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New Jersey State Library

WRIT OF CERTIORARI.

Returnable June 28, 1928.

NEW JERSEY, ss.

The State of New Jersey to James
(SEAL) Stollo, Thomas Beatty and Mortimer
R. De Roche, City Clerk of the City of
Long Branch, GREETINGS: We being willing for
certain reasons to be certified of and concerning
a certain alleged appointment of James Stollo to
the office of City Engineer of the City of Long
Branch, purporting to have been made by Thomas
Beatty, Commissioner of Streets and Public Im-
provements of said City, on or about May 15,
1928, do command you that said alleged appoint-
ment and all proceedings touching and concerning
the same you do certify to this Court, on the 28th
day of June, 1928, that of right may be done
touching and concerning the same.

WITNESS, HONORABLE WILLIAM S. GUMMERE,
Chief Justice of our Supreme Court, at Trenton,
this 29th day of May, 1928.

FRED L. BLOODGOOD,
Clerk.

McCARTER & ENGLISH,
Attorneys. 30

I allow this writ. Let it be sealed.

Dated, May 29, 1928.

FRANK T. LLOYD,
J. S. C.

RETURN TO WRIT.

To The Honorable Justices of the Supreme Court
of Judicature of New Jersey :

10 In obedience to the command of this Writ, to
us directed, we, James Strollo, Thomas Beatty
and Mortimer R. DeRoche, within named, do
send, under our seals, to the Supreme Court, all
the proceedings touching and concerning the
alleged appointment of James Strollo to the of-
fice of City Engineer of the City of Long Branch,
purporting to have been made by Thomas Beatty,
Commissioner of Streets and Public Improve-
ments of said City, together with all things touch-
ing and concerning the same, as fully and entire-
ly as they remain of record and as we are com-
20 manded so to do and as appears in the schedule
hereto annexed.

IN WITNESS WHEREOF, we have hereunto set
our hands and seals, this sixth day of June, Nine-
teen Hundred and Twenty-eight.

..... (L. s.)
..... (L. s.)
..... (L. s.)

30

SCHEDULE 1.

City Hall, Long Branch, N. J., May 15, 1928.

The first meeting of the Board of Commis-
sioners of the City of Long Branch was called
to order by Commissioner Jones on Tuesday,
May 15, 1928, at 12 o'clock, noon, eastern stand-
ard time.

40 Present—Commissioners Beatty, Bennett,
Brown, Carr and Jones, 5.

Return to Writ.

Commissioner Bennett moved that Commissioner Jones be appointed temporary Chairman of the meeting.

The nomination was seconded.

On the call of the roll Mr. Jones was appointed Temporary Chairman by the following vote: 10
Ayes—5.

1. A statement of the result of the Municipal Election held in the City of Long Branch on May 8, 1928 was read.

Commissioner Beatty moved that the statement be received and spread upon the minutes. Carried. Roll call, Ayes—5.

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Return to Writ.

I DO CERTIFY that the foregoing is a true, full and correct statement of the result of the election above mentioned and that the same exhibits the whole number of names on the poll books and of the ballots rejected, the name of each person for whom any vote or votes were given for any office designated for him in each vote or votes and the number of votes given for each person for the offices or officers as designated for him, according to the returns on file in this office made by the District Boards of Registry and Election. 10

IN WITNESS WHEREOF, I have hereunto set my hand this fourteenth day of May, 1928.

MORTIMER R. DE ROCHE,
City Clerk. 20

2. Commissioner Bennett moved that Commissioner J. William Jones be nominated Mayor and Director of Public Affairs of the City of Long Branch.

The nomination was seconded.

On the call of the roll Commissioner Jones was elected Mayor and Director of Public Affairs by the following vote: Ayes—5. 30

3. Commissioner Beatty moved that Commissioner Milton A. Bennett be nominated Director of Revenue and Finance of the City of Long Branch.

The nomination was seconded.

On the call of the roll Commissioner Bennett was elected Director of Revenue and Finance by the following vote: Ayes—5. 40

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4. Commissioner Beatty moved that Commissioner C. Fred Carr be nominated Director of Public Safety of the City of Long Branch.

The nomination was seconded.

10 Commissioner Bennett moved that Commissioner Charles E. Brown be nominated Director of Public Safety of the City of Long Branch.

The nomination was seconded.

On the call of the roll Commissioner Brown was elected Director of Public Safety by the following vote: Brown—3, Carr—2, Beatty and Carr.

20 5. Commissioner Carr moved that Commissioner Thomas Beatty be nominated Director of Streets and Public Improvements of the City of Long Branch.

The nomination was seconded.

On the call of the roll Commissioner Beatty was elected Director of Streets and Public Improvements by the following vote: Ayes—5.

6. Commissioner Bennett moved that Commissioner C. Fred Carr be nominated Director of Parks and Public Property of the City of Long Branch.

30 The nomination was seconded.

On the call of the roll Commissioner Carr was elected Director of Parks and Public Property by the following vote: Ayes—4, Nay—1, Carr.

7. At this point Mayor Jones called upon Rev. Herbert J. Lane to offer a prayer.

40 8. Commissioner Jones expressed his appreciation to the citizens of the City for the loyal support given him and requested their co-operation to make his administration a success.

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9. The following resolution was offered by Commissioner Bennett:

Resolved, that at this, the first meeting of the Board of Commissioners, they take up as a whole Board, the first appointments of the several City officers.

MILTON A. BENNETT.
 J. WILLIAM JONES,
 CHARLES E. BROWN,
 THOMAS BEATTY,
 C. FRED CARR.

10

Adopted. Roll call, Ayes—5.

10. The following resolution was offered by Commissioner Bennett:

Be It Resolved that the City Solicitor of the City of Long Branch shall be appointed for a period of two years to terminate on the third Tuesday of May, in the second year following his appointment and that the annual salary of the City Solicitor shall be \$2,500.00 payable in semi-monthly installments, which shall be in lieu of all fees other than actual disbursements incurred in the carrying on and conducting of the legal business of the City. And be it further.

20

Resolved that the City Clerk of the City of Long Branch shall be appointed for a period of two years to terminate on the third Tuesday of May, in the second year following his appointment and that the annual salary of the City Clerk shall be \$1,800.00 payable in semi-monthly installments; and that the said Clerk shall be Clerk of the Board of Commissioners, and have the custody of the minutes and of all papers and records of the City not expressly provided for by law or other ordinance or resolution; he shall also have the custody of the seal of the

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Return to Writ.

City and in addition thereto shall perform such other duties as pertain to the office of the City Clerk and as pertain to the business of other Departments, offices and employment as may be imposed by the Commissioners from time to time, without additional compensation and shall
 10 immediately qualify by giving bond in the sum of \$3,000.00 to truly and faithfully perform all the duties of said office. And be it further

Resolved that there shall be appointed for the term of two years a Deputy City Clerk, who likewise shall be the official stenographer of the Board of Commissioners and who shall also perform such other clerical duties in respect to the work of the City as shall be from time to time assigned to such official and that the annual salary of such official shall be \$1,800.00 payable in
 20 semi-monthly installments. And be it further

Resolved that the City Recorder of the City of Long Branch shall be appointed for a period of one year to terminate on the third Tuesday of May in the year following his appointment and that the annual salary shall be \$1,500.00 payable in semi-monthly installments. And be it further

Resolved that the City Engineer of the City
 30 of Long Branch shall be appointed for a period of two years to terminate on the third Tuesday of May, in the second year following his appointment and that the annual salary of the City Engineer shall be \$1,800.00 payable in semi-monthly installments and that such salary shall be in lieu of all fees for mapping and other usual work required by the City. And be it further

Return to Writ.

Resolved that the License Inspector of the City of Long Branch shall be appointed for a period of one year to terminate on the third Tuesday of May, in the year following his appointment, and that the annual salary shall be \$1,500.00 payable in semi-monthly installments, and that the said License Inspector shall attend to the collection of all licenses and such other matters relating to license regulations as may be required by the Board of Commissioners. And be it further

10

Resolved that there shall be appointed a Building Inspector for the term of one year and whose term of office shall end on the third Tuesday of May, in the year following his appointment, and that the annual salary of the Building Inspector shall be \$1,200.00 payable in semi-monthly installments. And be it further

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Resolved that there shall be appointed a City Physician for the period of one year and whose term of office shall expire on the third Tuesday of May, in the year following his appointment, and that the annual salary shall be \$600.00 payable in semi-monthly installments. And be it further

Resolved that the Assessor of Taxes of the City of Long Branch shall be appointed for a period of one year to terminate on the third Tuesday of May, in the year following his appointment, and that the annual salary of the Assessor of Taxes shall be \$1,500.00 payable in semi-monthly installments. And be it further

30

Resolved that the said salaries shall be in lieu of all fees, except as in this resolution specified, and be it further

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Return to Writ.

Resolved that the salaries herein provided for and the appointments made under the authority of this resolution date from the third Tuesday of May, 1928.

10

MILTON A. BENNETT,
J. WILLIAM JONES,
CHARLES E. BROWN,
THOMAS BEATTY,
C. FRED CARR.

Adopted. Roll call, Ayes—5.

11. The following resolution was offered by Commissioner Bennett:

Be It Resolved that all officers now or hereafter to give bond for the faithful and impartial discharge of their duties may have as the surety thereon an incorporated surety company authorized by the laws of this State to transact business herein, and in such case the premium therefor shall be paid by the City.

20

MILTON A. BENNETT,
J. WILLIAM JONES,
CHARLES E. BROWN,
THOMAS BEATTY,
C. FRED CARR.

Adopted. Roll call, Ayes—5.

30

12. The following resolution was offered by Commissioner Bennett:

Be It Resolved that the incumbents of all office or offices and all employees of the City who are now bonded furnish a new bond in the same amount for which they are now bonded, with the exception of those the amount of whose bonds have been specifically fixed at this meeting, reserving, however, the right to increase or decrease bonds as the Commissioners may here-

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Return to Writ.

after see fit and to require of any other officers or employees.

MILTON A. BENNETT,
J. WILLIAM JONES,
CHARLES E. BROWN,
THOMAS BEATTY,
C. FRED CARR.

10

Adopted. Roll call, Ayes—5.

13. The following resolution was offered by Commissioner Bennett:

Be It Resolved that the City Clerk is hereby authorized and directed to immediately advertise in a daily newspaper published in the City of Long Branch, requesting that all bills against the City of Long Branch outstanding and unpaid should be presented on proper voucher within thirty days from the date of such advertisement.

20

MILTON A. BENNETT,
J. WILLIAM JONES,
CHARLES E. BROWN,
THOMAS BEATTY,
C. FRED CARR.

Adopted. Roll call, Ayes—5.

14. The following resolution was offered by Commissioner Bennett:

30

Be It Resolved that no goods or supplies shall be purchased or ordered by an employee or officer of the City of Long Branch or bills incurred for services of any person or persons without the written warrant for the same first had and received from the head of the Department for the use of which said goods or supplies or services where by law such authority may be given excepting in those cases where the City Com-

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missioners have first authorized the purchase or the contract.

10

MILTON A. BENNETT,
J. WILLIAM JONES,
CHARLES E. BROWN,
THOMAS BEATTY,
C. FRED CARR.

Adopted. Roll call, Ayes—5.

15. The following resolution was offered by Commissioner Bennett:

Be It Resolved that the Directors of the various Departments make or cause to be made an exact inventory of all property, real and personal, of the City of Long Branch and file their reports thereof with this Board at the earliest possible time.

20

MILTON A. BENNETT,
J. WILLIAM JONES,
CHARLES E. BROWN,
THOMAS BEATTY,
C. FRED CARR.

Adopted. Roll call, Ayes—5.

16. Commissioner Beatty moved that the Board proceed to the election of City Officers.
30 Carried. Roll call, Ayes—5.

17. Commissioner Bennett moved that Mr. William L. Edwards be appointed City Solicitor of the City of Long Branch.

The nomination was seconded.

On the call of the roll Mr. Edwards was elected City Solicitor by the following vote: Ayes—5.

40

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18. Commissioner Bennett moved that Mr. Mortimer R. DeRoche be appointed City Clerk of the City of Long Branch.

The nomination was seconded.

On the call of the roll Mr. DeRoche was elected City Clerk by the following vote: Ayes—5.

10

19. Commissioner Brown moved that Miss Maude F. Finn be appointed Deputy City Clerk and Official Stenographer of the City of Long Branch.

The nomination was seconded.

On the call of the roll Miss Finn was elected Deputy City Clerk and Official Stenographer by the following vote: Ayes—5.

20. Commissioner Bennett moved that Mr. Harry Truax be appointed Recorder of the City of Long Branch. 20

The nomination was seconded.

On the call of the roll Mr. Truax was elected Recorder by the following vote: Ayes—5.

21. Commissioner Beatty moved that Mr. James Strollo be appointed City Engineer of the City of Long Branch.

The nomination was seconded.

30

Commissioner Bennett nominated Mr. Otis R. Seaman as City Engineer of the City of Long Branch.

The nomination was seconded.

Commissioner Beatty stated that it is his understanding that as Director of Streets and Public Improvements it is his right to appoint the City Engineer, who is under his supervision, but as there is a difference of opinion as to the

40

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method of appointment it will have to go to a vote.

On the call of the roll Mr. Seaman was elected City Engineer by the following vote: Seaman—3. Strollo—2, Beatty and Carr.

- 10 22. Commissioner Brown moved that Dr. Harold A. Kazman be appointed City Physician of the City of Long Branch.

The nomination was seconded.

On the call of the roll Dr. Kazman was elected City Physician by the following vote: Ayes—5.

23. Commissioner Bennett moved that Mr. Philip L. Cohen be appointed License Inspector of the City of Long Branch.

- 20 The nomination was seconded.

On the call of the roll Mr. Cohen was elected License Inspector by the following vote: Ayes—5.

24. Commissioner Bennett moved that Mr. B. Drummond Woolley be appointed Assessor of Taxes of the City of Long Branch.

The nomination was seconded.

- 30 On the call of the roll Mr. Woolley was elected Assessor of Taxes by the following vote: Ayes—5.

25. Commissioner Bennett moved that Mr. Benjamin F. Lane be appointed Building Inspector of the City of Long Branch.

The nomination was seconded.

On the call of the roll Mr. Lane was elected Building Inspector by the following vote: Ayes—4, Nay—1, Beatty.

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26. The following resolution was offered by Commissioner Bennett:

The Board of Commissioners of the City of Long Branch do resolve that the following rules and orders shall govern the meetings of the Board in the authorized change:

Rule 1. The regular meetings of the Board shall be held on Tuesday afternoon of each week at City Hall, at 3 o'clock P. M. 10

Rule 2. The order of business shall be as follows:

1. Calling of the roll.
2. Approval or correction of minutes of previous meeting.
3. Reading of petitions.
4. Reports of City Officers. 20
5. Report of Department of Public Affairs.
6. Report of Department of Revenue and Finance.
7. Report of Department of Public Safety.
8. Report of Department of Streets and Public Improvements.
9. Report of Department of Parks and Public Property.
10. Motions and Resolutions. 30
11. Special Orders of the Day.
12. General Business.
13. New Business.
14. Any Citizen wish to be heard about City Affairs.

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15. Adjournment.

MILTON A. BENNETT,
J. WILLIAM JONES,
CHARLES E. BROWN,
THOMAS BEATTY,
C. FRED CARR.

10 Adopted. Roll call, Ayes—5.

27. Commissioner Carr moved that Mr. Joseph L. Clark, Jr., be appointed Custodian of City Hall for the term of one year.

The nomination was seconded.

On the call of the roll Mr. Clark was elected Custodian of City Hall by the following vote: Ayes—5.

20 28. The following resolution was offered by Commissioner Bennett:

The Board of Commissioners of the City of Long Branch do resolve that the various Departments are hereby determined and defined to include and be apportioned as follows:

1. Public Affairs:

Mayor's Office, City Clerk, City Solicitor and Legal Department, Overseer of the Poor, City Physician.

30 2. Revenue and Finance:

Tax Office, Assessor, Collector of Taxes, Treasurer, Comptroller's fees, licenses and fines.

3. Public Safety:

Building Inspector, Fire Department, Police Department, City Recorder, Sewer, Board of Health, Lights and Electrician.

4. Streets and Public Improvements:

40 Engineer, Street Superintendent, Street Improvements, permits and water.

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5. Parks and Public Property:

Parks, Playgrounds, Public Buildings, Beach Front and Boardwalk.

And Be It Further Resolved that all officers and employees assigned to the various Departments may be required to perform duties in two or more Departments without additional compensation. 10

MILTON A. BENNETT,
J. WILLIAM JONES,
CHARLES E. BROWN,
THOMAS BEATTY,
C. FRED CARR.

Adopted. Roll call, Ayes—5.

29. Commissioner Beatty moved that the bond of the Director of Revenue and Finance be fixed at the sum of \$25,000.00. Carried. Roll call, Ayes—5. 20

30. Mr. B. Cioffi addressed the Board and suggested that the Board hold its meetings in the evening.

Commission adjourned. Roll call, Ayes—5.

J. WILLIAM JONES,
MILTON A. BENNETT,
CHARLES E. BROWN,
THOMAS BEATTY,
C. FRED CARR,
Commissioners. 30

Attest:

MORTIMER R. DeROCHE,
City Clerk.

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SCHEDULE 2.

Abstracts from the minutes of a regular meeting of the Board of Commissioners of the City of Long Branch held on May 22, 1928:

10 Commissioner Carr moved that the further reading of the minutes of the last regular meeting be dispensed with and they be approved as recorded.

The motion was seconded.

20 Commissioner Beatty moved that Article 21 of the minutes be corrected to read: "Commissioner Beatty appointed Mr. James Strollo, City Engineer of the City of Long Branch," instead of "Commissioner Beatty moved that Mr. James Strollo be appointed City Engineer of the City of Long Branch," and in the same paragraph his comments be corrected to read: "It will not have to go to a vote of the Board" instead of "it will have to go to a vote."

The motion was seconded.

On the call of the roll the minutes were approved as corrected by the following vote: Ayes—5.

30 12. From the Director of Streets and Public Improvements reporting as follows:

May 22, 1928.

Mayor and Board of Commissioners,
City of Long Branch, New Jersey.

Gentlemen:

On Tuesday, May 15, 1928, as Commissioner of Streets in the City of Long Branch, I appointed James Strollo, City Engineer.

40 Mr. Strollo has been and is performing the duties of that office, under my direction, and I

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expect the City of Long Branch to pay him the City Engineer's salary.

I do not recognize the appointment of any City Engineer by the Board of Commissioners, in view of the fact that the appointment of the City Engineer is in my Department.

Yours very truly,

10

Thomas Beatty,
Commissioner of Streets and
Public Improvements.

Commissioner Bennett moved that it be received and referred to the City Solicitor. Carried. Roll call, Ayes—5.

SCHEDULE 3.

20

Abstracts from the minutes of a regular meeting of the Board of Commissioners of the City of Long Branch held on May 29, 1928:

5. From the City Solicitor rendering the following opinion:

Mayor and Board of Commissioners,
City of Long Branch, N. J.

Gentlemen:

Reporting on the letter of Mr. Thomas Beatty, Commissioner of Streets and Public Improvements, which he submitted to the Board of Commissioners at its last regular meeting and which was referred to me, I wish to say that, it will be noted that Mr. Beatty states that he appointed James Strollo, City Engineer; that he expected the City of Long Branch to pay him the City Engineer's salary and that he does not recognize the appointment of any City Engineer by the Board of Commissioners in view of the fact

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that the appointment of the City Engineer "Is in my Department." My opinion, however, is that Mr. Beatty did not appoint James Strollo, City Engineer; that the City Engineer was not, at that time, in Mr. Beatty's Department nor any other Department, and that the Board of
10 Commissioners should not recognize Mr. Strollo as the City Engineer nor pay him for any work that he may do or attempt to do as such. I base my conclusions upon the following facts and for the following reasons:

First, Mr. Beatty seconded the following resolution:

"Resolved, that at this, the first meeting of the Board of Commissioners, they take up as a whole Board, the first appointments of the several City Officers."
20

This resolution was unanimously adopted, which means, of course, that Mr. Beatty voted for this procedure. Afterwards and when the Board undertook to carry out the course adopted by this resolution, Commissioner Beatty moved that the Board "Proceed to the election of City Officers." There was a roll call on this motion and Mr. Beatty, together with the other Commis-
30 sioners, voted unanimously in its favor. Mr. Beatty then nominated Mr. Strollo for City Engineer. This nomination was seconded by Commissioner Carr. Commissioner Bennett nominated Otis R. Seaman as City Engineer. This nomination was seconded by Commissioner Brown. It was then that Mr. Beatty stated that it was his understanding that, as Director of Streets and Public Improvements, it was his right to appoint the City Engineer whom he
40 claimed was under his supervision and stated,

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that, "but as there is a difference of opinion as to the method of appointment it will have to go to a vote." It did go to a vote, Commissioner Beatty and Carr voting for Mr. Stollo, and Commissioners Brown, Bennett and Mayor Jones voting for Mr. Seaman.

Second: At the time Mr. Beatty claimed that the Engineer was in his Department, he was no such thing for the very apparent reason that the resolution distributing the subordinate officers among the several Departments had not, up to that time, been made, nor was such distribution of subordinate officers made until practically the last act at that meeting. Therefore, up to that time, the Board had just as much power to put the Engineer under the control of the Department of Parks and Public Property or under the Department of Revenue and Finance as it did under the Department of Streets and Public Improvements.

For these reasons, it is apparent:

First, that the Engineer had not been assigned to Mr. Beatty's Department at the time he made such claim.

Second, Mr. Beatty moved that the Board proceed to the election of City Officers and voted that it do so, further stating that since "there is a difference of opinion as to the method of appointment it (the nomination), will have to go to a vote" and he thereby proceeded to vote for Mr. Stollo.

Third, before there was any subordinate officers assigned to the Department of Streets and Public Improvements, or any other Department, Mr. Beatty made the statement that the Engineer was in his Department and therefore he had the

Return to Writ.

right to appoint when, as a matter of fact, such was not the case.

I may add that the latest reported case in our Supreme Court on the interpretation of the Statute referring to the assignment of officers to the several Departments in a commission govern-
 10 ment municipality, holds that the statutory provision permits the Board, as a whole, to make its appointments at its first meetings. It does not, however, indicate a purpose on the part of the Legislature that this power should not be *subsequently* distributed.

Very respectfully yours,

WM. L. EDWARDS.

Commissioner Bennett moved that the report
 20 be received and filed.

The motion was seconded.

Commissioner Beatty stated that he took excep-
 tion to the way they were nominated. He fur-
 further stated that he did not nominate, he ap-
 pointed, and he also took exception to the vote
 and stated that it did not have to go to a vote.
 As far as he is concerned he expects to recognize
 Mr. Strollo until it is settled by the Court.

On the call of the roll the motion was passed
 30 by the following vote: Ayes—3, Nays—2,
 Beatty and Carr.

REASONS.

NEW JERSEY SUPREME COURT.

OTIS R. SEAMAN,	}	<i>Prosecutor,</i>	<i>On</i>	10
<i>vs.</i>			<i>Certiorari.</i>	
JAMES STROLLO and others,		<i>Defendants.</i>	<i>Reasons.</i>	

And now comes the said Otis R. Seaman, prosecutor in the above-entitled cause, and states and files the following as the reasons upon which he will rely for the issuance and prosecution of the writ of certiorari heretofore granted in the above-stated cause, namely: 20

1. That the attempted appointment or designation of James Strollo as City Engineer of the City of Long Branch by Thomas Beatty, Commissioner of Streets and Public Improvements of said City, is altogether void and of no effect.

2. That the said Thomas Beatty had no power or authority to make such alleged appointment because the prosecutor at the first meeting of the Board of Commissioners of said City, held on the 8th of May, 1928, was duly elected City Engineer of the City of Long Branch by the Board of Commissioners of said City, and had and has, pursuant to such election, in due course taken and filed the oath of office, and entered upon, and is now engaged in executing the duties of such office. 30

Reasons.

5. Because the said attempted appointment of the said James Strollo by the said Thomas Beatty is in other respects ineffectual and illegal.

McCARTER & ENGLISH,
Attorneys of Otis R. Seaman.

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Testimony.

NEW JERSEY SUPREME COURT.

OTIS R. SEAMAN,

Prosecutor,

vs.

JAMES STROLLO, THOMAS BEATTY
and MORTIMER R. DE ROCHE,
City Clerk of the City of Long
Branch,

Defendants.

On Certiorari.

10

Transcript of testimony taken in the above matter before H. Richard Woebse, a Supreme Court Examiner of New Jersey, at the offices of McCarter & English, Esqs., Prudential Building, Newark, N. J., on Monday, the twenty-fourth day of September A. D., 1928, at 10:30 o'clock A. M., by consent of counsel.

20

APPEARANCES:

Robert H. McCarter, Esq., of McCarter & English, Esqs., representing Otis R. Seaman, the prosecutor.

Ralph E. Lum, Esq., of Lum, Tamblyn & Colyer, Esqs., representing the defendants.

30

It is stipulated and agreed by and between the attorneys for the respective parties that the testimony of the witnesses may be taken stenographically and afterwards reduced to typewriting, the signatures of the witnesses to their said testimony being waived.

H. RICHARD WOEBSE,
Supreme Court Examiner of New Jersey.

40

Otis R. Seaman, direct.

OTIS R. SEAMAN, prosecutor, called as a witness on his own behalf, being duly sworn by the Examiner, testified as follows:

Direct examination by Mr. McCarter.

10 Q Are you the Otis R. Seaman who is the prosecutor in this action? A I am.

Q What is your profession? A Civil engineering.

Q How long have you practiced that profession, and where? A About six years, in the City of Long Branch.

Q Do you live in Long Branch? A Yes, sir.

20 Q The return to this writ of certiorari indicates that at a meeting of the Board of Commissioners held on the 15th of May, 1928, you were elected City Engineer, as the minutes show by the following vote:

Seaman, 3; Strollo, 2.

Did you, pursuant to that action of the Board taken on that day, subscribe to and take an oath as City Engineer? A Yes, sir.

30 Mr. McCarter: Will you produce it, Mr. Van Tine?

Mr. Van Tine: Yes, sir.

Q Mr. Seaman, did you file the oath with the clerk? A Yes, sir.

Mr. McCarter: The City Clerk produces oath of Otis R. Seaman, reading as follows:

40 "I, Otis R. Seaman, by virtue of an act entitled, 'An act relating to, regulating and providing for the government of cities, ap-

Otis R. Seaman, direct.

proved April 8, 1903, and the various acts amendatory thereof and supplemental thereto, do solemnly swear that I will execute the duties required of me as Engineer of the City of Long Branch by aforesaid acts and supplements and in accordance with the lawful ordinances and regulations of the City of Long Branch, faithfully and impartially according to the best of my knowledge and ability. 10

"I further sincerely profess and swear that I do and will bear faith and allegiance to the government established in this State under the authority of the people, so help me God.

"I do further solemnly swear that I will support the Constitution of the United States and the Constitution of the State of New Jersey. 20

(Signed) "Otis R. Seaman.

"Sworn and subscribed to before me this 15th day of May A. D., 1928.

"Harry Truax,
"Master in Chancery of New Jersey.

Endorsed: "Oath of Office of Otis R. Seaman

"Filed May 15, 1928. 30

"M. R. De Roache,
"City Clerk."

Mr. McCarter: I offer the oath in evidence.

(Marked Exhibit P. 1.)

By Mr. McCarter.

Q Is there any room set aside in the City Hall at Long Branch for the City Engineer? A No, sir. 40

Otis R. Seaman, direct.

Q Is there any equipment owned by the City for use by the City Engineer? A No, sir.

Q After the taking and filing of that oath what, if anything, during the next two weeks did you do in the way of performing the duties of City Engineer to which office you purported to be elected? A I brought the tax map, which is the City atlas, up to date by plotting on it the descriptions sent to the Assessors by the County Clerk's office.

Q And who brought that matter to your attention and asked you to do that office? A Commissioner Bennett, of the Finance Department.

Q What further work during the next two weeks, if any, did you perform? A I went out on a conference with a majority of the Board of Commissioners on a matter relating to sewer inspection.

Q What sewer inspection? A The sewer laid in Roseland Gardens, which is a development.

Q Just detail briefly what was to be done and what you, with the majority of the Board, did? A Well, the sewer was stopped up, and the Board went over the entire matter with me on the ground and I recommended that the sewer be cleaned out.

Q And was it cleaned out? A It was; yes, sir.

Q Go on. A The following week I met with the Board on a street called Ellis avenue, which street the Commissioner of Streets, Mr. Beatty, wished to have extended from Seaview avenue to Central avenue, a distance of from probably one hundred and fifty to two hundred feet, and the whole Board, with the exception of Commis-

Otis R. Seaman, direct.

sioner Carr, was present, and Commissioner Beatty asked my advice several times on that occasion, as did the other Commissioners.

Q As to what subject? A As to whether the street should be widened, or whether that house or that house would be in the way, and whether the fence line should be here, and how wide was the street, and of course I answered all his questions. 10

Q Now you said the next week. What week is that? A Well, that was the week between the second and third meeting; that is, between May 23rd and May 29th.

Q You have been paid a salary since you were elected? A Yes, sir.

Q Commencing as of what date? A 16th of May. 20

Q Will you as between the first and second week after your appointment tell us when the work upon the tax map and the viewing and the giving of your advice, and so forth on the Roseland Gardens development occurred? A I made an inspection, as I remember, of the sewer in Roseland Gardens the following day.

Q What day? A About the 16th of May.

Q That would be the first week, then? A Yes, the first week. 30

Q Go on. A And of course, bringing the tax book up to date was scattered over the period of the two weeks.

Q Part in the first and part in the second? A Yes. Part in the first and part in the second.

Q At whose direction did you do the sewer inspection? A Commissioner Brown, head of Public Safety.

Q The work upon the tax map I think you have already said was done at the direction of Commissioner— A Commissioner Bennett. 40

Otis R. Seaman, direct.

Q The Commissioner of what? A Commissioner of Finance.

Q The old map was in the possession of whom? A The Assessor.

Q Where in fact did you perform the work which you described upon that tax map? A In the Assessor's office in the City Hall. I also gave out several house numbers; that is, looked up and gave out to the individual owners of property the house numbers of their property in various parts of the City during that period.

Q During the first two weeks? A Yes.

Q You mean people that were proposing to build or had built? A Had built and had no numbers.

Q From the end of those two weeks, Mr. Seaman, down to date, have you regularly been performing the duties of City Engineer? A Yes.

Q Such as what, and from then on—from the end of the two weeks say down to the present time, roughly? A Well—

Q I don't mean a daily repetition. A That is a difficult question to answer.

Q What is that? A I wasn't really recognized by Mr. Beatty—

Q I didn't ask you that. I asked you what work you have done as City Engineer since say the 29th of May or the 1st of June?

Mr. Lum: I guess he has covered it. That is what he has just been telling us.

By Mr. Lum.

Q Is that right? A Yes.

Mr. Lum: Mr. Beatty didn't recognize him; so he got no definite assignments.

Otis R. Seaman, cross.

Mr. McCarter: I would like to conduct my examination without the interruption of counsel.

By Mr. McCarter.

Q I have asked you twice, and I will be glad if you will answer the question and pay some attention to it. What work have you done? A Well, I made tax profiles and reports, and maps and surveys for the City, at the direction of the whole Board. 10

Q At the solicitation of the whole Board? A Yes.

Q Including Mr. Beatty? A Yes.

Q Since what time is that? A Well, since the 29th 20

Cross examination by Mr. Lum.

Q The City Engineer is under the department of the Director of Streets and Public Improvements, I believe, is he not? A What is that?

Q The office of City Engineer is under the direction of the Director of Streets and Public Improvements?

Mr. McCarter: Objected to because the record shows it is at the present time. 30

Q And Mr. Beatty is the Director to whom was assigned the work of the streets and public improvements? A Yes.

Q And he has never recognized you as the City Engineer since your appointment? A Yes, sir.

Q He has never given you details, any definite instructions about any specific work, has he? A I didn't say, no, sir. 40

Otis R. Seaman, cross.

Q He has not?

Mr. McCarter: Don't enter into controversy.

Mr. Lum: I think he did say it.

10 Q You knew at that first meeting of May 15th he voted against you as City Engineer, the only time he had a chance to register it?

Mr. McCarter: I object. The record will speak for itself. It doesn't appear the witness was present at that meeting.

A He voted against me at that meeting.

20 Q And you were present there and heard him so vote, did you not? A Yes.

Q And whom did Mr. Beatty appoint? A He nominated Mr. Strollo.

Q Did he not appoint him? A He nominated him.

Q Didn't you know he also appointed him? A He never did.

Mr. McCarter: That is objected to as not cross examination.

30

Q How do you distinguish between nominating and appointing?

Mr. McCarter: Same objection. This witness is not here to distinguish between nominating and appointing.

Mr. Lum: I asked him and he answered the other question, so he will have to distinguish.

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Milton A. Bennett, direct.

A He said "nominate" when he got up to make this nomination, and not "appoint."

Q You know, do you not, that Mr. Strollo stood ready at all times to proceed with the work of City Engineer?

Mr. McCarter: Same objection—not proper cross examination. 10

A I don't know anything about Strollo.

Mr. Lum: I guess that is all.

MILTON A. BENNETT, called as a witness on behalf of the prosecutor, being duly sworn by the Examiner, testified as follows: 20

Direct examination by Mr. McCarter.

Q You are one of the Commissioners of the City of Long Branch? A I am.

Q Are you the Milton A. Bennett who by the return seems to have signed the minutes of the organizing meeting of the Board held on the 15th of May, 1928? A I am.

Q Those minutes purport also to bear the signature of Thomas Beatty. Look at the original minute and see if the signature of Thomas Beatty is appended to the original minute of the meeting of May 15th, copy of which is in the return? A Yes, it is. Commissioner Beatty's name is also subscribed. 30

Q Have you before you the check of the first salary paid to Mr. Seaman? A I have.

Q Will you produce it? 40

Milton A. Bennett, direct.

(Witness produces check.)

Mr. McCarter: I offer the check in evidence.

Mr. Lum: No objection.

(Marked Exhibit P. 2.)

10 Q This check is dated May 31, 1928, and is to the order of Otis R. Seaman, City Hall, Long Branch, New Jersey, for \$75 salary of said engineer and is signed by yourself as Director of Revenue and Finance, by Mr. Jones as Mayor, and by M. F. Finn as Deputy City Clerk. For what period does that check pay Mr. Seaman? A That was for the two weeks beginning May 15, 1928, and ending May 31, 1928, which is the half month rather than the two weeks.

20 Q Have you the payroll of the City of Long Branch for the month of May, or half month of May, or whatever it is? A I have.

Q What period does it cover? A That covers the half of the month ending May 31, 1928.

Q From what date to what date? A From the 15th of May.

Q To the 31st? A To the 31st.

Q Will you let me look at it?

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(Witness produces payroll.)

Mr. McCarter: Do you want to see it, Mr. Lum?

Mr. Lum: No.

40 Q I notice that upon that roll appears the name Otis R. Seaman, City Engineer; rate per month, \$150; amount received, \$75, and the receipt of Otis R. Seaman is appended. That is his signature? A That is his signature.

Milton A. Bennett, cross.

Q And he received that check, No. 3618, that we have just offered in evidence? A He did.

Mr. McCarter: I offer the payroll in evidence.

Mr. Lum: You are only encumbering your own record. There is no dispute about it. 10

Mr. McCarter: All right.

Q Was it necessary that the tax map should be brought up to date? A It was.

Q Did you give any instruction to Mr. Seaman with reference thereto? A I did.

Q What was that and about when was that?
A That was shortly after I went into office, sometime during the first two weeks between the 15th of May and the 29th of May, 1928. I assigned Mr. Seaman to assist the Assessor, who had a number of descriptions in his office that had not been plotted on the said tax map, and the Assessor and Mr. Seaman both reported to me later that that had been done. 20

Cross examination by Mr. Lum.

Q Your department is what? A Revenue and Finance.

Q And you appoint, do you, the appointees who work in that department? 30

Mr. McCarter: I object to that as immaterial, incompetent and irrelevant.

A I have never had to appoint anyone as yet.

Q Never done any appointing? A The appointees, as you call them, that is, the employees of that department, were elected at the first meeting of the Board. 40

Milton A. Bennett, cross.

Q Who were they? A They were the Assessor, Mr. Drummond Wooley; the License Inspector, Mr. Philip Cohen.

Q Did you say Mr. Cohen was elected? A He was.

10 Mr. McCarter: You haven't told us them all.

Q At what meeting? A As I recall it, it was the organization meeting on the 15th of May.

Mr. McCarter: It will speak for itself by the record which is returned.

20 Q And the City Engineer is not in your department? A He is not.

Q Did you request Mr. Beatty to give instructions to this City Engineer in regard to this work you wished done?

Mr. McCarter: I object to that as immaterial and irrelevant.

A I did not.

30 Q Is it usual for one Commissioner to give directions and orders to the men in other departments? Is that the way you run Long Branch?

A It is.

Mr. Lum: That is all.

Benjamin C. Van Tine, direct.

BENJAMIN C. VAN TINE, called as a witness on behalf of the prosecutor, being duly sworn by the Examiner, testified as follows:

Direct examination by Mr. McCarter.

Q When did you become City Clerk? A The 10
7th of August.

Q 1928? A Yes, sir.

Q Your predecessor was Mr. De Roache? A
Mr. Mortimer R. De Roache.

Q Have you before you the official minutes
of the City of Long Branch? A I have.

Q Turn to the meeting at which, as Mr. Sea-
man said, he was recognized by Mr. Beatty—
A July 10th.

Q (Continuing)—and read the record. A 20
There was a paragraph in reference to about
what Mayor Jones had to say about this same
matter. There was a controversy about the
matter. Do you want me to read it?

Q Read what I asked you to. A (Reading.)
“Mayor Jones stated in reference to the City
Engineer that the City of Long Branch is not
going to have to pay two engineers and that Mr.
Seaman was appointed by the City, receiving a
salary and is waiting to do any work necessary. 30
If this report is going to bring Mr. Strollo in
as engineer it should be referred to the legal
department. Commissioner Beatty stated that
there is not going to be any trouble in this con-
nection and up until this time he has held up
the work on the streets. It is his intention to
go on with the work under the supervision of
the previous appointment and whatever the
Court decides he will be governed accordingly.
He further stated that he did feel at the time 40

Benjamin C. Van Tine, direct.

he made the appointment that it was in his department and he had a right to make the appointment and he still thinks so, but he is not going to delay improvements in the department on its account. Mayor Jones further stated that the city does not want two engineers on one job.
 10 Commissioner Beatty stated that he is willing to recognize the City Engineer."

By Mr. Lum.

Q What is that date? A July 10th.

By Mr. McCarter.

Q Has Mr. Strollo since May 15, 1928, filed any oath of office as City Engineer? A There is no such record on file.

20 Q Turn to the resolution with reference to the payroll and tell us what Commissioners voted for that payroll for the half month ending May 31, 1928. Did not all of the Board vote? A Yes.

Mr. Lum: No cross examination.

30 I, H. Richard Woebse, a Supreme Court Examiner of the State of New Jersey, do certify that the foregoing testimony was taken by and before me at the time and place hereinbefore mentioned, and I believe that the foregoing transcript fairly and accurately states the testimony so given.

H. RICHARD WOEBSE,
 Supreme Court Examiner of New Jersey.

OPINION OF SUPREME COURT.

Filed October 18, 1928.

NEW JERSEY SUPREME COURT.

No. 259, October Term, 1928.

OTIS R. SEAMAN,

Prosecutor,

vs.

JAMES STROLLO, *et als.,*

Defendants.

*On
Certiorari.*

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Argued October 2, 1928; decided October 18, 1928.

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Before Justices Minturn, Black and Campbell.

For the prosecutor: Messrs. McCarter and English.

For the defendant, James Strollo: Messrs. Lum, Tamblyn and Colyer.

PER CURIAM:

In this case, the writ of certiorari was allowed to review the action of Thomas Beatty, one of the Commissioners of the City of Long Branch, appointing the defendant James Strollo, City Engineer. It is conceded, that Long Branch is governed by five commissioners elected under the Walsh Act, P. L. 1911, p. 462; P. L. 1915, p. 496; 2 Cum. Sup. Comp. Sts. of N. J., p. 2462; and that a municipal election held on May 8, 1928, five commissioners were elected, of which Thomas Beatty was one. The only point involved in the case is whether the Board of Commissioners of a city as a body acting under the

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Opinion of Supreme Court.

Walsh Act, at its first or organizing meeting has power to choose a city engineer, or whether that power is lodged in the individual.

10 We think the answer to this question, under our decision, in the case of *Sykes v. Heinzman*, 100 N. J. L. 12, must be the appointment of the defendant, James Stollo, by Commissioner Thomas Beatty as City Engineer of Long Branch, was a valid and legal one.

This view leads to a dismissal of the writ of certiorari with costs.

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RULE FOR DISMISSAL.

NEW JERSEY SUPREME COURT.

<p>OTIS R. SEAMAN, <i>Prosecutor,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>JAMES STROLLO, <i>et als.,</i> <i>Defendants.</i></p>	}	<p><i>On Certiorari.</i></p> <p><i>Rule for Dismissal.</i></p>	<p>10</p>
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This cause coming on to be heard before the Court, and the argument of the counsel for the respective parties having been heard and duly considered;

It is ORDERED, that the writ of certiorari allowed in this cause be and the same hereby is dismissed with costs. **20**

Entered October 23, 1928.

On motion of

LUM, TAMBLYN & COLYER,
Attorneys for Defendant, James Strollo.

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NOTICE AND GROUNDS OF APPEAL.

Filed October 27, 1928.

NEW JERSEY SUPREME COURT.

10	OTIS R. SEAMAN, <div style="text-align: right;"><i>Prosecutor,</i></div> <div style="text-align: center;"><i>vs.</i></div> JAMES STROLLO, <i>et als.</i> , <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>On Certiorari. Notice of Appeal and Grounds.</i>
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To James Strollo, Thomas Beatty and Mortimer
R. DeRoche, City Clerk of the City of Long
Branch:

20 TAKE NOTICE, that the prosecutor appeals to the
Court of Errors and Appeals from the whole of
the judgment entered in the above-entitled cause
in the New Jersey Supreme Court on the follow-
ing grounds:

1. The Supreme Court erred in dismissing the writ of certiorari.
2. The Supreme Court erred in giving judgment for the defendants instead of for the prosecutor, Otis R. Seaman.
- 30 3. The judgment of the Supreme Court is in other respects erroneous and illegal.

Dated October 25, 1928.

McCARTER & ENGLISH,
Attorneys for and of Counsel
with Prosecutor.

Notice of Appeal and Grounds.

Service of the within notice of appeal and grounds is hereby acknowledged this 25th day of October, 1928.

LUM, TAMBLYN & COLYER,
Attorneys of Defendant, James Stollo.

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New Jersey Court of Errors and Appeals

OTIS R. SEAMAN, <i>Prosecutor-Appellant,</i>	}	<i>On</i>
<i>vs.</i>		<i>Certiorari.</i>
JAMES STROLLO, <i>et als.</i> , <i>Defendants-Appellees.</i>	}	<i>On Appeal</i>
		<i>from Su- preme Court.</i>

BRIEF FOR PROSECUTOR-APPELLANT.

This is an appeal from a judgment of the Supreme Court dismissing a certiorari to review the action of Thomas Beatty, one of the Commissioners of Long Branch, in his purported appointment of James Strollo as City Engineer of that city.

Long Branch is governed by five commissioners elected under the Walsh Act, which was adopted by the city many years since, and at a municipal election held in that city on the 8th of May, 1928, Thomas Beatty, J. William Jones, C. Fred Carr, Charles E. Brown and Milton A. Bennett were elected commissioners. On Tuesday, May 15, 1928, at 12:00 noon, Eastern Standard Time, the first meeting of the Board as thus elected was held, as appears by the return to the writ. The Board proceeded to assign the five commissioners to the several departments. Then the following resolution was offered by Commissioner Bennett:

“Resolved, that at this, the first meeting of the Board of Commissioners, they take up as a whole Board, the first appointments of the several City officers.”

This resolution, as appears by the return, was signed by all of the commissioners and unani-

mously adopted. Then followed resolutions, as the return shows, fixing the terms and salaries of the City Solicitor and Deputy City Clerk, the City Engineer and other officers. The language of the resolution with reference to the City Engineer is as follows:

“Resolved, that the City Engineer of the City of Long Branch shall be appointed for a period of two years to terminate on the third Tuesday of May, in the second year following his appointment and that the annual salary of the City Engineer shall be \$1,800.00, payable in semi-monthly installments, and that such salary shall be in lieu of all fees for mapping and other usual work required by the City.”

The return further shows:

“Commissioner Beatty moved that the Board proceed to the election of City officers. Carried. Roll call, Ayes—5.”

Then in due course followed the nomination and unanimous election of City Solicitor, City Clerk, Deputy City Clerk, Deputy City Clerk and Official Stenographer, Recorder and of the Prosecutor, Otis R. Seaman, as City Engineer, the proceedings being “Commissioner Beatty moved that Mr. James Strollo be appointed City Engineer of the City of Long Branch. The nomination was seconded. Commissioner Beatty stated that it is his understanding that as Director of Streets and Public Improvements it is his right to appoint the City Engineer who is under his supervision, but as there is a difference of opinion as to the method of appointment it will have to go to a vote.” On the call of the roll, Mr. Seaman was elected City Engineer by the following vote: Seaman—3. Strollo—2, Beatty and Carr.

The minutes containing the foregoing and other similar matters are signed, as the return shows, by all five of the commissioners.

It will be particularly noted that at the time Mr. Beatty claimed the right to appoint Mr. Strollo, the office of City Engineer had not been assigned to the Department of Streets and Public Improvements.

Immediately after the holding of this meeting the Prosecutor Seaman was inducted into the office of City Engineer, and from that time has continued to perform, and is still performing the duties thereof.

Another meeting of the Board was held on May 22, 1928, the minutes of which, as the return shows, include the following:

“Commissioner Beatty moved that Article 21 of the minutes be corrected to read: ‘Commissioner Beatty appointed Mr. James Strollo, City Engineer of the City of Long Branch’ and in the same paragraph his comments be corrected to read: ‘It will not have to go to a vote of the Board’ instead of ‘it will have to go to a vote.’

The motion was seconded.

On the call of the roll the minutes were approved as corrected by the following vote: Ayes—5.

12. From the Director of Streets and Public Improvements reporting as follows:

May 22, 1928.

Mayor and Board of Commissioners,
City of Long Branch,
New Jersey.

Gentlemen:

On Tuesday, May 15, 1928, as Commissioner of Streets in the City of Long Branch, I appointed James Strollo, City Engineer.

Mr. Strollo has been and is performing the duties of that office, under my direction, and I expect the City of Long Branch to pay him the City Engineer's salary.

I do not recognize the appointment of any City Engineer by the Board of Commissioners, in view of the fact that the appointment of the City Engineer is in my Department.

Yours very truly,

Thomas Beatty,
Commissioner of Streets &
Public Impts.

Commissioner Bennett moved that it be received and referred to the City Solicitor. Carried. Roll call, Ayes—5."

Notwithstanding the opinion of the City Solicitor, which in due course was delivered to the Board of Commissioners, Mr. Beatty and Mr. Strollo both insisted upon the validity of Mr. Beatty's alleged appointment of Strollo to the office of City Engineer, and hence this writ of certiorari.

The question involved is whether or not the Board of Commissioners of a city governed by the Walsh Act, has a right at its first or organizing meeting, thus to choose the City officers. It is the contention of the Prosecutor that it has. Mr. Beatty and Mr. Strollo on the other hand claim that the right to make the appointments resides in the several commissioners.

By Chapter 275 of the Laws of 1915, being an amendment to the Walsh Act, on page 496, it is provided:

"The board of commissioners *shall at the first meeting* or as soon as may be after organization, create such subordinate boards and appoint such officers as it may deem necessary for the proper and efficient conduct of the affairs of the city. Any

board created may be abated; or any officer or employee appointed by the board of commissioners may be removed from office by them, at any time for cause, after public hearing, provided their action shall be taken in accordance with the civil service and tenure of office acts in municipalities where such acts have been adopted, and such action shall be subject to review by the courts as heretofore."

See also 2 Cum. Sup. to Compiled Statutes of New Jersey, page 2462.

In *Sykes v. Heinzman*, 100 N. J. Law 12, it was held by this Court, the Chief Justice reading the opinion, that in municipalities which have adopted the provisions of the Walsh Act, power of appointment to the office of City Comptroller is vested in the Director of Revenue & Finance. In the opinion in this case, however, the Chief Justice was careful to say, p. 14:

"It is argued against the view which we have indicated that because in the same section of the statute it is also provided that the Board of Commissioners as a body shall at their first meeting or as soon as may be after organization, appoint such officers as it may deem necessary for the proper and efficient conduct of the affairs of the city, and that these officers so appointed may be removed by the board at any time for cause, it is apparent that it was not the legislative purpose that the power of appointment to subordinate offices in the various departments of the municipal government should be distributed among the directors of those departments. But the statutory provision which is referred to only applies to first appointments, and does not, as we think, indicate a purpose on the part of the legislature that this power should not be subsequently distributed, together with all other executive and administrative powers, among

the different departmental heads; for the legislative mandate directing the distribution of these powers is general and without limitation, containing no suggestion that the power of appointment to subordinate offices should be segregated from all other executive and administrative powers and should not be included in the distribution of those powers."

It is manifest that by the express terms of the statute, the Commissioners at their first meeting have the power to appoint such officers as they think necessary for proper and efficient conduct of the affairs of the city. Commissioner Beatty, as the return shows, manifested his concurrence in this view, not only by voting for the City Solicitor, City Clerk, Deputy City Clerk, Deputy City Clerk and Stenographer and other officers, but participated in the vote for the City Engineer, and after finding that his candidate, Mr. Strollo, had not as many votes as Mr. Seaman, he then for the first time, notwithstanding his vote on the previous and later appointees for the appointment of men by the whole board, took the mistaken position that as the City Engineer was in the department of the City government to be assigned to himself, he was entitled to appoint him, entirely overlooking the fact that as the minutes incorporated in the return to this writ show, the election of Mr. Seaman preceded the assignment of the office of City Engineer to the Department of Streets & Public Improvements, to which department Mr. Beatty had been assigned. The order of events was (1) *the assignment of the several commissioners to their respective departments*; (2) *the election of the subordinate officers including the City Engineer* and (3) *the allocation of the several officers thus elected to the several departments, including the City Engineer to the Department of Streets &*

Improvements. There is nothing in the nature of the office of City Engineer that *ipso facto* requires the placing of the City Engineer in the Department of Streets & Improvements. The Walsh Act likewise contains no such requirement.

By sections 37 and 38 of "An Act relating to, regulating and providing for the government of cities (P. L. 1903, page 292, at page 313) (1 C. S., page 1182, sections 2087 and 2088) under which act the city of Long Branch was governed prior to the adoption of the Walsh Act, the office of City Engineer is created and certain duties prescribed:

"2087. City engineer, appointment; term.—Sec. 37. There shall be in every such city a city engineer, who shall be appointed by the city council, and shall hold office for the period of two years. (P. L. 1903, p. 313.)

2088. City engineer; duties; abstract of deeds, etc.—Sec. 38. It shall be the duty of the city engineer to prepare, keep, renew and have the custody of a city map or atlas, whereon shall be shown the streets and highways and the lots, plots and tracts of land situate within such city and shall distinguish said lots, plots or tracts by numbers; he shall make or cause to be made and shall keep in his office an abstract of each and every deed or conveyance of lands, tenements and hereditaments, situate within such city, of record in the county clerk's or register's office of the county in which such city is located, and shall cause said abstracts to be properly indexed, and the information as to location and dimensions of the land described in said abstracts to be entered upon said atlas, to the end that it may show, as far as practicable, the ownership of each taxpayer. (P. L. 1903, p. 313.)"

The adoption of the Walsh Act did not alter general laws or charter provisions relating to the government of the city, except where inconsistent with its provisions. The above sections are still applicable to the City of Long Branch. *Salter v. Burk*, 83 N. J. Law 152; *Keffer v. Gaskill*, 88 N. J. Law 77. The testimony of the prosecutor in this case shows (Case, p. 28, lines 10 to 17; also p. 30, lines 5 to 17) that he has performed duties required by section 2088, *supra*, in reference to the city map or atlas for the Department of Revenue and Finance, to which department the Tax Office was assigned (Case, page 16, line 31). Furthermore, in a seaside resort like Long Branch he might quite as appropriately be assigned to the Department of Parks and Public Property.

Hence Mr. Beatty's contention falls to the ground, as at the time of the election by the Board of the City Engineer, Beatty had no claim whatever upon the appointment, as the City Engineer had not yet been assigned to Beatty's department.

Section 4 of the Act required the Board in determining the powers and duties to be performed by each department to assign such powers and duties to the "appropriate" department (*Oliver v. Daley*, 135 Atl. 870); but there is no such limitation of "appropriateness" upon the prescription of the powers and duties of all officers and employees. On the contrary, Section 4 as amended (Chapter 275 of the Laws of 1915) particularly provides that the commissioners "may assign particular officers and employees to one or more departments and may require any officers or employees to perform duties in two or more departments." By Chapter 330 of the Laws of 1927 (a supplement to

the Walsh Act) while modifying the provisions with reference to the appropriateness of the assignment of the powers and duties to be performed by each department still leaves unlimited the Board's right to prescribe the powers and duties of all officers and employees.

Mr. Beatty's contention also overlooks the fact that the statute as above quoted, particularly and specifically bestows upon the Board at its first meeting the right to make the appointment of all offices. It is, however, suggested that the "first meeting" as used in the statute means the first meeting in a municipality after it had adopted the Walsh Act, and that the words have no application to a "first meeting" of any successive board in due course elected after the expiration of the terms of the original board. There is no force whatever in this contention. The second section of the Act, as originally and now existing, provides fully for the first board selected at the first election after the adoption of the Act. The third section provides for the number of Commissioners and originally, provided, and at the present time, provides "that at the first meeting after their election the said Commissioners shall choose one of their members to preside, who shall be mayor." Then follows the fourth section which as originally and still existing provides "that the mayor shall be the director of the Department of Public Affairs and the Board of Commissioners shall, at the first regular meeting after the election of its members, designate by a majority vote one commissioner to be director, etc." Then follows the paragraph above quoted as to the creation of such subordinate boards and the appointment of such officers as the Board may deem necessary and the language is "the Board of Com-

missioners shall at the first meeting, or as soon after organization create such subordinate boards, etc." The first meeting there referred to is, undoubtedly, the same as the first regular meeting referred to in the earlier paragraph of the same section, providing for the time at which the mayor shall be chosen and the designation to the different departments made. Any other construction would be absurd, for the Board at this "first meeting" must create such subordinate boards and appoint such officers as it may deem necessary. If the contention of the other side be correct, then the powers and functions of the commission so far as the creation of subordinate boards is exhausted after the first meeting of Commissioners after the adoption of the Act. No growth or expansion would be possible, and, of course, it is unthinkable to suppose that the first board organized in a municipality after the adoption of the Walsh Act, would then and there have to foresee all the necessities of future years so far as the creation of subordinate boards is concerned. Such a hypothesis is ridiculous, and hence the conclusion is inevitable that the "first meeting" referred to in the fourth section is the first meeting of successive boards after they are quadrennially elected when the Act has been adopted. It is to be observed that in the *Heinzman case, supra* (100 N. J. L., 12) the City of Passaic had in 1911 adopted the Walsh Act. The dispute in the case arose with reference to the appointment of the City Comptroller of the City of Passaic in 1924. If the Act had referred to the first meeting after the adoption of the Act in 1911, the opinion of the Chief Justice would have been utterly inapplicable.

No significance whatever attaches to the use of the word "appoint" with reference to the action of the Board at the first meeting. When a selection to office is to be made by a body, and the word in the legislation descriptive of their action is "appoint," that is synonymous with "election." *Reid v. Gorsuch*, 67 N. J. Law 396.

The statement in the letter of May 22, 1928, from Mr. Beatty to the Commissioners is in that respect erroneous. He has never even filed an oath of office, which the statute requires.

Under these conditions, there is no question of the right of Mr. Seaman to provoke a determination of the question by certiorari. *Moor v. Bradley Beach*, 87 N. J. Law 391; *Murphy v. Freeholders*, 92 *Id.* 244; *O'Neill v. Bayonne*, 99 *Id.* 430.

In the last case, Mr. Justice Kalisch writing the opinion of the Court of Errors and Appeals, said:

"Certiorari is the proper method to review a resolution passed by a public body which the prosecutor apprehends may be used unlawfully to eject him or disturb him.

"We are also of the view that a writ of certiorari was a proper proceeding to review the legality of the resolution passed by the board. The prosecutor is in possession of the office, and when such is the case, and a resolution is passed by a public body which he apprehends may be used unlawfully to eject him or disturb him in the tenure of his office, he may properly maintain a writ of certiorari. See *Murphy v. Freeholders of Hudson County*, 92 N. J. L. 244, where Mr. Justice Black, in speaking for this court, enunciates the above principle, and where the cases germane to the subject are collated."

It was contended in the court below on behalf of Mr. Strollo that the record shows that after the first meeting of the Commissioners, Commissioner Beatty appointed Mr. Strollo to the office of City Engineer, and that, under the ruling of *Sykes v. Heinzman, supra*, this was within his power. The record does not warrant such a contention but, assuming that it does, it is obvious that if, as contended by the Prosecutor-Appellant, he was legally appointed by the Board of Commissioners at the meeting held on May 15, 1928, to the office of City Engineer there could be no further appointment until after the term of office for which he was appointed had expired, or he had in some other legal manner been removed from the office. Neither of these had occurred. There was only one office of City Engineer then existing, and that office was filled by the appointment of the board at its meeting on May 15, 1928.

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

McCARTER & ENGLISH,
Counsel for Prosecutor-Appellant.

ROBERT H. McCARTER,
Of Counsel.

February Term, 1929.

53
New Jersey Court of Errors and Appeals.

OTIS R. SEAMAN,
Prosecutor-Appellant,

vs.

JAMES STROLLO *et als.*,
Defendants-Appellees.

On Certiorari.
On Appeal from
Supreme Court.
Brief for De-
fendant-Appellee
James Strollo.

This writ of certiorari is brought to review the action of Thomas Beatty, one of the Commissioners of the City of Long Branch in the appointment of this defendant, James Strollo, as City Engineer of said city.

It is conceded that Long Branch is governed by five commissioners elected under the Walsh Act and that at a municipal election held on May 8, 1928, Thomas Beatty, J. William Jones, C. Fred Carr, Charles E. Brown and Milton A. Bennett were elected commissioners.

On Tuesday, May 15, 1928, the first meeting of the board was held, as will appear by the return made to the writ of certiorari. At this meeting the members of the board were assigned their several departments, pursuant to the provisions of the act. Mr. Thomas Beatty was elected by the unanimous vote of the board as Director of Streets and Public Improvements (Case, p. 6). By reference to page of the printed case, it appears that provision was made for the ap-

pointment of a City Engineer, fixing his term of office and his salary (Case, p. 8).

The case, page 12, indicates that Commissioner Beatty moved that the board proceed to the election of City Officers. After the election of certain officials are recorded in the minutes of the meeting, it appears that thereafter Commissioner Beatty moved that this defendant, James Strollo, be appointed City Engineer, which nomination was seconded. Commissioner Bennett also nominated Mr. Otis R. Seaman as City Engineer, which was also seconded. The return (Case, p. 13) proceeds as follows at the bottom of the page:

“Commissioner Beatty stated that it is his understanding that as Director of Streets and Public Improvements it is his right to appoint the City Engineer, who is under his supervision, but as there is a difference of opinion as to the method of appointment it will have to go to a vote.”

When a vote was taken, the return showed that Mr. Seaman received three votes and this defendant, James Strollo, two votes (Case, p. 14).

There is also included in the return to the writ, an abstract from the minutes of a meeting of the commissioners held on May 22, 1928 (Case, p. 18).

At this meeting an amendment was made to correct Article 21 of the minutes of the meeting of May 15, 1928. We quote from the return as follows:

“Commissioner Beatty moved that Article 21 of the minutes be corrected to read: ‘Commissioner Beatty appointed Mr. James Strollo City Engineer of the City of Long Branch’ instead of ‘Commissioner Beatty moved that Mr. James Strollo be appointed

City Engineer of the City of Long Branch' and in the same paragraph his comments be corrected to read: 'It will not have to go to a vote of the Board' instead of 'It will have to go to a vote'."

The minutes show that the motion to amend the minutes was adopted by the vote of all the commissioners.

The minutes of the same meeting include a copy of the communication directed to the Mayor and Board of Commissioners by Commissioner Beatty, which runs as follows:

"May 22, 1928.

Mayor and Board of Commissioners,
City of Long Branch, New Jersey.

Gentlemen:

On Tuesday, May 15, 1928, as Commissioner of Streets in the City of Long Branch, I appointed James Strollo, City Engineer.

Mr. Strollo has been and is performing the duties of that office, under my direction, and I expect the City of Long Branch to pay him the City Engineer's salary.

I do not recognize the appointment of any City Engineer by the Board of Commissioners, in view of the fact that the appointment of the City Engineer is in my Department.

Yours very truly,

THOMAS BEATTY,
Commissioner of Streets
and Public Improvements."

This communication was on motion received and referred to the City Solicitor.

In the brief of the prosecutor it is stated that the question involved here is whether or not the

Board of Commissioners of a city by the Walsh Act, has a right at its first or organizing meeting, thus to choose the City officers. Evidently the prosecutor of this writ contends that the board has such power. This defendant, however, respectfully contends that the ultimate right to make appointments resides in the several commissioners.

The provisions of the Walsh Act particularly applicable to the present situation in addition to the paragraph quoted in the brief for the prosecutor, includes the following:

The board of commissioners shall have and possess all administrative, judicial and legislative powers and duties now had and possessed and exercised by the mayor and city council and all other executive or legislative bodies in said city, and have complete control over the affairs of the city adopting the provisions of this act. The executive, administrative, judicial and legislative powers, authority and duties in such city shall be distributed into and among five departments * * * as follows:

1. Department of public affairs.
2. Department of revenue and finance.
3. Department of public safety.
4. Department of streets and public improvements.
5. Department of parks and public property.

The board of commissioners shall determine the powers and duties to be performed by each department and assign such powers and duties to the appropriate departments, and they shall prescribe the powers and duties of all officers and employees and they may assign particular

officers and employees to one or more departments and may require any officer or employee to perform duties in two or more departments, provided the work required of such officer or employee in such different departments be similar in character and make such other rules and regulations as may be necessary or proper for the efficient and economical conduct of the business of the city."

(See Laws of 1915, Chap. 275, p. 495.)

In the brief on behalf of the prosecutor, reference is made to the case of *Sykes v. Heinzman*, 100 N. J. Law, 12. We would particularly call attention to the opinion of the Chief Justice in this case because we respectfully submit that it supports the contention of this defendant. It appears that in this case a proceeding was instituted to determine the title to the office of the City Comptroller of the City of Passaic. The relator claimed to be entitled to the office by virtue of a resolution of the commissioners of the City by which he was appointed City Comptroller for practically the calendar year of 1924. The defendant was in possession of the office and claimed to be the legal holder thereof, "by virtue of an appointment made by one of the commissioners, who had been assigned by the board to the position of director of revenue and finance of the City, the latter appointment having been made on the 8th day of January, 1924." The Court stated in the opinion that the case presented a single question for determination—namely, whether the power of appointment to this office rests in the Board of Commissioners as a body or solely in the Director of Revenue and Finance of the City. Reference is made to the fact that the City of Passaic had in 1911 adopted the

Walsh Act. In the course of the opinion by the Supreme Court on page 13, the Chief Justice says:

“The fourth section of the legislative enactment as originally passed provided that the board of commissioners created thereby should have and possess all executive, administrative, judicial and legislative powers and duties then had and possessed and exercised by the mayor and city council and all other executive or legislative bodies of the city. The section further provided that the executive, administrative and legislative powers, authority and duties in such cities should be distributed into and among five several departments, one of which was designated as the department of revenue and finance; and that the board of commissioners, by a majority vote, should distribute the directorships of each of these departments among its several members. Subsequently, the statute was amended so as to include judicial powers among those to be distributed among the various departments; and, in construing the scope of the effect of this amendment the Court of Errors and Appeals, in the case of *Foley v. Orange*, 91 N. J. L. 554, declared that it ‘placed the judicial power appropriate to any one of such departments upon precisely the same footing as the executive and administrative powers; that is, to be exercised by the commissioner of such department, and not by the board itself as a body’. The pertinent expression in this judicial utterance is that the executive and administrative powers of the municipal government are, under this statute, to be exercised by the respective commissioners presiding over the several departments, and not by the whole body of commissioners. The determination of the question before us, therefore, depends upon whether the making of an appointment to

a subordinate municipal office is the exercise of an executive or an administrative power.”

The Court then refers to the fact that the power to appoint a City Comptroller was vested in the City of Passaic prior to the adoption of the Walsh Act and that it was exercised by the Common Council of the City, and proceeding further at page 14, the Court says:

“* * * * the acknowledgment that this power was transferred to the board of commissioners carries with it, by necessary implication, the admission that it is either an executive or a legislative one. This being the effect of the statute, and these powers being required by the statute to be distributed among the several departments of the city government, we are of opinion that the power to appoint a city comptroller passed to the director of revenue and finance, and is, in the language of the Court of Errors and Appeals, to be exercised by him as the head of his department, and not by the board of commissioners as a body.”

In the further course of the opinion, the Court anticipated the objection raised to the view expressed and proceeds as follows on the bottom of page 14:

“But the statutory provision which is referred to only applies to first appointments, and does not, as we think, indicate a purpose on the part of the legislature that this power should not be subsequently distributed, together with all other executive and administrative powers, among the different departmental heads; for the legislative mandate directing the distribution of these powers is general and without limitation, containing no suggestion that the power of

appointment to subordinate offices should be segregated from all other executive and administrative powers and should not be included in the distribution of those powers.

The conclusion which we reach is that the appointment of the respondent to the office of city comptroller by the director of revenue and finance was a valid one, and that, consequently, the respondent is entitled to judgment on the demurrer."

It is the contention of the prosecutor that Commissioner Beatty had no power or authority to appoint this defendant as City Engineer, because the prosecutor at the first meeting of the board was elected City Engineer by the Board of Commissioners.

In the course of the brief for the prosecutor, reference is made to the participation by Commissioner Beatty in proceedings taken by the commissioners for the appointment of certain officers. However this may be, the commissioner could not waive as it were, the powers and responsibilities which were cast upon him as such commissioner in his department. Furthermore, whatever power he possessed he could not share with others. In *Apple v. Atlantic City*, 104 Atl. Rep. 89, where the Supreme Court had under consideration the same statute involved here, a conviction and order of dismissal of a police officer in proceedings before the board was set aside although the Commissioner of Public Safety, who had jurisdiction to try the officer dismissed, heard the testimony and voted for the conviction and dismissal. It is, therefore, apparent that if a commissioner cannot share his judicial powers he certainly could not share his executive and administrative powers.

Again emphasis is placed upon the fact that it appears from the minutes that the allocation of the several officers to the several departments followed the election of Mr. Seaman to the office of City Engineer. At this point we would refer, however, to the amendment to the Walsh Act of 1915, mentioned above. By its terms, the Board of Commissioners shall determine the powers and duties to be performed by each department and assign such powers and duties to the appropriate departments and they shall prescribe the powers and duties of all officers and employees and they may assign particular officers and employees to one or more departments, etc. While it appears to be obligatory upon the Board of Commissioners to determine the powers and duties of each department and make the assignment and also obligatory upon them to prescribe the powers of officers and employees, it is not made by the statute obligatory upon them to make an assignment to one or more departments. The words of the statute are:

“They may assign particular officers and employees to one or more departments.”

Furthermore, if as contended, an officer must be assigned to a department before he is under the control of the department, the very purpose or object of the Walsh Act might be defeated because it is possible that the commissioners might not make such an assignment during their term of office.

Furthermore, reference to the report of the case of *Sykes v. Heinzman (supra)*, fails to disclose that there had been any assignment of the office of Comptroller to the Department of Revenue and Finance. There is no reference to any such as-

signment in the course of the opinion. After referring to the Walsh Act, the Court says in the middle of page 14:

“This being the effect of the statute and these powers being required by the statute to be distributed among the several departments of the city government, we are of opinion that the power to appoint a City Comptroller passed to the Director of Revenue and Finance.”

By reference to the minutes of the meetings of the commissioners (Case, p. 13 and p. 18) it appears that Commissioner Beatty informed the board of his right to appoint the City Engineer and pursuant thereto he appointed this defendant, James Strollo, to the said office. In the brief for the prosecutor it is stated that there is nothing in the Walsh Act or the nature of the office of City Engineer that requires the placing of the City Engineer in the Department of Streets and Public Improvements. The fourth section of the Walsh Act as amended in 1915 requires the Board of Commissioners to determine the powers and duties to be performed by each department and assign such powers and duties to the appropriate departments. We contend that it naturally follows that subordinate officers who are to function in the Department of Streets and Public Improvements fall within the jurisdiction of such a department. Therefore it follows that Commissioner Beatty did have a claim upon the appointment of the City Engineer when the matter came before the commission and that he exercised his prerogative in the appointment of this defendant and that he was clearly within his right (*Oliver v. Daly*, 103 N. J. L. 52, 134 Atl. 870).

Furthermore, we respectfully contend that the record brought before this Court in this proceeding shows clearly that this defendant, James Strollo, was properly and legally appointed to the office of City Engineer. Among the "reasons" filed by the prosecutor, he states that the attempted appointment or designation of this defendant as City Engineer was altogether void and of no effect. In addition to the proceedings at the first meeting of the board, there has been returned with the writ an abstract of the proceedings of the Board of Commissioners on May 22, 1928 and on May 29, 1928 (Case, pp. 18-22). At the bottom of page 18 is set forth the report of the Directors of Streets and Public Improvements which we have quoted in full in the former part of this brief. In this report, which is a part of the records of the City of Long Branch, Commissioner Beatty stated that on Tuesday, May 15, 1928, as Commissioner of Streets, he appointed James Strollo City Engineer; that he had been and was performing the duties of that office under Mr. Beatty's direction and that he expected the City of Long Branch to pay him the City Engineer's salary. Mr. Beatty further stated that he did not recognize the appointment by the board due to the fact that the appointment of the City Engineer was in his department. We contend that this action on the part of Commissioner Beatty must be construed as an appointment of the City Engineer. It certainly meets the objection raised by the prosecutor that at the first meeting Mr. Beatty could not make the appointment because the office has not been assigned to his department. It was assigned to his department before the termination of the first meeting (Case, p. 16, ll. 20-40). Hence it follows that the appoint-

ment as made by Mr. Beatty and reported in the meeting of May 22, 1928, is valid, legal and binding. It may be suggested by the prosecutor that the reference in this communication of Commissioner Beatty is to his action at the meeting on Tuesday, May 15, 1928. However, his letter makes no such reference. It simply states that on that day he appointed James Strollo, City Engineer. Pursuant to the rule laid down in *Sykes v. Heinzman (supra)*, and pursuant to the opinion in that case, Commissioner Beatty certainly any time after the first meeting had the power to make this appointment.

Furthermore, the communication as it stands certainly amounts to an appointment as of its date, because Commissioner Beatty states therein that Mr. Strollo has been and is performing the duties of that office under his direction and that he expected the City to pay him the salary. Furthermore, he gives notice that he does not recognize the appointment made by the board because it belongs to his department.

Apparently there is no formality to be observed by the commissioner in making an appointment under our decisions. Commissioner Beatty had the right and all that was necessary was for him to make the appointment in such a way that it became a matter of record in the City of Long Branch. That he has made such an appointment clearly appears from the return made to this writ as hereinabove indicated.

There is further evidence that Commissioner Beatty exercised his prerogative in this matter in the minutes of the meeting of May 29, 1928 (Case, p. 19). These minutes contain the opinion rendered by the City Solicitor with respect to Mr. Beatty's report in the form of a letter to the

commissioners of May 22, 1928. By reference to these minutes (Case, p. 22) it appears that Mr. Beatty made the statement following the opinion of the City Solicitor that:

“As far as he is concerned, he expects to recognize Mr. Strollo until it is settled by the Court.”

If these words mean anything they clearly imply that Commissioner Beatty had appointed Mr. Strollo to the office of City Engineer and that he was in that office at that time pursuant to his appointment.

Certainly the record here shows that Commissioner Beatty had appointed Mr. Strollo to the office after the first meeting of the commissioners and that certainly he was clearly within his right because at that time the office had been assigned to his department, if such prior assignment was necessary. Under the ruling of *Sykes v. Heinzman (supra)*, it was certainly within the power of Commissioner Beatty to make the appointment after the said first meeting of the commissioners. In that case this Court said:

“But the statutory provision which is referred to only applies to first appointments, and does not, as we think, indicate a purpose on the part of the legislature that this power should not be subsequently distributed, together with all other executive and administrative powers, among the different departmental heads; for the legislative mandate directing the distribution of these powers is general and without limitation, containing no suggestion that the power of appointment to subordinate offices should be segregated from all other executive and

administrative powers and should not be included in the distribution of those powers.”

Therefore we respectfully submit that this defendant James Stollo was duly and legally appointed to the office of City Engineer of the City of Long Branch, and that the judgment of the Supreme Court should be affirmed.

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James Stollo.*

RALPH E. LUM,
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