

File with State ex rel. Kirby v. Lee

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE BOARD OF CHOSEN FREE-
HOLDERS OF THE COUNTY OF
ATLANTIC AND LEVI C. AL-
BERTSON, COUNTY COLLECTOR,
Relators and Defendants in
Error,

vs.

EDWARD S. LEE,
Respondent and Plaintiff in
Error.

ON DEMURRER TO
MANDAMUS.
ON WRIT OF
ERROR TO SUPREME
COURT.

BRIEF OF HIGBEE AND COULOMB,
Attorneys of Relators and Defendants in Error.

The mandamus in this case was issued to compel Edward S. Lee, the present County Clerk of Atlantic county, to turn over to Levi C. Albertson, the County Collector, for the use of said county, all fees, etc., collected by him during his incumbency in said office.

The Supreme Court, in an opinion which may be found on page 16 of the State of the Case, gave judgment for the relators, from which judgment the respondent appeals.

The relators justify their application for the writ under the act of nineteen hundred and six (Pamphlet Laws 1906, page 76), which act provides for the payment of a salary to the County Clerk and other officers in lieu of the fees with which he was heretofore compensated. It is contended on behalf of the demurrant that this act does not apply to Edward S. Lee, because of the provision of Section 5, which reads as follows: "This act shall take effect so far as respects said offices at the expiration of the terms of office of the present Surrogates, Registers of Deeds and Mortgages, County Clerks and Sheriffs, respectively." This contention being based upon the theory that the term of Lewis P. Scott, whom Mr. Lee succeeded, has not yet expired.

The following facts are necessary to a complete understanding of the situation:

Mr. Lewis P. Scott was elected County Clerk of Atlantic county at the November election, nineteen hundred and five; he took his office on or about December first, nineteen hundred and five, and if he lived would have continued in office until the November election, nineteen hundred and ten. Mr. Scott died in December, nineteen hundred and seven, after he had served two years, and on December sixth, or thereabouts, Mr. Edward S. Lee was appointed by Governor Stokes; his commission by its terms expired at the November election, nineteen hundred and eight.

The crucial question in this controversy is whether or not the term of Mr. Scott expired at his death within

the meaning of Section 5 of the act of nineteen hundred and six, above referred to; and in solving this question it is necessary to keep in mind:

First. That the provision in question is a saving clause and must be strictly construed.

Endlich on Interpretation of Statutes, Sections 184-186.

Second. That the intention of the Legislation in passing the act in question was to put all the officers therein named on a salary basis, and all provisions of doubtful import must be construed to aid that intention.

Black Com., pp. 60-61.

End. Int. of Stat., Sec. 295.

It is the contention of the relators that the word "term" in the act of 1906 was designed by the Legislature to apply to the persons of the then incumbents in the various offices and not to the office itself; that it was meant to protect the incumbent from any change in the amount or method of compensation as long as he held office under his present commission and not for the purpose of holding the operation of the act in abeyance until the time for which the then incumbent was elected had expired, notwithstanding the then incumbent had ceased to hold office by reason of his death or resignation.

That this is so is manifest from the fact:

1. That a new county clerk is elected at the election next succeeding the happening of the vacancy.
2. That county clerk then elected holds his office for a full term of five years.

3. The history of the legislation shows that it was the intention of the Legislature to put all such officers on a salary basis.

I.

THE WORD "TERM" DOES NOT MEAN THE WHOLE OF THE TIME FOR WHICH MR. SCOTT WAS ELECTED, BECAUSE MR. LEE'S TERM ENDS AND A NEW TERM BEGINS IN NINETEEN HUNDRED AND EIGHT.

The various provisions of the constitution and statutes concerning the length of term of County Clerk, when his successor is elected, and the method of filling vacancies, are as follows:

The Constitution (Article 7, Section 2, paragraph 6) provides that "Clerks and Surrogates of counties shall be elected by the people of their respective counties at the annual elections for members of the General Assembly. They shall hold their office for five years."

Article 5, Section 12, of the Constitution provides that "When a vacancy happens in the office of the Clerk or Surrogate of any county, the Governor shall fill such vacancy and the commission shall expire when the successor is elected and qualified."

Section 139 of the Election Act of 1898 (Pamphlet Laws 1898, page 304) provides that "Any vacancy happening in the office of the Clerk, etc., of any county shall be supplied at the general election next succeeding the happening thereof, unless such vacancy shall happen within fifteen days next preceding such election. In which case such vacancy shall be supplied at the second succeeding general election."

Section 6 of the same act, page 238, provides that "Clerks, etc., shall be elected by the people of their respective counties at the general election once in every five years."

These various statutes and sections of the Constitution are *in pari materia*; that is to say, they all relate to the same subject matter, i. e., the election and term of office of County Clerks. In determining their effect and meaning they must be construed together.

Endlich on Int. of Stat., Sec. 43.

Farrell vs. State, 25 Vr., 421-423.

Perry vs. Orr, 6 Vr., 295-299.

Construing these statutes with respect to Mr. Lee's term under his commission, it is manifest that it expires in December, nineteen hundred and eight.

- (a) Because the commission so provides.
- (b) Because the Constitution provides that when a vacancy happens in the office of Clerk of any county the Governor shall fill such vacancy and the commission shall expire when a successor is elected and qualified.
- (c) Section 139 of the Election Laws provides that such successor shall be elected at the general election next succeeding the happening of the vacancy, unless such vacancy shall happen within fifteen days next preceding such election, in which case the vacancy shall be supplied at the second succeeding general election.

It may be argued that Section 6 of the Election Laws, which provides that a County Clerk shall be elected once in every five years, would prevent an election for County Clerk until November, nineteen hundred and ten. It is sufficient answer to this contention to say that the two

provisions in question are part and parcel of the same general act and effect must be given to each if possible.

Rudderow vs. West Jersey Ferry Co., 2 Vr., 512-517.

In this case the Court said: "Unless it be held that the eighth and ninth sections were designed to modify the general language of the seventh section they are useless and we shall thus wholly reject an important part of the statute, regardless of that rule of construction which requires every part to be so expounded, if practicable, as to give it full effect."

See also *Danforth vs. Paterson*, 5 Vr., 163-167.

Morris & Essex R. R. Co. vs. Commissioners, 8 Vr., 228.

In this latter case, Depue, J., says (page 233) "Statutes are to be so construed that if possible full effect shall be given to all parts of the statute. * * * The effort must, in the first instance, be to harmonize all the provisions of the statute by construing all parts together, and it is only when on such construction the repugnancy of specific provisions to the general language is plainly manifested that the intent of the Legislature, as declared in the general enacting part of the statute, is superseded."

Affirmed in Court of Errors, 9 Vr., 472-477.

In the present case Section 6 is a general provision, and if there is any repugnancy, section six must give way and not section 139. Both sections, however, may stand if section six be construed to apply only in the event that no vacancy by death or resignation occurs.

See also *Bartlett vs. Trenton*, 9 Vr., 64-68.

To give Section 6 the force which must be given it to support this contention is to nullify Section 139. On the other hand, Section 139 can be given its full force and effect if Section 6 be construed to apply only when no vacancy has occurred.

It may also be argued that when the Governor appoints to fill a vacancy under the power conferred upon him by Article 5, Section 12 of the Constitution, that his appointment is for the unexpired term, which in this case would be until December, nineteen hundred and ten. We do not think this contention has any merit, for the following reasons:

(a) There is no doubt that the primary object of the Constitution was to make the office of County Clerk elective rather than appointive, and therefore, that construction will be given which will promote that object and which will not deprive the citizens of their right to elect beyond a reasonable period.

Weller vs. Townsend, 102 N. Y., page 430.

A construction which would give the Governor a right to appoint for the remainder of the term would deprive the people of the right of choice for perhaps nearly the entire term, and in the present instance for more than half the term. Such a construction would be violative of the public policy of the State as expressed in the Constitution.

(b) Had the framers of the Constitution intended the Governor's appointee to hold for the balance of the term they would have said so in clear, definite language.

(c) The language used is that the commission shall expire when a successor is elected and qualified. The Constitution is absolutely silent as to when such succes-

sor shall be elected. The Legislature therefore had the right to provide for that contingency and they did so, in Section 139 of the Election Act.

(d) The Legislature by enacting Section 139 of the Election Act has interpreted this provision of the Constitution in accordance with our views. The greatest deference is shown by the Courts of the interpretation put upon the Constitution by the Legislature in the enactments of laws, and their practical applications of constitutional provisions to the legislative business.

Kenney vs. Hudspeth, 30 Vr., pages 504-533.
Endlich on Int. of Stat., Sec. 527.

(e) Under the Constitution of 1776, Clerks of inferior Courts of Common Pleas, an office now merged in that of County Clerk, were elected by the Council and Assembly and commissioned by the Governor for the term of five years. Under the Constitution of 1844, the County Clerks were elected by the people of their respective counties for five years, and in the event of a vacancy the Governor appointed and the commission expired when a successor was elected and qualified. There was no provision in the Constitution of 1844 as to when a successor was to be elected. Provisions in the Constitution of 1844 with respect to County Clerks were precisely the same as in the Constitution as amended in 1874. In 1846 the Legislature passed an Election Act (Pamphlet Law 1846, page 193.) In the fifth section of this act it was provided that County Clerks should be elected by the people every five years and as often as vacancies occurred, and in the event of a vacancy the election of a successor was to take place at the next succeeding election.

The Constitution as amended in 1874 did not change the provision in regard to County Clerks, and in the Election Act, as contained in the Revision of 1876 (Revision of N. J., page 337), we find the provision of the Election Act of 1846 practically re-enacted in the fifth and one hundred and forty-third sections of that revision. These same provisions appear in the present Election Act, but as sections 6 and 139, the only change being that if the vacancy occurs within fifteen days of the election it is to be filled at the second succeeding election. It will thus be perceived that contemporaneous with the adoption of the fundamental law making County Clerks elective, the Legislature immediately provided that in the event of a vacancy the vacancy was to be filled at the next succeeding election. Even if the constitutional provision were doubtful, the interpretation put upon them by the Legislature at the time of their adoption must have controlling effect in interpreting their meaning.

Kenny vs. Hudspeth, 30 Vr., 320-325.

In this case the Constitution was interpreted by means of what might be termed comparative legislation.

It seems to us that no surer means of interpretation could be used.

So, also, in *State vs. Kelsey, 15 Vr., 1-22-23*, great stress was laid upon the importance of contemporary interpretation as well as upon the enforcement of the construction of a statute of uncertain meaning held for a long term of years, even though the view of the Court might have been contrary to that interpretation had the interpretation been a subject of debate in the earlier years of the legislation. The Court said in this regard (page 22): "The legal rule is succinctly expressed in the

maxim of the civil law '*contemporanea exposito est fortissima*'. The doctrine has such prevalence that it is applicable not only in the interpretation of statutes, but in the interpretation of constitutions of government."

So in *Perry vs. Orr*, 6 Vr., 295, a provision of the constitution regarding imprisonment for debt was construed by the statute contemporaneous with its adoption.

See also State vs. Wrightson, 26 Vr., 126-206.

(f) The office of County Clerk is one of great importance, and there could be not even a momentary vacancy in that office without causing grave peril and harm to the affairs of the county and its citizens. To hold an election, either special or general, requires time to set the machinery in motion, during which time a vacancy in the office would continue. It is apparent that it was the intention of the framers of the Constitution to provide against any such contingency, and they therefore gave to the Governor the right and power to appoint a County Clerk until there could be an election, the time for which election the Legislature has appointed. Mr. Lee was appointed to fill a gap between the expiration of Mr. Scott's term, by his death, and the beginning of a new term by the person elected at the November election, nineteen hundred and eight.

It is submitted, therefore, that Mr. Lee's term expires in December, nineteen hundred and eight, and that his successor must be elected at the November election, nineteen hundred and eight.

It might not be amiss to add that Mr. Samuel Kirby was elected to succeed Mr. Lee at the November election, 1908, and was regularly sworn in and commissioned.

II.

THE PERSON WHO IS ELECTED COUNTY CLERK AT THE NOVEMBER ELECTION, 1908, HOLDS HIS OFFICE FOR THE FULL TERM OF FIVE YEARS.

Does the person elected to the office of County Clerk at the November election, nineteen hundred and eight, hold his office for a full term of five years, or for the unexpired term of Mr. Scott, to wit, until December, nineteen hundred and ten?

(a) In Article 7, Section 2 of the Constitution, there are a number of provisions concerning the term of office of various civil officers of the State and county. In some of these provisions it is provided that when a person is appointed to fill a vacancy he shall hold for the unexpired term. In other provisions, nothing is said touching this point.

For instance, Judges of the Court of Common Pleas when appointed to fill vacancies held for the unexpired term only. (Paragraph 2.)

Justices of the Peace when elected to fill vacancies held for the unexpired term only. (Paragraph 8.)

In particular there is nothing said regarding the office of County Clerk, as to whether the person elected to fill the vacancy holds for the unexpired term or not. Applying the maxim *expressio unius est exclusio alterius* to this constitutional provision, it is manifest that it was the intention of the Legislature that when a person was elected to fill a vacancy in the office of County Clerk he held for the full term and not for the unexpired term.

This interpretation of the Constitution should not be construed to mean that the County Clerk when appointed by the Governor is appointed for the full term of five years—first, for the reasons heretofore discussed, and secondly, because the provisions of Section 2 of Article 7 apply to the normal and regular election and appointment of officers and not to any extraordinary appointment such as we see in the appointment of a County Clerk by the Governor.

Where in a constitution it was provided that some officers were to hold until successor was elected and qualified, and as to others nothing was said, it was held that as to those offices where no provision was made they did not hold until successor was elected and qualified, and that the maxim "*expressio unius, &c.*," applied.

Scarf vs. Foster, 15 Ohio, 137-143.

See also *Endlich on Int. of Statutes, Sec. 533.*

State vs. Wrightson, 27 Vr., 126-201.

(b) Where the term of an elective office is fixed by the Constitution but without any time being established for its beginning or ending, a person elected to the office would be entitled to hold for the period established for the full term thereof, whether he was elected upon the happening of a casual vacancy or at the expiration of a complete term.

23 Enc. of Law, 2nd Edition, page 418.

In neither the Constitution nor in the Election Act nor in any other statute does it appear when the term of County Clerk begins or ends. This office, therefore, comes within the rule above cited, and there being no constitutional or statutory provision limiting the term it

must be held that the person so chosen holds the office for the full term.

(c) Even if there was any doubt as to the meaning of the Constitution in regard to the length of the term of the person elected to fill a vacancy in the office of County Clerk, and I submit there can be no doubt, the weight of authority is decidedly in favor of the proposition that where the constitution or statute has failed to specify the duration of the term of service of a person elected to fill a vacancy, or where the provision upon the subject is of doubtful construction, that the person so chosen holds for a full term and not merely for the unexpired portion of his predecessor's term.

Throop, Public Officers, Secs. 319-320.

In construing a law somewhat similar to the provision in question, it was decided that the person elected was elected to fill a vacant office, and not merely to serve out the vacant term of his predecessor. That a diversity of opinion on this subject has arisen from different applications of the term "vacancies," which has been applied sometimes to the office as contra-distinguished from the term of service, and sometimes to the term of office.

People vs. Green, 2 Wend., 266, and cases cited in Section 320, Throop, Public Officers.

In *Weller vs. Townsend, 102 N. Y. App., 430*, it was held that where a Surrogate was elected to fill a vacancy he was elected for the entire term of six years and not for the unexpired term of his predecessor. In this case it appeared that the Constitution provided that the Surrogate held office for the term of six years.

It is therefore respectfully submitted that the person who will be elected to the office of the County Clerk at the November election, nineteen hundred and eight, holds his office for a full term of five years.

III.

It is manifest that if the person elected in nineteen hundred and eight is elected for a full term, that the term of Mr. Scott is at an end, and, therefore, the person so elected is on a salary and not a fee basis, as provided in Pamphlet Laws 1906, page 76.

IV.

Having considered the term and time of election of the County Clerk, we now come to the question of whether or not Mr. Scott's term has expired within the meaning of Section 5 of the act of nineteen hundred and six, page 78. And this necessitates a consideration of the meaning of the word "term" as used in that section, and it is well to note that the section itself is positive in form and not negative. In other words, it says that "this act shall take effect at the expiration of the present terms, etc.," and not that "it shall not take effect until the expiration of such terms." In other words, the Legislature desired that the act should go into effect as soon as possibly consistent with fairness to the then incumbent and not that the act should be suspended for the longest possible time.

THE WORD TERM, AS USED IN THE ACT OF 1906, MEANS THE TIME THAT MR. SCOTT MIGHT BE IN OFFICE UNDER HIS EXISTING COMMISSION AND NOT THE TIME FOR WHICH HE WAS ELECTED.

First. Because the word "term" must either apply to the office or to the incumbent. In the present case it cannot apply to the office for the reason that a new term begins in 1908 and expires in 1913. It must therefore apply to the incumbent, but the incumbent died in December, 1907, therefore the term died with him and the Act of 1906 immediately became operative.

Second. The word "term" applies to the incumbent because that is the clear intent of the Legislature as discoverable in the light of the history of the legislation, aided by those rules of interpretation and construction which long usage has demonstrated most clearly point out the true meaning of the Legislature.

(a) It is a cardinal rule of construction that every statute should be so construed as to suppress the mischief and advance the remedy.

Randolph vs. Larned, 12 C. E. Gr., 557.

Smith, Exrs. vs. Tucker, 2 Harr., 82-84.

How may that rule be applied in aid of the present controversy? It has long been the policy of the State to place all its officers on a salary basis. The matter has been the subject of party platforms and public discussion for many years. In 1874 the Clerk of Camden county was placed on a salary basis. (P. L. 1874, page 280.) In 1896 the Clerk of the Supreme Court and of the Court of Chancery were placed upon a salary basis. (P. L. 1896, page 50.) In commenting editorily upon this act

the Law Journal (Vol. 19, page 104) says, "It has long been the settled policy of the State to place its officials under a regular salary and where there are fees taken for their services, such fees are to go into the State treasury." In *Fidelity Trust Co. vs. Clerk of Supreme Court*, 36 Vr., 494-499, Garrison, J., says: "It is clearly the legislative policy that the office (Supreme Court Clerk), shall produce an income from the State." It is manifest, then, that the Legislature intended to place all the county officers named in the act on a salary basis and to make their offices a source of profit to the county.

It is reasonable and logical to assume that it was the intention of the Legislature to place Surrogates, County Clerks and Sheriffs on a salary basis. That the act in question was framed to carry out that intention, and the language of the act must be interpreted with reference to that end. It is also well to bear in mind that there is no constitutional prohibition in this State against changing, diminishing or increasing the compensation of officers by general legislation during their terms of office. Nor is there any contractual relation between the incumbent of office and the State and county which would prevent any change in the compensation during his term of office. The Legislature, had it so desired, could have changed the compensation of Mr. Scott at any time during his term of office. Why didn't it? It is reasonable to assume that the Legislature conceived that it might be somewhat of a hardship on the then incumbents to decrease their salary or change their method of compensation during their term of office. While there is no constitutional prohibition, a feeling of fairness, which might almost be called public policy, would prevent such an act. They could not, however, have considered that they were

so bound to any one who might succeed Mr. Scott, for if such an one took office he took with full knowledge of the change in the method of compensation. Was it the intention of the Legislature to say in effect that this salary change shall not go into effect in Atlantic county until nineteen hundred and ten, or did they say in effect that this salary change is not to affect Mr. Scott during his present term?

We think there can be no doubt but that it was the clear intention of the Legislature to protect the then incumbents in office against any change in their compensation and not to protect the term of office of County Clerk considered aside from the incumbent. We think it must therefore be conceded that the section in question was for the protection of the incumbents and not to suspend the operation of the act for any particular length of time.

(b) The general intent of the Legislature being to put the officers named on a salary basis, the saving clause holding the operation of the act in abeyance must be strictly construed so as to forward the operation of the act.

26 Encl. of Law (2nd Ed.), page 680.

The word "term," like every other phrase or expression in legislation, is to be understood in the sense in which it best harmonizes with the subject of the enactment and the object which the Legislature has in view. And even technical terms must give away to this construction.

End. on Int. of Stat., Secs. 73-74-295.

"It is the duty of Courts to execute all laws according to their true intent and meaning. That intent, when collected from the whole and every part of the statute, must

prevail even over the literal import of terms and control the strict letter of the law when the latter would lead to possible injustice and contradictions."

Smith, Com., 662.

The word "term," in its connection in this statute, must be construed so as to give effect to the intention of the Legislature, even though that might possibly do violence to its technical meaning.

End. on Int. of Statutes, Sections 73-74.

(c) It must also be borne in mind, in considering the meaning of the word "term" in this section, that the act is not an act concerning the tenure of office of County Clerks, and that therefore the word "term" need not have the strict technical meaning which it might otherwise possess. The term occurs in a reservation clause in an act concerning salaries, etc., and is used merely for the purpose of indicating when the act is to take effect and not for the purpose of altering the time of service or tenure of office in any way.

(d) While it has been held that the word "term" means a fixed definite period of time, and therefore it might be argued that Mr. Scott's term continued until nineteen hundred and ten, it is apparent that such is not the case in the present controversy. Mr. Scott's term does not continue until nineteen hundred and ten, because an absolutely new term begins in nineteen hundred and eight. Now, the word "term" of office either means a definite fixed time or it means the actual time that the incumbent is in office under his existing commission. In the present case it does not mean an absolute definite fixed time, because there is a new term which begins in nineteen hun-

dred and eight, two years before Mr. Scott's term would have expired had he lived. If it be held that the person elected in nineteen hundred and eight holds only for the unexpired term of Mr. Scott, then there might be some merit in the contention that the word "term," in the section in question, means the whole of Mr. Scott's term, i. e., until December, nineteen hundred and ten. In all of those cases where it was held that the word "term" included the whole time for which a man was elected and not merely the time for which he served, it will be observed that either the statute provided that the vacancy is filled for the unexpired term only, as in

Benton vs. Mayor, etc., 28 Ind., 248.

Parmater vs. State, 102 Ind., 90-95.

Beale vs. State, 49 Ind., 41.

Weaver vs. State, 152 Ind., 479.

Scarf vs. Foster, 15 Ohio, 137.

Or else where there was a matter of public policy involved, as in

Ellis vs. Lennon, 86 Mich., 468.

In this case an Alderman resigned from his position before his term was up, to be appointed Chief of Police. The charter of the city provided that no Alderman should be elected to any office during his term of office. The legality of his appointment was questioned, and he contended that he had resigned and that his term was therefore at an end. The Court said: "This is a narrow view of the statute and gives the language used no purpose whatever. The purpose of the provision was to prevent officers from using their positions to create new offices for themselves or to effect the appointment of

themselves to offices." It will be noted that in this case the word "term" was construed so as to aid the intention of the city charter.

The distinction between these cases and the case at hand is readily to be seen.

I think it obvious that the word "term" in the connection in which it is used in the provision in question has not the narrow technical definition of meaning the entire time for which Mr. Scott was elected.

First, because such a meaning would not carry out the intention of the Legislature as expressed in the act.

It is a clear rule that such construction ought to be put upon a statute as may best answer the intention which the makers had in view.

Thompson vs. Egbert, 2 Harr., 459.

If the object of the Legislature in any enactment of restriction can be plainly gathered from the act, the true rule of construing any phrases that will admit of two meanings is to adopt such meanings as will effect the object to be attained and nothing further.

Doughty vs. Somerville, 1 Zab., 442.

A statute is to be construed so as to carry out the intent of the Legislature, although such construction may seem contrary to the letter of the statute.

Rudderow vs. State, 2 Vr., 512 (reversing 1 Vr., 421).

Associates vs. Davison, 5 Dutch., 415.

The real intention when ascertained will prevail over the literal sense of terms.

Morris Canal, &c., vs. Central R. R. Co., 1 C. E. Gr., 419.

The legislative will is to be ascertained not from the meaning of the text of the statute alone but from such words interpreted in view of the general object of the particular act.

Proprietors, &c., vs. Jones, 7 Vr., 206-209.
(*Affirmed 8 Vr., 556.*)

When statutes are ambiguously worded it is the duty of the Court to search for the motive and intention of the Legislature.

Vroom vs. Smith, 2 Gr., 479-482.

Second, because the statutes relating to the term of County Clerk prevent such a meaning being given it.

(d) It cannot be successfully urged that Mr. Scott's term continues until November, nineteen hundred and eight. The word "term" can only have two intelligent meanings. It either means the whole time for which Mr. Scott was elected and commissioned, *i. e.*, until December, nineteen hundred and ten, or it means the actual time of service of Mr. Scott under his then existing commission; in which event his term expired with his death.

That a term may expire before the time has run for which the incumbent was elected is illustrated by the case of *Weller vs. Townsend, 102 N. Y. App., 430*, where, in the absence of any statutory provision, it was held that a Surrogate elected to fill a vacancy held for the entire

term and not the unexpired term. Also in the case of *People vs. Brundage*, 78 N. Y. App., 407, where it was held that where a person was ineligible to further continue in office because he had reached the age limit, that his term had expired, notwithstanding it would otherwise have had several years to run.

It is obvious, therefore, that the word "term" in Section 5 of the act of 1906 means the length of service of Mr. Scott, and therefore it expired with his death, and the act became operative, and therefore Edward S. Lee, the present County Clerk, is on a salary basis and not a fee basis.

It is respectfully submitted that the judgment of the Supreme Court be sustained and the writ of error dismissed.

HIGBEE & COULOMB,
Attorneys for Relators and Defendants in Error.



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NEW JERSEY

Court of Errors and Appeals.

STATE, EX REL. KIRBY,
Relator, Deft. in Error,
vs.
EDWARD S. LEE,
Deft., Pltff. in Error. } Quo Warranto.

BOARD OF CHOSEN FREEHOLDERS OF
THE COUNTY OF ATLANTIC AND
LEVI C. ALBERTSON, COLLECTOR,
&c.,
Relators, Defts. in Error,
vs.
EDWARD S. LEE,
Respondent, Pltff. in Error. } On Mandamus.

Brief of Plaintiff in Error.

FACTS.

At the November election, 1905, Lewis P. Scott was elected to the office of County Clerk of the county of Atlantic, at which time the County Clerk was entitled to the fees and perquisites of the office of County Clerk as and for his compensation.

The said Lewis P. Scott entered upon the duties of said office of County Clerk immediately following his election in 1905, and continued in said office until the latter part of November, 1907, when he died.

On the thirtieth day of March, 1906, an act of the Legislature of the State of New Jersey, pamphlet laws, page 76, was approved, respecting the offices of Surrogates, Registers of Deeds and Mortgages, County Clerks, etc.

The object of this act is to ultimately place the offices mentioned therein on a salary basis instead of the fee compensation, which the incumbents then received.

The fifth section of said act is in words following:

“Section 5. All acts and parts of acts inconsistent herewith be, and the same are hereby repealed, and this act shall take effect so far as respects said offices at the expiration of the terms of office of the present Surrogates, Registers of Deeds and Mortgages, County Clerks and Sheriffs, respectively.”

At the time of the passage and approval of this act Lewis P. Scott was performing the duties of said office under his election of November, 1905.

Following the death of said Lewis P. Scott, to wit, on the sixth day of December, 1907, Edward S. Lee was appointed County Clerk to fill the vacancy. After his appointment and qualification, the Board of Chosen Freeholders of the county of Atlantic and Levi C. Albertson, Collector of said county, demanded of the said Edward S. Lee that he account to said county for all fees and other perquisites of said office of County Clerk to the said Board of Chosen Freeholders and the said County Collector, and that the said Edward S. Lee keep an accurate account of all fees, etc., and permit the same to be audited by said county, as provided in the act of March 30th, 1906, aforesaid. To this demand Edward S. Lee replied that the act of 1906 was not binding upon him for the reason that said act of March 30th, 1906, had not taken effect in Atlantic county insofar as the office of County Clerk was concerned, because the expiration of the term of office of Lewis P. Scott, who was in office at, and before the time said act was approved, had not arrived. Upon this refusal an al-

ternative writ of mandamus was issued, a demurrer was filed thereto by the respondent, Lee, and after argument before the Supreme Court, that Court overruled the demurrer, with costs, and final judgment was entered overruling said demurrer, and for costs in the Supreme Court. From this judgment this present writ of error is taken.

ARGUMENT.

The question to be determined is whether the act of March 30th, 1906, did or did not go into effect insofar as the Clerk of Atlantic county is concerned upon the death of Lewis P. Scott, to wit, at the end of November, 1907.

It is submitted by the plaintiff in error that it did not go into effect upon the happening of Mr. Scott's death. This leads to a consideration of section five of the act of March 30th, 1906, and particularly to a construction of the words "term of office" used in said section, wherein the Legislature says: "This act shall take effect so far as respects said offices at the expiration of the *terms of office* of the present Surrogates, Registers of Deeds and Mortgages, County Clerks and Sheriffs, respectively."

The language of the fifth section of the act is that it shall take effect at the expiration of the then term of the County Clerks. At that time Lewis P. Scott was in office for a term of five years, and it is submitted that the above contention is conclusive unless the Court shall construe the words "term of office" used in said section five to mean "term of incumbency." It was so construed by the relators in the argument below. It is contended, however, that there is a well recognized distinction between "term of office" and "term of incumbency," that this distinction clearly appears in paragraph 11 of section 2 of article 7 of the New Jersey Constitution, adopted in 1844, as well as in the same paragraph, section and article of our present amended constitution,

which reads as follows: "The term of office of all officers appointed pursuant to the provisions of this constitution, except when herein otherwise directed, shall commence on the day of the date of their respective commissions, but no commission for any office shall bear date prior to the expiration of the term of the incumbent of said office."

It is submitted that this paragraph of the constitution cannot be given effect except by recognizing the distinction between the phrases "term of office" and "time of service of the incumbent." In the case at hand, Lewis P. Scott was elected at the November election, 1905. His term of office was for five years. His term of office did not expire at the time of his death, and under the paragraph aforesaid there would have been no authority in the Governor to have issued another commission for the same office except the authority given in the latter part of said paragraph, which says "that no commission for an office shall bear date prior to the expiration of the term of the incumbent of said office." The time of service of the incumbent expired upon the death of Lewis P. Scott. The term of office did not expire on his death. Hence it is submitted that this distinction between the phrases "term of office" and "time of service of incumbent" is firmly established and not to be confused.

Therefore, the question arises:

Did the "term of office" of Lewis P. Scott expire upon his death?

It is submitted that the "time of service of incumbent," and not "term of office" came to an end upon Mr. Scott's death. Under our constitution a new term of office in the County Clerk can only be filled by popular election. If the term of office expired upon Mr. Scott's death, then there was no power in the Governor to fill the office, as under the constitution that must be done by popular vote. In other words, effect cannot be given to all of the constitutional provisions respecting this office without conceding that the vacancy caused by

Mr. Scott's death was a vacancy in the term to which Mr. Scott had been elected.

In the case of *Jamison vs. Hudson*, 82 Va. 279-282, the Court, speaking on the question of term of office, wherein it had been argued that "term of office" meant the "term of incumbent," said: "The fallacy of the argument of those who maintain the opposite doctrine lies in the assumption that the words 'term of office' necessarily refer to the incumbent, whereas, the fact is, that where the terms of the general classes of judges begin and end at different periods, as they do in our constitution, the words refer to the tenure and duration of the office." At the time of the passing of the act of March 30th, 1906, the terms of the then County Clerks were fixed and determined, and expired at different times, and it is submitted that the construction given to the Virginia case is the construction which should be given to our statute of March 30th, 1906.

The sixth paragraph of section 2 of article 7 of the amended constitution provides that the Clerks and Surrogates shall be elected by the people of their respective counties at the annual election for members of the General Assembly. They shall hold their offices for five years.

It is submitted that where the constitutional provision, such as the above exists, that the term of five years is a successive term of five years, beginning with the date of the first commission, to the same extent as though the constitution had provided for a term of five years beginning on a certain day.

The fact that a County Clerk may or may not have been elected each successive five years from the date of the setting off of Atlantic county is of no moment. As was stated in the case of the *State vs. Wrightson*, 56 Law, 126-208, "Acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the constitution and appointed judicial tribunals to enforce it. A power is frequently yielded to because it is claimed, and it may

be exercised for a long period in violation of the constitutional prohibition without the mischief which the constitution was designed to guard against appearing, or without anyone being sufficiently interested in the subject to raise the question, but these circumstances cannot be allowed to sanction a clear infraction of the constitution."

In the case of *State vs. Stonestreet*, 99 Mo. 361, a statute very similar to our constitution was construed. The Court in that case said: "Sec. 5838, etc., Revised Statute of Missouri, 1879, providing for the appointment of a coal inspector by the Governor to hold office for two years, and until his successor is appointed and qualified, and for filling the vacancy for the remainder of said term; the term begins on the day of the first appointment and continues for two years from and after that date, and the term of office of each succeeding appointee, whether for a full term or part of an unexpired term, will be regulated and controlled by the date fixed by the first appointment."

It is further submitted that the phrase, "term of office," covers a certain definite period, to wit, the duration of the office, and not the duration of the incumbency.

In the case of *People vs. Le Fev'er*, 40 Pac. 882, 21 Col. 218, the Court said: "The words, *term of office*, as used in the constitution with reference to the duration of office of a County Clerk refer to the tenure or duration of the office, and not to the incumbent."

The word, term, when used with reference to the tenure of office, means a fixed and definite period.

State vs. Stonestreet, 99 Mo. 372.

The word "incumbent" is defined in *State vs. Blackmore*, 114 Mo. 340, as follows: "An incumbent of an office is one who is legally authorized to discharge the duties of that office."

In the case of *People vs. Brundage*, 78 N. Y. 403, which case grew out of an election of a judge, who, at the time of his election, was sixty-five years of age, and

whose term of office, fixed by law, was six years, and wherein there was another law providing that no judge should hold office above the age of seventy years, and requiring said judge to file an affidavit stating therein his age, etc., within twenty days after election, thus creating an apparent conflict, the Court held that, while under the law the term of the office of the judge was fixed at six years, upon the election to said office of a man who could not, on account of the age limit, under the law serve six years, that his term of office was by said law shortened and fixed at said duration, as he was not under the law authorized to hold said office after arriving at the age of seventy years. The Court in discussing the question "term of office" said: "The term of office is a fixed period prescribed for holding the office. The causes which create a vacancy to be filled by appointment are uncertain, unknown and unconditional, but the term is made certain and specific."

In the case of *Parameter vs. State*, 102 Ind. 90-95, the Court said: "The word 'term' applies to the office, and not the incumbent holding it."

It is submitted that this definition of the words "term of office" is the one that must be used in the construction of our constitution and laws.

Paragraph 3 of article 5 of our amended constitution provides that "the Governor shall hold his office for three years, to commence on the third Tuesday of January, next, ensuing the election for Governor by the people, and to end on the Monday preceding the third Tuesday of January three years thereafter, and he shall be incapable of holding office for three years next *after his term of service* shall have expired, and no appointment or nomination to office shall be made by the Governor during the last week of his said term." "The time of service" is expressly distinguished here from "term of office."

If the words "term" or "term of office" means incumbency, or term of incumbent, then, if it should happen that during the session of the Legislature the Governor

should nominate some person to office, and such person should be immediately confirmed by the Senate, and after such appointment and confirmation, and within ~~two~~ ^{one} weeks from such nomination the Governor should die or resign, such appointment would be void because it was made within the week preceding the expiration of the Governor's term, whereas if the construction be given to our constitution that has been given in other states, no such condition would arise, because the term of office is a fixed period, and the clause of the constitution would mean that no appointment shall be made by the Governor during the last week of his term so fixed, to wit, the term of three years for which he was elected.

It is submitted that "term of incumbent" is not synonymous with "term of office."

Paragraph 12 of article 5 of our constitution provides that "in case of the death, resignation or removal from office of the Governor, the powers, duties, etc. * * * which devolve for the time being, etc. * * * until another Governor shall be elected and qualified * * * but in said case another Governor shall be chosen at the next election * * *. When a vacancy happens in the office of Surrogate or County Clerk of any county the Governor shall fill such vacancy, and the commission shall expire when a successor is elected and qualified."

It is submitted that no act of the Legislature was necessary to carry into effect this provision of the constitution, except one to provide for ~~proper~~ ^{popular} election. This paragraph, construed together with the sixth paragraph of section 2 of article 7, relating to the County Clerks, is perfect and complete, and it is submitted that paragraph 12 of article 5 aforesaid, shows that the Legislature had before it the question of death, resignation, filling ~~in~~ of vacancies and the question of election, and that the framers of the constitution with all these questions before them, as appears from said section, determined that in the case of a vacancy in the office of Governor such vacancy should be filled by popular vote

at the next or second election, and that in the event of a vacancy in an office filled by the Governor and Senate, the Governor should fill said vacancy until the end of the next session of the Legislature, and that in the event of a vacancy in the office of County Clerk, the framers of the constitution determined that the Governor should appoint some person to fill such office until his successor should be elected. It is submitted that the framers of the constitution herein had in mind, and intended that the Governor should appoint a County Clerk who should hold office until his successor was elected pursuant to the organic law they were enacting, which under the sixth paragraph of section 2 of article 7 was by a general election, held five years after the election of the person who had, by death, resignation or otherwise, vacated the said office.

It is submitted that neither section 6 nor section 139 of the act concerning elections was necessary to carry into effect the above mentioned portions of our State constitution, and in the case of the *State vs. Wrightson*, 56 *Law* 126-201, the Supreme Court said: "Where the constitution prescribes the manner in which an officer shall be appointed or elected, the constitutional prescription is exclusive, and it is not competent for the Legislature to provide any other mode of obtaining or holding it." Therefore, it is submitted that the above sections of the general election law are void and of no effect.

In the case of *Baker vs. Kirk*, 33 *Ind.* 516-521, the question was with regard to the election and term of office of prison inspector. The act pertaining to it read as follows:

"Sec. 2. There shall be elected at the General Assembly of the State of Indiana, at the present session thereof, three directors of the State Prison, one of whom shall hold his office for two years, and two of whom shall hold their offices four years from and after their election aforesaid, and until their respective successors shall

be elected or appointed and qualified. After the first election of directors as aforesaid, as the term of office of any director shall expire, his successor shall be elected in like manner for the term of four years, and until his successor shall be elected or appointed and qualified. Whenever any vacancy shall occur in the office of director by death, resignation or otherwise, or by the failure of the General Assembly to elect as aforesaid, the Governor shall appoint a person to fill such vacancy to serve until the next meeting of the General Assembly."

The Court said: "It is very manifest that the term of office of a prison inspector as fixed by the above law, after the expiration of the term of office of the person first elected, is for the period of four years, and that at the first election after the happening of a vacancy in said office of prison inspector a successor should be elected for the unexpired portion of said term of four years." In that case it was argued, as in this, that the phrase "term of office" did not mean the period of time for which the office might be held, as fixed by law, but the actual time that such director held said office, and that such term of office might expire by reason of death, resignation or removal, etc. The Court, commenting upon this argument, said: "We think such position is wholly untenable." The argument amounts to this: that the phrase "term of office" as used in the section under consideration, does not apply to the office, but to the incumbent of said office; that when the incumbent vacates said office to accept another office of trust and profit his term of office expired, and that it was the duty of the General Assembly to elect his successor for the full term of four years. In our judgment this reasoning is unsound. It would make the *term of office* to depend upon the pleasure or caprice of the incumbent, and not upon the will of the Legislature, as expressed in plain and undoubted language in the law. The construction contended for would be in violation of the well

settled rule of interpretation and construction that "words, if in common use, are to be taken in their natural, plain, obvious and ordinary significations, but if technical words are used they are to be taken in a technical sense, unless a contrary intention clearly appear in either case from the context."

If relators' contention be true, that the term of office expired upon the death or resignation of the incumbent, then there is no legal obstacle in the way of a Senator during the three years for which he is elected Senator resigning his position as such Senator and the next day accepting an appointment of judge, or other office of ^{under the} profit, and have his appointment confirmed by the very ^{institution} body of which he was but yesterday a member, and within the time for which he was originally elected.

If the term of office of County Clerk or Surrogate is ended prior to the expiration of five years from the date of his election upon the death or resignation of such officer, then it follows that it is always within the power of such officer or officers to fix the length of the term of such office, and the constitutional provision that it shall be five years is nil, and the object sought to be obtained by having the terms of office of different length, and filled at different times, is gone. In not a few counties in this State there is a strong leaning toward one or the other of the two principal political parties, while in county matters the popular will is almost evenly divided. The advantage to a person running for an elective county office at the time of a Presidential election is manifest, and if the County Clerk and Surrogate have the power to shorten their terms by resigning there is nothing to prevent them from resigning their office two months before election in a year when a President is to be elected, and the Governor would thereupon appoint to fill the vacancy until the coming election, either the same person or others would become candidates for the office and would be elected for the full term at the same election at which the President would be elected, and such new incumbent four years later might

likewise resign, his successor would be appointed to fill the vacancy, and either himself or some other person again be nominated for the office and again elected at the same time with a president. It is submitted that the framers of the constitution did not intend to make it possible that these different officers could so manipulate their offices that the election to them should, or could be held at the same time as the Presidential election, else why was the term of office of the Sheriff fixed at three years, the term of office of the County Clerk and Surrogate at five years, when the term of office of the President was fixed at four years? If the framers of the constitution had not intended to divorce these elections as fully as possible it would not have prescribed different terms for said different offices.

It is submitted that such a posture of affairs has never been considered to exist in this State.

In the case of *Haight vs. Love*, 10 *Vroom* 14, Mr. Justice Dixon speaking on the question of when a term of office begins, after pointing out the fallacy of the reasoning in the case of *Brodie vs. Camp*, 17 *Cal.* 11, said: "The objections against the rule relied upon by the relator is that it makes the term of office ascertainable only by reference to an act *in pais* of which the officers concerned in the selection of a successor would generally have no knowledge, and perhaps no accurate means of information; that it leaves the beginning and ending of the terms to be fixed, not by the appointing power, but by the appointee."

In this case the judge was speaking of the term of office in defining its beginning and ending, and on page 18 he said: "By this principle the beginning of an official term otherwise undefined is made dependent upon the will of the appointing power, and is ascertainable by reference to the records of their proceedings, and the person chosen is left to be impelled by his interest to put himself forthwith in compliance with the will of those who have chosen him."

It is submitted that the above reasoning is applicable to the present case, to wit, that the incumbent of the office of County Clerk cannot by death or resignation terminate his own official term nor fix the beginning of a subsequent official term; he may terminate his *incumbency of office* but not the *term of office*. Further, the above case coincides with the law in other states, holding that where an office is created and a term of office is determined, but the date of its commencement not specified, the *term of office* will continue for the prescribed period from and after the date of such appointment, and that the first appointment will govern and control the subsequent term of such office.

It is further submitted that while the then Governor had full power to appoint a person to be County Clerk for the unexpired term of Lewis P. Scott, the then Governor had not the power to limit that term to a period prior to the expiration of the term of Lewis P. Scott, deceased, no more than he could have extended the term beyond that period.

People v Lord 9 Mich 227.

Paragraph 12 of article 5 of our constitution provides "that the commission shall expire when a successor is elected and qualified." Hence, the words inserted in said commission, "Be chosen at the General Election 1908," are unwarranted in law and void.

In the case of *State vs. Chapman*, 11 N. E. Rep. 317 (Ind.), the Court held the Governor's commission did not and could not conclusively fix and determine the relator's term of office as judge of said Superior Court, but was merely *prima facie* evidence of the facts recited therein. The law fixes the term, or part thereof, for which upon the facts alleged and admitted the relator was elected, and this term or part thereof could not possibly be extended by the Governor's commission for a longer period, citing the case of *Hench vs. State*, 72 Ind. 297, and *Jetter vs. State*, 1 MacCord, S. C. 233.

In the case of *State vs. Harmon*, 1 Cheves (S. C.) 265, the Court said: "A clerk of a court appointed to fill a vacancy by death, resignation, etc., holds until the expiration of the term of the original incumbent."

The constitution impliedly provides that the commission to Mr. Lee by the Governor shall expire when a successor is elected and qualified. Paragraph 11 of section 2 of article 7 of the constitution distinguishes between "term of office" and "time of service of incumbent." The time of service, the incumbency of Scott, of course, ceased at his death, but his term of office was, by the constitution, five years, and that term continued until another term was legally created. Such new term could come into existence only by an election by the people. The prior term which had been brought into existence by the election of Scott in 1905 will not end until the term of his successor begins, to wit, after the election in November, 1910. Therefore, it is submitted that the vacancy caused by Scott's death was a vacancy in the incumbency of the office, and the commission to Lee will expire when the successor of Scott is elected and qualified, and not until then does the term of Scott expire.

At common law the king was the source of all power and had the disposition of offices. From whatever cause a vacancy occurred in a public office the office reverted to the king to be filled by him again. Consequently, there could be, at common law, no vacancy in the term of a public office.

At common law when a vacancy happens by death, resignation or removal, the term is gone and the vacancy reverts to the people. Whether, therefore, the vacancy is in the office or incumbency at common law and reverts to the people to be filled for the prescribed term, or whether the vacancy is in the term, and the unexpired term is to be filled, depends upon the language and construction of our constitution.

This leads to a consideration of the constitutional provisions, which we submit show that the framers of our State constitution used the language "term of office" as synonymous with the "time fixed by the constitution for the duration of the office, which was five years."

Section 2 of article 7 prescribes how the various con-

stitutional officers shall be appointed or elected, and the terms for which they shall hold.

Paragraph 6 of said section provides that Clerks shall be elected by the people and shall hold their offices for five years.

Paragraph 2 of said section provides that Judges of the Common Pleas shall hold their offices for five years, but when appointed to fill vacancies shall hold for the unexpired term only.

From these two provisions, applying both to appointive and elective officers in the two instances only above stated, it is well settled that where a vacancy occurs in any other office specified in section 2 of said article, the person appointed or elected, will hold for the full term and not for the unexpired term. It has never been questioned but that where a vacancy occurs by death or resignation in the Supreme Court the successor takes the office for the full term of seven years.

It is, therefore, quite clear that when an election is legally held to elect the successor to Scott he will hold the office for the full term of five years, and that the term of Scott must necessarily end when the term of the newly-elected Clerk begins. The question thereupon arises when a Clerk dies before the expiration of his term, how is the vacancy to be filled, and will the filling of that vacancy constitute a new term? Section 12 of article 5 provides fully for such a contingency and cannot be altered or affected by legislation.

The constitution provides as follows:

1. Section 12 of article 5 provides that in case of the death of a Governor, his successor shall be chosen at the next election for members of the Assembly unless death occurs within thirty days immediately preceding such election, in which case a Governor shall be elected at the second succeeding election for members of Assembly.

2. The same section provides that when a vacancy occurs in an office to be filled by the Governor and Senate the Governor shall fill the vacancy until the end of the next Legislature.

3. The same section provides that when a vacancy happens in the office of County Clerk the Governor shall fill such vacancy, and the commission shall expire when a successor is elected and qualified.

In this single paragraph of the constitution is found a definite, clear and specific provision for filling vacancies in three cases, to wit:

The first in an elective office, in which it is specifically stated when the successor shall be chosen by popular vote.

The second in an appointive office, in which it is with equal precision and certainty stated when the commission of the Governor shall expire.

The third is in an elective office, in which it is stated that Governor shall fill the vacancy, but the statement is that the commission shall expire when a successor is elected and qualified.

Constitutions are formulated with great care and precision, and the omission in this third case of fixing expressly a time to elect at the next or subsequent election for members of the Legislature cannot be regarded as an oversight.

It must be held under the settled rules of construction to have been intentional for the purpose of establishing a different rule. If the draftsman of the constitution had intended that the election for a successor should be held at the next election for members of the Legislature, as in the case of the Governor, he would not have failed to say so and remove all doubt as to that question.

"*Expressio unius exclusio alterus*" applies, and must be given the interpretation of the constitution.

What rule does the language necessarily indicate and establish? The language is, "the vacancy shall be filled by the Governor," without expressing any limitation upon the commission, as in the case of the death of the Governor or of an appointive officer.

Article 7, section 2, paragraph 8 of the State constitution, provides that justices of the peace shall hold their offices for five years, but when elected to fill vacancies they shall hold for the unexpired term only.

"Vacancy" here clearly means vacancy for the balance of the term to which the justice was elected, and the mandate that the successor shall hold for the unexpired term only expressly recognizes the fact that the term of the deceased incumbent did not expire with his death, for if it did there could be no unexpired term. The constitution fixes the term at five years, and that term under the language of the constitution runs until the five years have expired; it cannot expire either by the death or resignation of the incumbent. The appointment of the Governor does not create a new term, it is merely a substitution of an incumbent to discharge the duties of the office until 1910, before which time no new term can be created. The organic law refers to the unexpired constitutional term of the incumbent who has died or resigned, and the vacancy is a vacancy in the sense of the constitution for the whole of the unexpired term.

Two terms are not thereby running together. When Scott died, of course, his official life, his incumbency, terminated, but his term runs on for the full constitutional duration of the office, which is to be filled by Lee during the vacancy, which runs until 1910, but it is still the unexpired term of Scott, and not the term of Lee.

This clear distinction in the constitution between "the time of service of Scott" and the language "term of office" plainly expressed in the constitution cannot be disregarded.

The Governor has, in the appointment of Lee, filled the vacancy created by the death of Scott, whose term, in the language of the constitution, will not end until 1910.

We admit that the term of Scott must necessarily end when the term of the newly-elected officer begins, for then, and not until then, would the term of Scott end, so that it could not be said there would be two terms running at the same time.

This, we submit, is the reasonable, if not the neces-

sary interpretation of paragraph 12 of article 5 of the constitution.

The language is as follows: "When a vacancy happens in the office of Clerk or Surrogate of any county, the Governor shall fill such vacancy, and the commission shall expire when a successor is elected and qualified."

The person elected will be within the meaning of this constitutional provision a successor to Scott, the deceased Clerk, and not a successor to Lee.

Succession implies continuity; there is no break in succession, one term follows immediately upon the termination of the other.

The constitution, as before stated, distinguishes between "term of office" and "time of service of the incumbent."

The time of service, the incumbency of Scott, of course, ceased at his death, but his term of office was, by the constitution, five years, and that term continued until another term was legally created. Such term could come into existence only by an election by the people, the prior term not ending until the term of the elected successor begins; otherwise the succession would be broken.

The occupation of the office by Lee up to the election of Scott's successor is not under the constitution, and not in legal contemplation a new term, he is merely filling out by his service in the office a part of the unexpired constitutional term of Scott, which can end only when the term of his elected successor begins.

Under the language of the constitution there cannot be a successor to Scott by appointment by the Governor, the succession must be by election by popular vote.

We, therefore, submit that the language "term of office" in the fifth section of the act of 1906 was used by the Legislature as it is used in the constitution, and that it means the term of office as fixed by the constitution, and not the time the incumbent occupies the office and performs its duties, and that the term of office of Scott in this case runs at least until a successor to Scott is elected.

To say that the policy of the act of 1906 was to bring the office within the operation of that act when, and as soon as Scott died, is begging the question, as we think it may with more propriety and justice be said that the temporary appointee by the Governor, who stands in the place of Scott until a successor is elected to perform the duties and services, which he would have performed if he had survived, should have the same compensation which he would have received.

The act of 1906 was passed in Scott's lifetime, after he took possession of the office; his "term of office" indisputably then was for five years, expiring in 1910, and it must have been the expectation of the law-maker that Scott would live to serve for the full five years of his constitutional term, and that the compensation for service in the clerk's office of Atlantic county would not be changed until his successor was duly elected, which could not be in this case prior to November, 1910.

If it had been otherwise intended the act of 1906 would have expressly provided that upon the death or resignation of any Clerk, then in office, the office should be put upon a salary basis.

The act of 1906 speaks of, and applies to the situation as of the time when it took effect; the time of the service of Scott would be in the contingency of his death be less than five years, but "the term of office" of Scott was for five years, and it could not end until a successor to Scott was elected.

There is another view of the fifth section of the act of 1906 which leads to the same result, and which is in accordance with the letter of the statute, and not in contravention of its spirit.

The language is: "The act shall take effect so far as respects said officers at the expiration of the terms of office of the present clerks."

It is to take effect at the expiration of the "terms of office" of all the clerks in office at the time of the passage of the act, and cannot subject any clerk's office to salary compensation until the term of every clerk then in office

has expired. This interpretation accords with the letter of the statute; it produces uniformity in the counties by placing all of the clerks in the State on a salary basis at the same time, and therefore, should be the accepted construction.

Such a construction would render the act general, whereas a construction which would give effect to the act in the different counties at different times would render the act special and void.

A construction of a statute will never be given that will render the statute void if a construction may be given which will make it valid.

The 139th section of the election law of 1898, page 304, can have no effect upon the question involved in this case, because the duration of the term of office and the significance of the term "vacancy" must be determined by the language of the constitution alone; it cannot be affected or qualified by legislation.

We, therefore, submit that the plaintiff in error is entitled to be compensated by the fees of the office, and not by salary, and that Lee continues in office under his appointment by the Governor until after a successor to Scott is elected at the November election, 1910.

Respectfully submitted,

BENNETT VAN SYCKLE,
BOURGEOIS & SOOY,

Attys. of Pltff. in Error.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE, EX REL. SAMUEL KIRBY,

Relator, Defendant in Error,

vs.

EDWARD S. LEE,

Defendant, Plaintiff in Error.

QUO WARRANTO.

BRIEF OF DEFENDANT IN ERROR.

This matter comes before the Court on error to the Supreme Court. An information was filed on behalf of the defendant in error, and upon demurrer thereto the Supreme Court gave judgment of ouster.

The undisputed facts are as follows: At the November election, 1905, Lewis P. Scott was elected to the office of County Clerk of the county of Atlantic, duly qualified and entered upon the duties of his office, and continued in office until the latter part of November, 1907, when he died. On the 6th day of December, 1907, Edward S. Lee, plaintiff in error, was appointed by the Governor County Clerk and commissioned:

“To have, hold and enjoy said office, with all
“the powers, privileges, fees, perquisites, rights

“and advantages to the same belonging or appertaining until a successor be chosen at the General Election of 1908.”

Samuel Kirby, the defendant in error, was duly nominated and elected to the office of County Clerk of the county of Atlantic at the election held in November, 1908; he duly qualified, gave bond and received a commission from the Governor to hold said office for the period of five years next.

The claim of plaintiff in error, Lee, is that his appointment to said office is for the unexpired term of Scott and until November, 1910.

I.

If Lee held a commission from the Governor under the great seal of the State appointing him for the unexpired term, he might have some shadow of claim, but as it is he has none. His commission expressly limits his tenure of the office until the November election, 1908, and as that period has passed he is absolutely without title. He does not claim by election, and he cannot claim by appointment. If the argument of plaintiff in error is sound, that an appointment to fill the vacancy should have been for the remainder of the term for which Scott was elected, and that the election held this last November is null and void, then it would appear that there is a present vacancy in the office. Lee can claim no more than his commission gives him, and by the express terms of his commission his right to the clerkship is at an end.

If Lee were challenged by anyone to show by what authority he claims the office, he produces a commission

which on the face of it has expired. What right does such a commission give him in the premises?

The plaintiff in error, Lee, insists that the Governor had no right to insert in the commission the restrictive words, "To hold, &c., until a successor be chosen at "the General Election of November, 1908," and insists that his commission should have read (in the language of the Constitution), "until a successor is elected and qualified."

But by what right or authority is the Governor's commission to be altered? If the plaintiff in error could have persuaded the Governor that the commission first issued him was wrong and now came before this Court with a second or new commission, without the restrictive words, he might have been in a position where his claim could have been heard, but as the matter stands the defendant in error insists that plaintiff's claim is without merit.

II.

The provisions in the Constitution with reference to an expired term are clear and explicit and do not apply to such a case as that now before the Court.

Judges of the Courts of Common Pleas "shall hold their offices for five years, but when appointed to fill vacancies they shall hold for the unexpired term only." (Const., Article 7, sec. 2, par. 2.)

Justices of the Peace "shall hold their offices for five years; but when elected to fill vacancies they shall hold for the unexpired term only." (*Ibid*, par. 8.)

With respect to all other offices provided for in the Constitution, while the length of term of office is given

there is no provision for an appointment to an unexpired term nor reference to such a thing as an unexpired term.

It is insisted that the true construction of the Constitution in this respect is that the term of all other officers created by that instrument expires with the limitation of time stated or upon the death, resignation or disability of the person elected or appointed.

The provision of the Constitution with reference to the filling of vacancies provides that the same shall be filled until the people, or the Legislature in joint session, or the Governor and Senate, can act in the regular and orderly way pointed out by the Constitution for the election or appointment to office.

Article V, paragraph 12, is as follows:

“In case of the death, resignation or removal
 “from office of the Governor, the powers, duties,
 “emoluments of the office shall devolve upon the
 “President of the Senate, and in case of his death,
 “resignation or removal, then upon the Speaker
 “of the House of Assembly, for the time being,
 “until another Governor shall be elected and quali-
 “fied; but in such case another Governor shall be
 “chosen at the next election for members of the
 “Legislature, unless such death, resignation or re-
 “moval shall occur within thirty days immediately
 “preceding such next election, in which case a
 “Governor shall be chosen at the second succeed-
 “ing election for members of the Legislature.
 “When a vacancy happens during the recess of the
 “Legislature in any office which is to be filled by
 “the Governor and Senate, or by the Legislature
 “in joint meeting, the Governor shall fill such
 “vacancy, and the commission shall expire at the
 “end of the next session of the Legislature, un-
 “less a successor shall be sooner appointed; when

“a vacancy happens in the office of Clerk or Surrogate any county, the Governor shall fill such vacancy and the commission shall expire when a successor is elected and qualified.”

In case of the death of a Governor the President of the Senate serves until the next regular election, &c. In case of the death of a State Treasurer or Comptroller an appointment is made until the next Legislature meets and elects a successor and the commission to the person appointed runs until the election by the Legislature in joint session takes place, or, if no election takes place before the end of the session the vacancy continues and a new *ad interim* appointment is made by the Governor and a new commission issued to the person appointed to serve until the next session of the Legislature; in case of the death of an officer appointed by the Governor and confirmed by the Senate during the recess of the Legislature, an *ad interim* appointment is made and commission issued to the person appointed, which expires upon an appointment being made by the Governor and confirmed by the Senate. And so on with Clerks and Surrogates: in the event of vacancies by death, &c., the Governor fills the vacancy until an election can be had in accordance with the provisions of the Constitution.

In other words, the Governor's sole uncontrolled power of appointment is strictly limited everywhere in the Constitution to *ad interim* appointments; he is nowhere given power to make an appointment to an office which would enable the person appointed to hold beyond the time when the people, or the Legislature, or the Governor and the Senate together, are given power to elect or appoint.

The Constitution does not say that an election for County Clerk shall take place every five years, nor is there anything in the constitutional provision "They shall hold their offices for five years" (Const., Article 7, sec. 2, par. 6), which prevents an election oftener than once in five years.

"All political power is inherent in the people."
(Const., Article 1, par. 2.)

The right of the people to select their own Clerk is in no way restricted by the provisions of the Constitution; the only power that the Governor has is to provide for an interregnum for the period between the death, resignation, removal or disability of a Clerk and the time when the people can regularly proceed to elect.

The language of the Constitution:

"When a vacancy happens in the office of Clerk
"or Surrogate of any county, the Governor shall
"fill such vacancy, and the commission shall ex-
"pire when a successor is elected and qualified."

(Article V., paragraph 12.) Is capable of only one construction, and that is that the successor is to be elected at the next succeeding election.

It is respectfully submitted that light upon this question may be had by an examination of the language in paragraphs 7 and 9 of Article 10 of the Constitution. In paragraph 7 the language is: "The election of Clerks and
"Surrogates in those counties *where the term of office of*
"*the present incumbents shall expire* previous to the gen-
"eral election of 1845, shall be held at the General Elec-
"tion next ensuing the adoption of this Constitution,
"&c." Here incumbency and term of office refer to the

same thing, and "shall expire" includes not only lapse of the time fixed in the commission but also death, resignation, removal or other disability.

Paragraph 9 provides, "It shall be the duty of the Governor to fill all vacancies in office happening between the adoption of this Constitution and the first session of the Senate, and not otherwise provided for; and the commissions shall expire at the end of the first session of the Senate or when successors shall be elected or appointed and qualified." Here power is given to fill all vacancies in office, and being read in connection with section 7 shows that the intention of the framers of the Constitution was that the term of office expired whenever a vacancy happened by death, resignation or otherwise; the word "vacancies" refers to the office rather than to the term.

In the brief of the plaintiff in error, page 18, is discussed the meaning of the word "successor" in connection with the last part of paragraph 12, Article 5, "When a vacancy happens in the office of Clerk or Surrogate of any County, the Governor shall fill such vacancy and the commission shall expire when a successor is elected and qualified."

It seems to defendant in error that the argument advanced that "successor" refers to the person elected to succeed Scott may be adopted and that it is in harmony with the views as expressed in this brief.

In one sense "the term *successor* applies to all the indefinite line following the original incumbents."

People vs. Townsend, 102 *New York*, 438.

People vs. Carr, 86 *New York*, 514.

Adopting the view that the words of the Constitution "when a successor is elected" does not refer to an *ad interim* appointee, still we have nothing in this language that postpones beyond the next election the selection of the successor.

This view is strengthened by reference to Article 10, paragraph 9, in reference to the filling of vacancies happening between the adoption of the Constitution and before the session of the Legislature, &c. "And the commission shall expire at the end of the first session of the Senate or *when successors* shall be elected or appointed "and qualified." This undoubtedly provides that the commission so issued to fill vacancies in office shall expire as soon as under the Constitution a successor can be legally elected, appointed and qualified.

Under the Constitution of 1776, County Clerks were among the officers elected by the Legislature and commissioned by the Governor; their term of office undoubtedly ended at different times; it is not true in fact, as stated in the brief of plaintiff in error, that the Salary Act of 1906 "produces uniformity in the counties by placing all of the clerks in the State on a salary basis at the same time." County Clerks are not elected as supposed by the plaintiff in error in all the counties of the State uniformly the same year, at the expiration of a five year period.

By Article 10, Section 12, it was provided "The Legislature shall pass all laws necessary to carry into effect the provisions of this Constitution."

County Clerks, prior to the adoption of the Constitution of 1844, were not elected by the people but were

elected in joint session of the Legislature, and as election of Clerks by the people was a new provision, new laws had to be enacted in order to carry into effect the Constitution. And with this in mind the framers of the Constitution in Article 10, paragraph 8, provided "The elections for the year 1844 shall take place as now provided by law," referring to the law which provided for election of the members of the House of Assembly and Sheriffs and paragraph 7 of the same article provided that the new elective officers, to wit, Clerks and Surrogates, should be elected at the General Election of 1845, which was the next General Election after the adoption of the Constitution, leaving the clear inference that under paragraph 12 of the same article it would be necessary for the Legislature to pass acts to carry out the intention of the new Constitution.

III.

The first session of the Legislature under the Constitution adopted August 13, 1844, on the fourth day of April, 1845, passed an act entitled "A supplement to an Act to regulate elections," &c., section 19 of which is as follows:

"The Clerks and Surrogates of counties shall
 "be elected by the qualified voters of each county,
 "at the time of electing members of the General
 "Assembly; they shall be elected once in every
 "five years, and as often as vacancies occur; and
 "every such vacancy shall be supplied at the Gen-
 "eral Election next succeeding the happening
 "thereof; it shall be the duty of the Clerk of every
 "county, between the first day of August and the
 "first day of September, immediately preceding

“the expiration of the term of office of the Clerk
 “or Surrogate of such county, to direct and cause
 “to be delivered to the Clerk of each township in
 “said county, a notice that a Clerk or Surrogate
 “of said county or both, as the case may be, is to
 “be chosen at the ensuing annual election; in
 “every such year in which an election for Clerk
 “or Surrogate of a county is required to be made,
 “the Clerk of each township in said county shall
 “include in the advertisement required to be given
 “by the tenth section of the act to which this is a
 “supplement, a notice that a Clerk or Surrogate
 “of said county, or both, as the case may be, is
 “to be chosen at the ensuing election.”

Laws of 1845, page 250.

In this act is to be found what may be termed a cotem-
 poraneous construction of the provisions of the Constitu-
 tion, passed immediately after the Constitution was
 adopted by the Legislature, of which some of the framers
 of the Constitution were members.

It has stood substantially unchanged through several
 revisions down to the present time. It is found word for
 word in the revised statutes of 1847, p. 410, sec. 5, which
 revision was prepared by Peter D. Vroom, Henry W.
 Green, William L. Dayton and Stacy G. Potts; Vroom
 and Green were members of the Constitutional Conven-
 tion of 1844.

In the revision of the statutes of New Jersey, published
 in 1877, made under the supervision of the late Chief
 Justices Beasley, Depue and Hon. Cortlandt Parker, the
 provisions of the act are the same so far as relates to
 vacancies, the language being “that all vacancies happen-
 “ing in the offices of Clerks, Registers and Surrogates

*Sec 5 of 1847 was divided
 into Secs. 5 & 143*

"of counties shall be supplied at the General Election next succeeding the happening thereof." (Sec. 143, p. 362.)

The same language will be found in General Statutes of New Jersey, 1895, Vol. 2, p. 1320, sec. 143.

The Revision of 1898, Sec. 139, p. 304, is as follows: "Any vacancy happening in the office of Sheriff, Coroner, Clerk, Register or Surrogate of any county, shall be supplied at the General Election next succeeding the happening thereof," &c.

So that from the adoption of the Constitution of 1844, which first provided that the office of County Clerk should be an elective office, the provisions of the statutes, under that Constitution, with respect to the filling of vacancies at the next regular election thereafter, have remained the same and unchanged down to the present.

IV.

The same question has arisen in other States, where the provisions of the Constitution, for filling vacancies, are in the same language as that of ours.

In *Oregon vs. Johns*, 3 Or., p. 533, decided in 1869, the provisions of the Constitution are as follows: Sec. 14, Article 2, provides that "General elections shall be held on the first Monday in June, bi-annually."

Section 16, Article 5, provides: "When, during a recess of the Legislative Assembly, a vacancy shall happen in any office, the appointment of which is vested in the Legislative Assembly, or when at any time a vacancy shall have occurred in any other State office, or in the office of Judge of any Court, the Governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified."

At the time of the existence of the above articles in the Constitution of that State a man by the name of Morris was elected Judge in June of 1866; he qualified and took office in July of the same year, and died in September following. The Governor appointed a man by the name of Geary, "to fill vacancy, &c., caused by "the death," &c. In June of 1868, being the next General Election following the death of Morris, a man by the name of Johns was elected, qualified and took office in July following. The term of office of the County Judge was four years, so that in June of 1870 a man by the name of Whitney was elected and qualified, and in July following demanded the office of Johns. The proceeding was one to determine who was entitled to the office, Whitney or Johns. The Court decided that Johns was entitled to have the office, and, in its opinion, the Court held that the Governor had no power to appoint to a vacancy beyond the next General Election; that his power was not absolute, but limited and qualified, and only applied to a vacancy until such time as the people, the repository of all power, could act. It held that those appointed to fill a vacancy held office temporarily so that business would not be retarded by death or resignation, and that the words "shall expire when," in the Constitution, could only have one meaning, and that was to limit the term for which the Governor could appoint. It stated that it was a political axiom, that when an office becomes vacant the power that made the office can fill it again. *Vacancy, the Court said, meant the want of incumbent at the time; that the word had no reference to duration of time; that an appointment pro tem does not invest a full term unless so expressly provided; that vacancy is one thing and term another; that an office may*

be vacant many times and filled many times during a term.

The same question was presented to the Supreme Court of the State of Indiana, and it may be found reported under the title, *Beale vs. Gray, 49 Ind., 41*. The language of the Indiana Constitution, at section 18, Article 5, is as follows: "When during a recess of the General Assembly a vacancy shall happen in any office the appointment to which is vested in the Governor, or when at any time a vacancy shall have occurred in any other State office, or in the office of Judge of any court, the Governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified." And under the identical situation which exists in the case now before the Court, the Judges of the Supreme Court of Indiana held that the Governor's appointee held office only until the successor was elected and qualified, that such election must take place at the next General Election after the appointment and that the appointee of the Governor did not hold for the unexpired term of the person removed. Instead of there being a death in the Indiana case there was a removal from office.

A similar question was presented to the Supreme Court of the State of California, and is reported under the title, *People vs. Langdon, 8 Cal., 1*.

The language of the California Constitution, at Sec. 8 of Article 5, is that vacancies shall be filled by the Governor "by a commission which shall expire at the end of the next session of the Legislature, or the next election by the people"; and under facts very similar to those existing in this case that Court held that the power to

fill the vacancy is only till the appointing power can act; that the power to fill a vacancy and the power to fill an office are distinct and substantial in their nature.

While the Constitution of the State of New York is radically different from our own, in that it provides for elections for the unexpired term, yet the principle involved in this case, and considered in the Oregon case, appears in the case of *People vs. Cowles*, 13 N. Y., 350, where there occurred a vacancy in the office of one of the higher judgeships within a few days of the next General Election, and the Court held that notwithstanding the fact that the vacancy occurred so close to the General Election it was impossible to make the statutory call to fill the vacancy, yet it was the duty of the people to *elect for the unexpired term at the then occurring election.*

The same principle is to be seen in the case of *People vs. Green*, 2 Wend. (N. Y., p. 266). In this case the Court distinctly states that *the word "vacancy" applies to the office and not to the term.*

The thought running through all of these cases is that where there is an elective office the power to elect is in the people at the earliest possible moment succeeding the vacancy unless that right is taken away from them by their Constitution in express terms.

It is respectfully submitted that the judgment of the Supreme Court must be affirmed.

WM. M. CLEVENGER,
J. H. GASKILL,

Attorneys and of Counsel with Defendant in Error.

November 27th, 1908.



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NEW JERSEY

Court of Errors and Appeals

As yet of the November term,
A. D. nineteen hundred and eight.

THE STATE OF NEW JERSEY, Ex	} Quo Warranto. Judgment of Ouster. On Demurrer.
REL., SAMUEL KIRBY,	
Relator,	
vs.	
EDWARD S. LEE.	

Joseph H. Gaskill, William M. Clevenger, Attorneys.
Witness, WM. S. GUMMERE, ESQ., Chief Justice;
WM. RIKER, JR., Clerk.

10

ATLANTIC COUNTY, ss.

ROBERT H. McCARTER, Esquire, Attorney-General of the State of New Jersey, who sues for the said State in this behalf, comes in his own proper person hereinto the Supreme Court of Judicature of the said State, before the justices thereof, at the state house in the city of Trenton, on the sixteenth day of November, in the year one thousand nine hundred and eight, for the said State of New Jersey, at the relation of Samuel Kirby, of the city of Atlantic City, county of Atlantic, and State of New Jersey, desiring to sue and prosecute in this behalf, according to the form of the statute in such case made and provided, and gives the said court here

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to be informed and understood, that under and by virtue of an act of the Legislature of the State of New Jersey, entitled "An act to regulate elections," revision of 1898, approved April 4th, 1898, at an election held in the county of Atlantic, in the State of New Jersey, on Tuesday next after the first monday in November, nineteen hundred and eight, he was elected County Clerk of the county of Atlantic, in the State of New Jersey, to serve for a period of five years; that said

10 election was in all things conducted according to law; that the Board of County Canvassers, provided for in said act, duly met and organized as provided for in said act, canvassed the votes, declaring the result of said canvass to be that Samuel Kirby, having received the highest number of votes for County Clerk for the county of Atlantic, in the State of New Jersey, was duly elected County Clerk for the county of Atlantic, in the State of New Jersey for five years; that the said

20 Board of County Canvassers made the statement and certificate and statement of determination required by the said act and caused one copy thereof to be transmitted to the Secretary of State of the State of New Jersey, at Trenton, and the other to be filed with the Clerk of the county of Atlantic; that on the tenth day of November, nineteen hundred and eight, the Clerk of the county of Atlantic delivered unto the said Samuel Kirby, a statement of the determination of such Board of County Canvassers, although stating that the certificate of election and certificate of determination were

30 signed by him, the said Edward S. Lee, County Clerk, without prejudice to his rights in the premises, and the Secretary of State of the said State of New Jersey, delivered unto the said Samuel Kirby, a commission to the said Samuel Kirby, reciting that it had been duly certified to the Governor of the State of New Jersey that he had been duly chosen to be County Clerk of the county of Atlantic and thereby commissioned him to be such for and during legal time, which said commission was signed by the Governor of the State of

New Jersey, under the great seal of the State of New Jersey, duly attested by the said Secretary of State and bearing the date last mentioned; that on the same day, the said Samuel Kirby appeared before the judge of the Common Pleas Court of the County of Atlantic, in the State of New Jersey, and entered into bonds to the State of New Jersey with at least two good and sufficient sureties, being freeholders of the said county and approved of by the Judge of the said Court of Common Pleas of the said county of Atlantic, in the sum of **10** twenty-five thousand dollars; that after the making, execution and delivery and approval of the said bond and upon the production of the commission aforesaid, and of the certificate of determination aforesaid, the said Samuel Kirby, likewise before the said Judge of the said Court of Common Pleas of the county of Atlantic, in the State of New Jersey, took the oaths of allegiance to the State of New Jersey, and of office, and subscribed the same; that the said bond and the said oaths of allegiance and office were transmitted to the **20** said Secretary of State of the State of New Jersey, where the same now are and on file of record.

And the said Samuel Kirby further gives the said court here to be informed and understood that at the general election prior to the twentieth day of November, one thousand nine hundred and five, Lewis P. Scott was likewise under and by virtue of the act aforesaid elected County Clerk of the County of Atlantic, in the State of New Jersey, to serve for a period of five years, and that upon the same being certified to the then **30** Governor of the State of New Jersey, he, the said Lewis P. Scott, was on the said date last above mentioned commissioned as such County Clerk and thereupon duly qualified as such and entered upon the enjoyment of its liberties, privileges and franchises for and during legal time; that afterwards, to wit, in the month of November, one thousand nine hundred and seven, the said Lewis P. Scott while enjoying the said liberties, privileges and franchises departed this life before the ex-

piration of the legal time of the office aforesaid; that afterwards, to wit, on the sixth day of December in the year of our Lord one thousand nine hundred and seven, the then Governor of the State of New Jersey appointed and commissioned Edward S. Lee, County Clerk in and for the said county of Atlantic, to have, hold and enjoy said office with all the powers, privileges, fees, perquisites, rights and advantages to the same belonging or appertaining until a successor be chosen

10 at the general election of one thousand nine hundred and eight; that after such appointment and commission the said Edward S. Lee qualified as such according to law, and immediately entered into the possession of the liberties, privileges and franchises of the office of County Clerk in and for the county of Atlantic aforesaid, and continued therein under and by virtue of such appointment and commission until the tenth day of November, one thousand nine hundred and eight.

And the said Samuel Kirby further gives the said

20 court here to be informed and understood that on the tenth day of November, one thousand nine hundred and eight, after he had fully qualified for the office of County Clerk for the county of Atlantic as required by law, in the presence of the judge of the Common Pleas Court of said county, he demanded that the said Edward S. Lee deliver to him all the books, papers, records, writings and other documents appertaining to the said office then in his hands in the Clerk's office at Mays Landing, New Jersey, as well as all moneys on deposit

30 appertaining to the office aforesaid, and physical possession of the office building in which the same were stored, and in which the duties of the Clerk of the county of Atlantic are performed, but that the said Edward S. Lee declined and refused so to do, claiming to be lawfully entitled to the possession thereof and to be the legal custodian of the books, keys, files, etc., under and by virtue of his appointment as County Clerk to fill the vacancy caused by the death of the said Lewis P. Scott, deceased; that immediately after

the said Samuel Kirby was fully and legally qualified as County Clerk of the county of Atlantic the judge of the Court of Common Pleas in and for the said county committed to the custody of Samuel Kirby as County Clerk the bond and oaths of office of the sheriff of the county of Atlantic as required by law, and required that he file the same in his office as County Clerk; that the said bond and the said oaths of the said sheriff were accepted by the said Samuel Kirby and taken to the office of the County Clerk of Atlantic county at Mays Landing aforesaid and demand made of the said Edward S. Lee, who had usurped, intruded into and was unlawfully holding the office of County Clerk of Atlantic county within this State aforesaid, that the said Samuel Kirby be shown the files in which the said bond and oaths were kept, but the said Edward S. Lee declined to show the said Samuel Kirby the said files in which the said bond and oaths were kept and further declined to permit the said bond and oaths to be filed in the said office building of the said County Clerk; but the said Edward S. Lee, whose term of office as County Clerk as aforesaid had then expired, with force and arms actually and physically prevented the said Samuel Kirby from taking possession of the office to which he had been elected by the Governor and qualified by the judge of the Common Pleas Court of the said county of Atlantic as required by law.

And the said Samuel Kirby further gives the said court here to be informed and understood that ever since the tenth day of November, one thousand nine hundred and eight, he has been and still is rightfully entitled to hold, use and execute the said office of County Clerk for the county of Atlantic as aforesaid, which said office the said Edward S. Lee during all the time aforesaid of the State of New Jersey has usurped, intruded into and unlawfully held, used, executed and yet does usurp, intrude into and unlawfully hold and execute to the exclusion of the said Samuel Kirby, to wit, at Mays Landing, in the county of Atlantic afore-

said, in contempt of the State of New Jersey and to its great damage and prejudice against its sovereignty and dignity.

Whereupone the said Attorney-General for the State of New Jersey, at the relation of the said Samuel Kirby, desiring to sue and prosecute in this behalf, prays the advice of the court here in the premisies and for due process of law against the said Edward S. Lee in this behalf to be made to answer to the said State by what
10 warrant he claims to hold, use, execute and enjoy the aforesaid office of County Clerk of the county of Atlantic and the liberties, privileges and franchises thereof.

DEMURRER.

The said defendant demurs to the above information upon the following grounds.

First. Lewis P. Scott was elected to the office of County Clerk of Atlantic county at the general election held in November of the year nineteen hundred and
20 five; that the constitution of the State of New Jersey fixed the term for which the said Lewis P. Scott was elected at five years from November, nineteen hundred and five, and that the term of the said Lewis P. Scott did not, therefore, expire until November, nineteen hundred and ten.

Second. That the said Lewis P. Scott having died, Edward S. Lee was appointed to the office of County Clerk of Atlantic county by Edward C. Stokes, the then Governor of said State, on or about the sixth day
30 of December, nineteen hundred and seven, and that, having been so appointed, he, the said Edward S. Lee, duly qualified and entered upon his duties as such County Clerk of Atlantic county, and is entitled to hold said office until the end of Scott's term, to wit, November, 1910.

Third. That the term of Lewis P. Scott not expiring until November, nineteen hundred and ten, and the said Edward S. Lee having been appointed as aforesaid the successor of the said Lewis P. Scott, that, therefore, there was no vacancy in the office of County Clerk of Atlantic county, in November of the present year, and that Samuel Kirby, relator, could not have been and was not lawfully elected to said office at said November election or at any other time. And that the General Election Act of April 4, 1898, to the contrary is un- 10 constitutional and void.

Wherefore, and because of the insufficiency of the said information, he prays judgment, and that he may be dismissed and discharged by the court hereof and from the premises above charged upon him in form aforesaid.

JOINDER IN DEMURRER.

And the said Robert H. McCarter, Attorney-General, who for the State of New Jersey in this behalf prosecutes, says that the said information of him, the 20 said Attorney-General, and the matters therein contained are sufficient in law to convict the defendant, Edward S. Lee, of the premises above laid to his charge in said information, and to forejudge and exclude him of and from the franchise, liberty, privilege and emoluments aforesaid, which said information and the matters therein contained said Attorney-General is ready to verify and prove as said court shall award; and because said defendant has in nowise denied the said information or the matters therein contained, nor in 30 any manner answered the same, the said Attorney-General, as before, prays judgment and that the defendant may be convicted of the premises above charged upon him, and that the defendant may be fore-

judged and excluded of and from the franchise, liberties, privileges and emoluments aforesaid.

And now at this day, to wit, the seventeenth day of November, A. D. nineteen hundred and eight, before our Supreme Court, at Trenton, come the parties aforesaid, by their respective attorneys aforesaid; whereupon all and singular the premises aforesaid being seen and by the said court now here fully understood, and mature deliberation being thereupon had, it appears to
 10 the said court here that the said information and the matters therein contained are sufficient in law for the said State of New Jersey upon the relation of the said Samuel Kirby, to have and maintain the aforesaid action thereof against the said Edward S. Lee, and that the said Edward S. Lee usurps, intrudes into and unlawfully holds, uses and executes the office of County Clerk for the county of Atlantic, in the State of New Jersey, to which the said Samuel Kirby is legally entitled to hold. Therefore, it is considered that the
 20 said Samuel Kirby is legally entitled to hold, use, execute and enjoy the office of County Clerk for the county of Atlantic, in the State of New Jersey, and the liberties, privileges, and franchises thereof, which the said Edward S. Lee unlawfully usurps, intrudes into, holds, uses and executes.

And it is further considered that the said Samuel Kirby do recover against the said Edward S. Lee the sum of
 dollars and
 cents, for his costs and charges by
 30 him about his suit in this behalf expended.

Judgment signed this seventeenth day of November, A. D. nineteen hundred and eight.

I, William Riker, Jr., Clerk of the Supreme Court of the State of New Jersey, do hereby certify that the foregoing is a true copy of a certain judgment entered in the above stated cause on the seventeenth day of November, A. D. nineteen hundred and eight.

In testimony whereof, I have hereto set my hand and the seal of said court at Trenton, this seventeenth day of November, A. D. nineteen hundred and eight.

WM. RIKER, JR.,
Clerk.

 WRIT OF ERROR.

(Returnable November 17, 1908.)

NEW JERSEY, ss.—The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature, greeting:

[L. s.] For as much as in the record and proceedings, and also in the giving of judgment in a certain plaint, which was in our said Supreme Court of Judicature before you between the State of New Jersey, *ex rel.*, Samuel Kirby, relator, and Edward S. Lee, respondent, in an action of quo warranto manifest error hath intervened, to the great damage of the said defendant as it is said; we being willing that the error, if any there be, should, in due manner, be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton on the seventeenth day of November instant, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for the correcting that error, what of right, and, according to the law and custom of the State of New Jersey, ought to be done.

Witness, our Chancellor and President Judge of our said Court of Errors and Appeals at Trenton aforesaid, the seventeenth day of November, 1908.

S. D. DICKINSON,
Clerk.

BOURGOIS & SOOY,
Attorneys.

NEW JERSEY SUPREME COURT.

10	THE STATE OF NEW JERSEY, Ex REL SAMUEL KIRBY, <i>Relator,</i> <i>vs.</i> EDWARD S. LEE, <i>Respondent,</i>	}	On Information in the Nature of a Quo Warranto.
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OPINION.

(Filed November 18, 1908.)

On demurrer to an information praying for process of law against Edward S. Lee to answer by what warrant he claims to hold the office of County Clerk of the
 20 county of Atlantic.

Argued at November term, 1908, before Justices Reed, Bergen and Voorhees.

Mr. Joseph H. Gaskell, for the relator.

Messrs. Bourgeois and Sooy, for the respondent.

The opinion of the court was delivered by

REED, J.

The question raised by the pleadings rises from the following admitted facts: Lewis P. Scott was elected
 30 County Clerk of Atlantic county at a general election for members of Assembly held in November, 1905. Mr. Scott died in November, 1907. Edward S. Lee,

the respondent, was appointed by Governor Stokes on December 6th, 1907, to fill the vacancy created by the death of Mr. Scott. At the last general election, Samuel Kirby was elected to the office of County Clerk of Atlantic county, and has qualified as such. Mr. Lee refuses to surrender the office to Mr. Kirby. This writ is sued out to inquire by what right Mr. Lee still retains the office.

The insistence of Mr. Lee is that his appointment was for the unexpired term of Mr. Scott, whose term would have expired in November, 1910, had he lived to that period. 10

So far as the situation is controlled by the statutes of this State, the solution of the question propounded is plain. The act to regulate elections, P. L. 1898, p. 237, Sec. 6, enacts that the clerks, registrars of deeds, and surrogates of counties shall be elected by the people of their respective counties at a general election once in every five years. Section 136 of this statute, P. L. 1898, p. 304, enacts that "Any vacancy happening in the office of * * * clerk * * * of any county, shall be 20 supplied at the general election next succeeding the happening thereof, unless such vacancy shall happen within fifteen days next preceding such election, in which case such vacancy shall be supplied at the second succeeding general election."

Mr. Scott having died more than fifteen days before the last general election, the people of Atlantic county had the statutory right to elect a new clerk at that election.

It is insisted, however, that this statutory provision 30 respecting the filling of vacancies in the office of County Clerk, is in contravention of our State constitution.

The constitutional provisions invoked in support of this contention are Art. VII, Sec. 2, par. 6, and Art. V, par. 12 of that instrument.

The first of these clauses is this: "Clerks and surrogates of counties shall be elected by the people of their respective counties at an annual election for members

of the general assembly. They shall hold their office for five years."

The second of these constitutional provisions is this: "When a vacancy happens in the office of a clerk or surrogate of any county, the Governor shall fill such vacancy, and the commission shall expire when a successor is elected and qualified."

It is not perceived how these provisions antagonize the already quoted clauses in the election act. The
10 constitution does not say that there shall be an election for the office of County Clerk once in every five years. The clause in the election act does use that language, but that clause is to be read in connection with the clause providing for the filling of vacancies, which modified the language of the previous provision.

The constitution merely states how the clerks of counties are to be elected and how long they shall hold office; it does not state that there shall be an election for clerks at certain general elections, which elections
20 shall be separated by a period of five years. Nothing in the constitution prevents the election of a clerk at any general election for members of assembly, save the fact that there will be no vacancy to which the candidate can be elected.

When, however, an incumbent dies, there is a vacancy; and another elected at any general election thereafter, so far as the language of the constitution controls, is the *de jure* Clerk. The exercise by the
30 Governor of his constitutional power to fill this vacancy in no way impairs the right to elect at the ensuing general election, for the constitution itself provides that the appointment shall expire when a successor is elected and qualified.

We are therefore of the opinion that there should be judgment for the relator.

COURT OF ERRORS AND APPEALS.

THE STATE, EX REL. KIRBY,	}
<i>Relator,</i>	
<i>vs.</i>	
EDWARD S. LEE,	
<i>Defendant.</i>	}

ASSIGNMENT OF ERROR.

Afterwards, that is to say on the _____ day of November, nineteen hundred and eight, in the Court of Errors and Appeals in the last resort in all causes, **10** comes the said Edward S. Lee, by Bourgeois and Sooy, his attorneys, and says that in the record and proceedings aforesaid, and also in the matters therein recited and contained in the judgment aforesaid there is manifest error in this, to wit:

1. That the information aforesaid, and the matters therein contained are not sufficient in law for the said State of New Jersey, ex rel. Kirby, to have and maintain the aforesaid writ of quo warranto against the said Edward S. Lee. **20**

2. That there is error in this, to wit, that under the constitution of the State of New Jersey the term of office of Lewis P. Scott did not expire until the November election, 1910, whereas the Supreme Court decided that it expired at the November election, 1908.

3. That there is manifest error in this, that under the terms of the constitution of the State of New Jersey, there could lawfully be held no election for the election of a county clerk of Atlantic county before the November election, 1910, and that the Supreme Court of the State of New Jersey erroneously ruled and adjudged **30** that an election for county clerk in Atlantic county was lawfully held in November, 1908.

4. That there is error in this, that the Supreme Court held the No. 139 of the act respecting elections, ap-

proved April 4th, 1898, to be constitutional, whereas said act contravenes the provisions of the constitution respecting the term of office of county clerks, and contravenes the constitution, respecting vacancies in said office and the filling thereof, wherefore said statute is unconstitutional and void.

5. That there is error in this, to wit, that the Supreme Court determined and adjudged that Samuel Kirby is entitled to the office of county Clerk of Atlantic county, whereas under the law of the land the
10 said court should have determined and adjudged that Edward S. Lee is entitled to said office until the November election, 1910.

Therefore the said Edward S. Lee prays that the judgment aforesaid, by reason of the aforesaid errors and of other errors appearing in the record and proceedings aforesaid, be reversed, annulled and held for nothing, and that the said Edward S. Lee be declared
20 to be entitled to the said office of County Clerk of Atlantic county until November election, 1910, and that he be restored to all things he has lost on occasion of said judgment, and that the prosecutor of said writ may rejoin to said errors.

BOURGEOIS & SOOY,
Attorney and of Counsel
with Plaintiff in Error.

Joinder in error in usual form.

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