

INDEX

Petition	I
Rule to Show Cause	V
Order	VI
Information	VIII
Rule to Plead	XII
Plea	XIII
Memorandum of Opinion	XVI
Postea	XXI
Rule for Judgment	XXIII
Notice of Appeal	XXV
Grounds of Appeal	XXVI
Proceedings in Court	XXVIII

TESTIMONY

Herry Heher, direct	9
cross	23
Thomas L. Hanson, direct	33
cross	34
recalled, further direct	40

Petition
(Filed Dec. 7, 1929.)
NEW JERSEY SUPREME COURT

The State of New Jersey, ex rel., Louis D. Carr, vs. Samuel Geldziler,	Relator, Defendant	On Information in the nature of Quo Warranto
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PETITION

To the Honorable Charles C. Black, Justice of the
Supreme Court:

The petition of Louis D. Carr, respectfully represents to your Honor that:

1. I am a citizen of the City of Clifton in the County of Passaic and State of New Jersey and have voted in said City for the last five years. I have a residence at No. 105 Valley Road in said City of Clifton, and own the said premises and pay taxes thereon to the City of Clifton yearly. 20

2. I am a member of the Democratic Party of the City of Clifton and County of Passaic.

3. On or about the fourth day of September, 1929, Morgan F. Larson, Governor of the State of New Jersey did issue a commission to Samuel Geldziler as a member of the County Board of Elections for the County of Passaic to serve in lieu and in place of Robert C. Barr, for a term beginning with the date of said commission and ending on the first day of March, 1931. Your petitioner shows that the said Samuel Geldziler was not entitled to the said commission and had not been properly appointed to said office. 30

4. On March 1st, 1929, Harry Heher, Chairman of the Democratic State Committee of the State of

II.
Petition

New Jersey did nominate and appoint Robert C. Barr as a member of the County Board of Elections for the County of Passaic for a term of two years from that date.

10 5. After such appointment, it was apparently claimed by the said Governor that because of the passage of an act of the Legislature known as Chapter 257 of the Laws of 1929, that the office of the said Robert C. Barr became vacant because he was at the same time acting as a member of the City Council of the City of Clifton. It is claimed meanwhile by said Robert C. Barr that no such vacancy occurred, and that he is entitled to the said office as a member of the County Board of Elections.

20 6. The said Robert C. Barr has filed an information in the nature of quo warranto to test the right of the said Samuel Geldziler to hold the said office, and the said Samuel Geldziler has pleaded in answer thereto that it is not a municipal office and that the said Robert C. Barr has no right to make said contest without the permission of the court.

30 7. If there was a vacancy in the said office caused by the said Statute above referred to, the same was filled by Harry Heher, Chairman of the State Democratic Committee of the State of New Jersey who within ten days of notification to the existence of said vacancy by the Governor of the State of New Jersey nominated to fill the said vacancy Agnes V. Barr. In the event that there was a vacancy in the office as a member of the County Board of Elections held by Robert C. Barr as asserted by the said Samuel Geldziler, the said vacancy was filled by the appointment of Agnes V. Barr to the said position and the appointment or commissioning of the said Samuel Geldziler by the Governor of the State of New

III.
Petition

Jersey was void and of no effect and the said Samuel Geldziler usurps the said office which he is now occupying and claiming.

8. I am informed that Agnes V. Barr has, or is about to file a writ of quo warranto to test the right of the said Samuel Geldziler to hold the said office, and I have been given to understand that in the event that such information is filed, the same will be contested by the said Samuel Geldziler on the ground that the said Agnes V. Barr has no right to file such an information without the permission of the court. 10

9. I am also informed by counsel that a decision of the Supreme Court prevents a claimant for office from getting permission to make such a contest. It is important to the citizens of the County of Passaic and particularly to members of the Democratic Party that the question involved as to who is entitled to this office legally should be settled.

Your petitioner therefore prays that he have permission to exhibit in the Supreme Court in the name of the Attorney-General at the relation of himself an information in the nature of quo warranto against Samuel Geldziler for usurping, intruding into and unlawfully holding or executing the office of member of the County Board of Elections for the County of Passaic and with permission to proceed therein in such a manner as is usual in cases of informations in the nature of a quo warranto. 20 30

And your petitioner will ever pray, &c.

Louis D. Carr, Petitioner.

IV.
Petition

State of New Jersey }
County of Passaic } ss.

10 Louis D. Carr, of full age, being duly sworn according to law on his oath, deposes and says that he is the petitioner named in the foregoing petition; that he is a tax payer and a legal voter in the City of Clifton; and that the matters and things set forth in the foregoing petition are true to the best of his knowledge and belief.

Louis D. Carr

Sworn to and subscribed before me this 4th day of November, 1929.

Frank J. Davies,
A Master in Chancery of N. J.

20

80

V.

Rule to Show Cause

(Filed Dec. 7, 1929.)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex rel., Louis D. Carr, vs. Samuel Geldziler, Defendant.	}	On Information in the nature of Quo Warranto	10
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RULE TO SHOW CAUSE

On motion upon affidavit read and filed, and sufficient cause appearing therefor,

It is hereby Ordered that the defendant, Samuel Geldziler, show cause on Saturday, the seventh day of December, Nineteen hundred and twenty-nine, at ten o'clock in the forenoon before me, one of the Justices of the Supreme Court at the Court House in the City of Paterson, in the State of New Jersey why a writ of quo warranto should not issue in the above entitled cause directed to Samuel Geldziler to show by what warrant and authority he claims to have, use and enjoy the office, liberties, privileges and franchises of a member of the County Board of Elections for the County of Passaic and why leave should not be granted to Louis D. Carr to file an information in the matter of said quo warranto.

Chas. C. Black, J. S. C.

VI.
Order

NEW JERSEY SUPREME COURT

The State of New Jersey, ex rel., Louis D. Carr,	Relator	} On Information in the nature of quo warranto
vs.		
Samuel Geldziler,	Defendant.	

10

ORDER

20 Louis D. Carr, a resident, inhabitant and taxpayer
of the City of Clifton, County of Passaic, having by
petition duly verified, applied for leave to exhibit in
the Supreme Court in the name of the Attorney-
General an information in the nature of quo war-
ranto at the relation of the said Louis D. Carr
against the defendant, Samuel Geldziler, alleged to
be usurping, intruding into or unlawfully holding
and executing the office of a member of the County
Board of Elections for the County of Passaic, and
to proceed therein in such manner as is usual in cases
of information in the nature of a quo warranto; and
the said Louis D. Carr having taken a rule to show
cause on the said Samuel Geldziler, returnable at
this time at the Court House in the City of Paterson,
30 why such leave should not be granted; and upon
hearing counsel for the relator and the defendant;

It is thereupon, on this seventh day of December,
Nineteen hundred and twenty-nine, Ordered, that
the said Louis D. Carr have leave to exhibit in the
Supreme Court in the name of the Attorney-Gener-
al an information in the nature of a quo warranto
at the relation of the said Louis D. Carr against the

VII.
Order

defendant, Samuel Geldziler, alleged to be usurping,
intruding into and unlawfully holding or executing
the office of a member of the County Board of Elec-
tions for the County of Passaic.

Charles C. Black,
Justice of Supreme Court.

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VIII.

Information

(Filed Dec. 12, 1929.)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex
rel., Louis D. Carr,

Relator,

vs.

Samuel Geldziler,

Respondent.

On Quo Warranto

10

INFORMATION

William A. Stevens, Esquire, Attorney-General of the State of New Jersey, who sues for the State in this behalf, now comes into the Supreme Court of Judicature of the said State before the Justices thereof at the State House in the City of Trenton,

- 20 on the thirteenth day of December, Nineteen hundred and twenty-nine, for the said State of New Jersey, at the relation of Louis D. Carr, resident, freeholder and taxpayer of the County of Passaic and State of New Jersey, who desiring to sue and prosecute in this behalf according to the form of statute in such case made and provided, on the seventh day of December, Nineteen hundred and twenty-nine, obtained leave from Charles C. Black, a
- 30 Justice of the Supreme Court to exhibit in the Supreme Court in the name of the Attorney-General an information in the nature of quo warranto at the relation of the said Louis D. Carr against the defendant, Samuel Geldziler, alleged to be usurping, intruding into and unlawfully holding or executing the office of a member of the County Board of Elections of the County of Passaic and gives the court here to be informed and understand that:

IX.

1. In the month of February, 1929, Harry Heher, Chairman of the State Committee of the Democratic party, did nominate Robert C. Barr as a member of the County Board of Elections in and for the County of Passaic, and that Morgan F. Larson, Governor of the State of New Jersey, on the first day of March, Nineteen hundred and twenty-nine, commissioned Robert C. Barr as a member of the County Election Board of the County of Passaic for a term of two years beginning on the first day of March, Nineteen hundred and twenty-nine. 10

2. At the general election held in the City of Clifton on November 6th, said Robert C. Barr was elected Councilman of the third ward of the City of Clifton for a period commencing on the first day of January, Nineteen hundred and twenty-one, to and including the thirty-first day of December, Nineteen hundred and thirty, and the said Robert C. Barr accepted said office and was duly sworn and performed the duties thereof and in all other respects duly qualified and served as Councilman for the said office, did accept the said office and has continued to act as such ever since and is now acting. 20

3. At the session of 1929, the Legislature of the State of New Jersey passed an act entitled, "An Act to Amend an Act, Entitled, 'An Act to Regulate Elections' (Revision of 1920, approved April 8th, 1929)" and which is better known as Chapter 257 of the Laws of 1929, which act was approved by the Governor of the State of New Jersey on April 30th, 1929, and became and is the law of this State. 30

4. It was thereupon claimed by Morgan F. Larson, Governor of the State of New Jersey, that by virtue of the said Act, the office of Robert C. Barr as a member of the County Board of Elections for

X.

Information

the County of Passaic became vacant either because of the passage of the said Act, or because of the failure of the said Robert C. Barr to resign his office as Councilman of the third ward of the City of Clifton.

10 5. Thereupon, Morgan F. Larson, the Governor of the State of New Jersey, on July 10th, 1929, notified Harry Heher, Chairman of the State Committee of the Democratic party that a vacancy existed in the office of the said Robert C. Barr as a member of the County Board of Elections of Passaic County, and on the 16th day of July, Nineteen hundred and twenty-nine, the said Harry Heher, Chairman of the Democratic State Committee did nominate one Agnes V. Barr to fill the vacancy and to succeed the said Robert C. Barr and by reason thereof, the said Agnes V. Barr claims to be entitled to the said office and that it was the duty of the said Morgan F.
20 Larson to issue a commission to the said Agnes V. Barr as a member of the Passaic County Board of Elections for the said unexpired time of the said Robert C. Barr ending on the first day of March, Nineteen hundred and thirty-one.

6. If the office of the said Robert C. Barr became vacant as claimed by the said Governor, it then and there became the duty of the said Governor to issue a commission to the said Agnes V. Barr to fill the
30 said vacancy.

7. Notwithstanding that it was the duty of the said Morgan F. Larson, Governor of the State of New Jersey in case a vacancy existed in said office of the County Board of Elections for the County of Passaic to so commission the said Agnes V. Barr, the said Morgan F. Larson on or about the fourth day of December, Nineteen hundred and twenty-

XI.

Information

nine, did appoint or commission one Samuel Geldziler as a member of the County Board of Elections for the County of Passaic to serve in lieu and in place of the said Robert C. Barr for a term beginning with the first day of said commission and ending on the first day of March, Nineteen hundred and thirty-one.

8. Upon the said appointment and commission being made, the said Samuel Geldziler, pretending right and authority therefrom, was duly sworn according to law and accepted said appointment and commission, and thereupon intruded into and usurped said office and thereupon, and ever since has unlawfully usurped, held, used and executed the same, without any legal appointment, warrant or authorization whatsoever, and yet does so to the exclusion of the true holder of the said office, to wit, at the County of Passaic aforesaid. 10

9. Whereupon the said Attorney-General, for the State at the relation of Louis D. Carr, desiring to sue and prosecute in this behalf, prays the advice of the court herein in the premises and for due process of law against the said Samuel Geldziler in this behalf, to be made to answer to the said State by what warrant he claims to hold, use, execute and enjoy the aforesaid office as member of the County Board of Elections for the County of Passaic and the liberties, privileges and franchises thereof. 20 30

Edward F. Merrey,
Attorney for Relator.

XII.

Rule to Plead

(Filed Dec. 16, 1929.)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex
rel., Louis D. Carr,

Relator,

vs.

Samuel Geldziler,

Respondent.

On Information
in the
nature of
quo warranto

10

RULE TO PLEAD

20 The State of New Jersey, at the relation of Louis
D. Carr, having filed an information setting forth,
among other things, that the defendant, Samuel
Geldziler, unlawfully usurps, intrudes into and un-
lawfully holds and executes the office as member of
the County Board of Elections for the County of
Passaic, and its liberties, privileges and franchises,
without any legal authority, warrant or right what-
soever, and praying that he, the said defendant,
may be made to answer to the State of New Jersey,
at the relation of Louis D. Carr, by what warrant he
claims to hold, use, execute and enjoy the aforesaid
office as member of the County Board of Elections
for the County of Passaic and the liberties, privi-
leges and franchises thereof.

30 It is thereupon Ordered that the defendant, Sam-
uel Geldziler, plead or demur to said information
within ten days after service upon him of a certified
copy of such information and this Rule.

Rule actually entered this day of December,
1929, on motion of

Edward F. Merrey,
Attorney of Relator.

XIII.

Plea

(Filed Dec. 24, 1929.)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex rel., Louis D. Carr,	} On Information in the nature of quo warranto	} 10
vs.		
Samuel Geldziler, Respondent.		

PLEA

And now, as yet of the term of December, in the year 1929, comes the said Samuel Geldziler, respondent, and having heard the information read, he complains, and under color of the premises in the said information contained, he is greatly vexed and disquieted, and that by no means justly, comes protesting that the said information and the matters therein contained are by no means sufficient in the law, and that he need not, nor is subject by law, to answer thereto. Yet, for plea, thereto, he says that he ought not to be disfranchised or impleaded, by reason of the premises in the said information contained, because, he says:

1. Paragraphs 1, 2, 3 and 4 of the Information are admitted. 30

2. Paragraphs 5 and 6 of the Information are denied.

3. As to paragraph "7", this respondent denies that it was the duty of Governor Morgan F. Larson, in case of vacancy existing in said office of the County Board of Elections for the County of Passaic, to commission Agnes V. Barr, but admits the other allegations in paragraph "7" of the Information.

XIV.

Plea

4. As to paragraph "8", respondent denies that he is pretending to have the right and authority to sit as a member of the County Board of Elections for the County of Passaic, and denies that he has intruded into and usurped said office, or that he has held, used or executed the same without legal appointment, warrant or authorization, or that he now holds such office to the exclusion of any person who may claim to be the true holder of said office, but
10 alleges that he took the oath of office as a member of the County Board of Elections for the County of Passaic, and has in every way qualified for said office, and has attended the meetings of the County Board of Elections for Passaic County, and has participated in the transactions of said meetings, and has attended to and is still attending to all the duties of said office from the date of his appointment to the present time, and that he claims to be law-
20 fully and rightfully entitled to the office of member of the County Board of Elections for the County of Passaic.

5. As to paragraph "9", this respondent alleges that he has been lawfully appointed by the Governor of the State of New Jersey to fill the remainder of the term of Robert Carr as above mentioned, and that he lawfully and legally, by reason of said appointment, is a true member of the County Board of
30 Elections of the County of Passaic.

XV.

Plea

Respondent reserves the right to make any or all motions upon the hearing of this cause, which he may deem expedient and lawful, and prays that this Information may be dismissed.

Samuel Geldziler, Respondent.

Thomas J. Kennedy,

Attorney of Respondent.

James F. Minturn,

Of Counsel.

State of New Jersey, }
County of Passaic. } ss. 10

Samuel Geldziler, of full age, being duly sworn, according to law, on his oath deposes and says:

That he is a member of the office of the Passaic County Board of Elections and that he is the above-named defendant. Deponent further says that the facts, matters and things set forth in the foregoing plea in the above entitled cause are true to the best of his knowledge, information and belief. And this 20
deponent further says that the plea by the defendant above pleaded is not intended for the purpose of delay, but that this deponent lawfully believes that the said defendant has a just and legal defense to said action and information on the merits of the case.

Samuel Geldziler,

Sworn and subscribed to before me this 23 day
of December, 1929. 30

Nellie Kowal, Notary Public of N. J.

XVI.

Memorandum

NEW JERSEY SUPREME COURT
Passaic Circuit

	The State of New Jersey, ex rel., Robert C. Barr,	Relator,	} In the Nature of Quo Warranto.
	v.		
	Samuel Geldziler,	Defendant.	
10	The State of New Jersey, ex rel. Agnes V. Barr,	Relator,	
	v.		
	Samuel Geldziler,	Defendant.	

MEMORANDUM.

20

Edward F. Merrey and Frank J. Davies, Esqs.,
Attorneys for Relators.

Thomas J. Kennedy, Joseph J. Weinberger, and
James A. Murner, Esqs., Attorneys for
Defendant.

James F. Minturn, Esq., of counsel with defend-
ant.

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Porter, J.

These actions are in the nature of quo warranto
to test the title of the defendant to the office of
member of the Passaic County Board of Elections.
Questions of fact were raised by the pleadings and
tried by me, by consent of the parties, without a

XVII.
Memorandum

jury. Both actions were tried on January 15, 1930. For convenience the cases will be considered together.

The facts from the pleadings and as testified to at the hearings in substance are as follows: Robert C. Barr was appointed and commissioned on March 1, 1929, as a member of the County Election Board of Passaic County for a term of two years from that date. He exercised the duties of his office and was in office on April 30, 1929. On that date an Act of the Legislature was approved, effective from that date, amending the law concerning membership in County Election Boards, Chapter 257 P. L. 1929. This act provides "that no person who now or hereafter holds elective public office shall be eligible to serve as a member of the County Board of Elections during the term of such elective office."

On April 30, 1929, the relator, Robert C. Barr, was a member of the Council of the City of Clifton, an elective office. Under date of June 24, 1929, the Secretary to the Governor addressed and sent a letter to Harry Heher, Chairman of the State Committee of the democratic party advising him that a vacancy existed in the Passaic County Board of Elections by reason of Mr. Barr's ineligibility to the office under the act of April 30, 1929, and requesting a nomination to fill the vacancy. Mr. Heher did not actually receive this letter until he saw it with other opened mail in his office a few days before July 10, 1929. On that date he replied to the letter stating that a nomination would be made within a few days. Under date of July 16, 1929, Mr. Heher sent a letter to the Governor nominating the relator, Agnes V. Barr, to the office in question.

XVIII.

Memorandum

On August 29, 1929, the Governor appointed and commissioned Samuel Geldziler, defendant, to the position. Mr. Geldziler took the oath of office and entered upon the duties of the office and continues to perform same. These proceedings are instituted by the relators Robert C. Barr and Agnes V. Barr, respectively, under Sec. 4 of the Statute 3 Comp. Stat., 4212. In both cases the relators contend that the defendant is not entitled to the office. Mr. Barr argues that he is entitled to the office, saying that he was legally appointed, duly qualified, has not resigned and is not ineligible to hold the office under the provisions of the Act of April 30, 1929, *supra*. Mrs. Barr also claims the office by reason of her nomination by the State Chairman of the Democratic Party to the Governor under date of July 24, 1929, which she argues was legally done; she contends that under the law the appointing power is the State Chairman and the Governor's duty is to commission the person so nominated.

It seems clear that Mr. Barr was ousted from the office by the provisions of the Act of April 30, 1929, *supra*, as and from that date. This act is an amendment to Sec. 17 of the "Act to regulate elections," Rev. of 1920. It amends the law in two respects. First it vacates the office of any member of the County Board of Elections upon his becoming a candidate for any elective office, except to membership in county or state committee. Second, it provides "that no person who now or hereafter holds elective public office shall be eligible to serve as a member of the County Board of Elections during the term of such elective office."

Mr. Barr was on April 30, when this act took effect, holding an elective office. Clearly he became

XIX.

Memorandum

at that time ineligible to serve on the County Board under the provisions of this act. Ineligible as here used means incapable, unqualified. Thus there was created a vacancy. Art. 6, Sec. 19 of the Election Act provides how vacancies shall be filled.

The language of this section follows:

"In case of a vacancy arising in any County Board of Elections from any cause other than expiration of the term, the Governor shall be forthwith notified, notice of such vacancy 10 to be given to the Chairman of the State Committee, and such Chairman shall, not later than ten days thereafter, nominate a successor, who shall thereupon be commissioned by the Governor; all appointments to fill vacancies shall be for the unexpired term only."

It will be noted that this Act is silent as to whose duty it is to notify the Governor or the Chairman 20 when a vacancy occurs. Someone quite evidently did notify the Governor of the vacancy. A duty by the Governor to then notify the Chairman cannot be read into the law. However, the law provides that the Chairman be notified. The Governor did in fact notify him whether it was his duty to do so or not. So we have the Statute complied with by having a notice of the vacancy received by both the Governor and the State Chairman. The Chairman's duty 30 was to nominate and the Governor's to commission such nominee to fill the vacancy. However, the Chairman is required to nominate "not later than ten days thereafter."

The Chairman actually received the notice a few days before July 10 and nominated Mrs. Barr on July 16, not later than ten days from the time that

XX.

Memorandum

10 he read or knew the contents of the letter of notification of June 24. That is not a compliance with the Statute. The time began to run from the receipt by him of the notification; it was received, within the meaning of the law, when it was delivered to his office either by messenger or by mail, not when he read it or actually received it some two weeks after its date. The nomination by him, therefore, under date of July 16 came too late and is of no effect; he had lost his right to nominate by not having acted within the ten days limited by the Act. The relator Agnes V. Barr, therefore, has no rights to the office.

20 Article 6 Sec. 20 of the Election Act vests power in the Governor to make the "appointment of his own selection" where the Chairman fails to nominate within the ten-day period. Pursuant to this authority the Governor did appoint and commission the defendant. He was therefore legally appointed and is entitled to possess the office.

Both proceedings will be dismissed. Postea will be signed in accordance with these findings.

Newton H. Porter,

Circuit Court Judge.

January 20, 1930.

XXI.

Postea

(Filed March 15, 1930.)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex
rel., Louis D. Carr,

Relator.

vs.

Samuel Geldziler,

Respondent.

On Information
in the
Nature of
Quo Warranto

10

POSTEA

And now, on this day, to wit: on the 15th day of January, 1930, before the Honorable Newton H. Porter, comes the said Relator, by his attorneys aforesaid, before the said Court before whom the issue was tried as sent; wherefore his record had before him in these words, namely:

20

Afterwards, that is to say, on the day and at the place aforesaid, Newton H. Porter, one of the Circuit Judges of the State of New Jersey within named, according to the form of the Statute in such case made and provided, comes as well the within named Relator as the within named Respondent, by their respective attorneys within mentioned, and the jurors of the jury summoned to try the said issue and having been called also, and the parties aforesaid having consented to waive trial by jury, and the Court aforesaid having heard the testimony, has concluded that the said Relator is not entitled to the office which he seeks and that he has complained, and that the said Respondent is of right, according to law, entitled to said office, and the Court does therefore award the said office to the said Respond-

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XXII.

Postea

ent, together with his costs to be assessed with regard thereto, according to law.

Therefore, it is Ordered that the said Respondent be declared to be entitled to the office which he now holds, known as a member of the County Board of Elections for the County of Passaic, and the said petition of the said Relator is therefore dismissed, with costs as aforesaid.

Newton H. Porter,

Judge of the Passaic
County Circuit Court.

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XXIII.

Rule for Judgment

(Filed March 15, 1930.)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex rel., Louis D. Carr,	}	On Information in the nature of quo warranto
Relator,		
vs.		
Samuel Geldziler,		
Respondent.		

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RULE FOR JUDGMENT

The information in the above cause by leave of the Court having been duly filed, and the respondent having pleaded thereto, and the cause having been regularly set down and noticed for hearing and having been tried before Honorable Newton H. Porter, Judge of the Passaic County Circuit Court to whom cases were referred by the Justice of the Supreme Court holding such Circuit Court, without a Jury, and having been argued before the Court by Edward F. Merrey, Esq., Counsel for the relator, and James F. Minturn, Esq., of Counsel for the Respondent, and the Court having considered said testimony and the stipulation made in open court, and having found as a fact that Samuel Geldziler was legally entitled to hold the office of a member of the County Board of Elections in and for the County of Passaic by virtue of a commission issued to him by the Governor of the State of New Jersey bearing date the 4th day of September, 1929, for a term expiring on the 1st day of March, 1931, and that the said Samuel Geldziler was legally occupying the said office, and that he had duly qualified in accordance with law,

XXIV.

Rule for Judgment

It is Ordered that judgment in favor of the respondent, Samuel Geldziler and against the relator, Louis D. Carr, be entered in the above entitled suit, with costs to be taxed.

On Motion of

Thomas J. Kennedy,
Attorney for respondent.

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XXV.

Notice

(Filed July 14, 1930.)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex
rel., Louis D. Carr,

Relator.

vs.

Samuel Geldziler,

Respondent.

On Information
in the
Nature of
Quo Warranto

10

NOTICE

To: Thomas J. Kennedy, Attorney of Respondent:

Take Notice that the Relator appeals to the Court
of Errors and Appeals from the whole of the judg-
ment entered in this cause in the New Jersey Su-
preme Court.

Dated: July 9th, 1930.

20

Edward F. Merrey,
Attorney of Appellant.

30

Grounds of Appeal

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GROUND OF APPEAL

The appellant states the following grounds of appeal:

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2. The court below decided that Agnes V. Barr was not entitled to the office of member of the County Board of Elections of the County of Passaic, whereas, it should have found that Agnes V. Barr was entitled to said office.

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4. The court below erroneously held that the Chairman of the State Committee of the Democratic party lost his right to nominate a successor to Rob-

XXVII.

Grounds of Appeal

ert C. Barr as a member of the County Board of Elections for the County of Passaic by not having acted within ten days limited by the act of April 30th, 1929, whereas, said Chairman's right to so nominate did not expire until an appointment was actually made by the Governor.

5. That the court below erroneously held that the right of the said Chairman to nominate such successor to Robert C. Barr, expired ten days after receipt of notice from the Governor that a vacancy existed, whereas, the statute imposed no duty on the Governor to give such notice and the Governor could not by giving such notice, legally start the ten days limitation. 10

6. The Governor not having made an appointment to fill the vacancy in the office held by Robert C. Barr before the said Agnes V. Barr was nominated by the Chairman of the State Committee of the Democratic party, the appointment of defendant to fill said vacancy was void and the court below should have so held. 20

Edward F. Merrey,
Of Counsel with Appellant.

XXVIII.

Proceedings in Court

NEW JERSEY SUPREME COURT

Passaic Circuit.

The State of New Jersey, ex rel., Louis D. Carr,	Relator	} On Quo Warranto
vs.		
Samuel Geldziler,	Defendant.	

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PROCEEDINGS IN COURT

Paterson, N. J., January 15, 1930.

Before Hon. Newton H. Porter, without a jury.

Appearances :

For Relator: Edward F. Merrey, Esq., and
Frank J. Davies, Esq.

20 For Defendant: James F. Minturn, Esq.
Joseph J. Weinberger, Esq.
Thomas J. Kennedy, Esq.
James J. Murner, Esq.

The Court—Tell me what it is about, first.

Mr. Merrey—Now, if your Honor please, an infor-
mation was filed in the nature of a quo warranto by
Louis D. Carr, a citizen and taxpayer of the State,
against Samuel Geldziler. This information is filed
30 upon application to a Justice of the Supreme Court,
and with the permission of the Justice; in other
words, this particular suit of the three is brought
under the first section of the Quo Warranto Act ra-
ther than under the fourth section. The two other
suits we have here pending are brought by claimants
to the office. This particular suit is brought under
the statute, by permission, in the name of the At-
torney General against Samuel Geldziler, asking by

XXIX.

Proceedings in Court

what warrant he holds and uses the office of a Member of the County Board of Elections of the County of Passaic. So that, as I take it, the duty is upon Mr. Geldziler now to show by what right he occupies and uses that office.

The Court—This comes before this court, I take it, because there is a question of fact involved?

Mr. Merrey—There was a question of fact, but we have waived a jury.

The Court—There is no question of fact that is now before us? Are there any remaining questions of fact? 10

Mr. Merrey—In the information, in a prefatory way, it is stated—perhaps I better go back and give your Honor some idea of what the dispute is about that has arisen.

Mr. Weinberger—Just a minute; pardon my interruption. I do not think we are interested about the dispute. Mr. Merrey is limited in this case to the information he filed on behalf of Mr. Carr. To strip this of all camouflage and subterfuge on the part of Mr. Merrey, we are limited in this cause to the information and the facts set forth and pleaded in the Carr information. In the first place, when your Honor called the case you called it "Barr." Mr. Merrey said, "I am not moving that; I am moving the Carr case." Now we are limited in this case to the Carr case, and I do not want any injection of any other case, because in those cases we will meet them at the proper time. 20 30

The Court—I do not see any harm in giving the history of the case, the whole controversy, if it is all wound up together. I know nothing about it.

Mr. Merrey—I am not going out of the papers in

XXX.

Proceedings in Court

this particular controversy, notwithstanding the trepidation of my friend.

The Court—You may tell me what it is about.

Mr. Merrey—It seems this is what happened. Some time ago, before this controversy arose, Mr. Barr was one of the Democratic members of the Passaic County Board of Elections. He was such under the statute by the appointment of Mr. Heher, the Democratic State Chairman. He was given, under the statute, a commission by the Governor. While he was such, I understand he was elected to some office in the City of Clifton—a member of Council. There seemed to be somebody interested in that subject, and the Legislature passed a statute concerning members of the County Board of Elections. From the pleadings, I take it, that the gentlemen on the other side thought that upon the passage of that statute or by reason of that statute Mr. Barr lost his office. (Reads amendment 17th section of election act, referring to appointment of members.) That is, if the member of the County Board became a candidate for office, it says his office became vacant.

Now last Spring a further proviso was put in, which is the one your Honor will be concerned with. "Provided, further, that no person that now or hereafter holds elective public office shall be eligible to serve as a member of the County Board of Elections during the term of such elective office."

You will be called upon to construe the meaning of that paragraph.

We have said in the other case that that did not put Barr out of office. It was claimed that it did, and that there became a vacancy.

XXXI.

Proceedings in Court

Now then after that you will be concerned with the provisions for filling vacancies in the office. Now the 19th section of the act provides: "In case of a vacancy arising in any County Board of Elections from any cause other than the expiration of the term, the Governor shall be forthwith notified. Notice of such vacancy to be given to the Chairman of the State Committee, and such Chairman shall not later than ten days thereafter nominate a successor, who shall thereupon be commissioned by the Governor. All appointments to fill vacancies shall be for the unexpired term only."

The next paragraph: "In case the State Chairman shall fail to send in writing to the Governor nominations for appointment within the time specified aforesaid, the Governor shall make such appointment of his own selection from the citizens of the county in which such failure shall occur." Now then we find in this suit brought by Mr. Carr, the order of consent given by a Justice of the Supreme Court under the statute, that Mr. Geldziler is occupying this office which Mr. Barr had a commission for; and the question now in this particular case is, Is Geldziler entitled to occupy this office?

Now we, of course, know what their theory of the thing is, perhaps it would be objectionable upon my part to mention or go into it. I have not gone into that.

The Court—What is the other case, Barr against Geldziler, under Section 4?

Mr. Merrey—The original case. I may say this, we commenced a case for Mr. Robert Barr, claimant to the office, against Geldziler, under Section 4. They pleaded it was not a municipal office, for one

Proceedings in Court

thing. They did not demur, and I may say these pleadings are not under the Practice Act. According to the decisions of the court, quo warranto is a separate statute, and it has been held that the Practice Act does not apply, so we are under the old form of common law pleading, in which we have demurrer. They raised that point, that it was not a municipal office. They also said this statute put him out of office. Then here is what happened. The Governor called upon Mr. Heher, saying that there was a vacancy.

The Court—Who told him there was a vacancy?

Mr. Merrey—Who told the Governor? Nobody knows who told him. He just guessed it.

Of course, the statute does not say who is to tell him. My own thought is that the remaining members of the County Board told him; I don't know, that seems to be it. But, anyhow, the Governor told Mr. Heher, and Mr. Heher immediately after getting that notice, the next day or two, wrote him saying, "All right; I nominate Mrs. Barr, the wife of Mr. Barr, Mrs. Agnes Barr."

Some time after that the Governor wrote back and said, or telephoned to Mr. Heher and wanted Mr. Barr's resignation.

Mr. Heher replied, "Well, Mr. Barr says he is entitled to the office. I don't know anything about this." This is the substance of the letter. I have it here. "You said there is a vacancy and asked me to make a nomination, and I did it. That is all I can do."

Nothing done then by the Governor for a couple of months, and after that the first thing we hear Mr. Geldziler had been appointed by the Governor and we find him in office.

XXXIII.

Proceedings in Court

Then Mrs. Barr also filed under the 4th section.

The Court—So there are three suits. Mrs. Barr and Mr. Barr are both under Section 44, which you are not now moving, and Mr. Carr who is a taxpayer?

Mr. Merrey—Yes, that is the situation.

The Court—That is the case you are moving.

Mr. Merrey—That is the case I am moving. I expect to move the other cases afterward.

The Court—This will be dispositive of the others? 10

Mr. Merrey—If it is, why, perhaps we can move it.

The Court—Why not try one at a time?

Mr. Merrey—We should try one at a time.

The Court—What is your contention, Mr. Kennedy?

Mr. Kennedy—First of all in this case we contend as far as Geldziler is concerned he is in office by a commission from the Governor. The Act was adopted April 30, 1929, and at that time Barr was 20 in office acting as councilman of the City of Clifton; and as soon as that Act went into effect Barr we contend was ipso facto disqualified from acting further as a member of the County Board of Elections.

The Court—Does that cover any office that is then being held?

Mr. Kennedy—Yes, sir.

The Court—I thought that was one of the bones 30 of contention.

Mr. Merrey—Well, the language of the Act is so badly drawn it is hard to say what it means. We say it doesn't put him out of office, except he would be ineligible to serve.

Mr. Kennedy—That Act provided further, no person now or hereafter holds elective public office

XXXIV.

Proceedings in Court

shall be eligible to serve as a member of the County Board of Elections during the term of such elective office.

10 Now at that time Barr was in office acting as Councilman, and as soon as that Act went into effect, we contend that he became ipso facto disqualified to serve as a member of the County Board of Elections; and that being so, there was a vacancy created, and that vacancy existed for a considerable length of time; and the Governor, having notice of it, notified, I understand, Mr. Heher, and subsequently Mr. Heher, having failed within the time required to nominate somebody else, the Governor, under the Act having authority where Mr. Heher fails within ten days after receiving notice that there is a vacancy to nominate somebody to fill the office again, then the Governor of his own volition can nominate anybody.

20 The Court—Do you say Mr. Heher failed to send in any person's name within ten days?

Mr. Kennedy—Yes, sir.

The Court—Do you say he did not send it in at all?

Mr. Kennedy—I don't care when he sent it in, but we say he did not send it in within the time required by law.

The Court—Within ten days?

30 Mr. Kennedy—Yes. We contend the Governor then commissioned Geldziler; he was duly sworn, qualified as a member of the County Board of Elections and has been serving. There is no dispute about that fact, is there, Mr. Merrey?

Mr. Merrey—He is serving. That is what we charge.

Proceedings in Court

Mr. Kennedy—And that he qualified and took the oath of office?

Mr. Merrey—We say he is usurping the office. We say his appointment is not a valid appointment.

Mr. Kennedy—And this plea of the taxpayer, aside from these facts, makes only Geldziler defendant.

Now I say all we have to do on our own pleadings is to show our commission and our oath of office and that we are qualified, and that is dispositive of our case. I say he is the only one before the Court. 10

The Court—Yes, but isn't there a shifting of the burden of proof? Haven't you got to show by what warrant he has it—by what authority?

Mr. Kennedy—Yes; it is admitted in the information we got a commission from the Governor.

The Court—They say it is no good.

Mr. Kennedy—That is up to them.

The Court—That is what I am asking, whether 20 it is not up to you to show that he is not only appointed, but appointed under proper authority?

Mr. Kennedy—No, sir. All I have to show you is he has a valid commission from the Governor and the man has qualified for the office. I say we have this information and those things are admitted.

The Court—Then if that is so, it is simply a question of law?

Mr. Kennedy—Yes. 30

The Court—As to what the statute means?

Mr. Kennedy—Yes.

The Court—As to whether there was a vacancy and as to whether the Governor—No; there is a question of fact, isn't there, as to whether the Governor was notified by the State Chairamn of the

XXXVI.

Proceedings in Court

Democratic Party of the nomination? That is a question of fact. That is a fact.

Mr. Kennedy—I would say in this suit there is not, because there is only one person before the Court, and that is Geldziler.

10 The Court—The question is, by what right does he hold the office; and the Relator says here that he has no authority notwithstanding the fact that he has a commission; the Governor had no right to
10 commision him, having a nomination from the State Chairman within time.

Mr. Merrey—My point is this, that in every one of these quo warranto proceedings they are always very careful to set out all the preliminaries, show that the appointment was made upon authority. We are questioning the Governor's right to make this appointment, because the steps that led up to it were not specified, therefore he could not make
20 it.

And here in this last case we had before your Honor you will remember that our friend with Mr. Lane came in here and asked to amend to show that an oath or that a bond had been filed, so that every step was set forth in their pleadings as to what they did, to show that they were entitled to the office, even filing of a bond, the taking of an oath and every little detail is set forth. So it is here. They
30 are defending.

The Court—But they say you admit that.

Mr. Merrey—No; I say he is usurping the office. He is in the office. He is doing it. He is doing it. He is actually exercising the duties of this office and claiming the right to it. Now we are here. We are the Attorney General of the State of New Jersey

XXXVII.

Proceedings in Court

saying to him—and that is the title, the way it starts, Frederick N. Stevens. We had permission to use the Attorney General's name. The Attorney General says, "Here, I find you exercising this office. By what right do you exercise the office?" The mere Governor's commission is not sufficient. They have to show the Governor rightfully issued it. That is the question between us.

Mr. Kennedy—They can not very well attack collaterally the Governor's commission. They come in and say, "By what right are you in that office?" We say, "By virtue of a commission from the Governor; and here it is; and by virtue further of the fact I have qualified for the office." 10

Now how can they go to work and attack that collaterally?

Mr. Merrey—This is not a collateral attack; this is a direct attack. We can not bring the Governor here. The Governor can not be brought here. The Governor can not be brought into court. 20

Mr. Weinberger—That is wrong. You can bring him here. You can subpoena the Governor to come here and testify.

Mr. Merrey—You can not make the Governor a party in this court. He is the head of the State of New Jersey.

The Court—Do not let us argue that, because it is not apropos of anything we are discussing. 30

Mr. Merrey—We can not make any direct attack to set this commission aside, except by this kind of a suit.

The Court—I am frank to say I don't know whether the proof now shifts or not. I will ask Judge Minturn to answer that question. Justice Minturn, have you made out a prima facie case, or mustn't you

XXXVIII.

Proceedings in Court

show further by what authority he had the office other than the commission itself?

Mr. Minturn—If your Honor please, I am in some embarrassment as far as the facts of this case are concerned and as far as the general tenor of the law is concerned, because only this morning or late last night was I requested to come here by Mr. Weinberger.

The Court—I do not want to press the question.
10 I thought you had it at your finger tips, perhaps.

Mr. Minturn—I wish I had. But I am glad, of course, to be here and to seize this opportunity of saying I am pleased to be before your Honor on my first appearance here.

The Court—The honor is mine, sir.

Mr. Minturn—Thank you, sir. The environment is so congenial it is reminiscent of the happy days I spent here for twenty years. I am pleased to say
20 it is the first trial I have attended, and I am glad to be in the City of Paterson among so many of my friends, among which, of course, I number your Honor.

It seems to be, if the Court please, that when you produce the Great Seal of the State of New Jersey, as it is produced here this morning, in answer to the inquiry made by the other side, "By what authority are you acting? Show us your authority?"
30 Such is the meaning of quo warranto from time lost in the mist of ages. And it has always been the custom and the fact that when the Great Seal of the King of England where quo warranto, your Honor is well acquainted with the fact, had its origin, was produced in Court, it was an answer to everything that might be said against the right of

XXXIX.

Proceedings in Court

the incumbent to hold the office which he claimed. There is an old maxim of law that your Honor is familiar with, that where an act has been legally done—and we must assume that the Governor has done a legal act. You cannot assume that New Jersey has done something illegal. You cannot charge the State of New Jersey, represented by executives in this case, with doing something illegal. We cannot charge the Secretary of State and the entire legal environment in Trenton with doing something 10 that is wrong, something that they had no right to do, something that was fundamentally illegal. You must presume under the law that everything that a public officer has done under the requirements of the law is legally done.

To emphasize that maxim and that rule of law based upon it, the Great Seal of the State of New Jersey is produced, with the signature of the State Executive and the signature of the Secretary of 20 State, and in answer to the inquiry, "Upon what authority do you act here? Why do you presume to come in and occupy this office?" Against my client or against anybody else, we produce our certificates, our commission. Now, that is the authority of the State, with the Great Seal of the State impressed upon it, and everything necessary to show the legality of our standing and our status.

Now, it seems to me, if your Honor please, that 30 when we have done that, our duty is done.

If they propose to attack the Great Seal of the State of New Jersey and the act of its executive, they must do it, no matter how great the hardship may be; it is not for us to supplement our proof with additional proof to show why the Governor

Proceedings in Court

did this, or under what circumstances he did it, or to show whether the Democratic State Chairman performed his duties, or whether somebody else did his duty. All these are details which may enter into the question between the claimant to the office and the present incumbent. But that is not this case.

10 This is the case of a third party—a stranger to the office—and a man who makes no claim to the office, who is himself attempting to have this Court intrude into the office, without any authority, without any commission; and he comes here as any citizen, as any bystander might come and ask us the same question, “quo warranto? By what right? By what authority are you exercising this office?”

20 Why, just think of the result that might happen, if the thousands of people in this community, any one of them, might come in and ask the same question? This incumbent might be plagued with litigation. And there must be an end to litigation, as a matter of public policy. You cannot allow this man and every Tom, Dick, and Harry in the community to come here and question an incumbent to an office—a mere third party, a taxpayer or citizen, and say, “By what authority are you doing this?” Where will it terminate? Where is the limit? Your Honor’s right to sit on that bench might be questioned, because your Honor’s right to sit on that bench is
30 fortified only in this matter by the authority of the Governor, evidenced by his certificate or commission. And so we say of every office in the State, if it is subject to collateral attack, because it is nothing less than collateral.

We produce this, and we say we have done our duty. You asked for our authority. Here it is. You ask what we have done. We have taken the oath of

XLI.

Proceedings in Court

office, we are acting, we are here doing the public work, and this third party has no right to question us.

Just think of the result? They do not bring the other party who makes the claim to this office into Court—Barr; he just attacks us, upon the theory that we alone, not the other man, have no right to the office.

Suppose it should be held by the adjudication of your Honor that we have no right to this office, 10 what then? Your Honor creates what? A vacancy in the office. Nobody fills this. There is nobody here capable of filling it, according to my friend's statement. The Governor has appointed nobody else. And until the Governor shall have appointed, nobody is capable of filling it. Therefore the law, like nature, abhors a vacuum, and as a matter of public policy, your Honor will not create a vacuum in this case. You will not take from this board this man 20 who is serving under the commission of the Governor, under the Great Seal of the State, according to law, and for aught that appears in the case, performing his duty properly, for no reason whatever, except some one comes in here without any great authority in itself, except as a taxpayer and a citizen, and that is all that is conjured up in every case, and asks us to show what our authority is, asks us to supplement the commission of the Governor, if 30 necessary by bringing the Governor himself here.

Now, the Governor is subject to subpoena, the same as any other citizen of the State. A Supreme Court Justice is subject to subpoena. The President of the United States is subject to subpoena. No man is above the law, no matter how high his station or office.

XLII.

Proceedings in Court

Mr. Merrey—He cannot be made defendant.

Mr. Minturn—I am not arguing that he be made a defendant, but you are asking us to supplement this authority and his commission with the facts in the case justified him in making this appointment and in issuing this commission.

10 Now, if your Honor please, those are the facts in the case. In my hurried study of them this morning on my way to the Court House, I committed them to my memory in the best way I could. I trust I have enlightened your Honor fully on the situation in this particular case, to justify the conclusion that when we answer their inquiry by producing this commission, showing that we have acted under it and are now acting under it, have done all that the law requires of us, and that the petition on their side should be dismissed.

The Court—I will hear you, Mr. Merrey.

20 Mr. Merrey—If the Court please, I want to say that this is not a collateral attack, as I said before. The Governor of the State of New Jersey cannot be brought into this Court. Mr. Larson may be brought here by subpoena. That is, we could not attack him by certiorari to try and set aside his commission. And the reason is, that he is the head of the State. He takes the place of the king to that extent. And this is the only recourse left to us.

30 Now, I have listened with attention to Justice Minturn.

Mr. Minturn—May I say that I have seen the Chancellor of the State subpoenaed here?

Mr. Merrey—That is, individually.

Mr. Minturn—Yes. I don't know how.

Mr. Merrey—And, Mr. Justice, it has been decided

XLIII.

Proceedings in Court

that the Governor himself—that is an officer of the State—cannot be made a party defendant. in this case, we could not certiorari his action in making this appointment.

Mr. Minturn—I am not contending for that.

Mr. Merrey—I am making that statement; and that would be the only way we could directly attack this paper. That is, if we could certiorari his action in making this appointment and raise the question that way, we would have done it, and we would have done it had that been an appointment of anybody else but the Governor. 10

Now, the Justice has spoken several times about Mr. Carr and myself. Humble as we are, it is not Mr. Carr that is asking this, and it is not Mr. Merrey, but it is the Attorney-General of the State of New Jersey that is here. It is the Attorney General of the State of New Jersey that stands here and says, "Show me why that commission is right." 20 His functions are just as sacred as those of the Governor. They are founded upon the same instrument. It is the same right. The Attorney-General comes here, not Mr. Carr.

The Justice said something about maybe a thousand trying it. No; because before the name of the Attorney-General can be used, we have to go to the Supreme Court or the Justice of the Supreme Court and show there was some reason for bringing a suit 30 of this kind, and that was done in this case. We say right here that it is done by leave of a Justice of the Supreme Court. There is no danger about that. We now stand here as the Attorney-General by the permission of the Supreme Court, and we challenge the Governor's commission, and we want, not the Governor, but we want the man who is get-

XLIV.

Proceedings in Court

ting the good from it, the man who is getting the benefit of this appointment, to say to the Attorney-General why the Governor was right when he made the appointment.

10 If it cannot be challenged, if they do not have to show he acted legally, or that is a sufficient answer to it, then nobody that the Governor appoints can have his office questioned, notwithstanding the fact that the books are full of such cases. One of the quo warranto cases that I read recently was one of the Common Pleas Judge's office that was questioned. He had to come in. He had the warrant of the Governor, the commission of the Governor. The Governor has certain limited powers. If he exceeds those powers, his act is invalid. There is no presumption, against the Attorney-General, that his act is valid. The Attorney-General is just as much within his rights and within his duties and within his office, is just as powerful and just as strong as the Governor of this State or any other official in the State, and it is his duty to challenge those who go in and exercise this office. It has been questioned whether the fourth section of the Act is constitutional. It has been questioned whether that act is constitutional which permits the relator to be the claimant to the office, and that question has not been passed upon, but I am arguing in this last case 20 which your Honor heard that they had no right to enter a judgment on the postea, without the special permission of the Supreme Court itself, because the Supreme Court holds all these cases in its hands. 30 It is not a suit between parties.

The Court—You mean rather than individual justice.

XLV.

Proceedings in Court

Mr. Merrey—No.

The Court—The judgment was entered in the case by a Supreme Court Justice.

Mr. Weinberger—It was entered as a matter of right.

Mr. Merrey—It was entered as a matter of course, under the rule of Court, which provides the judgment should be entered on postea, and which we claim related to ordinary suits.

The Court—I think the fact was in that case that on my findings there was a judgment then signed by a Justice of the Supreme Court. 10

Mr. Merrey—No. We take that same position that they had no right to enter a judgment as of course, but must have the permission of the Court. In other words, the Court had certain rights in these quo warranto proceedings and may refuse, although you may find in this case—

The Court—If you are right on that other case, it will be very soon corrected. If your position is well taken on that you are wasting time on the other case, because it can be very soon corrected, perhaps. 20

Mr. Merrey—Oh, well, it is not that, but we say as a matter of discretion that the Court could not do it until the trial of this indictment.

The Court—I understand.

Mr. Merrey—Yes, of course. The Court takes that position, they won't enter judgment—may not enter it until the trial is over, which may be two or three weeks or six months. 30

But here I say the Court controls all these things in its hands, the Supreme Court. Your Honor can try this case, decide it, and send in a postea. The Court may refuse to enter judgment. It may enter

XLVI.

Proceedings in Court

judgment putting him out, but I mean it is not Louis Carr, it is not myself, nor it is not Mr. Barr—it is not a suit between parties here.

10 Now, I say that the Governor is not the King; that he is an official with certain limited authority; that he can only act when the facts are such as to give him the power to act; and that his commission is invalid unless those facts occur. It cannot be brought into question by everybody, but when the Attorney-General, by virtue of his ancient right and prerogative, comes into the Court here and says to anybody, “By what right do you exercise that au-
thority,” that is all the Attorney-General has to do, and then they must show every step to show that the Governor has the authority when he made this appointment and issued this commission. That is our position.

The Court—Have you any authorities?

20 Mr. Merrey—No, sir.

The Court—Well, it seems to me that your argument is fallacious, because, if it be true, then the Governor would not only have to show that his conditions precedent were good, that the State Chairman did nominate somebody or did not nominate somebody, and, forsooth, he was duly elected Governor, or he was properly constituted as Governor. If you are going to make him prove everything all
30 the way along the line, that he was properly sworn in as Governor, or he received the majority of the votes in the last election, it seems to me you have got to show all of that, and I haven’t any doubt, after having heard your argument that all that is required is that the defendant in this case come in here and answer your proposition. You say, “By what warrant do you hold this office?” and he says,

XLVII.

Proceedings in Court

"I hand you the commission of the Governor. It is by this warrant that I hold this office and I exercise the authority conferred in me by the Governor by entering upon the duties of the office." It seems to me that is the answer.

Now, that is the position the Court takes. You have no authorities for your proposition, and there is no case cited to me on either side, and in the absence of any authorities it seems to me that that should be the law, and I so decide and dismiss the petition. 10

Mr. Merrey—What is that?

The Court—I dismiss the petition. That is all there is to it, isn't it?

Mr. Merrey—No. We are asking them to prove, and if you say—

The Court—They have.

Mr. Merrey—Now, then I answer that, don't I?

The Court—You can if you like. 20

Mr. Merrey—Of course. I first except to your Honor's ruling.

The Court—Certainly I did not understand you wished to put in any testimony.

Mr. Merrey—Certainly, we will bring in testimony. Is the appointment, the original appointment of Mr. Barr admitted?

Mr. Weinberger—Nothing is admitted.

Mr. Kennedy—Yes, the original appointment is 30 admitted.

Mr. Merrey—That is, the appointment which he was serving when he was elected? May not that be made part of the record?

The Court—Yes. If there is anything that can be stipulated, let's do it.

XLVIII.

Proceedings in Court

Mr. Merrey—In the first part of the information it is stated, "In the month of February, 1929, Harry Heher, Chairman of the State Committee of the Democratic Party, did nominate Robert C. Barr as member of the County Board of Elections in and for the County of Passaic, and that Morgan F. Larson, Governor of the State of New Jersey, on the first day of March, Nineteen Twenty Nine commissioned Robert C. Barr as a member of the County Board of Elections of the County of Passaic, for the term of two years beginning on the first day of March, Nineteen Twenty-nine."

My recollection of the plea is that that section is admitted.

The Court—Is it admitted?

Mr. Weinberger—Yes, I think it is.

Mr. Merrey—Then we have Mr. Barr in office.

Mr. Kennedy—Paragraph one, two, three, and four are admitted.

Mr. Merrey—All right. Now, we have Mr. Barr admittedly in office for the term of two years, including the present time.

The Court—Do I understand that you admitted that the State Chairman of the Democratic Party nominated Mr. Barr to the Governor within time when—

Mr. Merrey—No. This is the regular appointment.

Mr. Kennedy—That is the regular appointment which he says became disqualified to hold.

Mr. Merrey—Then we have Mr. Barr admittedly in office under a valid appointment from March 1, 1929 for the term of two years.

XLIX.

Proceedings in Court

The Court—Well, this Act was passed within thirty days?

Mr. Merrey—Yes; this Act was passed right after that, April 30.

Now then, I ask your Honor to rule again. Having Mr. Barr in office, I say the burden is shifted upon them to show that he was put out of office. May we have a ruling on that?

Mr. Kennedy—If your Honor please, get the record right, so that there will be no misunderstanding. I would like to have it, first of all, that as far as Geldziler is concerned he has offered his commission, or it is admitted that he has a commission from the Governor. 10

Mr. Merrey—You offered that in the beginning.

Mr. Kennedy—Yes.

Mr. Merrey—Perhaps it ought to be marked. Then the Court ruling was made upon that offer.

The Court—Certainly. Now, the commission may be marked, Mr. Kelley. 20

(Paper marked exhibit R-1.)

The Court—What do you say to this proposition that the proof is shifted to you, with respect to the right of Mr. Barr?

Mr. Kennedy—My associate wants me to be certain that it is admitted on the record that Mr. Geldziler was duly qualified, took the oath of office, and duly qualified, and is serving at the time. 30

The Court—No question about that.

Mr. Kennedy—I understood that that was understood, but my associate wanted that.

Now, having offered in evidence, if your Honor please, Chapter 257 of the Laws of 1929—

The Court—I will take judicial notice of that. You do not need to offer that.

L.

Proceedings in Court

Mr. Kennedy—And we say by virtue of that enactment, Barr is ousted from office by the Legislature.

Mr. Merrey—They have not proved if Barr has any elective office.

The Court—Didn't you agree he was councilman? Don't the pleadings show that?

Mr. Kennedy—Certainly.

The Court—Is there any doubt about it?

10 Mr. Merrey—I don't know that they do. Let us look. We have so many cases—if you will pardon me.

The Court—That is so patent a fact that I think you might stipulate as to that.

Mr. Merrey—I wouldn't stipulate very readily, but I want to think—I do not want to shift my burden if I can help it.

The Court—All right.

20 Mr. Merrey—I see in the second provision here, that Barr was elected councilman. That is what it says, and they admit that he was.

Mr. Kennedy—Certainly. He was in office at the time this Act went into effect. He was actually qualified. Of course, if necessary, we have the City Clerk here, if you want formal proof.

Mr. Merrey—I mean, if you start your formal proof, I want you to finish it.

30 The Court—If there is any doubt about it, I think you better put your proof in that he was elected, and he was serving.

Mr. Kennedy—All right.

Mr. Merrey—I am not doing this to be technical.

Mr. Weinberger—I want to know if Mr. Merrey rests his case? It is not up to us to put in our defense at this time.

Proceedings in Court

The Court—That is the ruling he asked the Court to make, that is what I wanted to hear you on.

Mr. Kennedy—All right. Then suppose we call Mr. Lewis, the City Clerk.

The Court—I do not say you must. You are assuming that is true.

Mr. Kennedy—I thought you said I must.

The Court—No. That was Mr. Merrey's contention. I am asking you to reply to that.

Mr. Minturn—If your Honor please, I know your Honor will recall that we are confronted with three cases here. 10

The Court—Yes, we are only trying the Carr case.

Mr. Minturn—We are trying the citizen case, which I have argued. We produce the certificate of office, we produce our present status of the occupant of the office, and that is enough as against the citizen. Another question might arise—

The Court—Yes. 20

Mr. Minturn—That is the question my brother, Merrey, is endeavoring to inject at this time in this case, and I say that is improper in this case. This citizen has no right to know all these things; it is enough for him to know that we are serving under the legal authority of the Governor, so far as the commission is concerned.

The Court—I think that is correct, Mr. Merrey. How can you go any further than that, except by your proof, if need be, that the answer that the other side has given is not sufficient. You cannot shift it to them, it seems to me, and I will so rule. They have answered your information. 30

Mr. Merrey—Well, if the Court please, I except to your Honor's ruling.

The Court—You may have it noted.

LII.

Proceedings in Court

Mr. Merrey—I might say we are gradually working—Justice Minturn is gradually working us into the position where you may have to rule in the end that we have no right to come in here and question that, even though it is wrong, you see? That is where we are getting to. I know your Honor would not do that in the end.

The Court—You cannot be sure about that.

Mr. Merrey—I feel quite confident about that.

10 Mr. Minturn—You never can tell what a Court or a jury will do, Brother Merrey.

The Court—I am rather impressed with the proposition that the proofs that you are about to offer should be offered in the other cases. I think as far as this case is concerned, we are about through. That was my thought before.

Mr. Merrey—I understood your Honor to rule upon that.

20 The Court—Well, he asked them to permit him to put in some testimony on the question as to the propriety of it. I think the only question in the taxpayer's case—if there is any doubt about it, I do not want to be wrong about it but I am not any authority on quo warranto at all, as I told you before—if there is any doubt about it, I would rather reserve decision.

Mr. Merrey—Well, if the Court please—

30 The Court—Well, you submit no cases to me, and it seems to me that where the Attorney-General comes in through a citizen's suit, and asks by what authority he acts, that is answered by the commission, isn't it?

Mr. Merrey—If the Court please, they should have demurred to our plea, if that is their case, because, if your Honor is right, they should have simply said,

LIII.

Proceedings in Court

"This is a matter of law entirely." Now, if your Honor is going to rule that way, you might as well do it now. If we cannot show that the Governor—that these Acts which the statute says—if you won't listen to them—

The Court—I will reserve decision and hear you on that matter, if you wish to argue it now, or on brief, and if you wish you may move the case of Barr against Geldziler.

Mr. Merrey—Well, unless you rule right against me now, I must go and present my proof. I cannot stop. 10

The Court—No, not if I reserve my decision on the question of whether you can present any proof in the Carr case.

Mr. Merrey—I have Mr. Heher here. I did not want to bring him from Trenton.

The Court—That is the point of my suggestion that I will reserve decision on that, and you go on with the Barr case. I do not want to put him in an awkward position. 20

Mr. Minturn—On what point is your Honor reserving decision?

The Court—On the question as to whether we are not through with the Carr case, and whether he is not estopped from putting in any testimony to attack the commission. Whether that is not the answer to the whole Carr case. 30

Mr. Minturn—I think it is.

The Court—That is my thought, and he gave me no authority to the contrary, and he is trying to force me to rule, and I want to be right, and I am not sure I am right if I rule now.

LIV.

Proceedings in Court

Mr. Merrey—I would like a ruling promptly, because we can put this on next Monday on two days' notice before the Supreme Court.

The Court—I will rule now. I dismiss the petition in the Carr case.

Mr. Merrey—I except to your Honor's ruling.

The Court—You may have it noted.

10

20

30

LV.

Appearances

PASSAIC COUNTY CIRCUIT COURT

State of New Jersey, ex rel., Louis D. Carr, et al., vs. Samuel Geldziler, 	}	Plaintiff, Defendant.	Action at Law On Motion, etc.
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Paterson, N. J., March 19, 1930. 10

Before—

Hon. Newton H. Porter, Judge.

Appearances:

Edw. F. Merrey, Esq., for Relator.

Hon. James F. Minturn, Jos. J. Weinberger, Esq.,
 Thomas J. Kennedy, Esq., and James J. Murner, Esq., for Defendant.

20

On Motion before Porter, J.

The Court—(After extended argument by counsel) The court is asked by counsel for the relator, in the presence of counsel for the defendant, to reverse a ruling made in the first case tried, the Louis D. Carr case. Three cases were tried practically together, and most of the testimony was pertinent to each. In the Louis D. Carr case testimony offered by the relator was not allowed, the objection by the defendant of its incompetency being sustained. In the other two cases the testimony was allowed. The relator now moves that the testimony so given be considered as having also been allowed in the Louis D. Carr case insofar as it was applicable to that case. Counsel for the defendant consenting, the motion is granted. The court's ruling of dismissal of the petition is the same as made previously. 30

Discussion by Counsel

Mr. Weinberger—I want to show that quo warranto is not the proper remedy, that is all.

The Court—There is nothing in the pleadings.

Mr. Weinberger—I would like to have Mr. Merrey admit something once in awhile.

The Court—I do not think he needs do it.

Mr. Weinberger—I knew he wouldn't. 10

The Court—Well, I won't ask him too either, because it is not in the case, and hasn't anything to do with it.

HARRY HEHER, sworn.

Direct Examination by Mr. Merrey:

Q. Mr. Heher, do you occupy a position of any kind? A. Public position? 20

Q. Yes. A. I do.

Q. What is it? A. Chairman of the Democratic State Committee.

Q. How long have you been Chairman of the Democratic State Committee? A. Since 1922, I think, in the month of February.

Q. Sometime in July, or thereabouts, did you get a letter from the Governor of the State of New Jersey, concerning the office of the Board of Elections of the County of Passaic? A. Shortly before July 10th, a day or two before, a letter addressed to me, bearing date June 24th, was brought to my office. 30

Harry Heher—direct

The Court—1929?

The Witness—1929.

Q. Yes; and what was the effect of that letter?
A. Well, I have the letter here.

Q. Will you read it?

The Court—Whom was it addressed to?
Signed by whom?

10 The Witness—It was addressed to me
and apparently signed by the Secretary to
the Governor.

Q. Who is the Secretary to the Governor?
A. Thomas L. Hanson.

Q. Do you know him?
A. Oh, yes.

20 Mr. Merrey—Might I ask if Mr. Hanson
is here? I subpoenaed him.

Mr. Weinberger—He will be here.

Q. Will you read it?
A. "My dear Mr. Heher: Under the act of 1929, which prohibits a member of the County Board of Election from holding another elective office, there is a vacancy in the County Board of Elections in Passaic County in respect to Robert C. Barr. Will you kindly
30 forward me a nominee for this office, in order that the work of the County Board of Elections in this county might continue. Very truly yours, Thomas L. Hanson, Secretary to the Governor."

Q. Did you make any response to that?
A. I did.

Q. When?
A. As I stated, on July 10, 1929.

Harry Heher—direct

Mr. Merrey—I will ask that Mr. Hanson, who was under subpoena, and I have an affidavit of service on him, to produce the original letter.

The Court—Is Mr. Hanson here? Not here.

Mr. Merrey—Will you admit a copy? He informed us yesterday he would positively be here.

Mr. Weinberger—I won't admit anything 10
for the time being.

Mr. Merrey—There are other counsel. Talk to them.

Mr. Weinberger—We won't admit anything.

The Court—Do you all agree with Mr. Weinberger?

Mr. Kennedy—The reason we cannot admit it is he is attempting to prove a letter 20
sent to the witness, not the defendant in this case. I don't know anything about it.

The Court—The only question is whether in the absence of the witness, we might use a copy. He is under subpoena duces tecum. I will allow the copy to be used now, subject to being stricken out if he does not come and if it develops when he comes it is not in accordance with this 30
copy. You may read it with that understanding.

Mr. Weinberger—What is the date of the letter?

The Court—July 10th.

Mr. Merrey—July 16th.

The Court—He said the 10th.

Harry Heher—direct

A. Do you desire me to read it for you?

Q. Yes. A. "Thomas Hanson, Esquire—"

The Court—The Secretary to the Governor has sent word he is on his way. You may go on.

A. "Thomas Hanson, Esquire, Secretary to the Governor, Trenton, New Jersey. My dear Mr.

10 Hanson: In reference to your favor of 24th ult., regarding the vacancy in the County Board of Elections for Passaic County, I beg to say that such recommendation will be forwarded to you in the next few days. Your very truly."

Q. All right. Was there anything else after that? A. Any correspondence?

Q. Yes. A. Yes.

20 Mr. Merrey—Can this take the same course?

The Court—Oh, yes.

A. On July 16th, 1929.

The Court—That is a letter from you?

The Witness—From me to the Governor.

30

A. I addressed this letter to the Governor: "Honorable Morgan F. Larson, Governor of New Jersey, Trenton, New Jersey. Dear Governor: In accordance with your request I hereby appoint Mrs. Agnes V. Barr of 80 Union Avenue, Clifton, New Jersey, as a member of the Passaic County Board of Elections, to succeed Robert C. Barr. Mr. Han-

Harry Heher—direct

son recently advised me that it is your contention that under the Act recently passed by the legislature this office became vacant, and this appointment is in accordance with the request which he made. Yours very truly."

The Court—Was that the first nomination or appointment that you made to the vacant office?

The Witness—Yes.

10

Q. That is signed—pardon me. A. That was signed by me as Chairman of the Democratic State Committee.

Mr. Minturn—As I understand it, if your Honor please, the Democratic Chairman simply recommends.

The Court—He called it appointing. 20 That is why I used the word myself. In the letter to the Governor, he said, "I appoint."

The Witness—I understand the statute provides—

Mr. Merrey—What is that? It says nominate on his nomination. The Governor commissions. The Governor does not make the appointment. 30

The Court—He used the word "appoint" improperly. He should have followed the language of the statute, and nominated. I always like to instruct Democrats.

The Witness—Well, if I may be permitted, I construe the statute to require the

Harry Heher—direct

Chairman of the State Committee to make the appointment.

The Court—This is off the record. This is merely colloquy between a Republican and a Democrat.

Q. Did you hear from the Governor's office or the Governor afterwards about it? A. Yes. Miss Smith, one of the Secretaries to the Governor
10 called my office on the telephone.

Mr. Murner—This is objected to.

The Court—On what ground?

Mr. Murner—He is now endeavoring to ask did he hear from the Governor's office. What they told him, so far as we are concerned, the defendants in this case, is hearsay and it is not admissible.

20

The Court—I will allow it.

Mr. Murner—We have no way of contradicting it.

The Court—Yes; bring Miss Smith here.

Mr. Murner—We have had no notice of it.

The Court—You have now, and if you want it, I will adjourn it.

30

Mr. Murner—It is merely hearsay. It is not binding on us.

The Court—It won't influence the Court, if it is not proper.

Mr. Weinberger—May we have our objection noted on the record and an exception?

The Court—Yes. But only one at a time.

Harry Heher—direct

There are four of you and you may get me all mixed up.

Mr. Weinberger—All right. It needs four to watch them.

A. Miss Smith, whom I know to be one of the Governor's Secretaries called my office on the telephone and said that the Governor's office desired the formal resignation of Mr. Barr. That information was conveyed to me, and on August 1, 10 1929—

The Court—When? Do you know about when?

A. Well, I cannot—I have no way of fixing the date. The letter of appointment bore date July 16th, and the next letter bore date August 1st.

20

The Court—Sometime between July 16th and August 1st, Miss Smith had this communication by telephone with you?

The Witness—Yes; I am quite sure only a day or two or three days. I sent the letter on August 1st. I thereupon, on that day, August 1st, sent this letter to Mr. Hanson, "Thomas Hanson, Esquire, Secretary to the Governor, Trenton, New Jersey, Dear 30 Mr. Hanson: In accordance with your suggestion and on the theory that a vacancy exists, I appointed Mrs. Agnes V. Barr, as a member of the Passaic County Board of Elections to succeed Mr. Robert C. Barr. After I forwarded this appointment to

Harry Heher—direct

10 your office, Miss Smith sent word to my office that a resignation of Mr. Robert C. Barr should be forwarded to your office. My information is that Mr. Barr contends that he has not lost membership in the board, and that therefore no vacancy exists. He has not forwarded the resignation to me, and I do not see how I can compel it. I made the appointment as you suggested, because you contended that a vacancy had occurred. Under the circumstances, therefore, I do not see that I can do anything further in the matter. Yours very truly."

Q. Was that signed by you? A. I signed that.

Q. How were these letters sent, Mr. Heber?
20 A. By mail.

Mr. Merrey—Now, I ask leave of the Court to have the originals marked when they are produced by Mr. Hanson.

The Court—They will be marked. Is that all?

A. There was subsequent correspondence. You
30 asked me if there was any more?

Q. Yes. Well, I do not want to take something that may not be an issue in this case.

The Court—That was an argument between you and the Governor, or the Governor's Secretary as to the propriety of your action and his action?

Harry Heher—direct

The Witness—I asked the Governor why.

The Court—We are not interested in that.

Q. You mean about the last September 26th?

A. Yes.

Mr. Merrey—I think he would not let us put that in.

The Court—I think not. I can imagine 10 what they were.

Mr. Merrey—It was concerning newspaper articles.

The Court—Yes.

Q. However— A. Well, in the letter the Governor's Secretary sent to me—

Mr. Murner—We are objecting to this. 20

The Court—Objection sustained.

Mr. Merrey—I think that perhaps we ought to put this letter in, because this is the letter direct to the Governor.

The Court—A letter from him to the Governor?

Mr. Merrey—A letter from Mr. Heher to the Governor of New Jersey. It recites the facts of what happened. No answer has 30 been received by Mr. Heher and no denial that those facts were true.

A. Well, there was a reply.

Q. There was? A. I have it here. That is what I attempted to say and objection was made.

Harry Heher—direct

The Court—I know. But this is all, as I understand it, from Mr. Heher—a letter from Mr. Heher to the Governor or to the Governor's Secretary, in which he explains his position, and a reply from the Governor in which he explains his; isn't that it?

Mr. Merrey—I don't know that the Governor explains his position.

10 The Witness—Yes, he assigned a reason for his action.

The Court—I don't know.

Mr. Merrey—I think we ought to put it in.

The Court—I don't know.

Mr. Kennedy—I object to it.

The Court—I will allow it.

Mr. Weinberger—How is it binding on us, the Governor's reason?

20 Mr. Merrey—You are standing behind the Governor's paper.

The Court—There is no jury here.

Mr. Weinberger—All right, over our objection.

The Court—I cannot rule on it properly, because I don't know what it is yet. I will hear it and then rule.

30 Mr. Merrey—It is undoubtedly corroboration of Mr. Heher's statement that he made the nomination and so on.

The Court—It may be.

Mr. Weinberger—That is a self-serving declaration.

Mr. Merrey—By the Governor.

Mr. Weinberger—By Mr. Heher.

The Court—You may read it .

Harry Heher—direct

The Witness—Shall I read the letter that I sent to the Governor.

The Court—If you please.

A. It was dated September 26, 1929.

The Court—Is this to the Governor?

A. "To the Governor. Honorable Morgan F. Larson, Governor of New Jersey."

10

Mr. Kennedy—That is long after they allege their appointment. How is that fair?

The Court—I cannot tell you. I will answer that when it is read. Do you know what is in it?

Mr. Kennedy—No, sir. They allege their appointment was made in July. What happened subsequent to that has no bearing.

20

The Court—I will rule on it after I have heard it read.

A. "Honorable Morgan F. Larson, Governor of New Jersey, Trenton, New Jersey, Honorable Dear Sir:

I am in receipt of news articles clipped from Paterson papers asserting that your office is responsible for the statement that you appointed Mr. Samuel Geldziler as a member of the Passaic County Board of Elections to succeed Robert C. Barr, because of my failure to nominate a candidate to succeed him. This statement being contrary to fact, I am at a loss to understand it.

30

Your secretary called my attention by letter to the Act of 1929, which in your judgment made Mr.

Harry Heher—direct

Barr ineligible to continue as a member of the County Board of Elections, and requested that I nominate his successor. I thereupon investigated that matter, and on July 16, advised you, likewise by letter, of my appointment of Mrs. Agnes V. Barr, as a member of said Board. My letter notifying you of the appointment stated that:

10 'Mr. Hanson recently advised me that it is your contention that under the Act recently passed by the Legislature, this office became vacant, and this appointment is in accordance with the request which he made.'

While receipt of this letter was not formally acknowledged, Miss Smith of your office, called my office on the telephone later, acknowledged receipt of the letter, and requested that, in order to clear the record, I secure the resignation of Robert C. Barr, as a member of the abovementioned
20 board and forward it to your office. On August 1, I advised your Secretary by letter, that it was Mr. Barr's contention that he had not lost membership in the board, and that therefore no vacancy existed; that he had not forwarded his resignation to me, and I did not see how I could compel it; that I made the appointment in accordance with your suggestion, because you contended that a vacancy had occurred.

30 I am sure you will agree that, in fairness to me, the facts should be fully and correctly stated. The news articles in question carry the clear implication that I was in default in the performance of my official duties, and I felt that in the circumstances you would be willing to clear up the misunderstanding that had resulted from the news articles in question. I am sure you will not regard

Harry Heher—direct

as presumptuous a request that I be advised of the reason which prompted the rejection of the nomination of Mrs. Barr. Yours sincerely." Signed by me.

On October 2, 1929, this letter was forwarded to me by the Secretary of the Governor: "My dear Mr. Heher:

Replying to your recent letter to the Governor, concerning the appointment to the Passaic County Board of Elections, the statement given to the 10 newspapers explicitly said that you had recommended Mrs. Barr's name, but that subsequently we were advised by you that Mr. Barr would not resign, claiming that there was not vacancy, which left no other alternative than litigation, and it would be foolhardy on the part of this office to appoint a wife to succeed a husband to an office the title was in dispute. Very truly yours, Thomas L. Hanson, Secretary to the Governor." 20

Mr. Weinberger—Of course, we object, and ask that it be stricken out as not binding on us and ask that it be overruled.

The Court—I will allow it.

Mr. Weinberger—Allow an exception.

The Court—You may have one.

Mr. Weinberger—Not being too late? 30

The Court—No, sir.

Mr. Merrey—I think that is all.

The Court—There is not anything really in either of them that was not already before the Court.

Mr. Merrey—You may cross-examine.

Mr. Minturn—No questions.

Harry Heher—direct

Mr. Murner—No questions.

Mr. Merrey—We rest our case.

Relator Rests.

DEFENDANT'S TESTIMONY

The Court—Any evidence in reply?

10 Mr. Murner—If the Court please, do I understand that Mr. Merrey has rested his case.

The Court—He has.

Mr. Murner—Of course, Mr. Heher has testified, as your Honor knows, that on June 24, 1929, or just prior to that, a couple of days, one or two, before June 24, 1929, he had notice that there was a vacancy existing in the office of membership in the Passaic County Board of Elections.

20

Mr. Merrey—I think the testimony ought to be read, if he thinks that.

The Court—No, he did not say that.

Mr. Murner—He said a day or two before that he had notice of this vacancy.

The Court—I did not understand him to say so.

30

Mr. Murner—That is my understanding, sir.

Mr. Merrey—He did not say that.

Mr. Murner—Well, regardless of whether or not he said it, he did say on the 24th day of June, 1929, he received a notice in writing.

Mr. Merrey—No, he did not.

Mr. Murner—Yes, he did, he read that letter.

Harry Heher—cross

Mr. Merrey—He said he did not get that letter until one or two days before July 10th.

Mr. Murner—No.

Mr. Heher—I do not know that I fixed the date. May I take the stand?

The Court—You may come back.

Mr. Murner—I would like to read his testimony. I will ask the court stenographer to read his testimony. 10

Mr. Heher—I would like to explain.

The Court—Wait a minute.

(Testimony read by reporter.)

The Court—Mr. Merrey is right.

Mr. Murner—A letter bearing date June 24th.

Mr. Weinberger—I understood him a letter dated June 24th.

The Court—He says so yet. 20

Mr. Murner—And he did not get it until—

The Court—Shortly before July 10th. Do you want to cross-examine him?

Mr. Weinberger—Yes.

HARRY HEHER, recalled.

30

Cross Examination by Mr. Weinberger:

Q. Mr. Heher, where was your office?

The Court—Are you going to examine?

Mr. Weinberger—If I may examine this witness.

Harry Heher—cross

Mr. Merrey—Didn't they waive that cross examination?

The Court—I will permit it.

Q. Where was your office on June 24, 1929?

A. Trenton.

Q. Where did you receive that letter? A. Well, I received that letter at my office, of course.

Q. Was it post-marked Trenton, or didn't you see the envelope? A. No, I didn't see the envelope.

Q. It was torn? A. Well, I never received the envelope. My secretary—

Q. You don't know—

The Court—Let him finish.

A. My secretary opens my mail and delivers the enclosures to me and I do not see the envelopes.

Q. You don't know whether or not, Mr. Heher, that letter was not received by you at your office or someone in charge of your office on the 24th of June, 1929? A. Well, I assume it was not. It could not possibly be received until the next day. It was dated—

Q. I mean the 25th of June? A. Yes; I cannot say when it was received because I don't know.

Q. I assume you are a busy man, going to all parts of the state, and sometimes you don't come back to your office. A. I was very busy at that time.

Q. Do you keep a diary? A. No.

Q. Were you at Trenton on the 24th of June?

A. I could not say. The month of June is always a busy month for me, because of the number of

Harry Heher—cross

cases that come up in the various courts in which I practice, prior to the opening of the summer vacation, and I was out of town a great deal trying cases, and I was out of town in June trying cases, but I kept in contact, and I couldn't tell you what days.

Q. You might have, when that letter came, just pushed it aside? A. No; I am quite sure I did not receive that letter. Either one or two days before.

Q. Can you— A. Wait until I answer the question. 10

The Court—Wait.

A. I have no record of the date when I actually received it, because I made no note of it, but I have been chairman of the State Committee since 1922 and I know of that provision requiring a vacancy 20 to be filled in ten days.

Q. I am not asking you about the filling.

The Court—You asked him why he knows when he got it and I think it is pertinent.

A. I know that I acted on that letter within not more than three or four days after it was brought to my attention. 30

Q. How long it laid in your office, whether it was the 24th of June or the 25th of June, you don't know? A. Oh, no.

Q. But when you found time to look at your mail, you saw such a letter on your desk, which you read, is that right? A. Well, I am telling you probably three or four days before I sent the reply, I saw that letter.

Harry Heher—cross

Q. You saw the letter? A. Yes; and then I took time to examine the statute.

Q. Do you stamp a letter when you receive it?

A. No.

Q. Eh? A. No.

Q. None at all? A. No; we never done that.

Q. Don't put a stamp on that when a letter comes into your office? A. No, sir; that has never been done in my office.

10 Q. Whether it laid on your desk you don't know? A. No.

Q. From June 25th on? A. I couldn't tell you, because I don't know.

Q. You don't know whether it reached your office on the 24th of June or on the 25th of June? A. Of course, I don't know.

20 Q. You would not swear under oath as a lawyer, would you, as any other witness—withdraw that. You would not testify today that you did not receive that letter on the 25th of June?

The Court—He has already said so.

Mr. Weinberger—He did not say it.

The Court—Yes; he did. He said he did not receive personally until two or three days before.

30 A. I am quite sure I did not receive it personally, but I would not say it did not reach my office on the 25th.

Q. Oh, you wouldn't say it did not reach your office? A. Of course, not.

The Court—How could he?

Harry Heher—cross

Q. Who is your secretary? A. Well, I have two.

Q. What are their names? A. Mrs. Anna Seabridge and Paul Bransitt.

Q. Which one handles your mail? A. Mrs. Seabridge usually.

Q. Who called this to your attention? A. Well, the letter was on my desk with other mail; I don't know who laid it there.

Q. How long it laid there, you don't know? A. 10
No, I can't tell you that.

Q. You don't read the Paterson newspapers do you? A. No.

Q. When you received that letter, you say—I mean when you saw the letter for the first time, you put no stock in that letter, because you knew—
A. I don't understand that question.

Q. Well, you paid no attention to the letter, because you knew Mr. Robert Barr had been appointed by the Governor, the office was filled? A. Well, 20
I knew that I had nominated Mr. Barr to the Governor.

Q. Answer the question.

The Court—Hold on!

A. I knew I had nominated Mr. Barr to the Governor for a term of two years, a month or two before. 30

Q. Yes; and therefore, being interested in politics as you are, you took the trouble to find out that he had qualified, didn't you, and got a commission? A. No, sir, I did not.

Q. Oh, weren't you interested? A. I did not take the trouble to ascertain that. I made the nom-

Harry Heher—cross

ination and the Governor appointed every one that I nominated; at least, I was not informed to the contrary, and I paid no further attention to it.

Q. And therefore you paid no attention when you got this notice from the Governor? A. I am telling you what attention I paid to it. I have already stated that.

Q. You don't know what date the letter was received at your office? A. No, sir, I do not.

10 Q. You don't know whether it was June 24th or 25th? A. I do not.

Q. But the first thing you did was a day or two before July 10th? A. It might have been three or four.

Q. Now, it is three or four. A. I cannot fix the date. I have stated that. I made no record of it.

20 Q. Well, you sent the name of Mrs. Barr to the Governor on what day? Or don't you know that? A. Well, the letter—I think it is dated July 16th.

Q. When did you send it? A. On that day. I assume it was sent from my office.

Q. Do you read your mail every day? A. No.

Q. Eh?

The Court—No.

30 A. I do not.

Q. How often do you read it? A. It depends on whether I am in town.

Q. How often are you out of town? A. Now, I can't tell you that. I know—

Q. Well, how often were you out of town in June? From June 24th to July 16, 1929? A. My recollection is several days during that month.

Q. Keep a diary? A. I do not.

Harry Heher—cross

Q. Keep a court diary when you go to court?
A. No, sir, I do not.

Q. Did you try any cases that week, June 24th?
A. I tried several cases that month.

Q. Don't you keep a record in a book of the cases you try and what courts you have got to go to?
A. No, sir.

Q. You do not? A. No.

Q. How do you remember that? A. My Secretary advises me of that.

Q. Hasn't she a diary? A. I assume she keeps a record of it.

Q. Do you know whether you were in your office that day? A. Which day?

Q. June 24th or 25th? A. No, I don't know.

Q. You might have seen the letter, if you don't know whether you were in your office or not and you had those letters on your desk. A. My recollection is that I acted on that letter within three or four days after it was brought to my attention.

Q. Mr. Heher, you are a busy man? A. I told you I do not remember it. I was personally concerned only in the examination of this law to see what the effect was, and then I wrote the letter to the Governor.

Q. Mr. Heher, you are a busy man, with thousands of people asking you to do favors,—politicians and heelers from all kinds of cases, aren't you? Am I right or wrong?

Mr. Merrey—Is that a statement?

Q. Am I right or wrong—withdraw it.

Q. You have several hundred people to interview during the week, don't you? A. I don't know about that.

Harry Heher—cross

Q. At times? A. A great many people, no doubt about it.

Q. You get a great many letters? A. Yes, sir.

Q. And you stack them up on your desk? A. I guess that is it at times.

Q. You guess that is it. Well, whether that letter was there on June 25th and you saw it or not, you don't know? A. No; I said that I—

Q. I mean with certainty, Mr. Heher. A. I made no record of the date when I first saw the letter.

Q. Certainly not. A. My recollection is that I acted within three or four days—

Q. Well, your recollection may be bad?

The Court—Let him answer the question.

A. Because I was familiar with the provision of the law with regard to vacancies to be filled in ten days. I had filled several vacancies during my incumbency as Chairman of the State Committee.

Q. Mr. Heher, your recollection may be bad, because you don't know what cases you tried during the week?

Mr. Merrey—I object to that. What right has counsel to say that?

Mr. Weinberger—I withdraw it.

Q. Might not your recollection be bad?

The Court—I might say it won't have any influence with the Court.

Mr. Merrey—I know it would not.

The Court—You are wasting time. I think Mr. Heher's recollection is probably very good. Anything more?

Harry Heher—cross

The Witness—I think that is enough.

Mr. Weinberger—One more thing.

The Court—No jury here, you know. Mr. Heher and I are old friends.

Q. Mr. Heher, were you in your office on June 24th to July 1st, any day? A. You mean every day?

Q. Any day. A. Oh, I assume I was there on some day. I am quite sure of that, although I could not fix the date. 10

Q. How many times, Mr. Heher? A. Was I in my office during that week?

Q. Yes. A. I couldn't answer that. I don't know.

Q. A hundred?

The Court—He cannot say, he says.

20

Q. Would you look at your mail when you came in every day when you were there? A. No, many days I did not find time to go to the office at all.

Q. Didn't you pay any attention to mail? A. Yes, sir.

Q. Aren't you interested in the mail that comes in? A. I am.

Q. Some days you go there and you don't look at your mail? A. I say that on many days I am required to be out of town or away from the office. Very often when I reach my office in the morning I have to talk to people and then I must leave for Court, and if I don't find time to look at my mail, I don't do it, because I can't do it. 30

Q. Well, from June 24th, or June 25th until July 1st, did you look at your mail? A. Oh, I assume so, though I cannot answer that definitely, I don't know.

Harry Heher—cross

Q. Was this letter among them? A. I have no recollection of that.

Q. That is all.

Mr. Merrey—Is that all?

Q. Just a minute. Did you mail the letter to the Governor? A. No.

Q. That is all.

10

Mr. Merrey—Is that all?

The Court—Anything more, Mr. Merrey?

Mr. Merrey—No.

Mr. Murner—Now, if your Honor please,—

20

The Court—The Governor's Secretary is here, I take it, Mr. Hanson. Will you produce some letters that have been subpoenaed, July 10th—or rather, July 16th, I guess it is—yes, July 10th and July 16th, Mr. Heher to you or to the Governor.

Mr. Hanson—I have a letter of July 10th, but I have not the letter of July 16th and I was unable to locate it.

The Court—Have you looked for it?

Mr. Hanson—Yes.

30

The Court—Cannot locate it?

Mr. Hanson—No.

The Court—Do you remember it?

Thomas L. Hanson—direct

Mr. Hanson—Yes, I recall the letter.

The Court—Very well. Let the letter of July 10th be produced.

Mr. Merrey—He is here and I think we better put it on the record and let him be sworn.

THOMAS L. HANSON, sworn.

10

Direct Examination by Mr. Merrey:

Q. Would you mind letting me see the letters?

A. Yes, that is the whole file.

Q. The only one is the 16th? A. Yes.

Q. Mr. Hanson, you are Secretary to the Governor? A. I am.

Q. Do you remember receiving a letter from Harry Heher of July 10th, which you were subpoenaed to bring here? A. Yes.

20

Q. Did you look for it among the files? A. Yes.

Q. Cannot find it? A. I have the letter of July 10th.

Q. I mean July 16th? A. July 16th, I looked for it, but I cannot find it.

The Court—But you do recall receiving a letter—that letter.

The Witness—Oh, yes.

30

The Court—What was that date?

Mr. Merrey—Can I show you this and ask you if this is a copy of it?

The Court—Yes.

(Witness examines paper.)

A. Yes, that is a copy of the letter.

Thomas L. Hanson—cross

The Court—In other words, you were advised by Mr. Heher that he appointed a Mrs. Barr to this office?

The Witness—That is right, yes, sir.

The Court—Very well.

Mr. Merrey—That is all.

The Court—If you have no objection, I will allow the Secretary to take back the original. Is there any objection?

10 Mr. Merrey—We have copies of those.

The Court—Any objection to that?

Mr. Murner—Which letter?

The Court—The only letter he brings is the original of July 10th.

The Witness—And September 26th.

Mr. Murner—Both of which Mr. Heher wrote?

The Witness—Yes.

20 The Court—Very well, you may take them back with you, Mr. Heher.

Cross Examination by Mr. Weinberger:

Q. You mailed the letter on June 24th?

Mr. Merrey—I object to that. That is not cross examination.

30 Mr. Weinberger—Trust me to know.

Mr. Merrey—I suppose you do.

The Court—I will sustain the objection.

Mr. Weinberger—I won't press you at this time. I will call him as our witness.

The Court—All right. Stay around. I was trying to get rid of you.

Mr. Merrey—That is our case. We rest.

*Motion for Dismissal***MOTION FOR DISMISSAL**

Mr. Murner—I would like at this time to move for a dismissal of the proceedings, on the ground that they have not established that Mrs. Barr was commissioned by the Governor, as the Act requires.

The Court—Motion denied on that ground.

Mr. Murner—Your Honor, allow an exception?

The Court—You may have it.

10

Mr. Murner—Number two, on the ground that on the testimony that has been used before your Honor, as part of their case, there is no proof that the Governor was notified of any nomination by Mr. Heher, the Chairman of the Democratic State Committee, within the period of ten days that the Act requires. Mr. Heher says this, that three or four days before the tenth day of July, and he won't say for sure it was not on the first day of 20 July, he received this communication from the Governor, in which it advised them that there was a vacancy existent in this County, calling upon him to make a nomination; that on the 10th day of July, he wrote to the Governor and said that he would send him a nomination within the next few days; then on July 16th they state that he dictated a letter in which he endeavored to make a nomination. If it was delivered to the Governor 30 on the 16th day of July, there is no proof before your Honor that it is within the ten days that the statute provides.

The Court—There is no question but what it was received by the Governor, because that is the testimony of Mr. Hanson.

Mr. Murner—But it is important, if your Honor

Motion for Dismissal

please, that it be done in accordance with the statute that provides it must be done within ten days.

The Court—That may be, but why raise a question of fact when there is no question of fact on the receipt of that letter?

Mr. Murner—If that is so, and the testimony is as I have stated that it is, the law is that Mr. Heher had no right to make a nomination after the ten days.

10

The Court—In other words, from the ten days from the time that the statute was enacted, Mr. Heher must have nominated, or he was through; is that right?

Mr. Weinberger—No.

20

Mr. Murner—We do not contend that. If your Honor please, the Act does not say who shall notify him. It says after notification of a vacancy he shall within ten days after notice. Now, we contend that the Act of itself—the fact that Mr. Barr qualified to an office—he knew of it. He knew he was a Councilman. That when this act was passed, that that was public notice. He knew he was in office, and he knew that within ten days after that, he would be required to fill the vacancy. But in addition to that, that he received on the date of June 24th, a communication—when, he will not say.

30

He will say that it was prior to July 10th, three or four days. He would not say he did not receive it on the first day of July. But if it was four days before that time, the testimony that they adduced here is to this effect, that it was on July 16th, he dictated a letter. That still doesn't comply with the provisions of the statute. He complied with that regarding the Chairman of the State Committee, to notify the Governor. Mr. Heher, on the

Motion for Dismissal

contrary, says he did not—and I have the letter—he doesn't say he notified the Governor. There is no proof here that he did notify the Governor within the ten days that the Statute requires, and I say under the law we are entitled at this time to have a dismissal.

The Court—He did not think the Governor would be in such a hurry.

Mr. Murner—No, but he was.

Mr. Merrey—He did not make any nomination 10
himself for a month after.

Mr. Murner—He took that. Those are the facts and undisputed. That is their testimony, that there was a receipt of a notice. It might have been on July 1st. Mr. Heher don't know it was not. He says he doesn't remember. Then on July 16th, he says he dictated a letter. He still does not say that he notified the Governor as the law requires. It says here: "In case of a vacancy arising in any 20
of the County Boards of Election from any cause other than expiration of time, the Governor shall be forthwith notified."

Mr. Merrey—By whom?

Mr. Murner—"Notice of such vacancy to be given to the Chairman of the State Democratic Committee, and such Chairman shall not later than ten days thereafter nominate a successor." Now, then, if the Court please, they have testified here as part 30
of their case that it might have been on July 1st.

The Court—Do not waste any more time about that, because I am quite satisfied from Mr. Heher's testimony that it is a fact that he actually received the letter of June 24th, a few days before he answered it on July 10th. He says that repeatedly and you gentlemen with all of your ingenuity could not get him to change his story.

Motion for Dismissal

Mr. Murner—But, nevertheless, that is really, if your Honor please, the letter of July 10th.

The Court—So when he got actual notice of the vacancy, I have no doubt was a few days before he replied to the letter.

Mr. Murner—That was on July 10th.

The Court—When he replied.

Mr. Murner—He said he did not make a nomination until July 16th.

10 The Court—That is correct.

Mr. Murner—Now then, he does not say that he notified the Governor as the Act requires. The Act says that such Chairman shall not later than ten days after nominate a successor who shall thereupon be commissioned by the Governor.

Mr. Merrey—It doesn't say the Governor shall notify him.

20 Mr. Murner—Who was he going to send it to, some Justice of the Peace in Weehawken?

The Court—I will have to look at the statute. I will reserve decision. Do you wish to be heard?

Mr. Weinberger—He doesn't even testify he mailed the letter.

The Court—He doesn't have to. He received it.

Mr. Weinberger—He might have received it on the 25th of November.

The Court—July 16.

30 Mr. Weinberger—No; that is the date of the letter.

The Court—I haven't any doubt about that. This case is not going to be decided on the supposition that Mr. Heher sent a letter on July 16th and the Governor never got it.

Mr. Weinberger—If you argue that way—

Mr. Merrey—May I proceed?

Motion for Dismissal

Mr. Weinberger—Mr. Barr's letter which he received, dated the 16th—he letter Heher sent out—the letter he says he sent out was dated July 16th to the Governor. Your Honor says that you are not going to suppose that letter might take five or six days or ten days or ten months. Then your Honor must bear this in mind, Mr. Merrey offered in evidence a letter dated June 24th that Mr. Heher got. Now, if your Honor is going to say that it doesn't take any more time to get from Mr. Heher's office to the Governor's office— 10

The Court—There is no dispute about the fact that the letter the Governor received was received in Mr. Heher's office promptly. Mr. Heher does not attempt to say it was not. He says it probably was, but it was not received by him, it was not called to his notice, until a few days before the 10th of July. There is no mistake about that.

Mr. Weinberger—If your Honor please, I think that that is constructive notice when a letter is sent to a man and he lets the letter lay on his desk. 20

The Court—Do not let us waste so much time about facts that are as clear as noonday sun.

Mr. Weinberger—All right.

The Court—The facts are not in dispute. What the law might be, whether he must have actual notice, or from whom, I cannot say until I look at it. Do you want to be heard, Mr. Merrey? 30

Mr. Merrey—In this subject?

The Court—Yes.

Mr. Merrey—I think counsel is begging the question, because there is nothing in the Act which says it is ten days after the Governor does it. There is nothing there that says the Governor is to notify Mr. Heher at all. We proved what happened.

Thomas L. Hanson—direct

The Court—I do not believe the statute meant to put any such responsibility on the Governor.

Mr. Merrey—I think on this kind of County Board, the remaining members would take notice of the vacancy.

The Court—I do not think the Governor had to. I think Mr. Weinberger contends that.

Mr. Merrey—The thing is this: Mr. Heher did it, and there was correspondence afterwards between them.

10 The Court—If the Legislature did not say who was to give the notice, how am I to know who was to give it? You gentlemen say that the Legislature was silent as to who was to give the notice?

Mr. Merrey—Yes.

The Court—How do I know who was to give it?

Mr. Merrey—I don't know.

The Court—No idea about it?

20 Mr. Merrey—No, sir.

The Court—Do you want to put in a defense?

Mr. Weinberger—Certainly.

THOMAS L. HANSON, recalled.

Direct Examination by Mr. Murner:

30 Q. Mr. Hanson, as Secretary to the Governor of the State of New Jersey, did you notify Mr. Harry Heher, the Chairman of the Democratic State Committee, of the fact that a vacancy existed in a membership in the Passaic County Board of Elections?

A. I did.

Q. When did you do that? A. By letter dated June 24, 1929.

Q. Did you after that receive any nomination

Thomas L. Hanson—direct

from Mr. Heher to fill that vacancy? A. Well, the Governor's office was notified by Mr. Heher of a nomination.

Q. That was when? A. Letter of July 16th.

Q. You don't remember when that was received?

A. I don't know the date, no.

Q. It was not received before July 16th? A. No, no.

Q. That is all.

10

Mr. Merrey—I have no questions.

By the Court:

Q. Of course, you don't know of your own knowledge when your letter of June 24th was mailed either? You did not mail it personally?

A. I did not mail it personally. It went out on that day.

Q. You assume it went out in due course? A. 20
I assume it went out that evening, yes.

Mr. Murner—May it be agreed to expedite the thing, that we proved the commission once more, and the oath of office?

The Court—No dispute about the oath of office.

Mr. Merrey—I do not think there is. I do not make any dispute about it. 30

The Court—It is understood and agreed that the Governor commissioned Mr. Geldziler and he qualified by taking the necessary oath of office and has been exercising the duties of the office since. Do you rest?

Mr. Murner—We rest.

The Court—The court will reserve decision.

6 MAY. 7. 1931

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY

ex rel., LOUIS D. CARR,

Relator

vs.

SAMUEL GELDZILER,

Defendant

Quo Warranto

On Appeal

from the

Supreme Court

Brief of Edward F. Merrey, of Counsel with Relator

STATEMENT

The information in this case issues to test the right of Samuel Geldziler to hold the office of a member of the Board of County Board of Elections of the County of Passaic. It issues in the name of the Attorney-General at the relation of Louis D. Carr, who was given permission to exhibit by Justice Black under the provisions of Section 1 of the Quo Warranto Act. (C. S. 4210.)

This suit is one of three brought to test the right of Geldziler to hold said office. One case is brought by Robert C. Barr and another by Agnes V. Barr, both of whom claim the office. Both these cases are brought under the fourth section of the Quo Warranto Act and the defendant in each case has tried to raise the question that the office in question is not a municipal one, and that for that reason quo warranto will not lie und-

er the fourth section. Upon this question being suggested, the relator in this proceeding in order that the matter might be decided on the merits and not on a technical question of procedure, applied to Justice Black and received permission under the first section to exhibit the information in this case. Under the first section of the Quo Warranto Act, there is no limitation as to the character of the office. Since all the questions presented in this case are fully argued in the briefs submitted into the other two cases, it would only be repetition to present them here.

We respectfully request that the court consider the arguments presented in the briefs of counsel for relator in the cases argued herewith of Agnes V. Barr vs Geldziler, and Robert C. Barr vs Geldziler as having been made herein. We print here merely the points made so as not to be considered as having waived the same.

SPECIFICATION

We claim,

1. The defendant is not entitled to the office.
2. The Governor had no power to fill the office in that no vacancy existed at the time he made the appointment.
3. If a vacancy existed in the office, the Governor was obliged to commission Agnes V. Barr, the nominee of the State Chairman.

ARGUMENT

I

THE NOTICE TO THE STATE CHAIRMAN
FROM THE SECRETARY OF THE GOVERNOR
WAS NOT THE NOTICE CONTEMPLATED BY

THE STATUTE

II

THE APPOINTMENT OF AGNES V. BARR WAS
MADE BY THE STATE CHAIRMAN WITHIN
TEN DAYS AFTER THE ACTUAL RECEIPT OF

NOTICE FROM THE GOVERNOR

III

THE CHAIRMAN'S RIGHT TO NOMINATE DID
NOT EXPIRE UNTIL THE GOVERNOR MADE

AN APPOINTMENT

IV

THE OFFICE OF ROBERT C. BARR WAS NOT
VACATED BY THE ACT OF APRIL 30TH, 1929

Respectfully submitted,
EDWARD F. MERREY
OF COUNSEL WITH RELATOR

THE STATE OF NEW YORK
IN SENATE
JANUARY 1, 1891.

REPORT
OF THE
COMMISSIONER OF THE LAND OFFICE
FOR THE YEAR 1890.

ALBANY:
PUBLISHED BY THE
J. B. LIPPINCOTT COMPANY,
1891.

THE OFFICE OF THE COMMISSIONER OF THE LAND OFFICE
IS LOCATED AT ALBANY, N. Y.

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**ANSWER TO BRIEF OF DEFENDANT-
RESPONDENT**

Counsel for the defendant-respondent under point 1 insists: first, that the question involved in this case is a moot question; and, second, that our side delayed in pursuing the appeal. It seems to us that counsel is unfair in these statements. *The question involved is not a moot question.* While the office in question has expired, the respondent must know that he was unable to collect any salary from the County of Passaic which now holds the sum of \$2,916.55 to abide the result of this suit. Even if the County had not retained the money but had paid it to the respondent, he would have had to return it if unsuccessful here. We cannot understand the claim made in the brief that this is a moot question.

We have not delayed in bringing on this appeal. The rule for judgment was entered April 15th, 1930, and was not served on relator's counsel for some time thereafter. The notice of appeal was dated July 9th, 1930. The printed state of the case was served on counsel for respondent on August 19th, 1930. Our briefs were served on the respondent on October 6th, 1930. The earliest the appeal could have been brought on for hearing was the October Term, 1930. The case was noticed for hearing at that term but the acknowledged service of notice reached the Secretary of State's office too late to be put on the printed list. Counsels were present and agreed that the case should be submitted on brief, but the court

announced that no case would be taken up beyond 100. The proper number of the case would have been over 200. It therefore could not be heard even had it been on the printed list. The case was then on the list again for the February Term, 1931, and another agreement was made that it be argued on brief and briefs of all parties were filed but it was not reached, as it was still above No. 100 and went over again to the May Term, 1931.

There has therefore been no delay on our part in bringing the matter to hearing.

Respectfully submitted,

EDWARD F. MERREY,
Counsel for Relator-Appellant.

6 MAY. 1. 1931

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY *ex rel.*,
LOUIS D. CARR,
Relator-Appellant,

v.

SAMUEL GELDZILER,
Defendant-Respondent.

In the Nature of
Quo Warranto.

On Appeal from
Supreme Court.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT.

Statement of Facts.

The information in this case issued to test the right of Samuel Geldziler to hold the office of a member of the Passaic County Board of Elections. By consent of all the parties, a jury was waived and this action, together with two other related actions were tried before Honorable Newton H. Porter, Judge of the Passaic County Circuit Court, to whom the cases were referred by the Justice of the Supreme Court holding such Circuit Court, without a jury.

It is to be observed that this action is one of three related actions brought simultaneously with two others by Agnes V. Barr and Robert C. Barr. All three actions deal with the same office, present common questions of law and fact and, in general, rest upon common grounds. They were all tried together in the lower court and all were decided favorably for the defendant-appellee. Robert C. Barr is the husband of Agnes V. Barr, the relator in another action. Each claims the same office as

against Samuel Geldziler. One of the Barrs must obviously fail, assuming of course that Mr. Geldziler is not entitled to the office; and both therefore must necessarily recognize this. Harry Heher, chairman of the Democratic State Committee, as will be indicated in another part of this brief, realized the same situation in that he recognized the ineligibility of Mr. Barr and nominated Mrs. Barr. It is respectfully submitted, therefore, that the appellants themselves are undecided as to their own positions and are attempting to have this Court consider the matters as original rather than appellate.

Judge Porter decided the case favorably to the respondent, Samuel Geldziler. The Court found from the evidence that the said Samuel Geldziler legally occupied the office as a member of the County Board of Elections for the County of Passaic, by virtue of a commission issued by the Governor of the State of New Jersey, bearing date the 4th day of September, 1929, and appointed the said Samuel Geldziler as a member of the County Board of Elections for a term expiring on the 1st day of March, 1931. The Court further found from the evidence that after having received said commission he duly qualified in accordance with law to serve as a member of the said County Board of Elections. In the proceeding brought by Louis D. Carr the Court ordered that final judgment be entered in favor of the respondent, Samuel Geldziler.

The final conclusion in this case depends upon the opinion of this honorable Court in deciding these questions: First, was the relator, Robert C. Barr, properly declared ineligible to occupy the office in question? Second, was the office in the County Election Board legally vacant? Third, was Agnes V. Barr properly appointed to such office? Fourth, was the respondent, Samuel Geld-

ziler, properly appointed to such office by the Governor, and is he legally entitled to hold and continue in said office?

The facts from the pleadings and as testified to at the trial in substance are as follows: Robert C. Barr was appointed and commissioned on March 1st, 1929, as a member of the County Election Board of Passaic County for a term of two years from that date. He exercised the duties of his office and was in office on April 30, 1929. On that date an act of the Legislature was approved, effective from that date, amending the law concerning membership in County Election Boards, Chapter 257, P. L. 1929. The act so far as it is pertinent to the issue of this case provides as follows:

“The county board of elections shall consist of four persons, who shall be legal voters of the counties for which they are respectively appointed. Two members of such county board shall be members of the political party which at the last preceding general election cast the largest number of votes in this State for members of the General Assembly, and the remaining two members of such board shall be members of the political party which at the said election cast the next largest number of votes in the State for members of the General Assembly; provided, however, that the office of member of the county board of elections in any of the counties of this State shall be deemed vacant upon such member becoming a candidate for any office to be voted upon at any primary, general election or special election, except for nomination for or election to membership in any county committee or State committee, said candidacy to be determined by the filing of a petition of nomination duly accepted by such member in the manner provided by law; provided further, that no person who now or hereafter holds elective public office shall be eligible to serve as a member of the county

board of elections during the term of such elective office.”

On April 30, 1929, Robert C. Barr was a member of the Council of the City of Clifton, an elective office. Under date of June 24, 1929, the Secretary to the Governor addressed and sent a letter to Harry Heher, Chairman of the State Committee of the Democratic Party, advising him that a vacancy existed in the Passaic County Board of Elections by reason of Mr. Barr's ineligibility to the office under the act of April 30, 1929, and requesting a nomination to fill the vacancy. Mr. Heher contended that he did not actually receive this letter until he saw it with other opened mail in his office a few days before July 10, 1929. On that date, evidently realizing that a vacancy existed by virtue of Robert C. Barr's ineligibility, he replied to the letter stating that a nomination would be made within a few days. Under date of July 16, 1929, Mr. Heher sent a letter to the Governor nominating Agnes V. Barr to the office in question. On August 29, 1929, the Governor appointed and commissioned Samuel Geldziler, defendant, to the position. Mr. Geldziler took the oath of office and entered upon the duties of the office and continued to perform the same. It was stipulated in open court that the respondent, Samuel Geldziler, had received a commission from the Governor of the State of New Jersey on the fourth day of September, 1929, appointing him a member of the County Board of Elections for the County of Passaic for the term ending on the first day of March, 1931, which commission was offered in evidence, and that the said Samuel Geldziler had been duly sworn to act as a member of the County Board of Elections of the County of Passaic in accordance with law.

Louis D. Carr brings this information as a taxpayer and in the name of the Attorney General for

the purpose of testing the right of the said Samuel Geldziler to hold the office of a member of the Board of County Board of Elections of the County of Passaic. If the defendant's right to the office is upheld, then this relator's proceeding was properly dismissed by the lower Court.

POINT I.

The question involved is a moot question.

It will be observed by this honorable Court that the term of the office, title to which is disputed, will expire on March 1st, 1931. Had the appeal in this case been diligently pursued after judgment was pronounced by the lower Court, the decision by this Court would have been pronounced in the term previous to the forthcoming February term. As it is, because of the delay of the relator-appellant in pursuing the appeal, this cause comes to be heard before this coming February term. Certainly a decision will not be forthcoming until some time after March 1st, 1931. By that time the term of office of the present incumbent will have expired and the decision of the Court will be of no practical consequence in deciding title to said office.

In view of the date of said expiration and the date at which this appeal is presented and the time at which a decision will be rendered, which will be long after March 1, 1931, it is respectfully submitted that the question involved presents purely a moot question and that therefore this appeal should be dismissed and judgment affirmed.

POINT II.

Mr. Barr was legally and properly ousted from office, and the subsequent appointment of Mr. Geldziler was proper and legal and in strict conformance with the statutory provisions.

The act of April 30, 1929, before recited, and entitled "An Act to Amend an act entitled 'An Act to regulate elections' (Revision 1920), approved April eighth, one thousand nine hundred and twenty-one, clearly establishes the legal right of Mr. Geldziler to occupy the office. Said act is an amendment to Sec. 17, of the "Act to regulate elections," Rev. of 1920. It amends the law in two respects. First, it vacates the office of any member of the County Board of Elections upon his becoming a candidate for any elective office, except to membership in county or state committee. Second, it provides that no person holding an elective public office shall be eligible to the County Board of Elections during the terms of such elective office.

At a general election held in the City of Clifton, County of Passaic and State of New Jersey, on the sixth day of November, 1928, Robert C. Barr was elected Councilman of the Third Ward of the aforesaid City of Clifton, for a period of two years commencing with the first day of January, 1929, to and including the thirty-first day of December, 1930, and on the aforesaid first day of January, 1929, said Robert C. Barr accepted said office of Councilman of the aforesaid Ward in the City of Clifton by being duly sworn to perform the duties thereof and the aforesaid Robert C. Barr thereby duly qualified to serve as aforesaid Councilman of the Third Ward in the aforesaid City of Clifton, on the first day of January, 1929,

and he thereby did accept that office of Councilman and became a member of said body and on April 30, 1929, when the act amending the act to regulate elections was approved, was holding the elective office of Councilman. There is no dispute about this.

The law applicable to this set of facts is very clear and leaves no question of doubt. Clearly at the time the aforementioned act took effect, Mr. Barr was holding an elective office and by the provisions of said act he became at that time ineligible to serve on the County Board of Elections. Chap. 257 P. L. 1929 provides:

“that no person who now or hereafter holds elective public office shall be eligible to serve as a member of the County Board of Elections during the term of such elective office.”

Ineligible as here used means incapable, unqualified. Of necessity there was created a vacancy in the County Board of Elections which made it proper for a new appointment to fill the vacancy. Clearly there was a vacancy in the office as soon as the act took effect, Barr holding an elective office.

The principle of incompatibility of offices at common law, as well as under statutory and constitutional provisions, is well settled. For example, see *Howard v. Harrington* (1916), 114 Me. 443, L. R. A. 1917A, 211, 96 Atl. 769, in which the Court said:

“The doctrine of the incompatibility of offices is bedded in the common law, and is of great antiquity. At common law two offices whose functions are inconsistent are regarded as incompatible. The debatable question is, what constitutes incompatibility?”

We submit that the incompatibility of the offices in question is settled by the statute involved, and we need not go further on this particular phase.

In the case of *Newark v. Civil Service Commission*, 98 N. J. L. 417, the Supreme Court, on a writ of certiorari, said, at page 422:

“The fourth ground of attack is, there was no vacancy in the office of business manager of the board of education of Newark, when on February 28, 1922, the civil service commission by resolution changed the classification of the business manager from the unclassified to the classified service. *Where there is an office, but no legally qualified incumbent, there is a vacancy.* *Davis v. Davis*, 57 N. J. L. 80; 29 Cyc. 1400, para. 3. The office is vacant when it is without an incumbent who has a right to exercise its functions.”

This case was affirmed in 99 N. J. L. 106.

The case of *Davis v. Davis*, 57 N. J. L. 80, dealt with the same type of question as in the case at bar. It was an information in the nature of a quo warranto, filed by certain persons who claimed to be legally appointed chosen freeholders of the County of Camden, to test the legal right of certain other persons to exercise the functions of a board of chosen freeholders of such county. Justice Reed, speaking for the Supreme Court, said, at page 82:

“The facts set out in the information show that the relators are the legal appointees to the offices now in dispute. These facts are the following: An act of 1894 (Pamph, L. p. 298) provides for an election of a member of the board of chosen freeholders in each ward and township and in each borough possessing complete autonomy of local government, in the manner provided for municipal and township elections. This act took effect on May 9, 1894. The time for municipal and borough elections for that year had been passed. On May 25th, 1894, the act terminating the terms of the old members of the board went into

effect. *After that date, the old members being functus officii, and no one having been elected to membership in the board under the act of May 9th, 1894, there were offices and there were no legally qualified incumbents. This constituted a vacancy. Mech. Pub. Off., sec. 125; State v. Stocking, 7 Ind. 329; Am. & Eng. Encycl. L., Vol. 19, p. 430.*"

In 29 Cyc. 1400 par. three, we find the following:

"A vacancy in office exists only where there is no person authorized by law to discharge the duties of the office."

Mr. Barr was legally ineligible and the office vacant because the act specifically provided that any person in his status was unauthorized to occupy said office.

Further, on page 1401 in 29 Cyc:

"A vacancy in office, for any of the causes enumerated in the statute, occurs usually at the time of the happening of the event whose occurrence is by the statute the cause of the vacancy and no judicial determination that a vacancy has occurred is necessary."

The occurrence of the event in the case at bar was Mr. Barr's serving in an elective office.

In *Oliver v. Jersey City*, 63 N. J. L. 634, the Court of Errors and Appeals held that when a person legally holding one office is elected or appointed to another, but is prohibited by a statute from holding both, *upon accepting the second his de jure title to the first ends, and his successor may at once be appointed or elected.*

In the case at bar, Mr. Barr's election to the office of Councilman, *per se*, prohibited him from occupying the office to the election board and consequently there was a vacancy created in said election board.

We have thus tried to show that Robert C. Barr became ineligible to occupy said office and by force of statute was automatically removed, thus creating a vacancy.

This disposes of Point Four in the argument of relator's brief.

POINT III.

Whether the office of member of the County Board of Elections is a municipal office under the Quo Warranto Act is of no consequence.

We contend it would make no difference. The acts are clear as to the character of the offices involved. The proviso in chapter 257 P. L. 1929 says:

“ . . . provided however, that the office of member of the county board of elections in any of the counties of this state shall be deemed vacant upon such member becoming a candidate for *any* office to be voted upon at any primary, general election or special election . . . provided further that no person who now or hereafter holds elective public office shall be eligible to serve as a member of the county board of elections during the term of such elective office.”

It will be noted that the statute refers to membership of the county board of elections merely as an office, and whether it is a municipal office under the Quo Warranto Act or not, is of no import. There is no question that the statute referred to deals with the particular office involved, and the statute referred to is dispositive of the question.

POINT IV.

There being a vacancy created in the County Board of Elections, it was proper that a new appointment be made.

We now consider the claim of Agnes V. Barr to the office.

Article 6, Sec. 19 of the Election Act, provides how vacancies shall be filled. This section reads as follows:

“In case of a vacancy arising in any County Board of Elections from any cause other than expiration of the term, the Governor shall be forthwith notified, notice of such vacancy to be given to the chairman of the State Committee, and such Chairman shall, not later than ten days thereafter, nominate a successor, who shall thereupon be commissioned by the Governor; all appointments to fill vacancies shall be for the unexpired term only.”

This act is silent as to whose duty it is to notify the Governor or the Chairman when a vacancy occurs. Someone quite evidently did notify the Governor of the vacancy. A duty by the Governor to then notify the Chairman cannot be read into the law by any construction of the act. However, the law provides that the State Chairman be notified. There is no question that the Governor did in fact notify him, whether it was his duty to do so or not. Mr. Heher, State Chairman, admits receipt of the letter (see State of Case, p. 9, lines 30-36 inclusive). Said letter on the following page (10, lines 22 to 33) notified said chairman that a vacancy existed and requested a nominee for said office. This letter was sent by the Governor, through his secretary, Thomas L. Hanson, and it bore date June 24th, 1929, and the presump-

tion is, in absence of evidence to the contrary, that it was received in due course of mail. Mr. Thomas L. Hanson, secretary to the Governor, testified sending said letter (see p. 40, State of Case, lines 29 to 36).

So we have the statute complied with by having a notice of the vacancy received by both the Governor and the State Chairman. The Chairman's duty was to nominate within the statutory period and the Governor's to commission such nominee. This brings us to the next question as to whether the State Chairman properly acted upon such notice.

POINT V.

The State Chairman failed to make the necessary appointment within the required period as prescribed by statute.

The statute specifically says that the Chairman shall, *not later than 10 days thereafter* (after notice that a vacancy exists), nominate a successor. It was mandatory upon the State Chairman to nominate "not later than 10 days thereafter". The office having become vacant because of the ineligibility of Robert C. Barr to said office, any later appointment by the State Chairman must have been made within this ten day period, to have been of legal efficacy. So that, if the State Chairman's appointment of Agnes V. Barr is to be upheld, her appointment must have been made within the proper time, that is, within ten days after notice of a vacancy was sent to the State Chairman.

The testimony of Thomas L. Hanson is to the effect that he notified the State Chairman of the vacancy in the County Board of Elections. Said

letter was dated June 24th, 1929 (see State of Case, p. 40, lines 29-36 inclusive).

Mr. Harry Heher, the State Chairman, testified that he received said letter dated June 24th, 1929 (see State of Case, p. 9, lines 30-37). On what date said letter was received in the office of the State Chairman he cannot say (see State of Case, p. 26, lines 14-16). On the other hand, on the same page (lines 30 to 34), he would not say that it did not reach him on the 25th of June, 1929. The Chairman says he actually received the notice a few days before July 10, 1929, and nominated Mrs. Barr on July 16, 1929, not later than ten days from the time that he read or knew the contents of the letter of notification of June 24, 1929. That is not a complaiance with the statute. The time began to run from the receipt by him of the notification. It was received, within the meaning of the law, when it was delivered to his office, either by messenger or by mail, not when he read it some two weeks after the date of receipt. The nomination by him, therefore, under date of July 16, 1929, came too late and was of no legal efficacy. The law with regard to the mailing and delivery of a letter is clearly set forth in the case of *Alexander v. Rekoon*, 104 N. J. L. 1. Chief Justice Gummere, speaking for the Supreme Court, said at page 2:

“The amended statute declares that where a broker has been employed by an oral contract and shall actually effect a sale, he may recover from the owner the amount of his commission on such sale, provided the broker shall within five days of the making of such oral contract, serve upon such owner a notice in writing setting forth the terms of such oral agreement and stating the rate or amount of commissions to be paid thereunder . . . and that ‘the notice provided for shall be served either personally or by forwarding the same to the person to be served by registered mail to the last known post office address of such

person'. The argument is that this statutory requirement was not complied with; that there was no personal service of the notice, and that the letter containing it, which was mailed to the defendant was concededly, not registered."

"Where a statute provides for personal service of a notice, without requiring it to be made by an official or in a particular mode, the depositing of the notice with an agency of the Federal Government for the purpose of having it delivered, and the actual delivery thereof by such agency to the person to whom the notice is addressed, constitutes a personal service. *Wilson v. Trenton*, 53 N. J. L. 645, 648; *McKenna v. Harrington*, 96 N. J. E. 700."

"Where a letter is mailed in the place in which the party to whom it is directed resides, and it is received by him, it may reasonably be inferred that he received it in due course of mail; that is, in the present case, where a letter is delivered at the place to which it is addressed, either the day of its mailing or the day following, and whether or not such inference shall be drawn is a matter to be determined by the jury and not by the court."

The above decision clearly expounds the correct principle of the law. The cases might be greatly multiplied but they would merely be a reiteration of this same principle.

There is no question that the State Chairman received said letter in due course of mail. The contention of the relator-appellant is that notice conveyed by such letter is not legally effective until the addressee of such letter actually sees and reads it. This is fallacious for two reasons: First, the statute merely says that "notice of such vacancy to be given to the chairman". The relator-appellant cannot read into the statute the broad interpretation he seeks to attach to it. It would be too fanciful and entirely insufficient.

Counsel cites a number of cases dealing with personal service which are beside the point. The statute in question says merely notice, and it is the contention of counsel for the defendant-appellee that such notice was strictly complied with upon mailing of the letter and it took effect as such notice from the time it was received and not from the time it was actually read or seen. Secondly, to agree with the view proposed by counsel for the relator-appellant would lead to absurdity. Assuming his view is correct, then a notice would not be effective, even though delivered, until such time as the addressee actually sees and reads the letter. So that if for six months or a year after date of receipt of a letter the addressee for some known or unknown reason refused or did not find time to actually read the letter, then the letter actually received would be ineffective as notice.

The State Chairman therefore having presumptively received said letter on June 24th or 25th, 1929, by waiting until July 16, 1929, to make his appointment, his appointment by letter of July 16, 1929, was therefore of no effect. He had lost his right to nominate by not having acted within the ten days limited by the act. Agnes V. Barr, therefore, has no rights to the office. This disposes of Points 1, 2 and 3 of the argument in the brief of counsel with relator.

POINT VI.

Article 6, Sec. 20, of the Election Act, vests power in the Governor to make the appointment of his own selection where the Chairman fails to nominate within the ten day period.

Pursuant to this statutory authority, the Governor did appoint and commission the defendant, Samuel Geldziler, on the 4th day of September, 1929, as a member of the County Board of Elections for the County of Passaic for the term ending the 1st day of March, 1931. Said Samuel Geldziler was duly sworn to act as a member of said body in accordance with law and since that time has been legally and properly occupying said office. The information therefore by the relator, Louis D. Carr, fails.

We therefore respectfully submit that the incumbent, Samuel Geldziler, has sufficiently proved his right to said office and is entitled to continue for the term of the appointment, and we respectfully submit that the judgment of the lower Court be affirmed.

Respectfully submitted,

THOMAS J. KENNEDY,
Attorney of Defendant-Respondent.

JAMES F. MINTURN,
Of Counsel with Defendant-Respondent.

INDEX

Introduction	I
Chapter I	V
Chapter II	VI
Chapter III	IX
Chapter IV	XIII
Chapter V	XVII
Chapter VI	XX
Chapter VII	XXII
Chapter VIII	XXIII
Chapter IX	XXIV

Chapter X	XXV
Chapter XI	XXVI
Chapter XII	XXVII
Chapter XIII	XXVIII
Chapter XIV	XXIX

POINT VI.

Article 4, Sec. 24 of the Election Act, vests power in the Court to make the appointment of his own nominee when the Chairman fails to nominate within the ten day period.

Pursuant to this statutory authority, the Court did appoint and commission the defendant, Samuel Feldberg, on the 10th day of September, 1931, as a member of the County Board of Elections for the County of Pinal for the term ending the 1st day of March, 1932. Said Samuel Feldberg was duly sworn to as a member of said body in accordance with law and since that time has been legally and properly occupying said office. The objection thereto by the plaintiff, James D. Carr, fails.

We therefore respectfully submit that the plaintiff's objection has not sufficiently proved his right to said office and is entitled to dismissal for the term of the appointment, and we respectfully submit that the judgment of the lower Court be affirmed.

Respectfully submitted,

THOMAS J. MERRITT,
Attorney of Defendant-Respondent.

JAMES F. MERRITT,
Of Counsel with Defendant-Respondent.

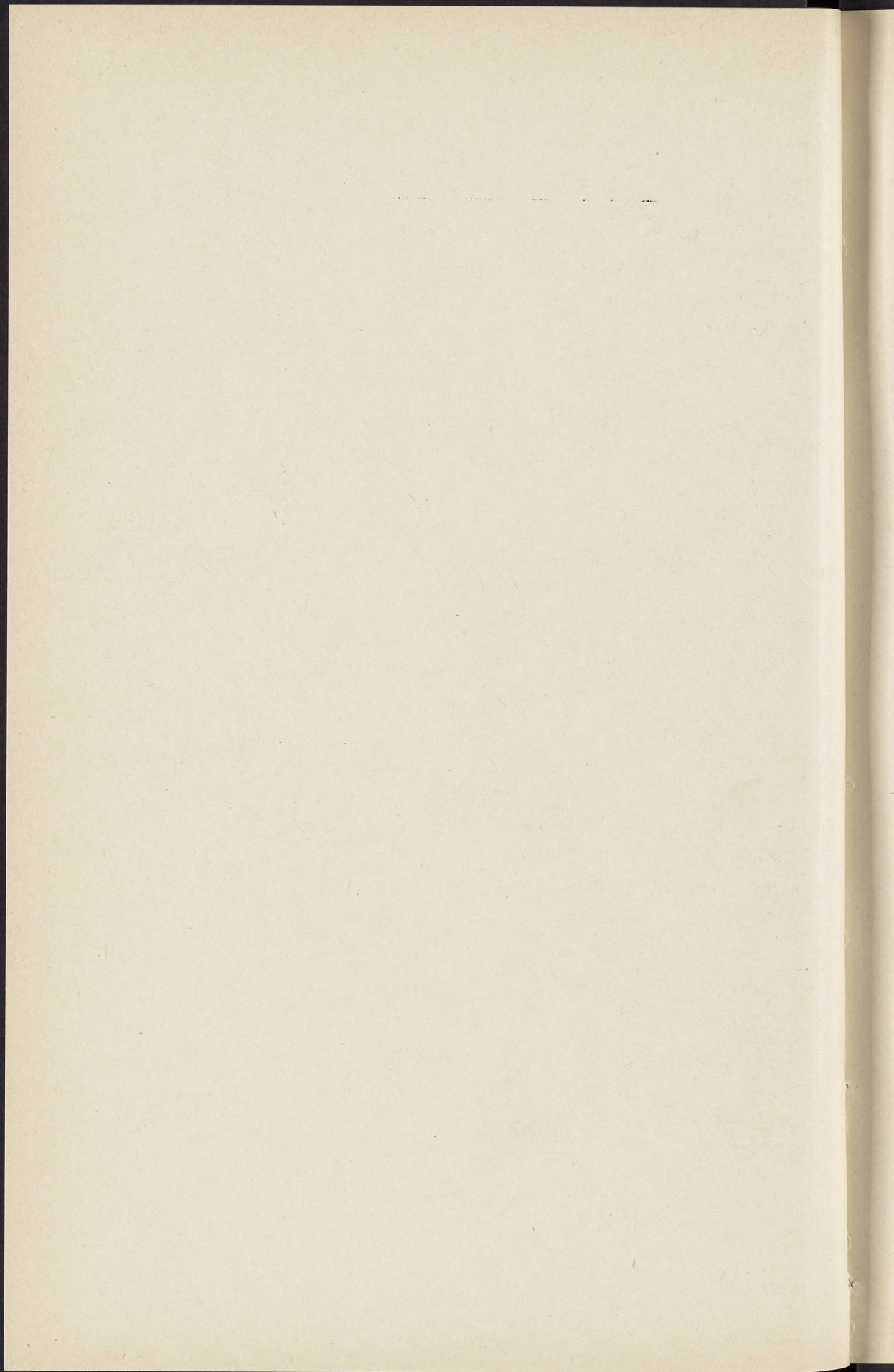
INDEX

PLEADINGS, ETC.

Information	I
Rule to plead	V
Plea	VI
Replication and demurrer	XI
Memorandum of opinion	XIII
Postea	XVIII
Rule for judgment	XX
Notice of appeal	XXII
Grounds of appeal	XXIII
Motion for dismissal	35

TESTIMONY

Harry Heher, direct	9
cross	23
Thomas L. Hanson, direct	33
cross	34
recalled, further direct	40



I
Information

(Filed Nov. 6, 1929)
NEW JERSEY SUPREME COURT

The State of New Jersey, ex rel., Agnes V. Barr, vs. Samuel Geldziler, Defendant.	}	On information in the nature of quo warranto
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10

INFORMATION

Passaic County, ss:

1. Agnes V. Barr, of the City of Clifton, County of Passaic and State of New Jersey, by Edward F. Merrey, her attorney, comes to the Supreme Court of the State of New Jersey, before the Justice hereof, in the State House in the City of Trenton, desiring to sue and prosecute in this behalf according to the form of the statute in such case made and provided, and gives said court here to be informed and understand that she, the said Agnes V. Barr, is and has been for many years a citizen of the State of New Jersey and a resident of the City of Clifton aforesaid; that for about ten years last past she has been a legal voter of the County of Passaic, and has been and is a member of the Democratic party which at the last general election held in the State of New Jersey cast the second largest number of votes in the State for members of the General Assembly.

2. In the month of February, 1929, Harry Heher, Chairman of the State Committee of the Democratic party, did nominate Robert C. Barr as a member of the County Board of Elections in and

II *Information*

for the County of Passaic, and that Morgan F. Larson, Governor of the State of New Jersey, on the first day of March, 1929, commissioned Robert C. Barr as a member of the County Election Board of the County of Passaic for a term of two years beginning on the first day of March, 1929.

10 3. At the general election held in the City of Clifton on November 6th, said Robert C. Barr was elected Councilman of the third ward of the City of Clifton for a period commencing on the first day of January, 1929, to and including the thirty-first day of December, 1930, and the said Robert C. Barr accepted said office and was duly sworn and performed the duties thereof and in all other respects duly qualified and served as Councilman for the said office, did accept the said office and has continued to act as such ever since and is now acting.

20 4. At the session of 1929, the Legislature of the State of New Jersey passed an act entitled, "An Act to Amend an Act, Entitled 'An Act to Regulate Elections' (Revision of 1920, approved April 8th, 1929)" and which is better known as Chapter 257 of the Laws of 1929, which act was approved by the Governor of the State of New Jersey on April 30th, 1929, and became and is the law of this State.

30 5. That by virtue of said Act, there became a vacancy in the office of a member of the County Board of Elections for the County of Passaic held by the said Robert C. Barr.

6. After the said vacancy arose, Morgan F. Larson, the Governor of the State of New Jersey, on July 10th, 1929, notified Harry Heher, Chairman of the State Committee of the Democratic party that the said vacancy existed and thereupon on the 16th day of July, 1929, the said Harry Heher,

III *Information*

Chairman of the Democratic State Committee did nominate this relator, Agnes V. Barr to fill the vacancy and to succeed the said Robert C. Barr and by reason thereof, this relator became entitled to the said office and it was the duty of the said Morgan F. Larson to issue a commission to the relator as a member of the Passaic County Board of Elections for the said unexpired time of the said Robert C. Barr ending on the first day of March, 1931.

7. Notwithstanding that it was the duty of the said Morgan F. Larson, Governor of the State of New Jersey to so commission this relator, the said Morgan F. Larson on or about the fourth day of September, 1929, did appoint or commission one Samuel Geldziler as a member of the County Board of Elections for the County of Passaic to serve in lieu and in place of this relator for a term beginning with the day of the said commission and ending on the first day of March, 1931. That said appointment and commission so made to the said Samuel Geldziler was to the same office to which relator was appointed as aforesaid, and the said Samuel Geldziler pretending right and authority therefrom, was duly sworn according to law and accepted said appointment and commission, and thereupon intruded into and usurped said office and thereupon and ever since has unlawfully usurped, held, used and executed the same without any legal appointment, warrant or authorization whatsoever, and yet does so, to the exclusion of relator, to wit, at the County of Passaic aforesaid.

Whereupon the said relator prays the advice of the court herein in the premises and for due process of law against the defendant, said Samuel Geldziler, that in this behalf he may be made to

IV
Information

answer to the said state by what warrant he claims
to hold, use, execute and enjoy the aforesaid office
as member of the County Board of Elections for
the County of Passaic and the liberties, privileges,
franchises and emoluments thereof, and that the
said Samuel Geldziler may be adjudged to be an
intruder and to be ousted from said office, and that
not only the title of the said Samuel Geldziler to
said office may be determined by the judgment
10 herein, but also the title of the relator to the same
office .

Edward F. Merrey,
Attorney of the Relator.

V

Rule To Plead

(Filed Nov. 6, 1929)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex rel., Agnes V. Barr, vs. Samuel Geldziler, Defendant.	}	On information in the nature of quo warranto
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10

RULE TO PLEAD

The State of New Jersey, at the relation of Agnes V. Barr, having filed an information setting forth, among other things, that the defendant Samuel Geldziler unlawfully usurps, intrudes into and unlawfully holds and executes the office as member of the County Board of Elections for the County of Passaic, and its liberties, privileges and franchises, without any legal authority, warrant or right whatsoever, and praying that he, the said defendant, may be made to answer to the State of New Jersey, at the relation of Agnes V. Barr, by what warrant he claims to hold, use, execute and enjoy the aforesaid office as member of the County Board of Elections for the County of Passaic and the liberties, privileges and franchises thereof. 30

It is thereupon Ordered that the defendant, Samuel Geldziler, plead or demur to said information within ten days after service upon him of a certified copy of such information and this Rule.

Rule actually entered this day of November, 1929, on motion of

Edward F. Merrey,
Attorney of Relator.

VI
Plea

(Filed Nov. 20, 1929)
NEW JERSEY SUPREME COURT

The State of New Jersey, ex
rel., Agnes V. Barr,

Relator,

vs.

Samuel Geldziler,

Defendant.

On Information
in the Nature of
Quo Warranto

10

PLEA

And now, as yet of the term of October, in the year 1929, comes the said Samuel Geldziler, defendant, and having heard the information read, he complains, and under color of the premises in the said information contained, he is greatly vexed and
20 disquieted, and that by no means justly, comes protesting that the said information and the matters therein contained are by no means sufficient in the law, and that he need not, nor is subject by law, to answer thereto. Yet, for plea, thereto, he says that he ought not to be disfranchised or impleaded, by reason of the premises in the said information contained, because, he says:

1. He admits that the Democratic party at the
30 last general election held in the State of New Jersey, cast the second largest number of votes in the State for members of the General Assembly, but he denies all the other allegations mentioned in paragraph "1" of the Relator's Information.

2. The allegations of paragraph "2" of the Relator's Information is admitted.

3. He admits that at the General election held

VII *Plea*

in the City of Clifton, in the County of Passaic and State of New Jersey, on November 6th, 1928, the said Robert C. Barr mentioned in paragraph "3" of the Relator's Information, was duly elected by the vote of the people, to the office of Councilman for the third ward of the City of Clifton, for a period or term commencing on the 1st day of January, 1929, and ending on December 31st, 1930, and this respondent alleges that the office of "Councilman of the third ward of the City of Clifton" was on November 6th, 1928 and still is an elective public office, and this respondent admits all the other allegations of paragraph "3" of the Relator's Information. 10

4. Paragraph "4" of the Relator's Information is admitted.

5. Respondent admits that by virtue of said act, the office of Robert C. Barr as one of the Democratic members of the County Board of Elections for Passaic County, became immediately vacant and that Harry Heher, Democratic State Committeeman, had constructive and actual notice both of the enactment of said chapter 257 of the Public Laws of 1929, and of the vacancy in the Passaic County Board of Elections, thereby created. 20

6. Paragraph "6" of the Relator's Information is denied.

7. This respondent denies it was the duty of the Governor, Morgan F. Larson, to appoint the Relator to the office of member of the County Board of Elections of Passaic County, to fill the vacancy of Robert C. Barr. 30

Respondent admits he was appointed by Governor Larson as a member of the County Board of Elections of Passaic County on September 4th, 1929, for the unexpired term of said Robert C.

VIII
Plea

Barr whose term of office was terminated by virtue of Chapter 257 Public Laws of 1929.

The respondent denies that he was appointed in the place of the Relator, and alleges that the Relator is not and never was a member of the County Board of Elections of Passaic County.

Respondent admits that he took his oath of office, and has in every way qualified for said office and has attended the meetings of the County Board of Elections of Passaic County and participated in the transactions of said meetings, and has attended to and is still attending to all the duties of said office, from the date of his appointment, and respondent denies that he has intruded into, usurped said office, or that he has unlawfully usurped, held, used and executed the same without any legal appointment, warrant or authorization, to the exclusion of the Relator, but alleges that he is lawfully and legally a member of the County Board of Elections of the County of Passaic, by virtue of his appointment thereto by his Excellency, Morgan F. Larson, Governor of the State of New Jersey, on September 4th, 1929.

8. And this Respondent further alleges, in answer to the Relator's Information that the said Relator's Information is illegally and unlawfully filed and is not made in accordance with the Statute in such case made and provided and that she has not been duly and legally commissioned or appointed by the Governor of the State of New Jersey to the office of member of the County Board of Elections of the County of Passaic, and that the power of making said appointment is vested solely in the Governor of the State of New Jersey, and alleges that Relator has no title to said office, nor even the color of title to said office.

IX
Plea

9. And this Respondent further alleges, in answer to the Relator's Information, that the office of member of the County Board of Elections of the County of Passaic, is not a municipal office or franchise, within the true intent and meaning of Section 4 of an act entitled "An Act Relating to Information in the Nature of Quo Warranto, Revision of 1903" (P. L. 1903, page 377).

10. And this Respondent further alleges, in answer to the Relator's Information, that the said office of member of the Board of Elections of the County of Passaic, not being a municipal office, it became the duty of the said Relator, Agnes V. Barr, to obtain leave to file Information against this Respondent, from the New Jersey Supreme Court, or a Justice thereof, and that the said Agnes V. Barr, the Relator, failed and neglected to obtain leave to file the Information from the New Jersey Supreme Court, or a Justice thereof, and having so failed to obtain such leave, she has no right or authority to prosecute this Information. 10 20

11. And this Respondent further alleges in answer to the Relator's Information, that he is a member and is affiliated with the Democratic party of the City of Clifton, in the County of Passaic, and that he was legally, and lawfully appointed by the Governor of the State of New Jersey as a Democratic member of the County Board of Elections for Passaic County, on September 4th, 1929; that he has taken and filed his oath of office and allegiance and has accepted the appointment and commission, and that from the said September 4th, 1929, to the present time, he has faithfully exercised and performed all of the duties of said office. 30

X
Plea

This Respondent reserves the right to make any or all motions upon the hearing of this cause, which he may deem expedient and lawful, and prays that this information may be dismissed.

Samuel Geldziler,
Respondent.
Thomas J. Kennedy,
Attorney for Respondent.
James F. Minturn,
Of Counsel.

10

State of New Jersey, }
County of Passaic } ss.:

Samuel Geldziler, of full age, being duly sworn, according to law on his oath deposes and says:

20 That he is a member of the office of the Passaic County Board of Elections and that he is the above named defendant. Deponent further says that the facts, matters and things set forth in the foregoing plea in the above entitled cause are true to the best of his knowledge, information and belief. And this deponent further says that the plea by the defendant above pleaded is not intended for the purpose of delay but that this deponent lawfully believes that the said defendant has a just and legal defense to said action and information on the merits
30 of the case.

Samuel Geldziler.

Sworn and subscribed to before me,
this 19th day of November, 1929.

Herman George Hovig,
Attorney at Law of N. J.

XI

Replication and Demurrer

(Filed Jan. 8, 1930)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex
rel., Agnes V. Barr,

Relator,

vs.

Samuel Geldziler,

Defendant.

On Information
in the Nature of
Quo Warranto

10

REPLICATION AND DEMURRER

And the said relator as to the said plea of the said Samuel Geldziler set forth in paragraphs one to seven and of which the said respondent puts himself on the country, the relator does the like.

And the said relator as to the said plea of the said Samuel Geldziler set forth in paragraphs 20 eight to eleven, says that the said plea and the matters therein contained are wholly insufficient in law to bar her, said relator, from having her aforesaid information against said Samuel Geldziler and from having not only the title of said Samuel Geldziler to the said office determined by the judgment herein, but also the title of this relator to the same office. And relator specifies the following causes of demurrer thereto: 30

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

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

XII

Replication and Demurrer

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

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

10

Edward F. Merrey,
Attorney of Relator.

20

30

XIII
Memorandum

(Filed June 20, 1930)
NEW JERSEY SUPREME COURT

The State of New Jersey, ex rel., Robert C. Barr, Relator, vs. Samuel Geldziler, Defendant.	}	In the Nature of 10 Quo Warranto
The State of New Jersey, ex rel., Agnes V. Barr, Relator, vs. Samuel Geldziler, Defendant.	}	

MEMORANDUM

20

Edward F. Merrey and Frank J. Davies, Esqs.,
Attorneys for Relators.

Thomas J. Kennedy, Joseph J. Weinberger, and
James A. Murner, Esqs., Attorneys for De-
fendant.

James F. Minturn, Esq., of counsel with Defend-
ant.

Porter, J.

These actions are in the nature of quo warranto to
test the title of the defendant to the office of mem-
ber of the Passaic County Board of Elections. 30
Questions of fact were raised by the pleadings and
tried by me, by consent of the parties, without a
jury. Both actions were tried on January 15, 1930.
For convenience the cases will be considered to-
gether.

XIV
Memorandum

The facts from the pleadings and as testified to at the hearings in substance are as follows: Robert C. Barr was appointed and commissioned on March 1, 1929, as a member of the County Election Board of Passaic County for a term of two years from that date. He exercised the duties of his office and was in office on April 30, 1929. On that date an Act of the Legislature was approved, effective from that date, amending the law concerning membership in County Election Boards, Chapter 257, P. L. 1929. This act provides "that no person who
10 now or hereafter holds elective public office shall be eligible to serve as a member of the County Board of Elections during the term of such elective office."

On April 30, 1929, the relator, Robert C. Barr, was a member of the Council of the City of Clifton, an elective office. Under date of June 24, 1929,
20 the Secretary to the Governor addressed and sent a letter to Harry Heher, Chairman of the State Committee of the democratic party advising him that a vacancy existed in the Passaic County Board of Elections by reason of Mr. Barr's ineligibility to the office under the act of April 30, 1929, and requesting a nomination to fill the vacancy. Mr. Heher did not actually receive this letter until he saw it with other opened mail in his office a few
30 days before July 10, 1929. On that date he replied to the letter stating that a nomination would be made within a few days. Under date of July 16, 1929, Mr. Heher sent a letter to the Governor nominating the relator, Agnes V. Barr to the office in question. On August 29, 1929, the Governor ap-

XV
Memorandum

pointed and commissioned Samuel Geldziler, defendant, to the position. Mr. Geldziler took the oath of office and entered upon the duties of the office and continues to perform same. These proceedings are instituted by the relators Robert C. Barr and Agnes V. Barr, respectively, under Sec. 4 of the Statute 3 Comp. Stat., 4212. In both cases the relators contend that the defendant is not entitled to the office. Mr. Barr argues hat he is entitled to the office, saying that he was legally appointed, duly qualified, has not resigned and is not ineligible to hold the office under the provisions of the Act of April 30, 1929, supra. Mrs. Barr also claims the office by reason of her nomination by the State Chairman of the Democratic Party to the Governor under date of July 24, 1929, which she argues was legally done; she contends that under the law the appointing power is the State Chairman and the Governor's duty is to commission the person so nominated. 10 20

It seems clear that Mr. Barr was ousted from the office by the provisions of the Act of April 30, 1929, supra, as and from that date. This act is an amendment to Sec. 17 of the "Act to regulate elections," Rev. of 1920. It amends the law in two respects. First it vacates the office of any member of the County Board of Elections upon his becoming a candidate for any elective office, except to membership in county or state committee. Second, it provides "that no person who now or hereafter holds elective public office shall be eligible to serve as a member of the County Board of Elections during the term of such elective office." 30

Mr. Barr was on April 30, when this act took effect, holding an elective office. Clearly he became

XVI
Memorandum

at that time ineligible to serve on the County Board under the provisions of this act. Ineligible as here used means incapable, unqualified. Thus there was created a vacancy. Art. 6, Sec. 19 of the Election Act provides how vacancies shall be filled.

10 The language of this section follows: "In case of a vacancy arising in any County Board of Elections from any cause other than expiration of the term, the Governor shall be forthwith notified, notice of such vacancy to be given to the Chairman of the State Committee, and such Chairman shall, not later than ten days thereafter, nominate a successor, who shall thereupon be commissioned by the Governor; all appointments to fill vacancies shall be for the unexpired term only."

20 It will be noted that this Act is silent as to whose duty it is to notify the Governor or the Chairman when a vacancy occurs. Someone quite evidently did notify the Governor of the vacancy. A duty by the Governor to then notify the Chairman cannot be read into the law. However, the law provides that the Chairman be notified. The Governor did in fact notify him whether it was his duty to do so or not. So we have the Statute complied with by having a notice of the vacancy received by both the Governor and the State Chairman. The Chairman's duty was to nominate and the Governor's to commission such nominee to fill the vacancy. However, the Chairman is required to nominate "not later than ten days thereafter."

30 The Chairman actually received the notice a few days before July 10 and nominated Mrs. Barr on July 16, not later than ten days from the time that he read or knew the contents of the letter of noti-

XVII
Memorandum

fication of June 24. That is not a compliance with the Statute. The time began to run from the receipt by him of the notification; it was received, within the meaning of the law, when it was delivered to his office either by messenger or by mail, not when he read it or actually received it some two weeks after its date. The nomination by him, therefore, under date of July 16 came too late and is of no effect; he had lost his right to nominate by not having acted within the ten days limited by the Act. The relator Agnes V. Barr, therefore, has no rights to the office. 10

Article 6 Sec. 20 of the Election Act vests power in the Governor to make the "appointment of his own selection" where the Chairman fails to nominate within the ten-day period. Pursuant to this authority the Governor did appoint and commission the defendant. He was therefore legally appointed and is entitled to possess the office. 20

Both proceedings will be dismissed. Postestas will be signed in accordance with these findings.

Newton H. Porter,
Circuit Court Judge.

January 20, 1930.

XVIII

Postea

(Filed April 15, 1930)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex
rel., Agnes V. Barr,

Relator,

vs.

Samuel Geldziler,

Defendant.

On Information
in the Nature of
Quo Warranto

10

POSTEA

And now, on this day, to wit: on the 15th day of
January, 1930, before the Honorable Newton H.
Porter, comes the said Relator, by her attorneys
aforesaid, before the said Court before whom the
issue was tried as sent; wherefore her record had
20 before her in these words, namely:

Afterwards, that is to say, on the day and at
the place aforesaid, Newton H. Porter, one of the
Circuit Judges of the State of New Jersey within
named, according to the form of the Statute in
such case made and provided, comes as well the
within named Relator as the within named Re-
spondent, by their respective attorneys within men-
tioned, and the jurors of the jury summoned to
30 try the said issue and having been called also, and
the parties aforesaid having consented to waive
trial by jury, and the Court aforesaid having heard
the testimony, has concluded that the said Relator
is not entitled to the office which she seeks and that
she has complained, and that the said Respondent
is of right, according to law, entitled to said office,
and he Court does therefore award the said office

XIX
Postea

to the said Respondent, together with his costs to be assessed with regard thereto, according to law.

Therefore, it is Ordered that the said Respondent be declared to be entitled to the office which he now holds, known as a member of the County Board of Elections for the County of Passaic, and the said petition of the said Relator is therefore dismissed, with costs as aforesaid.

Newton H. Porter,
Judge of the Passaic County 10
Circuit Court.

XX

Rule for Judgment

(Filed April 15, 1930)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex
rel., Agnes V. Barr,

Relator,

vs.

Samuel Geldziler,

Respondent.

On Information
in the Nature of
Quo Warranto

10

RULE FOR JUDGMENT

The information in the above cause by leave of
the Court having been duly filed, and the respond-
ent having pleaded thereto, and the cause having
been regularly set down and noticed for hearing
and having been tried before Honorable Newton H.
Porter, Judge of the Passaic County Circuit Court
to whom cases were referred by the Justice of the
Supreme Court holding such Circuit Court, with-
out a jury, and having been argued before the Court
by Edward F. Merrey, Esq., Counsel for the re-
lator, and James F. Minturn, Esq., of Counsel for
the Respondent, and the Court having considered
said testimony and the stipulation made in open
court, and having found as a fact that Samuel Geld-
ziler was legally entitled to hold the office of a
member of the County Board of Elections in and
for the County of Passaic by virtue of a commis-
sion issued to him by the Governor of the State of
New Jersey bearing date the 4th day of Septem-
ber, 1929, for a term expiring on the 1st day of
March, 1931, and that the said Samuel Geldziler
was legally occupying the said office, and that he
had duly qualified in accordance with law.

XXI

Rule for Judgment

It is Ordered that judgment in favor of the respondent, Samuel Geldziler, and against the relator, Agnes V. Barr, be entered in the above entitled suit, with costs to be taxed.

On Motion of

Thomas J. Kennedy,

Attorney for Respondent.

Rule entered this day of
1930.

10

20

30

XXII

Notice

(Filed July 14, 1930)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex
rel., Agnes V. Barr,

Relator,

vs.

Samuel Geldziler,

Respondent.

On Information
in the Nature of
Quo Warranto

10

NOTICE

To: Thomas J. Kennedy, Attorney of Respond-
ent:

Take Notice that the Relator appeals to the
Court of Errors and Appeals from the whole of
the judgment entered in this cause in the New Jer-
sey Supreme Court.

20

Dated: July 9th, 1930.

Edward F. Merrey,
Attorney of Appellant.

30

XXIII
Grounds of Appeal

NEW JERSEY COURT OF ERRORS AND
APPEALS

The State of New Jersey, ex rel., Agnes V. Barr, Relator-Appellant, vs. Samuel Geldziler, Defendant-Respondent.	}
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10

GROUND OF APPEAL

The appellant states the following grounds of appeal:

1. The court below decided that the defendant was entitled to the office of member of the County Board of Elections for the County of Passaic, whereas, it should have decided that the defendant was not so entitled. 20

2. The court below decided that the relator was not entitled to the office of member of the County Board of Elections of the County of Passaic, whereas, it should have found that the relator was entitled to said office.

3. The court below erroneously found as a fact that the Chairman of the State Committee of the Democratic party was notified of the vacancy in the office of member of the Board of Elections for Passaic County more than ten days prior to July 16th, 1929, the day he nominated relator to said office, whereas, the evidence shows that he was not so notified. 30

4. The court below erroneously held that the Chairman of State Committee of the Democratic

XXIV
Grounds of Appeal

party lost his right to nominate a successor to Robert C. Barr as a member of the County Board of Elections for the County of Passaic by not having acted within ten days limited by the act of April 30th, 1929, whereas, said Chairman's right to so nominate did not expire until an appointment was actually made by the Governor.

10 5. That the court below erroneously held that the right of the said Chairman to nominate such successor to Robert C. Barr, expired ten days after receipt of notice from the Governor that a vacancy existed, whereas, the statute imposed no duty on the Governor to give such notice and the Governor could not by giving such notice, legally start the ten days limitation.

20 6. The Governor not having made an appointment to fill the vacancy in the office held by Robert C. Barr before the relator was nominated by the Chairman of the State Committee of the Democratic party, the appointment of defendant to fill said vacancy was void and the court below should have so held.

Edward F. Merrey,
Of Counsel with Appellant.

Discussion by Counsel
NEW JERSEY SUPREME COURT
Passaic Circuit

The State of New Jersey, ex rel. Agnes V. Barr, vs. Samuel Geldziler, Defendant.	}	Relator, On quo Warranto
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Paterson, N. J., January 15, 1930.

Before Hon. Newton H. Porter, without a jury.

Appearances:

For Relator: Edward F. Merrey, Esq., and
Frank J. Davies, Esq.

For Defendant: James F. Minturn, Esq., Joseph
J. Weinberger, Esq., Thomas J. Kennedy,
Esq., James J. Murner, Esq.

20

DISCUSSIONS BY COUNSEL

The Court—Now, the case is Mrs. Barr's case, and do you wish a jury?

Mr. Kennedy—No.

The Court—Do you, Mr. Merrey?

Mr. Merrey—No.

The Court—Proceed.

Mr. Weinberger—Let us have it stipu- 30
lated on the records that no jury is re-
quired and demanded and is waived.

Mr. Merrey—His Honor is running this Court.

The Court—Let the minutes of the Court show that the Court is sitting by consent of both parties as both the Judge of the law and the facts. Is that sufficient?

Discussion by Counsel

Mr. Weinberger—That is plenty, Judge.

The Court—All right.

Mr. Weinberger—See how technical Mr. Merrey is with a judgment of ouster.

The Court—You may proceed, Mr. Merrey. Here are your records in the other case. This is under Section 4, isn't it?

Mr. Merrey—Yes. The case of Mrs. Barr—

10 Mr. Murner—Will your Honor just indulge us for a moment?

The Court—Yes.

20 Mr. Merrey—Now, then, in this case of Agnes V. Barr, I may roughly say to your Honor that this is what happened. As I mentioned in the other case, Mr. Barr was occupying the office, starting in March, 1929. The Act was passed and then the Governor's office called upon Mr. Heher for an appointment, on the ground there was a vacancy. He nominated Mrs. Barr. No attention was paid to the fact that Geldziler was afterwards commissioned by the Governor.

30 Now, the Governor has no right of appointment in the first place; in other words, he only has the duty, if the chairman makes the nomination, to commission that person under the statute.

The pleadings in this case are really peculiar. I have to say something about them. I hoped that we could get them into such shape that they would have all the formalities that are supposed to be required in

Discussion by Counsel

common law, but unfortunately they are not.

Under the decisions, which you will find collected in the Quo Warranto Act, originally there was only one pleading allowed to a defendant. There was no choice, no two pleas. Then Judge Swayze in the Riley Case, after the fourth section was added—the fourth section was originally the first section of another statute, but when the 10 compilation was made, it was somehow numbered as the fourth; so that in some of the old cases they are referred to as the first section of another statute. But it was then stated that after the passing of that fourth section of that Act, you might have more than one plea. In other words, the first plea is, they are entitled to the office. That is the old practice, because 20 the question of the relator's title did not come into question at all. But after the passage of that, and there was a provision there that permitted the defendant, the respondent, to question the title of the claimant, put both into issue. That would make a second plea. Now, here we have it in the form of a demurrer, which is improperly here. I move to strike it out, in response to 30 the notice which I annexed to my replication.

The Court—What difference does it make? Because after this case gets here, and is here now, because of the question of fact being raised, they may while they are here make such motions with respect

Discussion by Counsel

to the law as may be necessary, which would be the effect of a demurrer.

Mr. Merrey—I don't know, if the Court please—

The Court—Is there any objection to striking it out?

Mr. Minturn—We would simply plead it over again.

10 Mr. Merrey—You could not, I think, Judge. If it is the duty of these defendants in this case to either plead or demur, they could not do both things. Now, then, they put it in the form of an answer, but it is a demurrer. In other words, they say this is not a municipal office, and therefore you cannot bring this suit.

The Court—Yes, that is a demurrer.

Mr. Merrey—Yes, that is a demurrer.

20 The Court—What else do they say?

Mr. Merrey—Well, they say—

The Court—I mean with respect to the questions of fact, because if there is no question of fact indicated, it is not properly before this Court.

Mr. Merrey—There are questions of fact pleaded.

The Court—What are they?

30 Mr. Merrey—They admit the Democratic party had the second largest number of votes in the last election.

The Court—I hope it always will be so.

Mr. Merrey—They admit the allegations in paragraph two, and they say at the General Election held in Clifton, Robert C. Barr was duly elected to the office of Council-

Discussion by Counsel

man; then they say that paragraph four is admitted; and that Harry Heher had constructive notice, constructive and actual notice they say here of the enactment of that chapter. I suppose that is a question of fact, whether he had actual notice.

The Court—Actual, but not constructive.

Mr. Merrey—Well, they say he had actual notice. Then they deny paragraph six; and then after the vacancy arose, we 10 set forth here, that the Governor claimed that by virtue of the office—we say it is a vacancy, that a vacancy did occur. They admit it.

They say now that they deny the whole sixth paragraph, in which we set up that the Democratic State Chairman had made the nomination to the Governor.

The Court—I don't know why you gentlemen cannot stipulate with respect to 20 practically all of these facts. It is really in the guise of a question of fact, a question of law, in the last analysis, it seems to me.

Mr. Merrey—As far as this is concerned there probably are questions of fact raised, but I do not think they are disputed 30 questions of fact.

The Court—That is a point. Now, if that be so, let us get right down to brass tacks, if we can.

Mr. Minturn—If Mr. Merrey would recite them on the record, what he wants to do.

Discussion by Counsel

The Court—Suppose you do that.

Mr. Merrey—They have denied that.

The Court—Suppose you now stipulate.

Mr. Kennedy—Of course, before going to facts, there is a primary question of law involved in this particular information. There is nothing in this information showing that Mrs. Barr ever took an oath of office, or attempted to qualify. Now, I say she has no standing before the Court. That is essential.

The Court—That is one of the things she was not permitted to do, because the Governor appointed someone else.

Mr. Kennedy—There is no commission here. She has made no attempt to qualify.

The Court—That is not important.

Mr. Kennedy—I think she must show she had a commission of the same sort and had attempted to qualify. Now, her duty when the Governor refused to give her a commission, was not to come into this Court by quo warranto; she had to resort to some other remedy to get her commission, and then come into this Court and try to oust Geldziler.

Mr. Kennedy—Mandamus.

Mr. Merrey—Whom would she mandamus?

Mr. Minturn—We do not argue that. I am telling what she should do.

The Court—He says she could not mandamus the Governor, only certiorari. The only remedy open to her, according to her counsel, is quo warranto.

Discussion by Counsel

Mr. Kennedy—But she does not show any right to the office.

The Court—Yes, she does. She says under the law she was appointed, or at least, she was designated by the constituted authority to the Governor, and that gave her the right to the office. That is her position.

Mr. Kennedy—She does not say she attempted to qualify. 10

The Court—She did not need to.

Mr. Merrey—May I answer that quickly?

The Court—No; because I do not think there is anything in it.

Mr. Merrey—I say the fourth section says that anybody that claims the office, not one who is in it.

The Court—She claims it. 20

Mr. Merrey—That is it. She claims it.

The Court—Let us get back to the proposition that we were on, which is if you gentlemen can agree with respect to the facts, let us do it, and if you will read into the record what you think the facts should be, and the other side can agree that they are, we will have a stipulation.

Mr. Merrey—But the situation is this, in this sixth paragraph I state here certain things, but they flatly deny them. I don't know why. 30

The Court—They deny it in a pickwickian sense, perhaps.

Mr. Merrey—Well, so it is there. Now, here's what I say. It is the sixth para-

Discussion by Counsel

10 graph. "After the said vacancy arose, Morgan F. Larson, the Governor of the State of New Jersey, on July 10th, 1929, notified Harry Heher, Chairman of the State Committee of the Democratic Party, that the said vacancy existed; thereupon on the 16th day of July, 1929, the said Harry Heher, Chairman of the Democratic State Committee, did nominate the relator, Agnes V. Barr, to fill the vacancy and to succeed said Robert C. Barr, and by reason thereof this relator became appointed to the said office, and it was the duty of said Morgan F. Larson to issue a commission to the relator for the unexpired term of said Robert C. Barr, ending on the 19th of March, 1931."

20 The Court—Do you want to agree that that is not true?

Mr. Weinberger—No, that is not true.

The Court—Swear Mr. Heher and ask him. We could hear him.

30 Mr. Weinberger—If your Honor please, to save a lot of time before Mr. Barr goes on the witness stand, I would like to have Mr. Merrey admit, for the sake of saving time, that Mrs. Barr never took an oath and that Mrs. Barr never received a commission. Is that admitted?

The Court—It is not in the pleadings that she did.

Mr. Weinberger—Is it admitted for the sake of the record?

The Court—What has it to do with the case?

Discussion by Counsel

Mr. Weinberger—I want to show that quo warranto is not the proper remedy, that is all.

The Court—There is nothing in the pleadings.

Mr. Weinberger—I would like to have Mr. Merrey admit something once in awhile.

The Court—I do not think he needs do it.

Mr. Weinberger—I knew he wouldn't. 10

The Court—Well, I won't ask him too either, because it is not in the case, and hasn't anything to do with it.

HARRY HEHER, sworn.

Direct Examination by Mr. Merrey:

Q. Mr. Heher, do you occupy a position of any kind? A. Public position? 20

Q. Yes. A. I do.

Q. What is it? A. Chairman of the Democratic State Committee.

Q. How long have you been Chairman of the Democratic State Committee? A. Since 1922, I think, in the month of February.

Q. Sometime in July, or thereabouts, did you get a letter from the Governor of the State of New Jersey, concerning the office of the Board of Elections of the County of Passaic? A. Shortly before July 10th, a day or two before, a letter addressed to me, bearing date June 24th, was brought to my office. 30

Harry Heher—direct

The Court—1929?

The Witness—1929.

Q. Yes; and what was the effect of that letter?
A. Well, I have the letter here.

Q. Will you read it?

The Court—Whom was it addressed to?
Signed by whom?

10 The Witness—It was addressed to me
and apparently signed by the Secretary to
the Governor.

Q. Who is the Secretary to the Governor? A.
Thomas L. Hanson.

Q. Do you know him? A. Oh, yes.

20 Mr. Merrey—Might I ask if Mr. Hanson
is here? I subpoenaed him.

Mr. Weinberger—He will be here.

30 Q. Will you read it? A. "My dear Mr.
Heher: Under the act of 1929, which prohibits a
member of the County Board of Election from
holding another elective office, there is a vacancy
in the County Board of Elections in Passaic Coun-
ty in respect to Robert C. Barr. Will you kindly
forward me a nominee for this office, in order that
the work of the County Board of Elections in this
county might continue. Very truly yours, Thomas
L. Hanson, Secretary to the Governor."

Q. Did you make any response to that? A.
I did.

Q. When? A. As I stated, on July 10, 1929.

Harry Heher—direct

Mr. Merrey—I will ask that Mr. Hanson, who was under subpoena, and I have an affidavit of service on him, to produce the original letter.

The Court—Is Mr. Hanson here? Not here.

Mr. Merrey—Will you admit a copy? He informed us yesterday he would positively be here.

Mr. Weinberger—I won't admit anything 10
for the time being.

Mr. Merrey—There are other counsel.
Talk to them.

Mr. Weinberger—We won't admit anything.

The Court—Do you all agree with Mr. Weinberger?

Mr. Kennedy—The reason we cannot admit it is he is attempting to prove a letter 20
sent to the witness, not the defendant in this case. I don't know anything about it.

The Court—The only question is whether in the absence of the witness, we might use a copy. He is under subpoena duces tecum. I will allow the copy to be used now, subject to being stricken out if he does not come and if it develops when he comes it is not in accordance with this 30
copy. You may read it with that understanding.

Mr. Weinberger—What is the date of the letter?

The Court—July 10th.

Mr. Merrey—July 16th.

The Court—He said the 10th.

Harry Heher—direct

A. Do you desire me to read it for you?

Q. Yes. A. "Thomas Hanson, Esquire—"

The Court—The Secretary to the Governor has sent word he is on his way. You may go on.

A. "Thomas Hanson, Esquire, Secretary to the Governor, Trenton, New Jersey. My dear Mr.
10 Hanson: In reference to your favor of 24th ult., regarding the vacancy in the County Board of Elections for Passaic County, I beg to say that such recommendation will be forwarded to you in the next few days. Your very truly."

Q. All right. Was there anything else after that? A. Any correspondence?

Q. Yes. A. Yes.

20 Mr. Merrey—Can this take the same course?

The Court—Oh, yes.

A. On July 16th, 1929.

The Court—That is a letter from you?

The Witness—From me to the Governor.

30

A. I addressed this letter to the Governor: "Honorable Morgan F. Larson, Governor of New Jersey, Trenton, New Jersey. Dear Governor: In accordance with your request I hereby appoint Mrs. Agnes V. Barr of 80 Union Avenue, Clifton, New Jersey, as a member of the Passaic County Board of Elections, to succeed Robert C. Barr. Mr. Han-

Harry Heher—direct

son recently advised me that it is your contention that under the Act recently passed by the legislature this office became vacant, and this appointment is in accordance with the request which he made. Yours very truly."

The Court—Was that the first nomination or appointment that you made to the vacant office?

The Witness—Yes.

10

Q. That is signed—pardon me. A. That was signed by me as Chairman of the Democratic State Committee.

Mr. Minturn—As I understand it, if your Honor please, the Democratic Chairman simply recommends.

The Court—He called it appointing. 20 That is why I used the word myself. In the letter to the Governor, he said, "I appoint."

The Witness—I understand the statute provides—

Mr. Merrey—What is that? It says nominate on his nomination. The Governor commissions. The Governor does not make the appointment. 30

The Court—He used the word "appoint" improperly. He should have followed the language of the statute, and nominated. I always like to instruct Democrats.

The Witness—Well, if I may be permitted, I construe the statute to require the

Harry Heher—direct

Chairman of the State Committee to make the appointment.

The Court—This is off the record. This is merely colloquy between a Republican and a Democrat.

Q. Did you hear from the Governor's office or the Governor afterwards about it? A. Yes. Miss Smith, one of the Secretaries to the Governor
10 called my office on the telephone.

Mr. Murner—This is objected to.

The Court—On what ground?

Mr. Murner—He is now endeavoring to ask did he hear from the Governor's office. What they told him, so far as we are concerned, the defendants in this case, is hearsay and it is not admissible.

20

The Court—I will allow it.

Mr. Murner—We have no way of contradicting it.

The Court—Yes; bring Miss Smith here.

Mr. Murner—We have had no notice of it.

The Court—You have now, and if you want it, I will adjourn it.

30

Mr. Murner—It is merely hearsay. It is not binding on us.

The Court—It won't influence the Court, if it is not proper.

Mr. Weinberger—May we have our objection noted on the record and an exception?

The Court—Yes. But only one at a time.

Harry Heher—direct

There are four of you and you may get me all mixed up.

Mr. Weinberger—All right. It needs four to watch them.

A. Miss Smith, whom I know to be one of the Governor's Secretaries called my office on the telephone and said that the Governor's office desired the formal resignation of Mr. Barr. That information was conveyed to me, and on August 1, 10 1929—

The Court—When? Do you know about when?

A. Well, I cannot—I have no way of fixing the date. The letter of appointment bore date July 16th, and the next letter bore date August 1st.

20

The Court—Sometime between July 16th and August 1st, Miss Smith had this communication by telephone with you?

The Witness—Yes; I am quite sure only a day or two or three days. I sent the letter on August 1st. I thereupon, on that day, August 1st, sent this letter to Mr. Hanson, "Thomas Hanson, Esquire, Secretary to the Governor, Trenton, New Jersey, Dear Mr. Hanson: In accordance with your suggestion and on the theory that a vacancy exists, I appointed Mrs. Agnes V. Barr, as a member of the Passaic County Board of Elections to succeed Mr. Robert C. Barr. After I forwarded this appointment to

30

Harry Heher—direct

10 your office, Miss Smith sent word to my office that a resignation of Mr. Robert C. Barr should be forwarded to your office. My information is that Mr. Barr contends that he has not lost membership in the board, and that therefore no vacancy exists. He has not forwarded the resignation to me, and I do not see how I can compel it. I made the appointment as you suggested, because you contended that a vacancy had occurred. Under the circumstances, therefore, I do not see that I can do anything further in the matter. Yours very truly."

Q. Was that signed by you? A. I signed that.

Q. How were these letters sent, Mr. Heber?

20 A. By mail.

Mr. Merrey—Now, I ask leave of the Court to have the originals marked when they are produced by Mr. Hanson.

The Court—They will be marked. Is that all?

30 A. There was subsequent correspondence. You asked me if there was any more?

Q. Yes. Well, I do not want to take something that may not be an issue in this case.

The Court—That was an argument between you and the Governor, or the Governor's Secretary as to the propriety of your action and his action?

Harry Heher—direct

The Witness—I asked the Governor why.

The Court—We are not interested in that.

Q. You mean about the last September 26th?

A. Yes.

Mr. Merrey—I think he would not let us put that in.

The Court—I think not. I can imagine 10 what they were.

Mr. Merrey—It was concerning newspaper articles.

The Court—Yes.

Q. However— A. Well, in the letter the Governor's Secretary sent to me—

Mr. Murner—We are objecting to this. 20

The Court—Objection sustained.

Mr. Merrey—I think that perhaps we ought to put this letter in, because this is the letter direct to the Governor.

The Court—A letter from him to the Governor?

Mr. Merrey—A letter from Mr. Heher to the Governor of New Jersey. It recites the facts of what happened. No answer has 30 been received by Mr. Heher and no denial that those facts were true.

A. Well, there was a reply.

Q. There was? A. I have it here. That is what I attempted to say and objection was made.

Harry Heher—direct

The Court—I know. But this is all, as I understand it, from Mr. Heher—a letter from Mr. Heher to the Governor or to the Governor's Secretary, in which he explains his position, and a reply from the Governor in which he explains his; isn't that it?

Mr. Merrey—I don't know that the Governor explains his position.

10 The Witness—Yes, he assigned a reason for his action.

The Court—I don't know.

Mr. Merrey—I think we ought to put it in.

The Court—I don't know.

Mr. Kennedy—I object to it.

The Court—I will allow it.

Mr. Weinberger—How is it binding on us, the Governor's reason?

20 Mr. Merrey—You are standing behind the Governor's paper.

The Court—There is no jury here.

Mr. Weinberger—All right, over our objection.

The Court—I cannot rule on it properly, because I don't know what it is yet. I will hear it and then rule.

30 Mr. Merrey—It is undoubtedly corroboration of Mr. Heher's statement that he made the nomination and so on.

The Court—It may be.

Mr. Weinberger—That is a self-serving declaration.

Mr. Merrey—By the Governor.

Mr. Weinberger—By Mr. Heher.

The Court—You may read it .

Harry Heher—direct

The Witness—Shall I read the letter that I sent to the Governor.

The Court—If you please.

A. It was dated September 26, 1929.

The Court—Is this to the Governor?

A. "To the Governor. Honorable Morgan F. Larson, Governor of New Jersey."

10

Mr. Kennedy—That is long after they allege their appointment. How is that fair?

The Court—I cannot tell you. I will answer that when it is read. Do you know what is in it?

Mr. Kennedy—No, sir. They allege their appointment was made in July. What happened subsequent to that has no bearing.

20

The Court—I will rule on it after I have heard it read.

A. "Honorable Morgan F. Larson, Governor of New Jersey, Trenton, New Jersey, Honorable Dear Sir:

I am in receipt of news articles clipped from Paterson papers asserting that your office is responsible for the statement that you appointed Mr. Samuel Geldziler as a member of the Passaic County Board of Elections to succeed Robert C. Barr, because of my failure to nominate a candidate to succeed him. This statement being contrary to fact, I am at a loss to understand it.

30

Your secretary called my attention by letter to the Act of 1929, which in your judgment made Mr.

Harry Heher—direct

Barr ineligible to continue as a member of the County Board of Elections, and requested that I nominate his successor. I thereupon investigated that matter, and on July 16, advised you, likewise by letter, of my appointment of Mrs. Agnes V. Barr, as a member of said Board. My letter notifying you of the appointment stated that:

10 'Mr. Hanson recently advised me that it is your contention that under the Act recently passed by the Legislature, this office became vacant, and this appointment is in accordance with the request which he made.'

While receipt of this letter was not formally acknowledged, Miss Smith of your office, called my office on the telephone later, acknowledged receipt of the letter, and requested that, in order to clear the record, I secure the resignation of Robert C. Barr, as a member of the abovementioned
20 board and forward it to your office. On August 1, I advised your Secretary by letter, that it was Mr. Barr's contention that he had not lost membership in the board, and that therefore no vacancy existed; that he had not forwarded his resignation to me, and I did not see how I could compel it; that I made the appointment in accordance with your suggestion, because you contended that a vacancy had occurred.

30 I am sure you will agree that, in fairness to me, the facts should be fully and correctly stated. The news articles in question carry the clear implication that I was in default in the performance of my official duties, and I felt that in the circumstances you would be willing to clear up the misunderstanding that had resulted from the news articles in question. I am sure you will not regard

Harry Heher—direct

as presumptuous a request that I be advised of the reason which prompted the rejection of the nomination of Mrs. Barr. Yours sincerely." Signed by me.

On October 2, 1929, this letter was forwarded to me by the Secretary of the Governor: "My dear Mr. Heher:

Replying to your recent letter to the Governor, concerning the appointment to the Passaic County Board of Elections, the statement given to the 10 newspapers explicitly said that you had recommended Mrs. Barr's name, but that subsequently we were advised by you that Mr. Barr would not resign, claiming that there was not vacancy, which left no other alternative than litigation, and it would be foolhardy on the part of this office to appoint a wife to succeed a husband to an office the title was in dispute. Very truly yours, Thomas L. Hanson, Secretary to the Governor." 20

Mr. Weinberger—Of course, we object, and ask that it be stricken out as not binding on us and ask that it be overruled.

The Court—I will allow it.

Mr. Weinberger—Allow an exception.

The Court—You may have one.

Mr. Weinberger—Not being too late?

The Court—No, sir. 30

Mr. Merrey—I think that is all.

The Court—There is not anything really in either of them that was not already before the Court.

Mr. Merrey—You may cross-examine.

Mr. Minturn—No questions.

Harry Heher—direct

Mr. Murner—No questions.

Mr. Merrey—We rest our case.

Relator Rests.

DEFENDANT'S TESTIMONY

The Court—Any evidence in reply?

10 Mr. Murner—If the Court please, do I understand that Mr. Merrey has rested his case.

The Court—He has.

Mr. Murner—Of course, Mr. Heher has testified, as your Honor knows, that on June 24, 1929, or just prior to that, a couple of days, one or two, before June 24, 1929, he had notice that there was a vacancy existing in the office of membership in the Passaic County Board of Elections.

20 Mr. Merrey—I think the testimony ought to be read, if he thinks that.

The Court—No, he did not say that.

Mr. Murner—He said a day or two before that he had notice of this vacancy.

The Court—I did not understand him to say so.

30 Mr. Murner—That is my understanding, sir.

Mr. Merrey—He did not say that.

Mr. Murner—Well, regardless of whether or not he said it, he did say on the 24th day of June, 1929, he received a notice in writing.

Mr. Merrey—No, he did not.

Mr. Murner—Yes, he did, he read that letter.

Harry Heher—cross

Mr. Merrey—He said he did not get that letter until one or two days before July 10th.

Mr. Murner—No.

Mr. Heher—I do not know that I fixed the date. May I take the stand?

The Court—You may come back.

Mr. Murner—I would like to read his testimony. I will ask the court stenographer to read his testimony. 10

Mr. Heher—I would like to explain.

The Court—Wait a minute.

(Testimony read by reporter.)

The Court—Mr. Merrey is right.

Mr. Murner—A letter bearing date June 24th.

Mr. Weinberger—I understood him a letter dated June 24th.

The Court—He says so yet. 20

Mr. Murner—And he did not get it until—

The Court—Shortly before July 10th. Do you want to cross-examine him?

Mr. Weinberger—Yes.

HARRY HEHER, recalled.

30

Cross Examination by Mr. Weinberger:

Q. Mr. Heher, where was your office?

The Court—Are you going to examine?

Mr. Weinberger—If I may examine this witness.

Harry Heher—cross

Mr. Merrey—Didn't they waive that cross examination?

The Court—I will permit it.

Q. Where was your office on June 24, 1929?

A. Trenton.

Q. Where did you receive that letter? A. Well, I received that letter at my office, of course.

Q. Was it post-marked Trenton, or didn't you see the envelope? A. No, I didn't see the envelope.

Q. It was torn? A. Well, I never received the envelope. My secretary—

Q. You don't know—

The Court—Let him finish.

A. My secretary opens my mail and delivers the enclosures to me and I do not see the envelopes.

Q. You don't know whether or not, Mr. Heher, that letter was not received by you at your office or someone in charge of your office on the 24th of June, 1929? A. Well, I assume it was not. It could not possibly be received until the next day. It was dated—

Q. I mean the 25th of June? A. Yes; I cannot say when it was received because I don't know.

Q. I assume you are a busy man, going to all parts of the state, and sometimes you don't come back to your office. A. I was very busy at that time.

Q. Do you keep a diary? A. No.

Q. Were you at Trenton on the 24th of June? A. I could not say. The month of June is always a busy month for me, because of the number of

Harry Heher—cross

cases that come up in the various courts in which I practice, prior to the opening of the summer vacation, and I was out of town a great deal trying cases, and I was out of town in June trying cases, but I kept in contact, and I couldn't tell you what days.

Q. You might have, when that letter came, just pushed it aside? A. No; I am quite sure I did not receive that letter. Either one or two days before.

Q. Can you— A. Wait until I answer the question. 10

The Court—Wait.

A. I have no record of the date when I actually received it, because I made no note of it, but I have been chairman of the State Committee since 1922 and I know of that provision requiring a vacancy 20 to be filled in ten days.

Q. I am not asking you about the filling.

The Court—You asked him why he knows when he got it and I think it is pertinent.

A. I know that I acted on that letter within not more than three or four days after it was brought to my attention. 30

Q. How long it laid in your office, whether it was the 24th of June or the 25th of June, you don't know? A. Oh, no.

Q. But when you found time to look at your mail, you saw such a letter on your desk, which you read, is that right? A. Well, I am telling you probably three or four days before I sent the reply, I saw that letter.

Harry Heher—cross

Q. You saw the letter? A. Yes; and then I took time to examine the statute.

Q. Do you stamp a letter when you receive it? A. No.

Q. Eh? A. No.

Q. None at all? A. No; we never done that.

Q. Don't put a stamp on that when a letter comes into your office? A. No, sir; that has never been done in my office.

10 Q. Whether it laid on your desk you don't know? A. No.

Q. From June 25th on? A. I couldn't tell you, because I don't know.

Q. You don't know whether it reached your office on the 24th of June or on the 25th of June? A. Of course, I don't know.

20 Q. You would not swear under oath as a lawyer, would you, as any other witness—withdraw that. You would not testify today that you did not receive that letter on the 25th of June?

The Court—He has already said so.

Mr. Weinberger—He did not say it.

The Court—Yes; he did. He said he did not receive personally until two or three days before.

30 A. I am quite sure I did not receive it personally, but I would not say it did not reach my office on the 25th.

Q. Oh, you wouldn't say it did not reach your office? A. Of course, not.

The Court—How could he?

Harry Heher—cross

Q. Who is your secretary? A. Well, I have two.

Q. What are their names? A. Mrs. Anna Seabridge and Paul Bransitt.

Q. Which one handles your mail? A. Mrs. Seabridge usually.

Q. Who called this to your attention? A. Well, the letter was on my desk with other mail; I don't know who laid it there.

Q. How long it laid there, you don't know? A. 10 No, I can't tell you that.

Q. You don't read the Paterson newspapers do you? A. No.

Q. When you received that letter, you say—I mean when you saw the letter for the first time, you put no stock in that letter, because you knew—
A. I don't understand that question.

Q. Well, you paid no attention to the letter, because you knew Mr. Robert Barr had been appointed by the Governor, the office was filled? A. Well, 20 I knew that I had nominated Mr. Barr to the Governor.

Q. Answer the question.

The Court—Hold on!

A. I knew I had nominated Mr. Barr to the Governor for a term of two years, a month or two before. 30

Q. Yes; and therefore, being interested in politics as you are, you took the trouble to find out that he had qualified, didn't you, and got a commission? A. No, sir, I did not.

Q. Oh, weren't you interested? A. I did not take the trouble to ascertain that. I made the nom-

ination and the Governor appointed every one that I nominated; at least, I was not informed to the contrary, and I paid no further attention to it.

Q. And therefore you paid no attention when you got this notice from the Governor? A. I am telling you what attention I paid to it. I have already stated that.

Q. You don't know what date the letter was received at your office? A. No, sir, I do not.

10 Q. You don't know whether it was June 24th or 25th? A. I do not.

Q. But the first thing you did was a day or two before July 10th? A. It might have been three or four.

Q. Now, it is three or four. A. I cannot fix the date. I have stated that. I made no record of it.

20 Q. Well, you sent the name of Mrs. Barr to the Governor on what day? Or don't you know that? A. Well, the letter—I think it is dated July 16th.

Q. When did you send it? A. On that day. I assume it was sent from my office.

Q. Do you read your mail every day? A. No.

Q. Eh?

The Court—No.

30 A. I do not.

Q. How often do you read it? A. It depends on whether I am in town.

Q. How often are you out of town? A. Now, I can't tell you that. I know—

Q. Well, how often were you out of town in June? From June 24th to July 16, 1929? A. My recollection is several days during that month.

Q. Keep a diary? A. I do not.

Harry Heher—cross

Q. Keep a court diary when you go to court?

A. No, sir, I do not.

Q. Did you try any cases that week, June 24th?

A. I tried several cases that month.

Q. Don't you keep a record in a book of the cases you try and what courts you have got to go to? A. No, sir.

Q. You do not? A. No.

Q. How do you remember that? A. My Secretary advises me of that.

Q. Hasn't she a diary? A. I assume she keeps a record of it.

Q. Do you know whether you were in your office that day? A. Which day?

Q. June 24th or 25th? A. No, I don't know.

Q. You might have seen the letter, if you don't know whether you were in your office or not and you had those letters on your desk. A. My recollection is that I acted on that letter within three or four days after it was brought to my attention.

Q. Mr. Heher, you are a busy man? A. I told you I do not remember it. I was personally concerned only in the examination of this law to see what the effect was, and then I wrote the letter to the Governor.

Q. Mr. Heher, you are a busy man, with thousands of people asking you to do favors,—politicians and heelers from all kinds of cases, aren't you? Am I right or wrong?

Mr. Merrey—Is that a statement?

Q. Am I right or wrong—withdraw it.

Q. You have several hundred people to interview during the week, don't you? A. I don't know about that.

Harry Heher—cross

Q. At times? A. A great many people, no doubt about it.

Q. You get a great many letters? A. Yes, sir.

Q. And you stack them up on your desk? A. I guess that is it at times.

Q. You guess that is it. Well, whether that letter was there on June 25th and you saw it or not, you don't know? A. No; I said that I—

Q. I mean with certainty, Mr. Heher. A. I made no record of the date when I first saw the letter.

Q. Certainly not. A. My recollection is that I acted within three or four days—

Q. Well, your recollection may be bad?

The Court—Let him answer the question.

A. Because I was familiar with the provision of the law with regard to vacancies to be filled in ten days. I had filled several vacancies during my incumbency as Chairman of the State Committee.

Q. Mr. Heher, your recollection may be bad, because you don't know what cases you tried during the week?

Mr. Merrey—I object to that. What right has counsel to say that?

Mr. Weinberger—I withdraw it.

Q. Might not your recollection be bad?

The Court—I might say it won't have any influence with the Court.

Mr. Merrey—I know it would not.

The Court—You are wasting time. I think Mr. Heher's recollection is probably very good. Anything more?

Harry Heher—cross

The Witness—I think that is enough.

Mr. Weinberger—One more thing.

The Court—No jury here, you know. Mr. Heher and I are old friends.

Q. Mr. Heher, were you in your office on June 24th to July 1st, any day? A. You mean every day?

Q. Any day. A. Oh, I assume I was there on some day. I am quite sure of that, although I could not fix the date. 10

Q. How many times, Mr. Heher? A. Was I in my office during that week?

Q. Yes. A. I couldn't answer that. I don't know.

Q. A hundred?

The Court—He cannot say, he says.

Q. Would you look at your mail when you came in every day when you were there? A. No, many days I did not find time to go to the office at all. 20

Q. Didn't you pay any attention to mail? A. Yes, sir.

Q. Aren't you interested in the mail that comes in? A. I am.

Q. Some days you go there and you don't look at your mail? A. I say that on many days I am required to be out of town or away from the office. Very often when I reach my office in the morning I have to talk to people and then I must leave for Court, and if I don't find time to look at my mail, I don't do it, because I can't do it. 30

Q. Well, from June 24th, or June 25th until July 1st, did you look at your mail? A. Oh, I assume so, though I cannot answer that definitely, I don't know.

Harry Heher—cross

Q. Was this letter among them? A. I have no recollection of that.

Q. That is all.

Mr. Merrey—Is that all?

Q. Just a minute. Did you mail the letter to the Governor? A. No.

Q. That is all.

10

Mr. Merrey—Is that all?

The Court—Anything more, Mr. Merrey?

Mr. Merrey—No.

Mr. Murner—Now, if your Honor please,—

20

The Court—The Governor's Secretary is here, I take it, Mr. Hanson. Will you produce some letters that have been subpoenaed, July 10th—or rather, July 16th, I guess it is—yes, July 10th and July 16th, Mr. Heher to you or to the Governor.

Mr. Hanson—I have a letter of July 10th, but I have not the letter of July 16th and I was unable to locate it.

The Court—Have you looked for it?

Mr. Hanson—Yes.

30

The Court—Cannot locate it?

Mr. Hanson—No.

The Court—Do you remember it?

Thomas L. Hanson—direct

Mr. Hanson—Yes, I recall the letter.

The Court—Very well. Let the letter of July 10th be produced.

Mr. Merrey—He is here and I think we better put it on the record and let him be sworn.

THOMAS L. HANSON, sworn.

Direct Examination by Mr. Merrey:

10

Q. Would you mind letting me see the letters?

A. Yes, that is the whole file.

Q. The only one is the 16th? A. Yes.

Q. Mr. Hanson, you are Secretary to the Governor? A. I am.

Q. Do you remember receiving a letter from Harry Heher of July 10th, which you were subpoenaed to bring here? A. Yes.

20

Q. Did you look for it among the files? A. Yes.

Q. Cannot find it? A. I have the letter of July 10th.

Q. I mean July 16th? A. July 16th, I looked for it, but I cannot find it.

The Court—But you do recall receiving a letter—that letter.

The Witness—Oh, yes.

30

The Court—What was that date?

Mr. Merrey—Can I show you this and ask you if this is a copy of it?

The Court—Yes.

(Witness examines paper.)

A. Yes, that is a copy of the letter.

Thomas L. Hanson—cross

The Court—In other words, you were advised by Mr. Heher that he appointed a Mrs. Barr to this office?

The Witness—That is right, yes, sir.

The Court—Very well.

Mr. Merrey—That is all.

The Court—If you have no objection, I will allow the Secretary to take back the original. Is there any objection?

10 Mr. Merrey—We have copies of those.

The Court—Any objection to that?

Mr. Murner—Which letter?

The Court—The only letter he brings is the original of July 10th.

The Witness—And September 26th.

Mr. Murner—Both of which Mr. Heher wrote?

The Witness—Yes.

20 The Court—Very well, you may take them back with you, Mr. Heher.

Cross Examination by Mr. Weinberger:

Q. You mailed the letter on June 24th?

Mr. Merrey—I object to that. That is not cross examination.

30 Mr. Weinberger—Trust me to know.

Mr. Merrey—I suppose you do.

The Court—I will sustain the objection.

Mr. Weinberger—I won't press you at this time. I will call him as our witness.

The Court—All right. Stay around. I was trying to get rid of you.

Mr. Merrey—That is our case. We rest.

*Motion for Dismissal**MOTION FOR DISMISSAL*

Mr. Murner—I would like at this time to move for a dismissal of the proceedings, on the ground that they have not established that Mrs. Barr was commissioned by the Governor, as the Act requires.

The Court—Motion denied on that ground.

Mr. Murner—Your Honor, allow an exception?

The Court—You may have it.

10

Mr. Murner—Number two, on the ground that on the testimony that has been used before your Honor, as part of their case, there is no proof that the Governor was notified of any nomination by Mr. Heher, the Chairman of the Democratic State Committee, within the period of ten days that the Act requires. Mr. Heher says this, that three or four days before the tenth day of July, and he won't say for sure it was not on the first day of 20 July, he received this communication from the Governor, in which it advised them that there was a vacancy existent in this County, calling upon him to make a nomination; that on the 10th day of July, he wrote to the Governor and said that he would send him a nomination within the next few days; then on July 16th they state that he dictated a letter in which he endeavored to make a nomination. If it was delivered to the Governor 30 on the 16th day of July, there is no proof before your Honor that it is within the ten days that the statute provides.

The Court—There is no question but what it was received by the Governor, because that is the testimony of Mr. Hanson.

Mr. Murner—But it is important, if your Honor

Motion for Dismissal

please, that it be done in accordance with the statute that provides it must be done within ten days.

The Court—That may be, but why raise a question of fact when there is no question of fact on the receipt of that letter?

Mr. Murner—If that is so, and the testimony is as I have stated that it is, the law is that Mr. Heher had no right to make a nomination after the ten days.

10 The Court—In other words, from the ten days from the time that the statute was enacted, Mr. Heher must have nominated, or he was through; is that right?

Mr. Weinberger—No.

Mr. Murner—We do not contend that. If your Honor please, the Act does not say who shall notify him. It says after notification of a vacancy he shall within ten days after notice. Now, we contend that the Act of itself—the fact that Mr. Barr qualified to an office—he knew of it. He knew he was a Councilman. That when this act was passed, that that was public notice. He knew he was in office, and he knew that within ten days after that, he would be required to fill the vacancy. But in addition to that, that he received on the date of June 24th, a communication—when, he will not say.

20 He will say that it was prior to July 10th, three or four days. He would not say he did not receive it on the first day of July. But if it was four days before that time, the testimony that they adduced here is to this effect, that it was on July 16th, he dictated a letter. That still doesn't comply with the provisions of the statute. He complied with that regarding the Chairman of the State Committee, to notify the Governor. Mr. Heher, on the

30

Motion for Dismissal

contrary, says he did not—and I have the letter—he doesn't say he notified the Governor. There is no proof here that he did notify the Governor within the ten days that the Statute requires, and I say under the law we are entitled at this time to have a dismissal.

The Court—He did not think the Governor would be in such a hurry.

Mr. Murner—No, but he was.

Mr. Merrey—He did not make any nomination 10
himself for a month after.

Mr. Murner—He took that. Those are the facts and undisputed. That is their testimony, that there was a receipt of a notice. It might have been on July 1st. Mr. Heher don't know it was not. He says he doesn't remember. Then on July 16th, he says he dictated a letter. He still does not say that he notified the Governor as the law requires. It says here: "In case of a vacancy arising in any 20
of the County Boards of Election from any cause other than expiration of time, the Governor shall be forthwith notified."

Mr. Merrey—By whom?

Mr. Murner—"Notice of such vacancy to be given to the Chairman of the State Democratic Committee, and such Chairman shall not later than ten days thereafter nominate a successor." Now, then, if the Court please, they have testified here as part 30
of their case that it might have been on July 1st.

The Court—Do not waste any more time about that, because I am quite satisfied from Mr. Heher's testimony that it is a fact that he actually received the letter of June 24th, a few days before he answered it on July 10th. He says that repeatedly and you gentlemen with all of your ingenuity could not get him to change his story.

Motion for Dismissal

Mr. Murner—But, nevertheless, that is really, if your Honor please, the letter of July 10th.

The Court—So when he got actual notice of the vacancy, I have no doubt was a few days before he replied to the letter.

Mr. Murner—That was on July 10th.

The Court—When he replied.

Mr. Murner—He said he did not make a nomination until July 16th.

10 The Court—That is correct.

Mr. Murner—Now then, he does not say that he notified the Governor as the Act requires. The Act says that such Chairman shall not later than ten days after nominate a successor who shall thereupon be commissioned by the Governor.

Mr. Merrey—It doesn't say the Governor shall notify him.

20 Mr. Murner—Who was he going to send it to, some Justice of the Peace in Weehawken?

The Court—I will have to look at the statute. I will reserve decision. Do you wish to be heard?

Mr. Weinberger—He doesn't even testify he mailed the letter.

The Court—He doesn't have to. He received it.

Mr. Weinberger—He might have received it on the 25th of November.

The Court—July 16.

30 Mr. Weinberger—No; that is the date of the letter.

The Court—I haven't any doubt about that. This case is not going to be decided on the supposition that Mr. Heher sent a letter on July 16th and the Governor never got it.

Mr. Weinberger—If you argue that way—

Mr. Merrey—May I proceed?

Motion for Dismissal

Mr. Weinberger—Mr. Barr's letter which he received, dated the 16th—he letter Heher sent out—the letter he says he sent out was dated July 16th to the Governor. Your Honor says that you are not going to suppose that letter might take five or six days or ten days or ten months. Then your Honor must bear this in mind, Mr. Merrey offered in evidence a letter dated June 24th that Mr. Heher got. Now, if your Honor is going to say that it doesn't take any more time to get from Mr. Heher's office to the Governor's office— 10

The Court—There is no dispute about the fact that the letter the Governor received was received in Mr. Heher's office promptly. Mr. Heher does not attempt to say it was not. He says it probably was, but it was not received by him, it was not called to his notice, until a few days before the 10th of July. There is no mistake about that.

Mr. Weinberger—If your Honor please, I think that that is constructive notice when a letter is sent to a man and he lets the letter lay on his desk. 20

The Court—Do not let us waste so much time about facts that are as clear as noonday sun.

Mr. Weinberger—All right.

The Court—The facts are not in dispute. What the law might be, whether he must have actual notice, or from whom, I cannot say until I look at it. Do you want to be heard, Mr. Merrey? 30

Mr. Merrey—In this subject?

The Court—Yes.

Mr. Merrey—I think counsel is begging the question, because there is nothing in the Act which says it is ten days after the Governor does it. There is nothing there that says the Governor is to notify Mr. Heher at all. We proved what happened.

Thomas L. Hanson—direct

The Court—I do not believe the statute meant to put any such responsibility on the Governor.

Mr. Merrey—I think on this kind of County Board, the remaining members would take notice of the vacancy.

The Court—I do not think the Governor had to. I think Mr. Weinberger contends that.

Mr. Merrey—The thing is this: Mr. Heher did it, and there was correspondence afterwards between them.

10 The Court—If the Legislature did not say who was to give the notice, how am I to know who was to give it? You gentlemen say that the Legislature was silent as to who was to give the notice?

Mr. Merrey—Yes.

The Court—How do I know who was to give it?

Mr. Merrey—I don't know.

The Court—No idea about it?

20 Mr. Merrey—No, sir.

The Court—Do you want to put in a defense?

Mr. Weinberger—Certainly.

THOMAS L. HANSON, recalled.

Direct Examination by Mr. Murner:

30 Q. Mr. Hanson, as Secretary to the Governor of the State of New Jersey, did you notify Mr. Harry Heher, the Chairman of the Democratic State Committee, of the fact that a vacancy existed in a membership in the Passaic County Board of Elections?

A. I did.

Q. When did you do that? A. By letter dated June 24, 1929.

Q. Did you after that receive any nomination

Thomas L. Hanson—direct

from Mr. Heher to fill that vacancy? A. Well, the Governor's office was notified by Mr. Heher of a nomination.

Q. That was when? A. Letter of July 16th.

Q. You don't remember when that was received?

A. I don't know the date, no.

Q. It was not received before July 16th? A. No, no.

Q. That is all.

10

Mr. Merrey—I have no questions.

By the Court:

Q. Of course, you don't know of your own knowledge when your letter of June 24th was mailed either? You did not mail it personally?

A. I did not mail it personally. It went out on that day.

Q. You assume it went out in due course? A. 20
I assume it went out that evening, yes.

Mr. Murner—May it be agreed to expedite the thing, that we proved the commission once more, and the oath of office?

The Court—No dispute about the oath of office.

Mr. Merrey—I do not think there is. I
do not make any dispute about it. 30

The Court—It is understood and agreed that the Governor commissioned Mr. Geldziler and he qualified by taking the necessary oath of office and has been exercising the duties of the office since. Do you rest?

Mr. Murner—We rest.

The Court—The court will reserve decision.

7 MAY 7 1931

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY

ex rel., AGNES V. BARR,

Relator

vs.

SAMUEL GELDZILER,

Defendant

Quo Warranto
On Appeal
From Supreme
Court

Brief of Edward F. Merrey

ATTORNEY FOR RELATOR

STATEMENT

This suit is brought to test the right of Samuel Geldziler to hold the office of a member of the County Board of Elections of the County of Passaic. Robert C. Barr was the incumbent of this office, having been appointed in February, 1929, by Harry Heher, Chairman of the State Committee of the Democratic party, and having been commissioned by Morgan F. Larson, Governor of the State of New Jersey, on March 1st, 1929, for a two-year term beginning on the first of March, 1929. The provision for this office in force at the time of the appointment of Robert C. Barr is made in Section 17 of Article VI of the Election Laws of 1920, P. L. 1921, page 522 and 523. The part of the section pertinent is as follows:

“The county board of elections shall consist of four persons, who shall be legal voters of the counties for which they are respectively appointed. Two members of

such county board shall be members of the political party which at the last preceding general election cast the largest number of votes in this State for members of the General Assembly, and the remaining two members of such board shall be members of the political party which at said election cast the next largest number of votes in the State for members of the General Assembly."

The appointment was made under Section 18 of the Act which as last amended, will be found in P. L. 1928, on page 15. The provisions for the appointment are as follows:

"The chairman of the State committee of each of the two political parties as aforesaid, shall, during the month of February, in writing, nominate two persons residing in each county, qualified as aforesaid for members of the county board of elections in and for such county; and if nomination be made in said month of February, the Governor shall commission such appointees on or before the first day of March; provided, that two of such appointees, who shall be members of opposite parties, shall be commissioned for the term of one year from the first day of March and the remaining members shall be appointed for the term of two years from the first day of March; and thereafter one member of such board shall be nominated annually by each of said chairmen, in the same manner, in the month of February, and shall be commis-

sioned by the Governor as aforesaid, and shall continue in office for two years from the first day of March next after their appointment."

It appears that at the time of Barr's appointment and up to the time of the beginning of this suit and afterwards, Barr was a member of the City Council of the City of Clifton in the County of Passaic, to which office he was elected by the voters of one of the Wards of the City of Clifton. By Chapter 257 of the Laws of 1929 which was passed April 30th, 1929, section 17 of the Election Act was amended so far as it applied to the appointment of the members of the County Board of Elections as follows:

"The county board of elections shall consist of four persons, who shall be legal voters of the counties for which they are respectively appointed. Two members of such county board shall be members of the political party which at the last preceding general election cast the largest number of votes in this State for members of the General Assembly, and the remaining two members of such board shall be members of the political party which at the said election cast the next largest number of votes in the State for members of the General Assembly; provided, however, that the office of member of the county board of elections in any of the counties of this State shall be deemed vacant upon such member becoming a candidate for any office to be voted upon at any primary, general elec-

tion or special election, except for nomination for or election to membership in any county committee or State committee, said candidacy to be determined by the filing of a petition of nomination duly accepted by such member in the manner provided by law; provided, that no person who now or hereafter holds elective public office shall be eligible to serve as a member of the county board of elections during the term of such elective office."

It is claimed that the effect of this statute was to vacate the office which Barr held as a member of the county board of elections. The clauses of the Election Laws relating to vacancies and the filling of the same are found in Sections 19 and 20 of Article VI of the Election Laws. These sections are as follows:

"In case of a vacancy arising in any county board of election from any cause other than expiration of the term the Governor shall be forthwith notified, notice of such vacancy to be given to the chairman of the State committee, and such chairman shall, not later than ten days thereafter, nominate a successor, who shall thereupon be commissioned by the Governor; all appointments to fill vacancies shall be for the unexpired term only." P. L. 1920, p 641.

"If in any case the State chairman shall fail to send in writing to the Governor nominations for appointments within the time specified, as aforesaid, the Governor shall make such appointments of his own select-

ion from the citizens of the county in which such failure shall occur." P. L. 1921, p 524.

It appears that under date of June 24th, 1929, Thomas L. Hanson, the Secretary to the Governor of the State of New Jersey, wrote to Harry Heher, Chairman of the Democratic State Committee that a vacancy existed in the County Board of Elections in Passaic County with respect to Robert C. Barr and asking Mr. Heher to forward a nominee for the office. (See Case page 10.) This letter was actually received by Mr. Heher on July 10th, or a day or two before. (See Case page 9.) Under date of July 10th, Heher wrote to the Governor, saying that he would forward a recommendation in a few days. On July 16th, Mr. Heher nominated for the position, Mrs. Agnes V. Barr, the relator in this proceeding and the wife of Robert C. Barr. (See Case page 12.) Mr. Hanson, the Secretary of the Governor, admits receiving this letter on July 16th. (See Case page 33.) Shortly after the receipt of this letter, Miss Smith, one of the Governor's secretaries, called Mr. Heher and asked that he get the formal resignation of Barr. (See Case page 15.) Heher wrote under date of August 1st to the Secretary of the Governor to the effect that Barr claimed that there was no vacancy and therefore Heher could not compel him to resign, but inasmuch as the Governor contended a vacancy had occurred in the office Heher had nominated Agnes V. Barr, and that was all that he could do in the matter. (Case page 15.) Nothing further was done by the Governor until about the fourth of September, 1929, when the Governor appointed the respondent, Samuel Geld-

ziler, to the position which Barr had held. Geldziler was sworn and took the position and is now exercising its functions. It appears from the evidence that the action of the Governor was not founded upon any negligence of Heher to act within the time limited. It seems that in some newspaper articles suggestions were made that Heher had been derelict in his duty in not making a nomination, and he wrote a letter to the Governor, which is found on pages 19, 20 and 21 of the state of the case, and received a reply which is printed on page 21 of the case. The reason which is given by the Governor's secretary for the action of the Governor in failing to appoint Mrs. Barr was that inasmuch as Barr would not resign, claiming there was no vacancy, it would be foolhardy on the part of the Governor to appoint a wife to succeed a husband to an office, the title of which was in dispute.

After the appointment of Geldziler was made, Robert C. Barr commenced a proceeding in the nature of a quo warranto to test the title of Geldziler to hold office. Mrs. Barr also instituted the present proceeding. In the pleadings as found on page IX, paragraph 10 of the plea, it is set up that Mrs. Barr cannot maintain this suit under the statute because the office is not a municipal office. This objection should have been raised by demurrer. On page 3, line 30, a motion was made to strike out this part of the plea. No action was taken upon the motion.

There are two provisions under the quo warranto act for the starting of proceedings of this kind. Under the fourth section, any citizen of the state who believes himself lawfully entitled to an office

may, as relator, file an information in the nature of a quo warranto. Part of the wording of this section limits cases to municipal offices or franchises. The first section of the act applies to any office and any citizen of the state may exhibit in the Supreme Court in the name of the Attorney-General, an information in the nature of a quowarranto provided that leave is so given by the Supreme Court or a justice thereof. After the filing of the information in this suit and suggestion made that this was a municipal office, another proceeding was started under the first section by Louis D. Carr. Permission was given by Justice Charles C. Black of the Supreme Court to bring this action. The questions raised in that suit are practically the same as raised in the present suit. We have, therefore, three suits raising the question of the right of Geldziler to hold office, one by Robert C. Barr, the former incumbent; one by Agnes V. Barr, who received the nomination from the State Chairman, and one by the Attorney-General at the relation of Louis D. Carr, a citizen and taxpayer. The points raised in the Carr suit are the same as this, with the exception that that avoids the question as to whether or not the office is a municipal office. I understand the defendants do not press that question in this suit.

SPECIFICATION

We insist,

1. That the defendant is not entitled to the office. Reason 1. Case pg. XXIII.

2. That the relator is not entitled to the office.
Reason 2.

3. That the State Chairman nominated relator within ten days after he was notified that a vacancy existed and that it was the duty of the Governor to issue a commission to relator. Reasons 3 and 5.

4. That the State Chairman did not lose his right to make the nomination until the Governor actually appointed some person of his own selection. Reasons 4 and 6.

I.

THE NOTICE TO THE STATE CHAIRMAN FROM THE SECRETARY OF THE GOVERNOR WAS NOT THE NOTICE CONTEMPLATED BY THE STATUTE.

Section 19 of Article VI of the Election Law provides that upon a vacancy arising, "the Governor shall be forthwith notified, notice of such vacancy to be given to the Chairman of the State Committee". The Statute nowhere indicates who is to give the required notice to the Governor. The evidence does not show that he was ever notified by any one. The statute intends that some individual or body shall give the notice. Some one must determine that a vacancy exists. The remaining members of the board of elections should do so. This board not having acted, the Governor's notice to the State Chairman could not be effective. Again, the statute does not provide that the Governor is to no-

tify the State Chairman. We read the statute to mean that the same body that is to notify the Governor is to notify the State Chairman.

We contend that the State Chairman not having been notified as provided by the statute, the time in which the State Chairman was to act never started to run and the Governor never acquired the right to make the appointment. The court below held that it was not the duty of the Governor to notify the State Chairman, but having done so, the ten-day period began to run. This is the same as holding that the time began to run whenever the State Chairman received notice of the vacancy no matter from what source. We contend such holding is erroneous. It would leave the right of the chairman to appoint uncertain, as there would be no practical way of fixing the time the State Chairman received notice, nor when the Governor's right accrued.

II

THE APPOINTMENT OF RELATOR WAS MADE BY THE STATE CHAIRMAN WITHIN TEN DAYS AFTER THE ACTUAL RECEIPT OF NOTICE FROM THE GOVERNOR.

The court below found as a fact that the State Chairman appointed the relator within ten days after actual receipt of notice from the Governor. (See opinion on page XVI, line 35.) But the court below decided that the notice was received by the Chairman when it was delivered to his office (June 25th) not when he actually saw it. (July 8-10). That is that constructive notice was

sufficient. We contend that the court below was in error in so holding. Constructive notice is never effective unless the statute so provides.

“As a general rule, unless otherwise provided by law, the service of a notice must be personal. Notice other than personal is countenanced by law only as a matter of necessity or extreme expediency. Where a statute requires the giving of notice and there is nothing in the context of the law or in the circumstances of the case to show that any other notice was intended, personal notice must always be given.”

46 C. J. page 557

In **Wilson vs Trenton**, 53 N. J. Law, page 645 concerning a notice in reference to a city assessment, the charter of the City of Trenton provided that the City Council should

“Cause a notice of the proportion of said assessment and costs to be served upon every person, his or her guardian or legal representative, against whom the same is made and whose residence is in said city, and also to cause like notice, directed to such persons as do not reside in said city, to be inserted in one or more of the newspapers of said city for the space of one month.”

The court said,

“The legislature may prescribe how such notices may be given. The mode prescribed must be strictly followed and the proceedings must show the prescribed notice. *Kohler vs Guttenberg*, 9 Vroom 419; *Kellogg vs Elizabeth*, 11 Id. 274; *White vs*

Bayonne, 20 Id. 311. When no mode of giving notice has been prescribed, it was also conceded that what is called personal service is required and must appear."

The notice on ten residents was made by leaving a copy of the notice at the person's residence with a member of the family. (Page 648.) This was held insufficient service.

In **Brewster vs City of Newark**, 11 N. J. Equity page 114, it was held that a notice must be given personally "unless the law dispenses with it or provides some other notice." (Page 118.)

In **Brost vs Whittall-Tatum Company**, 89 N. J. Law, page 531, it was held,

"Where a statute provides for the giving of a notice but does not prescribe the manner of its service, it is sufficient if actual notice to the person to be affected is conveyed to him."

In this case the notice actually reached the person affected; but in *Troth vs Nullville Bottle Works*, 86 N. J. Law, page 558, a case on the same statute considered in the *Brost Whittall-Tatum* case, although the notice was given in the same way, it was held ineffective because not shown to have reached the person affected.

The above cases lay down the principle that where the statute does not prescribe the method of giving notice, it must be given personally to the person affected. Some later cases deal with the question of proof as to whether the notice was ac-

tually received or not and as to presumptions as to the receipt of letters mailed containing notice.

In **McKenna vs Harrington Company**, 96 N. J. Equity, page 700, Vice-Chancellor Fielder held that a letter containing notice was received. In this case the letter had been registered and the defendant admitted the signature on the return receipt.

In **Alexander vs Rekoon**, 104 N. J. Laws, page 1, it was held

"Where a statute provides for personal service of a notice, without requiring it to be made by an official or in a particular mode, the depositing of the notice with an agency of the federal government for the purpose of having it delivered, **and the actual delivery thereof by such agency to the person to whom the notice is addressed, constitutes a personal service.**" * * *

"The proofs showed that both the plaintiff and the defendant were residents of Newark, and that the letter was mailed in Newark on the day the contract was made. Where a letter is mailed in the place in which the party to whom it is directed resides, and it is received by him, it may reasonably be inferred that he received it in due course of mail; that is, in the present case, where a letter is delivered at the place to which it is addressed, either the day of its mailing or the day following, and whether or not such inference shall be

drawn is a matter to be determined by the jury and not by the court."

From the above, it seems that proof of mailing a letter raises a presumption that it was received by the person addressed. But this presumption is rebuttable and in the present case the presumption was clearly overcome by proof. The court below which sat in place of a jury found as a fact that the notice did not reach the addressee, the State Chairman, until many days after its posting. The court made a direct finding that as a fact the State Chairman actually received the letter less than ten days before he made the appointment of relator. This finding of fact is conclusive. On the evidence, any other finding should have been set aside as against the weight of evidence.

We contend the court below erred in a finding of law that "it was received within the meaning of the law, when it was delivered to his office either by messenger or by mail, not when he read it or actually received it some two weeks after its date." Such holding is contrary to all the authorities above cited.

Since the court found as a fact that the State Chairman made an appointment within ten days after the actual receipt of notice by him, it follows that the Governor never acquired the right to make the appointment under the statute. The exact finding of the trial court is as follows:

"The chairman actually received the notice a few days before July 10th and nominated Mrs. Barr on July 16th, **not later than ten days from the time that he read or knew the contents of the letter of notifica-**

tion of June 24th." Case pg. XVI, lines 35 &c.

If other than personal service is desirable or important, the Legislature may so provide; but in the absence of such provision, precedents so firmly founded and based on good reasoning should be followed.

III

THE CHAIRMAN'S RIGHT TO NOMINATE DID NOT EXPIRE UNTIL THE GOVERNOR MADE AN APPOINTMENT

Even though the court here decides against us on the points made above, we claim the relator is entitled to the office. We contend that the provision that the chairman appoint within ten days is only directory and not mandatory and that if the appointment is actually made by the State Chairman before the Governor acts, the appointee of the State Chairman takes the office.

A construction should be given to the statute which retains as long as possible the power of appointment in the hands of the State Chairman. There are in this state two major political parties. It has been the practice to have elections held by officers, an equal number of which are appointed by each of the parties. This is essential. To place the appointment of election officers under the control of one party would lead to much dissatisfaction and probably fraud.

In the present case, the Governor appointed an official for an opposition party. No matter how

fair a Governor may be, he cannot be familiar with the qualifications of all candidates who may be suggested to him from various counties. He must rely on statements of party leaders who are not always reliable. Fairness in this case required him to take the nomination of the chairman of the party the appointee was to represent. He rejected this nomination and made another suggestion but we know not whom. This appointee at one time was removed from the office of jury commissioner by the Chancellor. Certainly there is much objection to his appointment. We think all this points to the necessity of having this appointment made by the Governor only as a last resort. The Legislature must have so intended and we feel that the statute should be so construed.

"Where a statute directs a person, in discharge of a public duty, to do a thing at a certain time, without any negative words restraining him from doing it afterwards, or any expression from which such intent can be gathered, the naming of time is but directory, and not a limitation of authority."

Shelden vs. Sheldon, 100 N. J. E. 24.

Huggs vs. Camden, 39 N. J. L. 620.

IV

THE OFFICE OF MEMBER OF COUNTY BOARD OF ELECTIONS IS A MUNICIPAL OFFICE UNDER QUO WARRANTO ACT

We do not think this question was properly raised in this case. It can only be raised by demurrer. Motion was made to strike out the para-

graph in the plea in which the point was made. It is not important, however, because as soon as it was suggested, application was made under the first section of the Quo Warranto Act and Justice Black gave permission to Louis Carr, a citizen and taxpayer, to exhibit an information in the name of the Attorney-General against Geldziler. This case is on the list and all the points made above are raised in that suit except the question of the nature of the office.

The fourth section of the Quo Warranto act is as follows:

“Whenever it is alleged that any person usurps, intrudes into or unlawfully holds or executes any municipal office or franchise within this state, any citizen of this state, who believes himself lawfully entitled to such office or franchise, may, as relator, file in the office of the clerk of the supreme court an information in the nature of a quo warranto, against such person, for usurping, intruding into or unlawfully holding or executing any such office or franchise, and may proceed therein in such maner as is usual in cases of information in the nature of a quo warranto, except as is otherwise provided in this act.” (P.L. 1903, page 377.)

We believe a member of the county board of elections is a municipal officer under the above provision.

In **Pierson vs O'Connor**, 54 N. J. Law, page 36, a question arose concerning the office of clerk to

the District Court. From the title of the cause an information issued under the fourth section of the Quo Warranto Act. No point was made that the information would lie because the office was not a municipal one. The court held that this office was not one under the municipal government, and so not affected by certain tenure of office acts. Notwithstanding it must have been considered a municipal office under the Quo Warranto Act or the writ should have been dismissed.

In **McGuire vs DeMuro**, 98 N. J. Law, page 684, a question arose concerning the office of clerk to a District Court. The proceedings were commenced under section 1.

The court held that before permission could be given under section 1, it must appear that the applicant was a citizen and taxpayer and that he was **not the claimant**. It was pointed out that claimant in that case should proceed under section 4. The office of clerk to a district court being in the same class as member of a county board of elections this decision applies here. A county may be embraced in the term municipality. See **Murphy vs Freeholders, &c.** 91 N. J. Law, page 40.

An information to question the title to office of a police justice appointed by the Governor will lie under the fourth section. See **Perry vs Branchi**, 96 N. J. Law, page 113.

The term "municipal office" as used in the fourth section apparently means one of the functions of which are not state wide.

In conclusion, we believe that this act should be construed as liberally as possible to leave in the hands of the State Chairman the making of this appointment. The evident intention of the Legislature was to leave to each party organization the control of its own affairs, and to have election carried on by boards, one-half the membership of which are selected by each of the great parties. The County Board of Elections is an important board. It appoints all district boards, carries on recounts and supervises elections. A board not equally divided could turn over the control of the election to the organization of one party. It could have a material effect in the primaries of its opponents.

The provision for the appointment of these boards by the Governor is only to be exercised in case of necessity, so that elections should not be interfered with. There appeared to be no great hurry in this case, as the Governor waited nearly two months before he acted. (Letter sent June 24th, 1929, to the State Chairman; Chairman appointed relator July 16th, 1929; Governor appointed respondent September 4th, 1929.)

We respectfully submit that the Supreme Court should be reversed and directed to enter judgment of ouster against defendant.

EDWARD F. MERREY,
Of Counsel with Relator

**ANSWER TO BRIEF OF DEFENDANT-
RESPONDENT**

Counsel for the defendant-respondent under point 1 insists: first, that the question involved in this case is a moot question; and, second, that our side delayed in pursuing the appeal. It seems to us that counsel is unfair in these statements. ***The question involved is not a moot question.*** While the office in question has expired, the respondent must know that he was unable to collect any salary from the County of Passaic which now holds the sum of \$2,916.55 to abide the result of this suit. Even if the County had not retained the money but had paid it to the respondent, he would have had to return it if unsuccessful here. We cannot understand the claim made in the brief that this is a moot question.

We have not delayed in bringing on this appeal. The rule for judgment was entered April 15th, 1930, and was not served on relator's counsel for some time thereafter. The notice of appeal was dated July 9th, 1930. The printed state of the case was served on counsel for respondent on August 19th, 1930. Our briefs were served on the respondent on October 6th, 1930. The earliest the appeal could have been brought on for hearing was the October Term, 1930. The case was noticed for hearing at that term but the acknowledged service of notice reached the Secretary of State's office too late to be put on the printed list. Counsels were present and agreed that the case should be submitted on brief, but the court

announced that no case would be taken up beyond 100. The proper number of the case would have been over 200. It therefore could not be heard even had it been on the printed list. The case was then on the list again for the February Term, 1931, and another agreement was made that it be argued on brief and briefs of all parties were filed but it was not reached, as it was still above No. 100 and went over again to the May Term, 1931.

There has therefore been no delay on our part in bringing the matter to hearing.

Respectfully submitted,

EDWARD F. MERREY,
Counsel for Relator-Appellant.

7 MAY. 1 1931

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *ex rel.*

AGNES V. BARR,
Relator, Appellant,

vs.

SAMUEL GELDZILER,
Defendant, Appellee.

In the Nature of
Quo Warranto.

On Appeal from
Supreme Court.

BRIEF ON BEHALF OF DEFENDANT- APPELLEE.

Statement of Facts.

This action is in the nature of *quo warranto*, to test the title of the defendant-appellee to the office of member of the Passaic County Board of Elections. By consent of the parties, a jury was waived and this action, together with two other related actions, were tried before Hon. Newton H. Porter, Judge of the Passaic County Circuit Court to whom the cases were referred by the Justice of the Supreme Court holding such Circuit Court, without a jury.

It is to be observed that this action is one of three related actions brought simultaneously with two others by Robert C. Barr and Louis D. Carr. All three actions deal with the same office, present common questions of law and fact and, in general, rest upon common grounds. They were all tried together in the Lower Court and all were decided favorably for the defendant-appellee. Robert C. Barr is the husband of Agnes V. Barr, the relator in another action. Each claims the same office as

against Samuel Geldziler. One of the Barrs must obviously fail assuming, of course, that Mr. Geldziler is not entitled to the office and both, therefore, must necessarily recognize this. Harry Heher, chairman of the Democratic State Committee, as will be indicated in another part of this brief, realized the same situation in that he recognized the ineligibility of Mr. Barr and nominated Mrs. Barr. It is respectfully submitted, therefore, that the appellants themselves are undecided as to their own positions and are attempting to have this Court consider the matters as original rather than appellate.

Judge Porter decided the case favorably to the respondent, Samuel Geldziler. The Court found from the evidence that the said Samuel Geldziler legally occupied the office of a member of the County Board of Elections for the County of Passaic, by virtue of a commission issued by the Governor of the State of New Jersey, bearing date the 4th day of September, 1929, and appointed the said Samuel Geldziler as a member of the County Board of Elections for a term expiring on the 1st day of March, 1931. The Court further found from the evidence, that after having received said commission he duly qualified in accordance with law to serve as a member of the said County Board of Elections. The Court therefore dismissed the proceedings brought by Agnes V. Barr.

The final conclusion in this case depends upon the opinion of this Honorable Court in deciding these questions: First, Was the relator, Agnes V. Barr, properly appointed to such office? Second, Was the respondent, Samuel Geldziler properly appointed to such office by the Governor and is he legally entitled to hold and continue in said office?

The facts from the pleadings and as testified to

at the cause in substance are as follows: Robert C. Barr was appointed and commissioned on March 1, 1929, as a member of the County Election Board of Passaic County for a term of two years from that date. He exercised the duties of his office and was in office on April 30, 1929. On that date an act of the Legislature was approved, effective from that date, amending the law concerning membership in County Election Boards, Chap. 257, P. L. 1929. The act, so far as it is pertinent to the issue of this case, provides as follows:

“The County Board of Elections shall consist of four persons, who shall be legal voters of the counties for which they are respectively appointed. Two members of such county board shall be members of the political party which at the last preceding general election cast the largest number of votes in this State for members of the General Assembly, and the remaining two members of such board shall be members of the political party which at the said election cast the next largest number of votes in the State for members of the General Assembly; provided, however, that the office of member of the County Board of Elections in any of the Counties of this State shall be deemed vacant upon such member becoming a candidate for any office to be voted upon at any primary, general election or special election, except for nomination for or election to membership in any county committee or state committee, said candidacy to be determined by the filing of a petition of nomination duly accepted by such member in the manner provided by law; provided further, that no person who now or hereafter holds elective public office shall be eligible to serve as a member of the County Board of Elections during the term of such elective office.”

On April 30, 1929, Robert C. Barr was a member of the Council of the City of Clifton, an elec-

tive office. By virtue of his occupying said office the said Robert C. Barr immediately became ineligible to continue in his office in the County Board of Elections and by force of statute the latter office automatically became vacant. (For a consideration of this particular question, although it forms no part of the argument in this case, counsel respectfully requests that the Court consider the argument in the cases argued herewith of *Robert C. Barr v. Geldziler* and *Louis D. Carr vs. Geldziler*.)

Under date of June 24, 1929, the Secretary to the Governor addressed and sent a letter to Harry Heher, Chairman of the State Committee of the Democratic Party advising him that a vacancy existed in the Passaic County Board of Elections by reason of Mr. Barr's ineligibility to the office under the act of April 30, 1929, and requesting a nomination to fill the vacancy. Mr. Heher contended that he did not actually receive this letter until he saw it with other opened mail in his office a few days before July 10, 1929. On that date, evidently realizing that a vacancy existed, by virtue of Robert C. Barr's ineligibility, he replied to the letter stating that a nomination would be made within a few days. Under date of July 16, 1929, Mr. Heher sent a letter to the Governor nominating the relator Agnes V. Barr, to the office in question. This is the basis of her claim. On August 29, 1929, the Governor appointed and commissioned Samuel Geldziler, defendant, to the position. The Governor properly and legally did so since the Chairman of the Committee had not made a selection within the statutory ten day period after the expiration of which it became the right and power of the Governor to appoint one of his own choice. Mr. Geldziler took the oath of office and entered upon the duties of said office and continues to perform the same. It was stipu-

lated in open Court that the respondent, Samuel Geldziler, had received a commission from the Governor of the State of New Jersey on the fourth day of September, 1929, appointing him a member of the County Board of Elections for the County of Passaic for the term ending on the first day of March, 1931, which commission was offered in evidence, and that the said Samuel Geldziler had been duly sworn to act as a member of the County Board of Elections of the County of Passaic, in accordance with law.

This proceeding was instituted by the relator, Agnes V. Barr, under Section 4 of the Statute, 3 Comp. Stat. 412. Mrs. Barr claims the office by reason of her nomination by the State Chairman of the Democratic Party, to the Governor, under date of July 24, 1929, which she argues was legally done; she further contends that under the law the appointing power is the State Chairman and the Governor's duty is to commission the person so nominated.

POINT I.

The question involved is a moot question.

It will be observed by this Honorable Court that the term of the office, title to which is disputed, will expire on March 1, 1931. Had the appeal in this case been diligently pursued after judgment was pronounced by the lower Court the decision by this Court would have been pronounced in the term previous to the forthcoming February Term. As it is, because of the delay of the relator-appellant in pursuing the appeal, this cause comes to be heard before this coming February Term. Certainly, a decision will not be forthcoming until some time after March 1st, 1931. By that time the term of office of the present incumbent will

have expired and the decision of the Court will be of no practical consequence in deciding title to said office.

In view of the date of said expiration and the date at which this appeal is presented and the time at which a decision will be rendered, which will be long after March 1, 1931, it is respectfully submitted that the question involved presents purely a moot question and that therefore this appeal should be dismissed and judgment affirmed.

POINT II.

There being a vacancy created in the County Board of Elections and no appointment having been made by the State Chairman within the statutory period, it became the right of the Governor to name the successor.

Article 6, Sec. 19 of the Election Act provides how vacancies shall be filled. This section reads as follows:

“In case of a vacancy arising in any County Board of Elections from any cause other than expiration of the term, the Governor shall be forthwith notified, notice of such vacancy to be given to the Chairman of the State Committee, and such chairman shall, not later than ten days thereafter, nominate a successor, who shall thereupon be commissioned by the governor; all appointments to fill vacancies shall be for the unexpired term only.”

This act is silent as to whose duty it is to notify the Governor or the Chairman when a vacancy occurs. Someone quite evidently did notify the Governor of the vacancy. A duty of the governor to then notify the chairman cannot be read into the law by any construction of the act. How-

ever, the law provides that the State Chairman be notified. There is no question that the Governor did in fact notify him whether it was his duty to do so or not. Mr. Heher, State Chairman, admits receipt of the letter (C., p. 9, lines 30-36). Said letter (C., p. 10, lines 22-33) notified said Chairman that the vacancy existed and requested a nominee for said office. This letter was sent by the Governor through his Secretary, Thomas L. Hanson, and it bore date June 24th, 1929. The presumption is, in absence of evidence to the contrary, that it was received in due course of mail. Mr. Thomas L. Hanson, Secretary to the Governor, testified sending said letter (C., p. 40, lines 29-36). So we have the statute complied with by having a notice of the vacancy received by both the Governor and the State Chairman. The chairman's duty was to nominate within the statutory period, and the Governor's to commission such nominee. This brings us to the next question as to whether the State Chairman properly acted upon such notice.

POINT III.

The State Chairman failed to make the necessary appointment within the required period as prescribed by statute.

The statute specifically says that the Chairman shall, *not later than 10 days thereafter* (after notice that a vacancy exists) nominate a successor. It was mandatory upon the State Chairman to nominate "not later than 10 days, thereafter." The office having become vacant and the State Chairman having due notice thereof, any later appointment by the State Chairman must have been made within this ten day period to have been of legal efficacy. So that if this State Chair-

man's appointment of Agnes V. Barr is to be upheld, her appointment must have been made within the proper time, that is, within ten days after notice of a vacancy was sent to the State Chairman.

The testimony of Thomas L. Hanson is to the effect that he notified the State Chairman of the vacancy in the County Board of Elections. Said letter was dated June 24th, 1929. (See C., p. 40, l. 29-36). Mr. Harry Heher, the State Chairman, testified that he received said letter dated June 24th, 1929. (See C., p. 9, lines 30-37). On what date said letter was received in the office of the Chairman, he cannot say (C., p. 26, lines 14-16). On the other hand, on the same page (lines 30-34) he would not say that it did not reach him on the 25th day of June, 1929. The chairman says he actually received the notice a few days before July 10, 1929, and nominated Mrs. Barr on July 16th, 1929, not later than ten days from the time he read or knew the contents of the letter of notification of June 24th, 1929. That is not a compliance with the statute. The time began to run from the receipt by him of the notification. It was received, within the meaning of the law, when it was delivered to his office, either by messenger or by mail, not when he read it some two weeks after the date of receipt. The nomination by him, therefore, under date of July 16th, 1929, came too late and was of no legal efficacy.

The law with regard to the mailing and delivery of a letter is clearly set forth in the case of *Alexander v. Rekoon*, 104 N. J. L. 1. Chief Justice Gummere, speaking for the Supreme Court in that case, said, at page 2:

"The amended statute declares that when a broker has been employed by an oral contract and shall actually effect a sale, he may

recover from the owner the amount of his commission on such sale, 'provided the broker shall within five days of the making of such oral contract serve upon such owner a notice in writing setting forth the terms of such oral agreement and stating the rate or amount of commissions to be paid thereunder' * * * and that 'the notice provided for shall be served either personally or by forwarding the same to the person to be served by registered mail to the last known post-office address of such person'. The argument is that this statutory requirement was not complied with; that there was no personal service of the notice, and that the letter containing it, which was mailed to the defendant, was concededly not registered."

"Where a statute provides for personal service of a notice, without requiring it to be made by an official or in a particular mode, the depositing of the notice with an agency of the Federal Government for the purpose of having it delivered, and the actual delivery thereof by such agency to the person to whom the notice is addressed, constitutes a personal service. *Wilson v. Trenton*, 53 N. J. L. 645, 648; *McKenna v. Harrington*, 96 N. J. E. 700."

"Where a letter is mailed in the place in which the party to whom it is directed resides, and it is received by him, it may reasonably be inferred that he received it in due course of mail; that is, in the present case, where a letter is delivered at the place to which it is addressed, either the day of its mailing or the day following and whether or not such inference shall be drawn is a matter to be determined by the jury, and not by the court."

The above decision clearly expounds the correct principle of the law. The cases might be greatly multiplied but they would merely be a reiteration of this same principle.

There is no question that the State Chairman received said letter in due course of mail. The

contention of the relator-appellant is that notice conveyed by such letter is not legally effective until the addressee of such letter actually sees and reads it. This is fallacious for two reasons: First, the statute merely says that "notice of such vacancy to be given to the chairman". The relator-appellant cannot read into the statute the broad interpretation she seeks to attach to it. It would be too fanciful and entirely insufficient. Counsel cites a number of cases dealing with personal service which are beside the point. The statute in question says merely notice, and it is the contention of counsel for the defendant-appellee that such notice was strictly complied with upon mailing of the letter and it took effect as such notice from the time it was received and not from the time it was actually read or seen. Second, to agree with the view proposed by counsel for the relator-appellant would lead to absurdity. Assuming the view is correct, then notice would not be effective even though delivered until such time as the addressee actually sees and reads the letter. So that if for six months or a year after date of receipt of a letter the addressee for some known or unknown reason refused or did not find time to actually read the letter, then the letter actually received would be ineffective as notice.

The State Chairman therefore having presumptively received said letter on June 24th or 25th, 1929, by waiting until July 16, 1929, to make his appointment, his appointment by letter of July 16, 1929, was therefore of no effect. He had lost his right to nominate by not having acted within the ten days limited by the Act. The relator, Agnes V. Barr, therefore, was not appointed in due time as provided by statute and therefore can claim no right to the office in question.

POINT IV.

Article 6, Sec. 20, of the Election Act vests power in the Governor to make the appointment of his own selection where the Chairman fails to nominate within the ten day period as provided by statute.

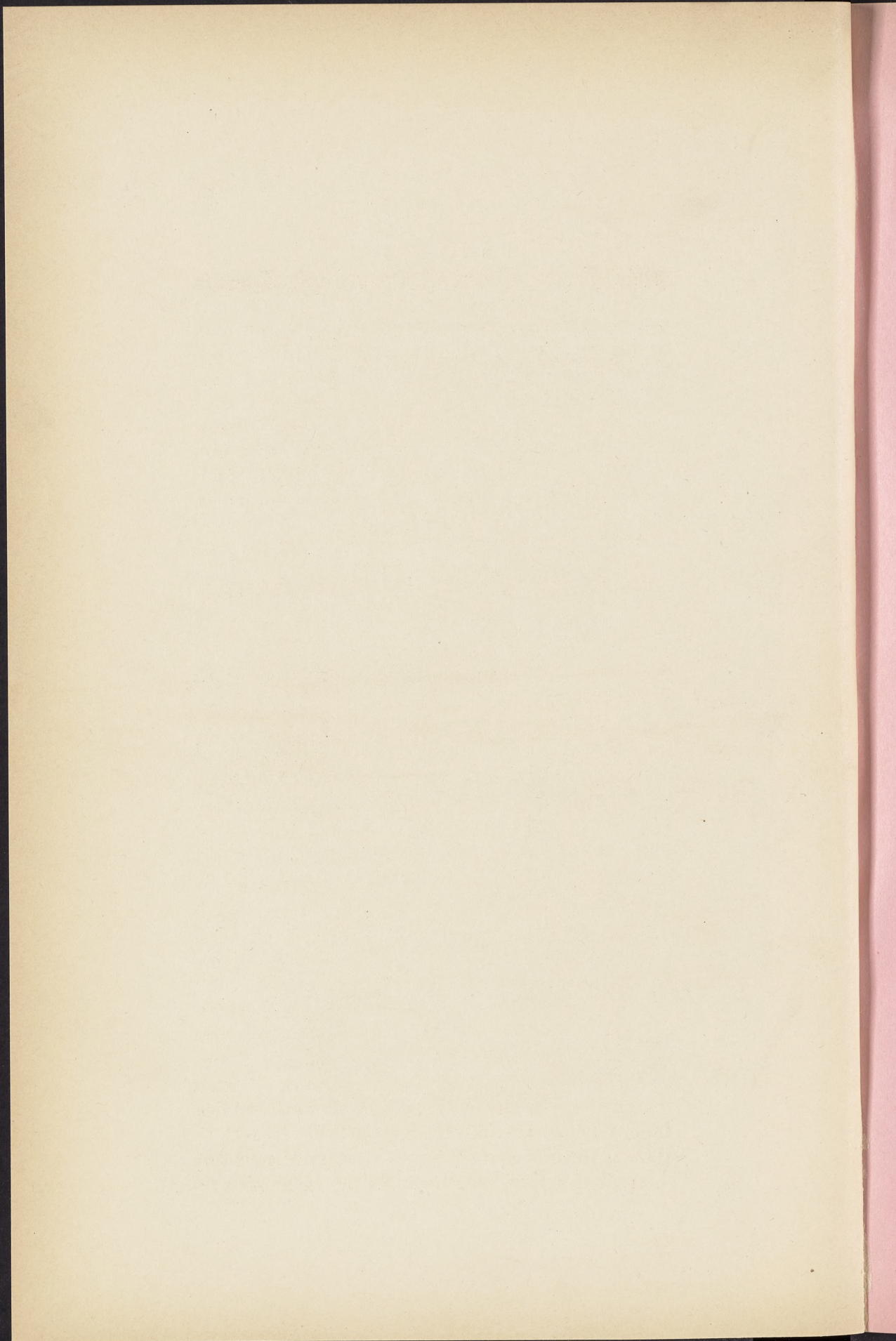
Pursuant to this statutory authority, the Governor did appoint and commission the defendant Samuel Geldziler on the 4th day of September, 1929, as a member of the County Board of Elections for the County of Passaic, for the term ending the 1st day of March, 1931. Said Samuel Geldziler was duly sworn to act as a member of said body in accordance with law, and since that time has been legally and properly occupying the said office. The information by the relator Agnes V. Barr fails.

We therefore respectfully submit that the relator Agnes V. Barr fails to establish any legal right to the office in question. On the contrary, the incumbent, Samuel Geldziler, has sufficiently proved his right to said office and is entitled to continue for the term of the appointment, and we respectfully submit that the judgment of the lower Court should be affirmed.

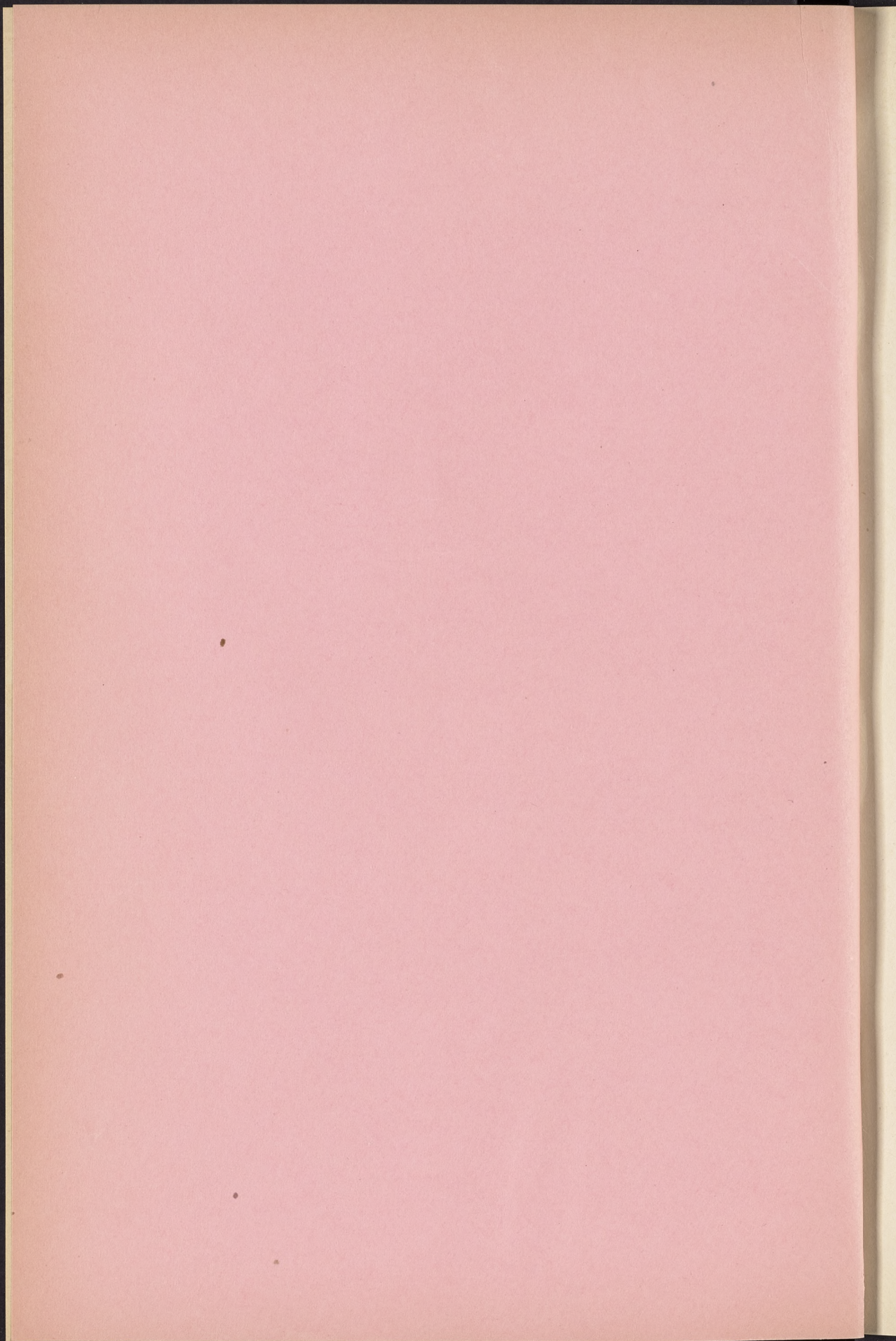
Respectfully submitted,

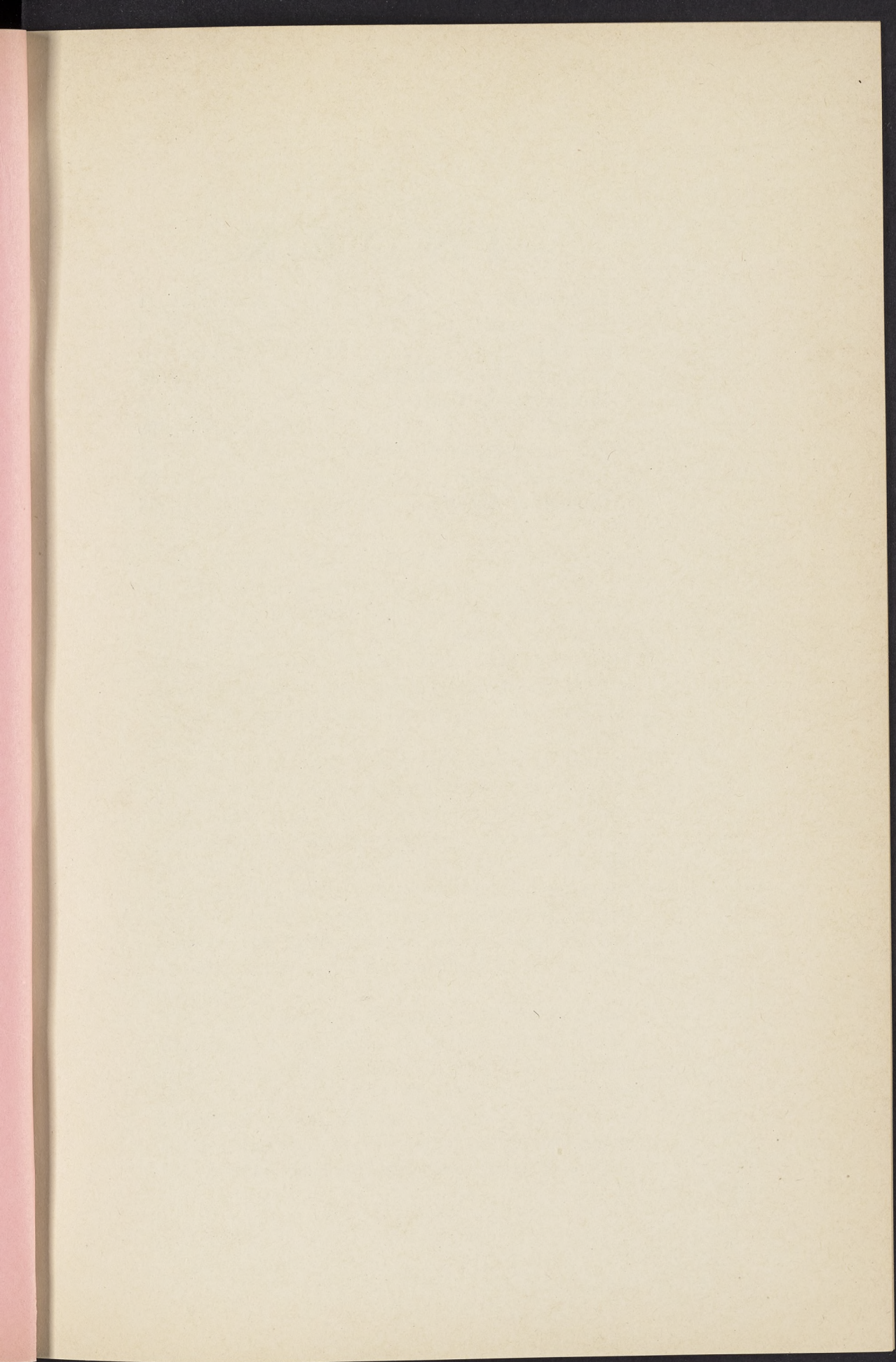
THOMAS J. KENNEDY,
Attorney of Defendant-Respondent.

JAMES F. MINTURN,
Of Counsel with Defendant-Respondent.









INDEX

Information	1
Rule to Plead	4
Amended Plea	5
Replication and Demurrer to Plea	12
Proceedings in Court	15
Postea	29
Rule for Judgment	31
Notice of Appeal	33
Grounds of Appeal	34

Information
(Filed Sept. 23, 1929.)
NEW JERSEY SUPREME COURT

The State of New Jersey ex rel., Robert C. Barr, Relator, vs. Samuel Geldziler, Defendant.	}	On Information, in the nature of quo warranto
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Passaic County, ss:

10

1. Robert C. Barr, of the City of Clifton, County of Passaic and State of New Jersey, by Edward F. Merrey, his attorney, comes to the Supreme Court of the State of New Jersey, before the Justices hereof, in the State House in the City of Trenton, desiring to sue and prosecute in this behalf according to the form of the statute in such case made and provided, and gives said court here to be informed and understand that he, the said Robert C. Barr, is and has been for many years a citizen of the State of New Jersey and a resident of the City of Clifton aforesaid; that for thirty-three years last past he has been a legal voter of the County of Passaic, and has been and is a member of the Democratic party which at the last general election held in the State of New Jersey cast the second largest number of votes in the State for members of the General Assmbly. 20

2. In the month of February, 1929, Harry Heher, Chairman of the State Committee of the Democratic party, did nominate this relator as a member of the County Board of Elections in and for the County of Passaic, and that Morgan F. Larson, Governor of the State of New Jersey on the first day of March, 1929, commissioned your relator as a mem- 30

Information

ber of the County Election Board of the County of Passaic for a term of two years beginning on the first day of March, 1929.

10 3. Relator thereafter accepted the said office and did duly take and subscribe an oath, in writing, before the Clerk of the County of Passaic to faithfully and impartially to discharge all his duties as a member of the County Board of Elections to the best of his skill and ability, which oath was forthwith recorded in the office of the County Clerk of the County of Passaic.

20 4. On or about the fourth day of September, 1929, Morgan F. Larson, Governor of the State of New Jersey did appoint or commission one Samuel Geldziler as a member of the County Board of Elections for the County of Passaic to serve in lieu and in place of this relator for a term beginning with the day of the said commission and ending on the first day of March, 1931. That said appointment and commission so made to the said Samuel Geldziler was to the same office to which relator was appointed as aforesaid, and the said Samuel Geldziler, pretending right and authority therefrom, was duly sworn according to law and accepted said appointment and commission, and thereupon intruded into and usurped said office and thereupon and ever since has unlawfully usurped, held, used and executed the same without any legal appointment, warrant or authorization whatsoever, and yet does so, to the exclusion of relator, to wit, at the County of Passaic aforesaid.

Whereupon the said relator prays the advice of the court herein in the premises and for due process of law against the defendant, said Samuel Geldziler, that in this behalf he may be made to answer to the

Information

said state by what warrant he claims to hold, use, execute and enjoy the aforesaid office as member of the County Board of Elections for the County of Passaic and the liberties, privileges, franchises and emoluments thereof, and that the said Samuel Geldziler may be adjudged to be an intruder and to be ousted from said office, and that not only the title of the said Samuel Geldziler to said office may be determined by the judgment herein, but also the title of the relator to the same office. 10

Edward F. Merrey,
Attorney of the Relator.

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Rule to Plead

(Filed Sept. 23, 1929.)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex rel., Robert C. Barr, vs. Samuel Geldilzer, Defendant.	}	On Information, in the El nature of quo warranto
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RULE TO PLEAD

The State of New Jersey, at the relation of Robert C. Barr, having filed an information setting forth, among other things, that the defendant, Samuel Geldilzer, unlawfully usurps, intrudes into and unlawfully holds and executes the office as member of the County Board of Elections for the County of Passaic, and its liberties, privileges and franchises, without any legal authority, warrant or right whatsoever, and praying that he, the said defendant, may be made to answer to the State of New Jersey, at the relation of Robert C. Barr, by what warrant he claims to hold, use, execute and enjoy the aforesaid office as member of the County Board of Elections for the County of Passaic, and the liberties, privileges and franchises thereof.

20

30

It is thereupon Ordered that the defendant, Samuel Geldziler, plead or demur to said information within ten days after service upon him of a certified copy of such information and this Rule.

Rule actually entered this day of September, 1929, on motion of

Edward F. Merrey,
Attorney of Relator.

Amended Plea

(Filed Oct. 22, 1929.)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex rel., Robert C. Barr, Relator, vs. Samuel Geldziler, Defendant.	}	On Information, in the Nature of Quo Warranto
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AMENDED PLEA

And now, as yet of the term of October, in the year 1929, comes the said Samuel Geldziler, defendant, and having heard the information read, he complains, and under color of the premises in the said information contained, he is greatly vexed and disquieted, and that by no means justly, comes pro- 20
testing that the said information and the matters therein contained are by no means sufficient in the law, and that he need not, nor is subject by law, to answer thereto. Yet, for plea, thereto, he says that he ought not to be disfranchised or impleaded, by reason of the premises in the said information contained, because, he says:

1. At a general election held in the City of Clifton, County of Passaic and State of New Jersey, on 30
the Sixth day of November, 1928, the relator, Robert C. Barr, was elected Councilman of the Third Ward of the aforesaid City of Clifton, for a period of two years commencing with the First day of January, 1929, to and including the Thirty-first Day of December, 1930, and on the aforesaid First day of January, 1929, said Robert C. Barr accepted said office of Councilman of the aforesaid Ward in the

Amended Plea

City of Clifton by being duly sworn to perform the duties thereof and the aforesaid Robert C. Barr thereby duly qualified to serve as aforesaid Councilman of the Third Ward in the aforesaid City of Clifton, on the First day of January, 1929, and he thereby did accept that office of Councilman and became a member of said body and has continued to be a member ever since that time and now is a member of the aforesaid governing body of the City of Clifton, to wit, a Councilman of the Third Ward of the City of Clifton, County of Passaic and State of New Jersey.

2. On the First day of March, 1929, Hon. Morgan F. Larson commissioned Robert C. Barr, your re-lator, Democratic member of the County Board of Elections of the County of Passaic for a period of two years beginning on the First day of March, 1929.

3. On April 30th, 1929, the Legislature of the State of New Jersey passed and approved an act entitled, "An Act to Amend An Act, Entitled 'An Act to Regulate Elections' (Revision of 1920, Approved April 8th, 1929)" and which is better known as Chapter 257 of the Special Laws of 1929, which act provided as follows:

"Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. Section seventeen, Article VI, of the act to which this act is an amendment be and the same is hereby amended to as to read as follows:

17. The County Board of Elections shall consist of four persons, who shall be legal voters of the counties for which they are respectively appointed. Two members of such county board shall be members of the political party which at the last preceding general election cast the largest number of votes in this State for members of the General Assembly.

Amended Plea

and the remaining two members of such board shall be members of the political party which at the said election cast the next largest number of votes in the State for members of the General Assembly; *Provided*, however, that the office of member of the County Board of Elections in any of the counties of this State shall be deemed vacant upon such member becoming a candidate for any office to be voted upon at any primary, general election or special election, except for nomination for or election to membership in any county committee or State committee, said candidacy to be determined by the filing of a petition of nomination duly accepted by such member in the manner provided by law; *Provided*, Further, that no person who now or hereafter holds elective public office shall be eligible to serve as a member of the County Board of elections during the term of such elective office. In all counties of the first class said county board of elections shall appoint some suitable person, clerk of such board, and may also appoint no more than two assistant clerks, and one clerk-stenographer, all of whom shall be appointed from the competitive class of civil service; *Provided*, However, that all persons holding such positions as clerk, assistant clerks and clerk-stenographer of such county board of elections at the time of the adoption of this act shall continue to hold said positions and shall be classified in said competitive class of civil service.

2. All acts or parts of acts inconsistent herewith be and they are hereby repealed.

3. This act shall take effect immediately.
Approved April 30, 1929."

4. By reason of the fact that the said Robert C. Barr was a duly qualified member of the Council of

Amended Plea

the City of Clifton at the time when the aforesaid act was approved, to wit, on April 30th, 1929, he became ineligible and disqualified to serve as a member of the County Board of Elections of the County of Passaic, and by reason of such disqualification of the said relator, Robert C. Barr, a vacancy was created on the Election Board of the County of Passaic. Upon the creation of said vacancy in said County Board of Elections, it became
10 the duty of the State Chairman of the Democratic Party to nominate, not later than ten days thereafter, a Democrat residing in the County of Passaic to fill such vacancy. That the said Democratic Chairman having due notice of the vacancy thereby created as aforesaid in the County Board of Elections of the County of Passaic did not within ten days thereafter nominate a successor to the said Robert C. Barr, as a consequence thereof and after the lapse
20 of the said ten days, Hon. Morgan F. Larson, Governor of the State of New Jersey, did, on September 4th, 1929, by virtue of the statute in such case made and provided, duly appoint Samuel Geldziler, the defendant, a Democrat and a resident of the County of Passaic, to fill the vacancy created in the Board of Elections of the County of Passaic by the disqualification and ineligibility of the said Robert C. Barr; and this defendant, having been duly commissioned
30 by the Governor of the State of New Jersey to fill the aforesaid vacancy of office of the member of the Board of Elections of the County of Passaic, was thereafter duly sworn according to law and took oath to fill said vacancy in the office of the County Board of Elections of the County of Passaic and has continued to be such member and still is a member of the County Board of Elections of the County of Passaic by virtue of the authority of his appointment aforesaid.

Amended Plea

5. This defendant says that he is a member of the Democratic Party which is one of the two political parties which in the preceding election cast the second largest amount of votes in this State for the members of General Assembly, and that he is a legal voter of the County of Passaic and State of New Jersey.

6. This defendant further answering says that since the Fourth day of September, 1929, he has lawfully held, used and executed and still does law- 10
fully hold, use and execute with full legal authority, warrant and right, the office of member of the Passaic County Board of Elections pursuant to the statute in such case made and provided and the amendment thereto above referred to, and since September 4th, 1929, has lawfully held, used and executed, with full legal authority, warrant and right, the office of member of the Passaic County Board of Elections and still does lawfully hold, use and execute such 20
office as aforesaid, without this, that the said defendant in the information mentioned has unlawfully held the same in manner and form as by the said information is alleged against him all and singular, which matters and things this defendant is ready to verify and prove as the Court shall award.

7. This defendant further answering said information says that the relator, Robert C. Barr, has no right, title or interest in the said office of mem- 30
ber of the Passaic County Board of Elections.

As a second plea to said information this defendant says:

1. The office of member of the County Board of Elections of the County of Passaic is not a municipal office or franchise within the true intent and meaning of Section 4 of an act entitled "An Act re-

Amended Plea

lating to informations in the nature of quo warranto, Revisions of 1903" (P. S. 1903, p. 377).

10 2. That the said office of the member of the Board of Elections of the County of Passaic not being a municipal office, it became the duty of the said relator, Robert C. Barr, to obtain leave to file information against this defendant from the New Jersey Supreme Court or a Justice thereof. That the said Robert C. Barr, the relator, failed and neglected to obtain leave to file the information from the New Jersey Supreme Court or a Justice thereof, and having so failed to obtain such leave, he has no right or authority to prosecute such information.

20 Wherefore this defendant prays judgment and that the office of member of the Passaic County Board of Elections, its liberties, privileges and franchises by this defendant claimed, in manner aforesaid, may be allowed and adjudged to him, and this defendant may be discharged by the Court hereof and from the premises above charged against him.

Samuel Geldziler,

Member of the Passaic County
Board of Elections.

Thomas J. Kennedy, Attorney for Defendant.

State of New Jersey, }
County of Passaic. } ss:

30 Samuel Geldziler, of full age, being duly sworn according to law, on his oath deposes and says:

That he is a member of the office of the Passaic County Board of Elections and that he is the above named defendant. Deponent further says that the facts, matters and things set forth in the foregoing plea in the above entitled cause are true to the best of his knowledge, information and belief. And this deponent further says that the plea by the defend-

Amended Plea

ant above pleaded is not intended for the purpose of delay but that this deponent lawfully believes that the said defendant has a just and legal defense to said action and information on the merits of the case.

Samuel Geldziler.

Sworn to and subscribed before me, this 14th day of October, 1929.

James J. Murner,
An Attorney-at-Law of New Jersey. 10

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Replication and Demurrer to Plea

(Filed Jan. 8, 1930.)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex rel., Robert C. Barr, vs. Samuel Geldziler, Respondent.	}	On Information in the Nature of Quo Warranto
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REPLICATION AND DEMURRER TO PLEA

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

30 1. He admits paragraphs one, two and three of the said plea.

2. He denies all matters set up in the fourth, fifth and sixth paragraphs of the said plea.

Wherefore he prays judgment, if the relator ought to have or maintain his aforesaid suit against him, etc.

And the said relator as to the said plea of the said Samuel Geldziler firstly above pleaded says

Replication and Demurrer to Plea

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

1. Because it appears on the face of said first plea that the relator has title to the office in question. 10

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

3. Because said first plea is not allowed to respondent by the law of the land.

Wherefore, because of the insufficiency of said first plea in this behalf, said relator prays judgment thereon, and that the office by him claimed in form aforesaid may be allowed and adjudged to him and that said Samuel Geldziler be adjudged to be an intruder therein and usurper thereof and to be ousted therefrom. 20

And the said relator as to the said plea of the said Samuel Geldziler secondly above pleaded says that the said plea and the matters therein contained are wholly insufficient in law to bar him, said relator, from having his aforesaid information against said Samuel Geldziler and from having not only the title of said Samuel Geldziler to the said office determined by the judgment herein, but also the title of this relator to the same office. And relator specifies the following causes of demurrer thereto: 30

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

Replication and Demurrer to Plea

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

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

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

Edward F. Merrey,
Attorney of Relator.

*Proceedings in Court*NEW JERSEY SUPREME COURT
Passaic Circuit.

The State of New Jersey, ex	}	On Quo Warranto.
rel. Robert C. Barr,		
Relator,		
vs.		
Samuel Geldziler,	}	
Defendant.		

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Paterson, N. J., January 15, 1930.

Before Hon. Newton H. Porter, without a jury.

Appearances:

For Relator: Edward F. Merrey, Esq.,
 Frank J. Davies, Esq.
 Joseph J. Weinberger, Esq.

For Defendant: James F. Minturn, Esq.,
 Thomas J. Kennedy, Esq.
 James J. Murner, Esq.

20

Mr. Merrey—I will move the case of Robert C. Barr. In the case, it seems to me there is only one question for your Honor to decide. Perhaps we can agree on that, can't we? The dispute seems to be there whether this Act actually put Mr. Barr out of office or not, when he did not resign.

Mr. Murner—Is it admitted that Mr. Robert C. Barr was elected to the position of Councilman in 30 the City of Clifton; that he properly qualified by taking the oath of office, and that he was in office as a member of the City Council of the City of Clifton, and in addition thereto, a member of the Passaic County Board of Elections, on the 30th day of April, 1929, or the date when this Act went into effect?

Mr. Merrey—Yes, we admit all that.

The Court—Very well.

Proceedings in Court

Mr. Merrey—The whole question submitted to your Honor in this case, as I see it, is the construction of the Act, as to whether it actually put Barr out of office.

Mr. Weinberger—How can Mr. Merrey blow hot or cold? In one breath, the case before this, he just said that Mrs. Barr is the rightful appointee, and in the next breath he says Mr. Barr is the rightful appointee.

10 Mr. Merrey—I have a new client.

The Court—This is a different case.

Mr. Weinberger—That is ridiculous on its face.

The Court—When you shoot a shot into a flock of ducks you may not get one but you get another one.

Mr. Weinberger—He cannot speculate.

The Court—Yes.

Mr. Weinberger—I do not think it is fair to this
20 Court.

The Court—It may not be, but I am not complaining. Any argument on the law?

Mr. Weinberger—I feel this, he sets up title, and the Court wants to take judicial notice we are here in Court. He has said under oath, because the quo warranto proceeding must be under oath—here is a man comes into Court and swears he is the rightful appointee and that that is his office, that there
30 is no vacancy, and claims Geldziler's position. Now, his wife, two minutes later, swears on the other side that she is the appointee and her husband is out and she is entitled to the office.

The Court—Don't blame me for it.

Mr. Weinberger—It is ridiculous on its face.

The Court—It may be.

Mr. Weinberger—It is ridiculous. Mr. Merrey is turning a somersault.

Proceedings in Court

The Court—Anything more?

Mr. Merrey—No, sir. I simply want to say that in this last case our contention is that Mr. Barr was not put out of office by the statute.

The Court—I understand.

Mr. Merrey—I want to say, your Honor, surely there cannot be any decisions on this statute, because it is rather new.

The Court—There will be one.

Mr. Weinberger—Maybe. I mean, if you take it 10
up. I do not mean for your Honor.

Mr. Merrey—If you keep on the Judge will reverse his position. In this statute, before this amendment, there was one proviso.

The Court—Well, that is a new statute.

Mr. Merrey—Yes, sir, a new statute, but it had a proviso in it, and it is an added proviso, which reads this way. It provides what the County Board shall consist of, and then says, "Provided, however, 20
that the office of a member of the County Board of Elections, in any of the counties of this State shall be deemed vacant upon such member becoming a candidate for any office to be voted upon at any primary, general, or special election, except for nomination for the election to membership in any county committee or state committee. Said candidacy to be determined by the filing of a petition of nomination duly accepted by such board in the manner pro- 30
vided by law."

That was in the Act, you see, before, when Mr. Barr was appointed. He was then, I think, a member of the Council of Clifton, and then Mr. Heher appointed him, but under this provision his office would not have become vacant. That is the way the law read before this amendment was passed. The idea was that no man who was going to run for of-

Proceedings in Court

10 fice should be a member of the County Board of Elections if he went before the public; which seems to be a very reasonable provision; and they provide that upon the filing of this acceptance of the petition for nomination, by filing the petition, his office becomes vacant. That is the wording of the statute. That is very clear. But then some gentleman, who I presume desired to get Mr. Barr out of office down in Clifton, went down to the Legislature and drew this statute and they were apparently in very great haste, and did not sit down and talk it over, and they did not draw the Act with very much care. They put this proviso, "Provided no person who now or hereafter holds elective public office shall be eligible to serve as a member of the County Board of Elections during the term of such elective office."

20 You see now, they did not say, as they had said in the paragraph before in very plain language, that his office became vacant. It said he should not be eligible to serve. They took out his eligibility while his term lasted—I suppose while he was occupying the other office—but they did not vacate his office. So he goes on, and there is no vacation of the office, only there is a disqualification to serve. In other words, he might resign that office next week, perhaps, and then his position as a member of the County Board would come back again.

30 As a matter of fact, when they drew this thing, they did it in such haste, there was another man on the County Board of Elections, who held a similar office, and the Governor did not act on him and appoint his successor. He was a Republican member, it seems. But he stayed there. If this Act ipso facto puts him out there is a vacancy in that Board.

Mr. Murner—That is not true, as a matter of fact.

Proceedings in Court

Mr. Merrey—What is not true about it?

Mr. Murner—You look up the records and you will find your statement of facts is not true. I do not say you are misrepresenting it, but those facts are not true.

The Court—I am not concerned with that.

Mr. Murner—He had resigned before.

Mr. Merrey—He did not tell anybody about until after.

Mr. Murner—He did it.

10

Mr. Merrey—Not that anybody heard of. We know he resigned, but I don't know what date was on the resignation.

Mr. Murner—It was the right date.

The Court—There are only two questions, it seems to me, in this case.

Mr. Merrey—In this case I say now—and not of the draftsman of the Act, of course that is not the test. It is what the Legislature wanted to do—and you cannot get away from the fact that where they use a difference of terms here—in the first place they said the office should be vacant, and in this they said it should not be vacant; therefore, as far as the Barr matter is concerned, we say now under a proper consideration of this Act, there is no vacancy.

20

The Court—We have a bureau now to draft them properly. There will be nothing for the Courts to do after this.

30

Mr. Minturn—It says he shall be ineligible to serve.

Mr. Merrey—Must not serve.

The Court—Mr. Merrey's point was, in the Act they should have gone further and should have said that those now holding office should be ineligible to continue to hold.

Proceedings in Court

Mr. Merrey—They would be vacated.

The Court—That their office should be vacated. In that respect, the Act is poorly drafted, as I understand.

I understand it is a question of whether or not there is a vacancy or was a vacancy under that act. If there was no vacancy—if Mr. Barr was not ineligible to continue to hold the office that ends the matter, of course.

10 Mr. Merrey—Yes.

The Court—If there was a vacancy—if that Act did oust him from the position, then the next question is whether or not Mrs. Barr was not properly entitled to the office by reason of Mr. Heher acting within time and in accordance with the law, or whether the fact that he did not act within the ten days from notice, from whom or by whom I don't know, then his act was of no effect, and there being a vacancy, of course, the Governor, in the absence of any action on the part of Mr. Heher, had the right to appoint Mr. Geldziler or any one else. That is the situation as I understand it.

Mr. Merrey—I think the Court has the questions that are presented very clear.

The Court—There is no law on the subject, therefore there is nothing to brief; that is correct, isn't it?

30 Mr. Merrey—There is more in the other case, perhaps.

The Court—Well, I will make some law then, if you want me to.

Mr. Merrey—It is a new law. There are no decisions on this particular law. May I give you this? That is the transcript in the other case, and you have the papers in the first case.

Proceedings in Court

The Court—No. I gave them back.

Mr. Minturn—May I suggest, therefore, if I may at this stage of the proceedings, which I suppose is the conclusion—

The Court—Yes.

Mr. Minturn—The case is novel upon the question of construction, as your Honor has intimated, and the fact that counsel upon the other side has produced no authorities, and neither have we—I haven't had time, having been injected into it only this morning, as I told your Honor, to give it any great consideration from the legal point of view. I suggest that it might aid your Honor in the consideration of these two statutes—because I consider both of them as subject to reasonable construction, upon which light might be shed by an examination of the authorities, not only here but in other states, and probably of the United States Supreme Court on the question of the construction of a statute.

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I say that for more reasons than one, if your Honor please. Mr. Merrey has endeavored to put a construction upon that statute, which makes his client ineligible under a certain situation, by reason of holding public office, to continue to hold an office which is in direct contact with the people, and that is this office of Board of Elections, the County Board of Elections. No office that we can imagine comes more in direct contact with the body politic, than one who serves on an election board. No man under our present system of government has a greater trust imposed upon him than the man who serves upon an election board, and therefore it is wise as a matter of public policy that the Legislature should make it impossible, as they have attempted to do in this Act, for the man who is serving on an election board to hold public office, or, conversely, to prevent

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Proceedings in Court

a man who is holding public office from using all the influence he can on an election board to help himself or his friends. In other words, the theory of our government is to so divorce the election board, with all its powers, from being in a position to exercise influence one way or the other upon the body politic, as to make it impossible for him to hold public office and at the same time through that public office perhaps, or indirectly to exceed or misuse his powers on the election board.

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We have that theory of government in our Sheriffs, in every county of the State, under our Constitution. We have it in the case of our Governor; he cannot succeed himself, neither can the Sheriff.

The public policy underlying it all, the fundamental theory of our government, is that a man shall not be placed in a position, even in the case of the Governor or the Sheriff for a few years, where, perchance, he may so exercise the powers as to enable him to succeed himself.

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That same policy runs through all this legislation. The Legislature may not have aptly expressed it by the word "eligible," but there can be no doubt about the meaning of the Legislature, and when your Honor comes to ascertain the meaning of the Act, you naturally use the words in the ordinary, every-day sense, and you ask yourself the question, "What did the members of the Legislature themselves mean when they used the word 'eligible'?" That is, he shall not be elected to, he shall not be entitled to hold, if we may use the etymology of the term.

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Therefore, I say it may be that there is ample scope for an examination of acts of that kind, with a view to throwing whatever light we can upon the proposition now before your Honor, because, leaving aside the little that may be in this case to ei-

Proceedings in Court

ther party, the problem in itself is the great public problem, that interests every man and woman, who are entitled to exercise the electoral franchise in the State of New Jersey.

Now, when it comes to the construction of the other Act, that Act, Section 68, provides in case of a vacancy arising in any County Board of Elections, from any cause other than expiration of a term, the Governor shall be forthwith notified.

The Governor is required to do nothing. The Governor is not supposed to be in contact with all these places in the state. 10

The Court—I did not anticipate there was any such duty on the Governor.

Mr. Minturn—Shall be forthwith notified. Notice of such vacancy to be given to the Chairman of the State Committee. It does not say whether the Governor is to send the notice or whether some clerk in his office is to send a notice, or who is to send it. 20 That is left in doubt entirely for him.

“And such chairman shall not later than ten days thereafter—” After receiving notice from whom? From the Governor? Nothing to that effect in the Act. By somebody in the Governor’s office? Some Secretary? There is nothing of that in the Act. Who, then, is to notify Mr. Heher, the Chairman of the Democratic State Committee? Is he to get notice from some Court down here or from the board 30 itself? But he shall do something; he shall act, and the act is mandatory from that point. “Such chairman shall not later than ten days after.” He himself within ten days must do something. It does not say that if he is out of town and the letter should come to his office and he did not read it for ten days, or if he had gone to Europe and the let-

Proceedings in Court

ter came to his office, that that shall excuse him from sending a notice to the Governor of this appointment. He may be tired, he may be sick, he may be incapacitated in some way; as he says himself, he may be in Court for a week or ten days. Does that stop the time set forth in the statute? Is there any limitation at all upon him by the Legislature in that respect? Nothing in reason that we can discern.

These are all questions, if your Honor please, that
 10 I think are subject to examination and construction, and I mention them now at this length, if your Honor will pardon me for doing so, for the purpose of enabling the Court to throw all the light necessary, with the aid of counsel, upon these questions of construction. On this phase of these two important cases—

The Court—I thought you were going to suggest, Justice Minturn, filing briefs. I was going to say
 20 that I do not think it is necessary, unless you really want to do that.

Mr. Minturn—I had no desire to take up the work.

Mr. Merrey—I was going to say, perhaps, if we tried to take time in the Robert Barr case to file a brief, that this Legislature is very expeditious under some circumstances, and I would not be a bit surprised if they would have a corrected Act before we get the briefs in.

30 So it comes down to Mrs. Barr's case. I think it is the spirit of fairness of the American people. I think it is important that elections should be properly held, and I want to say that if a member of one party, the Republican Party, is going to appoint the Democratic election officers, or a Democrat is going to appoint the Republican election officers, that the

Proceedings in Court

whole thing is going to be a farce; we might as well call our elections off.

Each party should control its own appointees, I think that has been the spirit right along, and when an appointment has been made by Mr. Heher, I am surprised that it was not upheld and I am surprised that another appointment was made. It should not be and it never was the intention of the Legislature, except upon a remote case, that the Governor should refuse to make the appointment, 10 which he did here, and it is a very serious thing, if a man of one party is going to make the appointment of the officers who are there to see that the other party gets a fair deal in an election, and if they cannot appoint their own people to that office, and the selection must come from outside, I think it is going to be a breakdown in our election laws.

The Court—Is there anything in these facts as to when the Governor did appoint Mr. Geldziler? 20

Mr. Merrey—No.

The Court—What does the commission say?

Mr. Murner—The 29th day of August. There is nothing in the Act which requires the Governor to make an appointment in any specified time. The Act is silent as to when he shall appoint, other than to suggest he shall appoint in case the state chairman fails.

The Court—So the point is he did appoint Mr. Geldziler, after he received Mr. Heher's letter of July 16th? 30

Mr. Murner—May I recall to your Honor that we did raise a question as to Mrs. Barr's right to bring this quo warranto, on the ground that it was not a municipal office.

The Court—Oh, yes.

Proceedings in Court

Mr. Merrey—Cannot bring it here.

Mr. Murner—Yes, we can, and we press that, and we want to make sure that your Honor remembers it.

Mr. Merrey—If there is going to be any question about that, I want to refer your Honor to a number of cases on that question. That has no right here. It is a demurrer and should have been brought up.

10 Now, I want to say this, just as a last argument, the term "municipal" in the fourth section of the Act, does not mean city. It means a division of the state less than the state itself.

In the case of Maguire versus DiMuro—and I will send these references to you. I have them here, but I better not take the time to dig them out. The case of Maguire versus DiMuro was a quo warranto concerning the Clerk of the District Court of the City of Passaic. Now back further is the case of
20 Pierson versus O'Connor. O'Connor was the Clerk of the District Court of Newark.

The Court—I knew him very well.

Mr. Merrey—And Pierson was his predecessor.

The Court—Yes, I knew him too.

Mr. Merrey—There was a question arose there as to which one was entitled to that office, and it was brought under—the question came up anyhow on whether it was a state office or municipal office, and
30 that was held to be a state office, that is, it was not a municipal office, it did not come under certain acts, which provide for the appointment of Veterans of the Spanish War at that time. That has been followed by the Civil Service Commission.

Now, in another case which came up later, not long ago, with regard to the same office, the Clerk of the District Court of the City of Passaic.

Proceedings in Court

The Court—Are you going to argue that case?

Mr. Merrey—I thought it was out, and I was going to send you authority.

Mr. Minturn—I was going to suggest if Mr. Merrey is going to submit a brief on this question, we have the same right.

Mr. Merrey—I am only trying to state the facts, and I am going to give you the book and page of these decisions.

The Court—Then send Justice Minturn a copy 10 of them, and if he wishes to reply to it, he may do so.

Mr. Minturn—I do not see anything to be gained by enumerating the authorities now.

The Court—No. I am not very much concerned with that anyway. I do not think it is going to be dispositive of this case. I am rather inclined to decide it on the merits.

Mr. Merrey—I want to say that the Supreme Court has said that the case of Passaic should go 20 under the Municipal Act.

The Court—Yes. You may do that, and if Mr. Justice Minturn wishes to reply, he may do so but do it promptly, won't you? I would like to decide this case before I forget the facts.

Mr. Merrey—I merely mean to send you the two citations.

Mr. Weinberger—Judge, as a matter of law, after your Honor decided the Carr case, isn't that res ad- 30 judicata?

The Court—No.

Mr. Weinberger—Your Honor decided Geldziler was rightfully entitled to this office by virtue of quo warranto. Well, isn't that res adjudicata?

The Court—No. Read the case of Somebody versus Fisher Baking Company in a recent Advanced

Proceedings in Court

Report, and you will find that there is no such thing as res adjudicata any more, hardly.

Mr. Weinberger—I thought I would call your Honor's attention that it might be res adjudicata.

The Court—It is not, because they are different parties.

Mr. Minturn—They are continually reversing themselves.

The Court—I did not say that, quite.

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Testimony Closed.

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Postea

(Filed April 15, 1930.)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex rel., Robert C. Barr, vs. Samuel Geldziler, Respondent.	}	On Information in the Nature of Quo Warranto
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POSTEA

And now, on this day, to wit: On the 15th day of January, 1930, before the Honorable Newton H. Porter, comes the said Relator, by his attorneys aforesaid, before the said Court before whom the issue was tried as sent; wherefore his record had before him in these words, namely:

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Afterwards, that is to say, on the day and at the place aforesaid, Newton H. Porter, one of the Circuit Judges of the State of New Jersey within named, according to the form of the Statute in such case made and provided, comes as well the within named Relator as the within named Respondent, by their respective attorneys within mentioned, and the jurors of the jury summoned to try the said issue and having been called also, and the parties aforesaid having consented to waive trial by jury, and the Court aforesaid having heard the testimony, has concluded that the said Respondent is of right, according to law, entitled to said office, and the Court does therefore award the said office to the said Respondent, together with his costs to be assessed with regard thereto, according to law.

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Postea

Therefore, it is Ordered that the said Respondent be declared to be entitled to the office which he now holds, known as a member of the County Board of Elections for the County of Passaic, and the said petition of the said Relator is therefore dismissed, with costs as aforesaid.

Newton H. Porter,
Judge of the Passaic County
Circuit Court.

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Rule for Judgment

(Filed April 15, 1930.)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex rel., Robert C. Barr, vs. Samuel Geldziler, Respondent.	}	On Information in the Nature of Quo Warranto
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RULE FOR JUDGMENT

The information in the above cause by leave of the Court having been duly filed, and the respondent having pleaded thereto, and the cause having been regularly set down and noticed for hearing and having been tried before Honorable Newton H. Porter, Judge of the Passaic County Circuit Court to whom 20 cases were referred by the Justice of the Supreme Court holding such Circuit Court, without a jury, and having been argued before the Court by Edward F. Merrey, Esq., Counsel for the relator, and James F. Minturn, Esq., of Counsel for the respondent, and the Court having considered said testimony and the stipulation made in open court, and having found as a fact that Samuel Geldziler was legally entitled to hold the office of a member of the County Board 30 of Elections in and for the County of Passaic by virtue of a commission issued to him by the Governor of the State of New Jersey bearing date the 4th day of September, 1929, for a term expiring on the 1st day of March, 1931, and that the said Samuel Geld-

ziler was legally occupying the said office, and that he had duly qualified in accordance with law,

It is Ordered that judgment in favor of the respondent, Samuel Geldziler, and against the relator, Robert C. Barr, be entered in the above entitled suit, with costs to be taxed.

On Motion of

Thomas J. Kennedy,
Attorney for Respondent.

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Notice

(Filed July 14, 1930.)

NEW JERSEY SUPREME COURT

The State of New Jersey, ex rel., Robert C. Barr, vs. Samuel Geldziler, Respondent.	}	On Information in the Nature of Quo Warranto
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NOTICE

To: Thomas J. Kennedy, Attorney of Respondent:

Take Notice that the Relator appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause in the New Jersey Supreme Court.

Dated: July 9th, 1930.

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Edward F. Merrey,
 Attorney of Appellant.

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*Grounds of Appeal*NEW JERSEY COURT OF ERRORS
AND APPEALS

10	The State of New Jersey, ex rel., Robert C. Barr, Relator-Appellant vs. Samuel Geldziler, Defendant, Respondent.
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GROUNDS OF APPEAL

The appellant states the following grounds of appeal:

1. The court below decided that the defendant was entitled to the office of member of the County Board of Elections for the County of Passaic whereas it should have decided that the defendant was not so entitled.

2. The court below decided that the relator was not entitled to the office of member of the County Board of Elections of the County of Passaic, whereas, it should have found that the relator was entitled to said office.

3. The court below erroneously held that a vacancy existed in the office which relator held as a member of the Passaic County Board of Elections.

Edward F. Merrey,
Of Counsel with Appellant.

8 MAY. 1 1931

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY	}	QUO
ex rel., Robert C. Barr,		WARRANTO
Relator-Appellant,		On Appeal from
vs		the
SAMUEL GELDZILER,		Supreme Court
Defendant-Respondent.		

Brief of Edward F. Merrey

ATTORNEY FOR RELATOR

STATEMENT

Robert C. Barr was a member of the County Board of Elections of Passaic County, having been nominated to that office by Harry Heher, Chairman of the State Committee of the Democratic Party in February, 1929, and commissioned by the Governor of New Jersey on March 1, 1929, for a term of two years, beginning on that date. This nomination and appointment was made by virtue of a provision of the Election Laws then in force. Section 17 of Article VI. P. L. 1921, page 522, reading as follows, creates the office.

"The county board of elections shall consist of four persons, who shall be legal voters of the counties for which they are respectively appointed. Two members of such county board shall be members of the political party which at the last preceding general election cast the largest number of votes in this state for members of the General Assembly, and the remaining two members of such board shall be members

of the political party which at said election cast the next largest number of votes in the state for members of the General Assembly."

Section 18, Article VI provides the method of filling it.

"The chairman of the State committee of each of the two political parties as aforesaid, shall, during the month of February, in writing, nominate two persons residing in each county, qualified as aforesaid for members of the county board of elections in and for such county; and if nominations be made in said month of February, the Governor shall commission such appointees on or before the first day of March; provided, that two of such appointees, who shall be members of opposite parties, shall be commissioned for the term of one year from the first day of March and the remaining members shall be appointed for the term of two years from the first day of March; and thereafter one member of such board shall be nominated annually by each of said chairmen, in the same manner, in the month of February, and shall be commissioned by the Governor as aforesaid, and shall continue in office for two years from the first day of March next after their appointment."

At the time of his appointment, Barr held the office of Councilman for the Third Ward of the City of Clifton, an office filled by election. After

Barr's appointment the 17th section of Article VI of the election law was amended to read as follows:

"The county board of elections shall consist of four persons, who shall be legal voters of the counties for which they are respectively appointed. Two members of such county board shall be members of the political party which at the last preceding general election cast the largest number of votes in this state for members of the General Assembly and the remaining two members of such board shall be members of the political party which at the said election cast the next largest number of votes in the State for members of the General Assembly; provided, however, that the office of member of the county board of elections in any of the counties of this state shall be deemed vacant upon such member becoming a candidate for any office to be voted upon at any primary, general election or special election, except for nomination for or election to membership in any county committee or State committee, said candidacy to be determined by the filing of a petition of nomination duly accepted by such member in the manner provided by law; provided, further, that no person who now or hereafter holds elective public office shall be eligible to serve as a member of the county board of elections during the term of such elective office."

This law was approved by the Governor on April 30, 1929. The Governor held this caused a vacancy and on September 4, 1929, appointed the defendant to fill the same. Defendant qualified and is now exercising the duties of the office. There are two other suits pending concerning the title to this office, and the three will be argued together. In the present suit, the question presented is whether or not the statute of April 30, 1929, created a vacancy in the office held by Barr as a member of the County Board of Elections. We insist it did not. The court below (Porter, Circuit Judge, sitting under a reference by Supreme Court Justice Black), decided that a vacancy existed and that the defendant rightfully held the office and the relator did not.

SPECIFICATION

We insist that the court below erred in finding that a vacancy existed in the office held by Barr, (reason 3), and that it should have decided that the relator was entitled to the office (reason 2), and that it erred in finding defendant was entitled to the office (reason 1).

I.

THE ACT OF APRIL 30, 1929, DID NOT CREATE A VACANCY IN THE OFFICE HELD BY BARR AS A MEMBER OF THE COUNTY BOARD OF ELECTIONS

This act added to the 17th section two provisos. The first reads as follows:

"Provided, however, that the office of member of the county board of elections in any of the counties of this State shall be deemed vacant upon such member becoming a candidate for any office to be voted upon at any primary, general election or special elections, except for nomination for or election to membership in any county committee or State committee, said candidacy to be determined by the filing of a petition of nomination duly accepted by such member in the manner provided by law."

This proviso did not affect Barr, as he was not a candidate for office, but an incumbent. It clearly vacates the office of any member of a County Board of Elections who became a candidate for elective office. This was a proper provision and no fair minded person could object to it.

The second proviso reads as follows:

"Provided, further, that no person who now or hereafter holds elective public office shall be eligible to serve as a member of the county board of elections during the term of such elective office."

The wording of this proviso differs materially from that of the first; the wording of the first is that "the office of member of the county board of elections in any of the counties of this State shall be deemed vacant;" while that of the second is "no person who now or hereafter holds elective public office shall be eligible to serve as a member of the county board of elections during the term of such elective office."

Why this difference? If it was the intention of causing a vacancy in the second case, why not say so in the same language as used in the first? Why two provisos? They could have been consolidated.

We contend that the Legislature did not intend to vacate the office of relator by the second proviso, but merely intended that so long as he performed the duties of the elective office, he could not perform the duties of a member of the County Board of Elections. If this second proviso made the office of relator as a member of the county board vacant, the vacancy occurred immediately on the approval of the statute by the Governor. Suppose, however, that the office of the relator as Councilman expired two months after such approval, would that restore the relator to the county office? Clearly the act makes him ineligible to act only during the term of the elective office, but is silent as to his status thereafter. If it was the intention to make the relator ineligible to serve during the remainder of his term on the county board, why did the statute not so provide? The intention seems clear to permit the official to act on the county board as soon as the term of his elective office ended. Now such term might have ended in many ways. It might have ended by resignation, by the municipality adopting commission government, or by the passage of this time fixed by the statute under which he was elected. But since the ineligibility was only to last during the term of the elective office, there is a clear intention that his eligibility may be restored before the expiration of his term as a member of the county board. There can therefore, have been

no vacancy for the Governor to fill. The Board could function without the presence of relator. There were three other members.

II

THE OFFICE OF MEMBER OF COUNTY BOARD OF ELECTIONS IS A MUNICIPAL OFFICE UNDER QUO WARRANTO ACT

In conclusion, we believe that this act should be construed as liberally as possible to leave in the hands of the State Chairman the making of this appointment. The evident intention of the Legislature was to leave to each party organization the control of its own affairs, and to have elections carried on by boards one-half the membership of which are selected by each of the great parties. The County Board of Elections is an important board. It appoints all district boards, carries on recounts and supervises elections. A board not equally divided could turn over the control of the election to the organization of one party. It could have a material effect in the primaries of its opponents.

The provision for the appointment of these boards by the Governor is only to be exercised in case of necessity, so that elections should not be interfered with. There appeared to be no great hurry in this case, as the Governor waited nearly two months before he acted. (Letter sent June 24th, 1929, to the State Chairman; Chairman appointed relator July 16th, 1929; Governor appointed respondent September 4th, 1929.)

We respectfully submit that the judgment of the court below should be reversed and directed to issue judgment of ouster against the defendant and to restore relator to his office.

EDWARD F. MERREY,
Of Counsel with Relator

**ANSWER TO BRIEF OF DEFENDANT-
RESPONDENT**

Counsel for the defendant-respondent under point 1 insists: first, that the question involved in this case is a moot question; and, second, that our side delayed in pursuing the appeal. It seems to us that counsel is unfair in these statements. ***The question involved is not a moot question.*** While the office in question has expired, the respondent must know that he was unable to collect any salary from the County of Passaic which now holds the sum of \$2,916.55 to abide the result of this suit. Even if the County had not retained the money but had paid it to the respondent, he would have had to return it if unsuccessful here. We cannot understand the claim made in the brief that this is a moot question.

We have not delayed in bringing on this appeal. The rule for judgment was entered April 15th, 1930, and was not served on relator's counsel for some time thereafter. The notice of appeal was dated July 9th, 1930. The printed state of the case was served on counsel for respondent on August 19th, 1930. Our briefs were served on the respondent on October 6th, 1930. The earliest the appeal could have been brought on for hearing was the October Term, 1930. The case was noticed for hearing at that term but the acknowledged service of notice reached the Secretary of State's office too late to be put on the printed list. Counsels were present and agreed that the case should be submitted on brief, but the court

announced that no case would be taken up beyond 100. The proper number of the case would have been over 200. It therefore could not be heard even had it been on the printed list. The case was then on the list again for the February Term, 1931, and another agreement was made that it be argued on brief and briefs of all parties were filed but it was not reached, as it was still above No. 100 and went over again to the May Term, 1931.

There has therefore been no delay on our part in bringing the matter to hearing.

Respectfully submitted,

EDWARD F. MERREY,
Counsel for Relator-Appellant.

8 MAY. 7. 1931

New Jersey Court of Errors and Appeals

THE STATE OF NEW JERSEY, *ex*
rel., ROBERT C. BARR,
Relator-Appellant,

vs.

SAMUEL GELDZILER,
Defendant-Appellee.

In the Nature of
Quo Warranto.

On Appeal from
Supreme Court.

BRIEF ON BEHALF OF DEFENDANT- APPELLEE.

Statement of Facts.

This action is in the nature of quo warranto to test the title of the defendant-appellee to the office of member of the Passaic County Board of Elections. By consent of the parties a jury was waived and this action together with two other related actions were tried before Honorable Newton H. Porter, Judge of the Passaic County Circuit Court, to whom the cases were referred by the Justice of the Supreme Court holding such Circuit Court without a jury.

It is to be observed that this action is one of three related actions brought simultaneously with two others by Louis D. Carr and Agnes V. Barr. All three actions deal with the same office, present common questions of law and fact and, in general, rest upon common grounds. They were all tried together in the lower court and all were decided favorably for the defendant-appellee. Robert C. Barr is the husband of Agnes V. Barr, the relator in another action. Each claims the same office as against Samuel Geldziler. One of the Barrs must

obviously fail, assuming of course that Mr. Geldziler is not entitled to the office, and both therefore must necessarily recognize this. Harry Heher, Chairman of the Democratic State Committee, as will be indicated in another part of this brief, realized the same situation in that he recognized the ineligibility of Mr. Barr and nominated Mrs. Barr. It is respectfully submitted, therefore, that the appellants themselves are undecided as to their own positions and are attempting to have this Court consider the matters as original rather than appellate.

Judge Porter decided the case favorably to the respondent, Samuel Geldziler. The Court found from the evidence that the said Samuel Geldziler legally occupied the office of a member of the County Board of Elections for the County of Passaic, by virtue of a commission issued by the Governor of the State of New Jersey, bearing date the 4th day of September, 1929, and appointed the said Samuel Geldziler as a member of the County Board of Elections for a term expiring on the 1st day of March, 1931. The Court further found from the evidence that, after having received said commission, he duly qualified in accordance with law to serve as a member of the said County Board of Elections. The Court therefore dismissed the proceedings brought by Robert C. Barr.

The final legal conclusion in this case depends upon the opinion of this Honorable Court in deciding these questions. First, was the relator, Robert C. Barr, properly and legally declared ineligible to occupy the office in question? Second, was the office of the County Election Board legally vacant? Third, was the respondent Samuel Geldziler properly appointed to such office by the Governor and is he legally entitled to hold and continue in said office?

The facts as developed from the pleadings and as testified to at the trial are in substance, as follows: Robert C. Barr was appointed and commissioned on March 1, 1929, as a member of the County Election Board of Passaic County for a term of two years from that date. He exercised the duties of his office and was in office on April 30, 1929. On that date an act of the Legislature was approved, effective from that date, amending the law concerning membership in County Election Boards, Chapter 257, P. L. 1929. The act so far as it is pertinent to the issue of this case provides as follows:

“The County Board of Elections shall consist of four persons, who shall be legal voters of the counties for which they are respectively appointed. Two members of such county board shall be members of the political party which at the last preceding general election cast the largest number of votes in this state for the members of the General Assembly, and the remaining two members of such board shall be members of the political party which at the said election cast the next largest number of votes in the state for members of the General Assembly; provided, however, that the office of member of the County Board of Elections in any of the Counties of the State shall be deemed vacant upon such member becoming a candidate for *any* office to be voted upon at any primary, general election or special election, except for nomination for or election to membership in any county committee or State Committee, said candidacy to be determined by the filing of a petition of nomination duly accepted by such member in the manner provided by law; provided further, that no person who now or hereafter holds elective public office shall be eligible to serve as a member of the County Board of Elections during the term of such elective office.”

On April 30, 1929, the relator, Robert C. Barr, was a member of the Council of the City of Clifton, an elective office. Under date of June 24, 1929, the Secretary to the Governor addressed and sent a letter to Harry Heher, Chairman of the State Committee of the Democratic Party, advising him that a vacancy existed in the Passaic County Board of Elections by reason of Mr. Barr's ineligibility to the office under the act of April 30, 1929, and requesting a renomination to fill the vacancy. On August 29, 1929, the Governor appointed and commissioned Samuel Geldziler, defendant, to the position. Mr. Geldziler took the oath of office and entered upon the duties of the office and continues to perform the same. It was stipulated in open court that the respondent, Samuel Geldziler, had received a commission from the Governor of the State of New Jersey, on the fourth day of September, 1929, appointing him a member of the County Board of Elections for the County of Passaic for the term ending on the first day of March, 1931, which commission was offered in evidence, and that the said Samuel Geldziler had been duly sworn to act as a member of the County Board of Elections of the County of Passaic in accordance with law.

This proceeding is instituted by the relator, Robert C. Barr, under Section 4 of the Statute, 3 Comp. Stat. 412. The relator contends that the defendant is not entitled to the office. Mr. Barr argues that he is entitled to the office, saying that he was legally appointed, duly qualified, has not resigned and is not ineligible to hold the office under the provisions of the Act of April 30, 1929, *supra*.

POINT I.

The question involved is a moot question.

It will be observed by this Honorable Court that the term of the office, title to which is disputed, will expire on March 1, 1931. Had the appeal in this case been diligently pursued after judgment was pronounced by the lower court the decision by this Court would have been pronounced in the term previous to the forthcoming February Term. As it is, because of the delay of the relator-appellant, in pursuing the appeal, this cause comes to be heard before this coming February Term. Certainly, a decision will not be forthcoming until some time after March 1, 1931. By that time the term of office of the present incumbent will have expired and the decision of the Court will be of no practical consequence in deciding title to said office.

In view of the date of said expiration and the date of which this appeal is presented and the time at which a decision will be rendered, which will be long after March 1, 1931, it is respectfully submitted that the question involved presents purely a moot question and that therefore this appeal should be dismissed and judgment affirmed.

POINT II.

Mr. Barr, the relator, was legally and properly ousted from office, the result of which occurrence created a vacancy by force of statute, and the subsequent appointment of Mr. Geldziler was proper and legal and in strict conformity with the statutory provisions.

The Act of April 30, 1929, before recited and entitled "An Act to amend an Act entitled 'An act to regulate elections' (Revision 1920), approved April eighth, one thousand nine hundred and twenty-one" clearly establishes the legal right of Mr. Geldziler to occupy the office. Said Act is an amendment to Sec. 17 of the "Act to Regulate Elections," Rev. of 1920. It amends the law in two respects: First: It vacates the office of any member of the County Board of Elections upon his becoming a candidate for any elective office, except to membership in County or State Committee. Second: It provides that no person holding an elective public office shall be eligible to the County Board of Elections during the term of such elective office.

At a general election held in the City of Clifton, County of Passaic and State of New Jersey, on the sixth day of November, 1928, Robert C. Barr, was elected Councilman of the Third Ward of the aforesaid City of Clifton, for a period of two years commencing with the first day of January, 1929, to and including the thirty-first day of December, 1930, and on the aforesaid first day of January, 1929, said Robert C. Barr accepted said office of Councilman of the aforesaid Ward in the City of Clifton by being duly sworn to perform the duties thereof and the aforesaid Robert C. Barr thereby duly qualified to serve as aforesaid Councilman of the Third

Ward in the aforesaid City of Clifton, on the first day of January, 1929, and he thereby did accept that office of Councilman and became a member of said body and on April 30, 1929, when the Act amending the Act to regulate elections was approved, was holding the elective office of Councilman. There is no dispute about this. Counsel for the relator-appellant admits this (C. 15, lines 29-37).

The law applicable to this set of facts is very clear and leaves no question of doubt. Clearly, when the aforementioned act took effect, Mr. Barr was holding an elective office and by the provisions of said Act he became at that time ineligible to serve on the County Board of Elections. CHAP. 257, P. L. 1929, provides:

“That no person who now or hereafter holds elective public office shall be eligible to serve as a member of the County Board of Elections during the term of such elective office.”

Ineligible, as here used, means incapable, unqualified. Of necessity there was created a vacancy in the County Board of Elections which made it proper for a new appointment to fill the vacancy.

Clearly, there was a vacancy in the office as soon as the Act took effect, Barr holding an elective office. Appellant asks on page 6 of his brief, whether the expiration of the relator's term as Councilman two months after the approval of the Act, would restore relator to the County Office. We respectfully submit that this Court cannot weigh future possibilities. The condition might or might not restore his eligibility in two months, but his County Office is none the less vacant because of his present and existing ineligibility. A possible future eligibility cannot determine a present vacancy. Mr. Barr's term

could not be continued by the mere possibility of a future eligibility. His existing status at the time determined his right or rights to the office.

To vest the relator with title to office (and that is what he seeks in his *quo warranto* proceeding) would be to hold that he was eligible to the County Office in face of the legislation which holds absolutely made him ineligible. It was this ineligibility of the relator at the time of the subsequent appointment of the respondent that prompted the Governor's action in selecting a successor who was eligible under the Statute to fill the vacancy created.

The principle of incompatibility of office at common law as well as under statutory and constitutional provisions, is well settled. For example, see *Howard v. Harrington* (1916), 114 Me. 443, L. R. A. 1917, A. 211, 96 Atl. 769, in which the Court said:

“The doctrine of the incompatibility of Offices is bedded in the common law, and is of great antiquity. At common law two offices whose functions are inconsistent are regarded as incompatible. The debatable question is, What constitutes incompatibility?”

We submit that the incompatibility of the offices in question is settled by the Statute involved, and we need not go further on this particular phase.

In the case of *Board of Education of Newark v. Civil Service Commission*, 98 N. J. L. 417, the Supreme Court on a writ of certiorari said, at page 422:

“The fourth ground of attack is, there was no vacancy in the office of business manager of the board of education of Newark, when on February 28, 1922, the Civil Service Commission by resolution changed the classifica-

tion of the business manager from the unclassified to the classified service. Where there is an office but no legally qualified incumbent, there is a vacancy. *Davis v. Davis*, 57 N. J. L. 80; 29 Cyc. 1400, par. 3. The office is vacant when it is without an incumbent who has a right to exercise its functions." (Italics our own).

This case was affirmed in 99 N. J. L. 106.

The case of *Davis v. Davis*, 57 N. J. L. 80, dealt with the same type of question as in the case at bar. It was an information in the nature of a *quo warranto*, filed by certain persons who claimed to be legally appointed chosen freeholders of the County of Camden, to test the legal right of certain other persons to exercise the functions of a board of chosen freeholders of such county. Justice Reed, speaking for the Supreme Court, in that case, said at page 82:

"The facts set out in the information show that the relators are the legal appointees to the offices now in dispute. These facts are the following: An Act of 1894 (Pamph. L. p. 298) provides for an election of a member of the board of chosen freeholders in each ward and township and in each borough possessing complete autonomy of local government, in the manner provided for municipal and township elections. This Act took effect on May 9, 1894. The time for municipal and Borough elections for that year had been passed. On May 25, 1894, the act terminating the terms of the old members of the board went into effect. *After that date, the old members being functus officii, and no one having been elected to membership in the board under the act of May 9th, 1894, there were offices and there were legally qualified incumbents.* Mech. Pub. Off. Sec. 125; *State v. Stocking*, 7 Ind. 329; Am. & Eng. Encycl. L. Vol. 19, p. 430."

In 29 Cyc. 1400, paragraph three, we find the following:

“A vacancy in office exists only where there is no person authorized by law to discharge the duties of the office.”

Mr. Barr was legally ineligible and the office vacant because the act specifically provided that any person in his status was unauthorized to occupy said office. Further, on page 1401 of 29 Cyc.:

“A vacancy in office for any of the causes enumerated in the statute, occurs usually at the time of the happening of the event whose occurrence is by the statute the cause of the vacancy and no judicial determination that a vacancy has occurred is necessary.”

The occurrence of the event in the case at bar was Mr. Barr's serving in an elective office.

In *Oliver v. Jersey City*, 63 N. J. L. 634, the Court of Errors and Appeals held that when a person legally holding one office is elected or appointed to another, but is prohibited by a statute from holding both, upon accepting the second his *de jure* title to the first ends, and his successor may at once be appointed or elected.

In the case at bar, the relator's election to the office of councilman *per se* prohibited him from occupying the office to the election board and consequently there was a vacancy created in said election board. The relator, Robert C. Barr, contends on page 7 of his brief that there are three other members and that the board could function without the presence of the relator. This is clearly answered in the case of *Board of Education of Newark v. The Civil Service Commission, supra*. The statute makes the relator ineligible to act on the board, assuming that the Board can function with three members, yet it cannot function with the fourth who is legally

ineligible. Where there is no person who has a right to exercise the functions of a member of the Board, our courts have held that the office is vacant.

We have thus tried to show that the relator Robert C. Barr became ineligible to occupy said office and by force of statute was automatically removed, thus creating a vacancy.

POINT III.

The acts under consideration are clear and definite as to the offices involved.

The relator in his brief, page 7, Point 2, says that the office of member of the County Board of Elections is a municipal office under the quo warranto Act. We fail to find any clear explanation of this statement under it, and the purpose thereof. Whether or not we agree with this blank proposition is of no consequence since we contend it would make no difference. The acts are clear as to the character of the office involved. The proviso in Chapter 257, P. L. 1929, says:

“* * * provided, however, that the office of member of the county board of Elections in any of the Counties of this State shall be deemed vacant upon such member becoming a candidate for any office to be voted upon at any primary, general election or special election * * * provided further, that no person who now or hereafter holds elective public office shall be eligible to serve as a member of the County Board of Elections during the term of such elective office.”

It will be noted that the statute refers to membership on the County Board of Elections merely as an office and whether it is a municipal office under the quo warranto Act or not is of no import.

There is no question that the statute referred to deals with the particular office involved. What appellation counsel for appellant tries to annex to it cannot in the least affect the real issue. The statute has specifically spoken and the office herein involved comes directly within its purview.

POINT IV.

The defendant Samuel Geldziler was legally and properly appointed to said office and is legally and properly continuing in said office.

Article 6, Sec. 20, of the Election Act vests power in the Governor to make the appointment of his own selection where the chairman fails to nominate within the ten day period. Pursuant to this statutory authority, the Governor did appoint and commission the defendant, Samuel Geldziler, on the 4th day of September, 1929, as a member of the County Board of Elections, for the County of Passaic, for the term ending the 1st day of March, 1931. Said Samuel Geldziler was duly sworn to act as a member of said body in accordance with law and since that time has been legally and properly occupying and exercising said office.

We therefore respectfully submit that the relator, Robert C. Barr, fails to establish any legal right to the office in question. On the contrary, the incumbent, Samuel Geldziler, has sufficiently proved his right to said office and is entitled to continue for the term of the appointment, and we respectfully submit that the judgment of the lower Court should be affirmed.

Respectfully submitted,

THOMAS J. KENNEDY,
Attorney of Defendant-Respondent.

JAMES F. MINTURN,
of Counsel with Defendant-Respondent.

INDEX

	Page
Act of Congress	1
Account of Bankers' Trust Company	12
Account of Bank of Atlantic City, N. J.	1
Account of Bank of Maryland National Bank	12
Account of Bank of Maryland to Statement of Second	20
Account of Bank of Maryland	384
Account of Bank of Maryland	392
Account of Bank of Maryland	397
Account of Bank of Maryland	411

TESTIMONY

Account of Bank of Maryland	38
Account of Bank of Maryland	39
Account of Bank of Maryland	34
Account of Bank of Maryland	36
Account of Bank of Maryland	42
Account of Bank of Maryland	57, 80
Account of Bank of Maryland	100
Account of Bank of Maryland	120
Account of Bank of Maryland	318, 318
Account of Bank of Maryland	323, 329
Account of Bank of Maryland	325
Account of Bank of Maryland	77
Account of Bank of Maryland	78
Account of Bank of Maryland	79
Account of Bank of Maryland	110
Account of Bank of Maryland	116
Account of Bank of Maryland	132, 301
Account of Bank of Maryland	148, 334
Account of Bank of Maryland	302

