

NEW JERSEY COURT OF ERRORS AND APPEALS.

SAMUEL BAKELY AND GEORGE	}	10
MILLER,		
Prosecutors, Defendants in Error,		
vs.		
JOSEPH E. NOWREY,	}	
Respondent, Plaintiff in Error.		20
ON CERTIORARI.		

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF FACTS.

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This was a certiorari brought by the prosecutors to test the power of the respondent to summarily remove them as police officers, without any charge being made against them, without any hearing or trial, and without any notice.

No material facts are in dispute.

Two police officers, namely, Stackhouse and English, had resigned—the one on December 23d, the other on December 30th, 1901. Officer Gravenor was at once promoted to take the place of Stackhouse, and the places made vacant by Gravenor and English were filled by the promotion of sub-policemen Stone and Chambers. The prosecutors were appointed, on or before December 30th, to take the places of the said sub-policemen, Stone and

10 Chambers.

Cooper B. Hatch was Mayor of the city of Camden till twelve o'clock noon, January 1st, 1902, when Joseph E. Nowrey, the respondent, became Mayor. (P. L. 1901, p. 41.)

The Mayor had the power to appoint. (Amendment to Camden Charter, March 7, 1872.)

Mayor Hatch testified that he accepted the resignations of Stackhouse and English when they were presented. In
20 fact, English resigned verbally on or about December 28th, and quit the police service on that day, but did not put his resignation in writing until December 30th. Mayor Hatch at once appointed the prosecutors as sub-policemen, but they were not sworn in until the morning of January 1st, about half-past ten.

Both the prosecutors, immediately on being sworn in, were, according to the rules of the Police Department, on duty as police officers.

30 Rule 1 of the Police Department says that "each member shall devote his whole time and attention to the service, and although certain times are allotted for 'regular tours,' the officers are to be considered *at all times* on duty."

Both these officers actually did duty on certain beats, in the city of Camden, from January 1st to January 3d,

when, without any complaint being filed against them, or without any hearing or trial, or notice, as required by the tenure of office acts, the respondent, the new Mayor, removed the prosecutors as police officers summarily, and gave orders to the Police Department, through the Chief of Police, not to recognize them, and ordered the Chief to take away from them their tools, namely, revolver, club, etc.

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POINTS.

The prosecutors claim that Mayor Nowrey, the respondent, acted illegally in thus removing them from office, because :

First. If these prosecutors were discharged for cause, it is admitted that they were discharged without any charges or any hearing, as required by the tenure of office acts regulating police departments in this State. Rev. Vol. 2, page 1534, Sec. 326, which says: "No person, whether an officer *or an employee*, in the police department of any city shall be removed," etc. (New act, passed 1899, p. 26.) 20

Second. "The removal of these men was a judicial act, and there were not only no charges, but they were also removed without notice." 30

Douglass vs. Jersey City, 24 Vr., 118.

Third. If these men were not removed for cause, and it be claimed that the respondent was justified, because

they were not properly appointed, not having gone on duty before Mayor Hatch's term expired (and this seems to be the justification set out by him in his return, on page three of the case, lines 27 to 30), this question involves title to office, and the title to office of the prosecutors could only be questioned by the respondent in quo warranto proceedings.

- 10 These men had been appointed, and at the time of their removal, January 3d, 1902, had been actually in the service and on duty for three days.

"A strong *prima facie* presumption is indulged in favor of the legality and regularity of the acts of the executive, and where it appears that he has undertaken to appoint to an office, which under a certain state of facts he is empowered to fill, *it will be presumed*, in the first instance, that the requisite facts existed at the date of the appointment and that the appointment was regular and valid."

- 20 *Eldodt vs. Territory*, 61 P., 105, Citing *People vs. Vail*, 20 Wend., 12; *Wood vs. Peake*, 8 Johns., 69; 16 Johns., 49; 5 Denio, 409.

The question was not whether these men were officers *de jure*, because that involves title to office, and the respondent could not decide such a question as against men who were already in office doing duty.

- 30 The real issue is, "Could the respondent summarily remove these prosecutors, who were admittedly officers *de facto*?"

As far as the respondent was concerned, there was no written evidence necessary to prove the official character or standing of these prosecutors.

"It is a general rule, in relation to all public officers, that they may establish their official character by proving

that they are generally reputed to be and *have acted* as such officers without producing their commissions or other evidence of their appointment."

"And where a person has performed various official acts in public office, they are, both for himself and others, considered *prima facie* evidence of his due appointment to the office."

Enc. of Law, Vol. 19, 436, and cases there cited.

See also *Bownes vs. Meeham, 16 Vr., 189-192.*

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"That these men were officers *de facto* needs no proof beyond the admitted facts."

Enc. of Law, Vol. 19, page 394, and cases there cited.

"When an office is full *de facto* of a person claiming it under a color of right, the proper remedy to test the claimant's right is by quo warranto."

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Leeds vs. Atlantic City, 23 Vr., 332.

Bradshaw vs. Camden, 10 Vr., 416.

"The right of a party to an office can only be called in question by proceedings in quo warranto."

Stokes vs. Camden, 6 Vr., 217.

Hoey vs. Ocean, 10 Vr., 75.

These cases make it clear that if there was any question about the title to the office held by these men, it was a matter that concerned the State, and if the State saw proper and fit to excuse any apparent defects in their title, such defects would be cured by the neglect of the State to remove them by quo warranto proceedings.

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Enc. of Law, Vol. 19, page 440, and cases there cited,

"Police officers are in fact State or public officers."
Dillon on Mun. Corp., Vol. 1, page 102, page 60.

And the Mayor, therefore, had no right, simply by his own *ipse dixit*, to deprive these men of their offices or appointment, or of their title thereto, even if his contention were correct that they were not officers *de jure*, because being officers *de facto*, they were *prima facie* officers *de*
 10 *jure*.

ARGUMENT ON RESPONDENT'S POINTS.

VACANCIES EXISTED.

It is contended, on the part of the respondent, that the
 20 terms of office of the prosecutors began after Mayor Hatch's term expired, because they went on duty at 7 P. M. of January 1st, and that Mayor Hatch could not appoint for an office that did not become vacant during his term of office.

Counsel for the respondent says that a man is not a police officer until he has qualified and is sworn in, and that his term of office begins when he goes on duty.

30 All these contentions are entirely without any legal foundation, and are completely at variance with the decisions of our Courts.

If counsel for the respondent should argue that the word officer, in the Meeker act, includes police officers,

and by virtue of the resignations received by Mayor Hatch of Officers English and Stackhouse, before the expiration of his term, that their terms were extended until 12 o'clock noon of January 1st, and that under section 4 of the Meeker act no other appointments to fill these vacancies could be made by Mayor Hatch, then it must be clear that the Meeker act applies only to officers who *have a fixed term of office*, and that under the tenure of office act all policemen, after once being appointed and in office, hold office during good behaviour and not for any fixed term. If this were not so, then every resignation of any police officer that occurred during Mayor Hatch's term since the passage of the Meeker act would, by this act, be kept vacant, and it would be out of his power to appoint other officers, and if, in the latter part of 1901, all the policemen in the city has resigned, Mayor Hatch could not have appointed others and the city would have been without police protection. This is the ridiculous conclusion to which this argument of counsel would lead.

But the undisputed facts, as shown by the stipulations, are that Mr. Stackhouse resigned December 23d, and his resignation was accepted at once, and that Mr. English resigned verbally on December 28th, and put it in writing on December 30th, which resignation Mayor Hatch also accepted at once.

The uncontradicted facts also are that Mayor Hatch appointed the prosecutors not later than December 30th, although they were not sworn in till January 1st.

The filling of these vacancies under this state of facts undoubtedly belonged to Mayor Hatch.

See *Haight vs. Love*, 10 Vr., 476; *Whitney vs. Van Buskirk*, 11 Vr., 469; *Horam vs. Lane*, 24 Vr., 276.

The regularity and validity of the appointment will be presumed, in the first instance, to be *prima facie*.

Eldodt vs. Territory, 61 P., 105, and other cases heretofore cited on page 4 of this brief.

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It is true that the prosecutors were not sworn in till January 1st, at 10.30 A. M. But it is claimed on the part of the prosecutors that Mayor Hatch was as much Mayor then as he was at any time during his whole term of office, since the Meeker act expressly fixed the end of his term of office at 12 o'clock noon of that day.

The swearing in of these officers did not affect their terms of office or the duties thereof.

20 "The oath of office is a mere incident to the office and constitutes no part of it."

State vs. Stanley, 66 N. C., 59.

Johnson & Johnson, 2 N. H., 202.

"An officer who is elected and has qualified is the right-ful officer, although holding by a defeasible title when he does not take the oath of office."

People vs. Crissey, 91 N. Y., 616.

30 *In re Kendall*, 85 N. Y., 305.

Foot vs. Stiles, 57 N. Y., 401.

Weeks vs. Ellis, 2 Barb. (N. Y.), 320.

"When no time is fixed by law for the commencement of an official term, it begins to run from the date of ap-

pointment." *Haight vs. Love*, 10 Vr., 476-480; *Rightmire vs. Camden*, 21 Vr., 43, 47. There the Court said: "It begins to run from the date of the appointment, or from the time the person chosen is authorized by his own act to assume the duties of his office, and *not from the time he actually enters his office.*"

The prosecutors could by their own act have been sworn in on December 30th, when they were appointed, and their term of office, under the Rightmire case, began on that date. 10

It was claimed, on the part of the respondent, that English and Stackhouse drew their salaries up to December 31st, but the payment of these salaries could not have affected the term of office of the prosecutors. If Messrs. Stackhouse and English are overpaid, or have received something that did not belong to them, that is a matter between them and the city of Camden. Aside from this, it is evident in this case that the salaries were paid according to the usual custom on December 21st, and that English and Stackhouse, then being regular officers, received their salaries as usual. Like the other officials, they received their last yearly payment previous to the holidays, pursuant to the resolution set forth in the stipulation No. 12. It will also be noted that these salaries were paid on December 21st, two days before Stackhouse handed in his resignation, and nine days before English handed in his resignation, so that neither the Mayor, City Treasurer nor the City Comptroller had any knowledge of these resignations on December 21st, when these officers were paid. 20 30

But as was held by the Court of Appeals in *Haight vs. Love*, 10 Vr., at the bottom of page 480, "this question as

to the emoluments of the office is not involved in the issues now before the Court."

- In the same case, at the bottom of page 479 and top of page 480, speaking of an officer who had held over after his term of office expired, the Court said that "Although he was to continue in the exercise of his functions, the office was, under such circumstances, declared to be vacant. There is no incongruity in the
10 fact of a vacancy for the purpose of a new election, and the actual holding by the former incumbent, nor is there any necessary incongruity in the running of the new term while the former incumbent is discharging the duties of the office."

PROSECUTORS ARE POLICE OFFICERS.

- 20** The next point that the respondent makes is that these sub-policemen do not come within the class named in the tenure of office act of the laws of 1885, pages 163 and 164.

P. L. 1885, page 164, sec. 5, says that "No person, whether officer *or employee*, in the police department of any city shall be removed from employment or office therein except for just cause, as provided in the first section of the act, and then only on written charges, etc."

- 30** The respondent quotes the case of *Stewart vs. Freeholders of Hudson*, 32 *Vr.*, 118. This case will not support his contention.

The argument of counsel for the respondent is that the law was meant to protect regular policemen whose duties are permanent and continuous, and which per-

tain to the position as such. Counsel evidently places some weight on the word "permanent" and would argue, no doubt, that the duties of these sub-policemen are not permanent.

The duties of the regular police officers are not permanent. They have regular shifts of eight hours each. They are not continuously on regular duty, any more than are the chance men (the prosecutors), and this argument of counsel for the respondent in reference to the word "permanent" is illogical. 10

The meaning of the word "permanent" as contained in the decision in question, undoubtedly refers to an appointment that is fixed for some definite or indefinite term as opposed to a temporary employment or a temporary position. If a carpenter or painter were employed for a certain period and to do certain work, by some public body, the employment would not be permanent but simply temporary. The decision of the Court in 32 Vr., page 118, is based on three other decisions, namely, *Lewis vs. Jersey City*, 22 Vr., 240, and *Bownes vs. Meehan*, 16 Vr., 189, and *State vs. Broome*, 32 Vr., 115. 20

In the latter case the Court explained that "in order to ascertain the nature of the respondent's duties recourse was to be had, not to any regulation of law, but only to his contract with the commissioners."

The meaning of the word "permanent" was also clearly put by Justice Depue in the Jersey City case, above noted (22 Vr., page 240). There the Court said that "the duties are to be continuous, permanent and specially pertaining to the position." And on page 242 (22 Vr.) the Court said: "The tenor of the act and its language indicate a purpose to apply to positions analogous to offices as distinguished from mere employment." 30

Of course, the word "continuous" does not mean that the men shall work without any rest or intermission, but only that the employment is fixed and permanent and that when one portion of his work or duty is performed there does not need to be a new employment, but that the work connected with the office or position is fixed by the office itself. The work need *not be permanent or continuous*, but the *office and employment thereunder is*.

- 10 Where the party holding the office or position holds the same at the pleasure or will of his employer, the position is not fixed or permanent, but it is otherwise if it has certain well known duties, or if the position is defined by law or by authority of law. Take the case of *Bownes vs. Meehan*, 16 Vr., 189-193. There Chief Justice Beasley held that "even a jailer held a position which was fixed." At the bottom of page 193, he said that "this office is a part of the machinery by which a part of the criminal law of the State is administered." This would also apply to the present case; and at the bottom of page 195 a definition is inserted in reference to an office of a public nature. The Court held that such an office was "one where the employment was not held merely at the will or pleasure of others, but that it had an independent existence and was created by the statute."
- 20

- Take the case of *Peterson vs. Freeholders*, 34 Vr., 59. In that case it was held that "the janitor of the Court House, appointed for an indefinite term, held a position under the Veteran act, from which he could not be removed except for cause." It was also held that "an office was a *place created*, or at least *recognized*, by the laws of the State, to which duties are assigned by the *law itself* or by the regulations adopted under authority of law."
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In 20 Johnson (N. Y.), 492, it was held, "an attorney does not hold office—he performs no duties on behalf of the government—he executes no public trust." But the prosecutors had to perform public duties as provided by law.

Section 17 of the Charter of the city of Camden, as adopted February 14, 1871, provides that the City Council shall have power to elect, appoint and prescribe the duties of all subordinate officers, including those named 10 in the act, as well as those not named therein, and who may, *in the opinion of the City Council, be necessary for* the better order and governing of the city or for the preservation of health and for the convenience, safety and advantage of trade, etc.

Sections 30 and 31 of the Charter provide that the City Council shall have power to pass such ordinances as they deem necessary to carry into effect the provisions of the charter, and such also as they shall deem necessary 20 and proper for the good government, order and protection of the persons and property, etc.

The City Council passed an ordinance, which has been marked Exhibit 1. This ordinance *created* the Police Department of the city of Camden, and by the terms of the ordinance, found on page 13, the substitute policemen are as much a part of the Police Department and are police officers to the same extent as the sergeants, detectives or patrolmen. 30

Section 126 of this ordinance says that the police officers of the city of Camden shall consist of a chief of police, three captains, etc., two detectives, 78 policemen, and two sub-policemen or chance policemen, *who shall be known as the police force* of the city of Camden,

Here, then, is a statutory authority for the appointment of these men, and the ordinance fixes their duties and compensation. It appears from stipulation No. 7, page 10, that these men were continuously on duty from the day they were appointed till the day they were removed, and as a matter of fact, a sub-policeman is always on duty. This necessarily follows, because in any city where there are 100 policemen there are always at least two, if not
 10 more, absent from sickness or other causes, and when the sub-policemen are not permitted to act, as in this case, the city and the public are without their services and the number and effectiveness of the police force is reduced to that extent.

By discharging these two men the police force has been reduced, and practically the office of sub-policeman has been abolished by the respondent by virtue of the order and proceedings brought up here for review. He has
 20 thus assumed powers belonging to City Council alone.

CITY COUNCIL, CREATED THE OFFICE.

It must be borne in mind that the position or office here created was so created by the City Council, *and not by the respondent*. There is a vital distinction between the present case and some of the reported cases. In the present
 30 case City Council *created the office*, and the Mayor, or respondent, *appointed* the officer to fill the office. The power to abolish is in the City Council and not in the Mayor. The cases where the *power to appoint* and the *power to abolish* the office were lodged *in the same person*, body or authority are not apt to this discussion. And besides this, they are cases where the offices were abolished for the public good.

Take, for instance, the case of *Evans vs. Freeholder*, 24 *Vr.*, 585-587.

Here the Board of Freeholder had, for economical reasons, extinguished the office, and the Court, on page 587, said: "The power which created can annul it"; and the Court also said that "such exercise of the power must be bona fide, for it is manifest that if it should appear that a formal act, purporting to abolish such an office or position, is only a device for the purpose of removing an officer or employee, while the office or position practically still remains in existence, that such a subterfuge would be of no avail." 10

There is no pretense on the part of the respondent in this case that he had economical reasons, but, as he states in his return (page 3, near the bottom), "in as much as the officers whose places the prosecutors took did not report for duty until after the expiration of the office of (his predecessor) Mayor Hatch," he practically ignored 20 the appointment of the prosecutors, and, as shown by the stipulations, refused to recognize them and ordered the Chief to have them removed and their tools taken away. But even if the respondent did have good and sufficient reasons, he *could not ignore or abolish the office* which he did not and *could not create*.

In the case of *Lyon vs. Newark*, 24 *Vr.*, page 92, the Court of Errors (24 *Vr.*, pages 632-637) reverses Justice Depue, who wrote the opinion below, but it does not reverse his findings in reference to the character of the office. 30

The Court of Errors simply held that the power *to abolish* the position being in the Fire Commissioners, they could do so regardless of the question whether the

tenure of office act applied. As was stated by the Court at the bottom of page 635, "these statutes were not intended to give perpetuity to offices, but for the protection of incumbents while the offices continued."

And on page 637, the Court held that the "tenure of office is qualified by the continuance of the office."

In other words, the Fire Commissioners had the power to abolish, and having abolished the office for the benefit of the public, the protection of the tenure of office act was not extended to the prosecutor.

In the present case the respondent not only *could not*, but the City Council, which did have the power, *has not* yet abolished this office. It is still in existence.

Taking up the opinion of Justice Depue, in the same case, on the points not reversed by the Court of Errors, which opinion is found in 24 Vr., page 92, etc., on page 96, Justice Depue said that "it is indisputable that these men were within the purview of the tenure of office acts."

In the case of *Van Alst vs. Jersey City*, 20th Vr., 156, the Court held that "a Clerk to the Board of Fire Commissioners was an employee of the Fire Department, and that all these men were engaged in a common service."

Justice Depue also held (24 Vr., 96) that "while the firemen in that case were simply *call members*, still so far as the continuity of employment was concerned, all members were equally permanent." He was not reversed on this point, and this case, instead of supporting, is adverse to the respondent's contention.

Then again it will be seen that the offices in question, namely that of sub-policemen, are authorized by the charter of the city of Camden, and the ordinances pass-

ed pursuant thereto, and they are in stronger and more definite position than these *call* men were in the case of *Lyon vs. Newark*.

In the latter case, as has been stated, "The Board, having authority to appoint, had also authority to abolish," but these sub-policemen had their offices created by City Council, and these offices are still in existence. It is not disputed that City Council could abolish these offices by amending the ordinance, and so they could 10 the positions of detective or sergeant.

In the case of *Kreigh vs. Freeholders*, 33 *Vr.*, 179, it will be noted that this was a case of a carpenter who had no fixed employment, and was simply working by the day, and, under the opinion of Justice Depue in *Lewis vs. Jersey City*, he was held not to be included within the statutory provision.

The case is not apt to the present discussion, because the offices of sub-policemen now in question were, as 20 required by the decision in *Stewart vs. Freeholders*, 32 *Vr.*, page 118, first, *offices created* and recognized by the law of the State; second, offices to which certain permanent public duties *were assigned*; and this does not mean permanent or continuous duties without any hours of intermission or rest, but, as previously shown, it means duties which are fixed and expressed in the law or ordinance creating the office, and which are not dependent on the mere whim or caprice of some other person 30 or authority.

TWO PROSECUTORS JOINED NOT ERROR.

There are two prosecutors in this case, and the respondent claims that the writ should be quashed for this reason.

The respondent contends that "the prosecutors had no such joint relation as entitled them to prosecute the writ
10 jointly."

Morris Canal Company vs. State, 2 J. S. Green, 411.

This is a technical question and of course does not affect the merits of the controversy in this case. In 2 Green, page 433, the Court said that "where the State, *in legal contemplation*, is a party, the writ may be issued at the instance of any *one or more* number of persons who may be affected by the proceedings below, however several
20 their respective rights may be."

The prosecutors contend that while *a recent rule of the Supreme Court* has done away with the necessity of making the State a party as prosecutor, still, *in legal contemplation*, the State is a party to this suit.

In *State vs. Kirby, 2 South., 985 (*838)*, the Court said, "The name of the State can be used as plaintiff where the public interest, the public peace, or the public order are concerned." On page 986 of the same case,
30 the Court said that "Such proceedings arise upon municipal regulations made for the public benefit, the public convenience, or the public safety."

The State is interested because, as above noted, police officers are State or public officers. The public is interested because they are deprived of the services of two

police officers, and if the respondent could, without a trial or hearing or any charges, or even if there were no tenure of office acts, then without notice or without judicial proceedings by way of quo warranto, remove the prosecutors, he could also remove other police officers; and if two, why not ten, or, possibly, the whole police force?

The respondent has deprived the public of the services of a part of the police force in the city of Camden.

The greater the number of police, the greater the protection to public life and safety, and for these reasons, as well as others that need not be mentioned, the public are interested. And *in legal contemplation* the State would be and is a proper prosecutor of this writ, and therefore, under the case of Morris Canal ads. The State, one or more prosecutors may unite in this application. 10

But the prosecutor contends further, that it is not clear in this case, as contended by the respondent, that the interests of the prosecutors are several and not joint within the purview of the above named decision. 20

A careful examination of the Morris Canal case will show (see bottom of page 431) that the certiorari in that case called for "five several and different records, though the prosecutors were neither parties nor privies to all or any two or more of them."

That was clearly a case, therefore, where it would vex and harass the respondents in defending such a palpably mulitfarious return. 30

Again, it must be noted in the Morris Canal case that the sole or main ground for quashing the writ *was not* the

fact that several prosecutors had been joined, but rather on account of the return being nugatory.

See *2 J. S. Green, page 438.*

10 It will be seen that on the first question the Court was divided. See Judge Ryerson's opinion, page 435 to page 439. At the bottom of page 438, he agreed with the Court in quashing the writ, but he agreed on the last objection and not on the objection in reference to the joinder of more than one prosecutor, stating that even "if such objection were well taken it would be better to amend by striking off the names of all but one of the prosecutors."

ONLY ONE RECORD.

20 In the present case there is *but one record*, and the respondent cannot possibly be injured by the fact that the writ brings up this order as to both the prosecutors.

He might well complain in case there were two writs here, for he would then have two bills of costs to pay in case the prosecutors were successful.

30 As long as the respondent cannot possibly be injured, and as it could not benefit him, except in delay, by quashing the writ, and as the objection is technical and does not touch the real question in controversy, the motion to quash this writ should not prevail.

IF ERROR IT IS AMENDABLE.

But if the Court holds that there is any substance in this point, the prosecutors can have leave to have a severance, or, if necessary, that the writ be amended and the second prosecutor struck out.

It will be noted that the opinion on which the respondent bases his motion to quash was only that of one of the judges, and it was delivered in 1834. In 1855 (see Rev., par. 138, page 2556), the Legislature passed a law in reference to amendments which provided that "all necessary amendments for the purpose of determining the real question in controversy should be made by the Court."

See also sections 34 to section 37 of the Practice act. 10
Section 37 of the Practice act provides that "any person originally joined as plaintiff may be struck out." But even before this act was passed, one of the judges in the Morris Canal case (2 J. S. Green, page 438), suggested that it would be better to amend by striking off the names of some of the prosecutors, leaving it to be proceeded on by one alone. And in *State vs. Kirby, 2 South, page 985* (*838-840), while the Court held that the mover was right in all of his contentions, yet 20
he would not allow the writ to be quashed, stating at the top of page 838-40 that "the writ would not be quashed simply because it had been issued upon the application of more than one."

In *State vs. Hanford, 6 Hal., 71, page 78*, the Court would not quash because the writ was wrongly entitled, but allowed it to be amended.

A similar amendment was allowed in *State vs. Coleman, 1 Green, 103*. 30

See also *Long Branch vs. Sloan, 20 Vr., 358*.

"The statute confers upon the Courts ample powers of amendment in order to prevent the failure of justice, and the Court will exercise the power with liberality whenever justice requires it at any stage in the pro-

ceedings. A plaintiff may be added, or the name of the plaintiff on the record may be struck out and the name of another inserted as plaintiff."

Vunk vs. Raritan River R. R. Co., 27 Vr., 399.

"The power of amendment extends to matters of substance as well as of form."

10 *Excelsior Electric Co. vs. Sweet*, 28 Vr., 226; 2 Vr., 229; see also 3d Dutch., 265; 11 Vr., 313; 11 Vr., 601; 14 Vr., 430; 10 Vr., 89; 16 Vr., 177; 6 Vr., 457; 4 Vr., 42.

20 "But aside from the power of amendment, there is a question whether this motion of quashing should not have been one to strike out the name of one of the prosecutors." See Enc. of Law, Vol. 4, page 176, and cases there cited under note two, to wit, 45 Hun. N. Y. and 17 Wend. N. Y., 434.

QUASHAL DISCRETIONARY.

30 Then again, this being a technical defense, it is entirely discretionary with the Court as to whether the writ should be quashed. *Ency. Pl. & Pr.*, Vol. 4, page 234. Nothing could be gained by the respondent but delay. In *People vs. Public Park Com.*, 66 How. Pr. (N. Y. Supreme Court), 293, the Court refused to quash the writ, although some of the grounds for quashal were not taken, because the quashal would simply remit the parties to another proceeding and necessarily result in great delay. This being a public matter, delay should be avoided.

PROSECUTORS PROPERLY APPOINTED.

There may be a contention on the part of the respondent that the appointment without the swearing in was not a complete appointment.

"Appointment is the selection of a person by the person having authority to fill an office, etc." *Enc. of Law, Vol. 19, page 417.*

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"The choice of a person to fill an office constitutes the essence of the appointment." *Enc. of Law, Vol. 19, page 423.* See also *People vs. Fitzimmons*, 68 N. Y., 514.

"It is the right of the appointing power to determine for its own guidance whether or not the vacancy exists in each particular case." *Enc. of Law, Vol. 19, page 434* and cases there cited.

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"The transmission of the Commission of the officer is not essential to his investiture of the office."

U. S. vs. Le Baron, 19 W., U. S., 73.

"A commission bears date and the salary of the officer commences from his appointment, not from the transmission or acceptance of his commission."

Marbury vs. Madison, 1 Cranch, U. S., 137.

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These officers were actually in office and, under the cases previously noted, having acted and performed official duties, this was *prima facie* evidence of their due appointment to office.

Whether rightfully or wrongfully, they were actually in office doing duty, recognized by the Police Department, and performing all the duties of the office when they were removed without complaint or trial. They were officers *de facto* and the ceremony necessary to make them officers *de jure* was not needed as far as this issue is concerned. Of course, the prosecutors claim to be officers *de jure*, but we are not here to test the title to these
10 offices, but to test the right of the respondent to summarily remove officers who are and were admittedly so *de facto*.

“Qualification is usually held to be a condition precedent to the exercise of the functions of an office as an officer *de jure*. Statutes prescribing the time within which a bond is to be given or an oath of office is to be taken, are usually defined to be directory only, failure
20 to do so within the prescribed time, not of itself annulling or avoiding the office, but simply rendering it voidable or defeasible, and if the State see proper to excuse the delinquencies by granting him his commission, the defects of title are cured and the office converted into a title *de jure*.” *Enc. of Law, Vol. 19, page 440*, and cases there cited.

“Where no time is fixed by law when an officer shall take his office and enter on his duties, his term begins
30 immediately if he sees fit to enter on his official duties, and the explicit requirement by statute of an oath or bond, or other matter, is directory merely, and is not a condition precedent to his entering the office.”

State vs. Pollner, 18 Ohio Cir. Ct. R., 304, 10 O. C. D., 141.

Under these cases both the prosecutors could have gone on duty on Saturday night, December 28th, had they seen fit; and, in fact, under the rules, were actually then on duty.

Even Mayor Hatch could not have discharged them at that time without a trial, much less Mayor Nowrey, after they had served three days.

Police officers are State officers unquestionably, and a suit in quo warranto would have to be brought to avoid their office or to test the title thereto, or set aside their appointment after they had once been officers *de facto*, and the above cases, and also the cases cited in *Enc. of Law, Vol. 19, pages 440 and 441*, show that an oath is not a necessary prerequisite to make a person a *de facto* officer. 10

"When an office is full *de facto* of a person claiming it under color of right, the proper remedy to test the claimant's right is by quo warranto." 20

Leeds vs. Atlantic City, 23 Vr., 332.

Bradshaw vs. Camden, 10 Vr., 416.

"The right of a party to an office can only be called in question by proceedings in quo warranto."

Stokes vs. Camden, 6 Vr., 217.

Hoey vs. Ocean, 10 Vr., 75.

30

CONCLUSIONS.

1. Vacancies existed. The facts are admitted and cannot be questioned now.

2. The prosecutors were public officers. They were not employees, but had an office with fixed duties.

3. If these prosecutors were officers within the protection of the tenure of office acts, they were removed without any complaint or any hearing.

4. If they were not within such protection they could not be removed without notice, the office itself not having been abolished.

5. But being admittedly officers *de facto*, they could not, in any event, have their title to office destroyed or
10 tested, except by quo warranto proceedings.

For these reasons the respondent acted illegally in removing them and in ordering the Chief of Police not to recognize them, and to take away their tools and insignia of office.

And his orders and all his proceedings in the premises were properly set aside.

Respectfully submitted,

20

H. C. KRAMER,

E. G. C. BLEAKLY,

Counsel for Prosecutors.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

NOVEMBER TERM, 1902.

SAMUEL BAKELY AND GEORGE MILLER, Prosecutors, and Def'ts in Error, vs. JOSEPH E. NOWREY, Respondent and Plaintiff in Error.	CERTIORARI. WRIT OF ERROR TO SUPREME COURT.	10 20
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BRIEF OF WILLIAM J. KRAFT AND HOWARD CARROW, Att'ys for Plaintiff in Error.	30
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This writ of error brings up for review the judgment of the Supreme Court (52 Atlantic Reporter, p. 289), setting aside an order of Mayor Nowrey, of the city of Camden, dismissing two sub or chance policemen.

Mayor Hatch went out of office at twelve o'clock noon on January first, A. D. 1902. His term had been extended from March twelfth, A. D. 1901, by the Meeker Merger Law (Pamph. Laws 1901, p. 41).

Prosecutors were sworn in office on the morning of January first, A. D. 1902, at about ten-thirty o'clock; they went on duty at seven o'clock in the evening of said January first.

- 10 Mayor Hatch says he told the prosecutors, a day or some time before they were sworn in, that he would appoint them as sub or chance policemen. We maintain that there was no actual or legal appointment of prosecutors until January first, 1902; that an official appointment to a police office occurs when the officer is sworn in, and not before. There is no such thing as a verbal appointment. A man is not a police officer until he has qualified and is sworn in. His term is not fixed by any commis-
- 20 sion or statute or ordinance of the city, hence it must begin when he goes on duty after his qualification. Commissioned officers begin their term at the period mentioned in the commission, although they may have been appointed and qualified prior to the date of the commission.

This writ should be dismissed:

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FIRST.

Because the prosecutors hold no such joint relation as to be entitled to prosecute their writ jointly. The record affects them severally and not jointly.

Morris Canal Co. vs. State, 2 J. S. Gr., 411.

SECOND.

Because the prosecutors, being *sub or chance policemen*, are not such officers or men employed by municipal authority in the police department of any city as the statute (P. L. 1885, p. 163) contemplates.

"An office is a place created, or at least recognized, by the law of the State, and to which permanent public duties are assigned, either by the law itself or by regulations adopted by authority of law." 10

Stewart vs. Freeholders, 32 Vr., 118.

This law was meant to protect regular policemen and others whose duties are permanent and continuous, and which pertain to the position as such.

Peterson vs. Freeholders, 34 Vr., 59.

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Stewart vs. Freeholders, *vide supra*.

Sub or chance policemen are not regular employes of the city. They received no salaries and were paid for only such time as they would serve, and no occasion might arise for their doing duty.

"A person appointed as relieving engineer at the sum of \$3.50 per day, whose services were the relieving of the regular engineer and who worked wherever sent by the superintendent and who was paid for his time of actual service, is not a person holding a position in any city," &c. 30

Evans vs. Freeholders, 24 Vr., 585.

In *Lyons vs. Newark*, 24 Vr., pp. 92 and 637, the prosecutors were members of the fire department, called "call men," and received \$150 per year. The Court (page 636) said: "They were still, however, but call men, distinct from permanent members. * * * They were recognized as part of the working force, but not as permanent firemen."

10

In *Kreigh vs. Freeholders*, 33 Vr., 179—

Relator was a carpenter; *he was to work by the day only*, and the services to be rendered by him were merely such as, in the line of his trade, might be directed from time to time by his superior.

Held, that he did not hold an office or position.

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"A person employed by a member of a board (of public work) as a general workman, to perform such work at the pumping station, under the charge of the board, as might from *time to time* be required by the foreman, was not a person 'holding' a position."

Lewis vs. Jersey City, 22 Vr., 240.

30

THIRD.

Because the prosecutors' terms began after Mayor Hatch's term had expired. The proof shows that they went on duty at seven P. M. shift, and that there was no

duty for them to perform between the time that they were sworn in and the time they went on duty. Sub or chance policemen are only officers when they are on actual duty. A regular policeman may be said to be on duty all the time; but a sub policeman is on duty only when serving in the place of some regular officer, who is sick or absent on leave, and then he gets three-fourths of the regular officer's pay.

"An out-going board of trustees of public schools cannot appoint to an office that will not become vacant during the term of their own official life." **10**

Fitch vs. Smith, 28 Vr., 526.

"An out-going board of chosen freeholders cannot fill an office that will not become vacant during the term of their own official life."

Bownes vs. Meehan, 16 Vr., 189.

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It is respectfully submitted that the judgment of the Supreme Court should be reversed and the writ of certiorari should be dismissed.

WILLIAM J. KRAFT,
HOWARD CARROW,
Attorneys for and of Counsel with
Plaintiff in Error.

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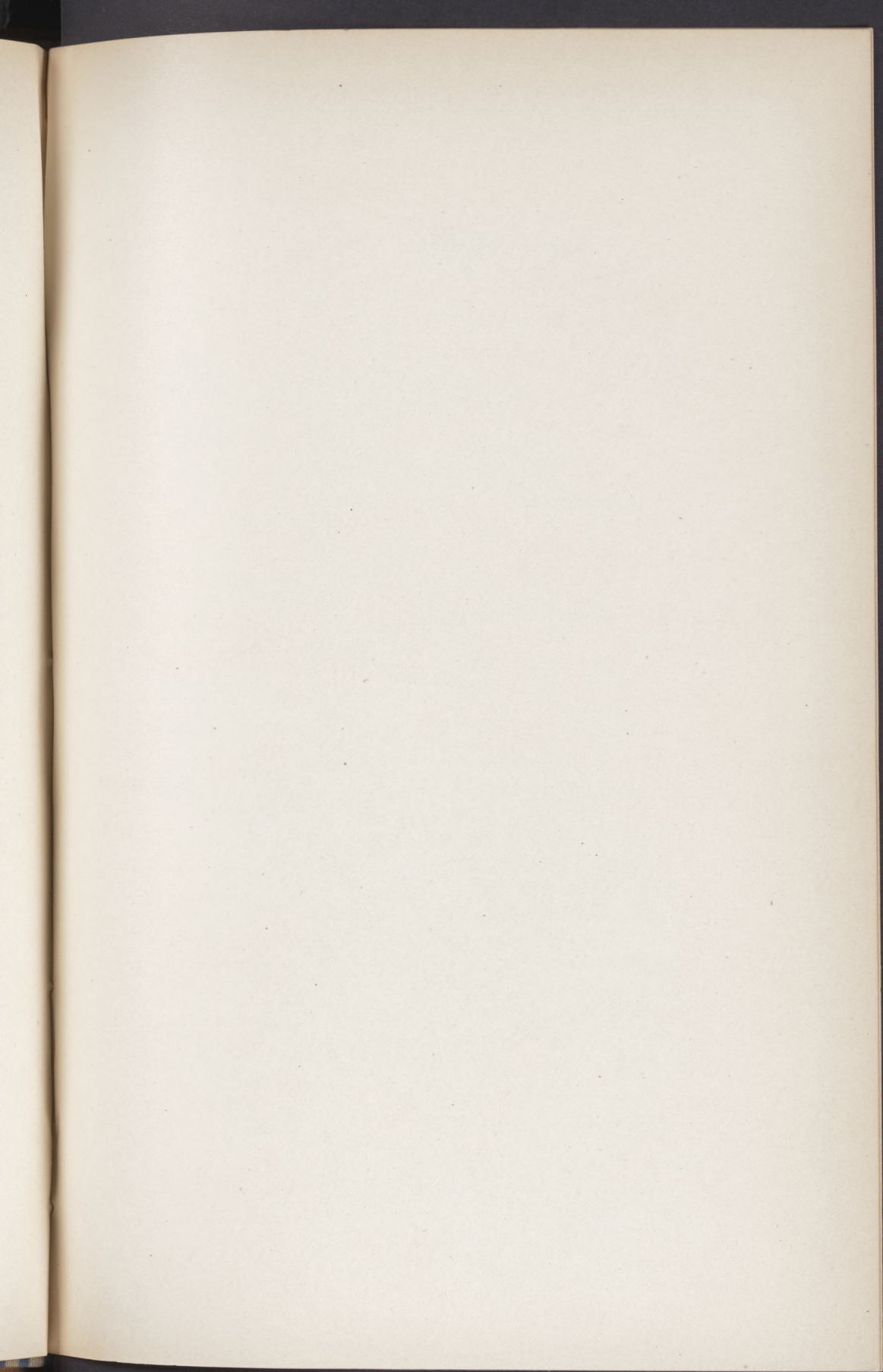
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NEW JERSEY CODE OF ORDINANCES AND REVENUES

OF
THE STATE OF NEW JERSEY

NEW JERSEY SUPREME COURT.

SAMUEL BAKELY and GEORGE

MILLER,

Prosecutors,

vs.

JOSEPH E. NOWREY,

Respondent.

10

CERTIORARI.

20

WRIT.

*State of New Jersey to Joseph E. Nowrey, Mayor of the
City of Camden:*

[SEAL]

GREETING—We being willing for certain reasons to be certified of and concerning a certain order or proceeding of Joseph E. Nowrey, Mayor of the city of Camden, in removing from office Samuel Bakely and George Miller, as police officers of the city of Camden, do command you that you certify and send to our Justices of our Supreme Court, at Trenton, on the twenty-first day of January, A. D. nineteen hundred and two, as well the said order or proceed-

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ing aforesaid, with all things touching and concerning the same, as fully and entirely as the same remain before you, together with this our writ, that we may cause to be done therein what of right and according to law and justice ought to be done.

Witness, William S. Gummere, Chief Justice of our Supreme Court, this fourth day of January A. D. nineteen hundred and two.

WM. RIKER,
Clerk.

10 H. C. KRAMER,
Attorney.

RETURN.

In obedience to the command of the annexed writ, directed to Joseph E. Nowrey, Mayor of the city of Camden, I do hereby certify and send to the honorable, the
20 Justices of the Supreme Court of the State of New Jersey, the order or proceedings whereof mention is within made, and all things touching and concerning the same, as fully and entirely as before me they remain.

In witness whereof, I have hereunto set my hand and seal this seventh day of January, in the year of our Lord one thousand nine hundred and two.

JOSEPH E. NOWREY,
Mayor.

30 I hereby certify, that on and prior to the twenty-first day of December, A. D. 1901, among the police officers of the city of Camden was one English and one Stackhouse, the said Stackhouse being a sergeant; that on that day they received their salary, up to and including December 31st, 1901, and that at that time there were two substitutes, or chance policemen, by the names of Stone and

Chambers; that after receiving their pay the said English and Stackhouse resigned, placing their resignations in the hands of the Honorable Cooper B. Hatch, then Mayor, who still has same; that prior to December 31st, one Gravenor was advanced to the position of acting sergeant, in the place of said Stackhouse; that on January 1st, prior to 12 o'clock M., the said Mayor Hatch is alleged to have appointed the two subs, or chance policemen, to wit, Stone and Chambers, to the position occupied by English and the position occupied by Gravenor, who was advanced to 10 take the place of Stackhouse; and that said appointments are alleged to have been made at about 11.30 A. M., and the only record is an affidavit or oath of office; that on the first day of January, the said Stone and Chambers reported for duty on the night shift, at 7 P. M., and that said Stone was on duty as a sub, or chance policeman, from 7 P. M., of December 31st to 3 A. M. of January 1st; that said Chambers was acting in the place of one Donovan, as a sub, or chance officer, from 3 to 11 A. M. of January 1st; that Gravenor was on duty as sergeant at 9 A. M.; that the prosecutors, Bakely and Miller, were appointed, 20 it is alleged, by ex-Mayor Hatch, as subs or chance policemen, prior to 12 M. on January 1st, and at about 11.30 A. M., although there is no record except the oath of office. That the said Stackhouse, at or about 12 M., on January 1st, assumed the duties of Recorder of the city of Camden; that the said English and Stackhouse both received their clothing money, due January 1st, as set out in Sections 126 and 127 of the Revised Ordinances; that inasmuch as Chambers and Stone did not report for duty until 7 P. M. of January 1st, and after the expiration of the term of office of the Honorable Cooper B. Hatch, I, 30 Joseph E. Nowrey, appointed one Alcott and one Nasardy in the place of English and Gravenor, advanced to the place of Stackhouse, and retained Stone and Chambers as sub, or chance men.

The oaths taken by Bakely and Miller are said to be in the possession of Hon. C. B. Hatch. There is no record of these appointments.

JOS. E. NOWREY,
Mayor.

A true copy,

WM. RIKER, JR.,
Clerk.

10

TESTIMONY.

Appearances—

E. G. C. BLEAKLY, for Prosecutors.
HOWARD CARROW, for Respondent.

It is agreed that the evidence shall be taken stenographically,
20 cally, and the signatures of witnesses are waived.

COOPER B. HATCH, sworn.

Ques. You were Mayor of the City of Camden up to January 1st?

Ans. Yes.

Ques. You know the prosecutors in this cause—Bakely and Miller?

30 Ans. Yes.

Ques. Did you appoint them as officers on the Camden police force?

Ans. Yes; sub-policemen; that is, chance policemen.

Ques. You appointed them as chance policemen?

Ans. Yes.

Ques. When did you appoint them?

Ans. I appointed them the Saturday previous to the first—the twenty-eighth.

Ques. The last Saturday in December?

Ans. The last Saturday in December.

Ques. Did you swear them in then?

Ans. I gave them notice—sent them word to be there Tuesday evening, at eight o'clock.

Ques. The thirty-first of December?

Ans. The thirty-first of December. I was unable to be there that night to swear them in, and told them to be there early the next morning.

Ques. Did you swear them in the next morning?

Ans. I swore one in, and Mr. Stackhouse the other.

(Miller's oath of office produced and offered, and marked Exhibit P4.)

Ques. Is that the oath of office Mr. Miller took before you, as Mayor?

Ans. Yes.

20

Ques. What time was the oath taken?

Ans. About—as close as I can remember—about ten or half-past ten.

Ques. Ten or half-past ten?

Ans. Yes.

Ques. You got out to the Hall what time, that morning?

Ans. About nine-thirty (9.30).

(Bakely's oath of office produced and marked Exhibit P5.)

30

Ques. Is this the oath of office of Mr. Bakely?

Ans. Yes.

Ques. Is there any mark on it by which you can identify it?

Ans. My name is on it. I took Miller's oath of office

and Bakely was sworn in by Mr. Stackhouse, who was a Justice of the Peace.

Ques. Both oaths of office were then filed with you?

Ans. Yes.

Ques. What time?

Ans. I judge about half-past ten.

Ques. Is there any mark on there?

Ans. Yes—there is a mark on that one—that is the time, 10.30 A. M.

1c Ques. Is the Bakely one, the one referred to?

Ans. The Miller oath is marked 10.30 A. M. There is no mark on the other one.

Ques. Were these oaths then with you, the same as all other oaths?

Ans. Yes; all filed with me.

Ques. For all the officers that you ever appointed?

Ans. All that I ever appointed.

Ques. During your term of office as Mayor, was there ever any record—written record—in your office or any other office; that is, of these appointments or of these
2c oaths?

Ans. Not to my knowledge.

Ques. Did you or did you not, make your appointments verbally or in writing?

Ans. Verbally.

Ques. That was your universal practice?

Ans. Yes.

Cross-examination.

30 By Mr. Carrow:

Ques. The first thing that an officer did, was to take his oath of office and file it with you—that was the first thing he was to do?

Ans. No.

Ques. What was the first thing?

Ans. The first thing he was to do, when appointed, was to present himself at the Hall to be sworn in. He had nothing to do with the oath after he had signed it. If I swore the man in, I filed the oath in my office, and if Mr. Stackhouse swore the man in, he would file the oath with me.

Ques. You say when you appointed these men, you appointed them verbally; that is, you told them you would put them on the force?

Ans. Yes.

10

Ques. You told them to come out to the Hall?

Ans. I told them to come Tuesday evening; but I could not get there.

Ques. On the 27th, were these two vacancies then open—to be filled? Whose places were these two men to fill—they were to be sub-chance policemen; whose places were they to fill?

Ans. I don't know now. They were to take the places of the men who were serving as sub-policemen then.

Ques. They were appointed as regular policemen; that is, prosecutors were appointed as sub-policemen to take the places of others who had been promoted to the regular force? 20

Ans. Yes.

Ques. Were there any vacancies at that time? Were these vacancies open; were they to occur on the first of January?

Ans. I can not say about that now.

Ques. What you mean to say is, as soon as those next in the sub-force were promoted and their places were open, that these men should fill the places?

Ans. They could not fill their places. They could not fill their places until there was a vacancy. 30

Witness is shown the resignation of English, dated December 30. Is asked if he accepted that on that date.

Ans. I received it on the 30th. He virtually resigned

two or three days before that. He told me he was going. He dated the resignation on the 30th.

Ques. Did he serve on Monday?

Ans. No.

Ques. Did you take the resignation then?

Ans. Yes.

Ques. He wasn't a sub-policeman, was he?

Ans. No; he was a regular then.

Ques. Did you accept it on Monday, the 30th, or that day?

10 Ans. I accepted it when it was tendered me.

Ques. The twenty-eighth?

Ans. Yes.

(Paper produced and shown witness and he is asked.)

Ques. This is Mr. Stackhouse's resignation, and it is dated December 23rd, 1901. When did you accept this resignation?

Ans. On the 23rd.

20 Ques. That is Mr. Stackhouse's resignation?

Ans. Yes.

Ques. Was it on Saturday or Monday, then, that you appointed these two men; that is, Saturday was the 28th and Monday was the 30th; was it Saturday or Monday that you appointed these two prosecutors?

Ans. I think it was Saturday. It might have been Monday—it was not later than Monday. I wouldn't say positively whether it was Saturday or Monday.

Ques. State in relation as to the time of accepting these two resignations, was it before or after or at the time that
30 you accepted these resignations of Stackhouse and English, just after that, or what?

Ans. It was after I had accepted the resignations. I never appointed a man until there was a vacancy.

Ques. Did you say that English had resigned before he gave you the written resignation?

Ans. Yes, he had. I had suspended him. He wasn't working for two or three days before he tendered his resignation.

The ordinance of the City of Camden governing the police force is offered and marked Exhibit P1.

The resignation of Mr. Stackhouse, dated December 23d, is offered, admitted and marked Exhibit P2.

The resignation of Mr. English is offered, admitted and Marked Exhibit P3.

The oath of office of Miller is offered, admitted and 10 marked Exhibit P4.

The oath of office of Bakely is offered, admitted and marked Exhibit P5.

Both sides close.

STIPULATIONS.

20

It is hereby stipulated and agreed between counsel in the above entitled cause :

First. That Cooper B. Hatch was Mayor of the City of Camden under the laws of this State, up to twelve o'clock noon of January first, A. D. nineteen hundred and two.

Second. That previous to that time, said Cooper B. Hatch as Mayor, had received the resignations of Roland B. English and Owen Glen Stackhouse, as shown by Exhibits P2 and P3.

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Third. That the annexed is a true copy of the ordinance of the City of Camden governing the number of police officers and the respective positions or offices, salaries, etc., of said police officers in said city, and is marked "Exhibit P1."

Fourth. That the said Mayor, Cooper B. Hatch, previous to the expiration of term of office, to wit, at 10 A. M. January first, 1902, swore in the two then sub-policemen or chance men in said city, viz.: A. M. Stone and John Chambers, as regular policemen to succeed English, who had resigned, and Gravenor, who had been promoted to take Stackhouse's place, and that at the same time he swore in as sub-policemen or chance men the prosecutors, Samuel Bakely and George Miller, to succeed and take the place
 10 of A. M. Stone and John Chambers; and that immediately upon their being sworn in, about half-past ten o'clock in the morning of January first, A. D. nineteen hundred and two, the said prosecutors, Samuel Bakely and George Miller, and having taken the usual oath of office taken by police officers of said city, they filed the same with the then Mayor, Cooper B. Hatch.

Fifth. That there were then three police shifts in the City of Camden, of eight hours each; one from seven o'clock P. M. till three o'clock A. M.; one from three o'clock A. M. to eleven o'clock A. M., and another from
 20 eleven o'clock A. M. to seven o'clock P. M.

Sixth. That it is the duty of the sub-policemen or chance men to take the place of regular policemen who are absent by reason of sickness or other cause, as shown by the ordinance, Exhibit P1.

Seventh. That the said prosecutor, George Miller, went on his first shift at seven o'clock P. M. January first, nineteen hundred and two, and did duty as a chance man or sub-policeman in said city until three o'clock on the morning of January second; and that he again went on duty on January second at eleven o'clock A. M. and stayed until
 30 seven P. M.; that he again went on duty on January third at three o'clock A. M. and stayed and did duty until eleven o'clock A. M., when he was notified to report to the Chief. That the said prosecutor, Samuel Bakely, likewise did duty as a chance man or sub-policeman in said city between seven P. M. of January first and eleven A. M. January third, 1902.

Eighth. That at twelve o'clock noon on January first, A. D. nineteen hundred and two, Joseph E. Nowrey became and was the Mayor of the city of Camden. And that on January third, A. D. nineteen hundred and two, he notified John Foster, the Chief of Police, to remove the said prosecutors, and gave orders to the Police Department, through the said John Foster, Chief of Police, not to recognize the said prosecutors as chance men or as sub-policemen, or as police officers of the city of Camden; and that the said Chief of Police was then and there ordered 10 by Mayor Nowrey to take away from said prosecutors their tools, to wit, revolver, club, blackjack, nippers, keys, etc., which had been given to them January first, to be used in the discharge of their duties as such sub-policemen or chance men.

Ninth. That there was no complaint made against either of the prosecutors, nor was any such complaint filed with the Mayor or City Clerk, Police Committee, or other officer or body of the city of Camden.

Tenth. That the said prosecutors were not accorded any hearing by the said Joseph E. Nowrey, or any other official or body, previous to their removal. 20

Eleventh. That the papers hereto annexed, marked "Exhibit P2 and P3," are true copies of the resignations respectively of the said Owen Glen Stackhouse and said Roland E. English, and together with "Exhibit P1" are to be used in the argument of the above case.

Twelfth. That it is customary in the city of Camden to pay the police officers twice a month, once in the middle of the month, and once at the end of the month. In De- 30 cember it is always customary, under orders from City Council, to pay all city employes their last yearly payment of their salary a day or two before Christmas, and that on December twenty-first, the police officers of the city of Camden were paid their last yearly payment, instead of December thirty-first; and that the said Owen Glen Stackhouse and Roland E. English drew their said

last yearly payment for the year nineteen hundred and one on December twenty-first last, which included their pay as police officers up to and including December 31, 1901. That at a meeting of the Camden City Council, held November twenty-seventh, A. D. nineteen hundred and one, the following resolution was adopted:

“Resolved, That the City Treasurer and City Comptroller be, and they are hereby, authorized and instructed to draw warrants for the payment of the salaries of the
 10 city employes for the month of December on December twenty-first, in view of the approaching holidays.” And that in accordance with the above resolution the City Treasurer and City Comptroller made the Police Department salary payments without any notice or knowledge of the resignations above mentioned.

Thirteenth. That Rule 1, of the Rules and Regulations of the Camden City Police Department, as revised and adopted December first, eighteen hundred and ninety-
 20 eight, and in force and operation in the city of Camden during the months of December, nineteen hundred and one, and January, nineteen hundred and two, reads as follows:

“Each member of the police force shall devote his whole time and attention to the service of the Department, and is expressly prohibited from following any other calling or being engaged in any other business. Although certain hours are allotted for the performance of ‘regular tours of duty,’ officers are considered to be at all times on duty, and must act promptly at any time that their services are
 30 required.”

Fourteenth. That on December twenty-third, nineteen hundred and one, B. S. Gravenor was a hall officer and a member of the police force of the city of Camden; and that the said O. Glen Stackhouse was a Sergeant and a member of said force; and that on December twenty-third, nineteen hundred and one, the said Gravenor was sworn in as Sergeant, to take the place made vacant by the resig-

nation of said Stackhouse; and that on December thirtieth, one John Chambers, who had previously been a sub-policeman, was appointed as a regular policeman in the place made vacant by the resignation of the said Roland E. English.

E. G. C. BLEAKLY,
Counsel for Prosecutor.
HOWARD CARROW,
Counsel for Respondent.

10

“EXHIBIT P1.”

REVISED ORDINANCE OF THE CITY OF CAMDEN, PASSED
DECEMBER 30, 1886.

SECTION NO. 126, AS AMENDED JUNE 29, 1899.

Section 126. That the police officers of the city of Camden shall consist of a Chief of Police, three Captains of Police, two House Sergeants, three Sergeants of Police, two detectives, eight police patrolmen, seventy-eight policemen, and two substitute or chance policemen; who shall act and be known as the police force of the aforesaid city.

SECTION NO. 127, AS AMENDED SEPTEMBER 28, 1899.

Section 127. The annual salaries of the members of the police force herein named shall be respectively as follows, namely: That of the Chief of Police, twelve hundred dollars; that of each of the Captains of Police, one thousand dollars; that of each of the House Sergeants, and each of the Sergeants of Police, nine hundred dollars; that of each of the detectives, nine hundred dollars; and that of each of the police patrolmen, and each of the policemen, eight

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hundred and forty dollars, all payable semi-monthly, on the first and fifteenth days of each month; and to the Chief of Police, each Captain, each House and Patrol Sergeant, each detective, and to each patrolman and policeman, there shall be paid annually, by the Camden City Police Department, the additional sum of fifty (50) dollars, in equal payments of twenty-five dollars each on the first days of January and July in each year, to be applied exclusively to the purchase of regulation police uniforms and clothing; provided, however, that the city shall not
 10 be liable for the payment of either or any of the said instalments unless the officer claiming the same shall be a member of the police force of said city at the time any of said instalments are due and payable; and in case of the removal of any officer or the appointment of a new officer at any time between the first days of January and July in any one year, or between the first day of July of any year, and the following first day of January, that
 20 then, and in such case, said officer so removed or appointed shall be entitled to receive only a pro rata proportion instead of the full \$25 (twenty-five dollars) instalment of such uniform money, according to the length of time during any six months' period he is in the employ of the city in this department; and further provided, that such annual salaries shall be in lieu of all fees, perquisites, commissions and emoluments, of any kind or nature paid to or received by any of said police officers, all of which said fees, perquisites, commissions and emoluments the said officers are hereby required to account for and pay into the
 30 City Treasury of the city of Camden; and that in addition to the salaries paid to the said substitute or chance men, there shall be paid the sum of \$25 (twenty-five dollars) each year, the first of which payment shall be made on the appointment of such substitute or chance men, and which said sum is to be expended by said substitute or chance men in the purchase of uniforms; provided, that in case of a promotion of any such substitute or

chance man to be a regular policeman or patrolman, within six months after his appointment as such substitute or chance man, or within six months after the payment of any instalment of such uniform money, that then, and in such case, the pro rata proportion of such instalment shall be charged to such officer on the first instalment of his uniform money as a regular officer.

And it shall be the duty of said substitute or chance policeman, under the direction of the Mayor and Chief of Police of said city, to take the place of such officer or officers from time to time, as may be unable to perform his or their duty by reason of absence, sickness or other disability, which said substitute men while on duty, shall be subject to the rules and regulations of the Police Department of said city. 10

And there shall be deducted from the pay of any officer or patrolman in the Police Department in the City of Camden, three-fourths of the pay of such officer or patrolman for any period that such officer or patrolman shall fail to report for duty, or shall be absent from duty by reason of sickness or other disability, and that the pay so deducted shall be paid to the substitute officer or patrolman who may be absent from duty as aforesaid. 20

Provided, that no officer or patrolman shall have any deduction made from his monthly pay for absence on account of any disability incurred by such officer or patrolman in the performance of his duty in the service of the Department; and further provided, that whenever any officer or patrolman is absent from duty by reason of any disability incurred in the performance of duty, a substitute man taking the place of such officer or patrolman, shall be paid out of the general police appropriation a sum equivalent to three-fourths of the salary of the officer or patrolman whose place such substitute man may take during the period of such disability. 30

who shall perform the duties of off

"EXHIBIT P2."

DECEMBER 23D, 1901.

Hon. Cooper B. Hatch,
Mayor of the City of Camden.

Dear Sir:—

I hereby tender you my resignation, as House Sergeant of the police force of the City of Camden, to take effect at your pleasure.

1C Respectfully submitted,
(Signed) O. GLEN STACKHOUSE.

DECEMBER 23D, 1901.

Hon. Cooper B. Hatch,
Mayor of the City of Camden.

2C Dear Sir:—

In tendering you herewith my resignation, as House Sergeant of the police force of this city, to take effect at your pleasure, I desire to thank you for the kind treatment and uniform courtesy you have extended to me during your incumbency as the Chief Executive of the City of Camden, and sincerely hoping to merit a continuance of your good-will and esteem, beg leave to remain,

Yours very respectfully,
(Signed) O. GLEN STACKHOUSE.

"EXHIBIT P3."

CAMDEN, N. J., DEC. 30, 1901.

To the Honorable Mayor,

Cooper B. Hatch,

Camden, N. J.,

Dear Sir:—

I hereby tender my resignation as policeman of the City
of Camden, N. J. The same to take effect immediately. 10

Trusting this will be accepted, I am

Yours respectfully,

(Signed) ROWLAND E. ENGLISH.

"EXHIBIT P4."

STATE OF NEW JERSEY, }
CAMDEN COUNTY, } ss.

20

I, Geo. V. Miller, do solemnly promise and swear that I
do and will bear true faith and allegiance to the Govern-
ment established in this State, also of the United States,
under the authority of the people, and that I will faithfully
and impartially execute the trust reposed in me as a sub-
police officer or chance man on the police force of the City
of Camden, N. J., according to the best of my ability and
understanding.

GEORGE V. MILLER.

30

Sworn and subscribed before me this 1st day of Jan-
uary, A. D. 1902.

COOPER B. HATCH,
Mayor.

"EXHIBIT P5."

STATE OF NEW JERSEY, } ss.
 CAMDEN COUNTY, }

I, Samuel S. Bakley, do solemnly promise and swear that I do and will bear true faith and allegiance to the Government established in this State, also of the United States, under the authority of the people, and that I will faithfully
 10 and impartially execute the trust reposed in me as a substitute member of the police force of the City of Camden, according to the best of my ability and understanding.

SAM'L S. BAKLEY.

Sworn and subscribed before me this 1st day of January, A. D. 1902.

O. GLEN STACKHOUSE,
 Justice of the Peace.

20

30

REASONS.

The prosecutors, by Harry C. Kramer, their attorney, come and pray that a certain order and proceedings made and taken by Joseph E. Nowrey, Mayor of the city of Camden, N. J., on or about January 3d, 1902, in removing from office, as sub-policemen or chance men, the prosecutors, Samuel Bakely and George Miller, and discharging them as police officers of the city of Camden, may be set aside as void and for nothing holden for the following reasons :

First. Because there was no written accusation or complaint made or filed against them, the said prosecutors, or either of them, as the law of this State required.

Second. Because there was no trial or hearing given or accorded to the said prosecutors, or either of them, previous to their removal from office by the said Joseph E. Nowrey, as required by the law of this State.

Third. Because the said Joseph E. Nowrey had no power or authority in law to remove the said prosecutors, or either of them, at the time when or in the manner by which they were removed from office.

Fourth. Because the said order and all proceedings taken by the said Joseph E. Nowery in removing the said prosecutors from office were done and performed in an illegal manner.

Fifth. Because, having been appointed and being actually in office, and having done duty, and in fact actually being on duty as such officers, said respondent could ~~not~~ legally remove the prosecutors for cause, except on complaint made and after hearing given, and if not for cause, then only by writ of quo warranto or other judicial proceedings. And because said officers

having been recognized and acting as police officers, the validity of their appointment could not now be called in question, and particularly by the respondent in the manner and at the time it was so done by him.

Sixth. Because, in the removal of said prosecutors and the proceedings incident thereto, the said Joseph E. Nowrey acted contrary to law, and without notice to the said prosecutors.

10 Seventh Because the said order to remove, and the proceedings incident thereto, are in divers other respects illegal and contrary to law, and should be set aside and for nothing holden.

Respectfully submitted,

H. C. KRAMER, Att'y, and

E. G. C. BLEAKLY,

Counsel for Prosecutor.

WRIT.

NEW JERSEY, ss.

The State of New Jersey to our Justices of our Supreme Court, Greeting: Because in
 [SEAL] the record and proceedings, and also in the giving of the judgment in a plaint which was in our said Supreme Court before you,
 between Samuel Bakeley and George Miller, prosecutors, 10
 and Joseph E. Nowrey, Mayor of the city of Camden, defendant, on a certiorari issued out of our said Supreme Court to the said defendant, as is said, manifest error hath intervened to the great damage of the said defendant, as by his complaint we are informed, we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you that, if judgment be thereupon given, then you send distinctly and openly, under your seal, the record and proceedings and plaint aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals, before the Judges thereof, on the ninth day of August next, with this writ, that the records and proceedings aforesaid being inspected, we may cause to be further done thereupon what of right and according to law ought to be done. 20

Witness, William J. Magie, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, this twenty-first day of July, A. D. nineteen hundred and two. 30

S. D. DICKINSON,

HOWARD CARROW,

Clerk.

Att'y for Plaintiff in Error.

RETURN.

The answer of the Justices of the Supreme Court of the State of New Jersey within named.

The record and proceedings whereof mention in within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

10

WILLIAM S. GUMMERE, [SEAL]
C. J.

NEW JERSEY SUPREME COURT.

20

SAMUEL BAKELY, ET AL.,

VS.

JOSEPH E. NOWREY.

ON CERTIORARI.

RULE VACATING

ORDER.

The Court having heard the argument of counsel and inspected the order of removal removed by the writ in this cause, and duly considered the reasons filed,

It is ordered that said order of removal be vacated with costs.

Entered June 16, 1902.

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On motion of

E. G. C. BLEAKLY,

Attorney.

NEW JERSEY SUPREME COURT.

SAMUEL BAKELY, ET AL.,

Prosecutor,

vs.

JOSEPH E. NOWREY,

Respondent.

10

Heard February 25th, 1902. Decided June 9th, 1902.

Certiorari to vacate an order of the Mayor of the City of Camden, removing the prosecutors from the Police Force of said city.

20

For the Prosecutors, H. C. KRAMER,
E. G. C. BLEAKLY.

For the Respondent, HOWARD CARROW.

Heard before JUSTICES FORT, HENDRICKSON AND PIT-
NEY.

30

Opinion by FORT, J.

The term of office of the respondent as Mayor of the city of Camden began at 12 o'clock noon of January 1, 1902, at which hour the term of office of his predecessor expired. The statute seldom fixes a certain hour for the

expiration of official life, but such is the case as to city officials in this State.

Laws of 1901, p. 41, Sec. 2.

Any vacancy in office occurring from any cause prior to 12 o'clock noon of January 1, 1902, and which vacancy the Mayor could fill, the outgoing Mayor of Camden had a right to fill. Mayor Hatch appointed the prosecutors as
 10 substitutes or chance policemen on the police force, and they were sworn in at 10.30 o'clock A. M., January 1st, 1902. At the time these appointments were made, there were vacancies to be filled. Two policemen had resigned prior to January 1, 1902. The prosecutors entered upon their duties and had served on the force on January 1, 2 and 3, when, on the latter day, they were summarily removed by the respondent, who became Mayor of the city on January 1, 1902, at 12 o'clock noon. No charges were
 20 preferred against the prosecutors and they were not given a hearing. They were simply removed by the order of the Mayor, and their badges, revolvers, clubs, etc., taken from them. If the prosecutors were entitled to the protection of the Police Tenure of Office act, their removal was illegal.

Gen. Stat., Vol. 2, p. 1534, Sec. 326.

This statute covers both officers and employes in the police department of any city, and prevents a removal ex-
 30 cept for just cause and after written charges duly signed and a public examination into the same by the proper authority. Proceedings of this character are judicial in their nature and the statute must be followed; otherwise a removal is void.

Douglass vs. Jersey City, 24 Vr., 118.

Bowlby vs. City of Dover, June Term, 1902.

But one question remains: Were the prosecutors members or employes of the Police Department of the city of Camden at the time of their summary removal? It is conceded they had been appointed and were acting as substitutes or chance policemen.

Of whom the police department of the city of Camden is constituted is defined by Section 126 of an ordinance of the city passed December 30th, 1886, which reads as follows:

"Section 126. That the police officers of the city of 10
Camden shall consist of a Chief of Police, three Captains of Police, two House Sergeants, three Sergeants of Police, two Detectives, eight police patrolmen, seventy-eight policemen, and two substitutes or chance policemen, who shall act and be known as the police force of the aforesaid city."

There appears no room for controversy over the construction of this ordinance or the relation of chance policemen to the department; they are police officers. A chance man on the force of the city of Camden is a police officer 20
within the act of March 25th, 1885, and its supplements, and is protected from removal except for cause and in the manner pointed out in that statute. Other objections raised are either without force or are amendable within the discretion of the Court.

This leads to the vacation of the order of removal of the Mayor. Let such an order be entered with costs.

SYLLABUS.

1. Under the act entitled, "An Act relative to the time 30
of election and appointment and terms of office of officers elected or appointed in cities of this State, approved February 28, 1901, the term of office of the present Mayor of the city of Camden began at twelve o'clock noon of January 1, 1902.

2. His predecessor in office could make an appointment to any position which the Mayor had the legal right to file at any time prior to twelve o'clock noon of January 1, 1902.

3. The two substitute or chance policemen of the city of Camden, provided for by city ordinance, are members of the police force of that city, and cannot be removed except for cause and after hearing.

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NEW JERSEY COURT OF ERRORS AND AP- PEALS.

	SAMUEL BAKELY AND GEORGE			
20	MILLER,	Prosecutors	}	ASSIGNMENTS OF ERROR.
		and Defendants in Error.		
		vs.		
	JOSEPH E. NOWREY,	Respondent		
30		and Plaintiff in Error.		

And now at this day the plaintiff in error assigns the following causes of error :

First. Because the Supreme Court decided that at the time said appointments were made by the out-going Mayor, vacancies existed, which said Mayor had a right to fill.

Second. Because the Supreme Court decided that the prosecutors were members or employes of the police force of the city of Camden.

Third. Because the Supreme Court decided that the prosecutors were within the protection of the Police Tenure of Office Act.

Fourth. Because the Supreme Court decided that the removal of said prosecutors by the respondent was illegal and null and void.

Fifth. Because the Supreme Court refused to dismiss ¹⁰ the writ of certiorari on the objection raised by the respondent that there were two prosecutors.

Sixth. Because the Supreme Court decided that the prosecutors were police officers and protected from removal except for cause and in the manner pointed out by the Police Tenure of Office Act.

Seventh. Because the Supreme Court ordered that the order of removal be vacated with costs.

Eighth. Because the Supreme Court should have ordered judgment for the respondent. ²⁰

HOWARD CARROW,
Attorney for Respondent and
Plaintiff in Error.

JOINDER IN ERROR IN USUAL FORM.

