Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

DAVID M. POTTER, *Plaintiff-Appellant,* *vs.* THE TOWNSHIP OF UNION, in the County of Union, *Defendant-Respondent.*	*On Appeal from Supreme Court.*

Brief for Defendant-Respondent.

The plaintiff-appellant was elected Collector of The Township of Union, in the County of Union, for a term commencing January 1, 1913, and expiring at noon on January 1, 1916. His salary for this term had been fixed, not by ordinance, but by resolution (see Stipulation, Case, page 2), adopted December 30th, 1912, at the sum of $750 per annum. He was again elected Collector at the general election of 1915 for a term of three years commencing January 1, 1916. He served during the year 1916 and then sued for a salary of $750. To this suit the Township interposed the defense that the Township Committee taking office January 1, 1916, at the hour of 2:30 P. M. of that day and prior to the hour upon which the Collector qualified by taking oath of office had adopted a resolution of which the following is a copy.

> "Resolved, that the salary of the Collector of Taxes be and hereby is fixed at the sum of $600 per annum, payable December 31st, in lieu of all fees."

Upon argument, on a motion to strike out the answer on the ground that the defense was not

pro tanto a valid one, Mr. Justice Kalisch decided in favor of the defendant and declared the defense to be good; upon which plaintiff entered judgment for the sum of only $600 and interest, instead of for the $750 which he had claimed to be due to him.

The statutes possibly relevant are as follows:

1. Township Act, Section 2, which gives to the Township Committee power,

> "To fix the annual salary or compensation to be paid to each person elected or appointed to any township office, except members of the township committee, and the time and manner of the payment thereof; the salary or compensation, when so fixed by ordinance, and (*sic*) shall be in lieu of the fees or compensation otherwise provided by law, and said fees or compensation shall thereafter be collected and paid into the treasury of the township for its use; but no salary or compensation shall be fixed or altered so as to affect any one who at the time of the adoption of the ordinance shall have been elected or appointed to office."

4 Compiled Statutes, p. 5585.

2. Township Act, Section 4, which declares the Collector to be an elective officer and his term to commence the second Saturday after his election.

4 Compiled Statutes, p. 5571.

3. Township Act, Section 17, which fixes the term for three years and provides that bond shall be given.

4 Compiled Statutes, p. 5585.

4. Act of 1905, page 14, known as the Meeker Act, which abolishes spring elections and pro-

vides, among other matters, that the terms of office of all officers (excepting justice of the peace) thereafter elected in townships, etc., shall commence at twelve o'clock noon on the first day of January next succeeding their election.

3 Compiled Statutes, pages 3487 and 3488 (not pages 347 and 343, as cited in appellant's brief).

5. Tax Act of 1903, Section 64, as follows:

"The governing body of the taxing district shall, by ordinance or resolution, fix the annual salary of its assessor, collector and members of the board of assessment at rates not in excess of the salary, if any, prescribed by law, and such salary so fixed shall not be increased or diminished during the term of any officer; such officers receiving a salary shall receive no other compensation from the taxing district for services in the office except the fees allowed to the collector by this act on proceedings for the collection of taxes by arrest, levy, lien and sale." (P. L. 1903, p. 435.)

4 Compiled Statutes, p. 5140.

Argument.

Plaintiff-appellant declares in his brief that the present case should not be governed by Statute No. 1 above set out, being Section 32 of The Township Act, and, indeed, he is prevented from claiming it to be relevant to the present issue and regulative in his favor, first, because this Act prohibits improper fixing or altering of compensation only when salary shall have been fixed by ordinance and not when it shall have been fixed by resolution, and, secondly, because the Statute has been modified by subse-

quent legislation, namely, Act No. 5 set out above, being the 64th section of The Tax Act.

Plaintiff-appellant does not cite any law to prove nor, indeed, does he attempt to claim that the fixing of the salary for the term commencing January 1, 1916, should have been not only prior to January 1st but prior to the election of the officer. His claim is simply that it should have been some time prior to January 1st, 1916. Indeed, to make a greater claim would have been fatal; as the salary of $750 which he claims to have been established legally for an indefinite time was fixed by resolution adopted in December of 1912, after the holding of the general election and after the election of the Collector.

Plaintiff-appellant advances two lines of argument.

1. *Appellant's first argument*—That it would be right that the salary should be fixed before the commencement of the term. Manifestly, there could be no benefit accruing to any one by such a regulation unless the salary were fixed at a much earlier date, namely, before the election, so that, as plaintiff-appellant states, the aspirant for the office would be cognizant of the salary which he was to receive. However, plaintiff-appellant does not make so great a claim; he could not make such claim without, at the same time, admitting that the fixing of the salary, for which he contends, was illegal; and there is no statute or other law to support such claim. If the Legislature had intended that salary should be fixed before the officer was elected it would have been very easy so to have stated distinctly in words.

The whole claim, namely, that the salary should have been fixed prior to the commence-

ment of the new term but might have been fixed on any day prior thereto, either before or subsequent to the election, is without merit.

By such action the committee would have failed to satisfy the objection now raised by the Collector's counsel, namely, that the law prevents the aspirant from knowing the value of the fruit for which he strives, and, at the same time, would have left itself open to criticism because of another rule of law, namely, that the salaries of officers shall be fixed by the body expected to be in office during the whole or a portion of the time of the service of the officer. Surely, the rule that an existing board cannot appoint to any office whose term commences at the same time as does the term of the next incoming board any more than it can appoint to an office commencing within the term of the incoming board some years later applies equally to a situation relating to salaries. A board, the terms of whose members are about to expire, cannot fix the salary for officers whose terms commence coincidently with or some months after the taking of office of an incoming board.

> *Haight* v. *Love,* 39 L., p. 476; *Bownes* v. *Meehan,* 45 *Id.* 189; *Fitch* v. *Smith,* 57 *Id.* 526, 530; *Dickinson* v. *Jersey City,* 68 *Id.* 99; *Erie R. Co. et al.* v. *Paterson,* 74 *Id.* 735.

2. *Appellant's second argument*—That as the statute provides that the term commences upon the minute of twelve o'clock noon and as it is impossible for the Township Committee to take any definite action except after the lapse of a few minutes, therefore, legislators must have meant that some preceding Township Committee should fix the salary. We believe the answer to this contention to be found in the above cited case of *Haight* v. *Love,* which declares that

the appointment of an officer cannot be made by a body which shall not be in office when the term commences, which case was followed by the other decisions above and cited immediately following.

A new Township Committee meets to organize at noon on January first and cannot meet at an earlier hour. It must elect its chairman and clerk and cannot fix the Collector's salary until at least a few minutes or a few hours later. The statute declares that the committee shall meet at noon but does not make invalid acts of its organization meeting if held at a later day or hour. It declares that compensation shall not be increased or diminished during the term but does not state that it may not be fixed during the term. Of course, the fact that Mr. Potter happened to succeed himself as Collector does not affect the situation. The action of the committee was the fixing of the salary for a new term and was not a diminishing of salary.

We are not confused, as appellant's counsel appears to believe, between the questions as to whether the salary is fixed for the officer or for the office and we realize well that after the fixing of the salary it will apply for the term in case of the death, resignation or removal of the officer and the selection of a successor. We cannot, however, subscribe to the doctrine that the salary is established forever and must so continue unless changed by a later governing body.

If this contention is good and if an incoming body cannot fix the salary, then the salary never could be changed except by action of a Township Committee not expecting to be in office during any part of the time of service.

The case of *Rightmire* v. *Camden,* 50 N. J. L., page 43, cited in appellant's brief, does not in

any way uphold his contention. The decision had to do with an officer who succeeded himself and tried to prolong his first term in order to take advantage of an increase in salary established many days after the commencement of his second term and the Court declared that the construed statute was passed in order to facilitate public business and not for the benefit of a designing officer committing a fault with the intention of benefiting thereby.

However, this very case does uphold and is nearly conclusive of respondent's contention. Among others, the decision construed an Act of 1874 which declared that

> "in case of the neglect or refusal of the said City Council to fix the salary of any officer or officers, then the salary theretofore paid for similar services shall be considered the salary of said officer or officers for his or their term of service." (Decision, page 45.)

The fact that the Legislature believed it necessary to make this provision in the statute then construed leads to the conclusion that in the absence of any such provision as in the section of the Tax Act now under discussion not only is it intended that a salary shall be fixed for each succeeding term of an officer but, indeed, that in case it is not so fixed, the amount of compensation shall not necessarily be the same as received by the incumbent during the preceding term.

We contend that the 64th section of the Tax Act, above cited, is very plain in its meaning. It means that at the commencement of the term of each Collector, etc., his salary shall be fixed by the body with which he is expected to have business relations and that when so fixed it shall

not be changed during the term, whether he shall continue to be the incumbent thereof or some one else shall take his place.

It is significant that the statute does not use the word "the" in referring to the Assessor, Collector, etc., but states that the governing body shall fix the salary of "its" Collector. Mr. Potter, during his term commencing January 1, 1916, was not expected to have any business relations whatsoever with the Committee whose official life expired upon the same minute when his term commenced. As to that body it must be said that he was not "its" Collector.

Respectfully submitted,

JOHN K. ENGLISH,
Attorney and Counsel for Respondent.

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NEW JERSEY SUPREME COURT

DAVID M. POTTER, Plaintiff, vs. THE TOWNSHIP OF UNION, IN THE COUNTY OF UNION, Defendant.	

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Complaint.

Plaintiff, residing at Union, Union County, New Jersey, says that:

1. On the 30th day of December, 1912, the Township Committee of said Township of Union, in the County of Union, did duly pass and adopt an ordinance in and by which the annual salary or compensation of the Collector of Taxes was fixed at the sum of $750.00, in lieu of the fees or compensation otherwise provided by law, except the fees allowed to said Collector for the collection of taxes by arrest, levy, lien and sale, and that such salary shall be paid annually, on the 31st day of December in each year.

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2. That at the general election held in said Township of Union aforesaid, on November 2d, 1915, the plaintiff was duly elected as the Collector of Taxes of said Township of Union, for a period of three years to commence on the first day of January, 1916.

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3. That plaintiff accepted said election and duly qualified as said Collector and during the entire year 1916 has performed the duties of the office of Collector of Taxes of said Township of Union,

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and that there is now due and owing to him for salary and compensation as such Collector for the year 1916, from the defendant, the sum of $750.00.

4. That plaintiff has filed with said Township Committee of the Township of Union, his duly sworn bill claiming said sum of $750.00, but payment thereof has been refused.

5. That at the time of the commencement of the term of office of the plaintiff, to wit, January 1st, 1916, the ordinance mentioned in the first paragraph hereof was in full force and effect.

Plaintiff demands as damages $750.00, with interest thereon from December 31st, 1916.

CLARK McK. WHITTEMORE,
Attorney for Plaintiff.

Filed March 22, 1917.

Stipulation.

It is hereby stipulated by and between the parties hereto by their respective attorneys, as follows:

1. That paragraph one of the complaint be and is hereby amended by inserting and adding in the third line thereof the words "a resolution" and erasing the words "an ordinance."

2. That paragraph five of the complaint be and is hereby amended by inserting and adding in the second line thereof the word "resolution" and erasing the word "ordinance."

C. McK. WHITTEMORE,
Attorney of Plaintiff.

JOHN K. ENGLISH,
Attorney of Defendant.

Answer.

Defendant, The Township of Union, in the County of Union, says that:

1. It admits paragraph 1 of the Complaint as the same is amended by stipulation between respective attorneys. 10

2. It admits paragraph 2 of the Complaint.

3. It admits paragraph 3 of the Complaint.

4. It admits paragraph 4 of the Complaint.

5. It denies paragraph 5 of the Complaint for the reason that on the first day of January, 1916, at the hour of 2.30 P. M., and prior to the hour on said day upon which the plaintiff qualified by 20 taking oath of office, the incoming Township Committee of the Township of Union adopted a resolution of which the following is a copy:

"Resolved, that the salary of the Collector of Taxes be and hereby is fixed at the sum of six hundred dollars per annum, payable December 31st, in lieu of all fees."

JOHN K. ENGLISH, 30
Attorney of Defendant.

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Notice of Motion to Strike Out Answer and for Summary Judgment.

To Mr. John K. English,
Attorney of Defendant.

Dear Sir:

10 Please take notice that on Saturday, the 2d day of June, 1917, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard at the Court House in the City of Elizabeth, New Jersey, I shall apply to his Honor James J. Bergen, Supreme Court Justice, for an order to strike out the fifth paragraph of defendant's answer because it does not set up any defense to plaintiff's cause of action in that it alleges the passage of a resolution at a time after the commencement of the 20 term of office of plaintiff, the term of office of the plaintiff having commenced at the hour of 12 o'clock noon of January 1st, 1916, and the plaintiff's salary could not be increased or diminished for his term of office by any resolution passed after that hour.

And you are further notified that plaintiff, in addition to asking that said fifth paragraph of the answer be struck out, will move for summary judgment on said answer of the defendant for the 30 reason above given, and for the further reason that the answer does not set up any defense to plaintiff's cause of action, and that plaintiff is entitled to judgment for $750.00, besides interest.

Dated, May 28th, 1917.

Yours truly,

CLARK McK. WHITTEMORE,
40 Attorney of Plaintiff.

Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF UNION. } ss.:

DAVID M. POTTER, of full age, being duly sworn according to law, on his oath deposes and says:

I am the plaintiff in the above entitled action; at the general election held November, 1915, I was duly elected Collector of Taxes of the Township of Union, in the County of Union, New Jersey, for the term of three years; that on the first day of January, 1916, at about 3.30 P. M., I went to the meeting of the new Township Committee for the purpose of offering my bond for approval and taking the oath of office, and I did accordingly at said time and place, give my bond and subscribe the oath of office. I fulfilled the duties of the office of Collector of Taxes for the Township of Union, in the County of Union, New Jersey, throughout the entire year nineteen hundred and sixteen, and at the conclusion of said year I did submit a duly sworn bill for $750.00 to the Township Committee, which said committee refused to pay.

On December 30th, 1912, the then Township Committee of said Township did duly adopt a resolution fixing the salaries of various officers, and in said resolution did fix the salary of the Township Collector at the sum of $750.00, to be annually paid on December 31st in each year. Ever since the adoption of said resolution the salary paid to the Tax Collector has been the sum of $750.00 per annum; and there is justly due and owing to me from the Township of Union in the County of Union, New Jersey, for my services rendered as Collector during the year nineteen hundred and sixteen, the sum of $750.00, besides interest there-

on from January 1st, 1917, and I believe that the said Township of Union, in the County of Union, New Jersey, has no defense to my action for said moneys.

DAVID M. POTTER.

10 Sworn and subscribed before me this 2d day of June, 1917.

F. J. BLATZ,
???? C. Co. of N. J.

Memorandum.

20 NEW JERSEY SUPREME COURT.

On motion to strike out the answer filed in the above stated cause and for leave to enter summary judgment.

For the motion: Clark M. Whittemore and Samuel Koestler.

Contra: John K. English.

30 KALISH, *J.:* The plaintiff at the general election held in the Township of Union, on the second day of November, 1915, was duly elected Collector of Taxes of said Township, for a period of three years, the term to commence at 12 o'clock noon on the first day of January next succeeding. At the time of the plaintiff's election he was serving out his term of Collector of Taxes, by virtue of a previous election to that office in November, 1912. The plaintiff qualified for his new term on the first day of January, 1916, at 3.30 P. M.

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Memorandum

It appears that on the 30th day of December, 1912, the then Township Committee, by resolution, fixed the salary of the Township Collector at the sum of seven hundred and fifty dollars, to be annually paid on the 31st day of December of each year, and that the plaintiff, as such Collector, has been drawing the said fixed annual salary ever since the adoption of the resolution; that the plaintiff performed the duties required of him by his office for the year 1916, and presented a duly sworn bill therefor to the Township Committee, which Committee refused payment. Thereupon, the plaintiff brought his action against the defendant to recover the sum of seven hundred and fifty dollars, the amount of salary claimed to be due him. As a defense to this claim, the defendant sets up "that on the first day of January, 1916, at the hour of 2.30 P. M., and prior to the hour on said day upon which the plaintiff qualified by taking oath of office, the incoming Township Committee of the Township of Union adopted a resolution of which the following is a copy:

"Resolved, that the salary of the Collector of Taxes be and hereby is fixed at the sum of six hundred dollars per annum, payable December 31st in lieu of all fees."

Counsel for plaintiff challenges the efficacy of this resolution. They argue that the incoming Township Committee was without power to pass a resolution, after 12 o'clock noon on the first day of January, 1916, which, in effect, either increased or diminished the plaintiff's salary. This assertion they base on Section 32 of the Township Act, 4 C. S. at p. 5585, which empowers the Township Committee to fix the annual salary or compensation to be paid each person elected or appointed

to any township office, and provides that no salary or compensation shall be fixed or altered so as to affect any one who at the time of the adoption of the ordinance shall have been elected or appointed to office. Counsel for plaintiff then proceed to point out that Section four of the Township Act, 4 C. S., p. 5571, expressly names the Collector of Taxes as an elective officer, and that by Section 17 of the same act, p. 5578, the Collector's term of office is for three years, and he is required to give a bond before he enters upon his duties.

And that by virtue four of the act of 1895 (P. L. 1895, p. 14), the term of office of the plaintiff commenced to run at twelve o'clock noon on the first day of January, 1916.

And that by Section 64 of the Tax Act of 1903 (P. L. 1903, p. 435), it is provided that the governing body of the taxing district, which, in this instance, is the Township Committee, shall, by ordinance or resolution fix the annual salary of its Assessors, Collector, etc., at rates not in excess of the salary, if any prescribed by law, and that such salary so fixed shall not be increased or diminished during the term of such offices.

And this being the situation, it is further argued that since the governing body of the Township of the year 1912, passed the ordinance of December 30th of that year, fixing the annual salary of the Collector of Taxes at seven hundred and fifty dollars, the sum fixed, became and was a salary prescribed by law and was existent at the time the term of the plaintiff commenced to run and therefore was not subject to be diminished.

I am unable to give to the statute the construction contended for by counsel for plaintiff. I think its plain reading clearly indicates that the govern-

ing body shall fix the salary to be paid the officer during his term of office, and when such salary is fixed, it is fixed for the term of office to which the person is elected, and during such term such salary may not be increased or diminished. The fact that the same person is reelected to the office is immaterial.

His term having expired, his re-election, in the eye of the law, constitutes him a new officer. As to such new collector no salary had been fixed. None could be fixed by the Township Committee until it had first organized, according to law. This it could not do until the noon hour of January 1st, 1916. Its official life began when it was organized. And until then it was powerless to pass any resolution or do any official act. It is required to elect its chairman and clerk, which action requires more or less time to do. The question of fixing the Collector's salary may be a matter of debate and reflection. It would be highly unreasonable to hold that it was incumbent on the governing body to act officially upon the stroke of twelve. A deadlock might occur in organizing. The public might be made to suffer through hasty and inconsiderate action.

If the contention of counsel for plaintiff should prevail then it is manifest that the conferring of the power on the Township Committee to fix the salary of the Collector is a vain mandate.

Moreover, it does not seem reasonable to believe that the legislature ever intended that the governing municipal body, in the expiring moments of its dissolution, should have the authority to fix the salaries of officers whose terms are to begin under a new governmental body. Such a condition of affairs would preclude the bringing about of economy in its administration of municipal affairs.

I think the present case falls within the principle and control of the following cases: *Haight* v. *Love,* 39 L., p. 476; *Bownes* v. *Meehan,* 45 Id. 189; *Fitch* v. *Smith,* 57 Id. 526, 530; *Dickinson* v. *Jersey City,* 69 Id. 99; *Erie R. Co. et al.* v. *Paterson,* 74 Id. 735.

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I think the proper construction to be given to the statute is, that after the new governmental body of a township has once fixed the salary of an incoming Collector, the salary so fixed may not be either increased or diminished during the term of such Collector.

In view of the facts of the present case, the defendant was in the exercise of a lawful authority, when it fixed, by resolution, the salary of the plaintiff at six hundred dollars per annum.

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The motion, therefore, to strike out the answer will be denied, with ten dollars costs.

Filed.

Objection to Decision of Supreme Court Justice.

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The plaintiff, David M. Potter, hereby formally enters his objection to the ruling, decision and determination of Mr. Justice Kalisch upon the application of said plaintiff to strike out the fifth paragraph of the defendant's answer and for summary judgment.

Filed and dated September 22d, 1917.

CLARK McK. WHITTEMORE,
Attorney of Plaintiff.

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Order for Summary Judgment.

NEW JERSEY SUPREME COURT.

This matter coming on to be heard by the Court before a single Justice in the presence of Clark McK. Whittemore and Samuel Koestler, of counsel for the plaintiff, and of John K. English, of counsel for the defendant, upon plaintiff's application to strike out the fifth paragraph of defendant's answer and for summary judgment in the sum of $750.00, besides interest, and counsel for plaintiff having disclaimed any recovery for interest, and the Court having heard and considered the arguments of the respective counsel, and being of the opinion that the said fifth paragraph of defendant's answer should not be stricken out and that the resolution set forth in the same is a defense to plaintiff's action for the recovery of the sum of $750.00, and that by reason of said resolution the plaintiff is only entitled to judgment for the sum of $600.00, and said decision on said motion being decisive of the whole case:

It is, thereupon, on this 25th day of September, 1917, ORDERED, that the application of the plaintiff to strike out the fifth paragraph of the defendant's answer and for summary judgment in the sum of $750.00 be denied, with $10.00 costs.

And it is further ORDERED, that judgment final forthwith be entered in favor of the plaintiff and against the defendant for the sum of $600.00, together with costs.

SAMUEL KALISCH,
Supreme Court Justice.

Filed October 4, 1917.

Plaintiff's Objection to Summary Judgment for $600.00 and Determination of Justice regarding same.

Plaintiff, David M. Potter, hereby enters formal objection to the rendering of judgment in his favor for ~~$800.00~~ 600.00 instead of $750.00, and to conclusions and determinations of the Justice refuing to allow judgment in the sum of $750.00 as claimed by the plaintiff.

C. McK. WHITTEMORE,
Attorney of Plaintiff.

Filed October 4, 1917.

Notice of Appeal.

NEW JERSEY SUPREME COURT.

To The Township of Union, in the County of Union, defendant, or Mr. John K. English, its attorney:

You are hereby notified that the plaintiff, David M. Potter, hereby appeals to the Court of Errors and Appeals of the State of New Jersey from the judgment heretofore entered on October 4th, 1917, in the New Jersey Supreme Court in favor of the plaintiff, against the defendant, in the sum of $600.00, besides cost, upon the following grounds:

1. That judgment was rendered for the plaintiff in only the sum of $600.00, whereas judgment should have been rendered for the plaintiff in the sum of $750.00, besides interest.

2. That the Supreme Court should have granted plaintiff's motion for summary judgment for the sum of $750.00, besides interest and costs of suit.

3. That the Supreme Court should have granted plaintiff's motion to strike out the defense attempted to be set up by defendant in the fifth paragraph of its answer and have granted summary judgment to the plaintiff for $750.00, besides interest.

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4. That the Supreme Court erroneously determined that the resolution set forth in the fifth paragraph of defendant's answer was a defense to plaintiff's action for $750.00.

5. That upon the pleadings in the cause, plaintiff is entitled to judgment for $750.00, besides interest and costs of suit.

CLARK McK. WHITTEMORE, 20
Attorney and of Counsel for Appellant.

Filed and dated October 6, 1917.

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New Jersey Court of Errors and Appeals

DAVID M. POTTER, Plaintiff-Appellant, vs. THE TOWNSHIP OF UNION, In the County of Union, Defendent-Respondent.	On Appeal from Supreme Court.

Brief For Plaintiff-Appellant.

By an order of one of the justices of the Supreme Court, judgment was ordered entered in favor of the plaintiff and against the defendant for $600.00. The plaintiff appeals from the judgment so entered upon the primary ground that on the pleadings in the cause he should have been awarded judgment for $750.00.

The Facts.

On December 30th, 1912 the Township Committee adopted a resolution fixing the salary of the Collector of Taxes at the sum of $750.00. At the General Election held November 2nd, 1915, plaintiff was elected as such Collector for a term of three years to commence January 1st, 1916. He served the entire year of 1916 and put in a sworn bill for $750.00, the payment whereof was refused by the defendant. (C. pg. 2-3).

The answer of the defendant admits all of the facts above recited and in its fifth paragraph sets up that on January 1, 1916 at the hour of 2.30 P. M. and prior to the hour of said day upon which

plaintiff qualified by taking the oath of office, the incoming Township Committee adopted a resolution fixing the salary of the Collector at $600.00. (C. pg. 3).

A motion was thereupon made before a Supreme Court Justice to strike out the fifth paragraph of the answer on the ground that it set forth no defense and for summary judgment for the sum of $750.00. Said motion was heard before Mr. Justice Kalisch who filed his memorandum denying the motion. (C. pg. 6 to 10).

Formal objection was filed to his conclusion (C. pg. 13). The Supreme Court Justice thereupon determining that his decision on the motion was decisive of the whole case in accordance with Rule 40 of the Supreme Court, ordered judgment for the plaintiff in the sum of $600.00 (C. pg. 11). Objection was made and filed to the entry of such judgment (C. pg. 12) and the plaintiff thereupon gave notice of appeal and brought the matter before this court by appeal.

Argument.

Plaintiff now contends that in the decision on the motion for summary judgment, the learned Supreme Court Justice erroneously concluded that the resolution set forth in the fifth paragraph of defendant's answer was a defense, and therefore, erroneously entered a judgment for $600.00 for the plaintiff instead of $750.00, besides interest.

The question for decision is one of public policy depending on the construction of certain statutes. Those statutes are found in the Township Act and in the act relating to Taxes and are as follows:

Under section 32 of the Township Act, the Township Committee is given the power to make ordinances for the following purposes:

"To fix the annual salary or compensation tion to be paid to each person elected or appointed to any township office, except members of the township committee, and the time and manner of the payment thereof; the salary or compensation, when so fixed by ordinance, and shall be in lieu of the fees or compensation otherwise provided by law, and said fees or compensation shall thereafter be collected and paid into the treasury of the township for its use; but no salary or compensation shall be fixed or altered so as to affect any one who at the time of the adoption of the ordinance shall have been elected or appointed to office."

4 Compiled Statutes, pg. 5585.

Section 4 of the Township Act names the collector of taxes as an elective officer; his term to begin the second Saturday after election and not to hold office after the expiration of his term.

4 Compiled Statutes, pg. 5571.

By section 17 of the same act the collector's term of office is for three years and provides that before he shall enter upon his duties he shall give bond.

4 Compiled Statutes, pg. 5578.

By P. L. 1905, pg. 14, entitled, "An Act relative to the time of election and appointment and terms of office of officers elected or appointed in Towns, Townships, Boroughs and other municipalities in this State," it was provided that such officers should be elected at the general election; that the term of office of those then in office should be extended to the first day of January next succeeding

the term at which their office would otherwise expire.

By the fourth section of that act it was provided that the terms of office of all officers (excepting Justice of the Peace) hereafter elected in any Town, Township, Borough or other municipality shall commence at 12 o'clock noon on the first day of January next succeeding their election and continue for the respective term of years now fixed by law. These provisions will be found in 3 Compiled Statutes at pages 347 and 343.

The Tax Act was revised in 1903 and the 64th section thereof provides as follows:

> "The governing body of the taxing district shall, by ordinance or resolution, fix the annual salary of its assessor, collector and members of the board of assessment at rates not in excess of the salary, if any, prescribed by law, and such salary so fixed shall not be increased or diminished during the term of any officer; such officers receiving a salary shall receive no other compensation from the taxing district for services in the office except the fees allowed to the collector by this act on proceedings for the collection of taxes by arrest, levy, lien and sale." (P. L. 1903, p. 435).
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> 4 Compiled Statutes, pg. 5140.

A careful reading of the memorandum filed by the Supreme Court Justice will show that his determination rests on erroneous supposition that the salary is fixed for the officer and not for the office.

The salary for the office of Collector of Taxes was fixed in December 1912 and at the time Mr. Potter ran for this office in November 1915, he knew what the salary was.

Under the statute his term commenced promptly at the stroke of twelve January 1st, 1916.

The learned Supreme Court Justice is correct when he says that the incoming Township Committee could not organize until at least the noon hour of January 1st, 1916, and it therefore must follow that the incoming Township Committee could not have prior to the time of the commencement of the term of the collector have passed any resolution relating to the fixing of a salary.

In support of the determination of the learned Supreme Court Justice he cites Haights vs. Love, 39 L. p. 476; Bownes v. Meehan, 45 Id. 189, Fitch v. Smith, 57 Id. 526, 530; Dickinson v. Jersey City, 69 Id. 99, Erie R. Co. et al. vs. Paterson, 74 Id. 735 and says that the present case falls within the principle of those cases.

The principle and law laid down by those cases is simply this—that an existing body cannot elect or appoint to an office which is to come into existence or to become vacant at a subsequent time when the board or body will be differently constituted. In the case at issue the officer was elected by the people at a General Election and the incoming Township Committee was bound to accept him as their Collector.

If the Township Committee had the right subsequently to or simultaneously with the commencement of the term of office of the Collector of Taxes to decrease his salary, they necessarily had the right to increase his salary, and is it not that very evil which the statutes above cited contemplate?

In Haight vs. Love, supra, Mr. Justice Van Syckle said:

> "The beginning of a term of office ought not to be left to the will of the officer himself. If not fixed by law, it must begin as soon as he can enter upon it."

Therefore, both by the express term of the law and the decision of this court, the appellant's term commenced instantly at noon, January 1st, 1916. There was a salary then fixed for the office.

Under the Township Act above cited there is an express prohibition against fixing or altering compensation of one who at the time of the adoption of the ordinance shall have been appointed or elected to office.

It is not contended by the appellant that he comes within the purview of section 32 of the Township Act, but it is insisted that that statute defined a distinctive legislative policy and that such policy was reiterated by the legislature in section 64 of the Tax Act.

The pertinent words of Section 64 so far as they relate to the question now before this court are "such salary so fixed, shall not be increased or diminished *during the term* of any officer." It will be noticed that the language is not "after the commencement of his term." The statute expressly declares that "at 12 o'clock the term shall commence."

Therefore, neither the officer nor the Township Committee by any action or inaction can sway the pendulum one way or the other. The second the clock shows twelve o'clock noon, the term of office has commenced and it is a physical impossibility for the incoming governmental body to pass any resolution which can be said to have been passed at a time other than during the term of office.

The learned Supreme Court Justice in his conclusion says "his term having expired, his re-election in the eye of the law constituted him a new officer. As to such new collector no salary had been fixed" (C. pg. 9, 1. 11), and that conclusion is the basis and foundation of the justice's determination.

Is it not ridiculous to urge that for each term of

office there must be action by a governmental body designating the salary?

The New York Court of Appeals in People vs. Crisey, 91 N. Y. 616, held that it was not required that salary should be fixed before every new appointment, that it was sufficient if the salary had been once fixed.

To the same effect is the decision of the Supreme Court of Dakota in the case of Polk vs. County of Minnehaha, 37 N. W. Reporter 93. That case is on all fours with the case at bar, and the facts are as follows: At a general election held in 1886, Polk was elected district attorney for the county for the ensuing term of two years from the first Monday of January '87, being January 3, 1887 and on that day he qualified by taking and subscribing the oath of office and executing a bond. On the same day, probably an hour or more later, the county board of commissioners at their regular session fixed the salary of the district attorney at $700.00 a year. It appeared that several years before, one E. G. Wright was the district attorney and that at a regular session of the county board the salary of the district attorney was fixed at $1,200.00 per annum, payable quarterly. Polk on and after January 3rd acted and continued to act as district attorney and on April 4, 1887 put in a bill for one quarter salary, $300.00. The commissioners rejected the bill but allowed $175.00; Polk then sued for $300.00; the decision was against him; he took an appeal to the Supreme Court which cited the Dakota statute "The district attorneys shall receive such salaries for their services as the board of county commissioners of the proper county shall allow—not less than $400.00 a year—but the salary of such district attorney shall not be diminished during the term for which they shall be elected or appointed," and held the action attempting to diminish the salary

was a clear violation of the plain provisions of the law, saying:

> "There is a distinction between the office and the person holding the office. The salary, when fixed or allowed, relates and attaches to the office itself, and also to the individual officer in so far as that the person who, for the time being, holds the office, is entitled to receive the salary of the office. When the board once fixed the salary of the district attorney at $700.00 per annum, it remained as fixed for the full term, and until changed as provided by law, no matter what person held or occupied the office, and the law says the salary of district attorneys shall not be diminished during the term for which they shall be elected or appointed. The contention of the attorney of respondent that the board did not diminish, but fixed, the salary, has no real existence, and is not even the well-defined ghost of a respectable technicality. If they fixed or allowed the salary at a less sum than the salary then existing they diminished it."

In our own state in Rightmire vs. Camden, 50 N. J. L. 43, the Supreme Court held that the receiver of taxes could not be entitled to an increase in salary where the ordinance increasing said salary was passed after the time fixed in the statute for the commencement of his term of office, although he did not qualify by being sworn in and giving bond until sometime after the passage of the ordinance.

Several Kentucky cases are to the same effect:

> Lowry vs. City of Lexington, 68 S. W. 1109; Lexington vs. Moore, 71 S. W.

621; Jefferson County vs. Waters, 70 S. W. 40.

See also Wolf vs. Hope, 70 N. E. 1082 (Ill.)

Again on page 9 the learned Supreme Court Justice says: "It would be highly unreasonable to hold that it was incumbent on the governing body to act officially upon the stroke of twelve. A deadlock might occur in organizing." Assume that there was such a deadlock, then, if the reasoning of the justice is correct that no salary was fixed as to the new officer, in the event of a deadlock extending over a period of one month or more, the collector and other officers would be without any salary.

It stands to reason that the policy of the law is to fix the salary for the office and not for the particular individual who might be acting as the officer. If salaries were fixed for the individuals it would tend to curry favor and displeasure.

While it is true that the officer is entitled to the remuneration, the salary is one of the incidents and emoluments of the office.

It is not necessary that each incoming Township Committee should fix a different salary for each and every office and officer and it is not a question of the Supreme Court or this court making the law, it is a question of enforcing the law as it is made and that law is, that there cannot be any change in salary during the term of office.

So far as the office of the Collector of Taxes is concerned, a failure to fix a salary before the commencement of the term of office, or at any previous time, does not and would not leave the Collector without remuneration for his services, because there are many statutes which would otherwise give him special fees. Several of those statutes are: Tax Act, Sections 44, 50, 52 and 55; 4 Compiled Statutes, pages 5127, 5131, 5133 and 5135.

It will be noticed that under Section 64 of the Tax Act the officer receiving a salary receives no other compensation "excepting the fees allowed to the collector by this act on proceedings for the collection of taxes by arrest, levy, lien and sale."

In this respect the case of the plaintiff as collector of taxes differs from that of other officers whose compensation is altogether dependent on the fixing of a salary by the governing body, because no fees or salary are fixed by the Legislature. But even in such a case, it is submitted and most strongly urged that a salary once fixed lawfully, is fixed for the office and not for the officer and can only be changed before the commencement of an incumbent's term of office, and it may even be urged, only before his election. Where the term commences coincidentally with the organization of an incoming body, it necessarily follows that the previously existing governing body only, can make a change in such officers salary.

The resolution set up in the fifth paragraph of the defendant's answer was passed "during the term of office" of the appellant and that is all there is to the whole case. Either that resolution was passed during the term of office or it was not, and if the term of office commenced at the stroke of 12 o'clock noon, it was as we have above stated, a physical impossibility for the incoming Township Committee to have passed a resolution other than during the term of office of Mr. Potter.

Therefore the judgment of the Supreme Court should be set aside and a judgment now entered for $750.00 with interest from January 1st, 1917.

Respectfully submitted,

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Of Counsel for Appellant.