New Jersey Court of Errors & Appeals

THOMAS A. CLAY, *Prosecutor-Appellant,* v. THE CIVIL SERVICE COMMISSION, ET AL., *Respondents-Appellees.*	*Certiorari. On Appeal from Supreme Court.*

BRIEF FOR PROSECUTOR-APPELLANT.
STATEMENT.

This is an appeal from the judgment of the Supreme Court dismissing the certiorari in the above stated case.

The certiorari was brought to review a certain ruling of the Civil Service Commission, a copy of which is found at page 12, line 22, et seq, of the printed case and its refusal to certify on the payroll that the prosecutor had been appointed in pursuance of law, thereby depriving him of his salary (Case p. 36, l. 12).

The ruling of the Civil Service Commission was as follows:

> "The appointment of Dr. Clay, which in effect was a dismissal of J. Alexander Browne, M. D., who had hitherto held the position, was, therefore, 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 has been illegally ousted."

The action affecting the payroll is stipulated as follows:

> "That the salary of the prosecutor was entered on the usual list or payroll and forwarded to the Civil Service Commission for its certificate that the prosecutor had been appointed in pursuance of law and of the rules of the Civil Service Commission made in accordance with the act mentioned in section 1, hereof.
>
> That said commission refused to make the certificate above mentioned."

The act mentioned in section 1 of the stipulation was the Civil Service act.

The Supreme Court held that the prosecutor was not lawfully appointed to the office of Health Inspector or Health Officer, and therefore, no legal injury was done him by the action of the Civil Service Commission.

The fundamental question involved in this case is as to whether Dr. Clay, the prosecutor, is entitled to either the office of health inspector or health officer of the board of health of the City of Paterson.

The respondent, Dr. Browne, claims that he, himself, is entitled to one or the other of the offices in question and that Dr. Clay is entitled to none.

The office of health inspector was created by an ordinance of the City of Paterson, adopted under the provisions of an act entitled "An Act entitled 'an act concerning the protection of the public health and the record of vital facts and statistics relating thereto,' " approved March 11, 1880, P. L. 1880, p. 206. The relevant provisions of the act are as follows:

"That every city, borough or incorporated town or any town governed by a commission, shall have a board of health, of not less than five or more than seven members, of which the keeper or recorder of vital statistics, and also one city physician and city health inspector shall be members, if there be such officer or officers; and the said board of health shall be nominated by the Mayor and approved by the common council or other governing board of the city, borough or town, to serve for not less than three years, but not more than three of the number shall go out of office at any one time, unless in case of removal by death or change of residence."

And its second section:

"That all cities of over ten thousand inhabitants shall have one or more city health inspectors, who hereafter in any new board, or in any case of vacancy, shall be appointed by the board of health."

On November 13, 1882, the following ordinance was adopted by the board of aldermen of the City of Paterson:

An Ordinance to Establish a Board of Health.

"The Board of Aldermen of the City of Paterson do ordain 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 act 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 appointments by the Mayor shall be as follows: One member to serve for three years, one member to serve for four years, 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.

"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 countersigned 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 ordinances 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 ordinances 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."

(Case, p. 16.)

The foregoing ordinance was amended by the Board of Aldermen on December 9th, 1914, as follows:

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

The Board of Health was also authorized to appoint a Health Inspector or Health Officer under the provisions of "An act to establish in this State, Boards of Health and a Bureau of Vital Statistics and to define their respective powers and duties" (2 Comp. Stat., p. 2656). By section 31 thereof, it was provided:

> "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 terms of such appointments and the compensation of such appointees."

By a supplement to the act last mentioned, passed April 8th, 1903, (prior to the first election of Dr. Browne as Health Officer, which was November 10, 1903) Comp. St. p. 2675, sections 56 et seq., "to the end that local Boards of Health may be enabled to secure the services of capable health officers" it was provided that such offi-

cers should be examined and licensed by the State board. And it was further provided by section 3 of this supplement that

> "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."

It is agreed that both Dr. Clay and Dr. Browne were at all times qualified as officers under this act, (Case p. 30, l. 9).

As hereinafter shown more particularly it appears in the printed case that Dr. Browne was elected Health Officer or Health Inspector on November 10, 1903, November 13, 1906, and November 12, 1909, for consecutive terms of three years; that subsequent attempts at his election by the board were futile and that subsequent to the going into effect of the amendment to the ordinance passed in 1914, Dr. Clay, on January 12, 1915, was elected Health Officer for a term of three years, and is the present incumbent of the office.

The Civil Service Act was adopted in Paterson November 5th, 1912, (Case p. 35).

The conclusion of the Supreme Court is based upon the following premises:

1. That the act of 1887 impliedly repealed the act of 1880 and the ordinance founded upon it in at least so far as it related to the status of health inspector.

2. That the original appointment of Dr. Browne rested in law on section 31 of the act of 1887, which provided for the fixing of a term by the board.

3. That no such term was fixed.

4. That Dr. Browne was holding over in his office when the Civil Service law was adopted in Paterson.

5. That consequently Dr. Browne is protected in his tenure by the Civil Service law.

6. That Dr. Clay unlawfully claims title to the same office as Dr. Browne.

POINTS.

1. That certiorari properly lies in this proceeding.

2. That the term of Dr. Browne as Health Inspector or Health Officer was fixed by law and therefore he was not protected in his tenure of office by the Civil Service act.

3. That the Civil Service act does not affect the tenure of one who is holding over in office.

4. The act of 1887 did not operate to repeal the ordinance in regard to the status of the Health Inspector of the Paterson Board of Health.

ARGUMENT.

I.

CERTIORARI PROPERLY LIES.

While the order of the Civil Service Commission that Dr. Browne be reinstated and that he had been illegally ousted is a nullity in so far as it affects the prosecutor's right to his office, it incidentally results in depriving him of its emoluments, because the Civil Service Commission, acting upon the theory that the prosecutor holds no office, declines to make the statutory certificate upon the payroll that the prosecutor has been appointed in pursuance of law and of the rules made in pursuance of the Civil Service law. While section 26 of the Civil Service act provides a remedy by mandamus for one entitled to be certified when he is refused such certification, yet, in this matter, it would seem that such a writ would not be the appropriate method for examining the action of the Commission, as it would at once be met with a denial of prosecutor's legal title. *O'Donnell* v. *Dusman,* 39 *N. J. L.,* p. 677. And as he is the incumbent of the office under consideration, *quo warranto* would not lie. *Haines* v. *Camden,* 47 *N. J. L.,* 454; *Robertson* v. *Bayonne,* 58 *N. J. L.,* 325.

This writ of certiorari is therefore brought by Dr. Clay, the incumbent of the office of Health Officer, to remove out of his way the order in question, which is unlawfully used to disturb him in the possession of his office and in the enjoyment thereof and its emoluments.

Loper v. *Millville,* 53 *N. J. L.,* 365.
DeFour v. *State Superintendent,* 72 *N. J. L.,* 374.

The Supreme Court, in the present case, in passing upon the propriety of the writ says:

> "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 reinstated 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 involved; and the point is made at the 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."

II.

The term of Dr. Browne as Health Inspector or Health Officer was fixed by law and, therefore, he was not protected in his tenure of office by the Civil Service act.

Dr. Browne's term of office was fixed by the *resolutions* electing him to office on each of his elections.

A resolution of a municipal body, duly authorized, is a law within the boundaries of the municipality passing such resolution.

> "Such 'enactments, when authorized by the legislature, are just as much laws within the boundaries of the municipality by

> which they were passed as are the former within the boundaries of the State itself. *Bradshaw v. Camden,* 10 *Vr.* 418; *Bohan v. Weehawken,* 36 *Id.* 490,' *McGrath v. Bayonne* 85 *L.* 192."

It may be safely assumed for the purposes of this point, 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.

Mr. Justice Parker says:

> "We consider, then, that Dr. Browne's original appointment in 1903 rested in law 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.*"

We respectfully submit that there was error in the conclusion we have italicized. The proceedings of the Board of Health on November 10, 1903, relating to the election of Dr. Browne, are part of the printed case and are as follows:

> "On motion the board proceeded to elect a Health Officer for the ensuing term of three years. * * * Dr. Alexander Browne, M. D., having received the necessary number of votes was declared elected for the ensuing term of three years." (Case, p. 20, l. 10).

It further appears in the printed case:

> "That on the 12th day of November, 1909, said Browne was again appointed by

> said Board of Health for the term of three years, and, among other things, the following minute thereof appears on the minutes of the Board of Health of Paterson: 'J. Alexander Browne was declared elected Health Officer for the ensuing term of three years.' " (Case, p. 21, l. 16).

No subsequent election was held until January 1913, (Case, p. 21, l. 27). This was unsuccessful because the presiding officer ruled that Dr. Browne could not vote for himself, (Case, p. 22). But at a meeting held Dec. 23, 1913, at which but four members were present, Dr. Browne was allowed to vote for himself and he was declared elected 'for the unexpired term.' As elsewhere argued this election was futile owing to Dr. Browne's inability to vote for himself. Consequently Dr. Browne was holding over after the expiration of his term in 1912. It is, therefore, submitted that if a resolution of the Board of Health could fix the term under which Dr. Browne held his office or position, his term was a fixed one.

Whether the term of an office may be fixed by a resolution of a municipal board is dependent upon the power delegated to the board. The Supreme Court, in this case, has said that the power to appoint a Health Officer and fix his term is found in section 31 of the act of 1887, the pertinent portion of which reads 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."

Section 36 of the same act is also pertinent:

> "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."

There is no other provision of the act of 1887 touching the appointment of subordinate officers or agents, or which concerns their terms of appointment. The act requires no particular method to be adopted in fixing the term. The provision of the act as to the matters to be regulated by ordinance makes no reference to offices.

It was, therefore, permissible for the Board of Health to create a term by resolution.

The case of *Trowbridge v. Newark,* 46 *N. J. L.,* 140, is in point. It is there said:

> "Where a common council is authorized by the charter to elect officers, and no mode of election is prescribed, they may appoint by resolution. 1 Dill. on Mun. Corp. (Ed. 1873), 273. It follows that officers may be removed and, after vacancy declared, others may be appointed in their stead, by resolution, unless some other mode be specially provided by the charter."

In the case cited a resolution of the common council of Newark declaring vacant the offices of lieutenants of police and appointing others in their stead was declared valid, notwithstanding the existence of an ordinance, unauthorized by the charter, which gave lieutenants of police a certain tenure.

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, this court 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.

III.

The Civil Service act does not affect the tenure of one who is holding over in office.

It is not at all clear that the Supreme Court meant to intimate to the contrary of this point, or to infer that one holding over in office was not an officer whose term was fixed by law.

The Court, however, referring to Dr. Browne, says:

> "He seems to have been actually holding over in office when the Civil Service act went in effect, and to have remained therein for over two years thereafter."

The tenure of one holding over in a city office is fixed by statute.

> "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."

In the case of *Hoel v. Camden,* 68 *L.* 226, 228, it was said:

> "The statute cited was held applicable to membership in a Board of Health where the term of office was fixed by ordinance under the sanction of legislation similar to that authorizing Camden's ordinance. Pamph. Laws, 1880, p. 206; *Clarke v. Trenton,* 20 *Vr.* 349.

If Dr. Browne was not holding over he was absolutely without title and was merely a *de facto* officer and not protected by the Civil Service act.

> "To construe the Civil Service act so as to keep in office one holding such office without right, would subvert the beneficient purposes of that legislation. It is manifest

that its application must be limited to the protection of officers *de jure.*

Salter v. Burk, 83, *L.* 152, 158.

Shalvoy v. Johnson, 84, *L.* 134.

IV.

The act of 1887 *did not operate to repeal the ordinance in regard to the status of the Health Inspector of the Paterson Board of Health.*

If this point be well taken, the result, shortly stated is this: Dr. Browne was elected Health Inspector under the ordinance in 1903 for three years, re-elected in 1906 and, again, in 1909, and, if, as is contended, was not afterward elected, continued to hold over until the passage of the amendment to the ordinance which went into effect Dec. 31st, 1914, or, until the election of Dr. Clay at the first meeting of the Board of Health thereafter in January, 1915.

The following is the opinion of the Supreme Court in its relation to this point:

> "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 and 31 of that act satisfies 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 as least as related to the status of Health Inspector."

It is conceded that were it not for the special provisions hereinafter referred to of the act of 1887, it being a general act embracing the whole subject of Boards of Health, that it was a repealer of prior legislation upon the same subject. But, it is submitted that the act in question carefully permitted such prior ordinances as those upon which the Paterson board relied, (being the same kind of an ordinance, as appears in *Hoel v. Camden, supra,* that Camden and Trenton relied upon) to continue in force.

In 1887 the Legislature passed the act in question. By section 9 it was enacted:

"That there shall be a local Board of Health in every city, * * * which 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 Board of Aldermen * * * may by ordinance provide; provided, however, that in cities containing a population of over one hundred thousand inhabitants such boards may consist of not less than five nor more than nine members. The terms of office of the members of such local boards shall be so arranged that the terms of not more than three members shall expire in any one year."

Section 11 provided:

"That every local Board of Health now existing in any city * * * which is in fact constituted and organized in the manner required 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 required to perform all the duties applicable to local boards mentioned in this act; the members of every such board shall continue in office until the expiration of the terms for which they were originally appointed; every ordinance which has heretofore been passed by any common council or other governing municipal body, creating, establish-

> ing or organizing, or providing for the creation, establishment or organization of such local Board of Health as aforesaid, shall be deemed, held and taken to be of the same force and validity as if it had been passed under the provisions and authority of this act."

The question then is, was the Paterson Board of Health "in fact constituted and organized in the manner required by the ninth section."

The ninth section required the board to be constituted by not less than five nor more than seven members. So did the act of 1880.

It is true that the act of 1880 required that the City Physician, the keeper of Vital Statistics and one Health Inspector should be members of the board, if there were such officer or officers, and that the members should be appointed by the Mayor, and that the act of 1887 makes no such requirements. But that difference is not conclusive, for the reason that under section 9 a Board of Aldermen could require by their ordinance that the members of the board should have the same qualifications as required by the act of 1880, and that they should be appointed by the Mayor. Section 9 gives to the Board of Aldermen the power to provide in their ordinance the *manner of appointment* to the Board of Health. This power, it is submitted, is not exhausted when they declare by ordinance the person who shall appoint the members of the Board

The legislature may lawfully prescribe reasonable qualifications in any person as a condition of his appointment to office. *McCarter v. McKelvey*, 49 *Vr.*, *p.* 3; *S. C., on appeal*, 49 *Vr.*, *p.* 621; *Hudspeth v. Swayze*, 56 *Vr.*, 592, 611.

In the first case, the Chief Justice cites Mr. Justice Peckham as saying, "But would a regulation which created a board of health, and provided that not more than one physician from any particular school, or none but a physician, should be appointed thereon, be arbitrary or unconstitutional as an illegal exclusion from office? I think not."

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the person to be appointed as to the person making the appointment. And such regard has to do with the *manner* of appointment. The word manner is of broad signification. The Century Dictionary defines it as,

> "1. The way in which an action is performed; method of doing anything; mode of proceeding in any case or situation; mode; way; method." ×

Furthermore, it is necessary to give this word, *manner,* the meaning contended for, in order to make the statute of 1887 sensible. The statute, itself, while nowhere making provision for an executive officer of the Board of Health who is to be a member of the board, expressly recognizes such an officer. Section 27 of the act of 1887 provides:

> "That a notice of any inspector of any local Board of Health to abate any nuisance, or by the executive officer or *other* authorized member of said board shall be taken as a notice from the board."

Nowhere in the act of 1887 is power given the Board of Health to appoint an executive officer. Therefore; it must have been contemplated that he would get his authority from the ordinance organizing the board.

Furthermore, in construing the saving section of the act in conjunction with section 27, it is to be considered that the legislature acted in view of existing legislation, and inasmuch as it provided by the saving section that certain ordinances were to remain in force, it legislated with

× As to "manner of appointment" see "Words & Phrases" under "manner"

those ordinances in mind. It now appears that the Paterson ordinance was then in force and that such ordinance made express provision for the appointment of the Health Officer as the executive officer of the Board of Health. Upon this hypothesis, the power conferred upon the executive officer of the board who is a member thereof, by sec. 27, becomes perfectly sensible.

Assuming the ordinance of 1882 to have remained in force until its amendment, Dr. Browne continued to hold office either by election or by holding over; upon this point the character of his title makes no difference. It would seem quite clear, however, that he held office after 1912 as an officer holding over until his successor was appointed as provided by statute. He was not elected after 1909. The attempt to elect him by his own vote in 1912 was a nullity.

It was competent for the board, upon the expiration of Dr. Browne's term, to elect a successor, and two attempts to do so were made. They were both ineffectual. The first attempt at such election was made January 19, 1913. The proceedings of the board thereon are found at pages 18 and 19 of the printed case. At this attempted election Dr. Browne voted for himself. His vote, upon the opinion of the City Counsel, was rejected by the presiding officer. Thereupon, the board, by a vote of 6 out of the 7, laid the election over for one month. It would seem beyond question that Dr. Browne could lay no claim to the office under this proceeding, not only because he had no right to vote for himself, but, also, because *if* he had been elected, the board, at the same meeting, substantially reconsidered its action. But,

as will be shown hereafter, he had no right to vote for himself.

The second attempt at an election occurred on December 23rd, 1913 (Case, p. 20, ll. 10-35). At the time of this attempted election the board consisted of seven members, including Dr. Browne, the Health Inspector (see Ordinance, Case, p. 14, l. 3).

On the evening last mentioned a meeting of the board was held and four members, including Dr. Browne, were present (Case, p. 20, l. 12). The only business that came up before the meeting was the election of Health Inspector. The vote was 3 for Dr. Browne and 1 for Mr. Marsh. Dr. Browne voted for himself.

It is submitted that the action taken at the meeting of December 23rd was ineffectual to elect Dr. Browne as Health Inspector, because there being but four members, including himself, present, the moment the question as to whether Dr. Browne should be elected Health Inspector came up for consideration, Dr. Browne became incompetent to act or vote and, therefore, there being but three competent members of the board present, the quorum was broken. It is also insisted that if Dr. Browne's presence with the other three constituted a quorum at the time of election, that in order to elect him there must have been a majority of lawful votes cast in his favor. He could not vote for himself, therefore he received but two votes, which was less than a majority of four, and insufficient to elect him.

Dr. Browne as a member of the board could not vote for himself. The rule is thus stated in the *Cyclopedia of Law and Procedure*:

> "There is a general rule of law that no member of a governing body shall vote on any question involving his own character or conduct, his right as a member, or his pecuniary interest, if that be immediate, particular, and distinct from the public interest."
>
> 28 *Cyc.*, p. 337.

Manifestly the character of the person to be selected as Health Inspector was an important consideration in his selection, and therefore Dr. Browne was disqualified to pass judgment upon his own character, as every man is disqualified to be a judge in his own cause. He was also pecuniarily interested in a manner distinct from the public, on account of the salary attached to the office.

In conclusion, if for any reason the court should find the amendment to the ordinance, passed in 1914, ineffective to change the status of the Health Inspector under the ordinance of 1882, and we are sustained into our contention that Dr. Browne was holding over, at the time of Dr. Clay's election in January, 1915, we submit that Dr. Clay was lawfully elected to succeed him and should have judgment.

Respectfully submitted,

William I. Lewis,

Of Counsel with Appellant

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals

Thomas A. Clay, *Prosecutor-Appellant,* *vs.* The Civil Service Commission et al., *Respondent-Appellees.*	Certiorari. On Appeal from Supreme Court.

Brief for Appellees.

STATEMENT OF FACTS.

This is an appeal from the judgment of the Supreme Court dismissing the writ of certiorari in the above stated case. The writ appears on page three of the printed case. It is addressed to the Civil Service Commission and commands it to send to the Supreme Court all things touching and concerning a certain proceeding had on the fourteenth day of April in the matter of the appointment of Dr. Thomas A. Clay as Health Officer of the Board of Health of the city of Paterson.

The return to the writ includes certain correspondence between the Chief Examiner and Secretary of the Civil Service Commission and Dr. Alexander Browne, former Health Officer of the city of Paterson, who was replaced by the prosecutor, and also the record of an

investigation conducted by the Civil Service Commission concerning the legality of Dr. Browne's dismissal and Dr. Clay's appointment, and a statement of the opinion of the board, the last paragraph of which is as follows:

> "The appointment of Dr. Clay, which in effect was the dismissal of Dr. J. Alexander Browne, M. D., who had hitherto held the position, was, therefore, illegal and contrary to the provisions of the Civil Service Law. It is therefore ordered that Dr. Browne be reinstated in the position of health officer, from which he has been illegally ousted."

The sole purpose of the writ is to review this opinion of the Civil Service Commission which appellant designates as an order for the reinstatement of Dr. Browne.

This opinion was mailed to the Board of Health by the Civil Service Commission, and in the letter sent with it (Case, page 13, line 30) it is referred to as an opinion, not as an order.

It appears from the State of the Case that the Board of Health did not obey this so-called order; that Dr. Clay is now in office, but that the Civil Service Commission have refused to certify the pay roll with Dr. Clay's name upon it.

The city of Paterson adopted the provisions of the Civil Service Act of 1908 (*P. L.* 1908, *p.* 235), on November 5th, 1912 (Case, p. 35), and the Civil Service Commission placed the position of health officer in the competitive class of the Civil Service (Case, p. 12, line 25).

From the stipulation as to the facts (Case, pages 16 to 30) it appears that the Board of Aldermen of the city of Paterson, on the thirteenth day of November, eighteen hundred and eighty-two, passed an ordinance establishing a Board of Health, pursuant to the provisions of an act entitled "An act concerning the

protection of the public health and the record of vital facts and statistics relating thereto," approved March eleventh, eighteen hundred and eighty (hereinafter referred to as the Act of 1880), and "An act relating to local boards of health," approved March twenty-second, eighteen hundred and eighty-one (hereinafter referred to as the Act of 1881). Section one of the Act of 1880 (*P. L.* 1880, *page* 206) provided that the Health Inspector of the city should be a member *ex officio* of the Board of Health. The ordinance establishing the Board of Health pursuant to the Act of 1880 also provided that the Health Inspector should be a member *ex officio* of the Board of Health. By this ordinance the Board was also required, within ten days after the ordinance should go into effect, to appoint a Health Inspector (Case, page 17, sec. 6, line 28); that he should be the executive officer of the Board of Health and should enforce the health ordinances of the city, and investigate and examine into all complaints of nuisances made to him, or which should come under his notice, etc., and should perform such duties as are required of him by the Board of Aldermen, or by the Board of Health.

It further appears that, under this ordinance, the defendant, Browne, was elected Health Officer for a term of three years, and was subsequently re-elected at various times for the term of three years, one re-election occurring on November 12th, 1909.

No action seems to have been taken on the question of the election of a successor to Dr. Browne after the expiration of three years from November 12th, 1909, until January 14th, 1913, when an attempt was made to elect a successor to Dr. Browne, which resulted in the re-election of Dr. Browne on December 23d, 1913, for the unexpired term.

On December 7th, 1914, the Board of Aldermen of Paterson passed an ordinance which provides that the Board of Health of the city of Paterson should con-

sist of ten members; that three of the appointments to be made under that ordinance were to be of members to take the place of the Registrar of Vital Statistics, Health Inspector and City Physician, who were members *ex officio* of the Board established pursuant to the old ordinance above referred to, and provided that no person holding any office or position in the city of Paterson should be appointed a member of the Board of Health.

On the 12th of January, as shown by the minutes of the meeting of the Board of Health of that date (Case, page 21), the Board proceeded to elect a Health Officer, and, notwithstanding the protest of Dr. Browne, the incumbent, elected the prosecutor as Health Officer for a term of three years.

The Supreme Court held that Dr. Browne was protected in his tenure of the office or position by the Civil Service Law and the classification thereof; that, consequently, Dr. Clay could not lawfully be appointed thereto, and that no legal injury had been done him by the order complained of, and dismissed the writ.

The appellant contends that certiorari is the proper remedy; that the term of Dr. Browne, as Health Inspector, or Health Officer, is fixed by law, and, therefore, he was not protected in his tenure of office by the Civil Service Act; that the Civil Service Act does not affect the tenure of one who is holding over in office; and that the Act of 1887 did not operate to repeal the ordinance of the city of Paterson in regard to the status of a health inspector of the Paterson Board of Health.

These contentions will be considered in the order named.

ARGUMENT.

I.

The So-called Order of the Civil Service Commission is Not Such an Order as is Reviewable by Writ of Certiorari.

It was argued before the Supreme Court that the so-called order of the Civil Service Commission was not such an order as is subject to review by writ of certiorari. It appears that the Civil Service Commission, for the purpose of obtaining information and in response to the defendant Browne's request, conducted a hearing or investigation as it is authorized to do by the third and fourth subdivisions of section eight of the Civil Service Act (3 *Comp. Stat.* 3797).

At the conclusion of this hearing the Commission reached a conclusion which was embodied in the opinion above referred to. This hearing, however, was a mere investigation, conducted by the board for its own information, and the so-called order was a mere expression of opinion on the part of the board as to the requirements of the law as applied to the facts before them. It was so treated by the Civil Service Commission, for in transmitting it to the Board of Health they designate it as the opinion of the Commission. Case, p. 13. It is not an order either in form or substance. The record discloses no official action by the Board which could legally in any way prejudice the rights of the prosecutor. The Board of Health, in fact, refused to concur in this opinion, and Dr. Clay is still in office.

It appears, however, that the Civil Service Commission have refused to certify the pay roll containing Dr. Clay's name, and it is claimed that this opinion of the Commission is in some way preventing the

prosecutor from securing the emoluments of this office or position, and that, therefore, he is entitled to the use of the writ of certiorari to remove this so-called order out of his way, under the doctrine of *Loper* v. *Millville,* 53 *N. J. L.* 364, and *Du Four* v. *State Superintendent,* 72 *N. J. L.* 374.

This contention, however, is based upon a misapprehension of the character and effect of the so-called order of the Civil Service Commission. This Commission is not given authority to make orders with regard to the appointment, removal or reinstatement of employees. It is however, authorized to make investigations, either sitting as a body or through a single commissioner (3 *Comp. Stat.* 3797). It is evidently the purpose of the statute that these investigations shall be conducted for the purpose of securing information so that the Commission may properly exercise its statutory powers.

The making of this so-called order, therefore, was nothing but an expression of opinion, based upon the investigation conducted. The action of the Commission in refusing to certify the pay roll containing Dr. Clay's name is based, not upon the so-called order, which the prosecutor is now seeking to set aside, but upon the opinion therein expressed.

Section twenty-six of the Civil Service Act (3 *Comp. Stat.* 3805) provides that any officer, clerk, employee, etc., entitled to be certified by said Commission * * * as having been appointed or employed in pursuance of law, and of the rules made in accordance with this act, who shall be refused such certificate, may maintain a proceeding by mandamus to compel such commission to issue such certificate. This provides a remedy for the precise situation in which the prosecutor is placed.

If the prosecutor was appointed pursuant to law, the Civil Service Commission have wrongfully refused to certify the pay roll containing his name, and for this refusal he is entitled to remedy by mandamus. In the prosecution of this remedy he will in no wise be em-

barrassed by the previous expression of opinion by the Civil Service Commission.

This is the view taken by the Supreme Court in the recently decided case of *Mayor and Common Council of Newark* v. *Fordyce et al.*, November Term, 1915, decided March 9, 1916, not yet reported. This case arose on writ of certiorari directing the Civil Service Commission to certify to the Supreme Court their action adjudging that a certain resolution of the Board of Fire Commissioners, reducing five battalion chiefs to the rank and salary of captains, was without legal power. The return certified the opinion of the Civil Service Commission to the foregoing effect, based upon an opinion of the Attorney-General. The Supreme Court, by Mr. Justice Garrison, said:

> "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. (Citing cases.) The interest of the prosecutors in the opinion of the Civil Service Commission is that it is at variance with that upon which the Board of Fire Commissioners acted in demoting the five chiefs, and by this writ we are in effect asked to decide which opinion is correct. 'The writ of certiorari cannot be used to draw judicial opinions in advance, or to affect adjudications of subordinate tribunals.' "

The return in the above case also brought up a resolution in the following words:

> "Resolved, that the refusal of the president of the commission to certify to the pay roll of the five battalion chiefs, to wit, Thomas S. Reilley, Charles C. Stroch, James Fagan, Jr., Michael J. Durkin and Cornelius Smith, listed

as captains for service from June 15th to July 31st, is hereby ratified;

And be it further resolved, that the president of the commission continue to refuse certification to such pay roll.

(Signed) GARDNER COLBY,
Chief Examiner," etc.

Speaking of this resolution, the Court further said:

"The prosecutors are not affected by this resolution excepting in the respect just considered, viz., that it clashes with the action based upon the opinion of the Board of Fire Commissioners. The persons whose rights are affected by the resolution are those whose pay as captains is denied certification."

After adverting to the fact that the only one of those persons who was a party to the proceeding insisted that the resolution of the Civil Service Commission was right and that the attitude of the other four did not appear, the Court further said:

"What the attitude of these four is we have no means of knowing, but if they wish to obtain the certificate denied by the resolution their action must be by mandamus, directed to the Civil Service Commissioners, under section 26 of the act (C. S. 3895); on the contrary, if the demoted chiefs wish to challenge the action of the Board of Fire Commissioners, it must be by an action instituted by them against that body."

It is apparent that the real object of this proceeding is to draw from this Court an expression of opinion as to the legality of the refusal of the Civil Service Commission to certify the pay roll. The futility of the proceeding for any other purpose is apparent.

The provision of the statute that any employee who is entitled to be certified may obtain a mandamus to compel such certification is plain and unconditional. The appellant is no more embarrassed in pursuing this

remedy by the so-called order of the Civil Service Commission than he would be by an opinion of the Attorney-General of the State or the city counsel of the city of Paterson to the same effect. His claim to the office is derived from the action of the Board of Health, not from the action of the Civil Service Commission. This Commission is entirely without authority to appoint, remove or reinstate the appellant or any employee of the Board of Health, and they have not attempted to do so. If, in this proceeding, the so-called order should be set aside, the legal position of the prosecutor would be the same thereafter as it is now. See *Watson* v. *Medical Society,* 38 *N. J. L.* 381; *Livingston* v. *Rector, &c., of Trinity Church,* 45 *N. J. L.,* 232; *Drake* v. *Plume,* 44 *N. J. L.,* 362; *Gouldey* v. *Atlantic City,* 63 *N. J. L.* 538; *Reynolds* v. *West Hoboken,* 63 *N. J. L.* 497.

The writ in this case does not bring up for review the action of the Civil Service Commission in classifying the office or position of Health Officer in the competitive class of the classified service; neither does it attempt to review the action of the Commission in refusing to certify the pay roll, as was attempted in the case of *Newark, &c.,* v. *Fordyce, supra.* As above stated, it merely brings up the opinion of the Commission.

The cases cited by appellant on this point refer to the rule announced in *Loper* v. *Millville,* 53 *N. J. L.* 363, as follows:

> "A certiorari is an appropriate remedy to remove out of the way of a prosecutor, in possession of and therefore presumptively entitled to an office, any order, resolution or other action adverse to his rights, which may be unlawfully used to disturb him in the possession and enjoyment of such office or its emoluments."

This rule has no application to this case, however,

for the reason that the so-called order of the Civil Service Commission can in no way be used to disturb the appellant in the possession and enjoyment either of his office or its emoluments.

Assuming that the appellant is rightfully in office, it is admitted that he has been disturbed in the enjoyment of the emoluments of his office, but this disturbance has not occurred by reason of the so-called order of the Civil Service Commission, but solely because of their refusal to certify the pay roll, and for this refusal, if wrongful, an ample remedy is provided by statute. See *Newark, &c.*, v. *Fordyce, supra.*

The judgment of the Supreme Court, dismissing the writ of certiorari, should, therefore, be affirmed regardless of the merits of the controversy.

II.

The Term of Health Inspector 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 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 ap-

pointed by both branches of the Legislature, election officers, assistant prosecutors of the pleas, heads of departments, members of commissions and boards, appointments of the mayors of municipalities, law officers of any municipality that may adopt the provisions of the act, officers, non-commissioned officers, 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* v. *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 *Fagan* v. *Morris,* 83 *N. J. L.* 3, and in *Walker* v. *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 employee 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.

The Supreme Court in this case held, however, that it did not appear in the State of the Case that the Board of Health had fixed a term for the office of Health Officer of the City of Paterson.

Counsel for appellant quotes from the opinion of the Supreme Court on this point as follows:

> "We consider, then, that Dr. Alexander Browne's original appointment in 1903 rested in law on section thirty-one 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.*"

and challenges the correctness of this view.

He argues that the motion adopted by the board electing Dr. Browne as Health Officer for the ensuing term of three years (Case, page 20, line 10), and a similar motion adopted on the 12th of November, 1909, operate to fix the term of Health Officer for the period named in the notice. No other action of the board fixing the term of Health Officer appears in the State of the Case.

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 Inspector should be a member of the board. Section eleven of the Ordinance of 1882 (Case, page 18) fixed the term of Health Inspector 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 Inspector, 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 ordinance term as Health Inspector, and was not an attempt to fix his term as Health Officer.

Assuming that the Supreme Court was right in de-

termining 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 Inspector should be a member of the board, it is apparent that the limitation imposed by the ordinance and by the statute of 1880 upon the term of office of a member of the board, no longer applied to the Health Inspector. Since, therefore, the motion appointing Dr. Browne did not fix his term, but rather referred either to a supposed statutory 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 under section 31 of the Act of 1887.

III.

It is Immaterial Whether the Defendant, 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 23d, 1913 (see Appellant's brief, page 24); that, therefore, at the time the Civil Service Act was adopted in the city of Paterson on November 5th, 1912, the appellee, Brown, was holding over in office after the expiration of his term and cites the statute (1 *Comp. Stat.* 619, § 105), providing that municipal officers elected for a precise and determined period shall continue to hold office until the appointment and qualification of their successors. He insists that, therefore, Dr. Browne was merely a *de facto* officer, and cities *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 the defendant, 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 29 *Cyc.*, 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 produce a vacancy which may be filled by the authority having the power to appoint to fill vacancies."

The appellee, Browne, therefore, was a *de jure* officer on the date of the adoption of the Civil Service Act by the city of Paterson.

IV.

THE PROVISIONS OF THE HEALTH ACT OF 1880, AND OF THE ORDINANCE OF THE CITY OF PATERSON OF 1882 REGARDING THE STATUS OF THE HEALTH INSPECTOR OF THE CITY OF PATERSON WERE REPEALED BY THE ACT OF 1886.

The Act of 1886 (*P. L.* 1886, *p.* 280) assumed to provide a scheme for the establishment of the State Board of Health and local boards of health within this State. By section forty-four 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; 2 *Comp. Stat.* 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 boards 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 duties 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 inspector, 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 inspector, 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 inspector. 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 Inspector a member *ex officio* of the board. The statutes then in force undoubtedly contemplated the appointment by the board of subordinate officers and employees 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, § 56 *to* 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 has been a distinct and separate office from the office of member of the Board of Health 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, § 58).

It is apparent, therefore, that since the passage of the Act of 1886, the office of health inspector 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 inspector 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.

Counsel for appellant contends that it was so constituted and organized. The fact, however, that under the ordinance of 1882 the Health Inspector was a member of the board, and that under the Act of 1887 the position of Health Officer was one which was incompatible with membership in the board, discloses that the two schemes of organization are inconsistent.

Counsel further contends that if we assume that the ordinance of 1882 remained in force until its amendment Dr. Browne was not legally in office at the time

the Civil Service Law was adopted in the City of Paterson, because, as he says, the attempted election of a health officer held in 1912 was rendered invalid by Dr. Browne's presence at and participation in the election.

As argued under Point II, it is entirely immaterial whether Dr. Browne's election in 1912 was valid or invalid. If such election in 1912 was valid, it is conceded that he was in office at the time the Civil Service Act was adopted by the City of Paterson. If his election was invalid he held over because no successor was elected and qualified, and he was an officer *de jure* by virtue of the statute providing that municipal officers shall hold office after the expiration of their term until their successors are chosen and qualified.

This argument of counsel for appellant is based upon the assumption that at that time Dr. Browne had a fixed term. If, however, as seems to be the case, he was acting as health officer under the Act of 1887, for which office no term had been fixed by the board, the question of the validity of his election in 1912 is of no importance.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed for the reasons stated by the Supreme Court, as well as for the reasons above stated.

JOSIAH STRYKER,
JOHN W. WESCOTT,
Attorney-General,
Attorneys for Respondents.

New Jersey Court of Errors and Appeals

THOMAS A. CLAY,
Prosecutor-Appellant,

vs.

THE CIVIL SERVICE COMMISSION, et als.,
Defendants-Respondents.

Brief on Behalf of Dr. J. Alexander Browne.

Statement of Facts.

This case involves a dispute between Dr. Thomas A. Clay, the prosecutor-appellant, and Dr. J. Alexander Browne, for the possession of the position of health officer of the city of Paterson.

The contest for this office arose as the result of the action of the Paterson Board of Health, in declaring the office vacant, although actually held by Dr. Browne, and then *electing one of its commissioners*—Dr. Clay to the office. The "election" was held January 12th, 1915.

Thereupon, Dr. Browne appealed to the State Civil Service Commission. After a hearing, the Civil Service Commission rendered a decision in favor of Dr. Browne, and held that "The appointment of Dr. Clay which in effect was a dismissal of J. Alexander Browne, M. D., who had theretofore held the position, was therefore illegal and contrary to the provisions of the Civil Service Law." The re-instatement of Dr.

Browne was ordered. Dr. Clay, the prosecutor seeks by these proceedings to review this finding of the Civil Service Commission.

The Supreme Court in an opinion filed at the November Term, 1915, upheld the Civil Service Commission. The prosecutor, Dr. Clay appeals from the decision of the Supreme Court.

POINT I.

The Prosecutor (assuming for the purpose of argument that there was a vacancy) was not legally elected Health Officer and therefore cannot prosecute the Writ of Certiorari.

It is conceeded by the agreed facts (*P*.23-26) that at the time of the alleged election of Dr. Clay, as health officer, he was a member of the Board of Health, This of itself was sufficient to render him ineligible for the position of health officer. By chapter 140 of the laws of 1885, which was an Act entitled: "An Act relating to elections and appointments to office hereafter to be made by any board of aldermen, common council, township committee or other municipal board or body".

By that act it was provided that "NO MEMBER OF ANY BOARD OF ALDERMEN, COMMON COUNCIL,TOWNSHIP COMMITTEE OR OTHER MUNICIPAL BOARD OR BODY SHALL DURING THE TERM FOR WHICH HE SHALL HAVE BEEN ELECTED SUCH MEMBER, BE ELIGIBLE FOR ELECTION OR APPOINTMENT TO ANY OFFICE"&C. "TO BE FILLED BY SUCH BOARD, COUNCIL, COMMITTEE OR BODY."

This act up to the time of the pretended election of Dr. Clay, was never altered, amended or repealed.

Reference is made to page 23 and 26 the agreed facts of the printed case, to show that there is no dispute on the question. Commissioner Clay merely asked to be excused from voting.

It is insisted that if the election of Commissioner Clay was indirect violation of law, it was a nullity, and in consequence, he may not challenge the action or ruling of the Civil Service Commission.

The effect too, would be, that Dr . Browne would continue to hold office pending the legal election of his successor.

POINT II.

There is no statutory provision that the term of Health Officer shall be three years, as alleged in the first reason of the Prosecutor.

The prosecutor gives as his first reason in support of the certiorari: "Because the term of office held by J. Alexander Browne was for three years." Yet the Civil Service Commission in considering this question at the time of the classification of the various municipal offices in the city of Paterson, took the matter up with the Attorney General of the State and received from him an opinion which is set out in the state of case at page 13. The Attorney General there effectively disposes of this question as to whether or not the position of health office was for a definite term.

The ordinance adopted in 1882, by the city of Paterson by which the first board of health was established provided for the appointment of each member of the Board for three years, and included in the membership, the health inspector, (state of case P. 2-line 1-10). In 1887 (Comp. Stat. P

2667 to 2670) however, the Legislature passed an Act (Chapter 68-P. L. 1887-p 80) which provides amongst other things for the organization of local boards of health. By section nine of this act it was provided, that there shall be a local Board of health in every city, town, borough &c., composed of not less than five and not more than seven members. By section 11, it was provided that every local board of health then existing in any city, town, borough &c., "shall be deemed, held and taken to be a local board of health, created under the provision of this act, and every such board of health created under the provision of this act, and every such board is hereby perpetuated and continued, and is hereby authorized without organization to exercise all the powers required to perform all the duties applicable to local boards mentioned in this act; THE MEMBERS OF EVERY BOARD SHALL CONTINUE IN OFFICES UNTIL THE EXPIRATION OF THE TERM FOR WHICH THEY WERE ORIGINALLY APPOINTED."

In providing for the creation of the new board of health, section 9. as well as the rest of the act, is absolutely silent as to the inclusion within the board of health inspector. On the contrary, by section 31, it is specifically provided that the local boards of health shall have power to appoint subordinate officers and agents to carry into effect the powers hereby conferred, and included in these offices that in every such town or borough containing more than two thousand inhabitants there shall be at least one inspector, APPOINTED BY SUCH BOARD. (P. L. 1887-p. 94-Sec 31). By this section his duties were defined by the Board of Health. Nothing is said as to the extent of the term of office of such inspector, and

as his appointment is under Section 31 included with "subordinate officers and agents, and appointees" and as his powers and duties were to be defined by the Board, it would seem that the only conclusion to be drawn, is that the health inspector was a subordinate employee, without a fixed term.

The ordinance of 1882 by which the Paterson Board of Health was first created does not state that the term of health officer shall be three years, but provided that the term of each member of the board shall be three years, and that the health officer or health inspector shall be a member of the board. Of course so far as his right to sit in the Board is concerned, it might be argued, that the term of each member of the board is to be three years, and the health officer or inspector shall be an exofficio member of the board, that his term would be thereby fixed for three years. The effect, however, of this act, was that health inspector held two distinct offices, viz, Health Commissioner and Health Inspector.

The effect of the act of 1887 was to leave the situation in this wise: That the Board of Health of Paterson might continue to allow this health officer or health inspector to sit as a member of the Board, if so appointed, in which event his appointment as Commissioner, would run for the term of three years, but his employment as health inspector or health officer would be by virtue of this act of 1887, and therefore, his presence on the board would be as a Commissioner, but his work would be that of an employee. We may say in passing that by the state of case, it is stipulated that the term of health officer and health inspector are interchangeable terms. (state of case p. 27).

That our view is correct, that a health officer is not necessarily a member of the Board of Health was the conclusion of the Attorney General in his opinion to the Civil Service Commission, under date of January 4th, 1913 and referred to in the state of case (p. 13).

> "It is my judgment, therefore, that there is no statutory provision which requires a health officer of the Paterson Board of Health to be a member of the Board, and that he should therefore be classified in the competitive class of the classified service."

If therefore, there is no statutory provision fixing the term of office of the health officer, his holding of office would therefore be undetermined, and therefore, he would fall within the protective classification of the Civil Service Act.

POINT III.

The second and third reasons advanced by the Prosecutor are necessarily involved in the discussion under Point II. and will not be considered further.

POINT IV.

The Respondent Dr. Browne was validly elected to the office involved.

This involves the fourth reason, which is that J. Alexander Browne, M. D., was never elected to or held the office held by the Prosecutor.

If by this reason, it is contended that Dr. Browne was not elected each three years following his original election of 1903, then the discussion is involved in point II, it being the contention of the Respondent that he does not and never did hold his office for a fixed term.

It does appear by the stae of case (p. 5), by stipulation therein (third), "That on the 10th day of November A. D., 1903, said J. Alexander Browne, was duly appointed as such Health Inspector, accepted the office and entered upon the discharge of his duties;" and that in November 1906 (p. 6, L. 10) Dr. Browne, "was again duly appointed Health Officer;" and "that on the 12th day of November, 1909, said Dr. Browne was again appointed by said Board of Health for the term of three years."

It will be seen of course, that no question can be raised that in the year 1903, the Board of Health appointed Dr. Browne to the position of Health Officer or Health Inspector, and in 1906 and in 1909 confirmed this appointment. It is

immaterial that they designate each time his appointment for three years. The construction of this group of laymen as to the meaning of the ordinance of the City of Paterson, 1882, and the Act of the Legislature, 1887, can have no binding force, either upon themselves, upon the Civil Service Commission, nor upon this court.

We insist that it does sufficiently appear in the case that at the time the Civil Service Act went into effect in the City of Paterson that Dr. Browne was actually holding the position of Health Officer or Health Inspector (terms interchangeable) (p. 15).

Incidentally Dr. Browne in 1912 was again elected for a term of three years, as legally as the election of the present incumbent, Dr. Clay. It appears by the state of case, page 7, that at an election held January 14th, 1913, Dr. Browne received a majority of the vote, but on the advice of the City Counsel, his vote was ruled out on the ground that he had not authority to vote for himself. This ruling of the president of the board left him without a majority. But it is by the reverse of this ruling that the present incumbent holds his office, as we have already discussed under point 1. To hold that Commissioner Clay who sat at an election when he was a candidate for a position, was legally elected, is to in effect legalize the election of Dr. Browne, of January, 1913.

POINT V.

The Prosecutor Dr. Clay was not legally elected to hold the office of Health Inspector.

Under this is discussed the fifth reason advanced by the attorney of the prosecutor, viz., "Because the prosecutor was legally elected to hold the office of Health Inspector." The discussion of this point is necessarily involved in the discussion of points one and two.

We reiterate that Dr. Clay was not legally elected to the office, assuming that there was a vacancy, as being a member of the commission, he could not be elected to fill any office to be filled by the board, as such action would be in violation of Chapter 140 of the laws of 1885, and referred to in point one.

We insist further that there could be no legal election if there was no vacancy. That there was no vacancy we refer this court to the discussion of the subject under point two.

The remaining reasons assigned by the prosecutor are considered in the brief filed by the attorney-general on behalf of the Civil Service Commission, and will not be further considered here.

CONCLUSION.

We believe that a careful consideration of this case must lead to only one conclusion, viz: that the Civil Service Commission, in the classification by which it placed the position of Health Inspector or Health Officer in the protective class was entirely justified. Conceding for the purpose of argument that there is some doubt or difficulty respecting the classification of the position, yet weight should be given by this court to the careful investigation that the Civil Service Commission must have given to this question. The members of this commission are men of experience and specialists on the question of the classification of various kinds of employment and guided from time to time by the Attorney General of the State, as to the law, they must have been strongly impressed with the fact that this position was protected by the Civil Service act. It was not the only time that they were obliged to rule on this question, as in each municipality, which adopted the Civil Service Act, they were obliged, to classify the position of Health Inspector. And their ruling in the case at bar was the same in the classification of the Health Inspector in the County of Hudson; Village of South Orange; Cities of Elizabeth, Jersey City, East Orange and Trenton.

The effect of the court's ruling that the action of the Board of Health in ousting Doctor Browne because the position was not protected by the Civil Service Act is to upset the classification of all the municipalities just enumerated.

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

Respectfully submitted,

WARD & McGINNIS,

Attorneys for and of counsel with respondent, J. Alexander Browne.

March Term, 1916.

INDEX

(Filed January 16, 1916)

New Jersey Supreme Court

Thomas A. Clay, Prosecutor, vs. The Civil Service Commission of the State of New Jersey, The Board of Health of the City of Paterson, N. J. and J. Alexander Browne, Respondents.	*On Certiorari.*

10

Notice of Appeal.

To John W. Wescott, Esquire, Attorney General and Josiah Stryker, Esquire, Attorneys of the Civil Service Commission of the State of New Jersey.

20

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.

Wm. I. Lewis,
Attorney for Prosecutor and Appellant

30

NEW JERSEY SUPREME COURT.

(Filed January 16, 1916)

Thomas A. Clay, Prosecutor, vs. The Civil Service Commission of the State of New Jersey, The Board of Health of the City of Paterson, N. J. and J. Alexander Browne, Respondents.	*On Certiorari.*

10

Notice of Appeal.

20

To Messrs. Ward & McGinnis, Attorneys of The Board of Health of the City of Paterson, N. J. and J. Alexander Browne.

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.

Wm. I. Lewis,
Attorney for Prosecutor and Appellant.

30

NEW JERSEY SUPREME COURT.
(Filed)

Thomas A. Clay,
Prosecutor,

vs.

The Civil Service Commission of the State of New Jersey, The Board of Health of the City of Paterson, N. J. and J. Alexander Browne,
Respondents.

10

Writ of Certiorari.

20

Wm. I. Lewis,
Atty. of Prosecutor,
9 Colt Street,
Paterson, N. J.

I allow the within writ. Let it be sealed.
Dated, April 19, 1915.

James F. Minturn,
J. S. C.

New Jersey to Wit:

The State of New Jersey, to the
(L. S.) Civil Service Commission of New Jersey, Greeting:

30

We being willing, for certain reasons, to be certified of a certain proceeding of the Civil Service Commission of the State of New Jersey, had on or about the fourteenth day of April, A. D. nineteen hundred and fifteen, in the matter of the ap-

pointment of Dr. Thomas A. Clay as Health Officer of the Board of Health of the City of Paterson,

We do command you, that the aforesaid proceeding, together with the minutes, and all other matters and things touching and concerning the said proceeding, fully and entirely as before you they remain, be certified and sent to our Justices
10 of the Supreme Court of Judicature at Trenton, on the seventh day of May, next, together with this writ, that therein may be done what of right and according to the laws of the State should be done.

Witness: William S. Gummere, Chief Justice of our New Jersey Supreme Court, at Trenton, this nineteenth day of April, A. D. nineteen hundred and fifteen.

WILLIAM C. GEBHARDT,
20 Clerk.

WM. I. LEWIS,
Attorney.

Return to Writ.

The Civil Service Commission in obedience to the command of the within writ does hereby certify and send to the Justices of the Supreme Court of Judicature within mentioned the minutes of
30 the said commission, concerning the appointment of Thomas A. Clay as Health Officer of the Board of Health of the City of Paterson and all other matters and things touching and concerning the said appointment as fully as they remain before

the said commission as within it is commanded.
Dated May 7, 1915.
(Seal)

Civil Service Commission,
By GARDNER COLBY, (Seal)
Secretary.

Schedule.

1. Letter of J. Alexander Browne, addressed to Gardner Colby, Chief Examiner and Secretary of the Civil Service Commission, complaining of removal. 10

2. Stenographic notes of proceedings of hearing granted by Civil Service Commission to Browne, at which Prosecutor Thomas A. Clay and J. Alexander Browne both appeared by respective counsel.

3. Extract from minutes of Civil Service Commission, containing order for Browne's reinstatement as Health Officer.

4. Copy of letter sent to Board of Health of Paterson, enclosing copy of above mentioned order. 20

Board of Health
City of Paterson, N. J.,

January 13, 1915.

Gardner Colby,
Chief Examiner and Secretary,
Civil Service Commission, 30
State of New Jersey,
State House, Trenton, N. J.

Dear Sir:

At a meeting of the Board of Health of the City of Paterson, New Jersey, held in the rooms

of the Board, Tuesday, January 12, 1915, the members of the board, consisting of two members, whose terms of office have not expired; two members re-appointed and six new members appointed by the Mayor (all ten members excepting one re-appointed member, being Republican in politics), passed a motion to go into the election of a Health Officer, a position which I have held for the past eleven years. This motion was car-
10 ried and Dr. Thomas A. Clay was nominated and declared elected, by the newly elected President of the Board of Health.

This was done after the City Counsel, Mr. Edward F. Merrey, had given the following opinion at the request of Commissioner James J. Mahar:

> "I can give you the opinion right now, I have already given you a written opinion,
> 20 'that the position has been classified by the Civil Service Commission.' The position is now in the competitive class. I have never heard why such a classification is improper. The term is indefinite and depending upon good behavior."

He also stated that the Attorney-General's office had already given an opinion of the same character.

30 I entered the following protest in writing before the ballot for Dr. Clay was taken and also stated that there was no vacancy and than an election for a health officer could not be legally held.

To the President and Members of the Board of Health, Paterson, N. J.

Gentlemen:

Having heard rumors to the effect that your body was contemplating my removal as Health Officer, I hereby enter this formal protest against any such action on your part for the following reasons, viz:

First—That it would be a direct violation of the decision of the Civil Service Commission of the State of New Jersey made by it, on or about December 15th, 1912, by placing the Health Officer of Paterson, N. J., in the competitive class of the Civil Service.

Second—That it would be a direct violation of the decision rendered by the Attorney General of the State of New Jersey to Gardner Colby, Secretary and Chief Examiner of the Civil Service Commission of the State of New Jersey and transmitted by him, (Gardner Colby) to me in writing under date of January 6th, 1913.

Trenton, N. J., January 6, 1913.

J. Alex. Browne, M. D.
Health Officer, Paterson, N. J.

Dear Sir:

I desire to advise you that we have received an opinion from the Attorney General's department to the effect that there is no statutory provision requiring that a health officer of the City of Paterson be a member of the Board of Health, but that the position can be properly placed in the competitive class, in which class the Civil Service Commission classified your position, pending

the information which we have now received from the Attorney General's department.

Yours very truly,
(Signed) GARDNER COLBY,
Chief Examiner and Secretary.

Third—That it violates the written information conveyed by the City Counsel of the City of Paterson, N. J., in a communication to the Board of
10 Health, dated March 23rd, 1914, "Since, however, this officer now holds for an indefinite term" (communication relating to the health officer).

Fourth—That it would be a violation of the statutes of the State of New Jersey as outlined in chapter 156, laws of 1908, approved April 10th, 1908, entitled, "An act regulating employment, terms and discharge of certain officers and employees of this State, and the various counties and municipalities thereof, and providing for a
20 Civil Service Commission and defining its powers and duties." Sections Nos. 14, 17 and 24 of the above law being violated.

Finally—I would request of your body, what your reasons are for attempting my removal.

Respectfully submitted,
(Signed) J. ALEX. BROWNE, M. D.
Health Officer.

Assistant Attorney General Gaskill's opinion
30 to Civil Service Commission, printed in Paterson Press, under date of January 4th, 1913.

I would further present the following:

"With reference to your inquiry as to the proper classification of the health officer of the City of Paterson, I note that you state that this position is classified in other municipalities in the

competitive class, but that in Paterson the health officer is also a member of the Board of Health and is appointed for a definite period as a member of the board. This situation arises from the fact that the Health Board of Paterson was organized prior to the act of 1887, and under a previous act. Section 11 of this act, however, provides that any Board of Health then existing in any city shall be continued under the authority of this act. Section 58 of this act provides that any person licensed as a Health Officer shall be eligible to appointment as such officer by any local Board of Health.

It is my judgment, therefore, that there is no statutory provision which requires a health officer of the Paterson Board of Health to be a member of the board and that he should, therefore, be classed in the competitive class of the classified service.

(Signed) J. Alex. Browne, M. D.
Health Officer.

There were never any charges of any character made as regards my efficiency or behavior, the president of the board, when asked by me, the reason for the election, stated, it was, "because there was a vacancy." Several members of the board admitting to me and to others, that there was no personal feeling in the matter against me, but that it was purely a political move.

I therefore enter this protest that you may present it before the Civil Service Commission, for their consideration.

Feeling positive that the decision of your honorable body which was upheld by the Attorney General's office will not be reversed by a few in-

experienced men, acting, possibly for political or other reasons, I remain,

Very Respectfully,

J. Alex. Browne, M. D.

Health Officer, Paterson, N. J.

Hearing in the case of Health Officer Browne, of Paterson, February 10, 1915, Court House, Paterson.

Judge Lewis appeared in behalf of Dr. Thomas A. Clay.

Senator Peter J. McGinnis appeared in behalf of Health Officer Browne.

By Judge Lewis.

The Assistant Attorney General simply stated a conclusion, and did not state a reason for it. I think it was not well advised. He evidently supposed that he was dealing with the position of health officer that is referred to in the statutes. Our health officer shows that so far as the health officers of New Jersey are concerned, the position is really an anomalous position, and requires consideration of all legislation concerning the organization of the Board of Health.

The Legislature in 1880 passed an act which provided that there should be boards of health in cities, and those boards should consist of several members, one should be a physician, registrar of vital statistics, and another should be a Health Inspector, and the statute provided that they should hold office for a term of three years, and also provided that the board of health should be organized by an ordinance of the Board of Aldermen, and the ordinance was accordingly passed, and under that ordinance and under the act, this

very curious situation arose, that it became the duty of the Board of Health of Paterson to name the City Health Officer, and that their officer, whom they named was in turn to become a member of the Board of Health, and with a term of three years. Under the law of 1887 concerning public health, it was provided that wherever there was a board organized in any city of the State, in substantial conformity with the act of 1887, that that board organized as it was, should continue in existence under this ordinance, and therefore the Board of Health of Paterson has its foundation to-day on that act of 1880, and the ordinance passed under it, and has added to its powers the various powers of 1887.

Now, that being the situation, you see the health officer of Paterson does not hold his office under the general health laws of New Jersey. He is not the kind of health officer referred to in the statutes, but this Health Inspector, by virtue of the act of 1880, and by virtue of the ordinance passed under it, and by virtue of the continuing act of 1887, has held office for a period of three years. Accordingly, the position taken is that Dr. Browne has a term and it expired. I am not sure whether it expired at the time it was filled or sometime before.

By Senator McGinnis.

I have before me the pamphlet laws now. I am informed that all of these points were presented to the Attorney General and he took the opposite conclusion to Judge Lewis. I feel that under the circumstances, there is nothing for this commission to do in view of the classification, and the opinion of the Attorney General.

Judge Lewis' remedy should be to seek his relief in the courts.

By Judge Lewis.

I think Dr. Browne held office by virtue of the quorum of which he was a member.

By Mr. Merrey.

I think Dr. Browne asked the board to re-elect him, which might have been before the classification came in. The motion was put, and the question was asked whether he could vote for himself, and the matter dragged along until a meeting at which I was not present, and I have some sort of a recollection he voted for himself. If he held over, it was because of the classification.

By Senator McGinnis.

His taking a further assurance could have no bearing as the actions of the individual cannot overrule the law. We hold that by virtue of the classification, he is protected.

(Briefs to be submitted.)

At the meeting held on April 13, the Commission rendered its decision as follows:

The position of Health Officer in the City of Paterson was classified by the Civil Service Commission in the competitive class of the classified service in accordance with an opinion rendered by the Attorney General, Edmund Wilson, on December 31st, 1912, as follows:

"With reference to your inquiry as to the proper classification of the Health Officer in the City of Paterson, I note that you state that this position is classified in other municipalities in the competitive class but that in Paterson the Health Officer is also a member of the Board of Health

and is appointed for a definite period as a member of the Board. This situation arises from the fact that the Health Board of Paterson was organized prior to the Act of 1887, (2 Compiled Statutes, page 2656) under a previous act. Section 11 of this Act, however, (Compiled Statutes, page 2663) provides that any Board of Health then existing in any city, etc., shall be continued under the authority of that act. Section 58 of this act provides that any person licensed as a Health Officer shall be eligible to appointment as such officer by any local board of health. It is my judgment, therefore, that there is no statutory provision which requires a Health Officer of the Paterson Board of Health to be a member of the Board and that he should, therefore, be classified in the competitive class of the classified service."

The appointment of Dr. Clay which in effect was a dismissal of J. Alexander Browne, M. D., who had hitherto held the position, was, therefore, 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 has been illegally ousted.

April 14, 1915.

Mr. Thomas Tonge,
Secretary, Board of Health,
Paterson, N. J.

Dear Sir:

I am enclosing you herewith a copy of the opinion of this Commission in the case of J. Alexander Browne, vs. the Board of Health.

Yours very truly,
CHIEF EXAMINER & SECRETARY.

M-L

NEW JERSEY SUPREME COURT.

Thomas A. Clay, *Prosecutor,* vs. The Civil Service Commission of the State of New Jersey, The Board of Health of the City of Paterson, and J. Alexander Browne, *Respondents.*	*On Certiorari.*

10

Reasons.

The prosecutor, by William I. Lewis, his attorney, comes and prays that the order of the Civil Service Commission of the State of New Jersey made April 13th, 1915, wherein and whereby it ordered that the appointment of Dr. Clay which, said order recited, was in effect a dismissal of J. Alexander Browne, M. D., who had theretofore held the position, was, therefore, illegal and contrary to the provisions of the Civil Service Law, and that said Dr. Browne be reinstated in the position of Health Officer of the City of Paterson, from which, as said order declared, he had been illegally ousted, may be set aside and for nothing holden, for the following reasons, to wit:

20

30

First—Because the term of office held by J. Alexander Browne was three years.

Second—Because the office of Health Inspector of the City of Paterson held by said Browne was not subject to the jurisdiction, rules, orders or classification of said Civil Service Commission.

Third—Because the term of office of J. Alexander Browne, M. D., as Health Inspector of the City of Paterson had expired when the prosecutor was elected to said office.

Fourth—Because J. Alexander Browne, M. D., was never elected to nor held the office held by the prosecutor.

Fifth—Because the prosecutor was legally elected to hold the office of Health Inspector.

Sixth—Because the office of Health Inspector held by said Browne was created by and existed under the provisions of an ordinance of the Board of Alderman of the City of Paterson passed on or about the 13th day of November, A. D. 1882, under and by virtue of the provisions of an act of the legislature approved March 11th, 1880, and an act relating to local Boards of Health, approved March 22nd, 1881, and that said office has been abolished by an ordinance of the Board of Aldermen approved December 9th, 1914.

Seventh—Because the office held by said Browne and the office held by the prosecutor are two different offices.

Eighth—Because if the office held by the said J. Alexander Browne, M. D., under the said ordinance of 1882, was not abolished by the ordinance of 1914, then the prosecutor was lawfully elected to hold said office.

Ninth—Because the Civil Service Commission of New Jersey had no power, right or authority to make the said order.

Tenth—Because the Civil Service Commission of New Jersey had no juridiction to hear or determine any proceeding in which such order could be made.

Eleventh—Because the said order was illegal and void.

NEW JERSEY SUPREME COURT.

Thomas A. Clay, *Prosecutor,* vs. The Civil Service Commission of New Jersey, The Board of Health of the City of Paterson, and J. Alexander Browne, *Respondents.*	On Certiorari.

10

Stipulations as to Facts.

It is hereby stipulated and agreed that the following are and shall be the relevant facts to be considered and applied upon the hearing of the above stated matter.

20

First:—That on November 13th, 1882, the following ordinance was duly adopted by the City of Paterson.

An Ordinance to Establish a Board of Health.

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

Section 1. There shall be estalished 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 act or acts supplementary or amendatory to said acts.

30

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 appointments by the Mayor shall be as follows: One member to serve for three years, one member to serve for four years, 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 it 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.

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
10 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 countersigned 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 Comptrol
20 ler.

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.

30 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 ordinances 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 ordinances 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.

Second:—That under said ordinance the Board of Health therein provided was duly established and organized, and a Health Inspector appointed according to its provisions, who acted as the executive officer of said Board.

Third:—That on the tenth day of November, A. D. 1903, said J. Alexander Browne was duly appointed as such Health Inspector, accepted the office and entered upon the discharge of his duties; that the following is a copy of the minutes of the meeting at which he was appointed. "On motion the Board proceeded to elect a Health Officer for the ensuing term of three years. J. Alexander Browne, M. D., was nominated by Comissioner Van Noort; B. C. Magennis, M. D., was nominated by Commissioner Van Winkle. Ballot No. 1.

'For Magennis--Banta, Van Winkle, 2.

"For Browne--Hurley, Pollitt, Van Noort, McBride, 4.

Health Officer Magennis did not vote.

"J. Alexander Browne, M. D., having received the necessary number of votes was declared elected for the ensuing term of three years."

That in 1906, section 12 of said ordinance was amended by the Board of Aldermen in the manner set forth in the following copy of the minutes of the meeting of the Board of Health held November 13, 1916. The following is the copy:

"A communication from the City Clerk, calling the attention of the Board to an amendment of an ordinance entitled 'An ordinance to establish a Board of Health,' approved November 13th, 1882." "Section No. 12 of the ordinance was amended to read as follows: 'The Health Officer shall be paid an annual salary of fifteen hundred

dollars and give bonds to the amount of two thousand dollars.' A motion that the communication be received and the conditions of the ordinance complied with was adopted." That there after said Brown was paid and received a salary of fifteen hundred dollars per annum.

That on November 13, 1906, said Browne was again duly appointed Health Officer for the term of three years and, among other things, the following minute thereof appears on the minutes of the Board of Health of Paterson: "J. Alex. Browne, M. D, having received the necessary number of votes was declared elected for the ensuing term of three years."

That on the 12th day of November, 1909, said Browne was again appointed by said Board of Health for the term of three years and, among other things, the following minute thereof appears on the minutes of the Board of Health of Paterson: "J. Alexander Browne was declared elected Health Officer for the ensuing term of three years."

That the following is a copy of the minutes of the said Board of Health of a meeting held Jan. 14, 1913:

Tuesday evening, Jan. 14th, 1913.

The election of a Health Officer was called for. Before proceeding to the election of a Health Officer, Health Officer Browne requested that his counsel, Lawyer Ward, be granted the privilege of the floor. The request was granted by the President.

Lawyer Ward contended that the Board should not proceed to the election of a Health Officer as under the civil service law there was no va-

cancy; quoting the letter received from the Civil Service Commission.

In reply to the President, City Counsel Merrey advised the Board to proceed with the election.

Elias J. Marsh, M. D., was nominated by Commissioner Todd.

Jos V. Bergen, M. D., was nominated by Commissioner Briody.

J. Alexander Browne, M. D., was nominated
10 by Commissioner Van Winkle.

On motion the nominations were closed.

Ballot No. 1.

For Marsh—Todd, Leal, 2.

For Bergin—Briody, 1.

For Browne—Browne, Gall, Maher, Van Winkle, 4.

President Leal asked the opinion of City Counsel Merrey as to the right of Dr. Browne to vote on the election of a Health Officer, Counsel Mer-
20 rey replied that Dr. Browne had no right to vote on this question.

President Leal then ruled out Dr. Browne's vote.

Commissioner Maher then asked the opinion of Counsellor Merrey as to the right of the President to rule out Dr Browne's vote, Counsellor Merrey replied that it was within the right of the President, but that a member could appeal from
30 the decision.

A motion by Commissioner Briody that the election of a Health Officer be laid over for one month or until the next regular meeting was adopted by the following vote: Ayes, Briody, Gall, Maher, Todd, Van Winkle, Leal, 6 votes.

At a meeting of the Board of Hleath held Feb. 11th, 1913, a letter was read from the Civil Ser-

vice Commission under date of January 21st, 1913, in which according to an opinion of the Atty. General the Health Officer is in the competitive class and is therefore protected.

The following is a copy of the minutes of a special meeting of the Board of Health of the City of Paterson, N. J., held in the rooms of the Board Tuesday evening, Dec. 23rd, 1913.

Attendance.

Present: Commissioners Browne, Gall, Todd and Van Winkle. 10

On motion by Commissioner Gall, Commissioner Van Winkle was selected to act as Chairman.

On motion by Commissioner Gall the question of election of the Health Officer was taken up.

On motion by Commissioner Todd, which was duly seconded by Commissioner Gall, the election of the Health Officer was considered.

By Commissioner Gall: I nominate the present incumbent, J. Alexander Browne. 20

By Commissioner Todd: I nominate Doctor E J. Marsh.

Ballot No. 1.

For Dr. Browne, Commissioners Gall, Browne and Chairman Van Winkle, 3.

For Dr. Elias J. Marsh, Commissioner Todd. 1.

On the Secretary's announcement that the ballots 3 for Dr. J. Alex. Browne and one in favor of Dr. E. J. Marsh, Temporary Chairman Franklin Van Winkle declared Dr. J. Alex. Browne elected for the unexpired term. 30

Fourth—That said J. Alex. Browne from the time of his first election in 1903 to and including December 29th, 1914, attended the meetings of the said Board of Health, participated in its busi-

ness and voted upon the various motions considered by the Board at such meetings.

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

An Ordinance.

10 An Ordinance to amend an ordinance entitled, "An Ordinance to establish a Board of Health," passed November 13, 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 ap-
20 pointed 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 nspector 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
30 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 7th, 1914.

WALLACE R. KING,
President Board of Aldermen.

Approved, December 9, 1914. 10

ROBERT H. FORDYCE,
Mayor.

Attest: T. SIMPSON STANDEVEN,
City Clerk.

Sixth—That on January 12, 1915, a meeting of the said Board of Health was held and that the following is a copy of the minutes.

By Commissioner Decker:

Move that we go into the election of a Health Officer; this motion was seconded by Commissioner King and was carried. 20

Commissioner Van Winkle stated that he would like to have an opinion from the City Counsel as to whether or not it was proper to go into the election of a Health Officer and moved that "we defer action on this matter until the next meeting of the Board," which was duly seconded by Vice President Maher.

The motion by Commissioner Van Winkle was defeated by a vote of seven to two; Commissioner Clay [a commissioner duly appointed and qualified] requesting to be excused from voting, which permission was granted. 30

Health Officer J. Alex. Browne protested against the action of the members of the Board stating that there was no vacancy.

Dr. J. Alex. Browne submitted the following protest:

To the President and
Members of the Board of Health,
Paterson, N. J.

Gentlemen:—

Having heard rumors to the effect that your body was contemplating my removal as Health Officer, I hereby enter this formal protest against
10 any such action on your part for the following reasons, viz:

First—That it would be a direct violation of the decision of the Civil Service Commission of the State of New Jersey made by it on or about December 15th, 1912, by placing the Health Officer of Paterson, New Jersey, in the competitive class of the Civil Service.

Second—That it would be a direct violation of the decision rendered by the Attorney General
20 of the State of New Jersey to Gardner Colby, Secretary and Chief Examiner of the Civil Service Commission of the State of New Jersey and transmitted by him, (Gardner Colby) to me in writing under date of January 6th, 1913.

Trenton, N. J., January 6th, 1913.

J. Alex. Browne, M. D.,
Health Officer,
Paterson, N. J.

30 Dear sir:—

I desire to advise you that we have received an opinion from the Attorney General's department to the effect that there is no statutory provision requiring that a Health Officer of the City of Paterson be a member of the Board of Health,

but that the position can properly be placed in the competitive class, in which class the Civil Service Commission classified your position, pending the information which we have now received from the Attorney General's department.

Yours very truly,

(Signed) GARDNER COLBY,
Chief Examiner and Secretary.

Third—That it violates the written information conveyed by the City Counsel of the City of Paterson, N. J., in a communication to the Board of Health, dated March 23rd, 1914. "Since however, this officer now holds for an indefinite term," (Communication relating to the Health Officer). 10

Fourth—That it would be a direct violation of the statute of the State of New Jersey as outlined in Chapter 156, Laws of 1908, approved April 10th, 1908, entitled, "An act regulating employment, term and discharge of certain officers and employees of this State and the various Counties and Municipalities thereof, and providing for Civil Service Commission and defining its powers and duties," Sections Nos. 14-17 and 24 of the above laws being violated. 20

Finally—I would request of your body, what your reasons are for attempting my removal.

(Signed) J. ALEX. BROWNE,
Health Officer 30
January 4th, 1913.

Assistant Attorney Gaskill's opinion to Civil Service Commission, printed in Paterson Press under date of January 4th, 1913.

I would further present the following:

"With reference to your inquiries as to the proper clasification of the Health Officer in the City of Paterson, I note that you state that this position is classified in other municipalities in the competitive class, but that in Paterson that the Health Officer is also a member of the Board of Health and is appointed for a definite term as a member of the Board. This situation arises from the fact that the Health Board of Paterson was organized prior to the act of 1887, and under a previous act. Section 11 of this act, however, provides that any Board of Health then existing in any city shall be continued under the authority of this act. Section 58 of this act provides that any person licensed as a Health Officer shall be eligible to appointment as such officer at any local Board of Health.

"It is my judgment, therefore, that there is no statutory provision which requires a health officer of the Paterson Board of Health to be a member of the Board and that he should therefore be classed in the competitive class of the classified service."

(Signed) J. Alex. Browne, M. D.,
Health Officer.

Commisioner Maher stated that he would like to have an opinion of the City Counsel without waiting for a written opinion.

City Counsel Merrey stated that there was no question about this matter. The decision of the Attorney General clearly states that this position has been classified in the competitive class of the Civil Service and the term is fixed for an indefinite term, depending upon good behavior, un-

der the Civil Service Act. I have never heard why such a classification is improper and the Board of Health cannot elect a Health Officer, as there is no vacancy.

Commissioner Decker nominated Commissioner Clay for the position of Health Officer of Paterson, N. J., for a term of three years, which motion was duly seconded by Commisioner King.

On motion by Commissioner Garrison, the nominations were closed. 10

The members of the Board decided to vote on Dr. Thomas A. Clay, for the position of Health Officer of the City of Paterson, N. J., for a term of three years, with the roll call resulting as follows:

For Dr. Clay—Commissioners Barr, Decker. Garrison, Morris, Rabinowitz, President Randall.

Against Clay—Commissioners Maher and Van Winkle.

Commissioner Clay requested to be excused from voting, which request was granted. 20

On the announcement of the vote, President Randall declared Dr. Thomas A. Clay elected Health Officer of the City of Paterson, N. J., for a term of three years.

30

By Dr. J. Alex. Browne:

"May I ask why the attempt is being made to move me?"

President Randall:

"On the ground that there is a vacancy."

On motion the Board adjourned.

Seventh—The prosecutor and the respondent
10 Browne are duly qualified practicing physicians residing in the City of Paterson and respectively hold and have held at all necessary times health officers' licenses issued by the Board of Health of the State of New Jersey, issued under the provisions of P. L. 1903, p. 453.

Eighth—That the term "Health Officer" and the term "Health Inspector" as used in the minutes of the Board of Health of Paterson and in these proceedings have the same meaning.

20 Wm. I. Lewis,
Att'y of Prosecutor
Ward & McGinnis,
Att'ys of Respondents.

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Memorandum by the Court

(Filed Aug. 21, 1915)
NEW JERSEY SUPREME COURT.
June Term, 1915.

Thomas A. Clay, Prosecutor, vs. Civil Service Commission, et al., Respondents.	

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Memorandum by the Court.

This cause was submitted on briefs: and on a preliminary examination we do not find in the printed book all the data necessary for a consideration of the questions argued.

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The controversy involves to some extent the title to office. It is assumed on one side, and denied on the other that the office held (as asserted) by Dr. Clay is the same as that claimed by Dr. Browne. Assuming for present purposes that it is the same, prosecutor either assumes or asserts, without any support in the record or citation of authority so far as we find, the following details as essential to his case:

1. That the City of Paterson, or its Board of Health, or both, is or are subject to the Civil Service Law by adoption (C. S. 3799 pl. 67) or subsequent legislation.

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2. That Dr. Clay is the incumbent of the office and in possession of the same.

3. That his salary was entered on the usual list and forwarded to the Civil Service Commission for the usual certificate.

4. That said Commission refused to certify it.

It is plain from a glance at prosecutor's brief that the point with him is the payment of his salary. It may be that if he is the incumbent in possession of an office and the payment of the emoluments is interfered with by the alleged action of the commission, certiorari will lie to review that action as a foundation for mandamus to compel the desired certificate, although the Act, C. S. 3805 pl. 82 seems to contemplate mandamus in the first place. This we do not at present decide as the facts are not before us. It may be that the office is the same that Browne is in possession and Clay is out, in which case the proceeding should be quo warranto. It may be that the salary item has not been submitted to the commission in which case the question arises whether the deliverance of the commission is a mere *brutum fulmen* or not.

In any event, we consider that until the points above noted are covered, the case is not ripe for decision.

NEW JERSEY SUPREME COURT.
June Term, 1915.

Thomas A. Clay, *Prosecutor,* vs. Civil Service Commission, et al., *Respondents.*	Certiorari.

10

Order.

Upon motion of the attorneys of the respective parties to the above stated case, it is, on this twenty-ninth day of September, A. D. nineteen hundred and fifteen, ordered, that the said parties have leave, and it is hereby given them, to add to the state of the case in this cause evidence by deposition or stipulation, relevant to the following questions of fact:

20

1. Whether the City of Paterson, or its Board of Health, or both, is or are subject to the Civil Service Law by adoption or subsequent legislation.

2. Whether the Prosecutor is the incumbent of the office involved in this proceeding and is in possession of the same.

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3. Whether his salary was entered in the usual list and forwarded to the Civil Service Commission for the usual certificate.

4. Whether said Commission refused to certify it.

Order

It is further ordered that such additions to the state of the case be delivered to the sergeant-at-arms of this court on or before the fifteenth day of October, A. D. nineteen hundred and fifteen, and that all parties have leave to file within the same time such additions to their respective briefs as they deem fit.

Let this rule be entered.

C. W. Parker,

10 *J. S. C. in the Court.*

We hereby consent to the making of the above order.

Wm. I. Lewis,
Attorney for Prosecutor.
Ward & McGinnis,
Attorneys for all the Respondents.

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NEW JERSEY SUPREME COURT.
June Term, 1915.

Thomas A. Clay, *Prosecutor,* vs. Civil Service Commission, et al., *Respondents.*	Addition to State of Case.

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Stipulation.

Leave of the court being given to add to the State of the Case in this cause evidence, by deposition or stipulation, concerning the facts hereinafter stipulated, it is hereby stipulated, by the attorneys of the respective parties in the above stated cause.

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1. That an act entitled "An act regulating the employment, tenure and discharge of certain officers and employes of this state, and of the various counties and municipalities thereof, and providing for a Civil Service Commission, approved April 10th, 1908 (P. L. 1908, page 235)" was adopted in the City of Paterson by vote of the people on the fifth day of November, 1912.

2. That the prosecutor, Dr. Clay, is the incumbent of the office in question, whether it is the office created by the ordinance of the Board of Aldermen of the City of Paterson, adopted November 13th, 1882, or the office provided for by an act entitled, "A further supplement to the act

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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,' approved March thirty-first, one thousand eight hundred and eighty-seven'' approved April 8, 1903; and has been in possession of the same during all times since his election, has acted as the general agent of the Paterson Board of Health in the enforcement of its ordinances and the sanitary laws of this state within the territorial jurisdiction of said board.

3. That the salary of the prosecutor was entered on the usual list or payroll and forwarded to the Civil Service Commission for its certificate that the prosecutor had been apponted in pursuance of law and of the rules of the Civil Service Commission made in accordance with the act mentioned in section 1, hereof.

4. That said commission refused to make the certificate above mentioned.

Wm. I. Lewis,
Attorney for Prosecutor.
Ward & McGinnis,
Attorneys for all Respondents.

NEW JERSEY SUPREME COURT.

Thomas A. Clay, *Prosecutor,* vs. The Civil Service Commission of the State of New Jersey, et. al.,	Rule Dismissing Writ.

10

Rule Dismissing Writ.

The Court having inspected the transcript and proceedings of the Civil Service Commission of the State of New Jersey returned with the certiorari in this case, the reasons for reversing the order of said Commission, and heard the argument of counsel thereon, and having duly considered the same, do order that the Writ of Certiorari herein be, and the same hereby is, dismissed, with costs.

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Entered January 11, 1916,
On motion of

JOHN W. WESCOTT,
Attorney General of New Jersey.

30

Opinion

(Filed Jan. 4, 1916.)

NEW JERSEY SUPREME COURT.

June Term, 1915.

Thomas A. Clay,
Prosecutor,

vs.

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

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 20 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. 30

For the 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 or-

der of the Civil Service Commission, directing that J. Alexander Browne, one of the defendants, "be reinstated to the position of Health Officer, for 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 the outset, that certiorrai 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) 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 Inspector 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 re-organize 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 register of vital statistics as ex officio member 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 posession 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 and 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 board 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 act of 1887, which provided for the fixing of a term of office by the board. No such term appears to have been 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 offi-

cer 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 costs.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Thomas A. Clay, *Prosecutor-Appellant,* vs. Civil Service Commission et als., *Defendants-Respondents.*	On Appeal from Supreme Court.

10

Grounds of Appeal

The Appellant states the following grounds of Appeal:

1. Because the judgment of the Supreme Court adjudged that the writ of certiorari in the above stated cause should be dismissed.

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2. Because the judgment of the Supreme Court adjudged that the writ of certiorari in the above stated cause should be dismissed with costs.

3. Because the judgment of the Supreme Court adjudged that the term of office held by J. Alexander Browne was not three years.

4. Because the judgment of the Supreme Court adjudged that the term of office held by J. Alexander Browne was not a fixed term.

5. Because the judgment of the Supreme Court adjudged that the office of Health Inspector held by said Browne was subject to the jurisdiction, rules, orders and classification of the Civil Service Commission.

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6. Because the judgment of the Supreme Court adjudged that the term of office of J. Alexander Browne, as Health Inspector of the City of Pat-

erson had not expired when the prosecutor was elected to said office.

7. Because the judgment of the Supreme Court adjudged that J. Alexander Browne was elected to and held the office held by the prosecutor.

8. Because the judgment of the Supreme Court adjudged that the prosecutor was not legally elected to hold the office of Health Inspector.

9. Because the judgment of the Supreme Court
10 adjudged that the office of Health Inspector held by said Browne was not created by and did not exist under the provisions of an ordinance of the Board of Aldermen of the City of Paterson passed on or about the thirteenth day of November, A. D. eighteen hundred and eighty-two 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.

20 10. Because the judgment of the Supreme Court adjudged that the office held by said Browne was not abolished by an ordinance of the Board of Aldermen approved December 9th, 1914.

11. Because the judgment of the Supreme Court adjudged that the office held by said Browne and the office held by the prosecutor were not two different offices.

12. Because the judgment of the Supreme Court adjudged that the Civil Service Commission
30 of New Jersey had power, right and authority to make the order.

13. Because the judgment of the Supreme Court adjudged that the said order was not illegal and void.

Wm. I. Lewis,
Attorney of Appellant.