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New Jersey Supreme Court

The State of New Jersey ex rel. Thomas A. Clay, Relator, vs. J. Alexander Browne, Defendant.	On Information in the nature of quo warranto.

NOTICE OF APPEAL

To William I. Lewis, Esq.,
Attorney of Relator.

Take notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Respectfully yours,
Edward F. Merrey,
Atty. of Defendant.

NEW JERSEY SUPREME COURT

Of the November Term, A. D. 1920.

The State of New Jersey, ex rel, Thomas A. Clay, Relator vs. J. Alexander Browne, Defendant.	In quo warranto.

INFORMATION

Passaic County, ss.:

1. Thomas A. Clay, of the City of Paterson, in the County of Passaic and State of New Jersey, by William I. Lewis, his attorney, comes to the Supreme Court of Judicature of the State of New Jersey, before the Justices hereof, in the State House in the City of Trenton, desiring to sue and prosecute in this behalf according to the form of the statute in such case made and provided, and gives said court here to be informel and understand that he, the said Thomas A. Clay, is and has been for several years a citizen of the State of New Jersey, a resident in the City of Paterson aforesaid, and after being examined by persons appointed for the purpose by the State Board of Health of the State of New Jersey, at a time and place appointed by said board, and under rules and regulations adopted by it for the purpose of determining the qualifications of applicants for license as health officers (such examination being upon such subjects and conducted in such manner

as said board directed), and the examination of relator having been approved by said board, relator on the thirtieth day of June, A. D. 1914, received from said board a license as health officer and to perform the duties of such officer in the manner and form provided by law.

2. That on the fourteenth day of December, A. D. 1920, at the city of Paterson aforesaid, and at a regular meeting of the Board of Health of the City of Paterson, said last-mentioned board being the local board of health of said city of Paterson, relator was appointed health officer of said board for a term of three years, beginning on the fourteenth day of December aforesaid, at a compensation of $1560 per annum, payable monthly; which appointment was made by a resolution of said local board proposed, adopted and passed at said regular meeting thereof, and said resolution was in the words and figures following, to wit:

> "That Thomas A. Clay be and he is hereby appointed Health Officer of this Board for a term of three years, beginning upon the passage of this resolution, at a compensation of $1560 per annum, payable monthly."

That relator thereupon accepted said office, duly took an oath according to law to well, truly, faithfully and honestly execute the trust reposed in him and perform his duty as City Health Officer of the City of Paterson for a term of three years, and duly filed the same and entered upon the discharge of his duties as such Health Officer.

3. That on or about the first day of January, A. D. 1921, the said local board by resolution appointed one J. Alexander Browne to the same office to which the relator was appointed as aforesaid, and the said J. Alexander Browne, pretending right and authority therefor therefrom, was duly sworn according to law and accepted said appointment, and thereupon intruded into and usurped said office and thereupon and ever since has unlawfully usurped, held, used and executed the same without any legal appointment, warrant or authorization whatsoever, and yet does so, to the exclusion of relator, to wit, at the city of Paterson, in the County aforesaid.

Whereupon the said relator prays the advice of the court herein in the premises and for due process of law against the defendant, said J. Alexander Browne, that in this behalf he may be made to answer to the said state by what warrant he claims to hold, use, execute and enjoy the aforesaid office of Health Officer and the liberties, privileges, franchises and emoluments thereof, and that the said J. Alexander Browne may be adjudged to be an intruder and to be ousted from said office, and that not only the title of said J. Alexander Browne to the said office may be determined by the judgment herein, but also the title of the relator to the same office.

Wm. I. Lewis,
Attorney of the Relator.

Rule to Appear, Plead, etc.

NEW JERSEY SUPREME COURT

Of the November Term, A. D. 1920.

The State of New Jersey ex rel. Thomas A. Clay, Relator, vs. J. Alexander Browne, Defendant.	On information, in the nature of quo warranto.

RULE TO APPEAR, PLEAD, ETC.

The relator having filed an information in the nature of a quo warranto, and a bond approved by Hon. Frederick W. Van Blarcom, one of the Supreme Court Commissioners, as required by the act entitled, "An act relating to informations in the nature of a quo warranto" (Revision of 1903); and the attorney of the relator having requested the clerk of this court to enter a rule on the defendant to plead or demur to said information, it is hereby ordered that the said J. Alexander Browne, the above-name defendant, do appear and plead or demur to the said information within ten days after service upon him of a certified copy of said information.

On motion of

Wm. I. Lewis,
Atty. of Relator.

Entered July 7, 1921.

NEW JERSEY SUPREME COURT

Of the November Term, A. D. 1920.

The State of New Jersey ex rel. Thomas A. Clay, Relator, vs. J. Alexander Browne, Defendant.	In quo warranto.

PLEA

And now comes the said J. Alexander Browne, defendant, by Edward F. Merrey, his attorney, and having heard the information read, he complains, and under color of the premises in the said information contained, he is greatly vexed and disquieted, and that by no means justly, because protesting that the said information and the matters therein contained are by no means sufficient in the law, and that he need not, nor is subject by law to answer thereto. Yet, for plea thereto, he says that he ought not to be impleaded or impeached by reason of the premises in the said information contained, because he says that:

1. On January 8, 1918, one Orville R. Hagen was appointed Health Officer of the Board of Health of the City of Paterson for a term of three years.

2. The term of office of said Orville R. Hagen as such Health Officer, in accordance with the statute in such case made and provided, ended on January 1, 1921.

3. On December 14, 1920, the said Orville R. Hagen resigned said office to the Board of Health and which resignation was accepted.

4. Upon the acceptance of the said resignation the position of Health Officer of the City of Paterson became vacant and under the statute in such case made and provided the said Board of Health had power to fill the same for the unexpired term only, that is, until January 1, 1921.

5. The action of said Board of Health in attempting to appoint the relator to the office of Health Officer of said Board for a term of three years, beginning on December 14, 1920, was illegal, void and beyond the power of said Board.

6. The relator, not being legally entitled to the said office, is not entitled to maintain his said suit in the manner and form of said information.

7. And this the defendant is ready to verify and prove as the court shall award; wherefore he prays judgment if the relator ought to have or maintain the aforesaid suit against him, &c.

And for a further plea in this behalf the said defendant says that he ought not to be impleaded or impeached by reason of the premises in the said information contained, because he says that:

1. He is and has been for several years a citizen of the State of New Jersey, a resident of the City of Paterson aforesaid, and after being examined by persons appointed for that purpose by the

State Board of Health, and under the rules and regulations adopted by it, was, on the twenty-third day of June, nineteen hundred and six, given by the State Board of Health of the State of New Jersay, a license of Health Officer to perform the duties of such officer in the manner and form provided by law. Such license is still in full force. and effect.

2. On the eighth day of January, 1918, one Orville R. Hagen was appointed Health Officer of the Board of Health of the City of Paterson for the term of three years.

3. The said term of office of the said Orville R. Hagen, in accordance with the statute in such case made and provided, ended on the first day of January, 1921.

4. On the 14th day of December, 1920, the said Orville R. Hagen resigned his office as Health Officer of the City of Paterson to the said Board of Health, and which resignation was accepted.

5. Upon the acceptance of the said resignation the position of Health Officer of the City of Paterson became vacant and under the statute in that case made and provided the said Board of Health had power to fill the same for the unexpired term only, that, is for the term expiring on the first day of January, 1921.

6. That on the said fourteenth day of December, 1920, the said Board of Health of the City of Paterson attempted to appoint the relator to the

office of Health Officer of said Board for a term of three years beginning on said date.

7. Such action was illegal and void and beyond the power of the said Board of Health.

8. On the first day of January, 1921, the term of three years for which the said Orville R. Hagen had been appointed expired and at that time the Board of Health of the City of Paterson had the power and authority to fill the said office of Health Officer for a new term, and did on that date, at the regular annual meeting which was attended by all the members of said Board of Health, recognizing the illegality of their action in attempting to appoint the relator Health Officer of said Board of Health for a term of three years commencing December 14, 1920, rescind such action by duly adopting the following resolution:

> "Whereas, at a meeting held December 14th, 1920, this board passed a resolution ending the term of health officer, and
>
> Whereas, such action of this board was illegal, therefore
>
> Be it resolved, that the said resolution be and the same is hereby rescinded, and
>
> Be it further resolved, that the action of this board in electing Dr. Thomas A. Clay, as Health Officer, for a term of three years, be and the same is hereby rescinded, and
>
> Be it further resolved, that the said Thomas A. Clay is not the Health Officer of this board and was never legally elected to said office."

9. Thereafter the said Board went into the election of Health Officer of the Board and passed the following resolution:

> "Resolved that Dr. J. Alexander Browne be and is hereby appointed Health Officer of this board for a term of five years, which term of five years is hereby fixed as the term of a Health Officer of this Board commencing January 1, 1921."

10. By the adoption of the last resolution this relator was appointed Health Officer of the Board of Health of the City of Paterson for a term of five years.

11. That the defendant thereupon accepted said office, duly took an oath, according to law, to well, truly, faithfully and honestly execute the trust reposed in him and perform his duties as Health Officer of the City of Paterson for a term of three years and duly filed the same and entered upon the discharge of his duties as such Health Officer. And that he thereupon became, and from then continued until the time of exhibiting the information, and still is, the Health Officer of the Board of Health of the City of Paterson, without this, that the said defendant, the said office, its liberties, privileges and franchises in the said information above mentioned, or any of them, has usurped, or did usurp, in manner and form as by the said information is above alleged against him all and singular, which matters and things this defendant is ready to verify and prove as the court shall award; wherefore he prays judgment, and that the said office, its liberties, privileges and

franchises by him claimed in manner aforesaid may be allowed and adjudged to him and he may be discharged by the court hereof and from the premises above charged against him.

J. Alexaner Browne, M.D.

Edward F. Merrey,
Attorney of Defendant.

New Jersey, Passaic County, ss.:

J. Alexander Browne, the above-named defendant, of full age, being duly sworn, on his oath says that the facts, matters and things set forth in the foregoing plea in the above-entitled cause are true to the best of his knowledge, information and belief; and this deponent further says that the plea by him above pleaded is not intended for the purpose of delay, but that he verily believes the said defendant has a just and legal defense to said action and information on the merits of the case.

J. Alexander Browne, M. D.

Sworn and subscribed to before me this seventeenth day of January, 1921, at Paterson.

Edward F. Murphey,
A Master in Chancery of New Jersey.

NEW JERSEY SUPREME COURT.

The State of New Jersey, ex rel. Thomas A. Clay, Relator, vs. J. Alexander Browne, Defendant.	On Information, &c., in quo warranto.

REPLY AND DEMURRER

And the said Thomas A. Clay having heard the said plea of the said J. Alexander Browne first above pleaded says that for anything in the said first above plea pleaded that he ought not to be barred from having his aforesaid information against the said J. Alexander Browne and from having not only the title of said Browne to the said office determined by the judgment herein, but also the title of the relator to the same office, because, protesting that the said plea and the matter therein contained are insufficient in law to bar the relator in respect thereof, yet for reply in this behalf said relator says:

1. He admits that on January 8, 1918, said Orville R. Hagen was appointed Health Officer of the Board of Health of the City of Paterson for a term of three years.

2. He denies that the term of office of said Hagen as such Health Officer ended on January 1, 1921.

3. He admits that on December 14, 1920, said Orville R. Hagen resigned said office to the Board

of Health and that such resignation was accepted.

4. He denies that upon the acceptance of said resignation the position of Health Officer of the City of Paterson became vacant, and he also denies that under any statute said Board of Health had power to fill the same for the unexpired term only, and avers that it had lawful right to appoint the relator for a term of three years, not only by reason on the statute in such case made and provided, but also by reason of the fact that upon the acceptance by said board of said Hagen's resignation as aforesaid, said board thereupon, and before electing the relator in manner aforesaid, abolished and terminated said term of said Hagen by a resolution duly passed by said board at said regular meeting thereof, which resolution was in the words following, to wit:

> "That the term of Health Officer heretofore held by Orville R. Hagen be and the same is hereby terminated."

5. He denies that the action of the said Board in appointing relator to the office of Health Officer of said Board for a term of three years beginning on December 14, 1920, was illegal, void or beyond the power of said board.

6. He denies that he is not entitled to maintain his said suit in manner and form of said information, and this said relator is ready to verify; wherefore he prays judgment and that the office claimed by him may be allowed and adjudged to him and the said Browne be adjudged to be an intruder therein and usurper thereof and to be ousted therefrom.

Reply and Demurrer

And the said relator as to the said plea of the said Browne secondly above pleaded says that the said plea and the matters therein contained are wholly insufficient in law to bar him, said relator, from having his aforesaid information against said Browne and from having not only the title of said Browne to the said office determined by the judgment herein, but also the title of this relator to the same office. And relator specifies the following causes of demurrer thereto:

1. Because it appears on the face of said second plea that the relator has title to the office in question.

2. Because it appears on the face of said second plea that the defendant has no title to the office in question.

3. Because said second plea is not allowed to defendant by the law of the land.

Wherefore, because of the insufficiency of said second plea in this behalf, said relator prays judgment thereon, and that the office by him claimed in form aforesaid may be allowed and adjudged to him, and that said Browne be adjudged to be an intruder therein and usurper thereof and to be ousted therefrom.

Wm. I. Lewis,
Attorney of Relator.

NEW JERSEY SUPREME COURT

Of the November Term, A. D. 1920.

The State of New Jersey ex rel. Thomas A. Clay, Relator, vs. J. Alexander Browne, Defendant.	In quo Warranto.

REJOINDER

And the said J. Alexander Browne, as to the said plea of the said Thomas A. Clay in reply pleaded, protesting that the said plea and the matters therein contained are not sufficient in law to allow the said Thomas A. Clay to maintain his aforesaid information, yet for plea thereto this defendant says that while it is true that the said Board of Health of the City of Paterson did, on of Health did rescind the said resolution set forth in the fourth paragraph of said plea in reply pleaded, yet the said Board had no power to abolish and terminate the term of said Orville R. Hagen as Health Officer of the Board of Health of the City of Paterson at said meeting and said resolution was void in law and of no effect and this defendant avers that at the next meeting of the said Board following December 14, 1920, that is, on the first day of January, 1921, the said Board of Health did rescind the sai resolution set forth in the fourth paragraph of the plea in reply pleaded by the passage of another resolution as follows:

"Whereas at a meeting held December 14th, 1920, this board passed a resolution ending the term of Health Officer, and

Whereas, such action of this Board was illegal, therefore

Be it resolved, that the said resolution be and the same is hereby rescinded, and

Be it further resolved, that the action of this board in electing Dr. Thomas A. Clay, as Health Officer, for a term of three years, be and the same is hereby rescinded, and

Be it further resolved, that the said Thomas A. Clay is not the Health Officer of this board and was never legally elected to said office."

And this the defendant is ready to verify and prove as the court shall award; wherefore he prays judgment if the relator ought to have or maintain the aforesaid suit against him, &c.

Edward F. Merrey,
Attorney of J. Alexander Browne.

NEW JERSEY SUPREME COURT
Of the November Term, A. D. 1920.

The State of New Jersey ex rel. Thomas A. Clay, Relator, vs. J. Alexander Browne, Defendant.	On Information, &c., in quo warranto.

DEMURRER TO REJOINDER

And the said relator having heard the rejoinder of the said J. Alexander Browne to the replication of the said relator says that the said rejoinder and the matters therein contained are wholly insufficient in law to bar him, the relator, from having his aforesaid information against said Browne and from having not only the title of said Browne to the said office determined by the said judgment herein, but also the title of this relator to the same office.

Wherefore, because of the insufficiency of said rejoinder in this behalf, said relator prays judgment thereon, and that the office by him claimed in form aforesaid may be allowed and adjudged to him and that said Browne be adjudged to be an intruder therein and usurper thereof and to be ousted therefrom.

Wm. I. Lewis,
Attorney of Relator.

Opinion of Supreme Court

(Filed August 3, 1921)

NEW JERSEY SUPREME COURT

No. 77 Feb. T., 1921.

The State, ex rel.
Thomas A. Clay,
vs.
J. Alexander Browne.

On quo warranto.

Demurrer to plea.

Argued before Gummere, C. J., and Justice Bergen.

For the Relator, William I. Lewis.

For the respondent, Edward F. Merrey.

The opinion of the Court was delivered by Gummere, C. J.

This litigation involves the title to the office of Health Officer of the Board of Health of Paterson. The following is the situation disclosed by the pleadings. On the 8th of January, 1918, the Board, pursuant to authority conferred upon it by section 31 of the Health Code (Comp. Stat. p. 2669), appointed one Hagen as Health officer for a term of three years ending on the 1st of January, 1921. On December 14, 1920, Hagen resigned his office. His resignation was accepted by the Board, and a resolution was passed by it on the same day appointing Clay, the relator, as Health Officer "for a term of three years beginning upon the passage of this resolution." Pursuant to this appointment Clay accepted the office and entered up-

on the discharge of its duties. On January 1, 1921, the Board passed another resolution rescinding that which appointed Clay, declaring that he never was legally elected to the office, and then resolving that Browne, the respondent, "be and is hereby appointed Health Officer of this Board for a term of five years." Pursuant to this latter resolution Browne took possession of the office and Clay now seeks to oust him.

It was held by the Court of Errors and Appeals in the case of Browne vs. Hagen, 91 N. J. L. 544, that a resolution of the Board of Health of Paterson appointing Browne as Health Officer for a term of three years was justified by the 31st section of the Health Code, and that the appointee held his office for a term which was fixed by law. If, therefore, the action of the Board in passing the resolution of December 14th appointing Clay for a three year term was valid, then its subsequent action in rescinding that resolution and appointing Browne to the office was ultra vires and void; for Clay having accepted the office and entered upon the performance of his duties, and his term having been fixed by law, was not thereafter subject to removal therefrom during the continuance of that term except for cause. Haight vs. Love, 39 N. J. L. p. 14; S. C. on error, Id. p. 476.

Counsel for respondent does not contest the soundness of the legal proposition we have stated. His contention is that it is not applicable to the present situation for the reason that by force of the fifth section of the Act of 1901, entitled "An Act relative to the time of election and appointment and terms of office of officers elected or appointed in cities in this state" (Comp. Stat. p. 632)

the Board of Health was without power on December 14th to appoint a health officer except for the unexpired term of Dr. Hagen, i.e., for the period between December 14th and January 1st then next; that its attempt to do so was in violation of the statute and that its action was nugatory so far as the period not embraced in Dr. Hagen's term was concerned.

The statutory provision appealed to declares that "all vacancies in offices in any city of this state arising from or created by any other cause than expiration of term of office shall be filled for the unexpired term only."

It is conceded by counsel of the respective parties that the rights of their clients depend upon the scope of this statutory provision; and we concur in this view. The question for determination, therefore, is whether the term of Dr. Hagen came to an end by force of his resignation and its acceptance; or whether that term continued to exist notwithstanding that his right to further occupy the office had ceased.

When the legislature, by statute, creates an office, and affixes a term to it for which each and every incumbent shall hold it, or where a municipal board pursues the same course under legislative authority conferred upon it for the purpose, the resignation of an incumbent thereof, before the expiration of the term so fixed, leaves an uncompleted term, and the vacancy can only be filled in the manner provided by the fifth section of the Act of 1901; that is, for the period that the term has yet to run. But in our opinion where the fix-

ation of the term of office is not attached to the office itself, but relates only to a particular incumbent thereof, then upon the termination of the right of the incumbent to continue to occupy the office, no matter how or when the right ceases to exist, the term for which he was appointed automatically comes to an end, and no unexpired portion thereof remains to be dealt with in accordance with the statutory provision above cited.

Applying this principle to the case in hand: Upon Dr. Hagen's resignation and its acceptance the term for which he was appointed as Health Officer, as well as his right to continue to hold the office, came to an end; and the duty thereupon rested on the Board of Health not only to appoint his successor, but also to fix the term for which that successor should hold the office. This duty it performed by passing the resolution of December 24th appointing the relator, Clay, to the office and fixing the term during which he should occupy it.

The relator, Clay, is entitled to judgment of ouster against the respondent with costs to be taxed.

NEW JERSEY SUPREME COURT

State of New Jersey, ex rel. Thomas A. Clay, Relator, vs. J. Alexander Browne, Respondent.	On quo warranto On Demurrer to Plea and Rejoinder.

JUDGMENT OF OUSTER

The Relator having filed his information and the Respondent having pleaded thereto and the Relator having filed his Reply and Demurrer to said Plea; and the Respondent having Rejoined and the Relator having Demurred to said Rejoinder; and the cause being regularly set down and noticed for hearing at the February Term 1921 of this Court, and having been argued before the Court by William I. Lewis, Attorney for Relator and Edward F. Merrey, Attorney for Respondent, and the Court having considered said cause and directed a judgment in favor of the Relator and of ouster against the Respondent from the office of Health Officer of the Board of Health of the City of Paterson, and that he pay costs to the Relator;

It is ordered that judgment in favor of the said Relator and of ouster against Respondent, with costs to said Relator, be entered in the above entitled cause.

Entered August 5, 1921

On motion of

William I. Lewis, Atty.

A true copy,
Enoch L. Johnson,
Clerk.

NEW JERSEY COURT OF ERRORS AND APPEALS

The State of New Jersey ex rel. Thomas A. Clay, Relator, vs. J. Alexander Browne, Defendant.	On Information in the nature of quo warranto.

GROUNDS OF APPEAL

The defendant states and will rely upon the following Grounds of Appeal of the above stated cause.

1. Because the Supreme Court ordered judgment of Ouster against the respondent in favor of relator.

2. Because the Supreme Court held upon Dr. Hagen's resignation the term for which he was appointed as Health Officer came to an end.

3. Because the Supreme Court held that upon the resignation of Dr. Hagen the Board of Health had power to appoint his successor and to fix the term for which that successor should hold the office.

4. Because the Supreme Court held that the Board of Health had power to elect the relator Health Officer for a full term when the term for which Dr. Hagen had been elected had not expired.

5. Because the Supreme Court held relator was entitled to the office in question.

6. Because the Supreme Court held the defendant was not entitled to the office in question.

Edward F. Merrey,
Atty. of Defendant.

New Jersey Court of Errors and Appeals

On Appeal from Suprem Court.

The State of New Jersey ex rel. Thomas A. Clay, Relator-Appellee, vs. J. Alexander Browne, Defendant-Appellant.	On Information, &c., in Quo Warranto.

BRIEF FOR RELATOR-APPELLEE.

Statement.

The information, after showing the relator's qualifications for the office, alleges that on December 14, 1920, at a regular meeting of the local Board of Health of the City of Paterson, he was appointed by said Board as Health Officer thereof for the term of three years beginning December 14, 1920, at a compensation of $1,560 per annum, by the following resolution of the Board:

> "That Thomas A. Clay be and he is hereby appointed Health Officer of this Board for a term of three years beginning upon the passage of this resolution, at a compensation of $1,560 per annum, payable monthly."

That relator accepted said office, took the oath of office, filed the same, and entered upon the discharge of his duties; that on January 1, 1921, said local Board, by an illegal resolution, appointed one J. Alexander Browne to the same office; that Browne accepted the appointment and thereupon intruded into and usurped the said office and has ever since unlawfully held the same and excluded the relator therefrom. Relator prays that Browne be adjudged to be an intruder and be ousted from the office and that relator's title be established (Information, Case, p. 2.)

A rule to plead being served, defendant filed two pleas. *The first plea* avers that on January 8, 1918, one Orville R. Hagen was appointed Health Officer of the Board of Health for a term of three years; that such term, in accordance with the statute, ended January 1, 1921; that on December 14, 1920, Hagen resigned his office and that his resignation was accepted; that on such resignation the position became vacant and that under the statute the Board had power to fill it for the unexpired term only, *i. e.*, to January 1, 1921; that the action of the Board in appointing the relator for three years beginning December 14, 1920, was illegal, void and beyond the power of the Board. *The second plea* avers the qualifications of the defendant, and sets up Hagen's election, term, resignation and the acceptance thereof, the creation of a vacancy thereby and the power of the Board in filling it, in the same manner and form as in the first plea. It then avers that on December 14, 1920, the Board attempted to appoint the relator for a term of three years beginning December 14, 1920; that its action in that respect was illegal, void and beyond the power of the Board; that on January 1, 1921,

Hagen's term expired; that on that day the Board had power to fill the office for a new term and did on said day, at a regular annual meeting, recognizing the illegality of their said action on December 14, 1920, rescind such action by adopting the following resolution:

> "Whereas, at a meeting held December 14th, 1920, this Board passed a resolution ending the term of Health Officer, and
>
> Whereas, such action of this Board was illegal, therefore
>
> Be it resolved, that the said resolution be and the same is hereby rescinded, and
>
> Be it further resolved, that the action of this Board in electing Dr. Thomas A. Clay, as Health Officer, for a term of three years, be and the same is hereby rescinded, and
>
> Be it further resolved, that the said Thomas A. Clay is not the Health Officer of this Board and was never legally elected to said office."

That thereafter said Board went into the election of Health Officer and passed the following resolution:

> "Resolved that Dr. J. Alexander Browne be and is hereby appointed Health Officer of this Board for a term of five years, which term of five years is hereby fixed as the term of a Health Officer of this Board commencing January 1, 1921."

That by such resolution defendant was elected Health Officer for the term of five years and that he accepted the office, duly qualified, entered upon the discharge of his duties and thereupon became Health Officer, etc. (Case, p. 6.)

Relator thereupon filed a reply to the first plea and a demurrer to the second (Case, p. 12.)

The reply traversed all the material allegations of the plea and set up as new matter that after the resignation of Hagen was accepted and before the Board elected the relator, the Board abolished and terminated the term of Hagen by the adoption of the following resolution:

> "That the term of Health Officer heretofore held by Orville R. Hagen be and the same is hereby terminated."

To this reply defendant filed a rejoinder in which he admitted the passage of the foregoing resolution, but said that the Board had no power to abolish and terminate the term and that the resolution was void and of no effect and that the Board on January 1, 1921, rescinded it by the resolution of that date hereinbefore set forth (Case, p. 15.) To the rejoinder, relator filed a demurrer (Case, p, 17.)

The title of the relator, Dr. Clay, as well as that of the defendant, Dr. Browne, being involved in this proceeding, the substantial issues raised by the pleadings are as follows:

(a) Was Dr. Hagen's term ended by his resignation and its acceptance on December 14, 1920?

(b) If not, did the resolution passed by the Board after its acceptance of the resignation, and before the election of Dr. Clay, operate to end the term?

(c) If not, and if such resignation and acceptance operated only to create a vacancy in the office, and not to end the term, was it such a vacancy as could be filled only from December 14, 1920, to January 1, 1921?

(d) Assuming the term of Dr. Hagen to have been terminated by the resolution of December 14, 1920, and that such resolution was necessary to that end, did the resolution passed January 1, 1921, operate to rescind it, and to rescind Dr. Clay's election?

If Dr. Hagen's term was ended by his resignation and acceptance; or if such resignation, acceptance and terminating resolution ended it; or if his resignation and acceptance operated only to create a vacancy for the unexpired term, or to January 1, 1921, and it was such a vacancy as could be filled for a term to be then created at the will of the Board; it is to be argued that Dr. Clay was elected for a term of three years beginning December 14, 1920, which he could not be removed from, except for cause, prior to its expiration, and that the attempted election of Dr. Browne to the same office was illegal and his entry therein was without right.

POINTS.

1. Dr. Hagen's term as Health Officer was ended

by his resignation and its acceptance by the Board of Health, and the subsequent election of Dr. Clay for three years was legal; there being no vacancy.

2. If Dr. Hagen's term was not ended by such resignation and acceptance, it was ended by the resolution of the Board passed December 14, 1920, after such resignation and acceptance and before the election of Dr. Clay, and the subsequent election of Dr. Clay for a term of three years was legal; there being no vacancy.

3. If Dr. Hagen's term was not ended either by his resignation and its acceptance, or by said resolution, then a vacancy in the office was created which could be filled for a term then fixed by the Board, and the Board was not limited to filling the vacancy until January 1, 1921.

4. Dr. Clay being legally elected Health Officer for a term beginning December 14, 1920, the resolution of the Board passed January 1, 1921, rescinding the resolution of December 14, 1920, and rescinding his election, was illegal, void and of no effect.

5. The resolution of the Board passed January 1, 1921, electing Dr. Browne was illegal, void and of no effect.

ARGUMENT.

POINT I.

DR. HAGEN'S TERM AS HEALTH OFFICER WAS ENDED BY HIS RESIGNATION AND ITS

ACCEPTANCT BY THE BOARD OF HEALTH, AND THE SUBSEQUENT ELECTION OF DR. CLAY FOR THREE YEARS WAS LEGAL; THERE BEING NO VACANCY.

That the resignation and acceptance would have discharged Dr. Hagen from any obligation he was under to perform the duties of Health Officer established by law is well settled.

> "A resignation, when completed by an acceptance, will be a discharge from office."
>
> *State v. Ferguson,* 31 *L.,* 107, 123; followed in
> *Whitney v. Van Buskirk,* 40 *L.,* 463;
> *Freyer v. Norton,* 67 *L.,* 537.

But it is submitted the resignation and acceptance not only discharged Dr. Hagen from the duties of his office, but it also terminated the term of such office, and it ceased to exist.

The office of Dr. Hagen did not exist by virtue of any direct statutory creation. Nor did it exist by virtue of any ordinance or resolution of the Board of Health establishing it as a permanent office. It existed only by virtue of the act of the Board of Health on January 1, 1918, in appointing Dr. Hagen Health Officer of the Board for a term of three years. As will subsequently appear, he could have been deprived of his office, and the office could have been abolished, at the will of the Board, at any time, previous to the expiration of his term, were it not for Section 36 of the Health Act. The statutory power under which the Board made the

appointment is Section 31 of the Health Act (2 Comp. St., 2669.)

> "That such local boards of health shall have power and authority to appoint such subordinate officers and agents to carry into effect the powers hereby conferred as they may deem necessary, to fix the term of such appointments and the compensation of such appointees."

Hagen v. *Brown*, 91 *L.*, 544.

The only restraint upon his removal, or the abolishment of the office, is found in Section 36 of the same Act:

> "That the appointees, agents, and officers of the said boards, except those merely temporary, shall hold their offices during the term for which they were severally appointed, and shall not be removed therefrom except for cause and after an opportunity has been given them for a hearing."

This restraint upon the Board was merely for the protection of the incumbent. The moment his resignation was accepted, Section 36 ceased to affect the office or the term. The Board was under no obligation to continue the existence of the office or to appoint anyone to discharge the duties theretofore performed by Dr. Hagen. By his resignation, he surrendered his term to the Board, and, upon acceptance, it ceased to exist.

An authority upon this point is *People* v. *Supervisor*, 100 *Ill.*, 332. In that case the question was,

whether one who had resigned held over until the appointment of his successor, as did one whose term had expired; the Court said:

> "No distinction in this respect is to be drawn between a resignation and the expiration of the time fixed for the holding of an office. A resignation ends the term of office, the same as the expiration of the time of the tenure of the office does."

The variation in the meaning of the phrase "term of office, was considered in the case of *Freeholders of Atlantic* v. *Lee*, 76 *N. J. L.*, 327; affirmed 77 *N. J. L.*, 799. In that case the question arose as to whether a county clerk was entitled to fees or whether he was restricted to a salary under the Act of 1906 (P. L., 76.) Previous to the passage of the Act Mr. Scott had been elected County Clerk. He died November, 1907. The incumbent, Mr. Lee, was appointed by the Governor for the unexpired constitutional term of Mr. Scott. The Act there in question provided:

> "This act shall take effect so far as respects said offices at the expiration of the term of office of the present * * * County Clerk and Sheriffs, respectively."

It was contended on behalf of Mr. Lee that the term of office of his predecessor did not expire until the end of five years from his election. But the Court overruled this contention in the following language:

> "The words 'term of office' may, in a sense, be used to indicate the statutory period for

> which an officer is elected. We speak of the term of office of the president of the United States; the term of office of the governor of the state, meaning that the first was four years and the latter three years; but the words 'term of office' may also mean a period much shorter than that for which the particular officer was elected. His term of office may be terminated before the expiration of the statutory period for which he was elected by impeachment, or resignation, or death of the particular officer. The happening of these contingencies are implied limitations upon the right of the elected officer to continue in office for the period for which he would otherwise be entitled to hold."

In *Green* v. *Freeholders of Hudson*, 44 *E.*, 388, hereinafter referred to on another point, certain appointees of the freeholders having resigned before the expiration of their term, the Court said:

> "Treating the appointees as officers, the resignation, when accepted by the appointing power, became operative as a termination of the official existence of the appointee."

The argument upon this point is stated with precision and clarity in the conclusion reached in the court below. It is as follows: (Case pp. 20-21.)

> "When the legislature, by statute, creates an office, and affixes a term to it for which each and every incumbent shall hold it, or where a municipal board pursues the same course under legislative authority conferred upon it for the purpose, the resignation of an

incumbent thereof, before the expiration of the term so fixed, leaves an uncompleted term, and the vacancy can only be filled in the manner provided by the fifth section of the Act of 1901; that is, for the period that the term has yet to run. But in our opinion where the fixation of the term of office is not attached to the office itself, but relates only to a particular incumbent thereof, then upon the termination of the right of the incumbent to continue to occupy the office, no matter how or when the right ceases to exist, the term for which he was appointed automatically comes to an end and no unexpired portion thereof remains to be dealt with in accordance with the statutory provision above cited."

POINT II.

IF DR. HAGEN'S TERM WAS NOT ENDED BY SUCH RESIGNATION AND ACCEPTANCE, IT WAS ENDED BY THE RESOLUTION OF THE BOARD, PASSED DECEMBER 14, 1920, AFTER SUCH RESIGNATION AND ACCEPTANCE AND BEFORE THE ELECTION OF DR. CLAY; AND THE SUBSEQUENT ELECTION OF DR. CLAY FOR A TERM OF THREE YEARS WAS LEGAL; THERE BEING NO VACANCY.

The resolution (Case, p. 13, line 20) ended the term. But defendant, by his rejoinder (Case, p. 14), says that the Board had no power to end the term. But this is not so. As has been shown under the preceding point, the power to appoint the

Health Officer and fix his term is derived from Section 31 of the Health Act, and the only restriction upon its power in respect of the term and office of the appointee is found in Section 36 of said Act. The latter section being enacted for the protection of the incumbent only, it ceased to affect the term and office created by appointment, upon the resignation being offered and accepted. Consequently, the power of the Board over the term was the same as though Section 36 was not in existence. The powers of a Board over its appointees and their terms and offices under such legislation as that enacted by Section 31 is well settled by authority.

The power of a municipal board to abolish an office, change its term or to discharge an appointee before the expiration of his term, in the absence of constitutional or statutory restriction, depends, to adopt the language of Mr. Justice Garrison in *Fredericks* v. *Board of Health,* 82 *L.*, 202, upon whether the grant of power is "a grant of municipal control, i. e., a law-making power, or only a grant of the right of administration."

In the case last referred to the question was as to whether the Board of Health, having appointed Fredericks for a term of three years at a salary of $1,500 per annum, could lawfully reduce his salary to $1,000 before the expiration of his term. The Court said (p. 203):

> "In the absence of any constitutional interdict the question is solely one of statutory power, the answer to which depends upon whether the authority conferred upon local boards of health by the thirty-first section of

the act was a grant of municipal control, i. e., a law-making power, or only a grant of the right of administration. Of the former, *Bradshaw* v. *Camden,* 10 *Vroom* 416 and *Bohan* v. *Weehawken,* 36 *Id.* 490, are examples, and while the latter is illustrated by *Mathis* v. *Rose,* 35 *Id.* 45, and *Uffert* v. *Vogt,* 36 *Id.* 621. The very practical distinction, as was pointed out in *Bohan* v. *Weehawken,* is that where the law-making power is conferred, action taken thereunder has the force of a general law that is operative until repealed, whereas the grant of an administrative right only carries with it no such incident of the legislative function. In view of this distinction it is clear that section 31 of the act before us confers the right of administration only, and hence was subject to alteration without formal repeal."

In *Mathis* v. *Rose,* 64 *L.,* 45, it appeared that Mathis had been elected, by the Common Council of Atlantic City, street supervisor on March 15, 1898, and was again elected to the same position on March 21, 1899. On April 10, 1899, Rose was elected to the same office. The Charter of Atlantic City (P. L., 1866) empowered the Council

"to assemble from time to time, to elect and appoint such other and all other ordained officers of said city as well as those not in the act named and whose appointment or election are not provided for as those who are named herein, and who may, in the opinion of the City Council, be necessary for ordering and governing of the said city," etc.

In 1893 the City Council ordained that the term of the street supervisor (an office not provided for in the Charter) should be for one year. Under this ordinance Mathis claimed that he could not be removed or superseded during the term for which he was elected, and relied upon *Bradshaw* v. *Camden, supra.* But the Court held that the power of the Common Council to appoint was not dependent upon the ordinance, but upon the Charter; that Mathis could be removed at will, and that the election of Rose lawfully operated to remove Mathis.

In *Uffert* v. *Vogt, supra,* the Court of Errors approved and followed *Mathis* v. *Rose.*

While no express distinction had been made between municipal appointments made under a delegation of legislative power and those made under powers of administration until the two last cited cases, yet the powers of municipal boards, in respect to the removal of officers and appointment of successors under legislative authority like that contained in Section 31 of the Health Act, had been explicated by our courts in the cases referred to in *Mathis* v. *Rose.*

In *Green* v. *Freeholders of Hudson,* 44 *L.,* 388, it appeared the freeholders, at the beginning of the year May, 1881, had made sixty-eight appointments to office. In April, 1882, previous to the incoming of the new Board, the sixty-eight appointees resigned, and their resignations were accepted, and their offices declared vacant. At the same meeting the Board appointed each of said appointees to the same office for a new term of one year. For power

to do so, P. L., 1875, Section 10, was relied on. It reads as follows:

> "That the said board provided for in this act, and its successors, shall have power to appoint such officers, agents and employees as may be required to do the business of the county, and fix their compensation and term of service."

As to the resolutions the Court said: the making of appointments

> "and fixing their terms were within the law, and, therefore, as to this part of the case directly before us, which is the validity of these resolutions, so far as they fix and appoint a term, is decisive against the prosecutor."

Adams v. *Haines*, 48 *L.*, 25, involved the right to the office of steward of the alms-house. Haines was given a term of three years under a power conferred on the freeholders by Section 31 of the Act incorporating the chosen freeholders of the several counties (Rev. of 187, p. 132) by which they were authorized to appoint such officers, hire such servants, etc., respecting the care and government of the poor house as they shall from tme to time deem necessary or convenient. But Adams claimed the office under an appointment made before Haines' term expired. The Court said:

> "It will be seen by this section that the entire control over this subject is given to the board. They may create these offices as the public need requires, and continue them at

> their will; they may appoint to such office when and whom they see fit and abolish the office or change the incumbent at pleasure."

Other cases upon the point are:

> *Hoboken* v. *Gear*, 3 *Dutcher*, 265.
> *Butcher* v. *Camden*, 2 *Stew.*, 478.
> *Love* v. *Jersey City*, 11 *Vr.*, 456.

It is, therefore, submitted that if the mere resignation and acceptance were sufficient to abolish the term and office, that the resolution terminating the term, passed December 14, 1920, was effectual in that respect, and Dr. Clay's subsequent election for a term of three years was legal. If the resignation and acceptance were sufficient, then of course, the resolution was a mere work of supererogation.

POINT III.

IF DR. HAGEN'S TERM WAS NOT ENDED EITHER BY HIS RESIGNATION AND ITS ACCEPTANCE, OR BY SAID RESOLUTION, THEN A VACANCY IN THE OFFICE WAS CREATED WHICH COULD BE FILLED FOR A TERM THEN FIXED BY THE BOARD, AND THE BOARD, PASSED DECEMBER 14, 1920, THE VACANCY UNTIL JANUARY 1, 1921.

If the resolution of Dr. Hagen and its acceptance by the Board of Health, nor such resignation, acceptance and the ensuing resolution of December 14, 1920, should be considered as ending the term and abolishing the office held by him, then

it follows, of course, that there was a vacancy in the office which might be filled by the Board. That such vacancy might be filled for any term the Board might determine, it is submitted, is settled by the cases hereinbefore referred to under the second point of this brief.

Defendant's pleas and rejoinder aver that Dr. Hagen's term expired January 1, 1921; that upon his resignation on December 14, 1920, a vacancy in the office of Health Officer occurred which could be filled for the unexpired term only, and that consequently the election of Dr. Clay for a term of three years beginning December 14, 1920, was illegal and void.

Predicated upon the correctness of what has been heretofore said, it is submitted as obvious that such illegality in Dr. Clay's election, if it exists, must arise from some other law than the Health Acts.

In the court below defendant relied upon an Act entitled "An act relative to the time of election and appointment and terms of office of officers elected or appointed in cities in this state" (Pl., 1901, 41; 1 Comp. St., p. 632) as the foundation of the defense referred to. The pertinent provisions of that statute are as follows:

> "Sec. 4. The terms of office of all officers (except justices of the peace) hereafter elected in any city shall commence at twelve o'clock noon on the first day of January next succeeding their election, and continue for the respective terms of years now fixed by law; and the terms of office of all officers

hereafter appointed by the mayor of any city, or appointed or chosen by the common council or other governing body of any city, except to fill vacancies, shall commence on the first day of January of the year in which they are appointed, and continue for the respective terms of years now fixed by law, when said term is for a definite period; provided, however, that no appointment of any officer shall be made by the mayor of any city for a term of office to commence after the expiration of the term of said mayor, or by the common council or governing body of any city for a term of office to commence after the expiration of the term of any member of said common council or other governing body.

Sec. 5. All vacancies in offices in any city of this state arising from or created by any other cause than expiration of term of office, shall be filled for the unexpired term only; vacancies in elective offices shall hereafter be filled at the next general or state election, and not otherwise."

That the foregoing statute does not affect the term of, nor make provision for the filling of a vacancy in, the office of Health Officer of the City of Paterson is apparent upon the following considerations:

(1) The Health Officer of Paterson is not appointed "by the mayor of any city, or appointed or chosen by the common council or other governing body of any city." Such Health Officer is ap-

pointed by the local Board of Health of Paterson. The local Board of Health of Paterson is not the Mayor, nor is it the Common Council "or other governing body" of Paterson. That it is not such "other governing body" as is intended by the statute is made clear by applying that common maxim of construction, "*noscitur a sociis.*" The words "other governing body" refer to a governing body like a common council.

> "At common law cities were variously organized, some even existing by prescription; but in general they had a mayor and common council composed of aldermen. Dillon says that in this country the normal type created, as all cities must be, by legislative grant, either by special charter or under general laws, is a corporation with a 'governing body usually styled the council.' * * * again, he says: 'The council is the governing body of the municipal corporation, and the corporation, unless it is otherwise provided, can act and be bound only through the medium of the council' * * * The charters of most of New Jersey cities styled the members of this governing body aldermen and the body itself a common council."
>
> *Fitzgerald* v. *Jersey City*, 69 *N. J. L.*, 152.

In the last mentioned case the facts were that the Excise Board of Jersey City, appointed under an Act of 1894, attempted to provide by ordinance for the establishment of a new Excise Board under powers supposed by it to be conferred by an Act of 1902, which gave such powers to "the common council or other governing board of any city." Jersey

City, like Paterson, had no "common cuncil" *eo nomine,* but it, like Paterson, had a Board of Aldermen, possessing all the characteristics of a Common Council. The Court, in determining that the words "other governing board" and "other governing body" did not refer to the Excise Commission, but to the Board of Aldermen only, said (p. 155):

> "There was not, in Jersey City, on April 8th, 1902, any board or body that had governance of the establishment of excise departments; there was simply one which, if constitutionally authorized, had power to administer excise affairs. Therefore we must seek some other meaning for the words 'governing board' and 'governing body' used in the statute of that date. The natural indication is the general governing body of the corporation identified by the leading words 'common council.' *Noscitus a sociis.* The use of the word 'other' is conclusive that the legislature considered common councils as the governing bodies of cities, in the sense in which the word 'governing' was used in the statute, notwithstanding that many governmental powers may, in some cities, as notably in Jersey City, have been vested in other boards. The alternative expression was used in order to include a general board or body not styled a common council—e. g., in Jersey City, the board of aldermen. Such a board has, by law-writers, uniformly been spoken of as the governing body of the corporation, and is the marked characteristic of American cities."

Boards of Health were excluded from the Boards mentioned in the Walsh Act, in *Istvan* v. *Naar,* 84

L., 113. In that case it was contended that the Board of Health of Trenton was abolished upon the adoption of the Walsh Act (P. L., 1911, 462) and the organization of the Commissioners. The pertinent language of the Walsh Act was very much broader than that of the Election Act. It reads:

> "The city council or other governing body *or bodies theretofore acting as governing body or bodies and having any other functions shall be ipso facto* abolished
>
> The board of commissioners shall have and possess all administrative, judicial and legislative powers and duties now had and possessed by the *mayor and city council and all other executive or legislative bodies in said city.*" (Italics ours.)

Yet, for the reasons stated in the opinion, these broad words did not include the Board of Health.

(2) The term of the Health Officer of the City of Paterson was not fixed by law at the time of the passage of the Act of 1901 (*de non apparentibus et non existenibus eadem est ratio.*) The Act applies only to officers and offices having a term fixed by law at the time of the passage of the Act of 1901 in respect of the termination of the term. Therefore, the Act di dnot in any way affect the office of Health Officer of Paterson.

The language of the Act in reference to the point now considered is:

> "The terms of office of all officers here-

> after appoited * * * shall commence on the first day of January, of the year in which they are appointed, and continue for the respective terms of years now fixed by law, when said term is for a definite period."

It s submitted that it is apparent, from the clause now quoted, that the Legislature was making provision only for offices, the terms of which were fixed by law *at the time of the passage of the Act of 1901.* It was not dealing with offices or the terms thereof which were to be established in the future. The use of the emphatic word *"now"* in the phrase "terms of years now fixed by law" repels any possible inference to the contrary.

The main purpose of the Act of 1901 was not to change the terms of any officers. Such purpose was to abolish the spring elections which had been theretofore held in many cities of the State, which purpose is stated in the first section of the Act in the following resolution:

> "It being the intention hereby to consolidate of the municipal or charter election in cities with the general or state elections."

The change in the date of the election and appointment of municipal officers was subordinate to this intent, and adopted merely to prevent confusion in municipal administration by reason of the change. All that was necessary to achieve the main purpose of the Act was to extend the terms of existing offices to January 1st succeeding the passage of the Act, and, if a vacancy occurred, to provide that the term of the person elected to fill it should expire

at the same time. Such was the construction given to the Act by our Court of Errors:

> "In 1901 the legislature, conceiving it to be desirable that the municipal or charter election should be consolidated with the general or state election in the various cities of the state, passed a law providing that thereafter, in all the cities of the state, all officers required to be elected therein at any municipal or charter election should be voted for and elected on the first Tuesday after the first Monday of November in each year, and upon the same official ballot required by law for the election of state and county officers. Pamph. L. 1901, p. 41. This change of the date of the municipal or charter election in cities, from the spring (ordinarily) until the fall made it necessary to alter the date upon which the terms of office of the various officers elected or appointed for such municipalities should commence, and the time was fixed by the statute as 'the first day of January next succeeding their election.' In order that the change in the date of the charter election should not operate to suspend municipal functions in the various cities of the state, the act provided (in section 2) that the term of every officer theretofore elected in any city, and holding office at the time of the passage of the act, should be extended from the time when his term would otherwise expire to the first day of January next ensuing, and further provided (in section 3) for a like extension of the terms of officers who were appointed by the mayor or by the common council of the city."

Wright v. *Campbell*, 74 *L.*, 609.

(3) In order to apply the provisions of the Election Act to the office of Health Officer it must be held to repeal, *pro tanto*, Section 31 of the Health Act, *i. e.*, the absolute power given the Board of Health to fix the term of office. That they possess such power is established by *Browne* v. *Hagen*, *supra;* if the Election Act affects it at all, it deprives them not only of power to fill a vacancy for a full term, but it also deprives them of power to create any term which does not begin on January 1st of any year and end on January 1st of some subsequent year.

That an intent to repeal a former statute will not be implied unless the subsequent enactment is either clearly repugnant to the former or is manifestly intended to cover the same subject-matter by way of revision and furnish a complete substitute for the former is too well established by authority to require the citation of authority. That the Electin Act of 1901 was not a revision of the Health Act goes without saying. That the provisions of the Election Act and Section 31 of the Health Act are not clearly repugnant to each other would appear from such construction of the former as to make it applicable only to officers appointed by such "other governing body" as a Common Council, and to such officers as had their terms of office fixed by law at the time of its passage.

It would seem that an analogous rule of construction was adopted in a much more difficult case. *Istvan* v. *Naar*, 84 *L.*, 113. The Walsh Act (P. L., 1911, 462) provided that upon its adoption and the organization of the government under it

> "the city council or other governing body or bodies theretofore acting as governing body or bodies and having any other functions shall be *ipso facto* abolished. And the board of commissioners shall have and possess all administrative, judicial and legislative powers and duties now had and possessed by the mayor and city council and all other executive or legislative bodies in said City."

When Trenton adopted the Walsh Act and organized under it, it was contended that the Board of Health of Trenton was abolished. Yet, notwithstanding the generality of the language quoted, the contrary was held by this Court, and, also, that Section 18 of the Act was not repealed.

(4) If the foregoing propositions are correct, it follows, by reason of the language of the Act as well as upon general principles of statutory construction that Section 5, which provides for the filling of vacancies, does not apply to the position of Health Officer, because:

(a) If the pwer to abolish the term, as heretofore argued, is vested in the Board of Health, there was no vacancy to fill, and the appointment of Dr. Clay was for a new term, so, of course, the statute would not apply.

(b) Section 5 was intended to make the scheme for consolidating elections complete, by supplying that which was omitted from Section 4, and not to provide a general plan for filling vacancies in all city offices. By Section 4 the commencement and duration of all appointive terms was fixed as of

January 1st, *"except to fill vacancies."* If no more than this were enacted, the legislative scheme could have been rendered abortive by a wholesale resignation of city officers and a subsequent filling of the vacancies prior to January 1st. To prevent this, and to clarify the statute, and for no other purpose, Section 5 was both appropriate and necessary.

Consequently, it is submitted if any question should arise from the generality of the language used in Section 5, it should be restricted by its context and evident purpose.

> "It is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself * * * A survey of the entire statute is almost always indispensible, even when the words are the plainest; for the true meaning of any passage is that which best harmonizes with the subject, and with every other passage of the statute."
>
> *Endlich on the Interpretation of Statutes,* Sec. 35.

This was the rule applied, without express reference, in *Istvan* v. *Naar, supra.*

POINT IV.

DR. CLAY BEING LEGALLY ELECTED HEALTH OFFICER FOR A TERM BEGINNING DECEMBER 14, 1920, THE RESOLUTION OF THE BOARD PASSED JANUARY 1,

1921, RESCINDING THE RESOLUTION OF DECEMBER 14, 1920, WAS ILLEGAL, VOID AND OF NO EFFCT.

If the election of Dr. Clay on December 14, 1920, is considered as being established, the resolution of the Board passed January 1, 1921, would not operate to rescind it or remove Dr. Clay from office. When elected, he was protected from removal, under such a resolution, by the provisions of Section 36 of the Health Act heretofore quoted. The Board had exhausted its power in respect of removal, or substitution of persons, when Dr. Clay accepted the office.

> "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 recission of the appointment will not affect the right to the office."

Haight v.*Love,* 39 L., 14; affirmed, *id.*, 476.

POINT V.

THE RESOLUTION OF THE BOARD PASSED JANUARY 1, 1921, ELECTING DR. BROWNE WAS ILLEGAL, VOID AND OF NO EFFECT.

If Dr. Clay was legally elected on December 14, 1920, and not removed by the resolution of January 1, 1921, it is submitted, it goes without argument that the appointment, on the latter day, of Dr. Browne, to the same office, was null and void and

gave him no right to intrude therein, but that he is an usurper against whom judgment of ouster should go.

WILLIAM I. LEWIS,
Of Counsel With Relator-Appellee.

New Jersey Court of Errors and Appeals

The State of New Jersey, ex rel., Thomas A. Clay, Relator-Appellee, vs. J. Alexander Browne, Defendant-Appellant.	On Appeal from Supreme Court.

BRIEF FOR DEFENDANT

STATEMENT OF THE CASE

The relator claims to be entitled to the office of Health Officer of the City of Paterson and has filed an information under the fourth section of the Quo Warranto Act seeking to oust the incumbent.

This is the same office in dispute in *Clay v. Civil Service Commission,* 88 *Law,* 502; 89 *Law,* 194, and *Browne v. Hagen,* 90 *Law,* 423, and 91 *Law,* 544.

The questions involved in the present case are new. In the last of above cases it was determined that the office of Health Officer was one, the term of which is fixed by law and the incumbent is not protected by the Civil Service Act.

Health Officers are appointed under the thirty-first section of the General Health Act of 1887 (Comp. Stat., p. 2669), which provides that "Local boards of health shall have power and authority to appoint such subordinate officers and agents * * *

as they may deem necessary, to fix the term of such appointments, and the compensation of such appointees."

From the pleadings it appears that Dr. Hagen was elected Health Officer of Paterson on January 8, 1918, for a term of three years.

We claim that his term expired January 1, 1921, under the following statute, 1 C. S., page 633:

> "Sec. 4. * * * And the terms of office of all officers hereafter appointed by the mayor ment of any officer shall be made by the common council or other governing body of any city, except to fill vacancies, shall commence on the first day of January of the year in which they are appointed, and continue for the respective terms of years now fixed by law, when said term is for a definite period; provided, however, that no appointment of any officer hall be made by the mayor of any city for a term of office to commence after the expiration of the term of said mayor, or by the common council or other governing body of any city for a term of office to commence after the expiration of the term of any member of said common council or other governing body (P. L. 1901, p. 42)."

On December 14, 1920, Dr. Hagen resigned and the Board of Health proceeded to elect Dr. Clay as Health Officer for a term of three years, commencing immediately.

We claim that this action was void, as the Board

only had power to fill the vacancy for the unexpired term of Dr. Hagen, because of the provision of the statute as follows:

> "Sec. 5. All vacancies in offices in any city of this state arising from or created by any other cause than expiration of term of office, shall be filled for the unexpired term only; vacancies in elective offices shall hereafter be filed at the next general or state election, and not otherwise (P. L. 1901, p. 42)." (C. S., p. 633.)

On January 1, 1921, the defendant was elected to the office which he now claims.

The Supreme Court decided in favor of the relator holding "that upon Dr. Hagen's resignation and its acceptance, the term for which he was appointed as Health Officer, as well as his right to continue to hold the office came to an end." Case page 21.

GROUNDS OF APPEAL.

The appellant insists that the Supreme Court was in error in holding that the term of Dr. Hagen ended on December 24, 1919, and in holding that Dr. Clay was entitled to the office and that Dr. Browne was not entitled to the office. The six grounds of appeal are found on page 23 of the case.

ARGUMENT.

The question between the parties to this suit is

summed up very concisely in the Supreme Court opinion. On page 20 line 19 the Supreme Court says:

> "The question for determination therefore is whether the term of Dr. Hagen came to an end by force of his resignation and its acceptance, or whether that term continued to exist notwithstanding that his right to further occupy the office had ceased."

The effect of the decision of the Supreme Court is to make an exception to a general rule. The statute construed was intended by the Legislature to change a system theretofore in vogue in the cities of the State whereby the terms of officers expired at different times and to so arrange it that vacancies occurred in all offices on the first of January, and, second, to prevent officers resigning just before the end of their term and being reelected for a full term after the municipal election and before the members of new governing bodies were able to function. The result of the present decision is to create an exception in this rule which the statute did not intend to make.

POINT I.

THE RELATOR HAS NO TITLE TO THE OFFICE.

A. The Board of Health on December 14, 1920, could only elect the relator for the unexpired term of Dr. Hagen, and its action in attempting to elect him for a three-year term is a nullity.

B. If the Board of Health had power to abolish and terminate the term of office held by Dr. Hagen it has rescinded its action so doing.

C. If the Board of Health had power to terminate Dr. Hagen's term it must also have power to terminate Dr. Clay's term, which it has done.

(a) *The Board of Health on December* 14, 1920, *could only elect the relator for the unexpired term of Dr. Hagen, and its action in attempting to elect him for a three-year term is a nullity.*

We rely on the statute of 1901 entitled, "An act relative to the time of election and appointment and terms of office of officers elected or appointed in cities of this State" (P. L. 1901, p. 41, 1 Comp. Stat. 632.)

The pertinent sections are quoted above.

(1) This statute was passed for the purpose of consolidating the charter or Spring elections with the State or Fall elections. But it has numerous provisions not essential to such a consolidation. The elections could have been consolidated without any extension of terms of appointive officers. The Mayor or Council whose terms was extended could have exercised such power of appointment. But the Legislature seemed to have in mind that it was better to have the terms of appointive officers expire on the same date as the terms of the officers holding the appointive power. The American public loves fair play and objects very strenuously to an outgoing administration saddling an incoming one with a lot of officials hostile to it. There are numerous statutes that show that the trend of leg-

islation is against such a course. The Walsh Act is one instance; the Act of 1901 under consideration is another.

Let us consider what is here attempted. Dr. Hagen's term was about to expire and he was unlikely to be re-elected. At the last meeting of the Board of Health for 1920 he resigned and the Board, the complexion of which is about to change, attempted to elect Hagen's friend, the relator, for a long term, so as to defeat the right of the incoming Board to elect Dr. Hagen's successor.

Such a plan should not receive favorable consideration of a court and statutes should not receive a construction favorable to such a scheme, particularly when the Legislature has evinced its hostility to anything of that kind.

The 1901 Statute carries an express provision against such a practice.

Notice that the fourth section has a proviso against outgoing Mayors and Common Councils making appointments to commence after their own terms expire.

Such a provision was not essential to a scheme of consolidating charter and State elections. Note also that the fourth section in its scope is not limited to officers whose terms have been extended, but relates to *"all officers hereafter appointed, etc."*

The fifth section refers to *"all vacancies in offices in any city."* Here there is no limit of any kind. The provision following directly after the proviso in the fourth section concerning the ap-

pointment of officers whose terms are to commence after the expiration of the term of a Mayor or Common Council, indicates what was in the legislative mind.

In this sense the fifth section supplements the fourth. The fourth says to the appointive power, "you shall not appoint to offices becoming vacant during the term of your successor," and the fifth says, "you cannot evade the fourth section by permitting resignation during your term and filling the office for a full term."

(2) We consider that the officers referred to in Section 4 include officers appointed by the Board of Health. That the term "governing body" as used in this section includes Boards of Health.

We do not understand the decision in *Istvan* v. *Naar*, 84 *Law*, 113, to hold that Boards of Health were not included in the term "governing bodies." Indeed, the term used in the Walsh Act and which was under consideration in that case was much broader, it included "*bodies having any other function*" (*Istvan* v. *Naar*, 84 *Law*, at 114, bottom of page.)

The opinion in the *Istvan* case points out that nowhere in the Walsh Act is there any provision conferring on the Board of Commissioners power in relation to health matters. This is the reason for the decision in that case and not that the term "governing bodies" did not include a board of health.

In the case of *Fitzgerald v. Lee*, 69 *Law*, 152, quotations from which appear in relator's brief below, it was held that the term "governing body" did

not mean in the statute therein under consideration a board of excise and did mean a common council. But we find that the opinion in that case recognized that the term governing body was frequently used in a much broader sense so as to include departmental boards.

> "In other words, the assumption is that the legislature contemplated that, normally, a common council would be the governing body in the premises, but that, if governance of excise matters had been committed to some other board or body, it intended to confer the authority upon that board or body.
>
> The act of 1894 is limited to cities of the first class, and provides for the appointment of a bipartizan board, selected from the two leading political parties, and the confirmatory act continues these restrictions. The constitutionality of this legislation is attacked with much force by the counsel for the defendant, but the questions raised need not be decided, for it is quite plain to us that the board authorized by it is not a governing board or body in the sense of that designation in the statute *sub judice*. Like words may indicate a departmental board, and they are sometimes so used in the legislation of this state. An example may be found in the 'Act providing for the paving of any street or avenue or section thereof which forms the boundary line between two adjoining municipalities.' Pamph. L. 1894, p. 348. That act confers power to provide for street paving, in cases within its title, on the 'governing bodies' of the respective municipali-

ties. Undoubtedly, by the words quoted, it was meant to convey the meaning that the powers of the act should be exercised by the respective boards that had governance of street paving.

In applying legislation, as to licenses, power conferred on the governing boards or bodies would, in like manner, have been exercisable by such boards as those existing under the act of 1894 and its confirmatory statute; but to no such board had been committed authority to create an excise department, and so commit self-destruction" (69 *Law*, p. 154.)

To determine the meaning of the term "governing body" as used in the Statute of 1901 we must consider the intention of the Legislature. We think it intended to include the officers appointed by the Board of Health as well as officers appointed by a Board of Aldermen. There seems to be no reason to differentiate between such classes of officers in the matters covered by this statute.

Clearly it was the intention of the Act of 1901 to cover all officers appointed by all boards in cities. And in the present instance the term "governing body" was used in a broad sense as indicated in *Fitzgerald v. Lee*. But whether so used or not the regulation as to vacancies in the fifth section covered all vacancies in office in cities.

(3) The Act of 1901 is a modification only of the power granted to the Board of Health under Section 31 of the General Health Act of 1897, and does not repeal that section. A board of health

is a part of a city government, and the members of such a board go out of office on the adoption of the Walsh Act (*Istvan v. Naar.*) Since it is a local board and part of the municipal government and having full power in matters of health it is a governing body under the Act of 1901.

The two statutes can operate together.

(b) *If the Board of Health had power to abolish and terminate the term of office held by Dr. Hagen it has rescinded its action in so doing.*

The resolution that we claim was rescinded is not a resolution appointing Dr. Clay, but the one ending the term of Dr. Hagen.

In *Haight* v. *Love,* 39 *Law,* 14, it was held that a resolution appointing an officer could not be rescinded after he had taken office. Such action differs materially from one rescinding another resolution, even though it affect the officer.

> "An appointment to a public office for a term of years, and the acceptance of such office, is not a contract between the government and the person appointed that the officer will serve, or that the government will pay during the term for which the officer was appointed; either party may determine the official relation."

Hoboken v. *Gear,* 27 *Law,* 265.
Fredericks v. *Board of Health,* 82 *Law,* 200.

THE SUPREME COURT OPINION.

The opinion of the Supreme Court holds (case p. 20 last line) "where the fixation of the term of office is not attached to the office itself, but relates only to a particular incumbent thereof, then upon the termination of the right of the incumbent to occupy the office, no matter how or when the right ceases to exist, the term for which he was appointed automatically comes to an end, and no unexpired portion thereof remains to be dealt with &c."

To us this reasoning does not seem to apply to the case at bar.

The facts are presented to the court by the pleadings and they are shortly as follows:

PLEADINGS.

The relator filed an information under the fourth section of the Quo Warranto Act, claiming his election to the office of Health Officer of the City of Paterson on December 14, 1920, for a term of three years and alleging usurpation by the defendant about January 1, 1921. The information sets forth the qualifications of the relator for the position; that he had the necessary license and duly took the oath according to law. To this information the defendant pleaded:

1. A denial of the title of the relator and challenging his right to file an information. This first plea sets up that on January 8, 1918, one Hagen was appointed Health Officer for the term of three years, which defendant claims ended January 1,

1921; that on December 14, 1920, Hagen resigned from office and his resignation was accepted; that on the acceptance of the said resignation the position became vacant and the Board of Health had only power to fill the same for the unexpired term, that is, until January 1, 1921, and that the action of the Board of Health in attempting to appoint the relator for a term of three years beginning on December 14, 1920, was illegal, void and beyond the power of the Board.

2. A claim of title to the office in himself showing his election on January 1, 1921, his qualifications, etc.

This plea shows the election of Hagen on January 8, 1918, for a term of three years; his resignation and its acceptace; a claim that the Board then only had power to fill the vacancy until January 1, 1921; that the attempt on the part of the Board of Health to elect a Health Officer for a term of three years beginning December 14, 1920, was void; that on January 1, 1921, the action of the Board in attempting to elect relator on December 14th was rescinded and set aside; that therefore the defendant was elected Health Officer for a term of five years beginning on January 1, 1921.

Relator demurred to the second plea and replied to the first plea. This reply denies the claims of the defendant in his first plea and sets up as new matter that at the meeting of December 14, 1920 and after the resignation of Dr. Hagen the Board abolished and terminated the term of said Hagen by resolution which is set out in the reply. To this reply the defendant rejoined, denying that the Board had power to pass the resolution set forth

in the replication, and also setting out the resolution of January 1, 1920, rescinding the resolution referred to in the reply. To this rejoinder relator demurred.

In defendant's first plea it is charged (case p. 6 line 28):

> 1. "On January 8, 1918, one Orville R. Hagen was appointed Health Officer of the Board of Health of the City of Paterson for a term of three years."

To this relator replied (case p. 12 line 25):

> "He admits that on January 8, 1921, said Orville R. Hagen was appointed Health Officer of the City of Paterson for a term of three years."

There is not only recognition by the relator in the above that the term for which Dr. Hagen was elected was a fixed one of three years but later in the reply relator sets forth a claim, not that the term of Dr. Hagen expired by reason of his resignation but by the action of the Board of Health (case p. 13 lines 10-22) in passing the following resolution:

> "That the term of Health Officer heretofore held by Orville R. Hagen be and the same is hereby terminated."

This last resolution was clearly beyond the power of the Board of Health in view of the statute. It was also an admission that the term of office for which Dr. Hagen was appointed was stitll in existence after his resignation was accepted.

We cannot see how the court could find that the term of office related to the incumbent in the case of Dr. Hagen. Certainly there is nothing in the statute which gives power to Boards of Health to appoint Health Officres (C. S. 2669 sec. 31) which prevents such boards from fixing a term for such office which relates to the office and not to the particular incumbent and it clearly appears that that is exactly what the Board of Health did in the case of Dr. Hagen.

Further, Dr. Hagen was elected for a term of three years, nothing else, and it is clear that he did not serve three years. Therefore there is a portion of said three years left, an unexpired portion of that term for which he was originally appointed.

POINT II.

THE RELATOR HAVING NO TITLE TO THE OFFICE CANNOT QUESTION THE TITLE OF DEFENDANT.

Manahan v. *Watts*, 64 *Law*, 470.
Bullocks v. *Biggs*, 78 *Law*, 64.
Dunham v. *Bright*, 85 *Law*, 391.
Bouyne v. *Frank*, 89 *Law*, 239.
Florey v. *Lansing*, 90 *Law*, 11.
Browne v. *Hagen*, 90 *Law*, 425.

POINT III.

THE DEFENDANT HAS GOOD TITLE TO THE OFFICE.

The judgment of the Supreme Court should be reversed.

Respectfully submitted,

Edward F. Merrey,
Of Counsel with Defendant.