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132-12

132 MAR. T. 1917

NEW JERSEY

COURT OF ERRORS AND APPEALS.

JOHN ROSS,
Plaintiff-Appellant,

vs.

**BOARD OF CHOSEN FREEHOLD-
ERS OF THE COUNTY OF HUD-
SON,**

Defendant-Respondent.

*On Appeal from
Supreme Court,
Hudson County.*

State of the Case.

CHARLES M. EGAN,
Attorney of Plaintiff-Appellant.

JAMES J. MURPHY,
Attorney of Defendant-Respondent.

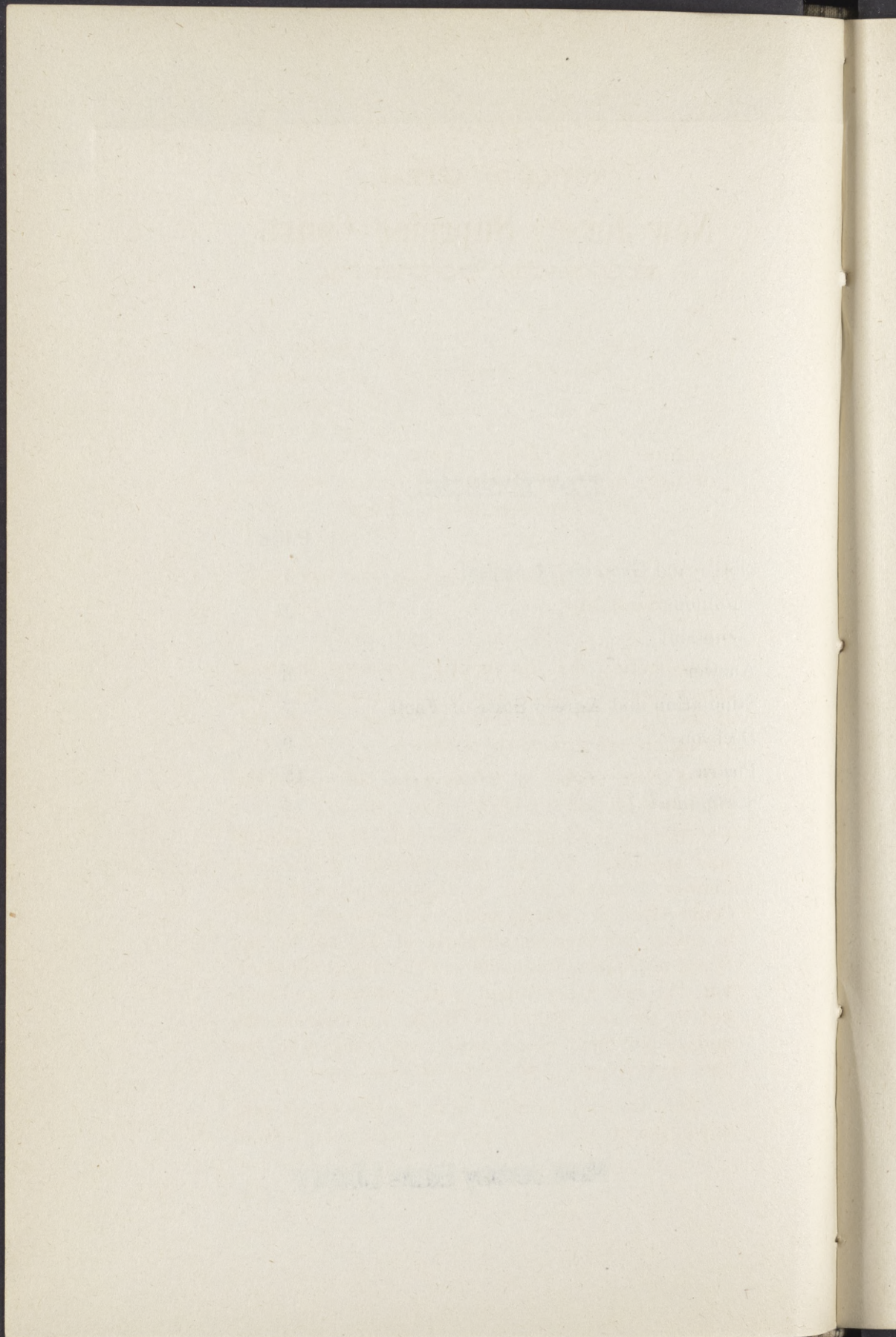
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1917

ON BRIEFS

State of the Case

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NOTICE OF APPEAL.

New Jersey Supreme Court.

HUDSON COUNTY

JOHN ROSS, <i>Plaintiff-Appellant,</i>	}	<i>Notice of Appeal and Grounds of Ap- peal, to the Court of Er- rors and Ap- peals.</i>	10
<i>vs.</i> BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, <i>Defendant-Respondent.</i>			

*To James J. Murphy, Attorney for Defendant
Respondent:* 20

SIR:

Take notice, that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause, and the following are the grounds of appeal:

The Court erred in refusing to find from the stipulated facts, as follows:

“That on or about November 8th, 1908, plaintiff was appointed by the then Sheriff of Hudson County, James J. Kelly, as a guard in the Hudson County Jail, at a yearly salary of \$1,000.00, payable in equal monthly installments of \$83.33, by the Board of Chosen Freeholders of the County of Hudson; the said appointment being allowed and ratified by the said Board of Chosen Freeholders, the said employment being under, and subject to, the civil service laws of the State of New Jersey. 30

“That the said plaintiff from the day of his said appointment, received regularly each month from 40

NOTICE OF APPEAL

the Board of Chosen Freeholders, his monthly salary of \$83.33, until on or about November 30th, 1911, when the said defendant refused to pay the said plaintiff his regular monthly salary and so continued to refuse to pay the said monthly salary from the 30th day of November, 1911, up to and including March 19th, 1913, although the said John Ross, daily and regularly reported for work, and was at all times ready and willing to perform the duties of his said employment. The said defendant refused to pay the plaintiff's salary for the period aforesaid because the then Sheriff of Hudson County dismissed plaintiff from his said position without alleging any reason and without a hearing, and contrary to law. The State Civil Service Commission refused to sustain the said Sheriff's action on the ground that it was improper and illegal, holding that the plaintiff should be permitted to perform his duties as such guard, and plaintiff thereupon, was allowed to perform his duties.

“The plaintiff was prevented by the then Sheriff from rendering any services as such guard in said Hudson County Jail, from November 30th, 1911, up to March 19th, 1913, upon which said last day the said plaintiff was allowed to perform his duties. That the amount of salary he would be entitled to receive if he were permitted to work, would be \$1,259.00, with interest from March 19th, 1913.

“That during all the above period of time the then Sheriff of the County of Hudson, appointed another person as guard in the said jail in the place of the said plaintiff, who rendered all the services required and necessary to be performed and rendered, and this defendant paid the salary of such other guard; and during all of said period of time the plaintiff did not render any services as such guard

NOTICE OF APPEAL

in said jail," in favor of the plaintiff and against the defendant.

The plaintiff requested the Court to find that the discharge of the plaintiff by the then Sheriff, without alleging any reason, and without a hearing and contrary to law, rendered the defendant liable for the amount of salary due him under the aforesaid stipulated facts. 10

The plaintiff requested the Court to find that since it is admitted that the dismissal of the plaintiff was contrary to law, by virtue hereof, there never was a legal dismissal of the plaintiff, and he must have presumed to have continued in his employment, and under the circumstances, the defendant was liable for the amount of his salary due him. 20

The plaintiff requested the Court to find that the said plaintiff daily and regularly reported for work, and was at all times ready and willing to perform the duties of the said employment, but he was prevented by the then Sheriff, from rendering any services as such guard, and as a consequence thereof, the defendant was liable for the amount of salary due him.

The plaintiff requested the Court to find that the plaintiff was employed under, and subject to, the Civil Service Laws of the State of New Jersey, and that he was dismissed from his position without any reason being alleged and without a hearing, and contrary to law; consequently, his dismissal was illegal, and without warrant, and the defendant was liable for the amount of salary due him. 30

That the Court should find that the plaintiff is entitled to \$1,259 with interest from March 19th, 40

SUMMONS

1913, and to which ruling of the Court the plaintiff duly excepted.

That the Court erred in refusing to give the decision and judgment in favor of the plaintiff.

10 That the Court erred in giving a judgment in favor of defendant.

CHAS. M. EGAN,

Attorney for Plaintiff-Appellant.

Dated Feb. 1, 1917.

SUMMONS.

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

You are summoned to answer the annexed complaint of John Ross in an action at law in the Supreme Court. [L. s.]
 And take notice, that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit, and judgment
 30 may be entered against you.

WITNESS, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this 22nd day of December, nineteen hundred and fifteen.

WILLIAM C. GEBHARDT,
 Clerk.

CHARLES M. EGAN,
 Attorney.

COMPLAINT.

SUPREME COURT OF NEW JERSEY,
HUDSON COUNTY.

JOHN ROSS,
Plaintiff,

vs.

BOARD OF CHOSEN FREEHOLDERS
OF HUDSON COUNTY,
Defendants.

Complaint.

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The plaintiff, John Ross, of No. 327 Henderson street, Jersey City, N. J., says:

1. That on or about November 8th, 1908, plaintiff was appointed by the then Sheriff of Hudson County, James J. Kelly, as a guard in the Hudson County Jail, at a yearly salary of \$1,000, payable in equal monthly installments of \$83.33, by the Board of Chosen Freeholders of the County of Hudson, the said appointment being allowed and ratified by the said Board of Chosen Freeholders 20

2. The said plaintiff, from the day of his said appointment, received regularly each month from the Board of Chosen Freeholders his monthly salary of \$83.33 until on or about November 30th, 1911, when the said defendant, refused to pay the said plaintiff his regular monthly salary, and so continued to refuse to pay the said monthly salary from the 30th day of November, 1911, up to and including March 19th, 1913, for which said period the plaintiff became and was entitled to the sum of \$1,259. 30

3. Plaintiff claims as damages the sum of \$1,259 with interest from March 19th, 1913.

CHARLES M. EGAN,
Attorney for Plaintiff.

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ANSWER.

SUPREME COURT OF NEW JERSEY,
HUDSON COUNTY.

10	JOHN ROSS, <i>Plaintiff,</i> <i>vs.</i> BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF HUDSON, <i>Defendant.</i>	}	<i>Action at Law.</i> <i>Answer.</i>
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The defendant, a Municipal Corporation of the State of New Jersey, for answer to the complaint herein, says:

20 1. This defendant admits the first paragraph of the complaint.

2. This defendant admits the second paragraph of the complaint except it denies that the plaintiff became and was entitled to the sum of \$1,259.00 from this defendant.

3. This defendant denies that it is indebted to the plaintiff in any sum whatever.

30 **Separate defense to said complaint.**

This defendant further answering says that during all the period of time between said November 30th, 1911, and the 19th day of March, 1913, the then Sheriff of the County of Hudson, appointed another person as guard in the Hudson County Jail, in the place of the said plaintiff; that said other person rendered all the services required and necessary to be performed and rendered as such guard in said Hudson County Jail, and this defendant paid
 40 the salary of such guard during all of said period

STIPULATION AND AGREED STATE OF FACTS

of time; and during all of said period of time the plaintiff did not render any services as such guard in said Hudson County Jail.

JNO. A. DENNIN,
Attorney for Defendant.

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STIPULATION AND AGREED STATE OF FACTS.

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

JOHN ROSS,
Plaintiff,

vs.

BOARD OF CHOSEN FREEHOLDERS
OF THE COUNTY OF HUDSON,
Defendant.

*Action at Law.
Stipulation and
Agreed State of
Facts.*

20

It is hereby stipulated and agreed by and between the attorneys for the respective parties to the above entitled action, that the same be submitted to the Court without a jury and without formal notice of the setting down of said cause on the calendar, and that the following are the facts involved in said action:

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1. That on or about November 8th, 1908, plaintiff was appointed by the then Sheriff of Hudson County, James J. Kelly, as a guard in the Hudson County Jail, at a yearly salary of \$1,000, payable in equal monthly installments of \$83.33, by the Board of Chosen Freeholders of the County of Hudson, the said appointment being allowed and ratified by the

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STIPULATION AND AGREED STATE OF FACTS

said Board of Chosen Freeholders, the said employment being under and subject to the civil service laws of the State of New Jersey.

10 2. The said plaintiff, from the day of his said appointment, received regularly each month from the Board of Chosen Freeholders his monthly salary of \$83.33 until on or about November 30th, 1911, when the said defendant refused to pay the said plaintiff his regular monthly salary, and so continued to refuse to pay the said monthly salary from the 30th day of November, 1911, up to and including March 19th, 1913, although the said John Ross daily and regularly reported for work and was at all times ready and willing to perform the duties of his said employment. The said defendant refused to pay the plaintiff's salary for the period aforesaid because the then Sheriff of Hudson County dismissed plaintiff from his said position without alleging any reason and without a hearing, and contrary to law. The State Civil Service Commission refused to sustain the said Sheriff's action on the ground that it was improper and illegal, holding that the plaintiff should be permitted to perform his duties as such guard, and plaintiff thereupon was allowed to perform his duties.

20 30 3. The plaintiff was presented by the then Sheriff from rendering any services as such guard in said County Jail from November 30th, 1911, up to March 19th, 1913, upon which said last day the said plaintiff was allowed to perform his duties. That the amount of salary he would be entitled to receive if he were permitted to work would be \$1,259 with interest from March 19th, 1913.

4 4. That during all the above period of time, the then Sheriff of the County of Hudson appointed another person as guard in the said jail, in the place of

DECISION

the said plaintiff, who rendered all the services required and necessary to be performed and rendered, and this defendant paid the salary of such other guard, and during all of said period of time the plaintiff did not render any services as such guard in said jail.

CHARLES M. EGAN, 10
 Atty. for Pltff.
 JAMES J. MURPHY,
 Atty. for Deft.

DECISION.

NEW JERSEY SUPREME COURT.

JOHN ROSS, <i>Plaintiff,</i>	}	20
<i>vs.</i>		<i>Action at Law.</i>
THE BOARD OF CHOSEN FREEHOLD- ERS OF HUDSON COUNTY, <i>Defendant.</i>		<i>Decision.</i>

Hon. Charles M. Egan, Attorney for Plaintiff.
 Hon. James J. Murphy, Attorney for Defendant. 30
 WILLIAM H. SPEER, Circuit Judge.

This case is, by consent, tried before me without a jury on a stipulated state of facts.

Plaintiff was employed as a guard in the Hudson County Jail. His employment was under and subject to the civil service laws of the State of New Jersey. The Sheriff of Hudson County dismissed plaintiff from his position without alleging any reason, without a hearing, and contrary to law. The State Civil Service Commission refused to sustain 40

DECISION

the Sheriff's said action on the ground that it was improper and illegal and held that the plaintiff should be permitted to perform his duties as such guard, and plaintiff thereupon was allowed to perform his duties. It is stipulated that plaintiff's dismissal was contrary to law and that he duly and regularly reported for work, and was at all times ready and willing to perform the duties of his said employment, but that he did not perform the same. It is also stipulated that plaintiff was prevented by the then Sheriff of Hudson County from rendering any services as such guard in said Hudson County Jail from November 30, 1911, up to March 19, 1913, for which period he sues herein to recover his salary.

There is no question made by either side but that a guard in a County Jail holds a position. *Cavanagh vs. Essex County* 29 Vroom, 531; nor is there any doubt that "a position is analogous to an office, in that the duties that pertain to it are permanent and certain, but it differs from an office, in that its duties *may* be non-governmental and not assigned to it by any public law of the State," *Fredericks vs. Board of Health*, 82 N. J. L., 200. There is no doubt either but that one who becomes a public officer de facto without dishonesty or fraud on his part, and who renders the services required of such public officer, may recover the compensation provided by law for such services during the period of their rendition. *Erwin vs. Jersey City*, 31 Vr., 141. It follows that he, the de facto officer, is entitled to the compensation. *Ibid*, p. 150. It was decided in that case that the de facto officer who actually performed the services was entitled to the compensation and that the de jure officer who had not performed them was not entitled to it. This conclusion

DECISION

is abundantly supported by the cases of *Stuhr vs. Curran*, 15 Vr., 188; *Uffert vs. Vogt*, 36 Vr., 380; and *Hoboken vs. Gear*, 3 Dutch., 265-278.

The question for decision in this case is whether the cases above cited are applicable to the case now sub judice or whether the case of *John Boylan, Appellee, vs. Mayor and Aldermen of Jersey City*, submitted March 25, 1914, and decided June 23, 1914, by the New Jersey Supreme Court, is applicable. The opinion in the latter case, which is short, was as follows:

"PER CURIAM: The appellee was employed in the street department of Jersey City at sixty-five dollars a month. On August 17, 1912, he was suspended and later was tried and dismissed. On appeal the Civil Service Commission adjudged that he was illegally dismissed and ordered his reinstatement; and on January 1, 1913, he was in fact reinstated. This suit is for sixty-five dollars a month from August 17, 1912, to January 1, 1913, less what the appellee was able to earn. Judgment was given for appellee for the amount claimed. This was right. It is not the case of an office or position, but of a mere employment. *Fredericks v. Board of Health*, 82 N. J. L., 200. The action was based on an unlawful discharge. If there had been a contract for a fixed term, say one year, judgment would unquestionably be founded on a sound legal principle. In our opinion the tenure of office created by the legislative policy of the civil service act takes in legal theory the place of such contract and hence by analogy the discharged employee when reinstated by the Civil Service Commission recovers upon the principle of an unlawful discharge, in which action under the civil service rule the technical difference between damages and wages does not arise. If this

DECISION

is not so a mere suspension, however unlawful, will accomplish all that a lawful dismissal could and the civil service be thereby entirely emasculated.

“The judgment of the First District Court of Jersey City will be affirmed.”

- 10 I think that the cases first cited, notably that of Erwin vs. Jersey City and Stuhr vs. Curran, are applicable, and that the case of Boylan vs. Jersey City is inapplicable. It must not be overlooked that the Court in pronouncing the opinion in Boylan vs. Jersey City took particular pains to differentiate that case from one in which the case of an office or position was in question and planted its decision firmly upon the ground that the case then before it
- 20 was one of mere employment, thereby indicating that if the case had been one of office or position the result would in all likelihood have been different. Further, it cannot be denied that if the case were one of office the defendant is entitled to prevail, and it seems to me that the analogy between an office and a position pointed out in Fredericks v. Board of Health, 82 N. J. L., and the fact that in this case the employment of the plaintiff was, in the light of the decisions and by the nature of plaintiff's
- 30 duties and functions and the source from which they emanated, of such a character as to make the analogy between it and an office too close to be overlooked or to work any difference in the adjudication that should be made in the case in hand.

The above results in my finding in favor of the defendant and against the plaintiff in the present action.

POSTEA.

NEW JERSEY SUPREME COURT.

JOHN ROSS, <i>Plaintiff,</i> <i>vs.</i> THE BOARD OF CHOSEN FREEHOLD- ERS OF HUDSON COUNTY, <i>Defendant.</i>	}	<i>Action at Law.</i> <i>Postea.</i>	10
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This case was tried before Judge William H. Speer, sitting in the Supreme Court, at Hudson County, without a jury, upon a stipulation of facts consented to between counsel for the plaintiff and counsel for the defendant, on January twenty-fifth, nineteen hundred and seventeen. 20

The said Court ordered judgment entered against the plaintiff and in favor of the defendant.

WILLIAM H. SPEER,
 Judge

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Judgment.
~~POSTEA.~~

NEW JERSEY SUPREME COURT.

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JOHN ROSS,

vs.

BOARD OF CHOSEN FREEHOLDERS
OF HUDSON COUNTY.

Action at Law.

~~On Postea.~~

Judgment.

It is ordered that judgment be and hereby is entered in favor of defendant and against the plaintiff with costs to be taxed nisi.

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Entered February 1, 1917,

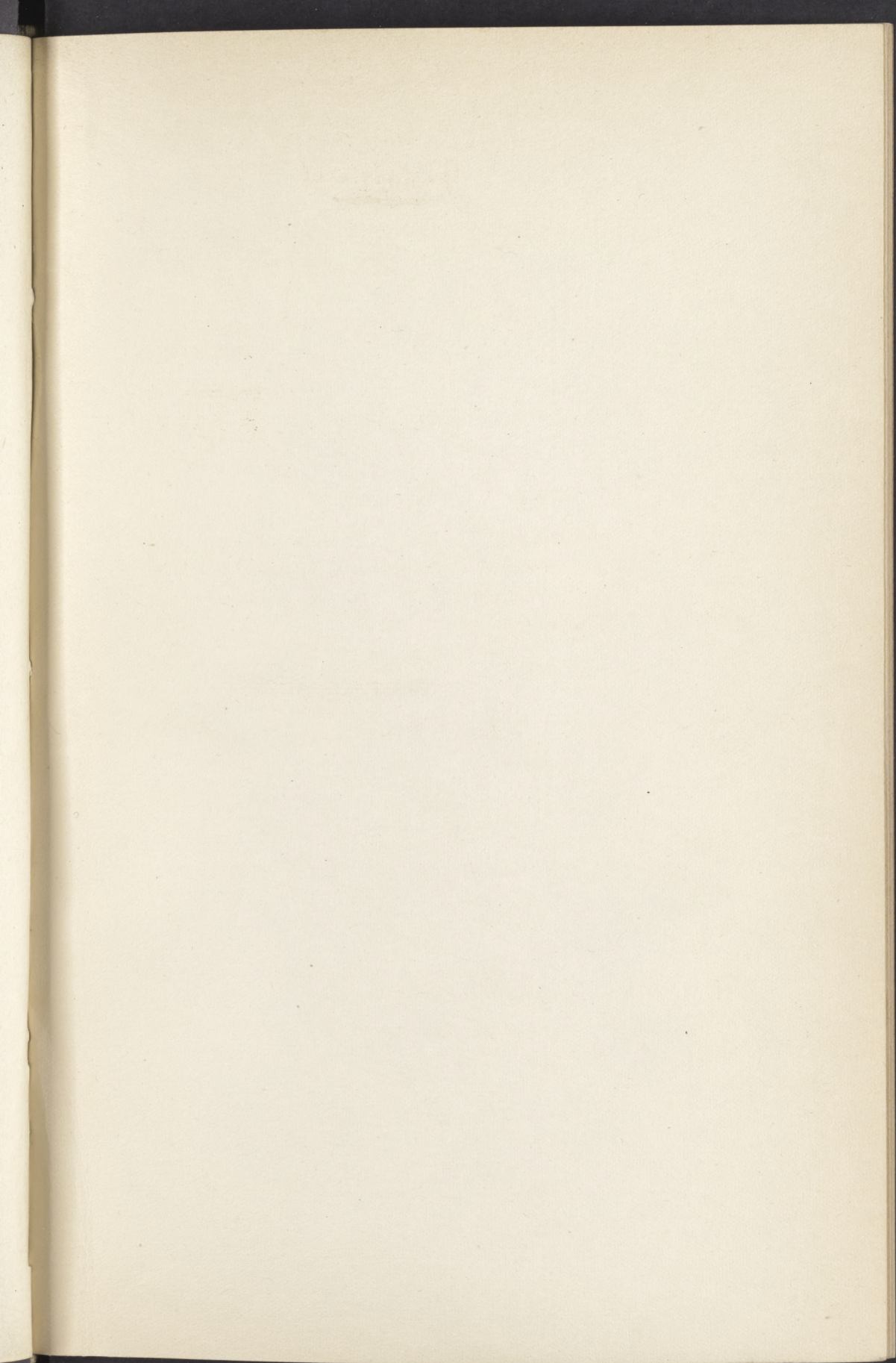
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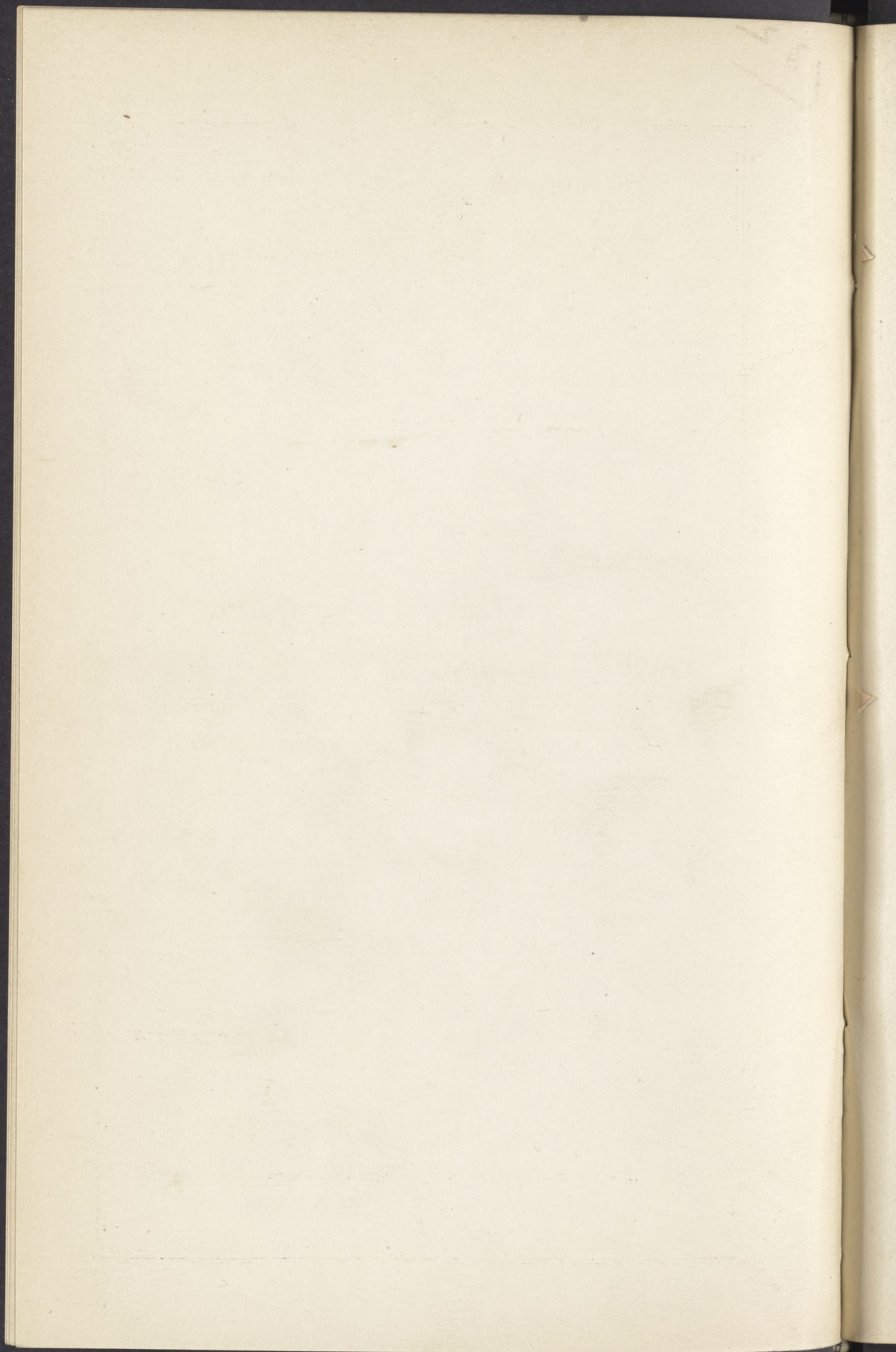
JAMES J. MURPHY,

Attorney.

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NEW JERSEY

Court of Errors and Appeals

JOHN ROSS,

Plaintiff-Appellant.

vs.

BOARD OF CHOSEN FREEHOLDERS
of the County of Hudson,

Defendant-Respondent.

*Action at Law.
On Appeal
from Supreme
Court, Hudson
County.*

BRIEF FOR PLAINTIFF-APPELLANT.

This action was brought in the Supreme Court, Hudson County, and the case was submitted on an agreed stipulation of facts, to his Honor, William H. Speer, who decided in favor of the defendant, the Board of Chosen Freeholders of Hudson County, upon the following facts:

“That on or about November 8th, 1908, plaintiff was appointed by the then Sheriff of Hudson County, James J. Kelly, as guard in the Hudson County Jail, at a yearly salary of \$1,000, payable in equal monthly installments of \$83.33, by the Board of Chosen Freeholders of the County of Hudson, the said appointment being allowed and ratified by the said Board of Chosen Freeholders, the said employment being under and subject to the civil service laws of the State of New Jersey.

“The said plaintiff, from the day of his said ap-

pointment, received regularly each month from the Board of Chosen Freeholders his monthly salary of \$83.33 until on or about November 30th, 1911, when the said defendant refused to pay the said plaintiff his said regular monthly salary and so continued to refuse to pay the said monthly salary from the 30th day of November, 1911, up to and including March 19th, 1913, although the said John Ross daily and regularly reported for work and was at all times ready and willing to perform the duties of his said employment.

“The said defendant refused to pay the plaintiff’s salary for the period aforesaid because the then Sheriff of Hudson County dismissed plaintiff from his said position without alleging any reason and without a hearing, and contrary to law. The State Civil Service Commission refused to sustain the said Sheriff’s action on the ground that it was improper and illegal, holding that the plaintiff should be permitted to perform his duties as such guard, and plaintiff thereupon was allowed to perform his duties.

“The plaintiff was prevented by the then Sheriff from rendering any services as such guard in said County Jail from November 30th, 1911, up to March 19th, 1913, upon which said last day the said plaintiff was allowed to perform his duties. That the amount of salary he would be entitled to receive if he were permitted to work, would be \$1,259 with interest from March 19th, 1913.

“That during all the above period of time, the then Sheriff of the County of Hudson appointed another person as guard in the said jail, in the place of the said plaintiff, who rendered all the services required and necessary to be performed and rendered, and this defendant paid the salary of such other guard, and during all of said period of time

the plaintiff did not render any services as such guard in said jail."

The case is now before this Court on Appeal. We submit that the judgment should be reversed for the following reasons:

POINT I.

The plaintiff was never legally dismissed from his position.

It was stipulated and agreed, that plaintiff was employed as a guard in the Hudson County Jail; that his employment was "under, and subject to the Civil Service Laws of the State of New Jersey"—"the then Sheriff of Hudson County dismissed plaintiff from his said position without alleging any reason and without a hearing, and *contrary to law*. The State Civil Service Commission refused to sustain the said Sheriff's action on the ground that it was improper and illegal, holding that the plaintiff should be permitted to perform his duties as such Guard, and plaintiff thereupon was allowed to perform his duties."

Since it is admitted that the dismissal of plaintiff was "contrary to law," therefore, there could not be, nor ever was, a legal dismissal of the plaintiff, and he must be presumed to have been continued in his employment.

It was also stipulated that "said John Ross, *daily and regularly reported for work, and was at all times ready and willing to perform the duties of his said employment* * * * The plaintiff was prevented by the then Sheriff from rendering any services as such guard in said Hudson County Jail, from November 30th, 1911, up to March 19th, 1913, upon which said last day the said plaintiff was allowed to perform his duties."

In the City of Hoboken vs. Gear, 3 Dutcher, at page 289, the Court said:

“The resolution of removal was either valid or, if void, the plaintiff ceased voluntarily to perform the duties of his office and so not entitled to the salary. It is not pretended that he was prevented from serving by the physical force of the defendants, but that, upon this void resolution of the Council being shown to the policeman, they voluntarily threw down their emblems of office and disbanded. If the plaintiff had been discharged or *prevented from serving by the defendants or by anybody authorized by them, might perhaps have been entitled to his salary without performing its duties.*”

The stipulated facts, in the case at issue, clearly show that Ross “regularly reported for work” and “was prevented by the then Sheriff from rendering any services.”

POINT II.

Plaintiff was protected by Civil Service.

The plaintiff was employed “under and subject to the Civil Service Laws of the State of New Jersey. * * * The then Sheriff of Hudson County dismissed plaintiff from his said position *without alleging any reason, and without a hearing, and contrary to law;*” therefore; the civil service laws were absolutely disregarded, and plaintiff should not have been deprived of his salary.

POINT III.

Plaintiff was not an officer.

The plaintiff was not an officer, and did not hold an office; therefore, the substitute who performed plaintiff’s duties and received the salary for the period for which plaintiff makes claim, was not a *de facto* officer. We submit that the law, and the de-

cisions thereon, offer no recognition of a *de facto* employee. In legal theory there can be no such person. The defendant's admitted fact that plaintiff's dismissal was "contrary to law" is an open confession of an illegal payment to the intruder who performed the duties of guard in the place of plaintiff. The plaintiff should not be denied justice because of the conceded wrong doing of the defendant. There is a legal maxim that when one of two innocent persons must suffer a loss, he must bear it through whom it occurred. In the case at issue, there was but one innocent person, and he was the plaintiff. If the defendant deliberately and with a consciousness of its illegal position unlawfully paid one man to do the work another is properly and legally engaged in performing, it should not be permitted to take advantage of its own wrong, and successfully set up as a barricade of defense, its admitted injustice. Contradictory rights of possession cannot co exist, and, as the lawful employee has the conceded right, the intruder's act must be wrongful. Plaintiff had a legal right to the employment and the attaching wages and that legal right cannot be put out of the protection of the law when its destruction is the result of error or design. If the employer makes a mistake that violates the rights of another, he is responsible in damages to the injured party.

The plaintiff was engaged as a guard in the Hudson County Jail. He was in no sense an officer; that it is parallel with the facts, or controlled by the decisions in the cases of *Erwin vs. Jersey City*; *Stuhr vs. Curran*, *Uffert vs. Vogt*, or *Hoboken vs. Gear*, is absolutely without warrant. *Erwin* was an officer in the city law department, and it was properly held he was a *de facto* officer. *Stuhr* sought to recover the emoluments of an office (the

office of Freeholder) which had been collected by the *de facto* officer Curran. Vogt was a receiver of taxes for the City of Newark, and was an officer of that municipality. Gear was a police officer and consequently an officer within the meaning of the decisions.

In *Stewart vs. Freeholders of Hudson*, 32 Vr., 117, it was held that "An office is a place created, or at least recognized, by the law of the State, and to which certain permanent public duties are assigned either by the law itself or by regulations adopted under authority of law." And "A position within the purview of this act, is defined to be a place, the duties of which are continuous and permanent, analagous to those of an office, and which pertain to the position as such."

It is held that a guard in a Jail holds "a position."

Fredericks vs. Board of Health, 82 N. J. L., 200.

Cavanaugh vs. Essex, 29 Vr., 531.

The plaintiff's position is practically identical with the principle which obtained in the case of *Cavanaugh vs. Essex*. In the *Cavanaugh* case the plaintiff, a jail guard, claimed protection under the Veteran Act. In the plaintiff's case the civil service law is the protecting influence.

The same principle is sustained in the cases of *Horan vs. Orange*, 29 Vr., 533; in *Lewis vs. Jersey City*, 22 Vr., 240; in *Evans vs. Freeholders of Hudson*, 24 Vr., 585; in *McGrath vs. Bayonne*, 89 Atl. Rep., 48.

POINT IV.**Defendant should not be permitted to take advantage of its admitted wrong.**

Defendant claims it paid another for the services which plaintiff had been employed to perform, as a reason why judgment should not be rendered in favor of plaintiff. But if Ross were an officer that contention would undoubtedly be sound. But as already shown, plaintiff was not an officer. In the case of Stuhr vs. Curran, the defendant had reasonable grounds for believing he was entitled to the emoluments of an office to which a legal body, in the first instance, certified he had been elected to fill, and he took the salary under a color of right. In this case at issue the defendant admits plaintiff should never have been dismissed. But we contend that when he reported regularly for work, he should have been permitted to perform it.

For the reasons above stated we ask for a reversal of the judgment of the Supreme Court.

Respectfully submitted,

CHARLES M. EGAN,

Attorney for Plaintiff-Appellant.

