shall remain in force, unless they shall be altered by future laws; and all actions and prosecutions now pending, shall proceed as if this constitution had not been made. Del. Const. Art. VIII, Sec. 10 (1792) (emphasis added).
>
> All the laws of this State existing at the time of making this Constitution and not inconsistent with it, shall remain in force unless they shall be altered by future laws; and all actions and prosecutions now pending shall proceed as if this Constitution had not been made. Del. Const. Art. VII, Sec. 9 (1831) (emphasis added).
>
> All the laws of this State existing at the time this Constitution shall take effect, and not inconsistent with it shall remain in force, except so far as they shall be altered by future laws. Del. Const. Schedules Sec. 18 (1897) (emphasis added).

Article II, Section 1 of the Delaware Constitution of 1897 succinctly states: "The legislative power of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives." It is this General Assembly that has the power to define the duties of the sheriff.

In his treatise entitled Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware, Vol. I, Sec. 93 (1906), Judge Victor Woolley wrote, "Sheriffs are ministerial officers who execute and carry into effect the orders and judgments of the court." This was written by the oracle of practice before the Delaware courts a mere nine (9) years after the current Constitution was ratified. Judge Woolley was clearly knowledgeable of the functions of a sheriff at the time. He says nothing about the sheriff having the power of arrest or any of the other tasks sought by the sheriff in this litigation.

In a text co-authored by Harvey B. Rubenstein, Esq., it is written:

> The sheriff is, under the state constitution, a conservator of the peace in the county in which he is located. Basically, however, he is an officer of the Superior Court responsible for summoning jurors for jury duty and witnesses for court appearances. He is also responsible for issuing notices of levies and conducting of sales of property, in accordance with the order of the court.
>
> The sheriff has a multitude of other individual duties, which have been placed upon his office over the years, such as: he is ex officio a deputy game warden and may make arrests for violations of the game laws; he is responsible, when he has information, to enforce

> the state tax laws relative to licenses for engaging in business; he is required to execute the orders of courts martial of the Delaware National Guard with regard to bringing persons before them who have been ordered to trial; he may be directed to enforce the orders of the State Board of Health; he may be ordered by the State Highway Department to remove any obstruction to a public bridge.

Liberman, Rosbrow and Rubenstein, The Delaware Citizen, The Guide to Active Citizenship in The First State, p. 328 (3rd Ed., 1967). B(SC)-53.54.

On three occasions the Office of Attorney General has been asked to weigh in on the authority of the Sheriff of Sussex County to engage in activities that were deemed contrary to his duties. By letter dated December 27, 1999, Attorney General Brady reviewed the statutory definitions of police officer as they applied to the Sussex County Sheriff.[4] She concluded:

> Sheriffs who do not have to undertake Council training or certification, therefore, do not have the general statutory power to enforce the laws of this state or to engage in the prevention or detection of crime. Re: Sheriff's Authority to Utilize Emergency Lights on Vehicle, Del. Op. Att'y Gen (Dec. 27, 1999). B(SC)-71,72.

In 2000, the question was posed whether the Sussex County sheriffs were police officers. By letter opinion dated October 16, 2000, State Solicitor Rich concluded:

> "An analysis of Delaware law leads to the conclusion that, under current Delaware law, the sheriff is not a police officer as defined in the Delaware Code." Re: Opinion of the Attorney General relating to

[4] This letter was not assigned an Attorney General opinion citation.

> the Sheriff as Police Officers. Del. Op. Att'y Gen. 00-IB16, 2000 WL 1920107 (October 16, 2000), B(SC)-73-75.

This Court in the matter of Watson v. State, No. 335, 2009 (Del. 2009) Brief Exhibit B cited this Attorney General's ruling favorably at page 6 by stating:

> We applaud "persons like constables, parole officers, correctional officers and the Attorney General and her Deputy Attorney General" for their commendable services and recognize that they may have certain law enforcement authority; nevertheless, that does not define them as police officers.

Lastly, the Attorney General was specifically asked to opine whether a Sheriff has the legal authority to make arrests. State Solicitor Lewis concluded after reviewing the history of the term conservator of the peace and the law that, "…Sheriffs do not have the statutory or common law authority to make arrests." Re: Opinion of the Attorney General Relating to Sheriff Arrest Powers, Del. Op. Att'y Gen No. 12-IIBO3 (Feb. 23, 2013). B(SC)-76-80.

Thus, from the time of the Duke of York to the present, sheriffs in Delaware have not been considered police or peace officers. Their function, defined consistently by statute, has been ministerial and in aid of the Courts.

3. THE GENERAL ASSEMBLY PROPERLY EXERCISED ITS POWERS TO STATUTORILY LIMIT THE DUTIES OF SHERIFFS IN DELAWARE BY PASSAGE OF HB 325.

Independence from England brought with it the responsibility of each state to adopt its own constitution and set of laws. Evans v. State, 872 A.2d 539, 544

(Del. 2005). The history of the sheriff as he historically existed has been reviewed. Additionally, the power vested in the General Assembly to pass legislation amending or repealing common law or statutory law in effect when the Constitutions were ratified has been set forth. The question then is whether there is a constitutional prohibition against enactment of HB 325 which specifically removed the authority of the sheriff from numerous sections of the Delaware Code. The effect was to clarify within the Delaware Code that the sheriffs did not have law enforcement duties or functions.

The General Assembly has previously set forth its view of the role of a sheriff in Delaware by enactment of 10 Del.C., Cpt. 21. Sheriff. This Chapter of the Delaware Code details the functions and duties of sheriffs. In summary, all of the duties set forth in the statute assure the orderly operation of the court system. There are no criminal or arrest powers vested in the sheriff.

In reviewing the constitutionality of statutes passed by the General Assembly, the Court must view each part of the Constitution and construe it as a whole. The entire document is to be given full force and effect. State v. Roberts, 282 A.2d 603, 606 (Del. 1971). The General Assembly is empowered to pass the statute, and the only question for the Court to consider is whether it violates a constitutional limitation; if it does not, the statute is valid. State ex rel. Craven v.

Shaw, et al., 126 A.2d 542, 546 (Del. Super. 1956), *aff'd* 131 A.2d 158 (Del. 1957).

This Court considered the issue of whether a member of the judiciary could be elected to a municipal office. The General Assembly had statutorily prohibited such an election. The Court found the statute to be unconstitutional, holding that the judiciary was created by the Constitution which prescribed the qualifications, tenure and method of appointment to those constitutional offices. But, the Court did recognize that "[The General Assembly] can by proper legislation affect the character and amount of matters coming within the judicial jurisdiction…" Buckingham v. State ex rel. Killoran, 35 A.2d 903, 907 (Del. 1944). A similar analysis can apply to this matter. The means of selecting the sheriff, that is by election, cannot be changed by statute, but since the duties of the sheriff are not set forth in the Constitution, the General Assembly has the power to establish the jurisdictional duties of the sheriff.

This concept was also the basis for the Court's decision in State ex rel. Rockey v. Hatton, 114 A.2d 651 (Del. Super. 1955). The issue was the power of a Magistrate's Court to vacate a declaratory judgment after the statutory time for opening such judgments had passed. The Court ruled that even though the Magistrate's Court was a constitutional court, its powers were not detailed in the

Constitution; thus, the Magistrate only had the powers conferred by statute. Id., p. 652.

This Court had occasion to rule on the powers and duties of the Attorney General, one of the conservators of the peace identified in Article XV, Sec. 1, of the Delaware Constitution of 1897. Under that section the Attorney General is identified as a conservator of the peace for the entire state and the sheriff is identified as a conservator of the peace in his respective county.

Chief Justice Layton in the case of Darling Apartment Co. v. Springer, Liquor Commission, 22 A.2d 397 (Del., 1941) in consideration of the question of the powers of the office of Attorney General at common law wrote:

> In England the office is of ancient origin. It was vested by the common law with a great variety of duties. The Attorney General was the law officer of the Crown, and its only legal representative in the courts. We derive our system of jurisprudence from England, and we adopted the office of Attorney General as it existed in England as a part of the governmental machinery necessary for the protection of public rights and the enforcement of public duties by proper proceedings in courts of justice. The powers and duties of the office of Attorney General are so numerous and varied that neither the framers of our several constitutions nor the legislatures have ever undertaken exhaustively to enumerate them, and where not defined by statute those powers and duties must be sought for in the common law. The authorities substantially agree that, in addition to those conferred on it by statute, the office is clothed with all of the powers and duties pertaining thereto at common law; and, as the chief law officer of the State, the Attorney General, in the absence of express legislative restriction to the contrary, may exercise all such power and authority as the public interests may from time to time require. In

> short, the Attorney General's powers are as broad as the common law unless restricted or modified by statute." Id. p. 403 (citations omitted) (emphasis added). The majority opinion went on to state "…[T]he accepted principle (is) that, in the absence of express legislative restriction, the Attorney General, as the chief law officer of the State, may exercise all the powers and authority incident to the office at common law." Id. p. 403. (Emphasis added.)

Justice Rodney in a concurring opinion engaged in a historical analysis of the Office of Attorney General. He noted preliminarily that, "A number of other states, like our own, merely provide in their constitutions for an Attorney General, but make no mention of the duties of the office." Id., p. 405. And that, "…the great majority hold that the office of Attorney General was vested with certain common law powers and duties which still exist, except as modified by statute." Id. p. 406 (emphasis added).

Justice Rodney reviewed the constitutional origins of the office of Attorney General and the fact the framers of the constitutions created an office by name only with the knowledge that most such offices had generally recognized legal powers, duties and functions. But for the case then before the Court, Justice Rodney stated:

> We are not primarily concerned with the exact list of powers and duties appertaining to the office of Attorney General, but rather with the question as to any authority in the Legislature to make some change in these, so-called inherent powers, even though remotely derived from the common law.
>
> Article 25 of the Constitution of 1776 says:

"The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature***."

It would seem that no common law was ever adopted in this State, except such as might be altered by a future law of the Legislature. Nor could it well be. The common law is largely founded on custom long acquiesced in or sanctioned by immemorial usage. It always bends and gives way to express statutory enactment intended to be in direct opposition. The common law powers inhering to an office are, at most, a part of the common law, and can rise no higher then their source. p. 407 ……

I am of the opinion that the Attorney General is the chief law officer of the State, clothed, except as altered by the Constitution or by legislation, with the powers and duties, criminal and civil, which inhered to that office when it first became a constitutional one.

I am equally of the opinion that the General Assembly, holding, except as restricted by the Constitution, the residuum of power and, as "parens patriae," the prerogatives of sovereignty, can add to or subtract from the common law powers of the Attorney General, to the same extent as the Sovereign could have done before the State came into being, and when the powers were created by or acquiesced in by the Sovereign. If this were not true then much legislation concerning sheriffs, coroners and other constitutional officers of common law origin, whose duties are not expressly defined, would suffer from the same taint. Thus could be brought into question much legislation enacted through the century and a half of the State's existence, touching the care and custody of prisoners and the manner of selecting juries, and countless other modifications of common law duties of an officer, where merely the name of the office was carried into the Constitution. Thus as of 1776, when the first Constitution was adopted, would be crystallized many of the most important relations of society, and the people, through the legislative branch, could neither make needed and desirable improvements, nor, possibly, even correct abuses. Id. p. 407-408.

Thus, the Supreme Court engaged in an analysis of the origin of the rights, duties and powers of a constitutional office similar to the sheriff. No powers are stated or inherent in the various constitutions of Delaware but derive from the common law except as restricted or detailed by statute. As with the Attorney General, the legislature must be able to make improvements or correct abuses in the common law regarding the Sheriff.

Appellant Sheriff in his Opening Brief at page 9 attempted to distinguish the Darling case from the one now being considered. In a circuitous argument, the Sheriff alleged he was not bound by Darling because the Attorney General's "core power" was to investigate and prosecute whereas the Sheriff's "core power" was to arrest criminals. The term "core power" was not defined, but that is irrelevant. The issue is not what power may or may not have existed. The issue is whether the General Assembly may prescribe the powers and duties of constitutional officers when the Constitution is silent in that regard. Applying Darling to this case requires that the Sheriff's duties be determined by the General Assembly. The Delaware Constitution of 1897 does not detail the duties of the Sheriff just as it was silent on the duties of the Attorney General. Thus, the Court should affirm the constitutionality of HB 325.

II. APPELLANT SHERIFF HAS WAIVED ITS ALLEGATIONS BELOW AGAINST SUSSEX COUNTY

A. Question Presented: Has the Appellant Sheriff waived its allegations against Sussex County stated in the Second Amended Complaint?

Answer: Yes.

B. Standard of Review: On appeal from the grant of summary judgment the Supreme Court reviews the order *de novo*. Sternberg v. Nanticoke Memorial Hos. Inc., 62 A.3d 1212 (Del.2013).

C. Merits of the Argument

The Opening Brief argues solely the constitutionality of HB 325. It fails to address any of the issues against Sussex County set forth in the Second Amended Complaint. The Court below found the allegations against Sussex County to be moot, but Appellant Sheriff did not preserve the issues on appeal. Thus, the arguments and issues are deemed waived under Supreme Court Rule 14(b)(A)(3).

CONCLUSION

Appellant Sheriff has admitted the original office of Sheriff as adopted from England was a statutory office. He also admitted no powers of a sheriff are stated in the Delaware Constitution. He has failed for the reasons set forth herein to justify why now he should not be subject to the statutory laws of Delaware in light of the power vested in the General Assembly to enact laws to amend or repeal prior statutes or common law when not in direct derogation of the Constitution. The presumption must be that HB 325 is valid.

Respectfully submitted,

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