

N. J. Supreme Court.

1

THE STATE OF NEW JERSEY, *ex rel*,
JOHN B. HAIGHT

vs

JAMES H. LOVE.

On Quo Warranto Information.

2

Jacob Vanatta, Esq., Attorney-General of the State of New Jersey, who sues for the said State in this behalf, comes in his own proper person here into the Supreme Court of Judicature of the said State before the Justices thereof, at the State House in the City of Trenton, on the fourteenth day of June, in the year one thousand eight hundred and seventy-six, for the said State of New Jersey, at the relation of John B. Haight, Jersey City, County of Hudson and State of New Jersey, desiring to sue and prosecute in this behalf, according to the form of the Statute in such cases made and provided gives the said Court here to be informed, and understand that the said relater for the space of more than ten days last past, hath been and still is, rightfully entitled to hold, have, use and exercise the office of city collector of the Mayor and Aldermen of Jersey City, under and by virtue of the following Acts of the State of New Jersey, and the facts hereinafter stated, that is to say, by an Act entitled, an Act to reorganize the the local government of Jersey City 4
passed March 31st, 1871, it was enacted among other things as follows :

SEC. 11. That "every person elected or appointed to any office named in this Act shall, before he enters upon the duties of his office, take and subscribe an oath before the

5 city clerk, who is hereby empowered to administer the same, that he will faithfully and impartially, to the best of his skill and understanding, discharge the duties of his office, which oath shall be filed in the office of the city clerk, and by last mentioned Act it is among other things further enacted :

6 SEC. 26. And be it enacted that as soon as may be after their organization the Board of Aldermen shall proceed to appoint by ballot (a majority of all the Aldermen being necessary to a choice) a city clerk, a city collector, a City Marshall, an Overseer of the Poor, and three Pound Keepers, whose term of office shall commence on the third Tuesday of May and continue for one year or until their successor shall qualify ; and by last mentioned Act it is further among other things enacted that the city collector shall give such bonds for the faithful performance of his duties as the board of finance and taxation may require.

7 That by an Act of said State entitled, "A supplement to an Act entitled, an Act to reorganize the local government of Jersey City passed March 31st, 1871, which supplement was approved March 24th, 1873, it was enacted among other things as follows :

8 SEC. 2. And be it enacted, That the Mayor shall not be ex-officio a member of any of the boards of the City Government but shall have power to veto the actions of any board within ten days thereafter ; and all ordinances and resolutions shall be certified and forwarded to the Mayor as now required by law ; and unless said board shall by a two-thirds vote at its next meeting after receiving notice thereof vote to sustain said action, notwithstanding said veto, said action shall be void.

SEC. 35. And be it enacted, That the present board of finance and taxation, as now constituted, be abolished after the first Monday of April next ; and that all the powers and duties exercised under the Act to which this is a supplement, and by this Act by the board of finance and taxation, are hereby transferred to and vested in a new board of finance and taxation where terms of office shall commence on the first Monday of April, one thousand eight hundred and seventy three ;

and said board of finance and taxation shall consist of 9 seven persons, as follows, to wit: The President of the Board of Aldermen, who shall be an ex-officio member of said board of finance and taxation, and six other persons to be appointed by the Board of Aldermen at a special or stated meeting after the passage of this act, of whom three shall hold office for one year and three for two years.

Sec. 36. And be it enacted, that persons appointed to succeed incumbents in the said board of finance and taxation on expiration of their term shall hold office for two 10 years; persons appointed to fill their vacancies therein arising from other causes than expiration of term shall hold office for the unexpired term only.

Sec. 42. And be it enacted, That the new board of finance and taxation shall appoint a collector of revenue to be called the city collector, who shall hold his office for the term of three years and may be removed by said board for cause, and who shall receive an annual salary of five thousand dollars, and give bonds for the faithful performance of his duties in such sum as the board of finance and 11 taxation shall approve; and the term of office of the present city collector shall expire as soon as the collector designated under this act is appointed and qualified.

That by another supplement entitled a supplement to an act entitled an act to reorganize the local government of Jersey City passed March 31st, 1871, which supplement passed March 27th, 1874, it was enacted among other things as follows:

Sec. 7. And be it enacted, That the term of office of each one of the present members of the board of finance 12 and taxation of said city shall expire on the second Monday of April next after the passage of this act; and thereafter said board shall consist of five persons to be appointed by the Board of Aldermen at any special or stated meeting after the passage of this act, two of whom shall hold office for one year, and three, for two years; and whose term of office shall commence on the said second Monday of April next. All vacancies in said board shall be filled by the Board of Aldermen. Persons chosen to succeed incumbents shall hold office for two years. Per-

- 13 sons chosen to fill vacancies therein arising from any other cause than expiration of term shall hold office for the unexpired term only. That the said Attorney-General at the relation aforesaid further gives the said court here to be informed and understand that James H. Love, the defendant, herein, was, on the the seventh day of May, 1872, under said act of March 31st, 1871, appointed by the Board of Aldermen, of Jersey City, city collector of said city ; that on the 21st day of May, A. D., 1872, defendant took and filed the oath of office as said city
- 14 collector and entered upon the duties of said office, that under said Act and supplement of March 24, 1873, the board of finance and taxation of Jersey City did on the 10th day of April, 1873, appoint said defendant city collector of Jersey City, ^{and notify him thereof} that on the 14th day of April, A. D. 1873, said defendant did take and subscribe before the city clerk, and file with said clerk the oath of office required by said Act and the said supplement thereto, and did, on the fifteenth day of May, A. D. eighteen hundred and seventy-three, pre-
- 15 sent to the finance committee of the said board of finance and taxation, his bond required by said Act and said supplement, ^{in the amount fixed by said Board on May 1, 1873} which said bond on the twenty-second day of May, A. D. eighteen hundred and seventy-three, was received and ordered on file by said board of finance and taxation, and that the said James H. Love, being so appointed and qualified, became and was city collector of Jersey City. That on the 13th day of April, A. D. 1876, the said board of finance and taxation, did appoint by virtue of said Act and said supplements, said relator,
- 16 John B. Haight, city collector of Jersey City, and did, on last above mentioned day, fix the bonds to be given by said John B. Haight as such city collector, in the sum of two hundred thousand dollars for the faithful performance of his duties as prescribed by, and in accordance with said Act and said supplement, and that the said relator did take and subscribe before the said city clerk of Jersey City, the oath of office required by said Act and said supplement, and did file the same as required by the said Act and said supplement, with the said city clerk, on the 14th day of April, A. D. 1876 ; and that the said re-

lator did, on the 24th day of April, A. D. 1876, present 17
 his bonds as such city collector, to the committee of
 finance and taxation, of Jersey City, and that said bond
 on the 27th day of April, A. D. 1876, was, by said com-
 mittee reported to said board, and by said board adopted
 and approved and ordered entered on the minutes of said
 board, and filed with the clerk of said board. Approved
 by Mayor, and that the acts of said board in appointing
 said relator and fixing and approving his bonds, were
 each presented to, and approved by the Mayor of Jersey
 City. And that the said relator, did, the second day of 18
 May, A. D. 1876, demand possession of the office from the
 said James H. Love, who refused to deliver the same to him,
 and that said relator did on the 25th day of May, A. D.
 1876, again demand the possession of said office from said
 James H. Love and was again refused by him ; and the
 said defendant still by force keeps the said relator out of
 the possession of said office of city collector, and still
 holds, uses and exercises the duties and franchises of said
 office ; and the said Attorney-General further gives said
 Court here to be informed and understand that although 19
 on the 6th day of April, A. D. 1876, the said board of
 finance and taxation did appoint the said defendant city
 collector for the ensuing term ; and although the clerk of
 said city was directed to ^{out. did on that day} notify him of his election, and
 that they did require him to ^A give bonds in the sum of
 two hundred thousand dollars for the faithful perform-
 ance of his duties as city collector as prescribed by and
 in accordance with the city charter ; and although on the
 8th day of April, A. D. 1876, said bond did approve and 20
 accept and enter in the minutes of said bond in full and
 did file the official bond of said Love as such collector :

And, although on the 7th day of April, A. D. 1876, the
 said defendant, James H. Love, took and subscribed be-
 fore the said city clerk the oath of office required by said
 Act and said supplement and filed the same with said
 city clerk on said last above mentioned day ; yet the said
 Attorney-General, at the *relatim* aforesaid, says that the
 action of said board of finance and taxation in making
 said appointment of said defendant of April 6th, A. D.
 1876, and in fixing the amount and accepting the bond of

- 21 said defendant were never, nor were any of them ever presented to the Mayor of Jersey City aforesaid, for his approval or veto ; nor were they or any of them ever approved by the said Mayor ; and that also the term of office of three members of the said board of finance and taxation expired on or before the twelfth day of April, A. D. 1876 ; and that on the thirteenth day of April A. D. 1876, three new members of said board with the two members of said board whose term did not expire, organized said board and thereafter on the same day passed a resolution
- 22 to the effect following :

Whereas, the Board of finance and taxation did on the 6th day of April, 1876, pass the following resolution to wit : moved that we proceed to the election of a city collector for the ensuing term ; therefore be it resolved that the action of said board in passing said resolution and making an appointment thereunder, be and the same is hereby rescinded ; and the said resolution and appointment of James H. Love, collector, shall be and the same is hereby rescinded and made utterly void and of no effect.

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And thereafter on the same day passed another resolution to the effect following :

Resolved, that the resolution passed by the Board of finance and taxation April 6th, 1876, to wit : move that the city collector be required to give bonds in the sum of two hundred thousand dollars for the faithful performance of his duties as prescribed by and in accordance with the requirements of the city charter be and the same is hereby rescinded.

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And that thereafter and on the same day passed another resolution to the effect following :

Whereas, the board of finance and taxation, did on the eighth day of April, 1876, approve of the bonds of the city collector appointed by said board, and *whereas* the action of said board in accepting the said bond has not been presented to or approved by the Mayor as contemplated, with all matters affecting the city. *Therefore be it resolved*, that the action of the board in approving said bond, by motion adopted as aforesaid, be and the

same is hereby reconsidered, and the said motion and all 25
actions of the board acting upon or approving said bonds
shall be and the same is hereby utterly rescinded and
made utterly void and without effect.

That the three last above-mentioned resolutions passed
on said thirteenth day of April, 1876, were each approved
by the Mayor of Jersey City, as required by law.

That thereafter the said board did appoint the said
relator, city collector, as herein before-mentioned, and so
the said Attorney-General says, that the said defendant,
James.H. Love, for the space of more than ten days last 26
past, hath by virtue of the premises, unlawfully held,
used and occupied, and still doth unlawfully hold, use
and occupy the office of city collector of the Mayor and
Aldermen of Jersey City, and its liberties, privileges, and
franchises, and claims to such city collector, and to have,
hold, use, exercise and enjoy the said office, and the
liberties, privileges, franchises thereof, without any legal
election, appointment, warrant or authority whatever,
other than herein before set forth, which are insufficient
in law to enable him to hold the same. 27

That said relator John B. Haight, by virtue of his said
appointment, was under the said Act and said supple-
ments, duly appointed city collector of said, the Mayor
and Alderman of Jersey City, and that the said relator,
John B. Haight, hath ever since been and still is right-
fully entitled to hold, use and exercise the said office of
city collector as aforesaid at Jersey City, as aforesaid,
which said office the said defendant, James H. Love, dur-
ing all the time aforesaid upon the State of New Jersey,
hath usurped, intruded into and unlawfully held, used 28
and exercised, and yet doth usurp, intrude into and un-
lawfully hold and exercise, to the exclusion of the said
relator, John B. Haight, to wit: at Hudson County afore-
said in contempt of the State of New Jersey, and to its
great damage and prejudice against its sovereignty and
dignity.

Whereupon, the said Attorney-General, for the said
State at the relation of the said John B. Haight, desiring
to sue and prosecute in this behalf, prays the advice of
the Court herein, the premises and for due process of law

29 against the said defendant, James H. Love, in this behalf to be made to answer to the said State by what warrant he claims to hold, use, execute and enjoy the aforesaid office of city collector, of the Mayor and Alderman of Jersey City, and the liberties, privileges and franchises thereof.

JACOB VANATTA,
Atty. General,

JAMES B. VREDENBURG,
Atty. of relator.

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*General Demurrer filed
by defendant James H. Love
through Collins + Corbin
Attorneys.*

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NEW JERSEY SUPREME COURT.

THE STATE,

(*Ex rel*, JOHN B. HAIGHT,)

vs.

JAMES H. LOVE.

*On Dem. to
Quo. Warr.*

1. Where the commencement of an official term is not otherwise fixed, the term begins as soon as the appointee is authorized by his own action to legally assume the duties of his office, and not merely when he actually enters upon the office.

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2. Under the second section of the supplement to the charter of Jersey City, approved March 24, 1873, (P. L. 400) the mayor's power to veto extends only to such action of the city boards as partakes of a legislative character, and not to the appointment of city collector.

3. When a board has completely exercised its power of appointing a person to an office, and that person is not removable at the will of the board, a rescission of the appointment will not affect the right to the office.

4. The power to remove an officer for cause can be ex-20-
erted only for just cause, and after the officer has had an opportunity for defence.

Argued before the Chief Justice and Justices Scudder, Dixon and Reed.

The opinion of the court was delivered by Dixon, J. The attorney-general, at the instance of John B. Haight, the relator, filed an information in the nature of a writ of quo warranto against the defendant, James H. Love, for the

purpose of testing the right of the defendant to the office of city collector of Jersey City.

The information sets out as the basis upon which the defendant rests his claim to the office the following facts: That the defendant was appointed city collector on May 7, 1872, under the charter of Jersey City, passed March 31, 1871, by force of which his term of office was to commence on the third Tuesday of May and continue for one year, or until his successor should qualify; that on April 10, 1873, he was again appointed city collector by the board of finance and taxation of the city under a supplement to the charter, approved March 24, 1873, by which it was enacted that that board should appoint a city collector who should hold his office for the term of three years, and that the term of office of the then present city collector should expire as soon as the city collector to be designated under that act was appointed and qualified; that under that last appointment he took the oath of office April 14, 1873, and gave the bond required of him for the faithful performance of his official duties on May 15, 1873; that on April 6, 1876, the board of finance and taxation did again appoint the defendant to the same office for a further term, under which appointment he on April 7, 1876, took the official oath.

The information impugns the validity of the last appointment upon the ground that the action of the board in making it was never presented to the mayor of the city for his approval or veto, and was never approved by him, and the further ground that the preceding term of the defendant did not expire until April 14, 1876, and on or before April 12, 1876, the term of office of three members of the board of finance and taxation, which consisted of only five members, expired and consequently that board had not the right of appointment, and on the thirteenth of April, A. D. 1876, the board composed of the two members holding over and the three new members rescinded his appointment and appointed the relator as city collector.

To this information the defendant demurs and insists that the facts alleged show his right to the office, the reasons urged to the contrary notwithstanding.

In examining the issues thus raised, the first point to be

determined is the exact time of the ending of the defendant's term under his appointment of April 10, 1873. By the supplement of 1873, he was to hold his office for the term of three years. It therefore ended three years after it began. When did it begin? The relator insists that it did not begin until the expiration of the term that preceded it, which, by the supplement, was to expire when the collector designated under it was appointed and qualified; and that as the defendant, being so designated, did not qualify before April 14, 1873 (when he took the oath of office, therefore, 10 his new term did not begin before that date, and consequently did not end before April 14, 1876), prior to which the board of finance was changed.

In as much as the charter, although it provides that the appointee before entering upon the duties of his office shall take an official oath, does not expressly fix the commencement of his term, such commencement must be ascertained by the application of some general principle. What that principle should be, is a subject which does not seem to have received much judicial consideration. Of the cases to 20 which we are referred by counsel for the relator as sustaining the rule he contends for, only one, that of *Brodie v. Campbell*, 17, Cal. 11, has any relevancy, and even in that the rule was not necessary for the decision. The question there was whether the election at which Brodie had been elected, or that at which Campbell had been elected, was the one next proceeding the end of Norton's term. Brodie had been chosen in September 1859 and Campbell in November 1860; Norton had been elected September 7, 1854, his commission had been issued by the governor December 30 26, 1854, and he had taken the oath of office January 2, 1855, and his term was six years. The court held that Campbell's election and not Brodie's was that which the more closely preceded the expiration of Norton's term. But it is evident that this result followed whether the issuance of the commission or the taking of the official oath marked the beginning of the term, whether it ended December 26, 1860, or January 2, 1861; and on the former ground I think the decision was right. The judges, indeed, in deciding the cause, expressed the opinion that Norton's 40

term or *full* term, as Field, C. J., speaks of it, commenced with his qualification, he having qualified within the ten days allowed by law for that purpose, after the receipt of the commission. But in their opinions they intimated several reasons which, I think, made the adoption of a different rule, more consonant with public policy. "The record in the office of the secretary of state" says:—

Just. Field.—"Will show when the commission issued, and upon that record the governor will be presumed to act
 10 when notifying the public by his proclamation of the offices to be filled at any given election." Baldwin, J., in the same case, said "It is unreasonable to suppose that the legislature designed to fix the commencement of the term of an earlier period than that at which the incumbent could enter upon the office." * * "We do not mean to say that a person appointed to a vacancy may delay to qualify as long as he chooses, and then fix his regular term from the act of qualification, for that would be to perpetuate the office in himself; * * But that the rule in this case is
 20 that the new term commences with the qualification. * * The modification of the proposition being that this qualification must not be unreasonably deferred."

The objections against the rule relied upon by the relator are 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 term to be fixed not by the appointing power but by the appointee,
 30 and so in many cases enables the appointee to extend the legal tenure of his predecessor without abridging his own. Such a rule would be liable to great abuse in the case of an officer reappointed to the same office, nor does the modification suggested that this qualification must not be unreasonably deferred, evade the objections. Unreasonably is an elastic expression and only mitigates, does not remove the evils. The tenure of public offices should be rendered as definite as possible.

In my judgment the true rule is that as soon as the ap-
 40 pointee is authorized by his own action to legally assume

the duties of his office then his term should be regarded as begun unless some other period is clearly fixed by the proper authority. That the term of his predecessor lawfully continues until he does actually assume those duties, seems to me in no wise to militate with this principle. There is not the slightest inconsistency between the right to enter upon an office being vested in one person and the right to hold the office until such entry being vested in another. The terms of both indeed run together, but those terms are not incongruous, and the very act which alone could render them 10 conflicting. Entry by the owner of the later term ends the earlier one. By this principle the beginning of an official term otherwise undefined is made dependent upon the will of the appointing powers, 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. The rule thus stated coincides with the rule adopted for determining the commencement of an estate for years in lands, to which such terms of office bear some analogy. An instru- 20 ment reciting that A does this day agree to let to B certain premises for the term of ten years was held to be a present demise of a term commencing forthwith. *Stainforth v. Fox*, 7, *Bing.* 590, and cases cited. Hence I conclude that when on April 10, 1873, the board of finance appointed the defendant city collector for a term of three years, without naming any day for the beginning of the term, and none being named in the charter, the term during which he might lawfully hold the office under that appointment began on that day, and consequently ended with the close 30 of April 9, 1876.

By a supplement to the city charter approved March 27, 1874, it was enacted that the term of office of each of the present members of the board of finance and taxation shall expire on the second Monday of April next, and thereafter said board shall consist of five persons * * two of whom shall hold office for one year and three for two years, and whose term of office shall commence on the said second Monday of April next * * persons chosen to succeed incumbents shall hold office for two years. The second 40

Monday of April in that year was April 13, and the term of the three members commencing on that day and continuing for two years, i. e., both by common law and express statute, calendar years would expire with the close of April 12, 1876, as alleged in the information, and consequently it appears that the persons who composed the board at the time of the defendant's last appointment, April 6, 1876, likewise composed it at the expiration of his then existing term, April 9, 1876, and had the right to select the officer for the succeeding term. It is however further objected to the validity of this appointment that it was not presented to the mayor of Jersey City for his approval or veto, and was never in fact approved by him. The statute relied on to support this objection is the second section of a supplement to the city charter, approved March 24, 1873, which enacts that the mayor shall have power to veto the action of any board within ten days thereafter; and all ordinances and resolutions shall be certified and forwarded to the mayor as now

20 required by law, and unless said board shall by a two-thirds vote at its next meeting after receiving notice thereof, vote to sustain said action notwithstanding said veto, said action shall be void. The word action used in this section is standing alone of very wide import, but it cannot receive such interpretation here. The adoption of a motion to lay on the table or to adjourn would be the action of the board, but certainly such action was not designed to be subject to the mayor's veto. The word must be here limited to those

30 classes of actions which are directed to be certified to the mayor, viz: resolutions and ordinances. The board of finance does not act by ordinance and therefore the question is whether the appointment of city collector is embraced within the class of actions here denominated resolutions.

Statutes similar to the present have been in the courts of this state before for construction. In *State v. Newark*, 1 *Dutch*, 399, Vreedenburgh J., in delivering the opinion of the court, considers them as resembling the veto clauses in the state and general constitutions, and says that they made the mayor a distinct and separate branch of the legis-

40 lative power, and that the resolution can have no vitality

until the legislative power of the mayor has been invoked upon it. In a later case, *Howeth v. Jersey City*, 1 *Vroom*, 93, the same learned judge limits the power of veto to the final law, and fortifies his opinion by remarking that the section then under consideration, by which the right of veto was given, provided that if the resolution or ordinance were passed over the veto by two thirds of the council it should take effect as a law, and if not returned by the mayor within a proscribed time it should become a law; like phraseology exists in the twenty-third section of the present 10 charter of Jersey City, and with that section must this second section of the supplement of 1873 be construed in order to correctly react the purpose of the legislature. Indeed, it is only on the theory that by this second section the legislature intended to confer upon the mayor the same rights and powers over the action of all the other boards, as under that twenty-third section he had over the action of the board of aldermen, that the necessity of formal presentation to him as a prerequisite to the validity of 20 such action can be established. I think, therefore, that only those acts of the board of finance which partake of a legislative character are subject to the mayor's veto, and that his negative does not extend to the mere appointment of the city collector.

The justness of this conclusion is seen also on considering the inaptitude of the word resolution to signify the election of an officer, while, indeed, an officer may be chosen by resolution, such a mode is rarely adopted, usually a vote by ballot or viva voce indicates the choice; and though it is 30 quite clear that the legislature did not intend to make the mayor's power dependent on the form in which the boards acted, it is almost equally sure that they did not mean to extend his power beyond such action as usually in organized assemblies takes the form of resolution or ordinance.

Besides the course now contended for by the relator is an inversion of the common practice when an individual and a board or a body of several are to unite in the selection of an officer. Almost universally the individual nominates and the board ratifies or rejects. But here it is claimed the board is to nominate and the individual is to ratify or 40

reject. The legislature, of course, might adopt such a scheme, but I think when they do they will make it known in language more explicit than that used in this charter.

The relator further insists that the rescission of the defendant's appointment on April 13, 1876, terminated his rights under it. This contention also must fail. What I have already said shows my conviction that the choice of the board of finance was alone necessary to the appointment of the defendant, and the language of Chief Justice Marshall in *Marburg v. Madison*, 1 *Crauch*, 137, 157, is here applicable, "some point of time must be taken when the power of the executive over an officer not removable at his will must cease. That point of time must be when the constitutional power of appointment has been exercised, and this power has been exercised when the last act required from the person possessing the power has been performed. On April 13, 1876, not only had the last act of the appointing power been performed, but the defendant had actually taken the oath of office and entered upon his duties. The power of rescission then was clearly gone. The counsel for the relator suggested that as the defendant had not yet given an official bond, and the board of finance had not taken final action in fixing the amount of bond to be required, the appointment was still incomplete. But neither the charter nor any action of the board of finance made any of these things conditions precedent either to the vesting of right to the office or to the actual entry upon its duties. A failure to give such bond as might be required would doubtless furnish cause for removal, but removal was necessary to end his title; nor can this rescission be regarded as a valid removal. The section under which the defendant was appointed gave the board power to remove for cause. The cause intended is just cause, and the power may be exerted only after the officer has had opportunity for defence. Such has been the well settled law since the resolutions in *Boggs Case*, 11, *Rep.*, 93, corrected and so established by Lord Mansfield's opinion in *Ree v. Richardson*, 1 *Bun.*, 517.

It is not pretended that there was any just cause for removing the defendant, or that he had any opportunity to be heard before his appointment was rescinded. Hence

that rescission can derive no efficacy from this power of removal.

I conclude therefore that the information sets out a valid title to the office of city collector vested in the defendant, and alleges no lawful reason for ousting him.

Judgment should be entered in favor of the demurrant.

A true copy.

BENJ. F. LEE, *Clk.*

An order was thereupon entered that the Demurrer be sustained and that judgement be entered accordingly with costs to the defendant.

NEW JERSEY COURT OF ERRORS & APPEALS.

THE STATE OF NEW JERSEY, *ex rel*,
JOHN B. HAIGHT,

versus

JAMES H. LOVE.

In Error.

*Assignment of
Error.*

Afterwards, to wit, on the third Tuesday of November, in the year one thousand eight hundred and seventy-six, before the judges of the said court of errors and appeals in the last resort in all causes, The State of New Jersey comes
10 the said Jacob Vanatta, Esquire, Attorney-General of the State of New Jersey, who sues for the said State in this behalf in his own proper person, and says: that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that by the record aforesaid that the judgment in form aforesaid was given for James H. Love and against the said State of New Jersey; whereas, by the law of the land, judgment ought to have been given for the said State and against the said James H. Love; and that also there is manifest error
20 in this, to wit, that the judgment was, that the demurrer filed therein be sustained and that judgment be entered accordingly with costs to the defendants; whereas, by the law of the land, judgment ought to have been given for the plaintiff, the said State of New Jersey, and against the said demurrant, James H. Love.

Therefore the said Attorney-General prays that the judg-

ment aforesaid be reversed, annulled, and altogether held for nothing.

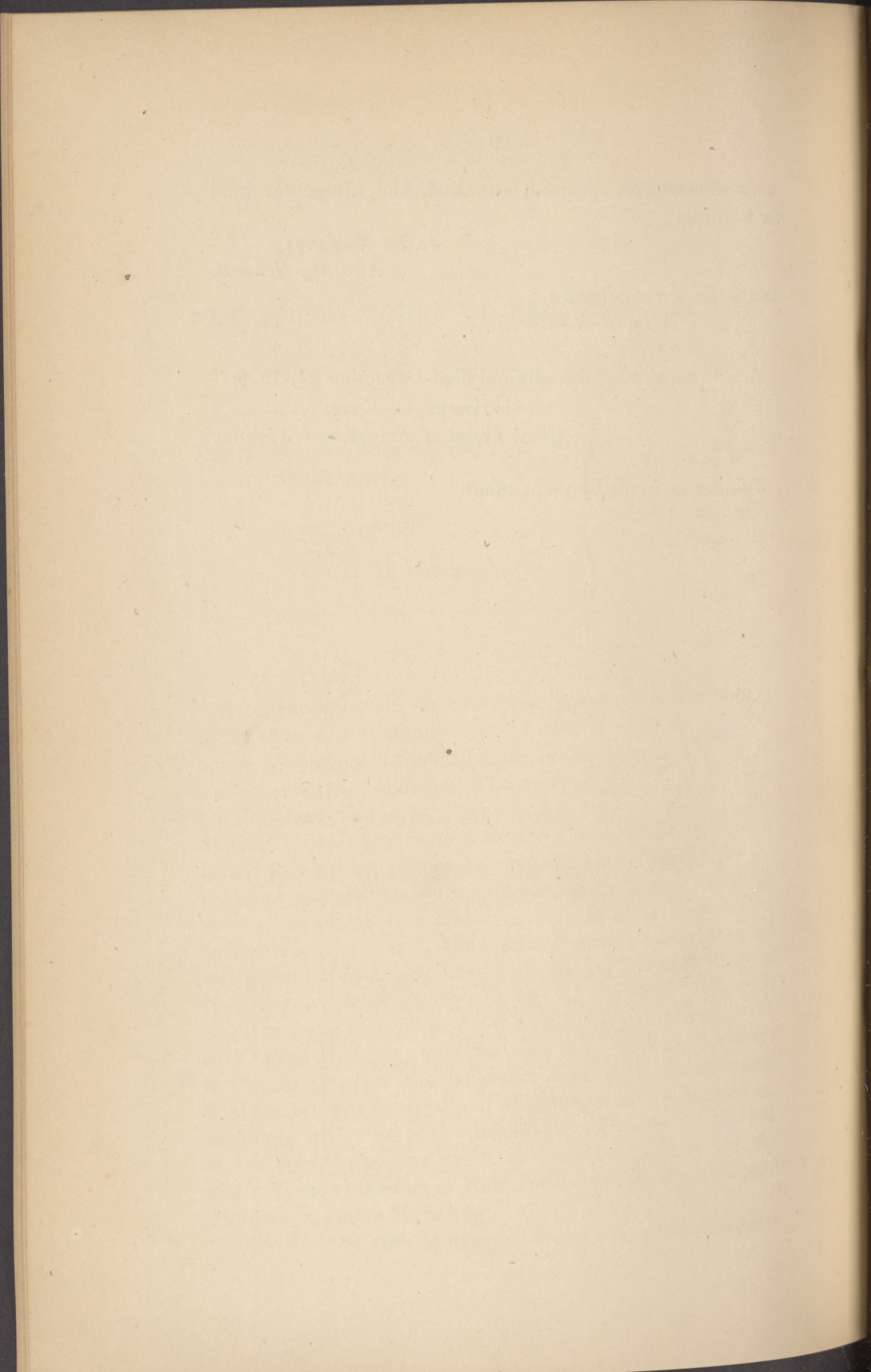
JACOB VANATTA,
Attorney-General.

JAMES B. VREDENBURGH,
Att'y of Relator.

A true copy from the original filed December 21, 1876.

HENRY C. KELSEY,
Clerk Court of Errors and Appeals.

Joinder in Error by respondent.



Court of Errors and Appeals.

THE STATE, EX REL. JOHN B. }
HAIGHT, } Points and
us. } Brief of
JAMES H. LOVE, } Plaintiff
Def't. } in Error.

Brief.

The question before your Honors for determination is, which of the two persons, the plaintiff in error, or the respondent, is entitled to the office of city collector of Jersey City.

The plaintiff in error claims title to this office through the appointment thereto by the present board of finance of Jersey City.

Printed book, p. 4, fol. 15, 16, 17, 18.

The defendant in error claims title through appointment by the former board of finance of Jersey City.

The plaintiff in error admits the appointment of defendant by the old board, but claims, in the first place, that said old board had no power to appoint defendant at the time they did appoint him, because the term of office of the then incumbent of the office did not expire until that old board had passed out of existence and a new board had been organized.

The defendant in error insists that the term of office of the then incumbent (which was himself,) expired *before* the former board passed out of existence.

This then is the first dispute.

Did the term of office of the incumbent of the office claimed by these two persons expire before or after the former board of finance ceased to exist?

This gives rise to two questions :

1st. When did the former board cease to exist?

10 2d. Did the term of office of the last incumbent expire before or after the former board ceased to exist?

That the old board ceased to exist on April 12, 1876, can hardly be disputed now.

The information so states, *p. 6, fol. 21.*

But, even if defendant were at liberty now to dispute this statement, it would follow from the facts stated on *p. 3, fol. 12, viz* : "That the board of finance shall consist of five (5) members, whose term of office shall commence on the second Monday of April, 1874, three of whom shall hold office for
20 two years." The second Monday of April, 1874, was on April 12, 1874, and two years would take to April 12, 1876.

Said former board then ceased to exist on April 12, 1876.

Did the term of office of the predecessor of the parties hereto expire before or after April 12, 1876?

Some confusion arises from the fact that defendant is not only his own successor but has been his own successor for two previous appointments, namely : In 1872 he was appointed for one year; in 1873, for three years; and now he claims to be re-appointed; so that the predecessor of the de-
30 fendant in this office is always himself.

This office called city collector by the supplement of 1873, was to be held for the term of three years, but no day was fixed for its commencement or ending.

Therefore, whether this term preceding the one in dispute ended before or after April 12, 1876, will depend upon whether it commenced before or after April 12, 1873.

The information shows that on May 7, 1872, the defendant, James H. Love, was appointed by the Board of Aldermen of Jersey City, city collector for one year, *p. 4, fol. 13*; that on May 24, 1872, he qualified and entered upon the duties of this office, which by the charter was to commence on the third Tuesday of May. *P. 2, fol. 6.*

That on March 24, 1873, an act was passed providing for ¹⁰ appointment by the board of finance of a collector of revenue to be called a city collector, whose duties were the same as the city collector appointed by the board of aldermen, under the act of 1871, and providing that he hold his office for the term of three years instead of one; and that the term of office of the then incumbent should expire as soon as the collector designated under that act "is appointed and qualified." *P. 3, fol. 11.*

The day of the commencement of the term of this officer so to be appointed, is not specified otherwise. 20

The term of the office of defendant, Love, under the appointment of May, 1871, would have continued until May 21, 1873, (the third Tuesday of May coming on May 20,) except for this supplement of 1873. On April 19, 1873, the board of finance did appoint said defendant city collector. On April 14, 1873, he took the oath of office, and on May 15, 1873, he presented the bonds required by the said act and supplement, for the amount fixed by said board on May 1, 1873, to said board, which bonds were approved by said board on May 22, 1873. *P. 4, fol. 14 and 15.* 30

Now this section of the supplement was entirely in favor of the collector.

His term was lengthened from one year to three.

His salary was increased from \$3,500 to \$5,000 a year.

The power of appointing was taken from the popular branch, viz: board of aldermen, who were elected yearly, and placed in the hands of the board of finance, whose members were appointed.

It is curiously worded and in marked contrast with the charter and the remainder of this supplement, and drawn as if to meet a subsequent contingency. If the object was that the city collector should be, without fail, his own successor, not shorten his former term unless he wished it, does this section not accomplish it?

It provides, not that the term thereof shall be three years, but that the new officer "shall *hold his office* for the term of three years." Is it "*his office*" until he shall be both "ap-
10 pointed and qualified?"

It provides that his office, under his former appointment, shall not *expire* until he himself or his successor shall qualify.

When did the term of office of his predecessor, under the appointment of May 7, 1872, expire?

Certainly not until May 22, 1873, for until that date the officer appointed under the supplement of 1873 had not been appointed and qualified.

If that be so, then either the term of office of the defend-
20 ant, appointed under the supplement of 1873, did not commence to run until May 22, 1873, or there were two city collectors of Jersey City, from April 10, 1873, to May 22, 1873.

The defendant himself construed this supplement of 1873 by his actions, for although appointed April 10, 1873, he did not qualify until his former term, under the appointment of the board of finance, was about to expire, showing his intention then to be to claim under his first appointment until it expired by its limitation, and, then, to claim his three years from that date.

30 Now defendant asks this court to construe this supplement opposite to what he did, for if his term of office, under this appointment, did not commence until the term of his predecessor expired, then his term commencing on May 22, 1873, and being for three years, would not expire until May

22, 1876, one month after the old board of finance ceased to exist.

It will be noticed it was a very important question for him, financially too, for under the charter his salary was \$3,500, (*Pamph. Laws of 1871, p. 1,110, §31*), but under this supplement it was \$5,000.

So that defendant himself construed this supplement of 1873 at the time to mean that his term did not commence until his predecessor's term expired, namely, May 22, 1873, and this, too, in the face of the fact that it was a loss to him 10 of considerable salary, namely, the difference between \$3,500 and \$5,000 a year, or about \$175.

It may be fairly maintained, too, that this was the cotemporary construction of this act by the board of finance of Jersey City and its counsel, or otherwise there would have been some effort made to compel this defendant to qualify.

The board approved the bond on May 22d, 1873, the very day they should approve it, if the term of office of defendant commenced on that day.

It cannot be maintained that defendant had any authority 20 to act as collector prior to May 22, 1873, for before he acts the duty of the board of finance is to see that the bond to secure the faithful performance of this office is given and approved.

The language of the charter is (§ 27, *p. 1,108*): "And said board (meaning board of finance) shall also determine the amount and kind of security to be given for the faithful discharge of his duties by any officer provided for in this act," with the exception of certain officers, not including the collector. And in section 31 it provides that the city collector 30 shall receive an annual salary of \$3,500, * * * "and shall give such bond for the faithful performance of his duties as the board of finance and taxation may require." And by section 37, page 1,112, "That if any person shall neglect to take the oath of office or give the required security "for ten days after receiving notice of his election or ap-

“pointment to any office under this act, or of the security re-
 “quired, he shall be considered as having *declined* such of-
 “fice, and the same shall be deemed vacant,” &c.

If, then, the board of finance and others, the city officers and the defendant himself, had not construed this supplement at the time in the way we now contend for, they would not only have been guilty of dereliction in duty, but the appointment of the defendant would have been considered as declined, and they would have been compelled
 10 to appoint some one else.

Under that section of the act, and the fact that the bond was not presented until May 15, 1873, would not the construction as against the defendant now be that his appointment dated from May 22, or at least May 5th, 1873, and that, therefore, he was to hold office for three years from that date?

His Honor, Justice Dixon, seems to have overlooked this section, for it does control the time of the commencement of the office, and does permit the appointing power to fix it
 20 within ten days, and does prevent the appointee from delaying the time of its commencement for more than ten days.

In April, 1876, that happened the fear of which had induced the defendant, in 1873, to have the length of his term extended to three years.

The board of aldermen changed in politics, and appointed three members, the majority of said board, who were opposed politically to defendant; and as the ostensible reason for having the collector appointed by the board of finance
 30 was that, because of the intimate relations between said board and the collector, it became important for the benefit of the city that they should be on the best of terms, politically as well as otherwise, it was very apparent that defendant's successor would not this time be himself, unless the board, then about to expire, could be induced to re-appoint him. This was done, and on April 6, 1876, he was re-ap-

pointed, and on April 7 and 8, 1876, he qualified himself to hold the office.

The new board came in on April 13, 1876, and found that this office so important to them in the due administration of the office, and over the filling of which it was the clear intention of the legislature they should have control, had, with unseemly haste and in the last days of their existence, been attempted to be filled by the outgoing board.

It is apparent that the board felt they had been tricked out of this appointment, for, immediately on the 13th day 10 of April, 1876, they passed the following resolutions:

“By Mr. Pattberg :

“Whereas, The board of finance and taxation did, on the “6th day of April, 1876, pass the following resolution, to wit:

“‘Moved, That we proceed to the election of a city collector for the ensuing term.’ Therefore, be it

“Resolved, That the action of the board in passing said resolution and making an appointment thereunder, be and “the same is hereby reconsidered, and the said resolution “and appointment of James H. Love collector, shall be and 20 “the same is hereby rescinded, and made utterly void and “of no effect.

“The president calling for the ayes and nays, the resolution was adopted by the following vote :

“Ayes—President Drohan, Messrs. Pattberg and Sweeney.

“Nays—Messrs. Fry and Van Reipen.

“By Mr. Pattberg :

“Resolved, That the resolution adopted by the board of finance and taxation, approved April 6, 1876, to wit :

“‘Moved, That the city collector be required to give bonds 30 “in the sum of two hundred thousand dollars for the faithful performance of his duties, as prescribed by and in accordance with the requirements of the city charter,’ be “and the same is hereby rescinded.

“The president calling for the ayes the resolution was “adopted by the following vote :

“Ayes—President Drohan, Messrs. Pattberg and Sweeney.

“Nays—Messrs. Fry and Van Reipen.

"By Mr. Pattberg :

"Whereas, The board of finance and taxation did on the eighth day of April, 1876, approve of the bonds of the city collector appointed by said board, and

"Whereas, The action of said board in accepting the said bond has not been presented to or approved by the mayor as contemplated with all matters affecting the interests of the city ; therefore, be it

10 "Resolved, That the action of the board in approving said bonds by motion adopted as aforesaid, be and the same is hereby reconsidered and the said motion and all action of the board acting upon or approving said bonds shall be and the same is hereby rescinded and made utterly void and of no effect."

And thereupon they appoint plaintiff in error, and he qualifies himself, and hence these proceedings.

The Plaintiff in Error contend before this Court.

Points.

1st. That the term of office of defendant, Love, under his appointment of May, 7, 1872, did not expire until his successor was appointed and qualified.

His appointment. *P. 4, fol. 13.*

His term of office (*p. 2, fol. 6,*) was for the term of one year, commencing on third Monday of May, 1872. The supplement of 1873 permitted this term to be shortened by the joint action of his successor and board of finance. *P. 3, fol. 10 11.*

2d. That defendant, under his nomination in 1873, was not appointed and qualified until May 22, 1873. *P. 4, fol. 14-15.*

To "qualify," as here used, means to comply with the statutory prerequisites to take, hold and exercise the office.

One of these statutory prerequisites was that the person appointed should within ten days give bonds for the faithful performance of the duties of this office.

Pamph. Law 1871, p. 1,112, § 37.

20

The information states that—

On April 10, 1873, said defendant was appointed.

April 14, 1873, he took the oath of office.

May 1, 1873, board fixed the bond.

May 15, 1873, he presented his bond to board.

May 22, 1873, board approved his bond.

So that he did not comply with said requisites until May 22, 1873.

To "qualify" means to give the bonds required.
Marshall v. Harwood, 7 *Md.*, 473.
Spooner v. Elderskin, 5 *Wis.*, 300.
Aness v. Southwick, 13 *Wis.*, 365.

3d. That the term of office of defendant, under his appointment in 1873, commenced May 22, 1873, and he was to hold his office for the term of three years.

It is admitted he was to hold his office for the term of three years. *P. 3, fol. 10-11.*

10 The question is, when did his term commence—

On April 10, 1873, when appointed ;

On April 14, 1873, when sworn ;

On May 1, 1873, when board of finance fixed amount of bond ;

On May 15, 1873, when he gave bond, or

On May 22, 1873, when bond was finally accepted ?

The defendant claims it commenced on the day he was appointed, viz. : April 10, 1873.

20 The plaintiff in error claims it commenced when his predecessor's term expired, or, in any event, after April 12, 1873, and for the following reasons :

a. The term of his predecessor did not expire until May 22, 1873.

His predecessor (who was defendant himself) was appointed May 7, 1872, to an office which then was for the term of one year, to commence on third Tuesday of May, 1872.

30 Therefore his predecessor's term did not expire until May 22, 1873, unless the supplement of March 21, 1873 (*p. 3, fol. 11*), shortened his term. This supplement shortened it, in any event, only in case his successor should be appointed and qualified before this term ended. The legislature gave the board of finance and the appointee power to shorten it if they wished, by joint action, but, as we have seen, it was not shortened. They did not do it. We are then

forced to this conclusion: either that there were two terms of the same sole office, running at the same time, or that the term of office of defendant did not commence to run until May 22, 1873.

No case can be found where the terms of office of two incumbents of the same sole office are running at the same time.

It is analogous to no term of office in this State.

It often, indeed most usually, happens that an officer is appointed to an office while the incumbent's term 10 is still running, but the term of the appointee invariably commences at the expiration of the term of the incumbent—not at the time of his appointment.

An officer appointed by the governor and confirmed by the senate, does his term commence to run from his appointment or from the expiration of his predecessor's term?

"If a person is appointed to fill an office in which there is an incumbent, the term of the person appointed does not commence until the term of the incumbent 20 expires."

Marshall v. Harwood, 5 Md., 432.

Hughes v. Buckingham, 5 Sneed & Marshall, p. 635.

b. His salary did not commence until May 22, 1873.

1. Certainly he could not perform the duties of his office if another, viz., his predecessor, was performing them.

2. Nor could he until the term of his predecessor expired, for his predecessor had a right to the salary until his term did expire. 30

3. Nor could he until he qualified, for otherwise a person might be exercising this important financial office without the security required by the charter.

An officer must give the required bond before he can enter upon the duties of his office or be entitled to his salary.

Jackson v. Simonton, 4 Cranch. Cir. Ct., 255.

Marshall v. Harwood, 5 Md., 423.

Opin. of Att'y-Gen'l., vol. 10, p. 37.

Opin. of Att'y-Gen'l., vol. 7, p. 310.

10 When the salary commences is strong evidence of when the term commenced, nor is it an answer to say that he was his own successor, and, therefore, it could make no difference; for in this case his salary was increased from \$3,500, under the charter of 1871, to \$5,000, under the supplement of 1873.

c. This was the construction given to the act at the time.

Defendant thought so, for he did not present his bond until May 15, 1873, only five days before his predecessor's term expired by the charter.

He did not entitle himself to draw his increased salary.

20 If he did not think so he voluntarily made his office vacant, for the office was vacant by the terms of the act, unless he gave bonds in ten days. *Charter, Pamph. laws*, p. 1,112, § 37.

It is not an answer to say that the board of finance delayed him by not fixing the amount of his bond until May 1, 1873, for then defendant would be placed in the situation of contending that the board of finance had the right under the supplement of 1873 of shortening his term of office, and even that would not explain the fact that although the amount was fixed on May 1, 1873, defendant did not present his bond until May 15, 1873.

30 The board of finance evidently so construed it.

The cotemporary construction by the parties important.

Hughes v. Buckingham, (ed.)

d. The words of the supplement of 1873 admit of no other reasonable construction.

The person designated thereby is "to hold his office for the term of three years."

When does it become *his* office?

He can't *hold* it until it does.

He is entitled to hold it for three years; until he commences to hold it the three years do not commence to run.

He does not hold the office until he becomes an officer. 10

One is not an officer, nor does he hold his office, until he has qualified and become entitled to exercise the duties of his office.

Until he qualifies he is no more holding an office, nor is it any more his office than any other citizen's.

In *Thomas v. Owens*, 4 *Md.* p. 220, C. J. says, "now we hold that the late comptroller could not be considered as in office until he qualified. * * But until he actually did qualify he was no more comptroller than any other citizen, his qualification being an indispensable prerequisite to his investiture with the authority and responsibility of his office.

To the same effect, *Jump v. Spence*, 28 *Md.* 10, a person is not an officer until he qualifies.

Cordiel v. Frizell, 1 *New.* p. 133.

The death of the person entitled to fill office before he has qualified himself according to law, does not create a vacancy, but the incumbent holds over.

Com. v. Hanley, 9 *Barr*, 513.

State v. Hopkin, 10 *Ohio St.* p. 509.

State v. Lewis, 10 *Ohio St.* p. 128.

Wareham v. State, 25 *Ohio St.*, p. 600.

30

A man elected or appointed to an office does not thereby become an incumbent of it, for instance, a county treasurer must give bonds and take oath of office before he can enter on the discharge of his duties, and if not done in due time the office becomes vacant.

State v. McCollister, 11 O. 46.

See 9 Ohio St., 336.

Commonwealth v. Hanley, 9 Penn. p. 513.

Wareham v. State, 25 Ohio St. p. 600.

Can it be said with any reason and in the light of these cases that the defendant "held his" office from April 10, 1873, the date of his appointment, to May 22, 1873, under the supplement of 1873. Why, by the terms of the charter the designation of him was void by his not giving bonds. Another was holding this office at this time, viz., defendant, under his appointment in 1872. Could they both hold one and the same sole office at the same time?

The intention of the legislature that the term was to commence when the person appointed should qualify, seems clear from the last words.

In every office in this State the term of the successor commences when his predecessor's term expires; therefore it seemed to be alone necessary to fix the expiration of his predecessor's term, to fix the commencement of his. This they do. They recognize the fact that there is a city collector in office whose term of office has not yet expired; and recognizing the rule of law, as well as justice, that the term of a person appointed to an office in which there is an incumbent, commences to run from the expiration of the incumbent's term, instead of fixing a day when the term of the designated person under this supplement is to commence, they fix the time when the term of the incumbent should expire, which term would expire by limitation on May 21, 1873, unless shortened by the joint act of the board of finance and the person designated under this supplement.

Upon the reasoning of defendant he would find it difficult to say from what date his present pretended term commenced to run—from April 6, 1876, when he was appointed, or from April 10, 1876, when his previous term expired?

e. But if the words used do not fix the day of the expiration of predecessor's term for the commencement of the term, we respectfully claim it commences when the person appointed qualifies and renders himself able to exercise the duties of his office.

1860. *Brodie v. Campbell*, 17 Cal., p. 21.—Question was when Norton's term of office as judge expired under the following circumstances :

- May 15, 1854. Act authorizing governor to appoint judge to hold office till next general election. 10
- May 24, 1854. Governor appointed Norton.
- Sept. 6, 1854. First general election. Norton elected.
- Oct. 3, 1854. Certificate of clerk to that effect.
- Dec. 26, 1854. Governor issues a commission.
- Jan. 2, 1855. Norton took oath of office and same endorsed on commission.

The question was, "when did Norton's term of office under his *election* commence?" The statute did not name the day, it only authorized the appointee to hold until his *successor qualified*. On the 26th of December, 1854, governor issued to him a commission for that term, and on the 2d day of January, 1855, he *qualified* thereunder. It was held that, "His full term must be deemed, therefore, to have commenced with his qualification. A different rule would prevail if the law had fixed the commencement of the term by the designation of a day certain. In such cases we must look to the qualification of the officer to ascertain the date at which his office begun."

Until Norton had qualified in the manner stated, his full term did not and could not begin to run for the reason that, until he had so qualified, the term granted by the governor's appointment had not expired, and there could not be two terms of the same office running at the same time.

Held that full term commenced with his qualification in January, 1855.

f. Under this information there was no one appointed to fill the office until May 22, 1873.

His appointment by the board of finance of April 10, 1873, had become void.

4th. That the term of office of defendant under his appointment in 1873 expired on May 22, 1876.

5th. That the existence of the board of finance appointing the defendant to the office in dispute, ceased on or before April 12, 1876.

P. 6, fol. 21.

P. 3, fol. 11.

10 The term of three of the five members composing this board expired on April 12, 1876.

6th. That said board had no power under the act of 1871 and the supplements of 1873 and of 1874, to fill an office in which there was no vacancy, and where the term of office of the incumbent would not expire until after it ceased to exist.

An appointment to fill an office already filled is a nullity.

Hill v. State, 1 Ala., N. S., 561.

Marbury v. Maddison, 1 Cranch., 162.

20 *Johnson v. Wilson, 2 N. Hamp., 202.*

People v. Comptroller, 20 Wend., 596.

7th. That defendant's office was not vacant and his term of office did not expire until May 22, 1876, two months and ten days after said board ceased to exist.

8th. That the board succeeding the board appointing defendant in 1876, had the power to reconsider the appointment of defendant at any time before the bond to be given

by said defendant for the due performance of the duties of the office had been finally accepted.

9th. That the resolution fixing the amount of the bond to be given by the appointee of the old board in April, 1876, was not approved by the mayor, and was, therefore, void. And for the reason that it was a resolution affecting the interests of the city.

I. What was the effect of not presenting the resolution fixing the amount of the bonds, and the resolution approving bonds to the mayor, and the want of approval of these resolutions by the mayor?

The board of finance and taxation of Jersey City have some portion of the power usually exercised by the common council. Sec. 128 and 169, act of 1871.

By the act of 1871, the mayor was ex-officio a member of

1st. The board of police ;

2nd. The board of fire ;

3rd. The board of education ;

4th. The board of finance,

and had a veto upon the actions of the other boards. In 1873, the legislature, with full knowledge of the duties of these boards, enacted Sec. 2: "The mayor shall not be ex-officio a member of any of the boards, but shall have power to veto the action of any board, within ten days thereafter, and all ordinances and resolutions shall be certified and presented to mayor as now required by law, and unless the board shall vote to sustain said *action* notwithstanding said veto, said action shall be void."

The charters above mentioned give the mayor veto power in cases of the board of aldermen in these words. Sec. 23:30

"That every ordinance of the aldermen, and every resolution of the aldermen affecting the interest of the city, shall, before it takes effect, be presented duly certified to the mayor, and the report of the clerk shall be conclusive evidence that the said ordinance or resolution has been so presented to the mayor. If he approve it he shall sign it ;

if not, he shall return it with his objections, and file the same with the clerk within ten days after he received it, and the aldermen shall, at their first regular meeting thereafter, &c. And if two-thirds, &c."

And to the board of public works in these words. In Sec. 95:

"That every resolution of the board of public works affecting the interests of the city shall, before it takes effect, be presented duly certified to the mayor, and when so presented if he approve it he shall sign it, and if not he shall
10 return it with his objections in writing, and if he shall not return it with his objections in writing, &c., &c."

Now, by this supplement, the acts of the board of finance and taxation are to be certified and sent to the mayor in the same way as those of the aldermen and public works are, or else how shall mayor exercise this power of veto? Is he to run after the clerk of this board, and of the other boards? And that this is what the act means when it says, in same section, "and all ordinances and resolutions shall
20 be certified and forwarded to the mayor *as now required by law.*"

To be sure the words "ordinances and resolutions" are used, but that by those words is meant all acts of said board is clear from the remaining portion of this section, viz.: "And unless said board shall by a two-thirds vote at its next meeting after receiving notice thereof, vote to sustain said *action* notwithstanding said veto, *said action* shall be void."

What *notice* is referred to, where it says "at its next meeting after *receiving notice*," if it be not the filing of the mayor's objections with the clerk of the board and vetoing this *action* without signing it.

By the words ordinance and resolution it was intended to cover every way in which any of the boards could act, and the relator respectfully contends it does cover it.

These boards may call these resolutions and ordinances

by what name they please, motions or votes, or what not, but they come within the word "actions" with which they were intended to be synonymous and these words were used only to show how these "actions" were to be brought before the mayor for the exercise of this veto power.

If this be so, then all the actions of the board with regard to defendant should have been presented to mayor and approved by him.

But if this broad language is to be limited and by actions are intended only such as affect the "interest of the city,"¹⁰ then the actions fixing the amount of the bonds and approving the bonds certainly were questions affecting the interest of the city and should have been approved by him.

If his approval was necessary and was not obtained, what is the effect of that?

It makes such action null and void *ab initio*.

If by the word "action" is meant only such actions as affect the interest of the city, then it renders the bonds null and void.

Does it make these actions null and void?

20

"If the charter of a city requires that the resolutions and ordinances passed by the common council shall before taking effect be presented to the mayor for his approval and be approved by him, or if vetoed, have a second passage notwithstanding his objections, or that on failure to return them, they shall become operative, a literal compliance with the charter is essential to the validity of the proceedings, and the resolutions and ordinances should be formally presented to the mayor," etc.—*State v. Newark*, 1 *Dutch.*, 400.

If this be so, it made no difference whether the 10th or 30 the 16th day of April was the last day of defendant's term of office under his first appointment.

But even if this want of presentation to and approval of mayor was an immaterial mistake, not one of substance, still if the term of defendant's predecessor did not expire until April 14th, or afterwards, then on April 13th defendant's term had not yet commenced. He was not yet an incumbent of his office. He was not yet an officer, and here the relator claims that where the appointing power has the right to remove appointee for cause, at any time after the 40

term of office has commenced, they have power at any time before term commences to reconsider their appointment without cause. And especially if anything remains to be done to complete the appointment, such as induction in office.

10th. That the said board had a right to remove from office for cause. If they removed irregularly, such removal was not absolutely void, but voidable and to be righted by proper proceedings by appeal or otherwise, and not to be reviewed or considered in this collateral way.

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Attorney.

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