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AFFIDAVIT.

Filed January 8, 1918.

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

JAMES J. MURPHY, of full age, being duly sworn according to law on his oath, says:

On December 4, 1916, the Board of Chosen Freeholders of the County of Hudson, by resolution passed at a regular meeting of said Board, appointed me County Counsel of said County for the term prescribed by law (to wit, two years) under Chapter 89 of the Laws of 1900. I have ever since been in possession of said office and performing all the duties relating thereto up to the present time.

On this 7th day of January, 1918, said Board of Chosen Freeholders adopted the following resolution namely:

> "*Resolved*, That the services of James J. Murphy as County Counsel be dispensed with from and after the passage of this resolution, and he is hereby relieved of further duties;
>
> "*Be it further resolved*, That he be and he is hereby dismissed and deposed as such."

Thereafter and at the same meeting held this day, the said Board passed the following resolution namely:

> "*Resolved*, That John J. Fallon be and he is hereby appointed County Counsel for the unexpired term prescribed by law at a salary of $6,000 per annum, to be paid semi-monthly."

I am advised that the resolution or resolutions above quoted affecting myself are unlawful, and that I have a fixed term not expiring until Decem-

ber, 1918, and I desire to test the validity of said resolution by certiorari.

JAMES J. MURPHY.

Subscribed and sworn to before me at Jersey City, N. J., this January 7, A. D. 1918.

DAVID A. NEWTON,
Master in Chancery of
New Jersey.

RULE TO SHOW CAUSE.

Entered January 8, 1918.

On reading and filing the affidavit of James J. Murphy, it is ordered, that the Board of Chosen Freeholders of the County of Hudson show cause before me on Tuesday, January 15, A. D. 1918, at eight o'clock p. m. at my chambers, No. 765 High street, in the City of Newark, why a writ of certiorari should not be allowed to remove to this Court the following resolution or resolutions passed by said Board of Chosen Freeholders on January 7, 1918, namely:

> "*Resolved*, That the services of James J. Murphy as County Counsel be dispensed with from and after the passage of this resolution, and he is hereby relieved of further duties; be it further,
>
> "*Resolved*, That he be and he is hereby dismissed and deposed as such."

And it is further ordered, that depositions be taken under this rule by either party on two days' notice to the other.

And it appearing that John J. Fallon may claim to be interested in the premises, it is ordered that

in addition to serving a copy of this rule upon the Clerk of said Board of Chosen Freeholders a copy be also served upon said John J. Fallon that he may have an opportunity to be heard if he so desires; said copies to be certified by the prosecutor, which shall be sufficient notice of this rule.

And it is further ordered, that until the hearing of this rule and the further order of this Court all action founded upon the resolution or resolutions above quoted be and the same hereby is stayed.

F. J. SWAYZE,
J. S. C.

Rule granted January 7, 1918, and entered January 8, 1918.

On motion of
JAMES J. MURPHY,
Attorney *pro se*.

Served January 8, 1918.

WRIT OF CERTIORARI.

Allowed January 15, 1918.

NEW JERSEY, ss.

The State of New Jersey to the Board of Chosen Freeholders of the County of Hudson:

[SEAL]

GREETING:

We being willing for certain reasons to be certified of the following resolutions, adopted by you on the seventh day of January, nineteen hnndred and eighteen, namely:

"*Resolved*, That the services of James J. Murphy as County Counsel be dispensed with from and after the passage of this resolution, and he is hereby relieved of further duties;

"*Be it further resolved*, That he be and he is hereby dismissed and deposed as such,"

do hereby command you that the said resolutions, together with all things touching and concerning the same, to our Supreme Court to be held at Trenton on the nineteenth day of January, A. D. nineteen hundred and eighteen, you do certify and send, together with this writ, that therein may be done what of right and according to the Constitution and laws of this State ought to be done.

WITNESS, William S. Gummere, Esq., Chief Justice of our said Supreme Court at Trenton aforesaid this fifteenth day of January in the year of our Lord, one thousand nine hundred and eighteen.

WM. C. GEBHARDT,
Clerk.

JAMES J. MURPHY,
Prosecutor,
Attorney, *pro se*.

ALLOCATUR.

I allow this writ; let it be sealed. Both parties may take affidavits to be read on the hearing of this writ.

F. J. SWAYZE,
J. S. C.

RETURN TO WRIT.

Filed January 19, 1918.

I, WALTER O'MARA, Clerk of the Board of Chosen Freeholders of the County of Hudson, in obedience to the command of the annexed writ of

certiorari, do hereby make return as in said writ is commanded, as follows:

Regular meeting of the Board of Chosen Freeholders of the County of Hudson, held January 7, 1918.

Present, all the members.

Freeholder Wren offered the following resolutions:

"*Resolved*, That the services of James J. Murphy as County Counsel be dispensed with from and after the passage of this resolution, and he is hereby relieved of further duties.

"*Be it further resolved*, That he be and he is hereby dismissed and deposed as such."

which were unanimously adopted.

Witness my hand and the seal of said County this January 19, A. D. 1918.

WALTER O'MARA,
Clerk of the Board of Chosen Freeholders of the County of Hudson.
[SEAL]

STIPULATION OF FACTS.

It is hereby stipulated as follows: That the Board of Chosen Freeholders of the County of Hudson, organized on the first Monday in December, 1900, under Chapter 89 of the Laws of 1900, and John Griffin were appointed County Counsel for successive terms thereunder; that on the adoption of the Act of 1912 (P. L. 1912, p. 228) Mr. Griffin was in office under an appointment made in December, 1910; that at the Presidential primary election held in the Spring of 1912 the aforesaid Act of 1912 was adopted by the voters

of the County of Hudson; that the resolutions of which the annexed are copies, were duly passed by said Board of Chosen Freeholders of the County of Hudson; that the prosecutor, being in possession of the office of County Counsel under previous appointments, was latterly appointed on December 4, 1916, as said board was then constituted in membership; that three Freeholders' terms expired in 1917, and three others were elected in their stead, who assumed office on the first Monday in January, 1917; that prosecutor filed a bond as required by law; that on January 7, 1918, at 11 A. M. prosecutor took and subscribed and filed with the Clerk of the Board of Freeholders an official oath as County Counsel, but did not file such oath before entering upon the performance of his duties after his appointment of December 4, 1916; that the resolution under review in this case having for its purpose the dismissal of prosecutor from office was adopted at the meeting of the Board of Chosen Freeholders of Hudson County held on January 7, 1918, at noon; that subsequent to the appointment of prosecutor on December 4, 1916, the terms of six members of the Board of Freeholders who were in office when prosecutor was appointed had expired, and six others elected in their stead; that at the aforesaid meeting held on January 7, 1918, said Board of Chosen Freeholders passed a resolution appointing John J. Fallon as County Counsel in the place and stead of said prosecutor; that the prosecutor is acting as County Counsel under the resolution passed December 4, 1916.

JAMES J. MURPHY,
Pro se.

JOHN J. FALLON,
Attorney for Respondent.

Dated, January 18, 1918.

STIPULATION OF FACTS

MEETING OF DECEMBER 5, 1912.

By Freeholder Weir:

WHEREAS, All the officers and employees of this Board now in the employ of this Board, have been appointed for the statutory term prescribed by law, or the unexpired portion thereof; and

WHEREAS, Under the provisions of Chapter 158 of the Laws of 1912, the terms of office of the members of this Board have been extended until the first Monday in January, 1913, and because of this provision there may be some doubt as to the expiration of the terms of office of the said officers and employees of this Board; and

WHEREAS, This Board deems it wise to remove any doubt in the matter in order that the salaries for the respective services of said officers and employees for the current month may be properly paid; therefore be it

Resolved, That the terms of office of all the present officers and employees of this Board be and the same are hereby extended to the first Monday in January, 1913, and until their successors are appointed and qualified, if such action by this Board be necessary; and be it further

Resolved, That the salaries of all such officers and employees of this Board for the current month and to and including the first Monday in January, 1913, be and the same are hereby ordered paid in the usual manner, by warrants drawn on the sixteenth and first days of the month, as they respectively become due, computed upon the certificate of the heads of the

respective departments, showing actual time and service rendered, said warrants to be signed by the Director and Clerk of this Board and countersigned by the County Collector, without further action by this Board on the same.

Adopted by vote of 21 members present.
Nays—none.
Absent—10.

MEETING OF JANUARY 6, 1913.

By Freeholder Caparn:

Resolved, That the following named persons, be and they are hereby appointed to the positions, in the employ of this Board set opposite their respective names, at the respective salaries fixed, for the terms prescribed by law, to wit:

Officers of the Board.	*Annual Salary.*
John Griffin, County Counsel . . .	$6,000

MEETING OF MARCH 27, 1913.

Resolved, That Thomas G. Haight, a practicing counselor of law in this State, be and he is hereby appointed to the position of County Counsel to fill the vacancy caused by the resignation of John Griffin. The compensation for such service shall be at the rate of six thousand dollars ($6,000) per annum, payable in equal semi-monthly installments on the first and sixteenth days of each month as the same become due, by warrants signed by the Director and Clerk of this Board and countersigned by the County Collector without further action by this Board on the same.

MEETING OF FEBRUARY 19, 1914.

Resolved, That James J. Murphy, a practicing counselor at law of this County be and he

is hereby appointed to the position of County Counsel, to fill the vacancy caused by the resignation of Thomas G. Haight, to fill the unexpired term prescribed by law, to take effect from February 24th, instant. The compensation for such service shall be at the rate of six thousand dollars ($6,000) per annum, payable in equal semi-monthly installments on the first and sixteenth days of each month as the same become due, by warrants signed by the Director and Clerk of this Board, and countersigned by the County Collector, without further action by this Board on the same.

Adopted by the following vote:

Yeas—seven.

Nays—none.

Absent—Freeholder Heller.

Excused from voting—Freeholder Lally.

MEETING OF DECEMBER 7, 1914.

Resolved, That the following named persons, be and they are hereby appointed to the positions, in the employ of this Board set opposite to their respective names, at the respective salaries fixed, for the terms prescribed by law, to wit:

Officers of the Board.	*Annual Salary.*
James J. Murphy, County Counsel.....	$6,000

Adopted by the following vote:

Yeas—eight.

Nays—one, Freeholder Lally.

MEETING OF DECEMBER 4, 1916.

Resolved, That the following named persons, be and they are hereby appointed to the positions, in the employ of this Board set opposite

to their respective names, at the respective salaries fixed, for the terms prescribed by law to wit:

Officers of the Board.	*Annual Salary.*
James J. Murphy, County Counsel	$6,000

Adopted by the following vote:
Yeas—six.
Nays—three.

MEETING OF JANUARY 7, 1918.

Resolved, That the services of James J. Murphy as County Counsel be dispensed with from and after the passage of this resolution, and he is hereby relieved of further duties;

Be it Further Resolved, That he be and he is hereby dismissed and deposed as such.

Resolved, That John J. Fallon be and he is hereby appointed County Counsel for the unexpired term prescribed by law at a salary of $6,000 per annum, to be paid semi-monthly.

Adopted by the following vote:
Yeas—nine.
Nays—none.

REASONS.

Filed January 23, 1918.

The prosecutor writes down the following reasons on which he relies for reversal of the resolution brought up for review by the writ of certiorari in above stated cause:

1. At the time of the adoption of said resolutions the prosecutor was incumbent of the office of County

Counsel of the County of Hudson under appointment made by the Board of Chosen Freeholders of said County on the fourth day of December, A. D. 1916, under Chapter 89 of the Laws of 1900, for the term prescribed by law, namely, two years; and the defendant had no legal power to pass said resolutions.

2. Said resolutions were adopted without notice to prosecutor or any hearing thereon.

Attorney *pro se.*

OPINION.

Before Justice Swayze, by consent. Certiorari.

Gilbert Collins and James J. Murphy *pro se.*

John J. Fallon, contra.

SWAYZE, J.

The prosecutor seeks to set aside certain resolutions which stand in the way of his asserting his title to the office of counsel of Hudson County. He is still in possession of the office. The case is within the rule of Moore v. Borough of Bradley Beach, 87 N. J. Law, 391; certiorari is a proper remedy unless the defendant's preliminary objection is valid that by reason of the failure of the prosecutor to take and file an official oath, the office was vacant when the resolution was passed and his successor appointed. The prosecutor claims that he was elected County Counsel in December, 1916. No oath of office was taken until January 7, 1918, an hour or two before his successor was elected. This oath was filed the same day with the Clerk of the Board of Freeholders. The statutory provision as to the

oath on which the defendant relies is the Act of 1906 (P. L. 13), C. S. 3491, page 137.

A question arises as to the applicability of this statute to County offices. The act requires persons elected or appointed to any office in any town, township, borough or other municipality to take an oath before entering on the duties of his office and to file it with the Clerk of the municipality in which he shall have been elected or appointed. The specific question is whether the words "other municipality" were meant to include counties. That the word "municipality" sometimes includes counties has been decided, Union Stone Company v. Freeholders of Hudson, 71 N. J. Equity, 657; Herman and Grace v. Freeholders of Essex, 71 N. J. Equity, 541, affirmed on opinion 73 N. J. Equity, 415; both of these cases were cited recently by this Court in considering the meaning of the words "municipal board or body." Burtis v. Haines, 102 Atl., 355.

I do not attribute much importance in this case to the argument that the words with which the words "other municipalities" are here associated denote municipal corporations of a different character from counties. The broad connotation of "towns" is sufficiently demonstrated by the decision in Van Riper v Parson, 40 N. J. Law, 1. I am more impressed by the contention that the Act of 1906 should be limited because it was evidently intended for the relief of a situation that had arisen in boroughs. Smith v. Petty, 73 N. J. Law, 333. The force of this argument is lessened by the fact that while the difficulty to be cured had arisen in boroughs, the relief was extended by name to towns and townships and also to the more indefinite, or at any rate, wider class (other municipalities. This indicates that the Legislature meant to pass an act

that would afford relief wherever the difficulty arose. This perhaps explains the language of Section 2—that is, "any of the municipalities mentioned in the first section of this act, *or of this State.*" Such general language as "municipalities of this State" ought to be held to include all municipalities which might chance to need the remedy. It seems at least possible that a County officer might fail to take the oath at the proper time and yet might take it before his term began and thus bring himself within the healing of Section 2.

Where an oath is required, it is a prerequisite to full investiture with the office. Manahan v. Watts, 64 N. J. Law, 465; Hayter v. Benner, 67 N. J. Law, 359. If I am right, there was a vacancy in the office now in question from December, 1916, to January 7, 1918. This was not cured by the taking of the oath at 11 A. M., on January 7, 1918.

Section 2 only authorized the taking of the oath before the commencement of the term. The particular case which led to the statute was a case where the Legislature had declared that in case of failure to take the oath, the office should be vacant. If in a case where there was no such provision, the oath might be taken at any time no curative statute would have been necessary. The fact that the Legislature passed a curative statute is persuasive that in its judgment, there would, in the absence of a statute, be a vacancy. It is manifestly desirable that public officers should act under the sanction of an official oath, and there is no hardship in treating their failure to take an oath as equivalent to a vacation of the office, especially as it is probable that the taking of the oath is in most cases the only formal acceptance of the office.

No harm comes to the public since the acts of de facto officers are valid as to outsiders. Rosell v. Board of Education, 68 N. J. Law, 498, affirmed on opinion 70 N. J. Law, 336; Anderson v. Myers, 77 N. J. Law, 186.

The certiorari will be dismissed with costs.

RULE DISMISSING WRIT.

Filed January 31, 1918.

The Court having inspected the resolution passed by the Board of Chosen Freeholders of the County of Hudson on January 7th, 1918, and all proceedings touching and concerning the same, as contained in the return to the writ of certiorari issued in this cause, the reasons for setting aside said resolution, the stipulation of facts signed by the prosecutor and by the attorney for the defendant in the above stated cause, and the arguments and briefs of counsel for the respective parties having been duly considered;

It is, on this 30th day of January, 1918, ordered, that the said writ of certiorari be dismissed.

Entered January 31, 1918.

On motion of

JOHN J. FALLON,

Attorney of the Board of Chosen Freeholders of the County of Hudson.

A true copy.

WM. C. GEBHARDT,

Clerk.

NOTICE OF APPEAL.

Filed January 31, 1918.

To John J. Fallon, Esq.,
Attorney of Defendant.

Take notice, that the prosecutor appeals to the Court of Errors and Appeals from the whole of the judgment entered in above stated cause on the following ground:

The Supreme Court dismissed the certiorari of the prosecutor; whereas, for both or one of the reasons assigned by the prosecutor in said Court, the resolutions brought up for review by said writ should have been reversed, set aside and for nothing holden. Said reasons, which are hereby re-stated as grounds of appeal, were:

1. At the time of the adoption of said resolutions the prosecutor was incumbent of the office of County Counsel of the County of Hudson under appointment made by the Board of Chosen Freeholders of said County on the fourth day of December, A. D. 1916, under Chapter 89 of the Laws of 1900, for the term prescribed by law, namely, two years; and the defendant had no legal power to pass said resolutions.

2. Said resolutions were adopted without notice to prosecutor or any hearing thereon.

JAMES J. MURPHY,
Attorney *pro se.*

New Jersey
Court of Errors and Appeals.

JAMES J. MURPHY, *Prosecutor-Appellant,* *vs.* THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, *Defendant-Respondent.*	*On Certiorari.* *On Appeal from Supreme Court.*

Brief for Prosecutor-Appellant.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Supreme Court dismissing a writ of certiorari allowed the prosecutor to review the following resolutions adopted by the defendant January 7, 1918:

> "*Resolved*, That the services of James J. Murphy as County Counsel be dispensed with from and after the passage of this resolution, and he is hereby relieved of further duties; be it further,
>
> "*Resolved*, That he be and he is hereby dismissed and deposed as such."

At the same meeting the Board passed the following resolution:

> "*Resolved*, That John J. Fallon be and he is hereby appointed County Counsel for the unexpired term prescribed by law at a salary of $6,000 per annum, to be paid semi-monthly."

On the same day Mr. Justice Swayze granted a

rule to show cause why a certiorari should not issue to review the resolutions first above quoted, and directed that a copy of the rule be served upon Mr. Fallon as well as the Board of Chosen Freeholders. This rule ordered that all proceedings based upon the resolutions first above quoted be stayed, and was duly served.

On the hearing of the rule to show cause it was agreed by counsel that it should be turned into a writ of certiorari and be forthwith heard before Mr. Justice Swayze sitting for the Supreme Court.

Such a writ was allowed, with leave to take affidavits. The facts were stipulated; reasons were filed, and the cause proceeded to final determination.

The prosecutor's complaint was that he held for a fixed term under appointment for two years made December 4, 1916, which would not expire until December 4, 1918; that the Board of Chosen Freeholders had no legal power to remove him, and that the resolutions attempting to do so were adopted without notice or hearing (see Reasons, page 10). The Court did not pass upon the question of the prosecutor's tenure of office, Mr. Justice Swayze being of opinion that Chapter 3 of the Laws of 1906, requiring all officers elected or appointed in "towns, townships, boroughs and other municipalities of this State" to take and file an official oath before entering upon the execution of their duties, applied to county officers, and dismissed the writ, because although Mr. Murphy had taken and filed such an oath on January 7, 1918, an hour before the meeting of the Board of Chosen Freeholders at which the resolutions under review were adopted, he was not a lawful incumbent of the office because he had not taken and filed the oath before entering on the duties thereof at the time of his appointment in December, 1916. Justice Swayze conceded in the

opinion filed in the cause that had the prosecutor been a lawful incumbent of the office certiorari was the proper remedy to remove the obstructing resolutions brought up by the writ. For the prosecutor it was contended that the Act of 1906 did not apply to county officers, and that even if it did so apply lawful incumbency began as soon as the oath was taken and filed, inasmuch as there was no provision of forfeiture for not taking and filing the oath; but this contention did not prevail.

From the judgment of dismissal the present appeal was taken.

The questions involved are:

1. Does Chapter 3 of the Laws of 1906 apply to county officers?

2. If so, did not the taking and filing by the prosecutor of his official oath make him thereafter a lawful incumbent of his office secure against disturbance therein until the end of his term (there being no provision for forfeiture); or at least entitle him to a hearing on charges duly preferred?

3. Is certiorari the proper remedy?

4. Is the prosecutor correct in his contention that he was lawfully appointed December 4, 1916, for a term of two years?

Specification of the Grounds of Appeal.

The Supreme Court dismissed the certiorari of the prosecutor, whereas, for both or one of the reasons assigned by the prosecutor in said Court, the resolutions brought up for review by said writ should have been reversed, set aside and for nothing holden. Said reasons were:

1. At the time of the adoption of said resolutions the prosecutor was incumbent of the office of

County Counsel of the County of Hudson, under appointment made by the Board of Chosen Freeholders of said County, on the 4th day of December, A. D. 1916, under Chapter 89 of the Laws of 1900, for the term prescribed by law, namely, two years; and the defendant had no legal power to pass said resolutions.

2. Said resolutions were adopted without notice to prosecutor or any hearing thereon.

BRIEF OF THE ARGUMENT.

I.

Chapter 3 of the Laws of 1906 does not apply to County Officers.

This statute reads as follows:

> "An Act relative to the official oaths of officers heretofore or that may hereafter be elected or appointed to office in the towns, townships, boroughs and other municipalities of this State.
>
> "Be it enacted," etc.
>
> "1. Every person elected or appointed to any office in any town, township, borough, or other municipality of this State, shall, before entering upon the execution of the duties of the office to which he has been or shall be appointed or elected, take and subscribe an oath or affirmation that he will faithfully and impartially discharge the duties of his office and file the same with the clerk of such municipality in which he shall be or shall have been elected or appointed as aforesaid.
>
> "2. Any person heretofore elected or appointed to any office in any of the municipalities mentioned in the first section of this act, or of this State, who shall have, prior to the

commencement of his term of office, taken and subscribed and filed with the clerk of such municipality in which he shall have been elected or appointed, the oath or affirmation prescribed by the first section of this act, shall be deemed to have fully and properly qualified as such officer, and shall be entitled to serve for the full term of the office to which he shall have been elected or appointed from the beginning thereof.

"3. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, and this act shall take effect immediately."

Approved February 19, 1906.

The root word "municipal," derived from *municipium*, a free town, was broadened in meaning by Blackstone, who says:

"Thus much I thought it necessary to premise concerning the law of nature, the revealed law, and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations are governed; being thus defined by Justinian, '*jus civile quod quisque sibi populus constituit.*' I call it *municipal* law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one State or nation which is governed by the same laws and customs."

1 Black. Comm., p. 44.

This use of the word was followed by Bentham

and later writers. There has been, however, no broadening of the normal meaning of the word "municipality" when used in common speech. All lexicographers agree. The following is a typical definition taken from the Standard Dictionary:

> "Municipality: a borough, town or city possessed of a charter of incorporation conferring privileges of local self-government; a district enjoying municipal government."

I do not dispute that a county *may* be embraced within the term "municipality" when used in a statute. The question is always one of legislative intent. Standing alone, without light from the context, the normal meaning of the word would not embrace a county; and there is nothing in the statute *sub judice* that evinces any legislative intent to so extend it.

Illustrative cases in this Court are the following:

In *Campbell v. Wright*, 74 N. J. L., 82, affirmed *id.* 609, it was held, quoting from the headnote of the report in this Court, that:

> "'An act relative to the time of election and appointment and terms of office of officers elected or appointed in towns, townships, boroughs and other municipalities in this state,' has no application to the terms of county officers, except those who are elected by the various municipalities specified in the statute to represent them in the county government."

On the other hand, this Court, in *Herman & Grace v. Freeholders of Essex*, 73 N. J. Eq., 415, affirmed a decree advised by Vice-Chancellor Emery, for the reasons given in the Court of Chancery (71 N. J. Eq., 541). The learned Vice-Chancellor held, in

construing a municipal lien law, that "public improvements in cities, towns, townships and other municipalities in this State" would include such improvements in counties. He said (p. 544):

> "The erection of county buildings, such as court houses, jails and other public buildings, are authorized, if not absolutely required by law, in every county, and a construction of this act, *relating mainly to public buildings and the payment for them*, which would exclude counties, while necessarily including every other territorial division and including them for the reason that a county is not or may not be, for some other purposes, technically or strictly called a 'municipality,' seems to me unreasonable, and should not be adopted, especially as such exclusion might invalidate the act by making it special and unconstitutional."

Similar considerations led to a later decision in the Court of Chancery (Garrison, V. C.) in *Union Stone Co. vs. Freeholders of Hudson*, 71 N. J. Eq., 657.

If "municipality" *ex vi termini* includes a county, the labored reasoning of these opinions would have been unnecessary.

There is absolutely no reason for importing to the word "municipality" as used in the Act of 1906 an abnormal meaning. The collocation of "other municipalities" with towns, townships, and boroughs indicates plainly what was in the legislative mind. It is a case of *noscitur a sociis* and the general term "other municipalities" was used to avoid a recital of villages, improvement commissions, etc., etc. This seems to have been the idea of the Supreme Court in *Ludlam vs. Dallas*, 82 N.

J. L., 122, in which case it was held that *cities* were within the provisions of the Act of 1906. Voorhees, J., said:

> "In Wright v. Campbell, 45 Vroom, 83, this court held that the words 'other municipalities,' contained in a similar title in the Act of 1905, page 14, meant a *like* municipality to a town, township, &c.—that is, a municipality possessed of the same characteristics as towns, &c., the leading one being the power to hold an election by the people for offices. This case was affirmed (45 *Id.*, 609), and the reasoning there indirectly leads to the conclusion that the phrase 'other municipalities' is sufficiently descriptive of cities to include them."

Personally, I should be inclined to doubt if cities, and *a fortiori* counties, would be included in the general word "municipalities" in a case where the members of the class are specified and general words added, for the reason given by Blackstone in laying down the rules to be observed with regard to the construction of statutes (1 Black. Comm., p. 88). He says:

> "A statute which treats of things or persons of an inferior rank cannot *by any general words* be extended to those of a superior. So, a statute treating of 'deans, prebendaries, parsons, vicars *and others having spiritual promotion*' is held not to extend to bishops, though they have spiritual promotion, deans being the highest persons named, and bishops being of a still higher order."

This point was evidently not considered in the Ludlam case and is open in this Court.

There is nothing antagonistic to Campbell v. Wright and Ludlam v. Dallas, in the decision of the Supreme Court, cited by Mr. Justice Swayze in the present case of *Burtis v. Haines*, 102 Atl., 355. There the expression interpreted was "other municipal board or body," and it was held that those words were broad enough to include county boards of freeholders. The *ratio decidendi* was that for which I contend, namely, that the legislative intention is to be sought in every case. In the sense in which the words were used in the statute then before the Supreme Court, and indeed in almost every sense that occurs to me, a board of chosen freeholders is a municipal board; but that is a very different thing from saying that a county is a municipality.

It will not do to hold that the word "municipality" in a statute, unexplained by the context, extends to a county. To so hold would lead to great confusion. Take, for example, the Commission Government Act (P. L. 1911, p. 462). Its title is "An Act relating to, regulating and providing for the government of cities, towns, boroughs *and other municipalities* within this State," and the first section of the enactment has the same collocation. It would be startling indeed if it should be contended that the word "municipalities," as used in the title and body of the act, includes counties; and yet there is as much reason to contend for that result as in the Act of 1906, now before this Court.

In the Civil Service Act (P. L. 1908, p. 235) it is provided in section 32 that the word "municipality" in the statute "signifies village, town, township, borough, city or county or other such local civil government as is distinguished from the state government;" but the framers of the act took care to provide a title that should expressly include counties.

That title is, "An Act regulating the employment, tenure and discharge of certain officers and employes of this state, and of the various counties and municipalities thereof, and providing for a civil service commission, and defining its powers and duties."

The true rule of construction undoubtedly must be that the word "municipality" in a statute does not normally include a county, but that the context may give it that signification. I submit that in the case in hand there is no basis for the decision now under review, that the Act of 1906, either in title or enactment, extends to counties.

II:

The taking and filing by the prosecutor on January 7, 1918, of an official oath made him thereafter a de jure incumbent of the office of County Counsel and entitled to protection against obstructive action by the Board of Chosen Freeholders.

It was argued below in behalf of the defendant that the provision in the Act of 1906 that the official oath therein prescribed should be filed with the clerk of the "municipality" required the oath to be filed with the County Clerk. I submit that as to officers appointed by the Board of Chosen Freeholders that corporation, for it is made such by the general act (Comp. Stat., p. 474) is the "municipality" intended by the Act of 1906, if applicable to counties, for it is the body exercising powers of local government within the county. Actions at law or in equity are always brought against the the Board of Chosen Freeholders of a county and not against the county itself. To my mind, however, the statutory requirement only affords an

additional argument for my contention that counties are not "municipalities" within the purview of the Act of 1906.

Of course, the fact that the oath was filed only an hour before the convening of the board at its regular meeting does not deprive the prosecutor of the efficacy of the filing. He was as much an incumbent of the office when the Board attempted to remove him therefrom as if he had filed the oath months before. He had been a *de facto* incumbent since December 4, 1916. He became a *de jure* incumbent before the attempt to remove him. True, the Act of 1906 provides that the person elected or appointed to office shall "before entering upon the execution of the duties of the office" take the oath prescribed, but there is no resultant penalty of forfeiture. In the absence of any such provision a person who has entered upon the duties of an office without taking the prescribed official oath may render his tenure secure by taking and filing one. It goes without saying that an officer who has taken and filed a proper official oath can successfully resist quo warranto even though he failed to take and file the oath before he entered on the duties of the office.

Section 2 of the Act of 1906 has no applicability to the present controversy. Its object was to save municipal officers previously elected or appointed, who had failed to take the official oath within the prescribed time limit and who had thus become subject to forfeiture, but had taken and filed an oath before entering on the duties of the office. *Smith v. Petty*, 73 N. J. L., 333. Mr. Justice Swayze in the opinion in the present case argues that section 2 throws some light on section 1. He says:

"Section 2 only authorized the taking of the

> oath before the commencement of the term. The particular case which led to the statute was a case where the Legislature had declared that in case of failure to take the oath, the office should be vacant. If in a case where there was no such provision, the oath might be taken at any time no curative statute would have been necessary. The fact that the Legislature passed a curative statute is persuasive that in its judgment, there would, in the absence of a statute, be a vacancy."

I do not comprehend this argument. It concedes that section 2 was induced by a case where the Legislature had declared that failure to take the oath would render the office vacant, and it is a plain *non sequitur* that without such a declaration there would be a vacancy. Of course, no curative statute was necessary where there was no time limit, and none was enacted. Section 2 was expressly limited to a situation *preceding its enactment.* The situation to which it was applicable, and probably the one which led to its enactment, is very clearly pointed out by Gummere, C. J., in Smith v. Petty, *ubi supra.* The time limit fixed by the Borough Act for the taking of official oaths was ten days, which gave four days grace after the beginning of the official term. The beginning of terms had been put forward two months, the old officers holding over in the meantime (P. L. 1905, p. 14). It was held that although in the case then before the court the officer had not taken and filed the oath within the ten days, there should be no vacancy if he had done so before the term thus put forward began.

Furthermore, the prosecutor had a right to be judicially heard on the question of whether the filing of his official oath converted his *de facto* in-

cumbency into one *de jure*. Probably this could only be by quo warranto; certainly not by the Board of Chosen Freeholders without charges and opportunity for hearing. *Markley v. Cape May Point*, 55 N. J. L., 104.

III.

Certiorari was the proper remedy for prosecutor.

Assuming that the prosecutor was an incumbent of the office of county counsel either *de facto* or *de jure*, he had a right to review the action of the Board of Chosen Freeholders interfering with such incumbency. This is conceded by Mr. Justice Swayze in his opinion in this case, and the doctrine is well established. *Bradshaw v. Camden*, 39 N. J. L., 116. This decision has been somewhat misunderstood, but has been vindicated and its doctrine redeclared in the recent well considered opinion of Mr. Justice Parker in *Moore v. Bradley Beach*, 87 N. J. L., 391.

Mr. Justice Swayze seems to concede at the end of his opinion that the prosecutor was a *de facto* incumbent, as he undoubtedly was. Such being the case, while it is very true that quo warranto is the only proper method to settle title to office, the prosecutor was not compelled to vacate and bring quo warranto. He had a right to remain in possession and await the attack of Mr. Fallon on quo warranto. *Roberson v. Bayonne*, 58 N. J. L., 325. To help him in his defence against such possible attack, he had and has a right to a review of the resolutions of amotion.

Mr. Murphy, as soon as the resolution attempting to depose him was passed and on the same day, procured from Mr. Justice Swayze a rule to show cause why a certiorari should not issue to review the same, in which rule all action founded on such

resolution was stayed. It was directed that the rule should be served not only upon the Board of Chosen Freeholders, but upon Mr. Fallon, whose interest in the premises appeared in the affidavit on which the rule was based (case, pp. 1, 2).

Mr. Fallon will frankly concede, I have no doubt, that he does not rely upon the attempted appointment of January 7, 1918, which assumes an "unexpired term"—a position directly opposite to the argument he presented in the Court below and will present in this Court. Indeed, the resolution of appointment has been rescinded, although that does not appear in the stipulation of facts.

I proceed, therefore, to discuss the real question in this case, which was not passed upon in the Supreme Court.

IV.

The prosecutor was appointed December 4, 1916, for a term of two years, which has not yet expired.

The following is the pertinent legislation:

On March 22, 1900 (P. L., p. 168; Comp. Stat., p. 529) there was approved, taking effect immediately, "An Act to reorganize the government of counties of the first class in this State." It provided in Section 1, that after the first Monday in December, 1900, counties of the first class should be governed by a chief executive officer to be known as the "county supervisor" and a board of chosen freeholders constituted by election in the various political divisions of the county, and that the terms of office of the freeholders should begin on the first Monday in December next after their election, and that they should hold office for two years and until

their successors should have been elected and qualified. By section 2 the "county supervisor" was to be elected at large in the county, taking office on the first Monday in December next after the election, and hold for two years and until his successor should be elected and qualified.

Section 6 of said act reads as follows:

> "6. The boards of chosen freeholders in counties of the first class, constituted as hereinbefore directed, shall meet for organization on the first Monday in December, nineteen hundred, and thereafter on the first Monday in December next after their election, and shall elect from their own number a director, who shall be the presiding officer of such board, and shall appoint the standing committees thereof; said board shall also appoint a county counsel, a county physician, a county engineer, a warden of the penitentiary, a warden of the county jail, a superintendent of the county almshouse, a superintendent of each county hospital, a physician for the penitentiary, a physician for the county jail, and the physicians for the county hospitals, together with such other officers and agents for the transaction of county business, as may be determined by resolution of said board."

The terms of the officers whose appointments were thus authorized were undoubtedly to be coterminous with the term of the Board of Chosen Freeholders itself; and the Supreme Court so held in *McKenzie v. Elliott*, 77 N. J. L., 43. The controversy in that case was whether an appointment to fill a vacancy was for the unexpired term of the previous incumbent, or for a full term of two years. Swayze, J., said (p. 44):

"First. I think the election of the defendant in May, 1907, if valid, could only have been for the unexpired term of his predecessor, and not for a new term of two years from the date of his own election. The Act of 1900 (Pamph. L., p. 168) does not expressly define the term in case of an election to fill a vacancy, but it evidently contemplates that the term of service shall end with the first Monday of December of every second year, so as to be coterminous with the term of the freeholders. The reasoning of Judge Folger in People v. Potter, 47 N. J. L., 375, cited in relator's brief, is convincing, and is supported by the result in People v. McClave, 99 Id., 83."

Mr. Murphy, the prosecutor, being already in possession of the office of county counsel by appointment for an unexpired term, was on the 4th day of December (the first Monday), 1916, appointed county counsel "for the term prescribed by law," namely, two years, which term of course was still running at the time of his attempted removal on January 7, 1918. This entitles him to a judgment in his favor unless the contention of the defendant with regard to the act of 1912, hereinafter to be cited, shall prevail.

On March 26, 1912, there was approved "An Act to reorganize the government of counties of the first class in this state" (P. L., p. 228). It took effect immediately, but the provisions remained inoperative until assented to by a majority of the legal voters. It was assented to in Hudson County at the Presidential Primary election held in the Spring of 1912. It provided for a Board of Chosen Freeholders of nine members elected by the county at large for three years from the first Monday of January next after their election,

except that at the first election three members should be elected for one year, three for two years, and three for three years, so that thereafter one-third of the members should be elected every year for a term of three years. It was further provided that the Board of Chosen Freeholders constituted and elected under the act should meet for organization on the first Monday of January next after their election and on the first Monday of January of each second year thereafter. The terms of Freeholders in office at the adoption of the act were extended until the first Monday in January following the date when in the absence of the act their terms would expire.

Section 5 of this Act of 1912 reads as follows:

> "All laws, public, general, special or private, in force relating to the board of chosen freeholders in any county when this act goes into effect in such county, shall apply to the board of chosen freeholders of such county as the same shall be constituted or elected under the provisions of this act, so far as the same shall not be inconsistent with the provisions of this act, and the board of chosen freeholders of any county constituted or elected under the provisions of this act shall be vested with all the powers, authority, rights and privileges and shall have imposed upon it all the obligations and duties which are vested in or imposed upon the board of chosen freeholders of such county when this act goes into effect in such county, except where inconsistent with the provisions of this act; and all laws, parts of laws, statutes and parts of statutes, public or private, general or special, in force or in anywise applicable to

> such board of chosen freeholders of such county when this act goes into effect therein be and the same are hereby in all respects continued in full force and made applicable to the board of chosen freeholders of such county constituted or elected under the provisions of this act, except so far as the same may conflict with or be inconsistent with the terms and meaning of this act."

Notwithstanding this plain preservation of existing laws, the contention of the defendant is that in some unexpressed way the terms of officers, if the same would expire in the meantime, were impliedly extended, as the terms of the members of the Board were expressly extended, to the first Monday in January next after the adoption of the act, and that new appointments would be made at the organization meeting of the Board on the first Monday in January after such adoption, for terms of two years, to correspond with the statute requiring reorganization of the Board every second year.

There is no force in this argument. The terms of county officers are variant. True, those named in the Act of 1900, including county counsel, were coterminous with the life of the Board appointing them, but the act affords no *raison d'etre* for implying a continuance of that situation, which indeed would be impossible. It happens that the Act of 1912 was adopted in Hudson County at a time when the terms of the appointive officers were about expiring, but it might well have been otherwise. The act might as well have been adopted in 1913 in mid-term of the officers. Furthermore, under the Act of 1912 the personnel of the Board changes every year to the extent of one-third of its members, so that there is nothing in the notion that the Board

and its officers should have coincident terms. Some such an idea as that now put forward for the defendant was entertained by the outgoing Board of Freeholders in 1912, for as appears by the stipulation of facts (case, p. 7) on the first Monday in December, 1912, after the act of that year had been adopted, the outgoing Board of Freeholders undertook to extend the terms of all officers and employees until the first Monday in January, 1913, and until their successors should be appointed and qualified "(if such action of this Board be necessary)," and they refrained from appointing officers on the first Monday in December, 1912, and on the first Monday in January, 1913, the new Board appointed, among other officers, John Griffin as county counsel "for the term prescribed by law" (case, p. 8); but this theory was not adhered to. On March 27, 1913, Thomas G. Haight was appointed to fill the vacancy caused by the resignation of Mr. Griffin, and on February 19, 1914, Mr. Murphy, upon the resignation of Mr. Haight was appointed to fill the unexpired term prescribed by law (case, p. 8). On the first Monday in December, 1914, the Board set itself right and appointed Mr. Murphy county counsel "for the term prescribed by law," and on the first Monday in December, 1916, again appointed him county counsel "for the term prescribed by law." I submit that there can he no doubt that this last appointment was valid, and that the term began on the first Monday in December, 1916, and is still continuing.

The judgment of the Supreme Court should be reversed and judgment should be ordered setting aside the resolutions brought up by the writ of certiorari.

GILBERT COLLINS,
Of Counsel with Prosecutor-Appellant.

case no 61

New Jersey Court of Errors and Appeals

JAMES J. MURPHY, Prosecutor-Appellant, vs. THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, Defendant-Respondent.	On Certiorari. On Appeal From Supreme Court.

BRIEF FOR DEFENDANT-RESPONDENT.

This is an appeal from a judgment of the Supreme Court dismissing a writ of certiorari allowed the prosecutor to review the following resolution adopted by the respondent January 7, 1918:

> "Resolved, that the services of James J. Murphy as County Counsel be dispensed with from and after the passage of this resolution; and he is hereby relieved of further duties; be it further—
>
> Resolved, that he be and he is hereby dismissed and deposed as such."

Thereafter, at the same meeting, the respondent passed the following resolution:

"Resolved, that John J. Fallon be and he is hereby appointed County Counsel for the unexpired term prescribed by law, at a salary of $6,000.00 per annum, to be paid semi monthly."

On January 7, 1918, Justice Swayze granted a rule to show cause why a writ of certiorari should not be allowed to review the aforesaid resolution relating to the dismissal of James J. Murphy, and in said order it was recited:

"And it appearing that John J. Fallon may claim to be interested in the premises, it is ordered that in addition to serving a copy of this rule upon the clerk of said Board of Chosen Freeholders, a copy be also served upon said John J. Fallon that he may have an opportunity to be heard if he so desires."

On the return of the aforesaid rule to show cause it was agreed by counsel for prosecutor and respondent that it should be turned into a writ of certiorari and be forthwith heard before Justice Swayze sitting for the Supreme Court. The writ was allowed, the facts were stipulated, reasons were filed and the cause proceeded to final determination.

The reasons upon which the prosecutor relied for the setting aside of the resolution brought before the Court for review by writ of certiorari were as follows:

1. At the time of the adoption of said resolutions the prosecutor was incumbent of the office of County Counsel of the County of Hudson under appointment made by The Board of Chosen Freeholders of said County

on the fourth day of December, A. D. 1916, under Chapter 89 of the Laws of 1900, for the term prescribed by law, namely, two years; and the defendant had no legal power to pass said resolutions.

2. Said resolutions were adopted without notice to prosecutor or any hearing thereon.

The Supreme Court did not pass upon the question of prosecutor's alleged tenure of office. It was unnecessary to do so for the reason that the stipulation of facts shows that the prosecutor had failed to take, subscribe and file his oath of office as required by Chapter 3 of the Laws of 1906 (P. L., 1906, page 13), and therefore he was not a lawful incumbent of said office on January 7, 1918. The Supreme Court so determined.

Points for Respondent.

1. Chapter 3 of the Laws of 1906 (P. L., 1906, page 13), applies to county officers.

2. Prosecutor should have taken and subscribed and filed with the County Clerk before entering upon the execution of the duties of the office of County Counsel an oath of office as required by Chapter 3 of the Laws of 1906.

3. Quo warranto—and not certiorari—is the proper remedy for prosecutor to seek redress for his alleged grievance.

4. Prosecutor was not lawfully appointed County Counsel on December 4, 1916.

I.

The prosecutor was not a lawful incumbent of the office of County Counsel on January 7, 1918, when the resolution under review was adopted by the respondent.

Chapter 3 of the Laws of 1906 is entitled:

> "An Act relative to the official oaths of officers heretofore or that may hereafter be elected or appointed to office in the towns, townships, boroughs and other municipalities of this State."

Section 1 provides:

> "Every person elected or appointed to any office in any town, township, borough, or other municipality of this State, shall, before entering upon the execution of the duties of the office to which he has been or shall be appointed or elected, take and subscribe an oath or affirmation that he will faithfully and impartially discharge the duties of his office and file the same with the clerk of such municipality in which he shall be or shall have been elected or appointed as aforesaid."

Section 2 provides:

> "Any person heretofore elected or appointed to any office in any of the municipalities mentioned in the first section of this act, or of this State, who shall have, prior to the commencement of his term of office, taken and subscribed and filed with the clerk of such

municipality in which he shall have been elected or appointed the oath or affirmation prescribed by the first section of this act, shall be deemed to have fully and properly qualified as such officer, and shall be entitled to serve for the full term of the office to which he shall have been elected or appointed from the beginning thereof."

Section 3 provides:

"All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, and this act shall take effect immediately."

Approved February 19, 1906.

The prosecutor contends:

1. That the aforesaid act is not applicable to counties and that therefore he was not required to take, subscribe and file an oath of office before entering upon the execution of the duties of the office.

2. That inasmuch as prosecutor actually took and subscribed and filed an oath of office *on January* 7, 1918, with *the clerk of the Board of Freeholders* such was a compliance with the Statute.

The prosecutor says his lawful incumbency of the office of County Counsel began as soon as such oath was taken and filed by him. Such is not the fact.

Notwithstanding that the prosecutor contends that the aforesaid Act of 1906 is inapplicable to counties, nevertheless, on the day the respondent passed the resolution complained of the prosecutor took and subscribed and filed an oath of office with *the Clerk of the Board of Freeholders* (not with

the County Clerk as required by Statute) thereby evidencing that he deemed it requisite for him to file such oath.

The aforesaid Act of 1906 evidences that the Legislature intended that it should apply to *all* municipalities and that *all* municipal officers should, *before entering upon the execution of the duties of their office,* take and subscribe and file an oath that they would faithfully and impartially discharge the duties of their office.

It would be absurd to consider that the Legislature intended to require municipal officers of all municipal bodies, *other than counties,* to take and subscribe and file an oath of office. Justice Swayze has aptly said in rendering the opinion of the Supreme Court:

> "It is manifestly desirable that public officers should act under the sanction of an official oath."

Justice Swayze also pointed out that by the second section of the aforesaid Act of 1906 it is clearly apparent that the Legislature intended the act to apply to "any of the municipalities mentioned in the first section of this act, *or of this State,*" and that such general language as "municipalities of this State" ought to be held to include all municipalities which might chance to need the remedy.

The words "other municipalities" as used in the aforesaid act should be held to include counties. It was so held in the case of Herman & Grace vs. Freeholders of Essex, 71 N. J. Eq., 541; affirmed on opinion 73 N. J. Eq., 415; and also in the case of Union Stone Co. vs. Freeholders of Hudson, 71 N. J. Eq., 657. Both of said cases were cited recently by the Supreme Court (opinion by Gum-

mere, C. J.) in considering the meaning of the words "other municipal board or body" and it was held that those words were broad enough to include county boards of freeholders.

Burtis vs. Haines, 102 Atl. Rep., 355.

It has been repeatedly held that the Municipal Lien Law (Comp. Stat., page 3315) which provides for a lien in favor of mechanics and material men for work done upon, or material furnished for, any public improvement in "cities, towns, townships, and other municipalities of this State," embraced counties within its scope, although such were not expressly mentioned or referred to in said act.

Burtis vs. Haines, 102 Atl. Rep., 355;
Herman & Grace vs. Freeholders of Essex, 71 N. J. Eq., 541—affirmed 73 N. J. Eq., 415;
Union Stone Co. vs. Freeholders of Hudson, 71 N. J. Eq., 657;
Commissioners of Public Instruction vs. Fell, 52 N. J. Eq., 689;
Garrison vs. Borio, 61 N. J. Eq., 236;
Norton vs. Walter, 63 N. J. Eq., 313.

The prosecutor says it will not do to hold that the word "municipality" in a Statute, unexplained by the context, extends to a county, and that to so hold would lead to great confusion. He cites, for example, the Commission Government Act (P. L. 1911, page 462) the title of which he quotes as "An Act relating to, regulating and providing for the government of cities, towns, boroughs *and other municipalities* within this State." He says it would be startling indeed if it should be con-

tended that the word "municipality" as used in the title and body of said act includes counties, and yet, he says, there is as much reason to contend for that result as in the Actof 1906 now before this court. He evidently overlooks the fact that the title of the aforesaid Act of 1911 was amended by P. L. 1912, page 643, so that the title now reads: "An Act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities, governed by boards of commissioners or improvement commissions in this State."

The Legislature by P. L. 1914, page 253, undertook to amend Section 1 of the Commission Government Act of 1911, so as to expressly provide that the word "municipality" or "municipalities" should not be construed to include counties or school districts, and while said act was set aside (86 N J. L., 48) it nevertheless evidences that the Legislature intended that the Commission Government Act should not apply to counties but feared that it might be so regarded.

The Civil Service Act of 1908, page 235, to which the prosecutor refers in his brief, is inapplicable to the question now before the Court. The title of the Civil Service Act, as well as Section 32 thereof, expressly includes counties.

In Ludlam vs. Dallas, 82 N. J. L., 122, the phrase "other municipalities" contained in the title and body of the Act of 1906, page 13, was held to be sufficiently descriptive of cities to include them.

The prosecutor refers to the case of Wright vs. Campbell, 74 N. J. L., 82; affirmed in 74 N. J. L., 609, in which the Court passed upon P. L. 1905, page 14, and held that said act did not apply to the officers of the Board of Chosen Freeholders of Bergen County, elected by that Board, because

they were not expressly mentioned in the act. The Court pointed out in said case that the words "other municipalities" in the first section of the act and the words "other municipality" in the second section of the act, could not be held to include the county itself or the corporation of the Board of Chosen Freeholders created for the county; and that the first section of the act applies only to municipalities which at municipal or charter elections by the voters elect certain officers, as, for example, chosen freeholders, officers of those municipalities, and that neither counties nor boards of freeholders hold any such elections. The Court also pointed out, that the words "other municipality" in the third and fourth sections of the act must be taken to mean like municipality to town, township, borough, &c., a municipality possessed in the same characteristics as towns, townships, boroughs, — the leading characteristic in said legislation being the power of holding an election by the people for officers. The Court also pointed out (page 84) that the first section of said act clearly applied to the election of chosen freeholders, as they were officers required to be elected in towns, townships, boroughs and other municipalities at the municipal or charter election therein.

In the case of Doyle vs. Bayonne, 54 N. J. Law, 313, the Court held that the words "other municipal boards or bodies" applied to the Board of Education of Bayonne, and that the general words "other municipal boards" following the particular designation of certain bodies, included all bodies or boards having municipal governmental functions, whether legislative or administrative.

In the case of Union Stone Co. vs. Freeholders of Hudson, 71 N. J. Eq., 657, the Court points out numerous instances of the use of the word "Muni-

cipality" in Legislative acts which our Courts have held were applicable to counties, and in which the word "Municipality" was used in speaking of counties, so as to include the County.

See

P. L. 1894, page 170;
P. L. 1892, page 250;
P. L. 1892, page 39;
P. L. 1891, page 92.

The Pierson Act, Chapter 252, Laws of 1916 (P. L 1916, page 525, Section 12) provides that the chief financial officer of the "municipality" shall file in the office of the "clerk of the municipality" a debt statement. The Legislature, in 1917, realizing that thereunder such statement would have to be filed with the *County Clerk,* amended Section 12 of said Act so as to provide for the filing of such debt statement *"in the office of the clerk of the municipality other than a county, and in the case of a county in the office of the Clerk of the Board of Chosen Freeholders,"* thus evidencing that the county was regarded as a "municipality" (P. L. 1917, pages 803, 812).

II.

The taking and filing by the prosecutor of the oath of office as County Counsel as prescribed by the Act of 1906, page 13, was a prerequisite to his full investiture of the office.

Upon the failure of the prosecutor to take and file the required official oath before entering upon the execution of the duties of the office of County Counsel, he was not possessed of legal title to said

office, and consequently there was a vacancy in the office on January 7, 1918, when the respondent appointed John J. Fallon thereto.

Manahan vs. Watts, 64 N. J. L., 465;
Hayter vs. Benner, 67 N. J. L., 359;
29 Cyc., 1386 (b); 1388 (d).

In Manahan vs. Watts, 64 N. J. L., 465-473, the Court declared:

"Whenever certain acts shall be done by an appointee (oath of office and giving bond) before he shall enter on the possession of the office under his appointment, such an act becomes a condition precedent to the complete investiture of his office."

United States vs. LeBaron, 19 How., 73.

"Where an officer is acting without having been sworn into office, he is guilty of an usurpation, even though he may have been elected."

High Rxtr. Legal Rem., 627;
Mayor vs. Penryn Stra., 582.

"Whilst, if he be in possession of an office, as a public officer, all his acts as to the public and as to third parties, are to be deemed and held valid, yet if he be seeking the possession and enjoyment thereof, he will be debarred, if the oath of office be made a necessary prerequisite, and his right or title to the office may be rightly challenged for the want of such oath. Both the election and the oath are necessary to the title and enjoyment. The rule is founded in reason, and universally sustained

by authority. It has been so universally held without dissent that a discussion of the case appears to be entirely unnecesary."

(Citing numerous cases.)

"Without the oath of office, the officer can never acquire rights in that character."

(Citing cases.)

In Hayter vs. Benner, 67 N. J. Law, 359, which was a contest over the office of Councilman of the Borough of Bradley Beach, it appears that the relator failed to take or subscribe on oath or affirmation, faithfully and impartially to discharge the duties of his office. The relator had taken an oath which was not in substantial compliance with the statutory requirement and the Court decided against him.

The Court (opinion by Gummere, C. J.) says:

"The Legislature having prescribed the form of the oath to be used, the taking of the oath essentially in that form is a condition precedent to the complete investiture into the office, and, in contemplation of law, just as much a requisite to its enjoyment as the election itself."

Citing Manahan vs. Watts, 35 Vr., 465-473.

"The relator, having failed to take the oath prescribed by the statute never obtained title to the office of Councilman * * * "

The statute which was considered by the Court in the aforesaid case required the Municipal officer to take and subscribe an oath of office *before* entering upon the discharge of the duties of the office.

In 29 Cyc., 1388 (d), the author says with reference to failure to qualify by taking the oath of office, that in cases in which an officer has failed to take the oath within a specified time, but does so after the time, the courts usually decide that there is a vacancy in the office even where there is no judicial determination to that effect, and if the authority having the power to fill a vacancy has made an appointment, *the Court regards such appointee as the incumbent of the office.*

(Citing cases in Note 46.)

The Prosecutor says that in the absence of a provision in the law requiring the filing of an oath of office "before entering upon the execution of the duties of the office" of a penalty of forfeiture of the office by reason of the failure to qualify by the filing of such oath within the time prescribed by the statute, a person who has entered upon the term of the office without taking the prescribed official oath may render his tenure secure by making and filing one at any time. But respondent contends that to so hold would be to disregard the plain requirement of the statute and thwart the will of the Legislature; and where the statute requires the oath of office to be taken *before* the officer enters upon the execution of the duties of his office, the taking of the oath "is a condition precedent to the complete investiture into the office, and in contemplation of the law, just as much a requisite to its enjoyment as the election itself."

Hayter vs. Benner, 67 N. J. L., 359-360;
Manahan vs. Watts, 64 N. J. L., 465-473;
29 Cyc., 1388 (d).

The prosecutor did not take, subscribe and file his oath of office "before entering upon the execution of the duties of his office," and while he undertook to remedy his omission by filing an oath of office on January 7, 1918, the day when another was appointed to the office of County Counsel in his stead, he filed his oath of office with the Clerk of the Board of Freeholders, and not with the Clerk of the municipality (County Clerk) as required by P. L., 1906, page 13.

When the Legislature by the aforesaid Act of 1906, page 13, declared that persons elected or appointed to any office *shall,* before entering upon the execution of the duties of the office, take and subscribe and file an oath of office, it meant just what it said.

In Haythorn vs. Van Keuren & Son, 79 N. J. Law, 101-105, the Court declared that

> "the presumption is that the word 'shall' in a statute is used in an imperative and not in a directory sense."

And in the case of Van Noort, 85 Atl. Rep., 813-814, the Court says:

> "Affirmative words in a statute make it imperative, if they are absolute, explicit and peremptory, and show that no discretion is intended to be given."

Potter's Dwarris on Statutes, 228.

> "If an affirmative statute introductive of a new law directs a thing to be done in a certain manner, that thing cannot, even although there are no negative words, be done in any other manner."

Cook vs. Kelly, 12 Abb. Prac. (N. Y.), 35;
Com'rs vs. Gains, 3 Brev. (S. C.), 396;
Norwegian Street, 81 Pa., 349.

III.

Quo Warranto—and not certiorari—is the proper remedy for prosecutor to seek redress for his alleged grievance.

The prosecutor in his endeavor to sustain the certiorari proceedings instituted by him relies upon the cases of Bradshaw vs. Camden, 39 N. J. Law, 116, and Moore vs. Borough of Bradley Beach, 87 N. J. Law, 391. He assumes that he was the lawful incumbent of the office of County Counsel and argues that he had a right to review by certiorari, the action of the respondent interfering with such incumbency.

The respondent contends that certiorari is not the prosecutor's proper remedy, and that quo warranto is his proper *and only remedy.*

In Bradshaw vs. Camden, the Court held that a public officer who is in possession of his office might maintain certiorari to remove from his way a proceeding which he APPREHENDS MAY BE USED unlawfully to eject him. If the respondent in this case which is now before the Court had done nothing more than pass a resolution having for its purpose the contemplated dismissal of the prosecutor from the office of County Counsel, he might then, under the authority of said case, review the action of the respondent by certiorari. But it appears in the case now before the Court, that the respondent not only passed the resolution in question *but passed another resolution appointing another person in the*

place and stead of the prosecutor to the office of County Counsel. He therefore had no reason to *apprehend,* that is, to anticipate or expect that the respondent *would* undertake to deprive him of his office, *but he comprehended and knew* that not only was such the purpose of the respondent, but that the respondent *actually effectuated such purpose* by then passing the resolution appointing John J. Fallon in his stead.

It is stipulated in this case that the respondent at the meeting held on January 7, 1918, passed a resolution appointing John J. Fallon as County Counsel *"in the place and stead of said prosecutor."* (See stipulation of facts.)

The case of Moore vs. Borough of Bradley Beach, 87 N. J. Law, 392, upon which the Prosecutor relies, is inapplicable to the case now before the Court. From a reading of said case it appears:

(1) That the prosecutor had not been ousted from his office; and

(2) That there was no resolution or other action of the municipal body declaring his removal from office.

The Court says:

> "The case is therefore not a controversy between an ousted official and a new incumbent, for which the only remedy would be quo warranto."

If, as the prosecutor claims, he remains the lawful incumbent of the office of County Counsel, the resolution which he caused to be brought before the Supreme Court for review by certiorari has done him no harm and he cannot complain thereof.

McFall vs. Dover, 75 N. J. L., 520-522.

The prosecutor's writ of certiorari bringing, as it did, into the Supreme Court, *the respondent alone* was not a lawful mode of trying the title of the appointee John J. Fallon to the office of County Counsel.

Clayton vs. Freeholders of Hudson, 60 N. J. Law, 364.

Notwithstanding it appears by the prosecutor's affidavit upon which the rule to show cause was obtained, that after the respondent had adopted the resolution dispensing with the prosecutor's services, the respondent (at the same meeting) adopted another resolution appointing John J. Fallon as County Counsel, *"in the place and stead of said prosecutor"* (see stipulation of facts), and that by said rule to show cause it appears that said John J. Fallon "may claim to be interested in the premises"; said appointee, John J. Fallon, was not made a party to the proceedings in the above-entitled cause.

Where the purpose of a writ of certiorari is obviously to test the right to an office to which a claimant is not made a party, the writ will be dismissed.

Haines vs. Freeholders of Camden, 47 N. J. Law, 454.

Roberson vs. Bayonne, 58 N. J. Law., 325-328.

The prosecutor's attack upon the resolution in question is but a step in the attack upon John J. Fallon's title to the office of County Counsel to

which he had been appointed by the respondent. For the trial of controversies between rival claimants to office quo warranto and not certiorari is the proper remedy.

McFall vs. Dover, 74 N. J. L., 520.
Clayton vs. Freeholders, 60 N. J. L., 364.
Peterson vs. Freeholders, 63 N. J. Law, 58.
Simon vs. Hoboken, 52 N. J. L., 367.
Bildebach vs. Freeholders, 63 N. J. L., 55.
Miller vs. Washington, 67 N. J. L., 167.

If it appeared in the Supreme Court proceedings that John J. Fallon had actually been inducted into office, it is well settled that for this reason alone the certiorari should be dismissed.

Clayton vs. Freeholders, 60 N. J. L., 364.
Bildebach vs. Freeholders, 63 N. J. L., 58.
Miller vs. Washington, 67 N. J. L., 167.

Whatever may have been said in behalf of the prosecutor before the Supreme Court as to his right to review the resolution complained of, nevertheless, since the dismissal of said writ by the Supreme Court and the entry of judgment thereon, John J. Fallon having actually been inducted into the office of County Counsel, it is well settled that for this reason alone this Court cannot redress the alleged grievance of the prosecutor by his appeal in the certiorari proceedings.

This Court has knowledge that John J. Fallon has assumed the office of County Counsel to which he had been appointed. The Court was so informed when counsel for the prosecutor applied to this Court for a stay pending this appeal, which stay this Court, after hearing, denied.

The only method, therefore, by which the prosecutor may test John J. Fallon's right to continue to occupy the office of County Counsel is by quo warranto proceedings. Even though the resolution in question dispensing with the services of the prosecutor be set aside by the Court, the prosecutor is confronted with the fact that the respondent, by another resolution, which was not brought before the Supreme Court for review in the certiorari proceedings and is not now before this Court, has appointed another in his stead as County Counsel, and it is manifest, therefore, that a controversy arises as between the prosecutor and the person so named by the respondent in the prosecutor's stead. Quo warranto is the only remedy by which such controversy may be decided. Title to office is the real subject of the controversy and such cannot be determined by certiorari.

The review by certiorari determines nothing, judicially, which would be of any efficacy as a bar to or have any other effect in a subsequent proceeding in the nature of a quo warranto.

Haines vs. Freeholders, 47 N. J. L., 454.
McFall vs. Dover, 70 N. J. L., 520.
Roberson vs. Bayonne, 58 N. J. L., 355-358.
Clayton vs. Freeholders, 60 N. J. L., 364.
Simon vs. Hoboken, 52 N. J. L., 367.
Hildebach vs. Freeholders, 63 N. J. L., 55.
Peterson vs. Freeholders, 63 N. J. L., 58.
Miller vs. Washington, 67 N. J. L., 167.

IV.

Prosecutor was not lawfully appointed County Counsel on December 4, 1916.

Chapter 89 of the Laws of 1900, page 168, upon which the prosecutor relies, provides for what may be termed a large Board of Freeholders, which under the provisions of said Act (Section 6) was required to meet for organization *on the first day of December,* 1900, and thereafter on the *first Monday in December next after their election.* Freeholders under said Act were elected for terms of two years.

Section 6 of said Act provides that a Board *as constituted under the provisions of said Act,* shall appoint a County Counsel and other officers therein mentioned.

The Hudson County Board of Freeholders is not now constituted under the provisions of said Act.

Section 11 of said Act provides that a Board *constituted or elected under the provisions of said Act,* shall upon its organization appoint successors to the offices vacated by said Act who shall serve for terms of two years. *The Hudson County Board of Freeholders is not now constituted or elected under the provisions of said Act.* It *was* so constituted and elected prior to 1912.

The legal voters of Hudson County decided at the Presidential Primary Election held in 1912, to adopt another plan for the election of chosen freeholders (P. L., 1912, page 228). Said Act provides that boards of chosen freeholders of counties of the first class shall consist of nine members, who, when elected, shall hold office *for three years from the first Monday of January.*

In the case of Wright vs. Campbell (74 N. J. Law, 85) the Court, in passing upon the Act of

February 15, 1905 (P. L., 1905, page 14), says that those elected at the November election in 1905, took office on the first of January, 1906, *and that the effect of said legislation was to make the annual stated meeting of the board of chosen freeholders of Bergen County at* 12 *o'clock on January* 1 *of each year, instead of* 11 *o'clock on the second Wednesday of May annually, as directed by Section* 6 *of the Act of* 1846. This applied to the Board of Chosen Freeholders of Hudson County also.

The Court of Errors and Appeals, in affirming the decision of the Supreme Court in said case, indicates that the scheme of the legislative acts of 1901, 1905 and 1906 (P. L., 1901, page 41; P. L., 1905, page 14, and P. L., 1906, page 88), was to make the terms of all municipal officers and employees expire on January 1 of each year.

The Board of Chosen Freeholders of Hudson County elected under the provisions of the aforesaid Act of 1912, organized *on the first Monday of January,* 1913, at which time it is conceded by the facts stipulated in this case, a County Counsel (John Griffin) was appointed.

Section 2 of the aforesaid Act of 1912 requires the Board of Freeholders of Hudson County to meet for organization *on the first Monday of January of each second year after* 1913.

Assuming, therefore, for the purpose of argument (but not admitting), that the term of office of the County Counsel who was appointed on the first Monday of January, 1913, was two years, his successors should have been appointed every two years thereafter (1915 and 1917).

The prosecutor was not appointed on the first Monday of January, 1917. He claims he was appointed on the first Monday of December, 1916.

The 1916 Board was unauthorized to appoint a County Counsel to serve the Board which, in accordance with said Act of 1912, was to organize *on the first Monday of January,* 1917, and which was to be differently constituted in membership than the Board of 1916.

> "The Board which will be in office at the time the appointee is to take office shall alone make appointment to such office."
>
> Haight vs. Love, 39 N. J. L., 14-476.
> Dickinson vs. Jersey City, 68 N. J. L., 99.
> Collins vs. Sauer, 89 N. J. L., 143.
> Salter vs. Burke, 83 N. J. L., 152.
> Bownes vs. Meehan, 45 N. J. L., 189.

The prosecutor argues that this term of office—under the provisions of Chapter 89 of the Laws of of 1900, began on the first Monday in December, 1916. He evidently so argues because Section Six of said act provides that boards of chosen freeholders *constituted under the provisions of said act,* shall meet for organization on the first Monday of December, 1900, and thereafter on the first Monday in December next after their election (every two years), and shall appoint a County Counsel, &c.; but since the adoption of the Act of 1912, page 228, the Board of Freeholders of Hudson County does not meet for organization on the first Monday of December, *but meets on the first Monday in January of each year.* The aforesaid section of the 1900 Act indicates that the Board of Chosen Freeholders is authorized to appoint a County Counsel *at its organization meeting.* Consequently such appointment could not be lawfully made on the first Monday in December, 1916. The effect of the adoption

of the Act of 1912, page 228, was to make the organization meeting of the Board of Chosen Freeholders of Hudson County *on the first Monday of January,* instead of on the first Monday in December as directed by Section 6, of the Act of 1900. See Wright vs. Campbell, 74 N. J. L., 82, 85; affd. page 609. By force of P. L., 1905, page 14, the Board of Freeholders of Hudson County prior to 1912, should have held its organization or annual stated meeting on January 1st of each year.

The prosecutor argues that the terms of officers whose appointments were authorized by Section 6, of the aforesaid Act of 1900 were undoubtedly to be co-terminous with the term of the Board of Chosen Freeholders itself, and cites the case of McKenzie vs. Elliot, 77 N. J. L., 43; but it will be readily observed that prosecutor's alleged appointment of December 1916 would not be co-terminous with the term of the Freeholders as elected under the Act of 1912, page 228. The aforesaid decision does not apply to the Board of Chosen Freeholders of Hudson County *which is not constituted under the provisions of the Act of* 1900, *page* 168. A two year term of office would not be co-terminous with the term of the Hudson County Freeholders.

The prosecutor says that the aforesaid Act of 1912, page 228, was adopted in Hudson County at a time when the terms of the appointive officers were about expiring, but such is not the fact. In the printed state of the case "stipulation of facts," it is stated that the aforesaid Act of 1912 was adopted at a *general* election held in November, 1912, but this statement is erroneous. The election was he'd at the Primary Election for Presidential Delegates held in 1912, and the "Stipulation of facts" filed with the clerk of the Supreme Court evidences this to be the fact.

In Salter vs. Burke, 83 N. J. L., 152, it was held that where the law prescribes the term of a municipal officer, it is beyond the power of the appointing board or body to elect for a greater or less term, or for an indefinite term, and an attempt to do so will not constitute a valid appointment, and a vacancy in contemplation of law will still exist in such office. Citing O'Rourke vs. Newark, 66 N. J. L., 109; affirmed page 265.

The prosecutor's appeal should be dismissed and the judgment of the Supreme Court should be affirmed.

JOHN J. FALLON,
Attorney and Counsel with Respondent.

February 26, 1918.