

New Jersey Court of Errors and Appeals.

LUCIUS F. DONOHUE,
Relator-Respondent,

—against—

PALMER CAMPBELL,
Respondent-Appellant.

On Appeal from
Supreme Court,
Hudson Circuit.

BRIEF FOR RELATOR-RESPONDENT.

Statement of Case.

Counsel of appellant, in their brief have accurately recited the documentary evidence and the proven facts, so far as they are stated, and any statement of fact herein contained is intended to be supplementary.

Therefore, the Court's attention is directed to the fact that the paper signed by Judge Doherty (call it Order or Commission), appointing Dr. Donohoe, was signed prior to the signing of the paper by either Judges Blair or McCarthy, appointing Mr. Campbell.

This was the "fact" question presented to the jury for their finding (Case, pp. 69-70, etc.), and the jury found in favor of Dr. Donohoe, and the correctness of this finding is not questioned.

Argument.

The office in dispute was created by Chapter 277 of Laws of 1902, page 811, which conferred upon the Judge of the Court of Common Pleas of each County the power to appoint four Com-

missioners whose respective terms should be four years, except the first four appointees, whose terms should be for one, two, three and four years respectively.

In case of vacancy, the Judge is empowered to fill same by appointment, and to appoint successors for expired terms.

The appointee, *before entering upon the duties of his office*, is required to take and *subscribe* a prescribed oath or affirmation, which is to be filed in the office of the County Clerk.

The language of the statute is as follows:

“1. In any County of this State it shall be the duty of the Judge of the Court of Common Pleas, sitting in said County, to appoint four persons a Board of Commissioners to be known as ‘the County Park Commission’ (inserting the name of the County in and for which such Commissioners are appointed); and at no time shall more than two Commissioners, appointed under this act, be of the same political faith; the Commissioners first appointed under the provisions of this act, in any County, shall hold office respectively for the term of one, two, three and four years, *as indicated and fixed in the order of appointment*, and all such Commissioners, after the first appointment, shall be so appointed for the full term of four years; vacancies in said board happening by resignation or otherwise, shall be filled by such Judge as hereinafter provided, and the persons appointed to fill such vacancies shall be appointed for the unexpired term only; such persons so appointed, when duly qualified, constituting such Board of Park Commissioners and their successors, are hereby created a body politic, with power to sue and be sued, to use a common seal and to

make By-Laws; before entering upon the duties of his office, each of the members of said Board shall take and subscribe an oath or affirmation, *faithfully and impartially to perform the duties of his office, which oath or affirmation shall be filed in the office of the Clerk of the County wherein the Board of which he is a member, is appointed; etc.*"

When this act was adopted there was but a single Common Pleas Judge in each County, but subsequently their number was increased in some Counties, and to define their status and powers the Act of 1918, Chapter 48—Section 2—page 137, was adopted which provides:

"2. Whenever there shall be three Judges of the Court of Common Pleas in any County, said Judges sitting together, or either of them sitting alone, or each of them sitting separately at the same time, shall constitute and may hold the Court of Common Pleas, the Orphan's Court, the Court of Quarter Sessions, and the Court of Special Sessions, and said Judges, when sitting together, or either of them when sitting alone, or each of them when sitting separately at the same time, shall have and possess the same powers, authority and jurisdiction as are now vested in the existing Judges of said Courts; each of said Judges shall have the same power to hold the Court of Oyer and Terminer and Circuit Court as is now conferred by statute on the existing Judges of the Court of Common Pleas; whenever the said Judges shall sit together, the senior Judge in service shall be the President Judge of said Court; and any power or authority now conferred by statute on the Judge or Judges of the Court of Common Pleas in any proceeding or matter may be exercised by either of said Judges" (P. L., 1918, p. 138, Sec. 2).

In view of this situation, the appellant does not question the authority of a single Judge to make the appointment without the concurrence of his fellow Judges, in those Counties having more than one Common Pleas Judge.

(See Appellant's Brief, p. 7.)

In his brief, appellant makes but a single point, which under "Point I" he states as follows:

"The appointing power was completely exercised when Judge Blair signed D-1 for Identification."

In reply to this contention relator insists:

POINT I.

In signing "D-1 for Identification" Judge Blair neither exercised nor intended to exercise his appointing power, except in conjunction with this exercise by Judges Doherty and McCarthy and subject to their joint approval.

In the argument to support this point, Appellant's Brief says:

"It is well established that once the appointment is complete, the vacancy no longer exists and the authority of the appointing power ceases."

(Citing *Haight v. Love*, 39 N. J. L. 14.)

We deny that this is a correct statement of the legal principle, nor do the cases cited so hold.

It is true that when the appointive power has been completely exercised, and the "last act re-

quired from the person possessing that power has been performed" (as defined in *Marbury v. Madison*), then that appointive power cannot be further exercised, unless the vacancy is not filled.

The complete exercise of the appointive power does not, of itself, fill the *vacancy*. The appointee may refuse to accept the office, he may die or become disqualified before he enters into it; he may neglect or refuse to make himself eligible to enter into it, by failure to take the requisite oaths of office or give the required bond, etc., in each of which events the vacancy continues to exist.

In this case the appellant was clearly disqualified to enter into and exercise the duties of his office on June 18th even though his appointment had been entirely legal and complete.

The Official Oath Act (Chapter 215, Laws 1920) prescribes:

"1. In addition to any official oath that may be specially prescribed, every person hereafter elected or appointed to any public office in this State or in any county or municipality therein shall, *before he enters upon the execution of his said office*, take and subscribe the oath of allegiance set forth in Paragraph I of the Act entitled 'An Act prescribing certain oaths,'² and shall also take and subscribe the following oath, to wit:

I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully, impartially and justly perform all the duties of the office of _____, according to the best of my abilities and understanding. So help me God." (P. L. 1920, p. 413, Chapter 215.)

The foregoing oath was not taken and subscribed by the appellant until June 22, 1922 (Case, p. 14), five days after said term of office began, during which time the appellant was exercising the duties of the office in violation of the aforesaid statute.

In *Haight v. Love* (cited by Appellant, wherein is quoted an excerpt from the opinion of Chief Justice Marshall in *Marbury v. Madison*), the Court was pointing out the time when the appointive power *ceases* as against the appointee. The question before the Court was whether the Board of Finance having appointed Mr. Love, City Collector, by resolution regularly adopted and the appointee having duly qualified and entered upon his office, could be thereafter ousted by a rescission of the resolution of appointment. Quoting from *Marbury v. Madison*, the Court said:

“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.”

The Court then points out that not only had the last act of the appointing power been performed by the adoption of the appointive resolution, but also that Love had also taken the oath of office and entered upon his duties.

In signing the paper “D. 1.” Judge Blair did not intend, by his act, to make an appointment, nor to exercise his appointive power, but merely to set in motion the appointive power. This, we

submit, is conclusively shown, not only by his own conduct, but by the intrinsic evidence of the paper itself. As to his conduct, he first signed the paper, then sent it to Judge McCarthy, with a request for his signature, and obtaining that, then sent it to Judge Doherty for his signature.

Intending that the appointment should be made, if made, by the joint action of the three judges, he drafted the paper to read:

“* * * we, John A. Blair, Richard Doherty and James W. McCarthy, do hereby appoint Palmer Campbell, etc.”

As all were clothed with the appointive power, it was intended by Judges Blair and McCarthy, when they signed “D. 1” that such appointive power should be exercised through the united action of the three judges.

Each should have his opportunity to *deliberate*, and if satisfied, they should express their united choice by some open, unequivocal act, as the signing of the order, and filing it, or at least, delivering it to the appointee.

As was indicated in *Marbury v. Madison*, when, “the time for deliberation has passed;” when, “the appointment is evidenced by *an open, unequivocal act*”; when such act is “*the last required* from the person making it;” so that such act, when made, “necessarily excludes the idea of its being so far as respects the appointment *an inchoate and incomplete transaction*,” then, but not till then, has the constitutional power of appointment been exercised.

Applying these tests to “D. 1” it is clear that “D. 1” did not represent the “last act” of the appointive power.

Even had Judge Doherty signed the paper and put it in his pocket, still it might have been reconsidered by the judges, and if they thought it wise, a new appointee substituted. There was no open, unequivocal act, in the mere signing, nor had the time for deliberation yet passed. The act was still incomplete and inchoate.

The statute (above quoted) provides that terms of commissioners first appointed, shall be for one, two, three and four years, "as indicated and fixed in the order of appointment." As this order is to be made by a Judge of the Court, we urge that it should bear the usual characteristics of a Court order—viz; that it should be in writing and signed by the Judge, and then entered in the Courts' minutes or filed with its Clerk, 2 *Comp. Stat.*, p. 1727-101, seems to recognize that orders shall be in writing, signed and entered.

Supreme Court Rules Nos. 214 and 215 require these as to Supreme and Circuit Court rules.

Anderson L. Dict. defines an "order" to be, "any direction of a Court, other than a judgment or decree, made in a cause."

Burrill L. Dict. "A direction in writing, granted by a Court or judge, requiring or authorizing some act to be done."

Dahlstrom v. Portland Min. Co., 12 Ida. 87, 85 Pac. 916. "Every direction of a court or judge made or entered in writing, not included in a judgment."

29 *Cyc. L. & P.* (2nd Ed.) 1514.

If this appointment was to be made by an order, as we contend, then "D. 1" was entirely futile, and properly excluded as evidence.

It will be further noticed that Judges Blair and McCarthy did not consider it as a valid

order, for they subsequently signed another order, of like tenor, and which they delivered to the appellant to be filed. This paper was filed with the County Clerk, but *subsequent* to the filing of the Order appointing Dr. Donohoe.

In his plea, appellant, relies on this paper filed by him, as his order of appointment (Case, p. 10, l. 3, etc.), alleging it to have been signed on May 15, 1922.

It developed at the trial that such was not the fact.

We claim, therefore, that when Judge Doherty, on May 23, 1922, signed the order of appointment of Dr. Donohoe and filed the same with the County Clerk, the last act of appointive power, for the first time, had been exercised, by an open, unequivocal act, whereby all opportunity for further deliberation was terminated, and when the appointee took and subscribed, as he did, the requisite oaths of office, he became fully entitled to the office, and was wrongfully deprived of it by the intrusion of the appellant on June 18, 1922.

On that date Mr. Campbell had not even taken the requisite oaths.

While it may be that his failure to take these oaths would not necessarily vitiate a *prior act* of legal appointment, if made, yet it did raise a complete barrier against his investiture of and title to the office.

In *Manahan v. Watt*, 64 N. J. L., 465, the Supreme Court, speaking through Mr. Justice Lippincott (at p. 473), says:

“It will be perceived that under this statute the act of taking, subscribing and filing this oath, taken in the manner prescribed, becomes necessary before he can enter upon the possession of the office under his election or appointment. The act be-

comes a *condition precedent* to the complete investiture of the office, and in contemplation of law just as much a requisite to its enjoyment as the election itself. *It becomes an essential part of the title to the office.* The member of the Board of Chosen Freeholders is a creature of the statute, and he must comply with its requirements in order to be vested with the right to the enjoyment of the office. * * * Whenever certain acts shall be done by an appointee (oath of office and giving bond) before he shall enter on the possession of the office under his appointment, such an act becomes a condition precedent to the complete investiture of his office.

U. S. v. Le Baron, 19 How. 73.

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

High Estr. Legal Rem. 627; *Mayor of Penryn*, Stra. 582."

In *Hayter v. Benner*, 67 N. J. L., 360, the Supreme Court affirmed this principle, and speaking through Chief Justice Gummere, says:

"The Legislature having prescribed the form of the oath to be used, the taking of the oath substantially in that form, is a *condition precedent* to the complete investiture into the office, and, in contemplation of law, just as much a requisite to its enjoyment as the election itself." Citing *Manahan v. Watts*, 35 Vroom, 465."

The case of *Gardner v. Brevis* (95 N. J. L.), does not militate against this proposition in the slightest degree. There the appointive power had been completely exercised, and it was held that

the mere failure of a clerk to perform a ministerial act could not nullify the appointive act. The jurisdiction of the Court, was acquired only upon the failure or neglect of the County Board to appoint and as that Board had neither *failed* nor *neglected*, the jurisdiction of the Court never came into being.

In their brief, counsel of appellant suggest that the act of Judges Blair and McCarthy in sending this paper to Judge Doherty, was a mere act of courtesy on their part.

To so assume, is to do an injustice, not only to Judge Doherty, but to them.

They certainly knew that Judge Doherty would not "sign on the dotted line" in such an important matter.

The Trial Judge correctly held that "D-1" was ineffective as a valid appointment of appellant and therefore inadmissible to prove his title.

As between the two filed orders, that appointing Dr. Donohoe, was signed first and was filed first.

The determination of the seniority of officers appointed upon the same day is fixed by the actual time of their appointment.

23 Cyc. L. & P. (2nd Ed.) 344.

By a parity of reasoning the same rule should apply to the appointment to office.

It is respectfully submitted that the judgment should be affirmed.

WARREN DIXON,
Of Counsel With Respondent.