NEW JERSEY COURT OF ERRORS AND APPEALS

The State of New Jersey, Ex rel., J. Alexander Browne, Relator, vs Orville R. Hagen, Respondent	On Appeal.

BRIEF ON BEHALF J. ALEXANDER BROWNE, RELATOR.

Statement of Facts.

The appeal of the respondent, Dr. Orville R. Hagen, is for the purpose of seeking a reversal of the judgment of the Supreme Court, by which judgment it was decided that Dr. Browne, the relator, was entitled to the office of Health Officer of the City of Paterson. The respondent in this case is Dr. Orville R. Hagen, but the

controversy is an old one familiar to the court as the case of Browne vs. Clay, which first appeared in the Supreme Court on certiorari proceedings brought by Dr. Clay to review an order of the Civil Service Commission which declared Dr. Browne to have been protected in his office by virtue of the Civil Service Act. This case is reported in..... The facts of the case are as follows:

Dr. Browne was Health Officer until January, 1915, when the Board of Health declared the office to be vacant. From this decision of the Health Board Dr. Browne appealed to the Civil Service Commission, which Commission decided, that Dr. Browne was protected by the Civil Service Act of 1908, which had been adopted by the City of Paterson, and refused to recognize Dr. Clay, who had been elected as Dr. Browne's successor. Dr. Clay then by certiorari sought to review the action of the Civil Service, and by the Supreme Court it was held that Dr. Clay was not entitled to prosecute his action, as Dr. Browne was the lawful encumbent to the office. The Supreme Court decided this question upon the merits of the controversy.

The case was then appealed to the Court of Errors and Appeals, which Court affirmed the decision of the Supreme Court dismissing the certiorari but did not pass upon the merits of the controversy. They merely decided that certiorari was not the proper method of testing the questions at issue.

Pending mandamus proceedings brought by Dr. Browne to compel the payment of his salary

by the City of Paterson, which question is now pending in the Court of Errors at this term (case 74), Dr. Clay resigned, and Dr. Hagen was elected to fill the alleged vacancy.

Aside from the fact that a different person is claiming to hold the office of Health Officer than in the other controversy, there is no difference whatsoever in the controversy since it first arose. Through all the cases the facts have been agreed upon and the information has been so broadened as to include practically every fact in the case. Many matters are set up by the relator, which in counsel's opinion are not necessary, but were inserted in the information in view of the fact that counsel for respondent might deem them important.

The Supreme Court speaking through Justice Minturn before whom the case was argued decided that Dr. Browne was entitled to the office of Health Officer, basing his reasons upon the opinion of the Supreme Court in the certiorari case.

By the information it appears that the Board of Health of Paterson was created in 1882, under the Act of 1880 (p.l.p.206) and excepting to fix the salary of Health Officer, in 1895, the ordinance was not changed until 1914, and then only for the purpose of increasing the Board to ten members. The only Legislative acts to be considered are the acts of 1880-1886-1887; (1880 page 206; 1886 p.280 and 1887 page 80.)

POINT I.

The Act of 1880 was repealed by the Act of 1886, and the Ordinance of the City of Paterson of 1882 so far as it deals with the status of Health Officer, was repealed by said Act of 1886.

The Act of 1886 (P. L. 1886 p. 200) assumed to provide a scheme for the establishment of the State Board of Health and local boards of health within the State. By Section 44 of that act, the act of 1880 was expressly repealed. The act of 1886 was, however, superseded the following year by an act entitled, "An Act to establish in this State Boards of Health and a Bureau of Vital Statistics, and to define their respective powers and duties." (p.l.1887 page 80; Comp.2Stat.2656) which is the act under which local boards of health in this State have been organized and operating since its enactment.

Section eleven of the last mentioned act, referring to local board of health, provides that:

> "Every local board of health now existing in any city, borough, town or other local municipal government in this State, which is in fact constituted and organized in the manner provided by the ninth section of this act * * * * * shall be deemed, held and taken to be a local board of health, created under the provisions of this act, and every such board is hereby perpetuated and continued, and is hereby authorized without reorganization to exercise all the powers and perform all the du ties applicable to local boards mentioned in this act."

Section nine of the Act of 1887 provides that:

> "The local boards of health of every city * * * * shall be composed of not less than five nor more than seven members, who shall be appointed in such manner, and hold their respective offices for such terms not exceeding four years, as the governing body of the municipality may, by ordinance provide."

The Act of 1880 (P.L.1880 p.206) provides for boards in cities, boroughs, etc., of not less than five nor more than seven members, of which the keeper or recorder of vital statistics and also one city physician and city health officer shall be members, if there be such officer or officers, and provides that the members shall serve for not less than three years.

It will be noted that the Act of 1887 does not provide that the health officer, the city physician and the recorder of vital statistics shall be members of the local board of health. No such provision is contained in section fifteen of the Act of 1886 (P.L.1886 page 285).

Section thirty-six of that Act (the Act of 1886) provides that the board shall appoint such officers and agents as they may deem necessary, and requires the board in any city, town, borough, etc., containing a population of two thousand inhabitants or more, to appoint at least one officer. It will be seen, therefore, that at the time the Act of 1887, went into effect there was no law in existence making the Health Officer a member ex-officio of the board. The statutes then in force undoubtedly contemplated the appointment by

the board of subordinate officers and employes who should not be members of the board.

Section thirty-one of the Act of 1887 (2 Comp. Stat. 2669) gives to local boards of health power to appoint such subordinate officers and agents to carry into effect the powers conferred, as they may deem necessary; this paragraph corresponding closely with paragraph thirty-six of the Act of 1886. No authority is conferred upon the board to appoint a health officer except under this paragraph. The officer, when so appointed, is necessarily a subordinate officer, and not a member of the board.

The appointment of health officers was further regulated by the Act passed in 1903 (P.L. 1903, p.453; 2 Comp. Stat. 2675,p.56-60). This Act provides that no one shall be eligible for appointment as health officer or sanitary inspector without first having secured a license from the State Board of Health. Section three of that Act provides that any person licensed as health officer shall be eligible to appointment as such health officer by any local board of health of this State, and when so appointed shall, during the term of his appointment, and subject to the superior authority of such local board, be its general agent for the enforcement of its ordinances and the sanitary laws of this State.

It appears therefore, that the health officer contemplated by the Act of 1887, was a subordinate officer, appointed by the board, and not a member of the board ex-officio. It follows, therefore, that the ordinance of the Board of Aldermen of the City of Paterson providing that the health officer, although appointed by the board

of health, shall be a member ex-officio of the board, was superseded by the Act of 1887; that since the passage of those acts, the office of health officer of the City of Paterson, the health officer being the subordinate of the board, appointed pursuant to the authority contained in paragraph thirty-one of the Act of 1887 and performing the duties mentioned in section three of the Act of 1903 (2 Comp. Stat. 2675 sec. 58).

It is apparent, therefore, that since the passage of the Act of 1886, the office of health officer has been incompatible with the office of member of the board of health, and that, therefore the Board of Aldermen had no power to make the officer a member of the board of health ex-officio. It is also apparent that a board constituted and organized in that manner, with a subordinate officer as a member of the board was not a board constituted and organized in the manner provided by the ninth section of the Act of 1887.

POINT II.

The term of Health Officer is not fixed by statute.

Appellant's counsel contends that the action of the Civil Service Commission in classifying the office or position of Health Officer, in the competitive class or of the classified service was illegal, because of the fact that this office or position is one for which a term was fixed by law, and that, therefore, it is in the unclassified service. The writ, however, does not attempt to remove the order of the board in making this classification, and that order is not before the Court.

Section sixty-seven of the statute (3 Comp. Stat.3799) as amended in 1914 (P.L.1914,p.82) after enumerating the offices and positions in the unclassified service of the State, provides that the classified service shall include all persons in the paid service, etc., not included in the unclassified service. The unclassified service includes officers elected by popular vote, officers appointed by the Governor, officers or employees appointed by both branches of the Legislature, election officers, assistant prosecutors of the pleas, heads of departments, members of commissions and boards, appointments of the mayor of municipalities, law officers of any municipality that may adopt the provisions of the act, officers, non-commissioned, enlisted men and other persons employed in the military or naval service, superintendents, teachers and instructors in public schools and State institutions, etc., and police magistrates.

In McKenzie vs. Elliott, 48 Vr. 43, the Supreme Court held that the Civil Service Act did not operate to continue in office an officer with a fixed statutory term after the expiration of such term. This decision was cited with approval in Fagon vs. Morris, 83 N.J.L.3, and in Walker vs. Freeholders of Essex, 82 N.J.L.348.

It is significant that the decision of the court in these cases referred only to an officer with a *statutory* term. It has nowhere been decided that the tenure of office of a municipal officer, chosen for a term fixed by ordinance or resolution of a municipal body, as distinguished from a statutory term, is not affected by the provisions of the Civil Service Act, if the position is one in

the classified service under the provisions of that act. It may be that the Civil Service Act giving every employe in the competitive class of the Civil Service a tenure of office would operate to supersede the ordinance or resolution of a board of health fixing a term for this office, if such term has been fixed, and to extend the term of the then incumbent until such time as he might be discharged in accordance with the provisions of the act.

Counsel for respondent contends that inasmuch as the Board of Health elected Dr. Browne as Health Officer for three years originally and again in 1909, that such actions up-rated a fixed term for the period named.

The statute of 1880 (P.L.1880 page 206) under the authority of which the ordinance of the City of Paterson of 1882, establishing the Board of Health, was passed, provided that the term of office of the members of the board should be not less than three years, and this ordinance provided that the term should be three years. The statute further provided that the Health Officer should be a member of the Board. Section Eleven of the Ordinance of 1882 fixed the term of Health Officer at three years, but this, of course, was superseded by Section Thirty-one of the Act of 1887, which gave the Board of Health the power to fix the term. Dr. Browne during his incumbency as Health Officer, acted in the dual capacity of Health Officer and member of the Board. It is evident that the motion appointing him for the term of three years referred either to this supposed statutory limitation upon his term as member of the Board or to the supposed Ordin-

ance term as Health Officer, and was not an attempt to fix his term as Health Officer. Assuming that the Supreme Court was right in determining that the Health Act of 1887 repealed the provisions of the Act of 1880, and abrogated the provisions of the Ordinance of the City of Paterson of 1882, providing that the Health Officer should be a member of the Board, it is apparent that the limitation imposed by the Ordinance and by the statute of 1889 upon the term of office of a member of the Board, no longer applied to the Health Officer. Since, therefore, the motion appointing Dr. Browne did not fix his term as member of the board or to a term fixed by an ordinance which had been repealed, it cannot operate to fix the term of Dr. Browne's under Section 31 of the Act of 1887.

POINT III.

It is immaterial whether Dr. Browne was holding over after the expiration of three years from the date of his appointment, or whether he was duly appointed on December, 23, 1913, for the unexpired term.

Appellant contends that Dr. Browne was not legally elected on December 23, 1913; that therefore, at the time the Civil Service Act was adopted in the City of Paterson on November 5, 1912, the appellee, Browne was holding over in office after the expiration of his term and cites the statute (1 comp. stat. 619 sec. 105) providing that municipal officers elected for a precise and determined period shall continue to hold office until the appointment and qualification of their suc-

cessors. He insists that, therefore, Dr. Browne, was merely a de facto officer and cites Salter v. Burke, 83 N. J. L. 152, and Shalvoy v. Johnson 84 N. J. L. 134, as authority for the statement that the Civil Service Law cannot operate to protect de facto officers. These decisions are not applicable.

Assuming that Browne was at the time of the adoption of the Civil Service Act by the City of Paterson, holding over in office under the statute above mentioned, after the expiration of his term because his successor had not been appointed and qualified, he was nevertheless a de jure officer, for his term was not only a term of three years, but, by virtue of the provisions of that statute, his term continued until the election and qualification of his successor. See Hoagland v. Labaw, 32 N. J. L. 269, 270; State ex rel Kelly v. Paterson, 35 N. J. L. 196; Sooy v. State, 41 N. J. L. 394; Stilsing v. Davis 45 N. J. L. 390.

In Cyc. 29, 1399 appears the following:

> "Where, however, provision is made by statute for holding over, the holdover is regarded as in all respects a de jure officer, and the expiration of the term does not produre a vacancy which may be filled by the authorities having the power to appoint to fill vacancies."

In this connection, counsel for the respondent seems to rely upon the case of McKenzie v. Elliott, 77 N. J. L. 45, and Fagon v. Morris, 83 N. J. L. 3; neither of these cases are in point. In the McKenzie case, the court held:

(syl. 2.) "Section 2 of the Civil Service Act of 1908, (p. 1. p. 235) refers only to officers whose term was not previously fixed by law."

(syl. 3.) "The classified service under Civil Service act of 1908, (P. L. p. 235) does not include officials with a fixed statutory term who are appointed by the Board of Chosen Freeholders of a county."

It will be observed that the decision deals with "a fixed statutory term."

Throughout the opinion, Justice Swayze hammered on this expression, "statutory term."

To the same effect is the Fagon case, where the contest involved the right of the relator and the defendant to the office of City Clerk of Jersey City. From the opinion it appears that the office was in the charter of Jersey City, and that the charter was passed by the Legislature in 1871.

These cases therefore cannot be in point unless it could be said that an ordinance of the Board of Health, which board is itself a creation in part of an ordinance of another municipal body, is the same thing as a statute. Such, however, is not the law. See generally 28 Cyc. 373.

POINT IV.

Dr. Browne was not either by a valid election or resolution appointed for a fixed term.

Counsel for the respondent attempts to make a point of the fact that the relator was elected from time to time. It must be borne in mind, however, that at the time the Board of Health held one of

its so called elections it supposed it was acting under the Ordinance of 1882, wherein the term of Health Officer was fixed, and that they supposed that the Act of 1887 made no change in the situation. If the board in holding these elections supposed it was acting under a law which did not exist, then their so called elections were nullities. Section thirty-one of the Act of 1887, provides that the local boards of health shall have power to appoint subordinate officers, and to fix the term of such appointment and the compensation. But there never was any attempt by the Board of Health of Paterson to fix the term of Health Officer. The effect therefore, was, that during all these years that Dr. Browne held office, he held same for an indeterminate time, notwithstanding the so-called elections. It is our contention that until the adoption of the Civil Service Act by Paterson in 1912, Dr. Browne could have been removed at any time.

Counsel for respondent claims, however, that Dr. Browne's term was fixed by a resolution of the Board. He cites the cases of McGrath v. Bayonne, 85 N. J. L. 188; Peel vs. Newark 66 N. J. L. p. 265 in support of his contention. These cases are not in point as we shall show later. No resolution was adopted at any time with regard to Dr. Browne. All that happened was that the Board of Health proceeded to hold an election in conformity with the provisions of a law that had been repealed.

In order to uphold the respondent's contention, the Court will have to construe a void election as meaning a resolution. If in this case the Board of Health did recognize they had never fixed a term of office and it then "resolved" that Dr.

Browne held office for a period of three years, &c., we would then have a resolution, *but at no time did the Board of Health intend to "resolve" but it did intend to elect.* Can the Court hold that the Board of Health intended to adopt a resolu tion when the facts showed that they intended to hold an election? The case of McGrath v. Bayonne, is not in point. It appears in that opinion that in the charter of Bayonne the common counsel had power to create the office of building inspector; no term of office being fixed by the charter. McGrath was then appointed by the common counsel under a resolution, by which resolution they placed him in office for a definite period. It will be noted there, however, that the common counsel of Bayonne recognized the fact that the building inspector had no term fixed by law, and that they had adopted no ordinance which fixed his term, hence their resolution fixing the time for which they appointed him. The difference between the McGrath and the Browne case is that in the McGrath case they had intended to adopt a resoluion and did adopt it. In the Browne case the Board intended an election and held one (void of course).

In the case of Peal v. Newark, 66 N. J. L. 265 also urged by counsel of respondent as being in point, is identical with the McGrath case and differs in the same respect from the case at bar. The Peal case dealt with the right of the office of Superintendent of Buildings. The city charter provided for such office but fixed no term . The common counsel of Newark appointed Peal by a resolution and by the same resolution they fixed his term of office and his salary. Here again the common counsel knew

that no term of office was fixed; did not fix a term of office, but knowingly and intendedly did appoint Peal by resolution and by the same resolution fixed his salary and term of office. *They intended their act to be a resolution, and the court held it to be a resolution.*

In closing on this subject we would call the court's attention to the various authorities cited by respondent under point one. These cases deal with a situation wherein there was positively a fixed term, and therefore, radically different from the case at bar.

POINT V.

The Health Officer is not the head of the department, and the position or office of Health Officer is not a department at all.

If a department existed at all it would be the Board of Health itself that would be the department. At the time of the creation of the said Board of Health, the Board of Aldermen of the City of Paterson was the governing body of the City of Paterson. The Board of Health was the ance passed by the Board of Aldermen, and to this Board either by said ordinance or statute were delegated the duties pertaining to the health. The Board of Health in effect was a committee or commission and they would be the head or heads of the department of health. In his argument counsel for respondent quoted extensively from the case of Fagon vs. Morris 83 N. J. L. p. 3. Fagon was indeed the head of the depart-

ment, and a quotation from that case served to show the striking difference between his position and that of Dr. Browne's. The office held by Fagon was a charter office created by an act of the Legislature, and that charter distinctly states the various powers of the City Clerk; that he should have charge of all records, books, papers and documents of the city; that he should countersign all licenses, and all bonds, obligations, &c., that he should affix the corporate seal thereto; that he should have the custody of the corporate seal; that he should be the clerk of the Board of Aldermen and keep their minutes; that he should engross all the ardinances; that every ordinance should be signed by him as well as by the mayor and numerous other powers all of which are enumerated in the opinion. These powers the Board of Aldermen of Jersey City could not take from Mr. Fagon.

Contrast this with section thirty-one of the Act of 1887, which provides that the duty of the officers appointed by the Board of Hleath including that of Health Officer, shall by said Board "be prescribed and defined by the rules, regulations or ordinances made for that purpose." How could it be said that Dr. Browne was the head of the department when every slightest duty to be performed had to be such as the Board might at any time prescribe by a rule, regulation or an ordinance. He was merely an employe to take orders as they were given to him from time to time, by his supervisors. He had not the slightest authority to do anything of any kind, save such as the

Board of Health choose to direct him to do, an entirely different situation from that in the Fagon case. Fagon, a city clerk, looked to the charter of the City for his powers. He took no orders from anyone. Dr. Browne could not act without orders given to him. His position was the antithesis of that of Fagon. Other quotations in the brief of counsel for respondent indicate clearly that he is not the head of the department when holding the position of health officer.

Section 59 of the Health Act, 1910, provides any sanitary inspector so appointed shall be the agent of the *local board* appointing him, for the performance of such service as such Health Officer, for such local board, *under the authority of such board,* so assigning him.

Conclusion.

Every indication in the Fagon case shows that he was the head of the department; that he had authority under the law to appoint a clerk and an assistant, and to fix their salaries, and the right to designate a person to act during his absence, or disability. No such powers were conferred on the Health Officer. The fact that under the direction of the Board of Health certain sanitary employees might be obliged to obey Dr. Browne's direction, would not indicate that Dr. Browne was the head of the department. Is it a fact that a foreman of a gang of street cleaners would be the head of a department because the laborers under him would have to obey certain orders or directions given to them by the foreman, who in turn

received them from the street department?

There are very few decisions in our courts as to what constitutes a head of the department. It would seem that each case must be judged by itself. One test might be the independence of judgment. If that be the test then indeed Dr. Browne is not the head of a department. No judgment or independence of action was left to him.

Counsel so far as this court is concerned still takes the position that the decision of the Supreme Court in the certiorari case, in which it passed upon every one of the points raised in this case, should be legally and morally binding upon this Court.

Counsel feels that he may quote the decision of Judge Vredenburg in the case of Joyce v. West Jersey S. R. R. Co., 83 N. J. L. 608, and when speaking of the rule stare deccisis he said:

> "This doctrine, says a recent authority (Black on Judicial Precedents sec. 59) is one of surpassing importance, "It is, that when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases where the facts are substantially the same. * * * * * * * * * and it is upon this basis that the whole elaborate structure of our case law has been built up.

In view of the difficulty of deciding just what is required to constitute a head of a department some reliance should be placed upon the judgment and discretion of the Civil Service Commission, a body of men who have made a special study of

the subject, and whose classification in the case at bar was only made after a careful investigation as to the duties of that official.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

June term, 1917.

Respectfully,
WARD & MCGINNIS,
Attorneys of Relator.

NEW JERSEY COURT OF ERRORS AND APPEALS

The State of New Jersey, ex rel., J. Alexander Browne, *Relator*, *vs.* Orville R. Hagen, *Respondent.*	*Brief of Respondent.*

BRIEF OF RESPONDENT

The merits of the controversy in this proceeding were involved in the case of *Clay, pros. v. Civil Service Commission, et als.*, 88 *N. J. L.* 502: S. C. on appeal. 89 N. J. L. 194. For convenience copies of the opinions are annexed to this brief.

STATEMENT.

The information in this case claims title in the relator to the office of Health Officer of the Board of Health of the City of Paterson and alleges that the respondent is an intruder in said office.

Relator alleges the foundation of his right to the office to be as follows:

"1. That on the 10th day of November, 1903, the relator was by the Board of Health of the City of Paterson appointed Health Officer, and thereupon entered upon the discharge of his duties. That on the 13th day of November, 1906, he was re-appointed for a term of three years. That on the 12th of November, 1909, he was re-appointed by said Board of Health for the term of three years, and until a successor should be appointed. In 1912, owing to a dead-lock in the Board of Health no appointment was made and relator continued to hold over in office.

"3. Relator further avers that at the general election in November, 1912, the City of Paterson, adopted the provisions of the Civil Service Act of 1908, and thereafter, the position of Health Officer was classified as being within the competitive class, and relator accordingly held said position during good behavior, and was removable for cause only; that he was never at any time removable for cause."

After showing that Dr. Clay was elected to succeed him he shows the title of respondent as follows:

"6. Relator further avers that on the fourteenth day of November, 1916, the said Thomas A. Clay resigned as Health Officer, and thereupon the said Board of Health at a regular meeting held on the fourteenth day of November, 1916, elected or attempt-

> ed to elect and did formally declare to be elected one, Orville R. Hagen, the respondent, for the unexpired term of three years, to which they had elected or attempted to elect the said Thomas A. Clay. That the said Orville R. Hagen thereupon took possession of said office and has ever since been recognized by the Board of Health as its Health Officer, and is now performing or pretending to perform all the duties of said office.'"

And by section 7 alleges:

> "the said Orville R. Hagen during the time aforesaid has usurped, intruded into and unlawfully held, used and exercised [the office] and yet does intrude into and unlawfully hold and exercise [the office] to the exclusion of the said J. Alexander Browne."

The information is filed under section 4 of the *quo warranto* act (C. S. 4212) and may be disposed of under the provisions of the act of 1895 (P. L. 82) which now appears as section 12 (C. S. 4214) which gives respondent the right to put the title of the relator in issue. The respondent has raised such issue by demurrer to the information as was done in *Haight v. Love,* 39 *L.* 14, 476. *Anderson v. Myers,* 77 *L.* 186. *Dunham v. Bright,* 85 *L.* 391. *Civil Service Commissioners v. O'Neil,* 85 *L.* 92 *and Bonynge vs. Frank* 98 *At.* 456; in which latter case Moses had judgment owing to the inconsistent averments of the information.

The claim of the relator, as shown in the 3d section of the information is that by virtue of his tenure of office as it existed upon the adoption of the Civil Service Act in Paterson, he became upon and by virtue of such adoption, vested with a tenure "during good behavior and was removable for cause only."

To expedite the cause the present proceeding was heard below, by consent, by Mr. Justice Minturn, sitting alone. His opinion is printed at page 18 of the Case. Referring to *Clay v. The Civil Service Commission supra,* Mr. Justice Minturn says,

> "I am inclined, however, to accept the Supreme Court determination as finally dispositive of the rights of the parties upon this information."

I.

It appears upon the face of the information that relator has no title or right to the office in question, and that he had no tenure thereof under the civil service laws.

The question as to the source of Dr. Browne's title may not be relevant to the present inquiry. He has not set it up. If he has insufficiently done so, he must fail in this proceeding for the same reason as is given in *Dunham v. Bright.* 85 *L.* 391, where the relators failed to fully set up their title. Under such circumstances the question of whether the office of Health Officer springs from the ordinance of the Board of Aldermen of the City of Paterson passed in 1882, or from section 31 of the general health act of 1887 (C. S. 2656), which was the subject of discussion in *Clay v. Civil Service Commission* 88 *N. J. L.* 502, and of the appeal

in the same case becomes immaterial. The information in the present proceeding dispenses with the necessity of inquiry upon that question for it distinctly alleges the fact to be that the relator on the 12th of November, 1909 was "re-appointed by said Board of Health for the term of three years, and until a successor should be appointed," and that "in 1912, owing to a dead-lock in the board of health no appointment was made and relator continued to hold over in office."

The question, therefore, is resolved into an inquiry as to whether one holding over in office after the expiration of a fixed term and until a successor should be appointed is given a tenure of office under the Civil Service laws. (*C. S.* 3795).

It is well settled that a fixed term of office is not extended by the Civil Service Act. Nor, can the election and induction of a successor to one holding such office operate as a "removal" of his predecessor within the meaning of that law.

McKenzie v. Elliott, 77 *N. J. L.* 43.

Of the case last cited it has been said.

> "In the case of *McKenzie v. Elliott,* 77 *N. J. L.* 43, this court held that the incumbents of offices, the terms of which were fixed by statute, were not intended by the legislature in the passing of the Civil Service Law, to be placed in the "classified service" at the option of the civil service commissioners, and so to be given a tenure of office different from that which the stat-

> ute fixing the term prescribed, and were not affected by its provisions. Later the Court of Errors and Appeals, in the case of *Attorney General v. McGuinness,* 78 *N. J. L.* 346, commenting upon this construction placed by us on the Civil Service Law, declared that it met with its approval."
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> *Fagen v. Morris,* 83 *L.* 3.

In *Hosp v. Civil Service Commission,* 83 *L.* 10, a certiorari having been sued out to test the validity of a resolution of the commission placing in the classified service and classifying in the competitive class the position of a warden of a county jail of the first class, it was held that the warden held for a fixed term and the court said.

> "In the case of Attorney General v. McGuinness, 49 Vroom 346, 385 which was a proceeding in the nature of a *quo warranto* to test the question whether the office of county collector was one which could be placed in the classified service by the Civil Service Commission and thereby made subject to the provisions of the Civil Service law, it was determined by the trial justice that the act did not apply to the case of officers whose terms are established by law, and that conclusion was affirmed by the Court of Errors and Appeals."

The principle established by these cases has been followed in

> *Burgan v. Civil Service Commission,* 84 *L.* 219.

Young v. Stafford, 86 *L.* 422.

It being established that one having a fixed term of office has no tenure thereof under the Civil Service Laws, it follows that one holding over in office has no such tenure, for the reason that his term is also fixed by law.

The information fails to show under what authority the relator held over, whether it was as an officer *de facto* or as an officer *de jure.* In this case it is perhaps not of importance in which manner he held. If he was holding over *de facto* it has been settled that the Civil Service act would not apply.

> "It has been held by this court, however, that the application of the Civil Service Act * * * must be limited to the protection of officers *de jure* and cannot be extended keep in office *de facto* officers; *Salter v. Burk,* 54 *Vroom* 152."
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> *Shalvoy v. Johnson,* 84 *L.* 134.

Relator, himself, inferentially alleges that he was holding over "until a successor should be appointed", and in the absence of any statute or authorized resolution of the Board, such would be his status. Notwithstanding some contrariety of opinion in the various states, *Dillon on Municipal Cor.* states the rule to be,

> "the American courts have not adopted the strict rule of the English corporations which disables the mayor or chief officer from holding beyond the charter or election day, but rather the analogy of the oth-

> er corporate officers who hold over until their successors are elected, unless the legislative intent to the contrary be manifested."
>
> Dillon (4th ed) Sec. 219.

But, probably, his tenure was fixed by the act entitled "An Act relating to officers in cities who now hold or hereafter shall hold their offices for a fixed period." (C. S. 619, sec. 105) which act reads as follows:

> "That any officer of any city in this State who now holds or hereafter shall hold any office therein, under any law of this State, which fixes the term thereof for a precise and determined period, shall continue to hold such office and exercise the duties of the same, notwithstanding the time limited for its continuance shall have expired, until his successor has been appointed and qualified."

This statute was held to apply to membership in a city Board of Health in the case of *Clark v. Trenton,* 49 *L.* 349 *and Hoel v. Camden,* 68 *L.* 226.

Where one holds over in office there is a vacancy in the office for the purpose of electing a successor. This is decided in Haight v. Love, 39 L. 476, 479, in the following language:

> "The term of his predecessor was by the terms of the act of 1873, made to continue

> until he actually entered upon the duties of the office. * * * Although he was to continue in the exercise of his functions, the office was under such circumstances declared to be vacant. There is no incongruity in the fact of a vacancy for the purposes of a new election, and the actual holding by the former incumbent."
>
> *Haight v. Love,* 39 *L.* 476, 479.

In *Rightmire v. Camden,* 50 *L.* 43, 48, the court referring to the effect of a provision for the holding over of an incumbent until the qualification of his successor said,

> "such a provision was not designed to extend the tenure of office of the incumbent beyond the specified time for his benefit. Its purpose was to conserve the public interest, that there might be no vacancy in office during the delay of the successor to qualify. An incumbent holding the office under such circumstances is in by sufferance of the person who, being chosen to the office, has failed to assume its duties and the term so protracted is to the detriment of the latter in abridging his own term of office."

The reason of the opinion in *McKenzie v. Elliott, supra,* applies as well to the effect of an election or appointment made a day, a week, or a year after the precise date upon which a term of office ends as to an election or appointment made on the very day on which such term ends. The court says: (italics are ours)

> "The word "removal" naturally applies to one whose term is indefinite; it does not naturally connote the case of an officer whose statutory term has expired. In such a case there is a vacancy, and no removal is necessary. The distinction between *removing* an officer and *filling an existing vacancy not due to removal but to expiration of term,* is a natural one and makes a reasonable basis for classification."

Dr. Clay's appointment was to fill a vacancy not due to removal of Dr. Browne from office, but to fill a vacancy caused by the expiration of Dr. Browne's term. As is decided in *Haight v. Love, supra,* the expiration of a term causes a vacancy for the purposes of a new election notwithstanding the "holding over" of the prior encumbent.

If the fact that Dr. Clay was a member of the Board of Health disqualified him from holding *de jure,* nevertheless, either Dr. Browne held over, *de jure,* during Dr. Clay's incumbency or there was an absolute vacancy in the office during such time, in which case Dr. Hagen's election was valid whether he be looked upon as the successor of Dr. Browne or Dr. Clay.

II.

The various ordinances set forth in the information may in the view of the court render necessary consideration of the question as to whether the term of Health Officer of the City of Paterson is fixed by law.

If it is to be regarded as an office held under the ordinance of the City, there can be no question about it. The ordinance fixes the term. But it is conceived in light of the opinion of this court in *Clay vs. The Civil Service Commission et al., supra*, that the ordinance, so far as related to the office of Health Officer was repealed by the general health acts of 1886 and 1887. Therefore, if the court will consider anything outside the information as showing relator's title to the office, it is apparent resort must be had to sections 31 and 36 of the general Health acts of 1886 and 1887, under which the term of the relator was fixed.

The office held by relator was an office having a fixed term, not only under the ordinance, but under the general health act of 1887, *secs.* 31 *and* 36.

It is to be observed that relator by his information distinctly alleges that he was appointed by the Board of Health for a term of three years. The Board as such could act either by ordinance or resolution, in making such appointment. In this case it is a matter of indifference which method was used. That they had power so to act appears from the 31st section of the general health act of 1887. It is as follows:

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

In *Clay v. Civil Service Commission, supra*, it is said:

> "We consider, then, that Dr. Browne's original appointment in 1903 rested on Section 31 of the act of 1887, which provided for the fixing of a term of office by the board. No such term appears to have been fixed."

Admitting that in the case then considered, no term appeared to have been fixed, such conclusion can not be reached in the present proceeding because the information distinctly charges that relator was elected for three years which was a fixed term.

Inasmuch as the point above referred to, which was the basis of the conclusion in the Supreme Court was not touched upon in the argument of the former case, and if it be assumed to be of importance in the present case, it is now argued that to fix the term of office of the Health Officer nothing more was necessary to that end than a resolution of the Board of Health appointing the officer for a term expressed in the resolution appointing him.

> "Where a Common Council is authorized by the charter to elect officers, and no mode of election is prescribed, they may appoint by resolution. I *Dill on Mun. Corp.* (Ed. 1873) 273".
>
> *Trowbridge v. Newark,* 46 *L.* 140.

The case of *McGrath v. Bayonne,* 85 *L.* 188, is very much in point. The title to the office turned upon the question as to whether McGrath, an exempt fireman, held an office having a term which was fixed by law "at the date of the enact-

ment of the statute'' of 1911 giving a tenure of office during good behavior to exempt firemen. Under the charter of Bayonne the common council had power to create the office of building inspector, and the court held that from such grant of power it was necessarily implied that they had power to prescribe by resolution ''the term during which a given occupant should serve.'' McGrath's term was fixed by the resolution appointing him at one year, although he was elected for an unexpired term. He held over for two years when a successor was appointed. It was held, McGrath's term being fixed, that he was not protected by the exempt firemen's act—an act *in pari materia* with the civil service act in respect to removals from office.

In *Peal v. Newark,* 66 *N. J. L.* 265-271, the right to the office of superintendent of buildings was in dispute. The city charter provided for such an officer but fixed no term. In 1886 the legislature provided for the appointment of an inspector of buildings and authorized the common council ''to fix his term of office.'' After holding that the officer intended by the act of 1886 was identical with the officer intended by the charter, they having substantially the same powers although differing in name, the Court of Errors said:

> ''On April 13, 1900, a resolution was adopted by the council appointing Peal 'superintendent of buildings' for the period of two years, from May 1st, 1900, at a salary of $1,500 per year, payable monthly. * * * * * If the office was, in fact, that contemplated by the acts of 1886 and 1889, this resolution, by legal authority, fixed a term

therefor during which Peal can be removed therefrom only for cause."

It is to be observed that Peal's term was fixed by a resolution almost precisely similar in form to that passed in regard to Dr. Browne.

The propriety of appointing for a fixed term by resolution of the board being established, it is important to determine the effect of such resolution upon the duration of the term; as to whether the term being once fixed it can be changed or altered by the board of health, or whether, as in the Peal case, the incumbent could be removed therefrom only for cause. For if the term could be changed or altered by the Board of Health, it may be admitted that an incumbent would come within the class protected by the Civil Service Law.

If section 31 stood alone in the Health Act without any limitation upon the power of the Board to change or repeal its action thereunder in respect to the fixing of a term of office, it may be in view of the cases of *Mathis v. Rose,* 35 *Vr.* 45 and *Uffert v. Vogt,* 36 *Vr.* 621, that the board might change its action and thus at its pleasure deprive an incumbent of his office before the expiration of his term. That section 31 of the Health Act confers only administrative powers upon boards of health was adjudged in the case of *Fredericks v. Board of Health,* 53 *Vroom,* 200, wherein it was held that by reason of the legislative delegation of power in that section being administrative only, it was within the power of the board to reduce the salary of an incumbent during the term for which he was elected. If the salary could be reduced, it perhaps follows, for the same

reason, that the term could be changed or an incumbent dismissed before the expiration of the term for which he was elected. In such case the incumbent would hold practically at the pleasure of the board and thus his tenure might be of the kind protected by the Civil Service Laws.

But section 31 does not stand alone in the act in respect to the fixing of the terms of office authorized to be fixed under it.

Once a term of office is fixed by the Board, section 36 makes their action in that respect unchangeable by them, and so gives to an incumbent a fixed term of office. Section 36 reads as follows:

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

It is submitted that the term of the Health Officer is thereby fixed by law.

III.

The Health Officer of the Board of Health is the head of a department and hence not within the Civil Service Acts.

It is a well recognized fact that the position of Health Officer whether of a city, county, state or port is one of great importance and dignity. While boards of health exist in various municipalities and governments and are clothed with certain legislative and administrative powers, it is a matter of common knowledge that they act upon the advice of the health officer in all matters of importance and rely upon him as to the necessity of action in regard to the sanitary condition of the community and for knowledge as to the wisdom or expediency of such action. The board meets but occasionally; the health officer is in the daily discharge of daily duties. The various subordinate inspectors look to him for directions as to their conduct and duties; rarely if ever to the board. He is in the broadest sense, the head and executive of the department of health in any municipality.

These facts are recognized by the board of health acts. A plain distinction is made between those numerous subordinate appointees of the board and the Health Officer. That distinction is observed in the sections of the act of 1887 quoted in the preceeding point.

Again the distinction is noticed in section 27 of the health act (C. S. 2668) where the executive officer is given power to give notices.

Finally a marked recognition of the distinction is made in sections 56, 57, 58 and 59. Sections

58 and 59 clearly indicate the intention to make the Health Officer the head of the department. Section 58 is as follows:

> "Any person licensed as a health officer shall be eligible to appointment as such officer by any local board of health in this state, and when so appointed shall, during the term of his appointment, and subject to the superior authority of such local board, be its general agent for the enforcement of its ordinances and the sanitary laws of this state within the territorial jurisdiction of such local board. (P. L. 1903, p. 454)."

Section 59 gives him authority over the inspectors in the following language:

> "any sanitary inspector so appointed shall be the agent of the local board appointing him for the performance of such services as such local board, or any health officer under the authority of such local board, shall assign him."

If he is the head of a department he is not within the civil service acts.

Fagan v. Morris, 83 L. 3

It is respectfully submitted that the judgment below should be reversed and that judgment should be directed to be entered for the respondent-appellant upon the demurrer.

WM. I. LEWIS,
Of counsel with respondent-appellant.

L (Filed Jan. 4, 1916).

NEW JERSEY SUPREME COURT.

June Term, 1915.

Thomas A. Clay,
Prosecutor,

vs.

Civil Service Commission, Board of Health of Paterson and J. Alexander Browne,
Respondents.

Opinion.

Submitted October 15, 1915; decided December, 1915.

1. The general health acts of 1887 (P. L. p. 80; C. S. 2656) repealed the prior acts of 1880, p. 206, and 1881, p. 160, so far as not already repealed by section 44 of the act of 1886 (P. L. 280, 296).

2. The office of local Health Officer, or Health Inspector, since the passage of the act of 1887, *supra,* is an office subordinate to the Board of Health and incompatible with membership in that body.

On Certiorari.

Before Justices Parker, Minturn and Kalisch.

For the Prosecutor, William I. Lewis.

For the Civil Service Commission, Josiah Stryker and John W. Wescott, Attorney General.

For Respondent Browne, Ward & McGinnis.

The opinion of the court was delivered by Parker, J.

This is a certiorari sued out by the incumbent of the office or position of Health Officer of Paterson, whose aim is to set aside a decision or order of the Civil Service Commission, directing that J. Alexander Browne, one of the defendants, "be reintated to the position of Health Officer, from which he has been illegally ousted."

It is thus manifest that the title to an office or position is provided; and the point is made at he outset, that certiorari is not the proper remedy. If the subject of dispute is a "position," certiorari is proper. McGrath v. Bayonne, 85 N. J., L. 188. If an office, certiorari is still proper in a case such as this, where an incumbent challenges some official action calculated to interfere with his enjoyment of the office. Moore v. Bradley Beach, 94, Atl. 316, and cases cited.

We pass to the merits.

In 1882 the City of Paterson, through its Board of Aldermen, passed an ordinance based on the act of 1880 (P. L. p. 206) and 1881 (P. L. p. 160) to organize a Board of Health of seven members. Three of these were to be the City Physician, Health Inspector and Registrar of Vital Statistics; the other four were to be appointed for original terms of three, four, five and six years, and thereafter for three years each. The Health In-

spector was to be a physician appointed by the Board of Health, and to hold office for three years and until his successor should be appointed and qualified. The effect of this was to leave the Board of Health incomplete until it appointed the Health Inspector whereupon he became the seventh member ex officio.

This ordinance remained unchanged until December 7, 1914, although in the interim several health acts were passed by the legislature, notably the general act of 1886 (P. L. p. 280, of 1887 (P. L. p. 80; C. S. 2656) and an act of 1895 (P. L. p. 156; C. S. 2684) applicable to Paterson which gave rather plenary power to the City Council in the matter of organizing a local Board of Health. Evidently acting under this, the Board of Aldermen undertook to reorganize the Board of Health by raising the number to ten, all of whom were to be specially appointed; eliminating the City Physician, Health Inspector, and Registrar of Vital Statistics as ex officio members of the board, but leaving their offices and their tenure thereof otherwise unaffected. This was done in the form of an amendment of Sections 2 and 7 of the ordinance of 1882. The rest remained unchanged.

During the interval, between 1882 and 1914, over thirty years, the board presumably appointed a Health Inspector every three years under the ordinance. At all events it appointed Dr. Browne in 1903 and re-appointed him in 1906 and 1909. In 1912 he was not re-appointed, but held over notwithstanding some attempted action by way of appointment until January, 1915, when Prosecutor Clay, a member of the new board of ten was appointed by the Board as Health Officer

and took possession of the office, ousting Browne. Paterson in November, 1912, had adopted the Civil Service Act of 1908, and the commission having put the Health Officer on the competitive list, Browne appealed to them, and the commission made the order now complained of, besides refusing to certify Clay's salary.

The case would present some intricate and difficult questions for solution if we considered the ordinance of 1882 as amended in 1914 to be a material factor in the situation; but we do not so consider it. No notice appears to have been taken by the board, of the important general health acts of 1886 and 1887, the latter of which is the basis of the law as it stands today. A careful reading of Sections 9 to 31 of that act satisfied us that it does not contemplate the status of the official called a Health Inspector or Health Officer, in any other light than as subordinate to the Board of Health and not as a member of it, or having a vote therein. The act is a general one embracing the whole subject, and hence a repealer of prior legislation inconsistent therewith. Harrington Sons Co., v. Jersey City, 78, N. J. L. 610. In fact, by Section 38 it expressly repeals all acts and parts of acts which in anywise conflict with its provisions; and without any reservation of rights such as is contained in the specific repealer in the act of 1886, Section 44. It is true that section 11 saves existing boards organized in conformity with Section 9; but as we have said, the idea of a Health Officer as a member of the board, or in any other respect than that of a subordinate, is not within its scheme. It follows, therefore, that the acts of 1880 and 1881 fell as a foundation for the ordinance of 1882, and that ordinance fell with

them so far at least as related to the status of Health Inspector.

We consider, then, that Dr. Browne's original appointment in 1903 rested in law on Section 31 of the acts of 1887, which provided for the fixing of a term of office by the board. No such term appears to have ben fixed. Evidently that prescribed by the ordinance was relied on. He seems to have been actually holding over in office when the Civil Service Act went into effect, and to have remained therein for over two years thereafter. No claim is made that the office of Health Officer under the act of 1887 is not lawfully classified by the commission. The office claimed by Clay is that existing under the health laws of the state, i. e., the act of 1887 and that of 1903, C. S. 2675, pl. 56, 57, 58, providing for examination and certification of Health Officers. This is the same office to which, as we have just said, Dr. Browne was appointed. There is only one such office at present, and he is protected in his tenure thereof by the Civil Service Law and the classification thereunder. Consequently Dr. Clay could not lawfully be appointed thereto, and no legal injury is done him by the order complained of. Loper v. Millville, 53 N. J. L. 362.

The writ of certiorari will be dismissed with cost.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Thomas A. Clay,

vs.

The Civil Service Commission and J. Alexander Browne,

Opinion.

Appeal from a judgment of the Supreme Court

For the appellant, William I. Lewis.

For the Civil Service Commission, the Attorney General and Josiah Stryker.

For J. Alexander Browne, Ward & McGinnis.

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

This is an appeal from a judgment of the Supreme Court dismissing a writ of certiorari sued out by Dr. Clay for the purpose of reviewing a proceeding of the Civil Service Commission relating to the matter of his appointment as Health Officer of the Board of Health of the City of Paterson. This proceeding was instituted at the request of Dr. Browne, who contended that he was the *de jure* Health Officer of Patersoon and that Dr. Clay had wrongfully usurped that position. It consisted of an investigation of the rights of these two physicians with relation to the position, and of the following conclusion spread upon the minutes of the board: "The appointment of Dr. Clay, which in effect was a dismissal of J. Alexander Browne, M. D., who had hiterto held the position, was illegal and contrary to the provisions

of the Civil Service law. It is therefore ordered that Dr. Browne be reinstated to the position of Health Officer, from which he had been illegally ousted."

The judgment of the Supreme Court dismissing the writ was rested upon the conclusion that the appointment of Dr. Clay to the position of Health Officer was without warrant of law; that Dr. Browne was legally entitled to hold that position; and that consequently no legal injury was done to Dr. Clay by the order made by the Civil Service Commission of which he complains.

We are entirely satisfied that the writ of certiorari was properly dismissed by the Supreme Court; but we do not base our conclusion upon the grounds given by that court for its action. Dr. Clay insists that the action of the Civil Service Commission was an adjudication of the title to the position of Health Officer. The respondents insist that it was a mere expression of opinion with relation to the matter investigated by the board, and did not have and was not intended to have any mandatory force.

It is not necessary to determine which of these contentions is sound; for, whether the action complained of be merely the expression of an opinion or whether it be an attempted adjudication of the rights of the two gentlemen with relation to the position of Health Officer of Paterson, it is not the proper subject of review by certiorari.

If it be considered a mere expression of opinion, it is sufficient for the disposition of the matter to reiterate what was said by Mr. Justice Garrison, speaking for the Supreme Court, in the case of *Newark vs. Fordyce, et al,* decided at the

February term, 1916, viz.: "A writ of certiorari will not lie to revise or correct erroneous opinions, however hurtful they may be to individuals concerning whom they are expressed. An order, judgment or determination affecting the rights of the prosecutors is necessary as a foundation for the use of the writ."

If, on the other hand, it be considered a formal adjudication by the board of the right of Dr. Browne to continue in the position of Health Officer and the usurpation by Dr. Clay of that position, such adjudication is absolutely without force. It determines no right; it affords no protection. It is in legal contemplation as inoperative as though it had never been promulgated. It is as much beyond the powers or functions of the Civil Service Commission to adjudicate with relation to the right of either Dr. Browne or Dr. Clay to hold this position as a similar adjudication by a Justice of the Peace or the Overseer of the Poor of the City of Paterson would be outside of the official powers of either one of these officers. To justify the allowance of a writ of certiorari, it must appear that the matter sought to be reviewed has at least some semblance of vitality; that, as long as it stands, it affects some right or interest of the party applying for the writ.

It is argued on behalf of Dr. Clay that he is injuriously affected by the order of the Civil Service Commission because, on the basis of the conclusion reached by it and expressed therein, the board has refused to certify a payroll containing provision for the payment of him of the compensation to which he is entitled as the Health Officer of the City of Paterson either *de jure* or *de facto*.

But his remedy for the wrongful refusal of the Civil Service Commission to certify the payroll (if such refusal be wrongful) is not the suing out of a certiorari to test the soundness of the grounds upon which that refusal was rested, but an application for a mandamus to compel the performance by the board of a legal duty which the statute of its creation has imposed upon it. *Comp. Stat.* p. 3805; *sec.* 82.

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New Jersey Supreme Court

Notice of Appeal

The State of New Jersey ex rel J. Alexander Browne, *Relator-Appellee.* vs. Orville R. Hagen, *Respondent-Appellant.*	*On Quo Warranto. Information,*

NOTICE OF APPEAL.

To Messrs. Ward and McGinnis,
Attorneys of the Relator.

PLEASE TAKE NOTICE that the prosecutor in the above stated proceeding appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals and states the following grounds of appeal:

1. Because the judgment of the Supreme Court adjudged the relator to be legally entitled to the office of Health Officer of the City of Paterson.

2. Because the judgment of the Supreme Court adjudged that the term of office held by the relator was not for three years.

3. Because the judgment of the Supreme Court adjudged that the term of office held by the relator was not a fixed term.

4. Because the judgment of the Supreme Court adjudged that the office held by the relator was subject to the jurisdiction, rules, orders and classification of the Civil Service Commission of the State of New Jersey.

5. Because the judgment of the Supreme Court adjudged that the term of office of the relator as Health Inspector of the City of Paterson did not expire upon the election of a successor.

6. Because the judgment of the Supreme Court adjudged that the respondent was not legally elected to the office of Health Inspector.

7. Because the judgment of the Supreme Court adjudged that the office of Health Inspector held by said relator was not created by and did not exist under the provisions of an Ordinance of the the Board of Aldermen of the City of Paterson passed on or about the thirteenth day of November, 1882, under and by virtue of the provisions of an Act of the Legislature approved March 11, 1880 and an Act relating to local Boards of Health approved March 22, 1881.

8. Because the judgment of the Supreme Court adjudged that the office held by the relator was not abolished by an Ordinance of the Board of Aldermen approved Dec. 9, 1914.

9. Because the judgment of the Supreme Court adjudged and ordered that the respondent should be ousted from the office in question.

10. Because the judgment of the Supreme Court adjudged that relator had not failed to

show in this proceeding a legal title to the office in question.

11. Because the judgment of the Supreme Court was, in various other respects, contrary to law.

WM. I. LEWIS,
Attorney for respondent and appellant.

Information

NEW JERSEY SUPREME COURT.

(Filed March, 1917)

The State of New Jersey ex rel J. Alexander Browne, *Relator,* vs. Orville R. Hagen, *Respondent,*	*On Quo Warranto. Information.*

1. J. Alexander Browne, of the City of Paterson, County of Passaic and State of New Jersey comes in his own proper person herein to the Supreme Court of Judicature of the State of New Jersey before the Justices thereof, in the State House in the City of Trenton, on the 27th day of February, 1917, desiring to sue and prosecute in his behalf according to the form of the statute in such case made and provided and gives to said Court hereto be informed and understand that he, the said J. Alexander Browne is and has been for several years a citizen of the State of New Jersey, and a resident of the City of Paterson, County of Passaic.

2. That on the 10th day of November, 1903, the relator was by the Board of Health of the City of Paterson, appointed Health Officer, and thereupon entered upon the discharge of his duties. That on the 13th day of November, 1906, he was re-appointed for the term of three years. That on the 13th day of November, 1909, he was again re-appointed by said Board of Health for the term

of three years, and until a successor should be appointed. In 1912, owing to a dead-lock in the Board of Health re-appointment was made and relator continued to hold over in office.

3. Relator further avers that said Board of Health on January 14th, 1913 and December 23rd, 1913, made two attempts to elect a health officer, which attempts were ineffectual by reason of a majority of the members of the Board to agree upon the health officer. The relator continued to hold over in office. On the 12th day of January, 1915, against the protests of affiant said Board of Health declared that there was a vacancy, and elected one of its members Thomas A. Clay to the office or position of Health Officer, for the term of three years in place of the relator.

4. Relator further avers that at the general election in November, 1912, the City of Paterson, adopted the provisions of the Civil Service Act of 1908, and thereafter the position of Health Officer was classified by the Civil Service Commission as being within the competitive class, and relator accordingly held said position during good behavior and was removable for cause only; that he was never at any time removed for cause.

5. Relator further says that immediately after the Board of Health attempted to remove him from the office of Health Officer, he called at the office of the Board of Health on each and every day thereafter, until the present time for the purpose of performing his duties, and was at all times ready and willing and ever since has been ready and willing to perform the duties of Health Officer.

6. Relator further says that by virtue of his office he is entitled to receive a salary of fifteen

hundred dollars per year, payable semi-monthly. That since the 13th day of January, 1915, relator has not received any salary as such Health Officer, or any part thereof; that the said Board of Health has ever since refused to pay the same, although often requested to make such payment to relator.

7. Relator further avers that on the 14th day of November, 1916, the said Thomas A. Clay, resigned as Health Officer, and thereupon the said Board of Health at a regular meeting held on the 14th day of November, 1916, elected or attempted to elect and did formally declare to be elected one Orville R. Hagen, the respondent for the unexpired term of three years, to which they had elected or attempted to elect the said Thomas A. Clay. That the said Orville R. Hagen thereupon took possession of said office and has ever since been recognized by the Board of Health as its Health Officer, and is now performing or attempting to perform all the duties of said office.

8. That the said Board of Health was originally created by an ordinance which is as follows:

Section 1. There shall be established in and for the City of Paterson. a Board of Health in accordance with "An Act concerning the protection of the public health and the record of vital facts and statistics relating thereto." approved March 11th, 1880, and "An act relating to local Boards of Health," approved March 22nd. 1881, and the acts or acts supplementary or amendatory to said acts.

Section 2. The Board of Health of the City of Paterson shall consist of seven members who shall be selected as follows: Four members shall be nominated by the Mayor and approved by the

Board of Aldermen and the remaining three members shall be the City Physician, the Registrar of Vital Statistics and the Health Inspector.

Section 3. The first appointment by the Mayor shall be as follows: One member to serve for three years, one member to serve for four years, and one member to serve for five years and one member to serve for six years. Thereafter when a vacancy shall occur among the appointed members. by reason of the term of office expiring, the appointment shall be for three years; in case of death or resignation or removal appointment shall be made for the unexpired term.

Section 4. Any member of the Board of Health may be removed, for cause, by a two-thirds vote of the Board of Aldermen.

Section 5. The term of office or mode of appointment of the City Physician and Registrar of Vital Statistics, as regulated by the Charter of the City of Paterson, shall not be affected by this ordinance.

Section 6. Within ten days after this ordinance shall have gone into effect the Board of Health shall meet and elect a president and secretary; adopt rules for its government; nominate a health inspector, and proceed to prepare and adopt a code of sanitary ordinances.

Section 7. Regular meetings of the Board of Health shall be on the second Tuesday of each month, at an hour to be fixed by the said board. Special meetings may be called by the president or any two of the members at any time. The president shall also call a special meeting at any time when requested so to do by any five physicians practicing in the City, or by any twenty-five taxpayers or by direction of the Board of Aldermen.

Information

Section 8. The Board of Aldermen shall provide a suitable room or rooms for the use of said board.

Section 9. Appropriations of money for the Board of Health, shall be made in the same manner as the appropriations for other departments of the city government are made; and the said board shall not contract any debts of any kind beyond the amount of the annual appropriations. All vouchers for expenditures shall be counter signed by the president and the secretary of the Board and approved by the Finance Committee of the Board of Aldermen, and paid by the City Treasurer on the warrant of the Comptroller.

Section 10. The Board of Health shall appoint a committee of three, to be known as the Conference Committee of said board, and the President of the Board of Aldermen shall appoint a committee of three, to be known as the Conference Committee of the Board of Aldermen. and to a joint committee composed of the two aforesaid committees, shall be referred all points of differences between the two boards.

Section 11. The Board of Health shall appoint, subject to the approval of the Board of Aldermen, a competent person who shall act as Health Inspector, who shall be a physician, and who shall hold office for three years. unless sooner removed for cause. or until his successor shall be appointed and qualified.

Section 12. The Health Inspector shall be paid an annual salary of twelve hundred dollars, and shall give bonds to the amount of two thousand dollars.

Section 13. The Health Inspector shall be the executive officer of the Board of Health. It shall

be his duty to enforce the health ordinance of the City, to investigate and examine into all complaints of nuisances made to him or which shall come under his notice; to keep a record of such complaints, and when he deems sufficient cause to exist he shall notify the persons responsible for any nuisance to abate the same within a reasonable time; and in case said person shall fail to do so, he shall take action before the recorder to recover the penalty fixed for the violation of the ordinances violated. He shall perform such duties as are required by this board, or the Board of Health. and shall take monthly reports to the Board of Health.

Section 14. All fines or penalties collected for violations of any ordinance made by the Board of Health, shall be paid into the City Treasury, and the City Counsel shall prosecute all cases brought by said board.

Section 15. All notices or orders of the said Board of Health shall be served by the Police officers of the City.

Passed November 13th, 1882.

SAMUEL MURRAY,
President of the Board of Aldermen.

Approved November 13th, 1882.

DAVID T. GILLMOR,
Mayor.

Attest:

WILL HAGUE,
City Clerk.

9. No amendment was made to this ordinance until 1906, when section twelve was amended to

fix the salary of the Health Inspector at fifteen hundred dollars.

10. That on December 7, 1914. the Board of Aldermen of Paterson duly passed the following ordinance, which was approved by the Mayor December 9, 1914.

An ordinance to amend an ordinance entitled, "An ordinance to establish a Board of Health," passed November 13th, 1882.

The Board of Aldermen of the City of Paterson do ordain as follows:

1. Section 2 of an ordinance entitled "An ordinance to establish a Board of Health," be and the same is hereby amended to read as follows:

The Board of Health of the City of Paterson shall consist of ten members, who shall be appointed by the Mayor and approved by the Board of Aldermen.

2. Three of the appointments to be made hereunder to take the place of the Registrar of Vital Statistics, Health Inspector and City Physician and three to provide three additional members of the Board of Health of the City of Paterson as the same is now constituted. The appointments to be made hereunder shall be one for the term of three years, two for the term of two years and three for the term of one year. The successor to each of the above appointments shall be for the term of three years. No person holding any office or position in the City of Paterson may be appointed a member of the Board of Health.

3. Section 7 of the above ordinance be and the same is hereby amended to read as follows:

The Board of Health shall provide by rule for the holding of regular and special meetings.

4. This ordinance shall take effect December 31, 1914.

Passed December 7, 1914.

WALLACE R. KING,
President Board of Aldermen.

Approved December 9th, 1914.

ROBERT H. FORDYCE,
Mayor.

Attest:

T. SIMPSON STANDEVEN,
City Clerk.

11. The term health officer and health inspector are used interchangeably and have reference to one and the same office, which is the subject of the controversy between the relator and respondent.

12. Relator avers that since the proceedings on the 14th day of November, 1916, whereby the said Orville R. Hagen was elected as Health Officer, or by which the Board of Health claimed or pretended to elect the said Orville R. Hagen to such office of Health Officer, he the said Orville R. Hagen has unlawfully held, used and executed, and still does unlawfully use and execute the said office or position together with all rights, liberties and emoluments thereof, without any legal appointment, warrant or authorization whatsoever, which said office, the said Orville R. Hagen during the time aforesaid upon the State of New Jersey has usurped, intruded into and unlawfully held, used and exercised and yet does intrude into and unlawfully hold and exercse to the exclusion of the said J. Alexander Browne, to wit, at the City of Paterson, County of Passaic and State

of New Jersey, in contempt of the State of New Jersey, and to its great damage and prejudice against its sovereignity and dignity.

Whereupon the said relator, J. Alexander Browne, prays the advice of the said Court herein in the premises and for due process of the law against the said Orville R. Hagen in this behalf to be made to answer unto the State by what warrant he claims to hold, use, execute and enjoy the aforesaid office of Health Officer of the City of Paterson, and the liberties, privileges, franchise rights and emoluments thereof.

WARD & MCGINNIS,
Attorneys of Relator.

Rule to Appear, Plead, Etc.

NEW JERSEY SUPREME COURT.

(Entered March 3, 1917)

The State of New Jersey ex rel J. Alexander Browne, *Relator,* vs. Orville R. Hagen, *Respondent.*	*On information in nature of quo warranto. Rule to appear, plead, &c.*

On motion in behalf of the Attorney General, it having been ordered that leave be granted to file an information in this cause, and that process do issue against the respondent; and thereupon, an information being filed, setting forth, among other things, that the respondent, Orville R. Hagen, since the 14th of November, 1916, hath unlawfully held, used and executed and still doth unlawfully hold, use and execute, without any legal authority, warrant or right whatsoever, the office of Health Officer of the City of Paterson, and its liberties, privileges and franchises; and praying that he, the respondent, may be made to answer to the said state, by what warrant he claims to hold, use, execute and enjoy the aforesaid office of Health Officer, of the City of Paterson, and its liberties, privileges and franchises thereof.

It is thereupon ordered, that the respondent appear and plead or demur to the information filed in this cause, within ten days after service

upon him of a copy of this rule and of the information.

On motion of

WARD & MCGINNIS,
Attorneys and of counsel with relator.

Entered March 3, 1917.

(Filed March 25, 1917)
NEW JERSEY SUPREME COURT.

The State of New Jersey ex rel J. Alexander Browne, *Relator,* vs. Orville R. Hagen, *Respondent.*	*On Quo Warranto. . On Information, &c. Demurrer.*

And the said Orville R. Hagen comes by William I. Lewis, his attorney, and having heard the said information read, says that he ought not to be impeached or impleaded by reason of the premises in the said information mentioned and specified, because he says, that the said information and the matters therein contained are not sufficient in law, and that he need not, nor is he obliged by the law of the land to answer thereto, and this he is ready to verify.

And respondent specifies the following causes of demurrer.

1. Because it appears upon the face of the information that the relator has no title to the office in question.

2. Because it appears upon the face of the information that the respondent has title to the office in question and holds said office as of right.

3. Because it appears upon the face of information that the relator has no tenure of said office under the Civil Service Laws.

4. Because it appears upon the face of the in-

formation that the Civil Service Commission had no power or authority to classify said office within the competitive class of the Civil Service.

5. Because the information while showing that the relator has no title to the office in question, inconsistently avers that respondent has no title thereto.

Wherefore, and because of the insufficiency of the said information, he prays judgment and that he may be dismissed and discharged by the court hereof, and from the premises above charged upon him in form aforesaid.

WM. I. LEWIS,
Attorney for Respondent

Judgment

(Entered May, 1917)

NEW JERSEY SUPREME COURT.

The State of New Jersey ex rel J. Alexander Browne, *Relator,*	*On Quo Warranto. On Demurrer to Information. Judgment of Ouster.*
Orville R. Hagen, *Respondent.*	

JUDGMENT.

The information in this cause having been duly filed by the relator, and the respondent having been ruled to plead or demur thereto, and the said respondent having filed his demurrer to said information and the cause having been argued before the Court by Ward & McGinnis, of counsel for the relator, and W. I. Lewis, of counsel for the respondent, and the Court having considered said cause and directed judgment in favor of said relator and of ouster against said respondent from the office of Health Officer of the City of Paterson,

It is ordered that judgment of ouster from said office be entered in favor of said relator and against said respondent, with costs to be taxed.

Entered May 19, 1917.

On motion of

WARD & MCGINNIS, Attys.

A true Copy,

WM. C. GEBHARDT, *Clerk.*

NEW JERSEY SUPREME COURT.

The State of New Jersey ex rel J. Alexander Browne, *Relator,* vs. Orville R. Hagen, *Respondent.*	*Information in the Nature of Quo Warranto. On Demurrer to Information.*

OPINION.

Ward & McGinnis, for Relator.
William I. Lewis, for Respondent.
Minturn, J.

The relator in this information, bases his claim to the office of Health Officer of the Board of Health of the City of Paterson upon the following facts, which are substantially conceded by the litigants: On the 10th of November, 1903, the relator was by the Board of Health of the City of Paterson, appointed Health Officer, and thereupon entered upon the discharge of his duties. That on the 13th day of November, 1906, he was re-appointed for the term of three years. That on the 12th of November, 1909. he was re-appointed by said Board of Health for the term of three years, and until a successor should be appointed. In 1912 owing to a dead-lock in the Board of Health no appointment was made and relator continued to hold over in office.

At the general election in November, 1912, the City of Paterson, adopted the provisions of the Civil Service Act of 1908, and thereafter the po-

sition of Health Officer was classified as being within the competitive class, and relator accordingly held said position during good behavior, and was removable for cause only; that he was never at any time removed for cause, but Dr. Clay was elected to succeed him.

Relator further avers that on the fourteenth day of November, 1916. the said Thomas A. Clay resigned as Health Officer, and thereupon the said Board of Health at a regular meeting held on the fourteenth day of November, 1916, elected or attempted to elect and did formally declare to be elected one Orville R. Hagen, the respondent, for an unexpired term of three years, to which they had elected or attempted to elect the said Thomas A. Clay. That the said Orville R. Hagen thereupon took possession of said office and has ever since been recognized by the Board of Health as its Health Officer, and is now performing or pretending to perform all the duties of said office.

That the said Orville R. Hagen during the time aforesaid has usurped, intruded into and unlawfully held, used and exercised the office, and yet does intrude into and unlawfully hold and exercise the office to the exclusion of the said J. Alexander Browne.

The information is filed under the provisions of section 4 of the quo warranto act, (C. S. 4212) and may be disposed of under the provisions of the act of 1895 (P. L. 82) which now appears as section 12 (C. S. 4214) which gives respondent the right to put the title of the relator in issue. The respondent has raised such issue by demurrer to the information. This was the practice followed in

Haight v. Love, 31 L. 14, 476.
Anderson v. Myers, 77 L. 186.
Dunham v. Bright, 85 L. 391.
Civil Service Commission v. O'Neil, 85 L. 92.
Bonynge v. Frank, 98 Atl. 456.

The claim of the relator is that by virtue of his tenure of office as it existed upon the adoption of the Civil Service act in Paterson, he became, upon and by virtue of such adoption, vested with a tenure "during good behavior and was removable for cause only."

In determining the legal question presented by this information, I am naturally confronted with the inquiry as to what legal effect is to be attributed to the deliverance of Mr. Justice Parker speaking for this Court in the case of Clay v. Civil Service Commission, 88 L. 502. That case was upon certiorari and in effect determined that the relator was regularly appointed to the office in question, and that his tenure thereof was protected by the Civil Service act, and the classification made thereunder, and that as the result of such appointment and tenure the attempted appointment of Dr. Clay to the same office was necessarily invalid. This information discloses no change in the situation presented to the Court in that case, excepting the fact that the Respondent claims to have succeeded by appointment to the status occupied by Dr. Clay; otherwise the status of the parties in fact remains unchanged. The inherent difficulty in accepting the pronouncement of the Supreme Court as dispositive of the rights of the respective parties to the litigation arises not from any change in status, but entirely from the fact that the Court of Errors and Ap-

peals upon review affirmed the result reached by the Supreme Court, but upon different grounds.

The ratio decidendi in the Court of Errors and Appeals, was that the remedy invoked by certiorari to test the validity of the ruling of the Civil Service Commission was inappropriate and without legal warrant; and that the utmost protection to which Dr. Clay was entitled against the alleged illegal action or inaction of the Civil Service Commission, in refusing to certify his compensation, was a resort to the writ of mandamus to compel the performance of a statutory duty.

Clay v. Civil Service Commission, 98 Alt. 312.

This conclusion, manifestly, left the meritorious question inter partes with which this court dealt, untouched; and its value as a controlling precedent therefore upon this application presents the initial and fundamental difficulty which confronts me.

I am inclined however, to accept the Supreme Court determination as finally dispositive of the rights of the parties upon this information. I must assume in consonance with the opinion that that court upon consideration of the facts herein presented, adjudicated the respective rights of the parties, to the office in question.

The fact that the adjudication was reached through the medium of an inappropriate legal vehicle of transmission, may affect its value in an appellate tribunal, but the essential value of any precedent is the congency and applicability of its reasoning to the situation sub judice; for with Coke we must conclude Ratio legis est anima legis. 7 Co. 7.

Or as expressed by a more modern commentator "Adjudged cases become precedents for fu-

ture cases resting upon analagous facts, and brought within the same reason."

1 Kent 473.

The result is that upon the doctrine of stare decisis, I am of the opinion that the relator in this information, is legally entitled to the possession of the office in question, and that a judgment of ouster upon this demurrer should be entered against the respondent.