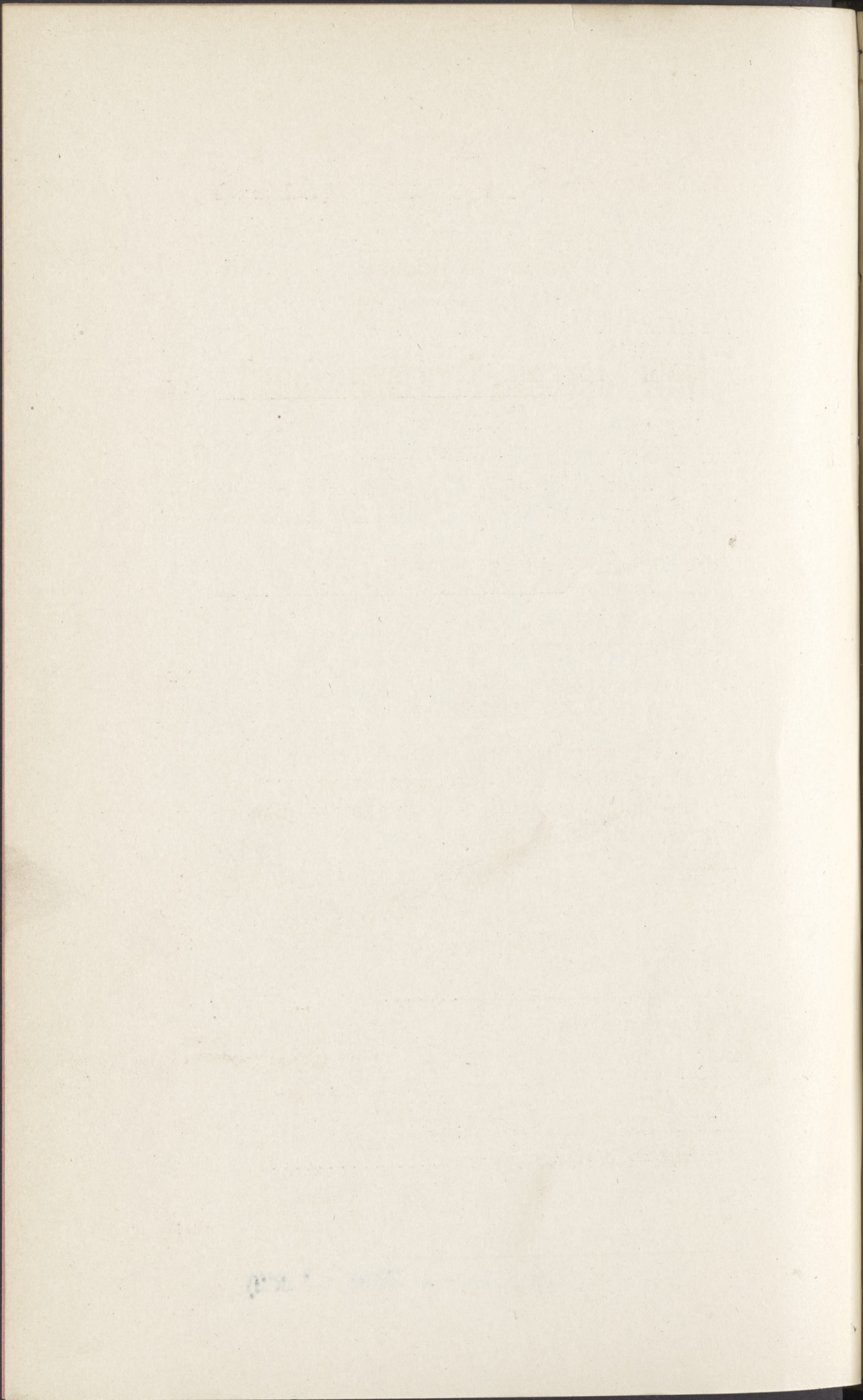


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Notice of Appeal.

Notice of Appeal.

Filed January 18, 1917.

New Jersey Supreme Court. 10

MICHAEL J. DURKIN, <i>Prosecutor,</i>
<i>vs.</i>
BOARD OF FIRE COMMISSIONERS OF THE CITY OF NEWARK, <i>Defendant.</i>

On Certiorari.
Notice of Appeal.

To HARRY KALISCH, Esq.,
Attorney of Defendant.

20

TAKE NOTICE that the prosecutor appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause dismissing the writ of certiorari.

FRANK E. BRADNER,
Attorney of Appellant.

Dated January 15, 1917.

30

JAMES FAGEN, JR.,
<i>vs.</i>
SAME.

Similar Notice of Appeal.

CORNELIUS SMITH,
<i>vs.</i>
SAME.

Similar Notice of Appeal.

40

Grounds of Appeal.

Grounds of Appeal.

Filed January 20, 1917.

New Jersey Court of Errors and Appeals

10

MICHAEL J. DURKIN,
Prosecutor-Appellant,
vs.

BOARD OF FIRE COMMISSIONERS
OF THE CITY OF NEWARK,
Defendant-Respondent.

*On Appeal
from Supreme
Court.*

*Grounds of
Appeal.*

- 20
1. The determination of the Supreme Court, that the appellant was lawfully reduced from the rank and pay of Battalion Chief to the rank and pay of Captain.
 2. The determination of the Supreme Court, that there was any evidence before the Board of Fire Commissioners of the City of Newark, to justify a finding that the appellant should be reduced in rank and pay for reasons of economy.
 - 30 3. The determination of the Supreme Court, that the action of the Board of Fire Commissioners of the City of Newark, whereby the appellant was reduced in rank and pay was not in conflict with the provisions of the statute commonly known as the Civil Service Law.
 4. The determination of the Supreme Court, that the writ of certiorari should be dismissed.

FRANK E. BRADNER,
Attorney of Appellant.

40

Grounds of Appeal.

JAMES FAGEN, JR.,

vs.

SAME.

} *Similar
Grounds of
Appeal.*

CORNELIUS SMITH,

vs.

SAME.

} *Similar
Grounds of
Appeal.*

10

20

30

40

*Stipulation.***Stipulation.**

Filed January 23, 1917.

New Jersey Court of Errors and Appeals

10

MICHAEL J. DURKIN,
Prosecutor-Appellant,
vs.

BOARD OF FIRE COMMISSIONERS
OF THE CITY OF NEWARK,
Defendant-Respondent.

*On Appeal
from Supreme
Court.*

Stipulation.

20

JAMES FAGEN, JR.,
Prosecutor-Appellant,
vs.

BOARD OF FIRE COMMISSIONERS
OF THE CITY OF NEWARK,
Defendant-Respondent.

*On Appeal
from Supreme
Court.*

Stipulation.

30

CORNELIUS SMITH,
Prosecutor-Appellant,
vs.

BOARD OF FIRE COMMISSIONERS
OF THE CITY OF NEWARK,
Defendant-Respondent.

*On Appeal
from Supreme
Court.*

Stipulation.

40

It is hereby stipulated and agreed by and between the attorney for the respective appellants above named, and the city attorney of the City of Newark, representing the Board of Fire Commissioners of the City of Newark, the respondent in each of the above stated causes, as follows:

Stipulation.

1. That the stipulation heretofore made in these causes in the Supreme Court, bearing date May 9, 1916, shall continue in full force and effect until these appeals have been finally disposed of.

2. That the above stated causes shall be consolidated and printed together and argued as one cause, and that the determination of one case shall be the determination of the others. 10

Dated January 16, 1917.

FRANK E. BRADNER,
Attorney of Appellants.

HARRY KALISCH,
Attorney of Respondent.

20

30

40

04

05

Writ of Certiorari.

Writ of Certiorari.

Returnable May 27, 1916.

NEW JERSEY, *to wit*:

The State of New Jersey to the Board of
[L. s.] Fire Commissioners of the City of New-
ark; greeting:

10

We being willing for certain reasons to be certified of a certain resolution made by the Board of Fire Commissioners of the City of Newark, and bearing date the third day of March, 1915, wherein and whereby it was resolved that for reasons of economy, Battalion Chiefs Thomas S. Reilly, Charles C. Storch, James Fagen, Jr., Michael J. Durkin and Cornelius Smith, should be and thereby were reduced to the rank and salary of Captain, beginning March 16, 1915, and the proceedings prior to and relating to the said resolution and the enforcement of the same.

20

WE DO COMMAND you that the aforesaid resolution made on the third day of March, 1915, by the Board of Fire Commissioners of the City of Newark, and all and every proceeding prior thereto and relating to the said resolution and the enforcement thereof, reducing the said Michael J. Durkin from the rank and salary of Battalion Chief in the Fire Department of the City of Newark, to the rank and salary of Captain, with all things touching and concerning the same as fully and entirely as before you they remain, to our Justices of the Supreme Court of Judicature, at Trenton, on the twenty-seventh day of May, 1916, you certify and send together with this writ that therein may be done what of right and according to the laws of this State should be done.

30

40

Return.

Witness, William S. Gummere, Chief Justice of our Supreme Court at Trenton, this eighth day of May, 1916.

WM. C. GEBHARDT,
Clerk.

10 FRANK E. BRADNER,
Attorney.

Defendant consents to the issuing of the within writ.

HARRY KALISCH,
*Att'y of Board of Fire Comm'rs
City of Newark.*

20 Allocatur.

WM. S. GUMMERE,
C. J.

Copy.

February 10th, 1915.

I offer the following resolution and move its adoption:

30 That the Battalion Chiefs Thomas S. Reilly, Charles C. Storch, James Fagen, Jr., Michael J. Durkin, Cornelius Smith, appear before this Board at its next regular meeting and show cause why they should not be reduced to the rank of Captain for reasons of economy.

Submitted by the Chairman of Committee on Applications, Appointments and Transfers.

Adopted by the Board of Fire Commissioners February 10, 1915.

40

Return.

Copy.

February 11, 1915.

Michael J. Durkin,
Newark Fire Department,
Newark, N. J.

Dear Sir:

10

You are hereby informed that at a meeting of the Board of Fire Commissioners, held February 10, 1915, the following resolution was adopted:

“That Battalion Chiefs Thomas S. Reilly, Charles C. Storch, James Fagen, Jr., Michael J. Durkin, Cornelius Smith, appear before this Board at its next regular meeting and show cause why they should not be reduced to the rank of Captain for reasons of economy.”

20

In accordance with the terms of this resolution you are notified to appear before the Board of Fire Commissioners at 3:30 o'clock P. M., February 24, 1915, and answer as directed.

By order of the Board of Fire Commissioners.

(Signed) CHAS. S. SMITH,
Secretary.

30

40

Return.

Copy.

BEFORE THE BOARD OF FIRE COMMISSIONERS OF THE CITY OF NEWARK.

10

In the Matter
of
Michael J. Durkin, Battalion Chief.

On Order to
Show Cause.

The answer of Michael J. Durkin, to the communication dated February 11, 1915, sent to him requiring him to appear before the Board and show cause why he should not be reduced to the rank of Captain for reasons of economy, respectfully shows:—

20.

1. That the communication dated February 11, 1915, served upon him by the Secretary of the Board of Fire Commissioners, and directing him to show cause before the Board on February 24, 1915, why he should not be reduced to the rank of Captain for reasons of economy, is not a charge against him in compliance with the Civil Service Law, to wit—the Act entitled “An Act regulating the employment, tenure and discharge of certain officers and employees of this State, and of the various counties and municipalities thereof, and providing for a Civil Service Commission and defining its powers and duties,” and the supplements thereto; and the rules adopted by the Civil Service Commission under and by virtue of said Act.

30

2. That he cannot be reduced in pay or position except for violation of the laws of the State of New Jersey relating to the tenure of office, and he is not charged with any such violation.

40

Return.

3. That he has been a member of the Fire Department for more than twenty-four years and has risen from the ranks to his present position as Battalion Chief, and is unwilling to be reduced in rank and protests against any action which would result in removing him from his office.

4. That he is advised that under the Civil Service Law aforesaid, if any vacancies exist in the office of Captain, those vacancies must be filled by promotion from a lower rank. 10

5. That he respectfully insists that there is no pressing reason of economy for reducing or removing any of the officers of the Fire Department, and he believes that the removal of the Battalion Chiefs, which seems to be contemplated by the action now being taken, would decrease the efficiency of the Fire Department and would result in an increase of expenses. 20

Respectfully submitted,
(Signed) MICHAEL J. DURKIN,
Battalion Chief.

Filed, March 3rd, 1915.

Copy.

30

RESOLUTION.

RESOLVED, That for reasons of economy, Battalion Chiefs Thomas S. Reilly, Charles C. Storch, James Fagen, Jr., Michael J. Durkin and Cornelius Smith, be and hereby are reduced to the rank and salary of Captain, beginning March 16th, 1915.

Adopted March 3, 1915.

40

Return.

Return.

In obedience to the command of the within writ directed to us, the Board of Fire Commissioners of the City of Newark, do hereby certify and send to the honorable Justices of the Supreme Court of Judicature of the State of New Jersey within mentioned, a certain resolution made by the Board of Fire Commissioners of the City of Newark, bearing date the third day of March, nineteen hundred and fifteen, wherein and whereby it was resolved that for reasons of economy Battalion Chiefs Thomas S. Reilly, Charles C. Storch, James Fagen, Jr., Michael J. Durkin and Cornelius Smith should be, and thereby were, reduced to the rank and salary of captains, beginning March 16, 1915, and the proceedings prior to and relating to the said resolution and the enforcement of the same, together with all things touching and concerning the same as fully and entirely as before us they remain; together with the said writ as within we are commanded.

IN WITNESS WHEREOF, we have caused this return to be signed by the secretary of the said Board of Fire Commissioners this twenty-seventh day of May, nineteen hundred and sixteen.

THE BOARD OF FIRE COMMISSIONERS
OF THE CITY OF NEWARK,

By CHAS. S. SMITH,
Secretary.

Statement.

STATEMENT.

When the foregoing writ of certiorari in which Michael J. Durkin is prosecutor, was allowed, there was a like writ allowed to each one of the other battalion chiefs named in the resolution of the Board of Fire Commissioners, dated March 3, 1915, namely—Thomas S. Reilly, Charles C. Storch, James Fagen, Jr., and Cornelius Smith; and a return has been made to each writ similar in all respects to the return made to the foregoing writ in favor of Durkin, prosecutor, with these exceptions:

1. The answer of Thomas S. Reilly alleges that he has been a member of the Fire Department for more than nineteen years, and in his answer these words are omitted: "That he respectfully insists that there is no pressing reason of economy for reducing or removing any of the officers of the Fire Department."

2. In the answer of Charles C. Storch, it is alleged that he has been a member of the Fire Department for more than nineteen years, and the same words are omitted in his answer, that were omitted in the Reilly answer.

3. In the answer of Cornelius Smith, it is alleged that he has been a member of the Fire Department for more than twenty years.

4. In the answer of James Fagen, Jr., it is alleged that he has been a member of the Fire Department for more than sixteen years.

By stipulation which follows, these cases have been consolidated and only one record has been printed.

Stipulation.

New Jersey Supreme Court.

10	<p>MICHAEL J. DURKIN, <i>Prosecutor,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>BOARD OF FIRE COMMISSIONERS OF THE CITY OF NEWARK, <i>Defendant.</i></p>	<p><i>On Certiorari.</i></p> <p><i>Stipulation.</i></p>
20	<p>JAMES FAGEN, JR., <i>Prosecutor,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>BOARD OF FIRE COMMISSIONERS OF THE CITY OF NEWARK, <i>Defendant.</i></p>	<p><i>On Certiorari.</i></p> <p><i>Stipulation.</i></p>
20	<p>CORNELIUS SMITH, <i>Prosecutor,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>BOARD OF FIRE COMMISSIONERS OF THE CITY OF NEWARK, <i>Defendant.</i></p>	<p><i>On Certiorari.</i></p> <p><i>Stipulation.</i></p>
30	<p>THOMAS S. REILLY, <i>Prosecutor,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>BOARD OF FIRE COMMISSIONERS OF THE CITY OF NEWARK, <i>Defendant.</i></p>	<p><i>On Certiorari.</i></p> <p><i>Stipulation.</i></p>
40	<p>CHARLES C. STORCH, <i>Prosecutor,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>BOARD OF FIRE COMMISSIONERS OF THE CITY OF NEWARK, <i>Defendant.</i></p>	<p><i>On Certiorari.</i></p> <p><i>Stipulation.</i></p>

It is hereby stipulated and agreed by and between the attorney for the respective prosecutors above named, and the City Attorney of the City of

Stipulation.

Newark, representing the Board of Fire Commissioners of the City of Newark, the defendant in each of the above stated causes, as follows:

1. That the stipulation heretofore made by Spaulding Frazer, Esq., City Counsel, acting in behalf of the Board of Fire Commissioners of the City of Newark, and Frank E. Bradner, Esq., acting as counsel for the said above named prosecutors, dated June 17, 1915, wherein it was agreed that the said several individuals could accept pay as captains pending any proceedings taken by the Civil Service Commission or by the Board of Fire Commissioners of the City of Newark, or by the said individuals reviewing the finding of the Civil Service Commission, and until the said several individuals shall be reinstated in their position as battalion chiefs, and that their acceptance of such pay as captains should be without prejudice and should not in any manner be used against them as an admission of the legality of the resolution demoting them in rank, or as a waiver of any right of action or proceeding that they would be or are entitled to review the action of said Board of Fire Commissioners, or of said Civil Service Commission, or of any court; shall be continued in full force and effect pending the proceedings in the above stated causes, so that the said prosecutors may accept pay as captains without prejudice.

2. That the above stated causes shall be consolidated and argued together, and that the determination of one case shall be the determination of the others.

Stipulation.

3. That the rule granted in the case of Durkin, prosecutor, giving both sides leave to take depositions, shall apply to the other cases, so that the depositions taken in the Durkin case may be read in the other cases.

Dated, May 9, 1916.

10

FRANK E. BRADNER,
Attorney of Prosecutors.

HARRY KALISCH,
Attorney of Defendant.

20

30

40

Michael J. Durkin, direct.

New Jersey Supreme Court.

MICHAEL J. DURKIN,

Prosecutor,

vs.

BOARD OF FIRE COMMISSIONERS
OF THE CITY OF NEWARK,

Defendant.

10

Transcript of testimony taken on behalf of prosecutor in the above entitled cause, pursuant to notice, before Nicholas W. Bindseil, a Supreme Court Commissioner, at the fire headquarters, City Hall, Newark, New Jersey, on Friday, May 19th, 1916, at three o'clock in the afternoon, in the presence of Mr. Frank E. Bradner for prosecutor, and Mr. Spaulding Frazer and Mr. Harry Kalisch for defendant.

20

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

30

MICHAEL J. DURKIN, being duly sworn according to law, testifies as follows:

Direct examination by Mr. Bradner.

Q Mr. Durkin, you are a member of the Fire Department of the City of Newark? A Yes, sir.

Q When did you join the department? A On April 16, 1890.

40

Michael J. Durkin, direct.

Q Have you been promoted from time to time?

A Yes, sir, to Captain, and from Captain to Battalion Chief.

Q Did you come up from the ranks? A Yes, sir.

10 Q When were you made Captain? A On September 1, 1896.

Q And when were you promoted to Battalion Chief? A To take office on the first of July, 1914.

Q What salary did you receive as Captain? A \$1,600.

Q What salary as Battalion Chief? A \$2,000.

20 Q After you became Battalion Chief, then, was there any increase in the expenses of the department for the performance of your duties? A No, sir, not for my duties. When I received notice of my appointment as Battalion Chief, I also received orders—in the same orders—to report to the Chief of Department for orders, and he assigned me to take the place of Exall, the retired Battalion Chief.

Q What district was that? A District No. 2.

30 Q Then what did you do? A I went down there and took charge of the district and had the same horse and rig that he had and the same driver that he had and performed the duties up to the time that I was demoted.

Q Then there hasn't been any extra expense attached to your promotion except the \$400? A That is all, the \$400.

Q Did you actually take the place of Exall? A Yes, sir.

40 Q At the time you were promoted from Captain to Battalion Chief, were there any other promotions? A Yes, sir, there were four more captains promoted to battalion chiefs.

Michael J. Durkin, direct.

Q Who were they? A Thomas S. Reilly, Charles C. Storch, James Fagen and Cornelius Smith.

Q Do you know what their duties were after they were promoted? A At the time they took office it was the vacation period, and there were two men on vacation—two regular chiefs on vacation and two on days off. These four men took the place of those four men that was off. 10

Q How many battalion chiefs were there in the Fire Department at the time of your promotion?

A Nine battalion chiefs.

Q And prior to your promotion how many had there been? A Five.

Q Exall—what had become of him? A He was retired. 20

Q Will you explain, if you please, about men taking their days off; how often? A The chiefs have one day off in six—every sixth day there were two chiefs off.

Q Are there any days when there isn't some vacancy to be filled? A No, there are nine battalion chiefs, two deputy chiefs and one chief, and there are two chiefs off each day. When the chief was on his regular leave, a deputy chief took his place, and a battalion chief was moved up to take the deputy chief's place. 30

Q You spoke of District No. 2, what does that mean? A That is a section allotted for the battalion chief to have full control and full charge of.

Q How many such districts are there in the city of Newark? A Five districts.

Q How are those five districts supplied with equipment for the performance of the duties of the battalion chiefs? A They have got horses and gigs. 40

Michael J. Durkin, direct.

Q You were the only one, then, who actually filled a position? A I was the only one that had a position—assigned to a regular position and had a horse and rig of my own.

10 Q How about the other four? A The other four had a roving commission and took the place of the chiefs that were off; consequently, they used their horses and their rigs.

Q Was there any extra expense in their use of any equipment? A No extra expense.

Q Not anything besides the salary? A Beside the salary, no extra expense.

Q Were any automobiles purchased that you know of? A None whatever.

20 Q To your knowledge, is the time of these men fully occupied or not? A They were fully occupied.

Q I am speaking of the time while they were battalion chiefs. A They were fully occupied.

Q Can you give any reason for your statement that their time was fully occupied? A The only reason I can give is that it was necessary to have them.

30 Q How about the size of the different districts? A The previous board had already arranged to redistrict number one, two, three and four districts, and to make two additional districts.

40 Q That would have made seven? A That would have made seven, and also to have two roving battalion chiefs. They already went to some expense in fitting up a place in No. 10 engine house at Sherman avenue and Astor street to put a horse and gig into it, and one of the commissioners told me that he was going to put an automobile in No. 9 engine house in Summer avenue near Kearny street.

Michael J. Durkin, direct.

Mr. Bradner. I suppose that is hearsay.

Mr. Frazer. I make no objection to it.

Q Which are the large districts? A No. 1, No. 2, No. 3, No. 4.

Q Prior to your promotion had you ever acted as battalion chief? A Yes, sir, I had acted for eight years, taking the place of the battalion chief when he was off. 10

Q I think you said six years before A I have for nearly two years—

Q I mean prior to your promotion. A About six years prior to my promotion.

Q Were there at the time of your promotion from captain any other acting battalion chiefs? A Yes, sir, there was an acting battalion chief, and where the battalion chief was stationed, the captain in the company acted as battalion chief in the absence of the regular chief. 20

Q If the new districts were established would that cause any increase of expense? A Yes, sir.

Q In what respect? A You would have to purchase a horse and gig or an automobile for two battalion chiefs.

Q How do the acting battalion chiefs get to a fire? A The acting battalion chiefs—you mean the roving battalion chiefs?

Q Yes. A There are two of them using the rigs of two of the battalion chiefs that were absent on regular leave, and two were stationed in the districts that were supposed to be made; they consequently rode on the apparatus. 30

Q What apparatus could they get on? A On the company, whether it was a truck company or an engine company. It has been the custom in Newark for the last twenty-nine years, that when a new chief was made, he rode on the apparatus for months before there was a rig purchased for 40

Michael J. Durkin, direct.

10 him. Starting with our late Chief William C. Astley, when he was made assistant chief July 1, 1887, he rode on the old chemical wagon on Market street for months before there was a rig purchased for him. When Battalion Chiefs Morgan and Sloan were made the first battalion chiefs, one of them rode on No. 1 truck on Broad street and the other one rode on No. 3 truck on Bruce street for months before there were rigs purchased for them. When Battalion Chief Moore, the present chief, and Battalion Chief McDermitt were made battalion chiefs, they also rode on the apparatus in the house where they were stationed before there was a rig purchased for them. When Deputy Chief Towey was made a battalion chief, he was made 20 a roving battalion chief for two years and went around the city taking the places of the chiefs that were off; and likewise Battalion Chief Schweickhardt was a roving battalion chief, taking the places of the chiefs on their days off; consequently, there were only four chiefs that had rigs for them when they were made chiefs, and that was Exall, Lynch, Guidera and myself.

Q What are the duties of a battalion chief?

30 A He has full charge of the district where he is located; when he arrives at a fire he has full charge until the deputy chief or the chief of the Fire Department arrives.

Q What difference is there between the battalion chief and the captain? A The captain has charge of his company, where the battalion chief has charge of the district, where there are from six to nine companies.

Q In the one district? A Yes.

Q So he is a superior officer to the captain?

40 A Oh, yes.

Michael J. Durkin, direct.

Q How about a captain acting as battalion chief; what rank does he take at a fire? A At a fire he has just the rank of a captain; he wears the uniform of a captain and he does not get the same respect from the captains as a battalion chief; when a battalion chief arrives at a fire he has his uniform on—his white coat and his white hat; consequently the captain knows that there is a battalion chief arriving, but when a captain comes into a fire the other captains don't know whether he is an acting battalion chief or not, and the rules of the Fire Department say that the first captain arriving at a fire assumes command until the first battalion chief arrives—deputy chief or chief. 10

Q Then when the acting battalion chief gets there in the uniform of a captain, there isn't anything to designate him? A Nothing to designate that he is chief more than a captain. 20

Q Since you were reduced in rank in March, 1915, have you acted as battalion chief? A Yes, sir.

Q Have you kept a record of the number of times that you have acted as battalion chief? A Yes.

Q How many times? A Since March 16, 1915, up to date, I have acted as battalion chief for 2,245 hours, allowing twenty-fours a day, would be ninety-three days and thirteen hours. 30

Q Do you know whether the other men have acted as battalion chiefs? A Yes, sir, they have.

Q For the same period of time? A I cannot say for the time, but I can say from records, taking from the journal in each fire house where the battalion chief is stationed in the first battalion, there has been a captain acting chief taking the battalion chief's place 305 times in the first bat- 40

Michael J. Durkin, direct.

talion, since the sixteenth day of March up to date.

10 Q Who is in that district; who is the captain there? A The captain was Hughes before there was an order issued by the Board of Fire Commissioners in July of last year, that a captain would only act for three days and then start and go right around; each captain had to act three days in his turn.

Q In that district? A In that district; in all the districts the same way; in the second battalion, the captains in the second battalion and the battalion chief for 320 times up to date.

In the third battalion, the captains in the battalion have acted battalion chief, in the absence of the battalion chief, for 121 times.

20 In the fourth battalion—that is the battalion that I am stationed in—the captains have acted battalion chief, in the absence of the battalion chief, for 258 times.

In the fifth district, in the absence of the battalion chief, the captains have acted battalion chief in that district for 160 times, making a grand total of 1,164 times that the captains in the city of Newark have been acting battalion chiefs.

30 Q Since March 16, 1915, up to date? A Yes.

Q How does it happen that you have had so many more days of service as acting battalion chief? A Because I am stationed in the same company with the battalion chief, and when he goes to his meals, or his day off, regular day, vacation or when he is detailed to act as deputy chief, I have taken his place.

40 Q Who is the battalion chief where you are stationed? A Chief Schweickhardt.

Michael J. Durkin, cross.

Cross examination by Mr. Frazer.

Q See whether I get the system right; at the time of your promotion to battalion chief, there were five battalion districts in the city of Newark? A Yes, sir.

Q And that number has remained unchanged; there never have been any more districts made? 10
A No more districts made; no, sir.

Q Just before your appointment there were five battalion chiefs, one of whom, Chief Exall, retired, leaving a vacancy in one of the battalion districts? A Yes, sir.

Q Then the city, in addition to that, is divided into two large districts, including certain of the battalion districts, each presided over by a deputy chief? A Yes, sir.

Q And the chief engineer himself is in charge of the whole system? A Yes, sir. 20

Q I understand that at the time that you were promoted there were rigs and proper equipment for the five battalion districts? A Yes, sir.

Q You immediately were appointed to take the place which was vacated by Chief Exall? A Yes, sir.

Q The other four men were temporarily on roving commissions? A Yes, sir.

Q The other four battalion chiefs who were appointed at the same time that you were? A Yes, sir. 30

Q As I understand the system, if the chief has a day off, one of the deputy chiefs acts as chief? A Yes, sir.

Q And in that event one of the battalion chiefs is stepped up so that he acts as deputy chief for that day? A Yes, sir.

Q And prior to the appointment of the five battalion chiefs now in question, one of the cap- 40

Michael J. Durkin, cross.

tains would then be stepped up to take the place of the deputy chief, who was stepped up into the deputyship? A Yes.

Q And if there was a battalion chief who had a day off at the same time, there would be another captain who would be stepped up into his position? A Yes.

10 Q I understood you to say that there were, under the arrangements, only two chiefs, whether the chief chief or the deputy chief or the battalion chief, who were off on any one day? A Outside of the vacation period, yes, sir.

Q But when the whole force is working, there would not be more than two chiefs of any grade off at one time? A Yes, unless through sickness or injury.

20 Q Except through some unusual circumstance? A Yes, sir.

Q At the time that you were graduated there happened to be four vacancies, because there were two of the chiefs off on vacation— A Yes.

Q —and there were two chiefs who would be having their day off every day? A Yes.

Q Making the four? A Yes, sir.

30 Q What, in your opinion, would be the duties of two of the battalion chiefs after the vacation period was over and there were two chiefs off? A That was to take the place that the commissioners—the previous commissioners were going to make two new districts.

Q Then you would say that unless the new districts were created in accordance with the plan of the previous commissioners, that there would be no work for two chiefs to do, except in vacation time or in times of sickness? A Well,
40 if the two new districts—it was certainly intend-

Michael J. Durkin, cross.

ed to make two new districts, or they wouldn't have appointed the men.

Q Assuming that the two new districts were not made—and they were not, were they? A No, they were not, for the simple reason, the things didn't go the way they expected them to go; they thought they were going back in power and the money was so short and they didn't have the money to buy the apparatus; if you haven't got any money you cannot buy bread. It was their intention to buy them and to get rigs for those men right after the first of January. 10

Q As I understand it, then—as you understand the intention of the Board of Fire Commissioners in 1914, it was this, that there would be created two additional fire districts to be presided over by battalion chiefs? A Yes, sir. 20

Q They made the new battalion chiefs in July of that year? A Yes.

Q And from July until January of the next year, not having sufficient funds to purchase the proper apparatus for the two new districts, they simply had two men who had nothing to do except in vacation time, on their hands? A No, they had placed two men in the two districts, but they had no apparatus for them to ride on, only they reverted back to the old custom. 30

Q But they were going to place these two men when the so-called districts were made? A Yes.

Q But the districts were never made? A No, they went out, they couldn't make them.

Q During their period of five or six months after the creation of the offices of four new battalion chiefs, they made no districts? A No, sir.

Q And as soon as the vacation period terminated, which would be around September, I suppose? A Yes. 40

Michael J. Durkin, cross.

Q From that time on until January there were two battalion chiefs who no longer had any companies, not being captains, and they had no districts, because the districts hadn't been created, and they had no place to fill temporarily, except in the event of the unexpected sickness on the part of one of the chiefs? A No, sir; they went to those places; one went to 25 Engine, and one to 23 Engine.

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Q And what did they do there? A Took the place of the battalion chief in the districts which was being created; there had already been a map made and that is in headquarters, with the districts laid out, where the new districts were going to be created, but the board didn't pass upon the map.

20

Q Assume that district six, which was to be created, and which never was created, but was laid out on a map, tentatively included a portion of district number one, under the old scheme, would not the battalion chief stationed in district number one, in the event of a fire, have jurisdiction over that part of district number six, which had not been established? A No, sir; that chief that went down there and was stationed in the house, the district for number one didn't respond there. That battalion chief that was there, he had full control of that district number six, and also the one that was in number 23 house had full control of district number seven.

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Q And there was no such district? A No, sir. They got orders to that effect, that the battalion chief in number three district goes so far up until he met the battalion chief in number seven district that was stationed in twenty-three house; also the same in twenty-five, where the man was.

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Michael J. Durkin, cross.

Q What happened in the event of the battalion chief in district number six, we might say, being on roving commission, and filling in for battalion chief number two, in district number two, when he had his day off; what territory, in that case, would the battalion chief in district number one cover? A He would cover that district.

10

Q Would he cover six as well? A Yes.

Q He would cover six as well on that day? A Yes, sir.

Q So that the practical result was that there was an informal division of the district? A Yes, sir.

Q Although the district was never formally established? A Yes.

Q It was merely mapped? A Tentatively.

Q And never adopted by the board? A That is right.

20

Mr. Bradner. Who were those two men in six and seven?

Witness. Chief Smith and Chief Fagen.

Q Your idea then is, that if it had not been contemplated to establish two new battalion districts, the utmost need that the department would have had at that time, under the old scheme, was two more instead of four; that is correct? A Well, I cannot speak for the previous commissioners; the commissioners said they were needed, they were badly needed, and they created and appointed those four battalion chiefs, because the city was in need of them—two new districts and two men.

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Q I am asking you as a practical fireman, if you were in charge of the fire department and you had not contemplated increasing the number of battalion districts in the city, at the time of

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Michael J. Durkin, cross.

your appointment, you would have felt that the creation of two more battalion chiefs to fill in the roving commissions would have been all that the department demanded; wouldn't you? A No, sir, I would not.

Q If there had been no new districts created?

10 A If there had been new districts created, yes, but the districts were badly needed; where it would take a battalion chief fifteen minutes to go from his house to the end of his district, in the four districts that I have already mentioned—one, two, three and four, it would take him maybe fifteen minutes to go to the end of his district.

Q Mr. Durkin, you are familiar with the apparatus that is suitable for a battalion chief? A Yes.

20 Q You spoke of the fact that the two new districts were not created, as being due to the lack of funds held by the old board? A Yes.

Q And that they expected to await the incoming of the first of January, when their new budget would start, when they hoped to have the funds to purchase the necessary equipment? A Yes.

30 Q About how much money would you say it would cost to equip an ordinary battalion station? A I have got no idea of that. I don't know the price of the different automobiles; they are all prices. Horses are all prices and the gigs are all prices.

Q Have you any idea of the cost of a suitable gig such as the other battalion chiefs are using; do you know what they are worth now? A I should judge a horse and gig and harness would amount to about \$550.

40 Q And do any of the battalion chiefs have automobiles? A No, sir.

Michael J. Durkin, re-direct.

Q All use gigs still? A All use gigs.

Q The deputy chiefs have automobiles? A Yes, sir.

Q And if a battalion chief should have an automobile it would be of the same general kind as the deputy chief, I presume? A That I cannot answer; that is something the Board of Fire Commissioners could answer. If I was a battalion chief I would want a good one, but they might think a Ford would be good enough for me, so I would take it. 10

Q What is a machine such as the type of those cost? A They cost, I think, \$1,600.

Q So that the initial expense of equipping a battalion chief, in your opinion, would vary from \$600 for a horse and gig up to \$1,600, perhaps, for an automobile equipment? A No, I understand that the battalion chiefs of New York are getting very good service out of a Ford car which costs about \$420. 20

Q So you put your figure a little bit lower? A Yes.

Q From \$420 up, possibly to \$1,600, according to the type of car? A Yes, but if the car was good enough for the battalion chiefs of New York, it ought to be good enough for the battalion chiefs in Newark. 30

Q Speaking about rotating, you meant the rotation of the four battalion chiefs who had no commissions? A Yes.

Q And they took their turns in filling in on the days off? A Yes, sir.

Re-direct by Mr. Bradner.

Q What is your own judgment as to the necessity of having two new districts? A I think they are greatly needed. 40

Michael J. Durkin, re-cross.

10 Q Why? A Because the districts are two large; it takes the battalion chief fifteen minutes to get to the end of his district where there is a fire, while the captain is in charge for, we will say, thirteen or fourteen minutes; consequently the battalion chief isn't there. It is at the time of the arrival of the apparatus that a battalion chief—that you want to have a head there, and you want to have a head there that they will all take notice of.

Q You explained a little while ago that there might be several captains there and they don't know which one is acting as battalion chief? A No, sir, they don't know; they have no designation.

20 Q And there would be a division of authority until a chief appeared on the scene? A Yes, sir.

Q What duties would the captain have to perform until the chief arrives? A He is held responsible for his actions at that fire until the first battalion chief arrives.

Q Who takes charge at a fire, which captain? A The first captain to arrive.

Re-cross by Mr. Frazer.

30 Q Suppose there is an acting battalion chief captain and he arrives second, he takes charge over the first captain when he comes in the capacity of an acting battalion chief? A He ought to, but he would of the first man; the rules and regulations say that the first captain who arrives at a fire—

40 Q But he is a battalion chief? A If I am the first one to arrive, he has nothing to designate that he is a battalion chief, he has the same kind of a black coat; I am responsible for that

Michael J. Durkin, re-direct.

fire; and another captain comes in there after me, I don't know that he is a battalion chief until I see the white coat or hat on.

Q If he told you so, you would believe him, wouldn't you? A I suppose I would, if he told me.

Q And after he tells you, he would take care of the fire? A I would turn it over to him. 10

Q On the different days when one of the battalion chiefs is off of duty, don't you know who is the acting battalion chief that day? A We would in one district, but if we came to another district, we wouldn't.

Q In case of a fire which carried your apparatus out of your district, you wouldn't know? A No. 20

Re-direct by Mr. Bradner.

Q You said something about there not being sufficient money to open up these districts; are you speaking of your own knowledge or what you have heard? A I am speaking of what the commissioner told me.

Q Wasn't there an appropriation made in 1914 for the fire department sufficient to cover all this proposed work? A It was supposed to, but I guess they must have used it for something else. 30

Q Wasn't there an extra appropriation made in the summer of 1914, or don't you know about that? A I don't know.

Q Then you are testifying in regard to the expense of it, or the lack of funds, from what some of the commissioners told you? A Yes.

Q That is, in regard to not instituting those two new districts? A Yes. 40

Thomas S. Reilly, direct.

Q But as a matter of fact, were those two proposed new districts actually covered by the newly appointed battalion chiefs from July 1, 1914, to March 16, 1915? A Yes, sir.

10 Q The two districts were there in existence covered by the battalion chief? A They were on the map and covered by the battalion chief.

Re-cross by Mr. Frazer.

Q Except such chiefs as those battalion chiefs might be going on a roving commission in some other district? A They rotated; there were two acting, taking the place of the two that were off, and on that particular day the other two were taking the place in the new districts.

20 *Re-direct* by Mr. Bradner.

Q And those four men, four of the newly appointed battalion chiefs, covered those two new districts in fact? A Yes.

Q During that time? A Yes, sir.

Q (By Mr. Frazer). Assuming for the moment that you were properly demoted, how many battalion chiefs are there at the present time? A Five.

30 THOMAS S. REILLY, being duly sworn according to law, testifies as follows:

Direct examination by Mr. Bradner.

Q You were one of the members of the fire department promoted from captain to battalion chief on July 1, 1914? A I was.

Q You acted as battalion chief until March 16, 1915? A I did.

40 Q And in what district were your duties performed? A Roving battalion chief.

Charles C. Storch, direct.

Q In the two proposed new districts? A One time I would be in 23 Engine and another time in 25, and another time I would be in District 1, District 2, 3, 4 and 5, at different intervals.

Q Was your time fully occupied as acting battalion chief, except on your days off? A It was.

Q Since March 16, 1915, have you been made a battalion chief again? A I have. 10

Q On what date? A To take effect October 1, 1915.

Q And since October 1, 1915, you have been a battalion chief again? A Yes.

Cross examination by Mr. Frazer.

Q You were first on the list at the time the five were made? A Yes, sir.

Q And after the demotion proceedings which are being reviewed here, there was a death of one of the chiefs? A There was, Robert Morgan. 20

Q And at the same time, or about the same time that you were appointed for the second time, Mr. Storch was also appointed to fill up the full number of five? A Both were appointed on the same day, to take effect the same day.

Q And Mr. Storch was the second man on the list at the time of the making of the five? A He was. 30

CHARLES C. STORCH, being duly sworn according to law, testifies as follows:

Direct examination by Mr. Bradner.

Q You were one of the battalion chiefs reduced in rank on March 16, 1915? A Yes, sir.

Q And since that date have you been made battalion chief again? A Yes, sir, October 1, 1915. 40

Cornelius Smith, direct.

Q Prior to March 16, 1915, you were battalion chief with a roving commission, as they call it, were you not? A Yes, sir, with the exception of the month of July, the battalion chief in the third battalion district was sick and I acted the whole month of July as battalion chief in district number three.

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Q In 1914? A Yes.

CORNELIUS SMITH, being duly sworn according to law, on his oath testifies as follows:

Direct examination by Mr. Bradner.

Q You are one of the demoted battalion chiefs?

A Yes, sir.

Q Have you been reinstated? A No, sir.

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Q Since March 16, 1915, have you been acting as captain? A Yes, sir.

Q Prior to that date, while you were battalion chief, where were you stationed? A I had a roving commission, I was in 25 Engine, 23 Engine, and one, two, three, four and five battalion, and upper and lower deputy district.

Q While you were battalion chief from July 1, 1914, to March 16, 1915, with the exception of your days off by permission, was your time fully occupied? A Yes, sir.

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Q In doing what? A Doing battalion chief and deputy chief work.

No cross examination.

JAMES FAGEN, Jr., being duly sworn according to law, on his oath testifies as follows:

Direct examination by Mr. Bradner.

Q Are you one of the demoted battalion chiefs?

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A I am.

James Fagen, Jr., direct.

Q You have not been reinstated? A No, sir.

Q From July 1, 1914, to March 16, 1915, except during your days off, was your time fully occupied? A It was.

Q In what duties? A In performing the duties of battalion chief and sometimes acting as deputy chief.

Q Have you any personal knowledge of the proposed new districts? A In the two most prominent districts spoken of, were the outlying districts of Woodside and Clinton Hill, and for that reason they considered Clinton Hill and Vailsburgh section and the Woodside section as being not properly protected, as far as executive officers at fires was concerned. The chief of the first battalion was located on Plane street, and to get to the end of his district, which includes Woodside, the city limits, would take between fifteen and seventeen minutes to the furthest station, and with the idea of placing a man in 23 Engine, which company responded to every station in a remote part of his district, and the battalion stationed there could cover that district just as well as though he was provided with a conveyance of his own; and the same thing would apply to Vailsburgh and the Clinton Hill district, for 25 Engine covered the remote sections of those districts and a good part of the inland section, so that battalion chief stationed there could answer those stations in the outlying districts, and leave the battalion chief that formerly responded to those stations, in quarters, so in case a fire should occur in the congested tenement districts and congested value districts, which those two chiefs were responsible for, they could be there to respond to those alarms; where, if those chiefs were not there, they would have to go out to the wilds of Wood-

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James Fagen, Jr., direct.

side or the wilds of Vailsburgh, and let another chief go into their districts.

Q Take this Woodside district, was that laid out in a circular form at all? A No; it just takes in the city line, up along the Passaic river to the Second river.

10 Q About what distance from Plane street—what part of Plane street? A It is easily between three and four miles.

Mr. Frazer. It is just north of James street?

Witness. Just in from Orange street.

Q About three and a half or four miles, running north? A Yes.

20 Q How far across east and west? A A mile and a half to a mile and three-quarters.

Q You take the Clinton Hill district, is that just as large? A Yes.

Q The battalion chiefs for each one of those districts, then, was located right down in the city itself, in the thickly settled part? A Yes.

Q Where was the engine house where the roving battalion chief had his headquarters, in the Woodside district? A It was on Mt. Prospect avenue, just this side of Sixth avenue.

30 Q And where was the engine house where he had his headquarters, in the Clinton district? A Corner of Avon and Thirteenth, and when you would arrive at those quarters, you would immediately call up—if you were twenty-five, you would call up battalion chief of the fourth battalion—that is on Belmont avenue, near Waverly—he takes in all that congested tenement district—you would notify him that you were in those quarters.

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James Fagen, Jr., direct.

Q In the same way, at No. 23, on Mt. Prospect avenue, you would notify the man down in Plane street? A Yes, and you would also notify the battalion chief in Bruce street near Thirteenth avenue; that would keep him from going to Vailsburgh in the event of a fire; he would know you were there, he wouldn't go to Vailsburgh; and the battalion chief in Belmont avenue, when he would know you were there, he wouldn't go to Clinton township; and battalion chief in Plane street, when he would receive notice that you were there, he wouldn't go up to Woodside, or to any of the remote boxes in the portion to the west.

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Mr. Frazer. Except in case of a second fire?

Witness. If there was a second alarm and he was assigned there, he would go there.

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Q Two of the men have been put back in the rank of battalion chief since the demotion of the five? A Yes.

Q But there were actually two vacancies there, Mr. Exall's retirement and the death of Chief Morgan? A Yes.

Q There are still three of you who are still under demotion? A Yes, sir.

30

Q Will you tell me whether there is any actual necessity for the battalion chief in those two large districts that you have spoken of—Clinton Hill and Woodside—to have a rig of any kind? A No, it is not absolutely necessary, although it would be beneficial. The same conditions exist there today that existed two years ago; if anything the conditions are worse. This is a progressive city and is growing every day, and those sections in particular are building up, and they are

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James Fagen, Jr., direct.

building of frame material; the fire limits do not extend out there and they can put up frame buildings there—fast burning buildings.

10 Q While you were there as battalion chief, how did you get to a fire? A Both of those companies are equipped with motor driven apparatus, and we could get there quicker than the battalion chief that was down in Plane street or these other chiefs that I spoke of, if they were there in the quarters where we were. When riding on the apparatus you can get there, it is safe to say, sixty to seventy per cent. quicker than you could with a horse-drawn apparatus.

20 Q Do you know anything of the reason why those two districts were not formally established? A I do not; I cannot give no reason that I know of.

Q They were actually covered as a matter of fact? A Yes.

30 Q From July 1, 1914, to March 16, 1915? A Yes, and we were equipped to perform the duty far better than our predecessors as battalion chiefs who were placed in the same position as we were, for this reason: I as a boy had spent my time around 3 Engine; on Court street, and I remember the late Chief Morgan, when he was made a battalion chief; I remember distinctly that for weeks and months, if an alarm of fire come in from—we used to call it Klondyke, that is, Clinton Township, he would have to leave his quarters on Court street and run up to Broad street, here to catch one truck coming down. Those were the conditions. When we were there, equipped with motor apparatus, with the modern equipment, we could get to a fire and we could perform the duties, and we did perform the duties, which the
40 chief can testify, that while we were rotating that

Exhibit P. 1.

way those districts were well taken care of and well covered, though not reflecting on the men in charge of them now, for they are not in position to perform the duties that we were, for we could get there from ten to twelve minutes quicker than they could.

Q (*By Mr. Frazer.*) Your two trucks, twenty-three and twenty-five, did they always respond to every first alarm in the district? A In those districts. 10

It is stipulated that there was an appropriation made to the Board of Fire Commissioners of the City of Newark for the year 1915, which was large enough to pay all the salaries of the men in the department, together with the salaries of the battalion chiefs, for that year, as they had been created in July, 1914. 20

Mr. Bradner. I offer in evidence the resolution of the Board of Fire Commissioners, either reinstating or promoting Thomas S. Reilly and Charles C. Storch.

(Marked Exhibit P. 1.)

“Resolution—Sept. 22, 1915.

WHEREAS, Thomas S. Reilly, Chas. C. Storch, James Fagen, Jr., Michael J. Durkin and Cornelius Smith, on the twenty-fourth day of June, 1914, were promoted to the rank of battalion chief in the Newark Fire Department by the Fire Commissioners then in charge of said department; and 30

WHEREAS, the present Board of Fire Commissioners did on the third day of March, 1915, reduce said members to the rank of captain in said Fire Department, for the reason of economy; and 40

Exhibit P. 1.

WHEREAS, the Civil Service Commission of the State of New Jersey, by its opinion held that the reduction in rank of the said officers was illegal, and said action is now before the Supreme Court of New Jersey for its determination; and

10 WHEREAS, at the present time there is in force and existence in the Fire Department of the City of Newark (disregarding the five positions of battalion chiefs made unnecessary as aforesaid) five other positions of battalion chief, two of which are now vacant, said vacancies being caused by the retirement of Chief Exall and by the death of Chief Morgan; and

20 WHEREAS, this Board is desirous of filling said two positions of battalion chief, but in so doing this Board in no way intends to increase the present number of positions of battalion chief in said department, nor in any way to acknowledge as existing the five positions of battalion chief so made unnecessary by it as aforesaid; therefore be it

30 RESOLVED, that Thomas S. Reilly and Charles C. Storch be appointed, and they are hereby appointed to the positions of battalion chief in the Newark Fire Department to fill vacancies caused by the death of Battalion Chief Robert F. Morgan and the retirement of Battalion Chief William Exall; and that said appointments are to take effect the first day of October, 1915. And that these appointments are hereby made with the understanding that if the Supreme Court of New Jersey in the litigation above mentioned should uphold the action of this Board the above appointees are according to the Civil Service Laws of New Jersey eligible to said appointment; and
40 the action of this Board is erroneous in said liti-

Certificate of Commissioner.

gation, then the above appointees will simply be holding a position which they are entitled to.

Adopted September 22, 1915.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

I HEREBY CERTIFY that the foregoing testimony 10
was taken on behalf of prosecutor, pursuant to
notice, before me as Supreme Court Commission-
er, at the Fire Headquarters, City Hall, Newark,
New Jersey, on Friday, May 19th, 1916, at three
o'clock in the afternoon, in the presence of Mr.
Frank E. Bradner for prosecutor, and Mr. Spauld-
ing Frazer and Mr. Harry Kalisch for defend-
ant; that it was stipulated and agreed by and be-
tween the attorneys for the respective parties that
the testimony of the witnesses should be taken 20
down in shorthand by me and afterwards reduced
to typewriting, the signatures of the witnesses to
their said testimony being waived; and I further
certify that the foregoing is a true and correct
transcript of my shorthand notes of the testimony
of the witnesses given before me.

Dated May 24th, 1916.

NICHOLAS W. BINDSEIL,
Supreme Court Commissioner of New Jersey. 30

*Reasons.***Reasons.**

Filed May 27, 1916.

New Jersey Supreme Court.

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MICHAEL J. DURKIN,

*Prosecutor,**vs.*BOARD OF FIRE COMMISSIONERS
OF THE CITY OF NEWARK,*Defendant.**On Certiorari.**Reasons.*

20

The said prosecutor by Frank E. Bradner, his attorney, comes and prays that the resolution of the Board of Fire Commissioners of the City of Newark, bearing date the third day of March, 1915, wherein and whereby it was resolved that for reasons of economy, Battalion Chiefs Thomas S. Reilly, Charles C. Storch, James Fagen, Jr., Michael J. Durkin and Cornelius Smith, should be and thereby were reduced to the rank and salary of captain, beginning March 16, 1915, may be set

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aside, reversed and for nothing holden, for the following reasons:

First: Because the prosecutor was in the classified Civil Service, and was in effect removed from his office in violation of the statute commonly known as the Civil Service Law, in that the office or rank of battalion chief was not abolished.

40

Second: Because the prosecutor was in the classified Civil Service, and was reduced in pay and position in violation of the statute commonly

Reasons.

known as the Civil Service Law, in that the office or rank of battalion chief was not abolished.

Third: Because the prosecutor was not charged with either incapacity, misconduct, non-residence or disobedience of the rules and regulations established for the Fire Department of the City of Newark.

10

Fourth: Because the prosecutor was not removed from his office of battalion chief for cause, and was entitled to hold his office during good behavior.

Fifth: Because at the time of the adoption of said resolution, there was no existing reason for reducing the expenses of the Fire Department of the City of Newark by demoting the battalion chiefs.

Sixth: Because the action of the Board of Fire Commissioners was not taken in good faith.

20

Seventh: Because the Board of Fire Commissioners afterwards on September 22, 1915, reinstated two of the said battalion chiefs.

Eighth: Because the efficiency of the Fire Department was decreased by the action of the Board in reducing the prosecutor and the other battalion chiefs named in said resolution.

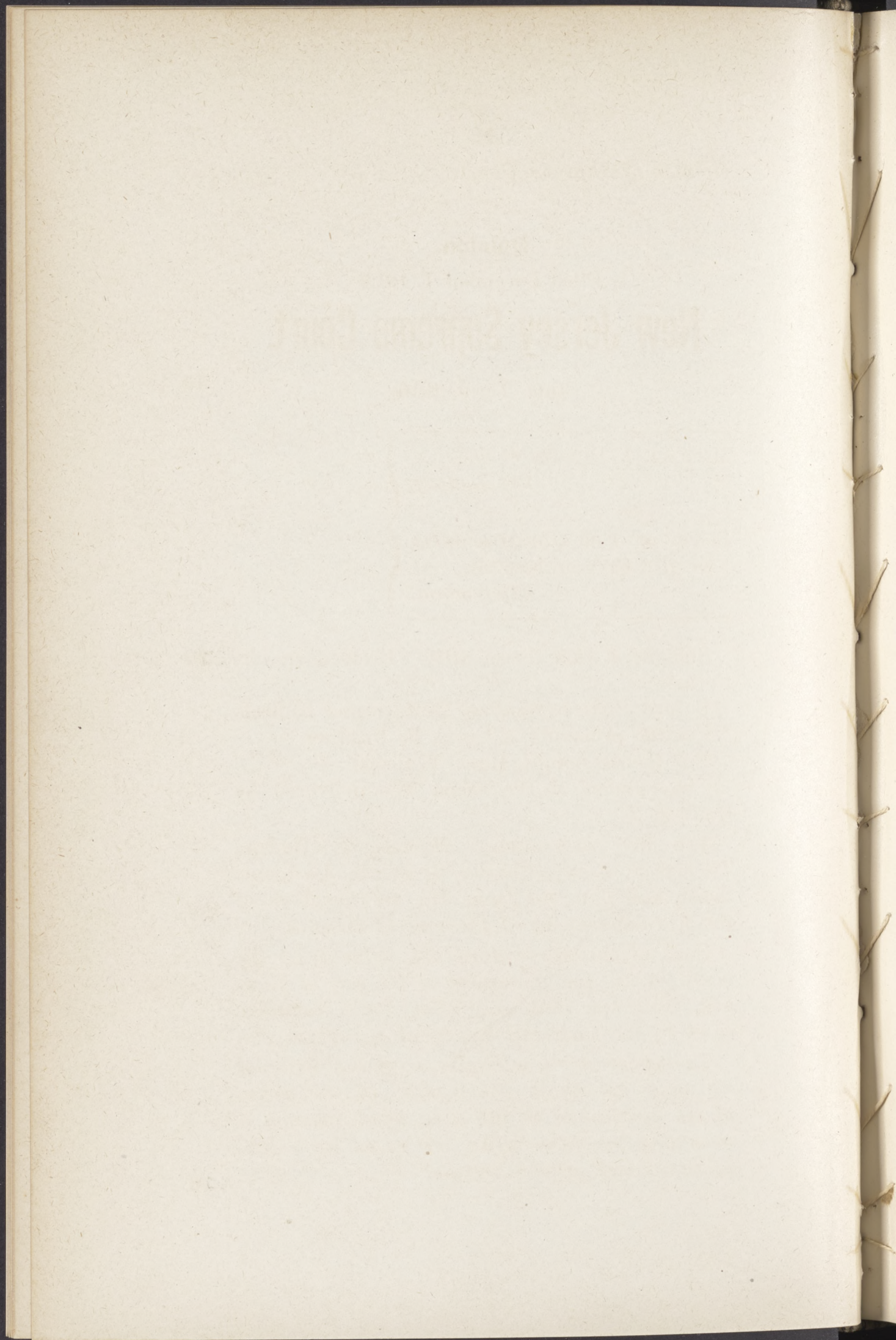
Ninth: Because the resolution of said Board of Fire Commissioners is in other respects illegal.

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Dated May 26, 1916.

FRANK E. BRADNER,
Attorney of Prosecutor.

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Opinion of Supreme Court.

Opinion.

Filed December 7, 1916.

New Jersey Supreme Court.

June Term, 1916.

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<p>MICHAEL J. DURKIN <i>et als.</i>, <i>Prosecutors,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>BOARD OF FIRE COMMISSIONERS OF THE CITY OF NEWARK, <i>Defendant.</i></p>	}
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Submitted June Term, 1916. Decided on cer- 20
tiorari.

Before Justices Swayze, Minturn and Kalisch.

For the prosecutors, Frank E. Bradner.

For the defendant, Harry Kalisch.

The opinion of the Court was delivered by
Kalisch, *J.*

The five prosecutors, Michael J. Durkin,
Thomas S. Reilly, Charles S. Storch, Cornelius
Smith and James Fagan, Jr., are members of 30
the fire department of the city of Newark.

Each of the prosecutors was reduced, by the
board of fire commissioners of the city of New-
ark, from the rank and salary of a battalion
chief to the rank and salary of a captain.

The prosecutors, severally, sued out writs of
certiorari to review the legality of the action
of the board, and as the same legal question is
presented by these writs, the cases were con-
solidated and argued together.

40

Opinion of Supreme Court.

The facts are briefly these: In June, 1914, the prosecutors, who were captains in the fire department, were made battalion chiefs. The city of Newark then contained five battalion districts under the supervision of four battalion chiefs, there being a vacancy in one of the districts. Each battalion chief was equipped, at the expense of the municipality, with a horse and gig at an initial cost of about \$550.00. The upkeep of these equipments was the source of considerable expense. The promotion of the prosecutors carried with it an increase of four hundred dollars in the salary of each annually. No new battalion districts were created and no equipments had been furnished to the promoted men. The effect of the advance of the prosecutors to battalion chiefs was to increase the force of the latter from five to nine for the five battalion districts. To carve out of the old division new battalion districts and to provide the proper equipment for the new battalion chiefs and to maintain the battalion stations properly would require the expenditure of large sums of money.

It further appeared that the affairs of the fire department had been conducted with efficiency at the time, when, in 1914, the five battalion districts were under the supervision of the four battalion chiefs.

Confronted with this situation, the board of fire commissioners of 1915, on the 11th day of February, 1915, notified each of the prosecutors to appear before the board, on February 24, 1915, and show cause why he should not be reduced to the rank of captain for reasons of economy. The prosecutors, with counsel, appeared before the board at the time stated, and asked leave to file written answers, which privilege was accorded

Opinion of Supreme Court.

them. At the request of their counsel a further continuance was granted them, and they filed their several answers on March 3, 1915, in which they set up that their reduction to the rank of captain for reasons of economy was not in the nature of a charge against them in compliance with the civil service law, and that the board was without power to make the reduction in rank on grounds of economy and furthermore that no such grounds existed. The prosecutors offered no testimony before the board and were content to rest upon their answers, whereupon the board passed the following resolution: "Resolved, that for reasons of economy, Battalion Chiefs Thomas S. Reilly, Charles C. Storch, James Fagan, Jr., Michael J. Durkin and Cornelius Smith, be and are hereby reduced to the rank and salary of Captain, beginning March 16, 1915. Adopted March 3, 1915."

Nine reasons have been assigned by counsel for the prosecutors why the resolution demoting the prosecutors should be set aside, but only two are relied on and presented in the brief for our consideration. The two reasons relied on and argued in the brief embody the following propositions: Firstly, that no member of the fire department can be reduced in rank except for cause as specified by the statutes, and only after a trial upon specific charges; secondly, that the prosecutors could only be reduced in rank in accordance with the civil service law.

In order to sustain the view expressed in the first proposition, counsel for the prosecutors pointed out that the act approved March 24, 1885 P. L. p. 130; 2 Comp. Stats. p. 2391, Sec. 256, prescribes that the officers and men employed by municipal authority in the fire depart-

Opinion of Supreme Court.

ment of any city shall severally hold their respective offices and continue in their respective employment as such municipal officers and employees during good behavior, efficiency and residence in such city, except where, by statute, the term of any such officer and employee is determined and fixed and does not depend upon the pleasure or caprice of any municipal officer, officers or board authorized to make appointment or employment in said department, and that such officer or employee shall not be removed from such office or employment for political reasons or for any other cause than incapacity, misconduct, non-residence or disobedience of just rules and regulations. And from this counsel argues that according to the construction put on this statute, in *Michaels v. Jersey City*, 49 N. J. L., 154, where it was held that the transfer of an employee in the Jersey City fire department from his position of engineer to that of stoker, the latter position being attended with different duties and different pay, was invalid, and it appearing that the reduction of the prosecutors in the present case is to a rank requiring different duties and less pay, therefore, the present case is controlled by the one cited, and the reduction in rank of the prosecutors must be declared invalid.

And it is further insisted that because section 1 of the act of 1906, P. L. 1906, p. 429; 2 Comp. Stat., p. 2402, plac. 298, provides, among other things that battalion chiefs shall hold their office or employment during good behavior and shall be removed for cause after a hearing or opportunity therefor is afforded, the word "cause" in the statute must be held to mean one of the causes designated in the act of 1885.

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The force of this argument is much weakened by the fact that, in an act entitled "An act to remove the Fire and Police Departments in the cities of this State from political control," approved May 2, 1885, P. L. 1885, p. 326; 2 Comp. Stats., p. 2341, under which a board of fire commissioners was organized in the city of Newark, it is provided by section 1, plac. 64, p. 2341, of the compiled statutes, that the board of fire commissioners shall be entrusted with the government, control and management of the fire department, and with the direction and control of all public fire matters, subject to the inspection and supervision of the common council of such city, as in the act provided. 10

And that by plac. 70, section 7, it is further provided, *inter alia*, that the board shall be authorized and empowered to employ such persons as may be deemed necessary by said board from time to time, and shall be authorized and empowered to declare vacant any and all of the offices or positions therein or thereunder as to such board may appear best for the public interest in the department. 20

And that by plac. 71, section 8, it is further provided, *inter alia*, that the board shall have full power and right to suspend and to expel or discharge any person employed or appointed in or under the control of the board, provided good cause shall be shown for such suspension, expulsion or discharge after an investigation by such board. 30

The legal effect of these provisions and their effect on the provisions of the earlier act of 1885 *supra*, was dealt with by the Court of Errors and Appeals in *Newark v. Lyon*, 53 N. J. L., 632, which case involved the legality of a resolution 40

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of the board of fire commissioners abolishing the call system in the fire department, which resulted in that all members of the fire department who were "call members," ceased to be such and lost their employment.

- 10 Judge Scudder, who delivered the opinion of that court, in discussing the nature of the tenure of office held under the acts referred to, on p. 635, said: "They cannot in such a case be tried and discharged for any of the causes named in the statute, for there is no incapacity, misconduct, non-residence, or disobedience of orders that can be shown against them. The cause is not in them, but in the public advantage of the change. They must, therefore, remain in office or be dealt with in some way satisfactory to themselves. But why should cities be obliged to
- 20 retain a larger number of men in service when a select body of a smaller number will be sufficient and do better service, when constantly on duty? This embarrassment was certainly not contemplated when these acts for the protection of deserving men against the designs of successful politicians, hurtful to the public as well as to the incumbents, were passed, and such construction should not be given to them." And on
- 30 p. 637, the learned justice in speaking of the powers of the board, said: "It certainly can in its government, control and management of an existing department, vacate or abolish superfluous, expensive and antiquated offices, if done in good faith to promote the efficiency of the service, although it may displace some men whose positions are secured to them during good behavior. The tenure of office is qualified by the continuance of the office."

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Counsel for the prosecutor does not contend that under *Newark v. Lyon, supra*, the board of fire commissioners had no power to abolish or vacate the position of a battalion chief. His contention is that because the board did not attempt to vacate any office or to abolish the rank of battalion chief, the demotion of the prosecutors did not fall within the reasoning of that case. We think the present case is clearly within the reasoning of *Newark v. Lyon*. 10

We are unable to perceive any difference in principle, insofar as the economical administration of governmental affairs is concerned, between the act abolishing an office or position that is needless and the act of reducing men in rank or discharging them altogether from office or position whose services in that office or position are unnecessary and needless. Both acts aim at economy in the public service. It is just as vicious and injurious to the public welfare to keep men in office or position whose services are not needed as to maintain needless offices or positions. Both involve a useless and unwarranted expenditure of the money of the taxpayer. 20

The contention of counsel carried out to a logical conclusion would require this court to declare that in order to get rid of unnecessary employees in office or position, that the office or position be first abolished, and this irrespective of the fact whether or not such office or position constituted an essential part of the government. The legislature never intended anything so unreasonable as that. The fact that the services of the prosecutors were not needed as battalion chiefs constituted a good cause for their reduction to a rank where their services could be utilized to maintain the efficiency of the fire department. 30
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This is what the board of fire commissioners evidently thought when they effected the change.

Section 24 of the civil service law, 3 Comp. Stats., p. 3804, which has also been invoked in behalf of the prosecutors does not tend to protect them against reduction in rank where such
10: reduction was not the result of discrimination because of their religious or political opinions or affiliations, but was made in the interest of economy in the affairs of government. *Paddock v. Hudson Tax Board*, 82 N. J. L., 360; *Colgarry v. Street Commissioners of Newark*, 85 *Id.*, 583.

The testimony taken in the present case tends to establish that the services of the prosecutors were not needed as battalion chiefs and that their reduction in rank and pay by the board of
20: fire commissioners was warranted upon the ground of economy.

The writs will be dismissed, with costs.

Rule dismissing Writ.

Rule Dismissing Writ.

Entered January 10, 1917.

New Jersey Supreme Court.

MICHAEL J. DURKIN, <i>Prosecutor,</i>	} <i>On Certiorari.</i>	10
<i>vs.</i>		
BOARD OF FIRE COMMISSIONERS OF THE CITY OF NEWARK, <i>Defendants.</i>	} <i>Rule Dismissing Writ.</i>	

The Court having inspected the transcript and proceedings of the Board of Fire Commissioners of the City of Newark, returned with the certiorari in this case, and the reasons for reversing the judgment below and heard the arguments of counsel therein, and having duly considered the same, it is on this tenth day of January, 1917,

ORDERED, That the writ of certiorari heretofore allowed in this case be and the same is hereby dismissed. Entered January 10, 1917, on motion of

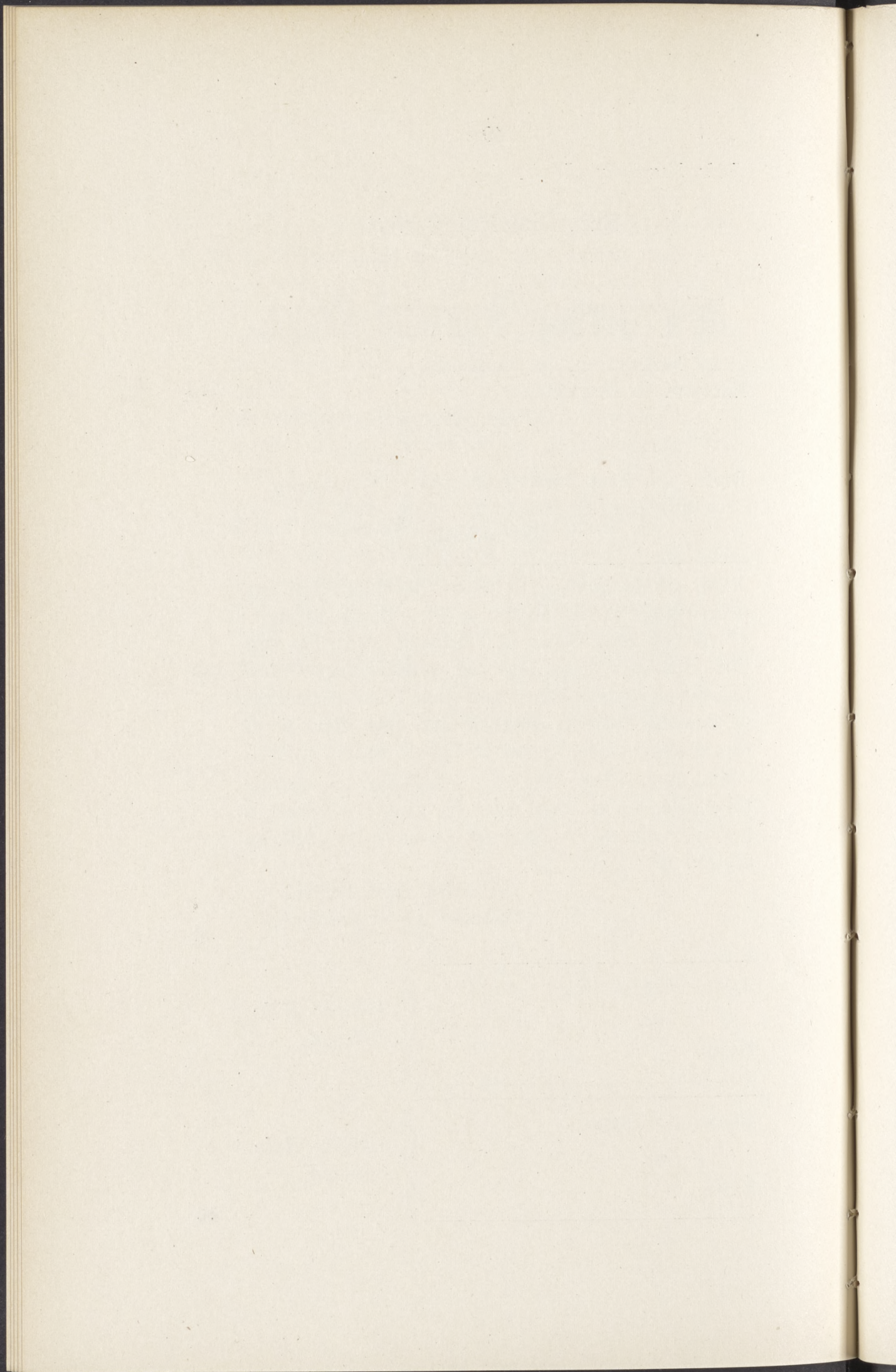
HARRY KALISCH,
Attorney of Defendants.

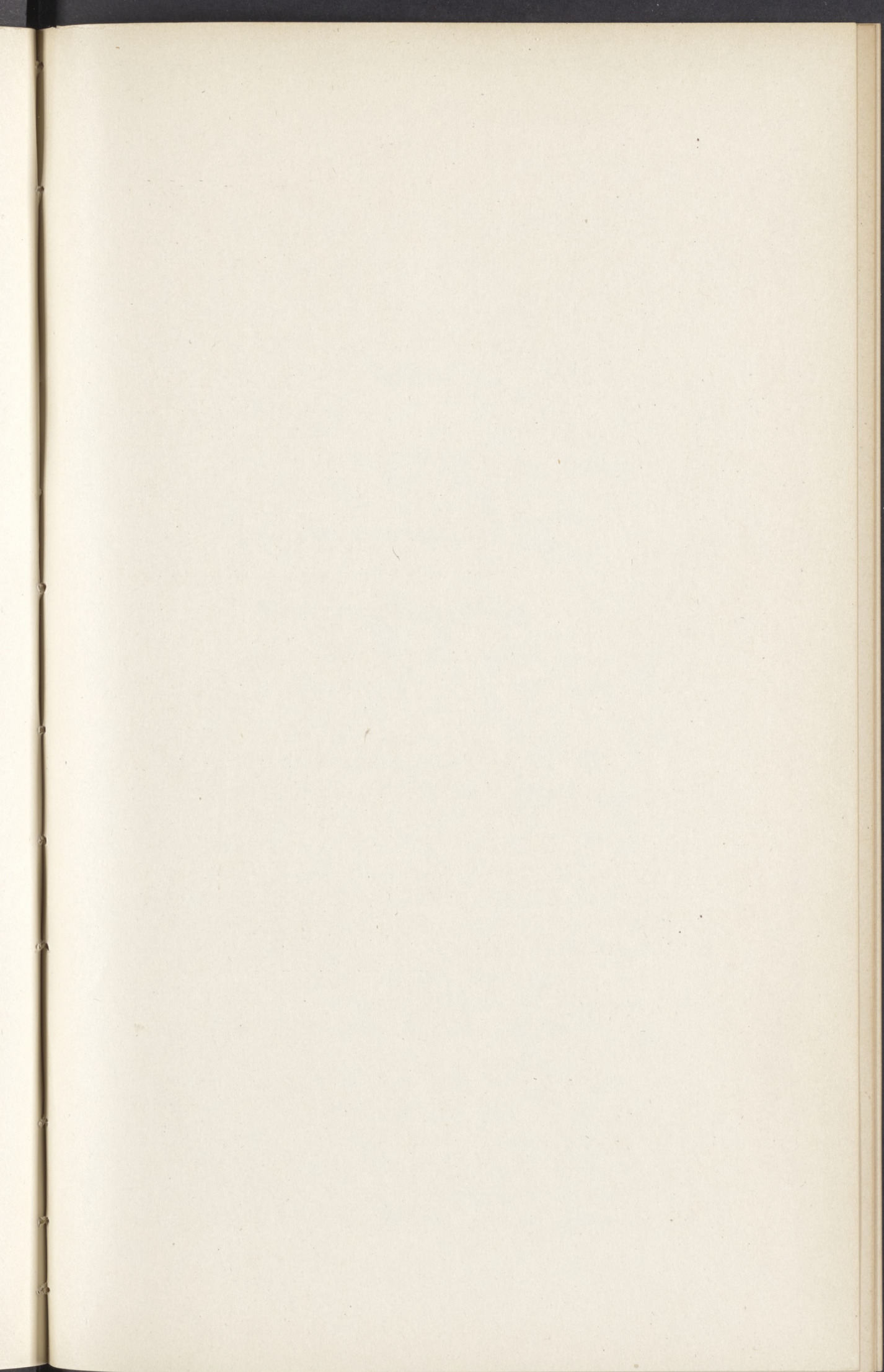
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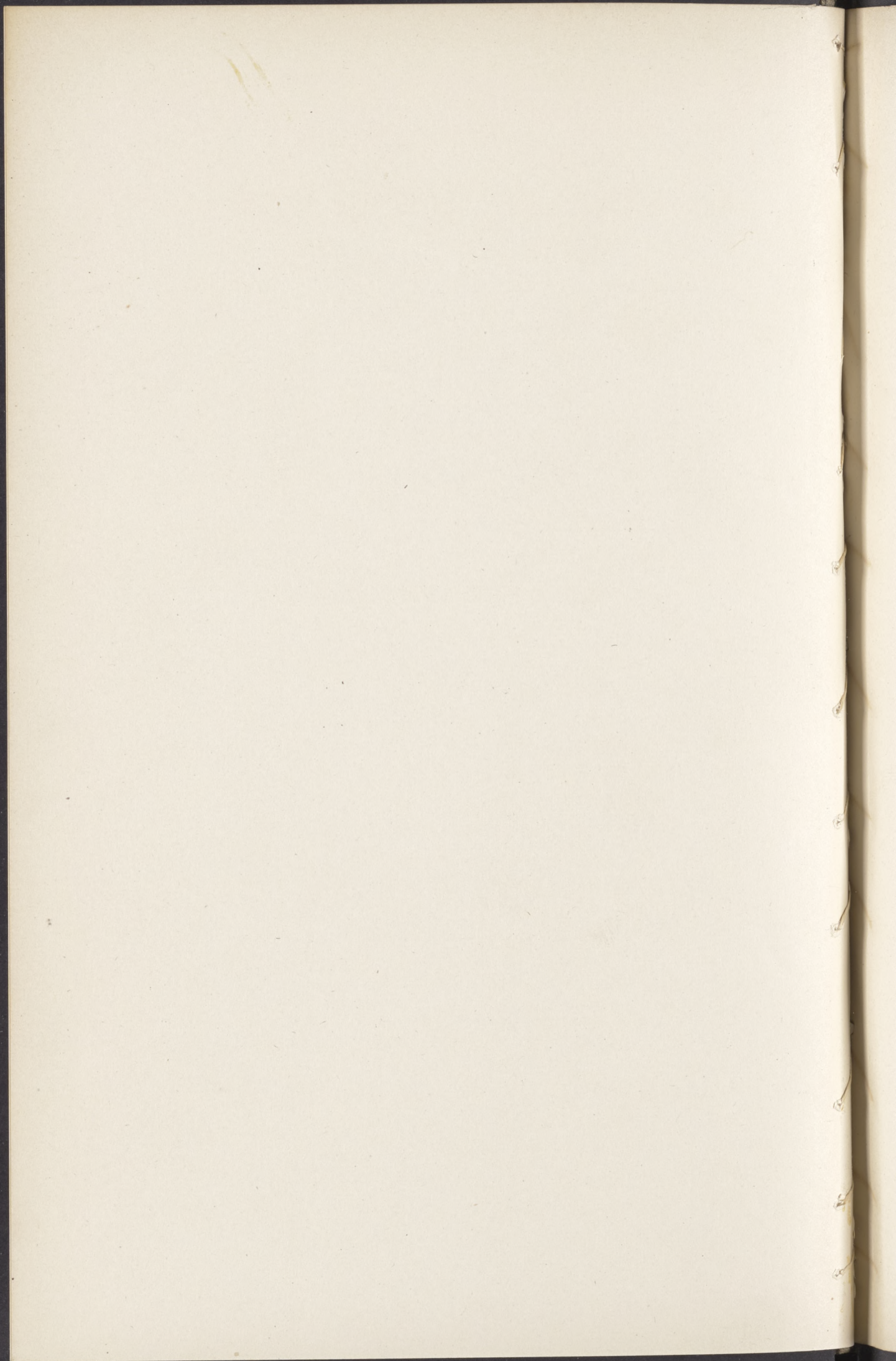
JAMES FAGEN, JR., <i>vs.</i>	} <i>Similar Rule Entered.</i>
SAME.	

CORNELIUS SMITH <i>vs.</i>	} <i>Similar Rule Entered.</i>
SAME.	

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New Jersey Court of Errors and Appeals

March Term, 1917.

MICHAEL J. DURKIN, *et als.*,
Prosecutors-Appellants,

vs.

THE BOARD OF FIRE COMMISSIONERS OF THE CITY OF
NEWARK,
Defendant-Respondent.

*On
Certiorari.*

*Three cases
consolidated.*

*On Appeal
from
Supreme
Court.*

Brief for Respondent.

This appeal brings up for review the judgment of the Supreme Court in dismissing the writ of certiorari previously allowed by said Supreme Court to review the action of the Board of Fire Commissioners of the City of Newark in reducing five battalion chiefs to the rank and salary of captains in the Fire Department. It appears that Michael J. Durkin, Thomas F. Reilly, Charles S. Storch, Cornelius Smith and James Fagan, Jr., were raised from the position of captain in June, 1914, to the rank of battalion chief. At that time there were in the City of Newark five battalion districts and four battalion chiefs, there being one vacancy in the offices as existing. Without adding any new battalion districts to those already existing and without providing any new equipment for five new appointees and despite the fact that there was but one vacancy among the five battalion chiefs then existing, in June, five new battalion chiefs were appointed, making a total of nine. The difference in pay between

the battalion chiefs and captains amounts to \$400 a year. (See State of Case, Testimony of Michael J. Durkin, page 12, beginning at line 14) which reads as follows:

“Q What salary did you receive as captain? A \$1,600.

Q What salary did you get as battalion chief? A \$2,000.”

It has also been the custom to supply each battalion chief with a conveyance either in the nature of a gig or runabout automobile with a driver or chauffeur. (See State of Case, page 24, beginning at line 28 and ending on page 25, line 30.)

“Q About how much money would you say it would cost to equip an ordinary battalion station? A I have got no idea of that. I don't know the price of the different automobiles; they are all prices. Horses are all prices and the gigs are all prices.

Q Have you any idea of the cost of a suitable gig such as the other battalion chiefs are using; do you know what they are worth now? A I should judge a horse and gig and harness would amount to about \$550.

Q And do any of the battalion chiefs have automobiles? A No, sir.

Q All use gigs still? A All use gigs.

Q The deputy chiefs have automobiles? A Yes, sir.

Q And if a battalion chief should have an automobile it would be of the same general kind as the deputy chief, I presume? A That I cannot answer; that is something the Board of Fire Commissioners could answer. If I was a battalion chief I would want a good one, but they might

think a Ford would be good enough for me, so I would take it.

Q What is a machine such as the type of those cost? A They cost, I think, \$1,600.

Q So that the initial expense of equipping a battalion chief, in your opinion, would vary from \$600 for a horse and gig up to \$1,600, perhaps, for an automobile equipment? A No, I understand that the battalion chiefs of New York are getting very good service out of a Ford car which costs about \$420.

Q So you put your figure a little bit lower? A Yes.

Q From \$420 up, possibly to \$1,600, according to the type of car? A Yes, but if the car was good enough for the battalion chiefs of New York, it ought to be good enough for the battalion chiefs in Newark."

The expense of these conveyances and their upkeep in the course of the year is substantial, while the position of driver necessary takes from active duty in the fire house where he had theretofore been employed the fireman who is detailed to that work, necessitates the appointment of another fireman in his place. Although the appointments to the battalion chief rank were made in June, as above stated, the five captaincies left vacant by this action of the Board of Fire Commissioners were never filled and remained unfilled until the present Board reduced the battalion chiefs and put them back into the captaincies left vacant. The specific problem which confronted the Board of Fire Commissioners is this—is it consistent with efficiency and economy and is it in the best interests of the department to create offices for which,

in the *opinion of the Board*, there is no need under the present conditions of the fire department in the City of Newark? The answer to the question above suggested, made by the Board, was that it could not at the present time afford the necessary equipment, nor could it afford to detail special firemen to the new chiefs as chauffeurs or drivers and that the requirements of the city were amply met by four battalion chiefs. The Board thereupon determined that the five most recently created chiefs should be reduced to their former position and made to perform the work for which no substitutes had been appointed, namely, the work of captains. To accomplish that purpose a notice was served upon the firemen whose reduction was contemplated, setting forth that they should show cause on February 24, 1915, why, for reasons of economy, they should not be reduced, and an opportunity was given for them to appear before the Board—an opportunity of which they availed themselves—appearing there by counsel on that day and asking leave to file written answers and asking for a continuance of the hearing for that purpose. This continuance was granted and a week later after the first continuance answers dated March 3, 1915, were filed and upon no testimony being given, after a request therefor by the Board, the following resolution was adopted by the Board:

“Resolved, That for reasons of economy, Battalion Chiefs Thomas S. Reilly, Charles C. Storch, James Fagen, Jr., Michael J. Durkin and Cornelius Smith, be and hereby are reduced to the rank and salary of captain, beginning March 16th, 1915.

Adopted March 3, 1915.”

From this resolution an appeal was taken to the Civil Service Commission and the Civil

Service Commission, on May 12, 1915, after briefs had been submitted by both sides, passed a resolution in which they held that the demotion of Battalion Chiefs Thomas S. Reilly, Charles C. Storch, James Fagen, Jr., Michael J. Durkin and Cornelius Smith, was improperly made and that they are entitled to be reinstated in the positions previously held by them. This resolution of the Civil Service Commission was certiorated to the Supreme Court, and that court, instead of passing upon the merits of the controversy, held that certiorari was not the proper remedy to invoke, thus leaving the substantial question undecided.

The Act creating the Board of Fire Commissioners was enacted May 2, 1885. Sections 1, 7 and 8 defined the powers of the Board concerning appointments of employees in the Fire Department.

“1. That there is hereby created and established in each of the cities of this state which shall accept the provisions of this act, a board of fire commissioners and a board of police commissioners, to whom respectively shall be entrusted the government, *control* and *management* of the fire and police departments therein, and the direction and control of all public fire and police matters respectively, subject to the inspection and supervision of the common council of such city as hereinafter provided.”

“7. That the commissioners composing such board of fire commissioners and board of police commissioners be and the said respective board of fire and police commissioners are hereby fully authorized and empowered to *employ* such persons as may be deemed necessary by said boards, from time

to time, in their respective departments, and said boards are respectively authorized and empowered to declare *vacant* any or all of the offices or positions therein or thereunder, as to such board may appear best for the public interest in such department, including the chief officers of such department; *provided*, the appointment of chief engineer of such fire department and the chief of police of such police department shall be approved by the common council of any such city; and said respective boards shall have power to make, from time to time, such by-laws, rules and regulations for the government of such board, and for the conduct and management of the affairs of such board and the department under its control, as to the members of such board shall seem proper; provided, such by-laws, rules and regulations are not contrary to the constitution and laws of this State or the provisions of this act."

"8. That such board of fire commissioners shall be and is hereby fully empowered to *designate, appoint or approve* all the firemen or other persons employed in the fire department of such city; and the said board of police commissioners shall be fully authorized and empowered to designate, appoint or approve all the policemen or other persons employed in the police department of such city; and said respective boards shall have full power and right to suspend and to expel or discharge any person employed or appointed in or under the department under the control of such board, provided good cause shall be shown for such suspension, expulsion or discharge after an investigation by such board."

About two months prior to the passage of the above Act, on March 24, 1885, the same Legislature had enacted the following law, which reads as follows:

“1. That in the several cities of the state the officers and men employed by municipal authority in the fire department of any city shall severally hold their respective offices and continue in their respective employment as such municipal officers and employes during good behavior, efficiency and residence in such city, except where, by statute, the term of any such officer and employe is determined and fixed, and does not depend upon the pleasure or caprice of any municipal officer, officers or board authorized to make appointment or employment in said department; and no person shall be removed from office or employment in the fire department of any such city, or from the fire department force of any such city, for political reasons or for any other cause than incapacity, misconduct, non-residence or disobedience of just rules and regulations established or which may be established for the fire department or force of such city; *provided*, that any member of the fire force of any such city who shall be absent from duty, without leave, for the term of five days, shall be deemed deserving of expulsion from such fire force.

“2. That it shall be lawful, for the better government of and discipline of the fire department in the cities of the state, for the municipal authority or authorities in any city whose duty it is or may become to provide for, regulate or manage a fire department in such city, from time to time to

prescribe and establish just rules and regulations respecting said department.

“3. That no person, whether officer or employe, in the fire department of any such city, shall be removed from office or employment therein, except for just cause, as provided in the first section of this act and then only after written charge or charges of the cause or causes of complaint shall have been preferred against any such officer or employe, signed by the person or persons making such charge or charges and filed in the office of the municipal officer, officers or board having charge of the said fire department, and after the said charge or charges have been publicly examined into by the appropriate municipal board, officer or authority, upon such reasonable notice to the person charged, and in such manner of examination as the rules and regulations governing the same may prescribe, it being the intent of this act to give every person, against whom charges for any cause may be preferred under this act, a fair trial upon said charges and every reasonable opportunity to make his defense, if any he has, or chooses to make.”

These acts undoubtedly conflict. The earlier act, which was passed in March, limits the power of the Board of Fire Commissioners in that it provides that the officers and men employed in the fire department shall hold their respective offices and continue in their respective employment as such municipal officers and employes during good *behavior, efficiency and residence* in such city, etc.

This act was interpreted in the case of *John Michael, Prosecutor, v. Board of Fire Commis-*

sioners of Jersey City, wherein the Supreme Court held that under the act the Board of Fire Commissioners had no power to transfer employes of the Fire Department from one position to another position which was inferior in kind and attended with decreased wages. This case was argued at the June Term, 1886, and decided at the November Term, same year. We respectfully submit that in that case the Court's attention was not called to the later act of May 2, 1885, quoted above, Section 23 of which provides that,

“All acts and parts of acts, general, special, local or private, inconsistent herewith, be, and the same are hereby repealed, and this act shall take effect immediately.”

We contend that the later act of May 2nd was inconsistent with the earlier act and, therefore, repealed it, for under Section 7 of the later act the commissioners were given full power to declare *vacant* any or all of the offices or positions therein or thereunder as to such Board may appear best for the public interest in such department, including chief officers of such department, and also the power to employ such persons as may be deemed necessary by said boards, and in Section 8 of the act was given the further power to designate, appoint or approve of the firemen or other persons employed in the fire department of such city, whereas under the earlier act officers and men held their respective offices during *good behavior, efficiency and residence* in such city. Also Section 1 of the later act entrusted the Board of Fire Commissioners with the *government, control and management* of the Fire Department.

It is, therefore, quite apparent that the Board of Fire Commissioners had plenary power under

the later act to make the reduction in rank and pay, for in effect such reduction simply meant that the Fire Commissioners created a vacancy in the office of battalion chief, and *employed, designated and appointed* certain men who happened to be the former battalion chiefs, for the position of captain, all of which they were empowered to do under Sections 1-7 and 8 of the later act of 1885.

On page 5 of prosecutors' brief, an effort is made to attribute to the words—"To declare vacant any or all of the offices or positions," a meaning which would require the Board to abolish the office, that is, that the office could not exist without an occupant. Counsel for the prosecutors relies upon the case of *Newark v. Lyon*, 53 N. J. L., 632, for sustaining his contention, but upon reading that case it appears that the Court took the view that it was perfectly proper to vacate an office without abolishing it. In that case, on p. 636, the Court in interpreting the very section now under consideration, namely, section 7, says as follows:

"Among the acts which the Board are authorized to do by section 7, it may declare vacant any and all of the offices or positions therein or thereunder as to such Board may appear best for the public interest in such department.' This cannot be done for the purpose of appointing another to the vacated office unless it be done for good cause shown against the incumbent, for this would be a removal within the prohibition of the statute, but a *permanent vacancy* may be declared when the public interest demands it."

And on p. 637, the Court in the same case says as follows:

“While, therefore, it may be questionable whether this Board acting within the terms of this statute could create an entirely new Fire Department, on which no opinion is expressed, the city can in its government, control and management of an existing department, *vacate or abolish* superfluous, expensive and antiquated offices if done in good faith to promote the efficiency of the service, although it may displace some men whose positions are secured to them during good behavior.”

It might very properly be said, however, that that office of these battalion chiefs was abolished. It appears from the evidence that when the attempt was made to create the office it was not fully carried out. All that was done by the old Board was the appointing of the battalion chiefs; there were no new battalion districts which a battalion chief presides over in the fire department; there was no equipment provided for the battalion chiefs and so far as the record shows, there was no appropriation made for the purpose of sustaining the new positions created. The new fire board in vacating the office of the newly created battalion chiefs absolutely put out of existence the office itself. No other person in the department was appointed to the vacated office; there was no such thing as a battalion district or an equipment for the office of battalion chief. In fact, after the chiefs were demoted, the last vestige of the office of battalion chief was removed.

The substance of the office was gone, even though in form the Fire Board did not so declare.

It is further contended by counsel for the prosecutors on page 6 of their brief that the right to create the rank of battalion chief was given by an act passed April 8, 1892, and amended in 1906, P. L. 1906, page 429, and that that act provides that the battalion chiefs

“shall hold their office or employment during good behavior and shall be removed only for cause after hearing or opportunity therefor is afforded.”

It is argued that no cause has been shown against prosecutors and that the reason given by the Board of Fire Commissioners for demoting these men is not within any of the statutes and does not constitute cause for reduction in rank and pay.

The word “cause” in the above act certainly means more than “misbehavior.” The act does say that the battalion chiefs shall hold their office or employment during good behavior. Therefore if it was intended to limit the cause for which a particular battalion chief could be removed to that of “misbehavior,” the legislature would not have added the following: “and shall be removed only for cause,” etc. It would have been sufficient if the act had ended with the words “hold their offices or employment during good behavior.”

In the case of *Hoboken v. Gear*, 3 Dutch., 286, the question arose as to what power the council had under their charter to remove from office for cause other than that of misbehavior and the Court, on page 286, says as follows:

“The act says the council for cause may remove. The cause assigned in this resolution is the means voted for the purpose are exhausted”;

and on page 287, the Court says:

“It is contended that even if there could be removal without previous notice, yet that the cause here assigned, viz., that the money was exhausted, is not such a cause as to raise their power; that the cause contemplated by the statute is only a certain class of causes such as misbehavior in the office”;

and on page 288, the Court says:

“The cause therefore intended by the statute need only be such as is satisfactory to the party exercising the power. What right have we to say that the legislature by the terms ‘for cause’ meant cause shown or a particular kind of cause, to wit, behavior. If they had intended only to embrace particular cause would they not have said so?”

and at the bottom of page 288, the Court continuing, says:

“It might well be questioned whether the want of funds is not good cause within the meaning of the act. At any rate we cannot well conceive of a more satisfactory one to all parties.”

This it appears is an interpretation by the Court of the meaning of the phrase “for cause” and although the Gear case was not a certiorari case, still it indicates what meaning should be attached to the act in question, which says that the battalion chiefs shall be removed only for cause, etc.

Civil Service Act.

There is nothing in the Civil Service Act which prohibits the reduction in pay and position and indeed it would be an unusual thing for the legislature to tie the hands of the local boards so that they could not act in case an emergency arose which required a reduction in pay or position of certain men in the service. If the Civil Service Commission were empowered to say when men should or should not be reduced in pay or position, it would be useless to have local boards at all. The Civil Service Commission was never intended to supplant municipal bodies. Local boards are composed of men who are familiar with local conditions and who are able to say when and how men in the various departments of the local government should be reduced, promoted or transferred, as the case may be. These local boards are only prevented by the Civil Service Act from performing their duties from religious or political motives and this limitation is good in all governments, but beyond that the Civil Service Act does not pretend to go.

Section 24 of the Act prescribes—

“No officer, clerk or employe in the classified Civil Service shall be removed, discharged, reduced in pay or position or otherwise discriminated against because of his religious or political opinions or affiliations. Further, no officer, clerk or employe holding a position in the competitive or non-competitive class of the classified Civil Service shall be removed, discharged or reduced, except as provided in section 17 of this act as to probationers until he shall have been furnished with a written statement of the *reasons* for such action and been allowed a

the book

We therefore contend that there is nothing in

the book which is in violation

of the laws of the State of New York

and of the laws of the United States

and of the laws of the State of New York

and of the laws of the United States

and of the laws of the State of New York

and of the laws of the United States

and of the laws of the State of New York

and of the laws of the United States

There are a few comments that I desire to make on the brief of the Prosecutors which were inadvertently omitted from my brief, and which I asked leave to insert when the case was submitted.

On page twenty-one of their brief, the Prosecutors say that:-

"The statute seems also to contemplate reduction in rank and pay, but does not provide a means for carrying out such reduction, and provides no place to put such officer who has been reduced. The Civil Service law requires the Civil Service men to maintain an eligible list of persons who have passed a satisfactory examination from which list appointments or promotions may be made, but does not provide any list of officers, clerks, or employees who have been reduced."

The point made by Prosecutors is that under the Civil Service Act, Section twenty-two, the office of Captain, from which the Battalion Chiefs in this case were promoted, in Nineteen Hundred and Fourteen, being vacant, could only be filled by promotions from among persons holding positions of a lower grade in the department, and that therefore, the position of Captain, left vacant by the Battalion Chiefs, when they were promoted, could not be filled by the reduction of Battalion Chiefs to that position.

The evidence shows that the position of Captain was never filled. Following this out, counsel for Prosecutors says that the Civil Service Act provides no place to put the officer who has been reduced. Our contention is that the Civil Service Act permits a reduction in rank and pay. Section twenty-two of the Civil Service Act says that:-

"Vacancies in the positions of competitive class shall be filled, so far as practicable, by promotions from among persons holding positions in a lower grade of the department."

Section fourteen of the Act says that:-

"Appointments shall be made to, or employment shall be given, in all positions in a competitive class that are not filled by promotion, reinstatement, transfer or reduction, under the provisions of this Act, and the rules made in pursuance thereto, by appointment from among those certified to the appointing officer, in accordance with the provisions of Section twenty-one of this Act."

Under Section fourteen, the appointments are to be made from an eligible list, after the men who are to be reduced are taken care of. In the case at bar, there were men who were to be reduced in rank and pay, and before appointing from an eligible list by promotion, choice must be first given to those men who were to be reduced. This is not in contravention of Section twenty-two of the Civil Service Act, because under that section, vacancies are to be filled by promotions from among persons holding positions in a lower grade in the department, when practicable. In the present case, it was not practicable to fill the vacancy of Captain by promotion from among persons holding positions in a lower grade, because there were men who were to be reduced from the position of Battalion Chief to the position of Captain, and they, having first choice, under Section fourteen of the Act, it was impracticable to fill the vacancy of the office of Captain by promotion.

Counsel, in urging this point, further says that the Civil Service Act does not provide any list of officers clerks or employees who have been reduced: but we contend that it is an impossibility to have such a list, for just as soon as the person is reduced, he is placed in the next lower position, and there could be no such thing as a list of persons who are not occupying positions. The very act of reducing to a lower position, implies the filling of

that position, and it is impossible to conceive of an eligible list of reduced persons who are waiting for appointments to fill vacancies, since the very act of reducing places them in a position.

We therefore contend that there is nothing in this point.

reasons for such action and been allowed a

reasonable time in which to make written answer thereto. In every case of such removal, discharge or reduction a copy of the *statement or reasons therefor* and of the answer thereto shall be furnished to the Civil Service Commission and entered upon the records of said Commission and upon the records of the department or office in which the discharged, removed or reduced person was or is employed."

From the foregoing section of the act it is quite apparent that the only limitation which is placed upon municipal boards is that it prevents their action from being influenced by religious or political motives; otherwise, it leaves them entirely free to act as they shall think is for the best interests of the public. It may plainly be implied from this section that officers or employes may be removed, discharged or reduced if it is not done for religious or political reasons and the procedure to be followed is pointed out in this section of the act and it is not necessary to charge misbehavior in order to remove, discharge or reduce persons in the service. This section of the act plainly says that the person to be removed, discharged or reduced shall be furnished with a written statement of the *reasons*, and this was done in the present case. The word "reason" does not necessarily mean an offense. This is quite apparent when we examine section 23 of the act, which provides:

"Any person holding an office or position under the classified service *who has been separated from the office without any delinquency or misconduct on his part but owing to reasons of economy or otherwise*, may be reinstated within two years from the date," etc.

This section certainly contemplates that persons in the service could be removed, discharged or reduced for other reasons than misbehavior.

It is therefore respectfully submitted that the Board of Fire Commissioners had a right to reduce prosecutors in rank and pay and that the resolution of said Board should not be disturbed.

Respectfully submitted,

HARRY KALISCH,
Attorney for Defendant-Respondent.

New Jersey Court of Errors and Appeals

MICHAEL J. DURKIN, <i>et als.</i> , Prosecutors-Appellants,	} On Appeal from Supreme Court 3 Cases.
<i>vs.</i>	
BOARD OF FIRE COMMISSIONERS OF THE CITY OF NEWARK, Defendant-Respondent.	

Brief for Appellants.

Abstract of the Case.

These are appeals from the judgment of the Supreme Court dismissing a writ of certiorari issued in three individual cases in behalf of Michael J. Durkin, James Fagen, Jr., and Cornelius Smith against Board of Fire Commissioners of the City of Newark.

Two other writs of certiorari were granted in behalf of Thomas S. Reilly and Charles C. Storch, and they were also dismissed by the Supreme Court; but Reilly and Storch have not appealed to this Court.

The cases on certiorari in the Supreme Court were consolidated and printed and argued together, and the cases of Durkin, Fagen and Smith have been consolidated and printed together and are to be argued together in this Court.

The appellants are members of the Fire Department of the City of Newark. Durkin has been such member for 26 years; and Smith for 22 years; and Fagen for 18 years.

In June, 1914, these appellants were officers in the Fire Department of Newark, and each held the office of Captain. In that month, these appellants, together with Reilly and Storch, who were also Captains, were promoted and appointed from an eligible list prescribed by Civil Service Commission of New Jersey, to the office of Battalion Chief, which is a grade higher in the Department than that of Captain, and carries a salary higher than that of Captain. These promotions and appointments took effect on July 1, 1914. At that time there were five Battalion Chiefs, but one of them was retired which left a vacancy in one office of that grade. The record does not show which one of the five new appointees was promoted to fill the vacancy caused by the retirement of Exall. In fact, Durkin was assigned to District No. 2, which was the district which had been covered by Exall, and had the same horse and rig and the same driver and performed the same duties as Exall, up to March 15, 1915, when the resolution reducing these appellants in rank and pay, and which is before the Court for review, took effect.

On January 1, 1915, there was a change of administration in the City of Newark, and an entirely new Board of Fire Commissioners was appointed.

On February 10, 1915, a resolution was adopted by the Board to the effect that the Battalion Chiefs Reilly, Storch, Fagen, Durkin and Smith should appear before the Board at its next regular meeting and show cause why they should not be reduced to the rank of Captain for reasons of economy (p. 2).

On February 11, 1915, notice was given to each of the Battalion Chiefs to appear on February 24th (p. 3). The men appeared, and the

hearing was postponed until March 3rd, on which date each filed an answer setting up these objections:

1. That the notice served directing him to show cause why he should not be reduced to the rank of Captain for reasons of economy, is not a charge against him in compliance with the Civil Service Law and the rules adopted by the Civil Service Commission.

2. That he cannot be reduced in pay or position except for violation of the laws of the State of New Jersey relating to the tenure of office, and he is not charged with any such violation.

3. That he has been a member of the Fire Department for more than twenty-four years (Durkin's case) and has risen from the ranks to his present position as Battalion Chief, and is unwilling to be reduced in rank and protests against any action which would result in removing him from his office.

4. That he is advised that under the Civil Service Law, if any vacancies exist in the office of Captain, those vacancies must be filled by promotion from the lower rank.

5. That he respectfully insists that there is no pressing reason of economy for reducing or removing any of the officers of the Fire Department, and he believes that the removal of the Battalion Chiefs would decrease the efficiency of the Fire Department and would result in an increase of expenses.

At the time of the hearing before the Board of Fire Commissioners, no testimony was taken. Immediately after the reading of the answers a resolution was adopted by the Board, which reads as follows:

“Resolved, that for reasons of economy Battalion Chiefs Thomas S. Reilly, Charles

C. Storch, James Fagen, Jr., Michael J. Durkin and Cornelius Smith, be and hereby are reduced to the rank *and salary* of Captain, beginning March 16, 1915'' (p. 5).

Thereupon, the appellants appealed to the Civil Service Commission, and that body after an investigation, refused to ratify the action of the Board of Fire Commissioners, *and refused to certify the pay-roll of the appellants as Captains*. In order to overcome this difficulty and to permit the men to receive their pay, a stipulation was entered into whereby they could take their pay as Captains without waiving any rights.

Proceedings were taken by the Board of Fire Commissioners and the City of Newark, by certiorari against Civil Service Commission, which resulted in the dismissal of the writ, and the case is reported in *Newark v. Fordyce*, 97 At. Rep., p. 67.

The appellants then sued out writs of certiorari, and a further stipulation was made respecting the pay of the men, and the consolidation of the cases (p. 8). Testimony was taken under rule of the Court after the writs of certiorari had been issued. The five demoted men were called as witnesses in their own behalf, and the direct examination was intended to show that they had performed the duties of Battalion Chief since their demotion, and that there had been no increase in the expenses of the Fire Department since they were originally made Battalion Chiefs, *except for their salaries*. The cross examination was directed to something that was not brought out on the direct examination, that is the fact that new districts had not been mapped out, and new rigs, either horses and vehicles or motor cars, had not been provided for them.

The only evidence pertinent to the case was that brought out on the direct examination of these witnesses, namely—*That there had been no increase in expenses except their salaries, and that since their demotion they had been performing very frequently the same duties that they had performed as Battalion Chiefs; that is—they were assigned as Captains to perform the duty of Battalion Chiefs, showing the necessity for Battalion Chiefs.*

The Supreme Court held that the appellants were lawfully reduced in rank and pay, and as I understand the opinion, the Supreme Court in effect held that the office of these men could be abolished by implication. No point was made in the Supreme Court, that the action of the Board of Fire Commissioners was not taken in good faith, because it was not deemed to be a question that was raised in the case. However, the Supreme Court did consider the point, and says at the close of the opinion, as follows:

“The testimony taken in the present case tends to establish that the services of the prosecutors were not needed as Battalion Chiefs, and that their reduction in rank and pay by the Board of Fire Commissioners, was warranted upon the ground of economy”
(p. 48).

The question whether there existed at the time of the adoption of the resolution any reason for reducing the expenses of the Fire Department, was not argued in the Supreme Court, for the like reason, that it was not deemed to be in issue; but the Supreme Court seems to have considered it and disposed of it as shown in the foregoing extract from the opinion.

These matters having been considered by the Supreme Court, it is deemed proper to raise them in this Court, so far as may be necessary, although they are not in issue in the view of the case as taken by the appellants.

Specification of Grounds of Appeal.

1. The determination of the Supreme Court, that the appellant was lawfully reduced from the rank and pay of Battalion Chief to the rank and pay of Captain.

2. The determination of the Supreme Court, that there was any evidence before the Board of Fire Commissioners of the City of Newark, to justify a finding that the appellants should be reduced in rank and pay for reasons of economy.

3. The determination of the Supreme Court, that the action of the Board of Fire Commissioners of the City of Newark, whereby the appellant was reduced in rank and pay, was not in conflict with the provisions of the statute commonly known as the Civil Service Law.

4. The determination of the Supreme Court, that the writ of certiorari should be dismissed.

These several grounds of appeal may be presented to this Court in the following points:

Point I.

THE INCUMBENT OF AN OFFICE IN THE FIRE DEPARTMENT OF A CITY OF THE FIRST CLASS WITH THE RANK OF BATTALION CHIEF, IS ENTITLED TO HOLD THE OFFICE DURING GOOD BEHAVIOR, WHILE THE OFFICE EXISTS; AND CANNOT BE REMOVED EXCEPT FOR CAUSE AND UPON A PROCEEDING

AGAINST HIM IN PERSON; AND THE CAUSE MUST BE EITHER INCAPACITY, MISCONDUCT, NON-RESIDENCE OR DISOBEDIENCE OF JUST RULES AND REGULATIONS.

Point II.

THE INCUMBENT OF AN OFFICE IN THE FIRE DEPARTMENT OF A CITY OF THE FIRST CLASS WITH THE RANK OF BATTALION CHIEF, WHO HAS BEEN APPOINTED OR PROMOTED THERETO FROM AN ELIGIBLE LIST IN THE COMPETITIVE CLASS OF THE CLASSIFIED CIVIL SERVICE, CANNOT BE REDUCED IN RANK AND PAY AND ASSIGNED TO DUTY IN AN OFFICE OR POSITION OF LOWER GRADE AND PAY.

Brief of Argument.

It will be convenient to discuss the two points together.

The policy of the law of this State relating to tenure of office, is expressed in the several authoritative cases that have been decided, and in the statutes.

It is submitted, that the incumbent of an office of indefinite term, and who is appointed to hold during good behavior, can only be removed from such office in either one of two ways:

1. By a proceeding against him in person.
2. By a proceeding against the office.

The earliest case in this State seems to be *City of Hoboken v. Gear*, 27 Law, 3 Dutch., 265.

That was an action of assumpsit brought by a policeman to recover his salary. It was held, that the charter of the city, which provided that the council could remove any person appointed by them, for cause, authorized the council to remove for any cause that was satisfactory to the council. The case shows (at p. 276) that the council passed a resolution that the city clerk be directed to notify the Chief of Police and the five assistant policemen, "that their services hereafter will not be required."

That seems to be the first definition of the word "cause," as any cause satisfactory to the appointing power which has the power to remove.

At p. 287, Justice Vredenburg says: "The statute prescribes no particular kind of cause; it is merely "for cause" not for cause shown. It is not, a matter requiring notice, or to be tried *per testes* or otherwise."

It is to be observed that the statute did not require notice to the officer or an opportunity to be heard, thus showing that the cause was not necessarily one involving the conduct or capacity of the officer.

Hoboken v. Gear is a case illustrating action against the person.

Butcher v. City of Camden, 29 Eq. 2 Stew., 478, is a case illustrating *amotion* from office, by the adoption of an ordinance *abolishing the office*.

In *Haight v. Love*, 39 Law, 10 Vr. 14, Justice Dixon held that a power to remove for cause, meant, *just cause*, and that the power may be asserted only after the officer has had opportunity for defence.

Justice Dixon did not consider the case of *Hoboken v. Gear*, and presumably, because that case was not before the Court in any proceeding necessarily raising the question of title to the office, and the case was properly disposed of upon the ground that no services had been rendered.

Haight v. Love was affirmed by the Court of Errors, 39 Law, p. 476.

Greene v. Freeholders of Hudson, 44 Law, 15 Vr. 388, came up on certiorari to review certain proceedings of the Board of Freeholders accepting resignation of certain officers and employees, and afterwards reappointing the same persons to the same positions for a fixed term and salary. The Board of Freeholders had power by statute to appoint such officers, agents and employees: "As may be required to do the business of the County, and fix their compensation and term of service." Under this power, the Court held that the Board could create and could destroy them or, as Justice Reed puts it at p. 391: "The power that created them can destroy them. The tenure of any officer is held at the will of the Board. He can be stripped of his salary, deposed from office, or be left unsheltered by reason of the abolition of the office itself at any moment the Board chooses to exercise its power."

Citing *Hoboken v. Gear*, *Butcher v. City of Camden*, *Love v. Jersey City*.

The case of *Greene v. Freeholders* construed the power of the Board under the act giving the power to appoint. This power was given without qualification.

On March 24, 1885, the Legislature passed an act entitled "An Act respecting the Fire Depart-

ment of cities and regulating the tenure and terms of office, of officers and men employed in said fire departments." P. L. 1885, 130, Comp. Stat. 2391. This statute prescribes that: "The officers and men employed by municipal authority in the fire department of any city, shall severally hold their respective offices and continue in their respective employments as such municipal officers and employees during good behavior, efficiency and residence in such city, except where by statute, the term of any such officer and employee is determined and fixed and does not depend upon the pleasure or caprice of any municipal officer, officers or board authorized to make appointment or employment in said department; and no person shall be removed from office or employment in the fire department of any such city, or from the fire department force of any such city, for political reasons, or for any other cause than incapacity, misconduct non-residence or disobedience of just rules and regulations established, or which may be established for the fire department or force of such city."

The statute further provides in section 3 as follows: "That no person whether officer or employee in the fire department of any such city, shall be removed from office or employment therein except for just cause, as provided in the first section of this act, and only after written charge or charges of the cause or causes of complaint shall have been preferred, etc."

It is to be noted that this statute clearly makes a distinction between *officers and employees* of a fire department and also clearly defines "*just cause.*" It seems to have been intended by this act to provide a mode for the removal of members of the fire department of a city for cause, and to define the meaning of cause as "just

cause," and to limit the causes to those described in the act.

The statute was first construed in *Michaelis v. Jersey City*, 49 Law, 20 Vr. 154, (1886), which was a writ of certiorari, bringing up proceedings to remove the prosecutor from his office or employment as engineer of Engine Company No. 1 to the position of stoker of Engine Company No. 3.

After reciting the provisions of the statute, Justice Reed says at p. 155:

"I think that he held his employment as engineer protected by the terms of that act, and any attempt to transfer him without his consent was a removal from office or employment. The place of stoker was a different position, inferior in dignity, dissimilar in its work and attended with decreased wages. It was, within the meaning of the act, a different employment or office." The resolution removing the prosecutor, was set aside.

In *Douglass v. Jersey City*, 53 Law, 24 Vr. 118, the Supreme Court construed a similar statute relating to the police departments of cities, passed February 23, 1886, P. L. p. 48, and following *Michaelis v. Jersey City*; and distinguished the case of *McManus v. Newark*, 49 Law, 20 Vr. 175.

Justice Scudder says, at p. 118, speaking of the change made, that is a detective officer being reduced to a roundsman with decreased pay without notice and a hearing:

"The change involved more than the mere transfer of a policeman from one duty to another within those assigned to the Department of equal grade. It differs therefore,

from the case of *McManus v. Newark*, where the duties were different, but the compensation the same, and resembles in principle *Michaelis v. Jersey City*, where there were different duties and decreased pay."

McManus v. Newark involved the construction of the act of May 2, 1885, P. L., p. 326, Comp. Stat., p. 2341, which is entitled "An Act to remove the Fire and Police Departments in the cities of this State from political control."

McManus was a patrolman appointed in February, 1885, at which time the whole police force was reorganized. He was detailed to act as detective officer before the reorganization and continued to act as such since. The Board of Police Commissioners appointed in pursuance of the act of May 2, 1885, took control of the Police Department February 4, 1886, and other detective officers were appointed, and McManus was assigned to duty as patrolman, and was then paid as patrolman, and acted as such and remained on the force. The change was made by the Commissioners without any notice or hearing.

Justice Scudder says, at p. 176:

"Section 1 of the Act of March 24, 1885, restrains the right of removal from office or employment in the Police Department, and Section 8 of the Act of May 2, 1885, gives the Commissioners the power and right to *suspend and to expel or discharge*, provided, good cause shall be shown for such suspension, expulsion or discharge after an investigation by such Board. As these prosecutors (there were two cases), have not been removed, *suspended, expelled or discharged* from the Police Force by the Commissioners,

they are not within the terms of either of these statutes."

The Act of May 2, 1885, provides as follows: "Section 1. That the Board shall be entrusted with the government, control and management of the Fire Department, and with the direction and control of all public fire matters, subject to inspection and supervision of the Common Council, as in the act provided."

Section 7 provides that the Board shall be authorized and empowered to employ such persons as may be deemed necessary by said Board from time to time, and shall be authorized and empowered to declare vacant any or all of the offices or positions therein or thereunder as to such Board may appear best for the public interest in the department.

Section 8 provides that the Board shall be fully empowered to designate, appoint or approve all the firemen or other persons employed in the fire department of the city; and shall have full power and right to suspend and to expel or discharge any person employed or appointed in or under the department under the control of the Board, provided good cause shall be shown for such suspension, expulsion or discharge after an investigation by such Board.

It is contended, that "*good cause*" in Section 8, means *just cause* as defined in the Act of March 24, 1885, and as defined by the previous adjudicated cases; and that Section 8 requires notice and an opportunity to be heard. Section 8 is not applicable to the case of the appellants, *because they were not suspended, expelled or discharged.*

Adams v. Haynes, 48 Law, 19 Vr. 25, follows the case of *Greene v. Freeholders of Hudson*, as to the power to depose, resting in a Board

of Freeholders, authorized to appoint such officers as they shall from time to time deem necessary or convenient, without qualification.

Evans v. Freeholders of Hudson, 53 Law, 24 Vr. 585, also follows *Adams v. Haynes* and *Greene v. Freeholders of Hudson* but the *Evans* case further involved the construction of the act relating to the removal of honorably discharged soldiers from offices and positions. That Act P. L. 1888, p. 135, provides that no such soldier shall be removed except for good cause shown after a hearing, and such person shall hold his position during good behavior.

Justice Reed says at p. 586:

“I think the Board possessed the power to abolish the position or office which it had created, assuming that the position was one within the meaning of the Act; nor in my judgment is this power abandoned by reason of the terms of the Act. The statute was not designed for the purpose of perpetuating the existence of offices. Whenever for economical reasons, or any other reasons arising from governmental policy, it may be thought wise to extinguish the office or position, the power which created can annul it. It is a matter of course, that the assertion of the power to disestablish must be *bona fide*, for it is manifest that if it should appear that a formal act purporting to abolish such an office or position is only a device for the purpose of removing an officer or employee while the office or position practically still remains in existence, that such a subterfuge would be of no avail.”

In the Evans case, the Board of Freeholders passed a resolution:

“That *the position of machinist held by Evans be abolished* and the said Evans be *dismissed from the employ and pay of the Board.*”

In *Newark v. Lyon*, 53 Law 24 Vr. 632 Court of Errors, this Court held that under the Act of May 2, 1885, the position or office of “call members” in the Fire Department of Newark, may be *vacated or abolished*, and that such action (meaning the vacation or abolishment of the position) is not within the Act of March 24, 1885.

Newark v. Lyon has been discussed very fully in the opinion of the Supreme Court, and is the case that was principally relied upon by the appellants in the Supreme Court *as pointing out the distinction between a proceeding against the person and a proceeding against the office.*

The Supreme Court held that *Newark v. Lyon* controls the case of the appellants, and Justice Kalisch says, p. 47 of the printed case:

“We are unable to perceive any difference in principle insofar as the economical administration of governmental affairs is concerned between the act abolishing an office or position *that is needless*, and the act of reducing men in rank or discharging them altogether from office or position, whose services in that office or position *are unnecessary and needless*. Both acts aim at economy in the public service.”

I contend that the Supreme Court incorporated into the case a fact that is not involved and which there is no evidence to support, namely, that the office of Battalion Chief was needless, or that the services of the appellants in that

office were unnecessary and needless. There is nothing in the resolution of the respondent even tending to show that in the opinion of the respondent these offices were unnecessary and needless. There is nothing in the testimony to show that they were unnecessary and needless, but on the contrary, the testimony shows clearly that the services of the men were necessary and the fact is that even after they were reduced in rank, *they were called upon to render services as acting Battalion Chiefs*. This shows that it was necessary to have some officer act in that capacity. I refer particularly to the testimony of Durkin and the testimony of Fagen.

The cases that have been cited and the statutes, it is respectfully contended, point out clearly a distinction in the two different modes of removing an officer. I have failed to find any case which sustains a removal from office, (unless there was authority in the removing officer or body to remove for any cause without limitation) except cases of a charge and notice and hearing based upon just cause as defined in *Haight v. Love*, or in the Tenure of Office Act of March 24, 1885; or cases, in which it appears clearly that the office has been *actually abolished by express action* of the Board having the power to abolish.

I do not find any case which holds that abolition of office may be implied from the act of suspending, expelling or discharging an incumbent, or removing him in any manner.

The Act of May 2, 1885, undoubtedly gives the respondent power to declare vacant any or all of the offices or positions. This does not mean that the Board can declare an office vacant and thereby amote an incumbent without making an investigation and showing a good cause, as required by Section 8.

All these statutes must be read together, and I contend that the power to declare vacant, means just what the words say: "The Board may adopt a resolution declaring any office vacant, *if there is no incumbent, or if it is intended to abolish the office*, if that shall appear to be best for the public interest."

As Justice Scudder says in the last line of the extract from his opinion quoted by the Supreme Court, p. 46: "*The tenure of office is qualified by the continuance of the office.*" A declaration, that an office is vacant, would be an absurdity if there was an actual incumbent.

"If the incumbent is removed by proper legal proceedings, the effect would be to cause a vacancy."

Dillon Municipal Corporations, 5th Ed. Vol. 2, 816, par. 485.

An officer cannot be removed, under the authorities and statutes that have been cited, except for just cause, as defined by the authorities and statutes, and after notice and opportunity to be heard. The office may be abolished without any notice to the incumbent.

Battalion Chiefs hold their office *during good behavior*. They were originally appointed in pursuance of an act entitled "An Act concerning the Fire Department of cities of the first class in this State, and the powers and duties of the board or body having the control and management thereof." Approved April 8, 1892, P. L. p. 438, Comp. Stat., p. 2402.

This statute prescribed that the Board shall have the power to appoint, and the authority therefor is hereby granted, of not more than two officers for such fire department, who shall be known as Battalion Chiefs thereof, and who

shall perform such service and duties as may be assigned to them and each of them by such body; they shall hold their office or employment during good behavior, and shall be removable only for cause after a hearing or opportunity therefor is afforded.

In 1894, P. L., p. 422, an act was adopted on May 17th entitled: "An Act to promote the efficiency of fire departments in cities of the first class," section 2 of which provides, "that promotions in said department shall be made from among the members of the fire department having the best record for intelligence, efficiency, sobriety and bravery;"—and the proviso is, that this section shall not forbid or prevent appointments or promotions to the position of Chief or Battalion Chief in said department, when made upon a unanimous vote of all of said Commissioners.

This statute is the first enacted which prescribes that an appointment to, or a promotion to, the position of Battalion Chief, may be made from any of the members of the Fire Department, and possibly of a person not a member of the Fire Department.

In 1901, a further act was passed on March 22nd, entitled "An Act authorizing the appointment of Battalion Chiefs of Fire Departments in cities," P. L. 1901, p. 322, which provides that in all cities where there are Battalion Chiefs, the Board may increase the number of such Battalion Chiefs to such number as in their judgment is necessary for the good of the Department.

In 1906, an amendment was passed to the Act of 1892, P. L. 1906, p. 429, Comp. Stat. 2391, which gives the Board power to appoint as many persons from among the members of such Fire Department as in their judgment may

seem necessary for the best interest of the Department, and that they shall hold their office or employment during good behavior, and shall be removed only for cause after a hearing or opportunity therefor is afforded.

It will be perceived, *that these statutes make no provision for reducing Battalion Chiefs to a lower rank in the Department.* They contemplate removal for cause. They contemplate possible appointment of an ordinary fireman to the office of Battalion Chief, and the Board of Commissioners is not required to promote from the office of Captain to the higher rank of Battalion Chief. Up to this period, the law as I contend, prohibited the removal of a Battalion Chief except for cause, and after a personal proceeding against him, or by express act of the Board of Fire Commissioners abolishing the office.

Other cases illustrating the effect of actually abolishing an office, which were decided prior to the enactment of the Civil Service Law, are *Boylan v. Newark*, 58 Law, 29 Vr. 132, which brought up a resolution *abolishing the office or rank of Police Sergeant*, and the resolution was sustained.

McCann v. New Brunswick, 73 Law, 44 Vr. 161, came before the court on a rule to show cause why a mandamus should not issue. An ordinance was passed, *abolishing the office of roundsmen*, which was within the power of council. It appeared that the place of the relator had not been filled, and no other officer had been appointed to do the same work, and the court held he was entitled to be reinstated as a policeman, so as to be a member of the force, and held in effect that he could not be removed from the Police Force except for cause after

charges had been presented and he had been tried and convicted pursuant to the statute.

McBride v. Bayonne, 74 Law, 45 Vr. 398, is a writ of certiorari bringing up an ordinance of the Common Council *abolishing the office of Captain of Police*, and the resolution was sustained.

In 1908, the Civil Service Law was passed, and was afterwards adopted by the City of Newark. The statute is P. L. 1908, p. 235, Comp. Stat., title "Officers," p. 3795.

"The Civil Service Law emphasizes a broad public policy to secure efficient service in the various departments of the government of this State, and therefore, the widest range should be given to its applicability."

Sullivan v. McOsker, 84 Law, 55 Vr. 380 Ct. of Er.

This statute provides in section 1 that appointments to and promotions in the Civil Service of a municipality, shall be made only according to merit and fitness to be ascertained as far as practicable by examinations, and no person shall be appointed, transferred, reinstated, promoted, reduced or dismissed as an officer, clerk, employee or laborer *in any manner or by any means other than those prescribed in this Act*.

Section 2 prescribes that officers within the competitive class of the Civil Service, shall continue to hold their offices or employments, and shall not be removed therefrom except in accordance with the provisions of section 24. Section 24 prescribes that no officer—in the Classified Civil Service—shall be removed, discharged, reduced in pay or position or other-

wise discriminated against because of his religious or political opinions or affiliations, and no officer—holding a position in the competitive class of the Classified Civil Service, shall be removed, discharged or reduced except as provided in section 17 relating to probationers, until he shall have been furnished with a written statement of the reasons for such action and been allowed a reasonable time in which to make written answer thereto.

This statute contemplates expulsion and discharge from office based upon causes which have been defined by the authorities and by the statutes as just causes. The statute seems also to contemplate reduction in rank and pay, *but does not provide any means for carrying out such reduction and provides no place to put the officer who has been reduced.*

The Civil Service Law requires the Civil Service Commission to maintain an eligible list of persons who have passed a satisfactory examination, from which list appointments or promotions may be made, but it does not provide any list of officers, clerks or employees who have been reduced.

Section 23 of the Act makes provision for the disposition of a person holding an office, who has been separated from the service without any delinquency or misconduct on his part, but owing to reasons of economy or otherwise, and provides that such persons may be reinstated within two years, and also provides that whenever any *permanent office is abolished or made unnecessary*, the incumbent of the office shall be deemed to be suspended for two years, and may then be reinstated to any office or position of the same or similar kind. Section 23 is the only section which contemplates *separation from the office*

for reasons of economy. It would seem to signify, that an officer might be separated from his office for reasons of economy, and it may be conceded that the Board of Fire Commissioners of the City of Newark could have taken that course, that is—to separate these Battalion Chiefs from the office for reasons of economy, provided they did so in good faith and actually abolished the office, or made it unnecessary. As I have before stated, the question of good faith does not enter into this case, *because the respondent did not proceed either to declare the office vacant, or to abolish it or to separate the appellants from the office, as contemplated by Section 23 of the Civil Service Law.*

The cases which have been decided since the enactment of the Civil Service Law, are as follows:

Paddock v. Hudson Tax Board, 82 Law 53 Vr., 360, which was a rule to show cause for mandamus.

It appeared that the relator was an assistant clerk in the office of the Board of Taxation of Hudson County. It also appeared that his office or position *was actually abolished for the purpose of economy.* And it further appeared that the Tax Board did not have sufficient appropriation to pay the salaries of the clerks, including the relator, who were necessarily removed by the action abolishing the position.

I contend that *Paddock* against Hudson Tax Board, is not a parallel case with that of the appellants, for the reason *that the office of Battalion Chief held by them still exists.*

Van Horne v. Freeholders of Mercer, 83 Law, 54 Vr. 239, which was a certiorari removing a Resolution of the Board of Freeholders, intended to *abolish the office of custodian of the Court*

House. This is another case of express action abolishing the office.

Colgarry v. Board of Street and Water Commissioners of Newark, 85 Law 583, which was an appeal from the Supreme Court affirming proceedings of the Board, which had adopted a Resolution *abolishing the positions and employments of certain persons* employed by the Board, including the prosecutor. Chancellor Walker says in this case: "The Civil Service Act does not provide that when a municipal corporation proposes to reduce its working force *by the abolition of said positions* in the interest of efficient and economical administration, the employees thus affected, shall be entitled to notice and an opportunity to be heard in relation to such a proceeding."

The Colgarry case is another case of express action abolishing the position. There is no case which holds *that abolition of the office may be implied from the act of removal.*

The Supreme Court states in the opinion (p. 48) that the testimony taken in the present case tends to establish that the services of the prosecutor were not needed as Battalion Chiefs, and that their reduction in rank and pay by the Board of Fire Commissioners was warranted upon the ground of economy. There was no testimony taken by the Board of Fire Commissioners at the time of the hearing before that Board, and there was no evidence at that time before the Board.

The evidence taken on the writ of certiorari, if it is to be considered at all, and I contend that the question of good faith and reasons for economy, are not necessarily before the Court, shows conclusively that there was a change of administration, and that these men almost immediately after the new Board went into office were

reduced in rank and pay, and that there **was** no existing reason for economy, *as there was sufficient appropriation, and there has been at all times sufficient appropriation made by the Common Council* to pay the salaries of the Battalion Chiefs.

The testimony also shows that the Board has been obliged to call upon these men to perform services as acting Battalion Chiefs since they were demoted. And it also appears that it was not necessary to have special rigs for these men to use, as they could go to fires just as expeditiously on some of the fire apparatus.

As to the efficiency of the Fire Department, it is only necessary to read the testimony of Durkin and Fagen to appreciate the very great necessity for having Battalion Chiefs or men with the power of Battalion Chief, to respond quickly in case of a fire. While it is true, that a Captain may act, he does not have the same moral effect that a superior officer would have.

It also appears that two of the districts in the City of Newark are very extensive and cannot be covered, as the fire stations are now located, by one Battalion Chief in each district, so that the Department is made less efficient by the removal of these men.

It is quite impossible to find any justification in the proceedings, or in the testimony, for the action of the Board of Fire Commissioners, and I respectfully repeat that *it is not incumbent upon the appellants to prove in the proceedings taken against them that there was no necessity for economy, or that the proceedings were not taken in good faith.* If the Board had abolished the office, and the appellants had come before the Court on a writ of certiorari, the situation would have been entirely different.

The decision of the Supreme Court carried out to its conclusion, is to the effect that an office is abolished by removing the incumbent of the office.

It is respectfully contended that the appellants were illegally reduced in rank and pay, and that the judgment of the Supreme Court in each case should be reversed, and a judgment entered setting aside the Resolution of the Board of Fire Commissioners.

Respectfully submitted,

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