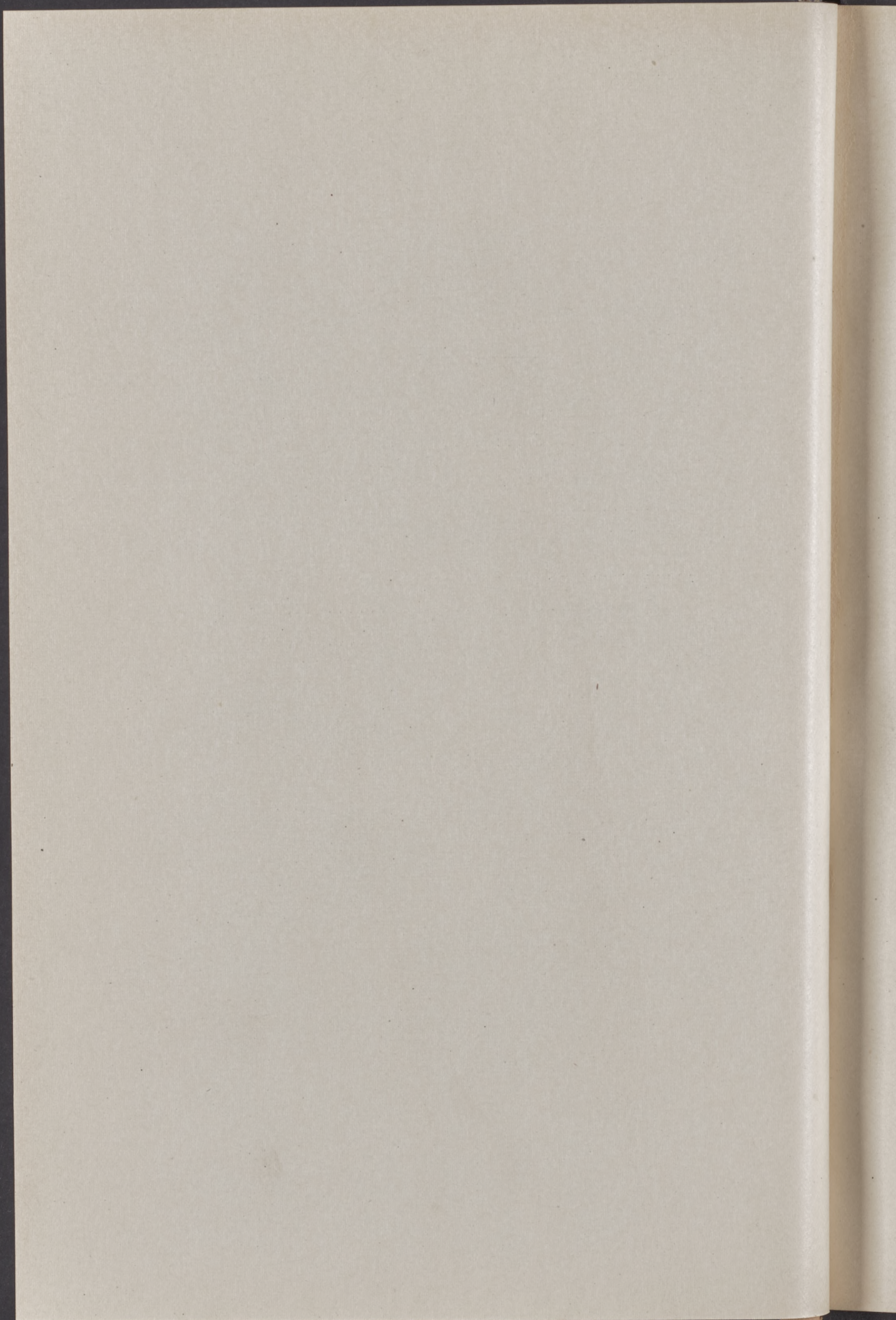


INDEX

	Page
Affidavit of Joseph E. Hornsby,	1
Writ of Certiorari,	4
Return to Writ,	5
Reasons,	7
Stipulation—Agreed State of Facts,	9
Rule,	10
Notice of Appeal,	11, 12
Opinion of Bergen, J.,	15, 16



New Jersey Supreme Court.

JOSEPH E. HORNSBY,
Prosecutor,
vs.
BOARD OF ALDERMEN OF THE
CITY OF PERTH AMBOY, CITY
OF PERTH AMBOY, AND JAMES
A. MULLEN,
Defendants.

AFFIDAVIT.

(Filed January 29, 1923.)

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX, } *ss.*

JOSEPH E. HORNSBY, being duly sworn according to law, upon his oath says:

I. On January 3, 1921, I was duly appointed by the Board of Aldermen to the office of Collector of Revenue for the City of Perth Amboy, for the term prescribed by Law. Immediately thereafter I qualified and took possession of said office and have continued in my duties as such up and until the present time. My appointment was made under an Act entitled "An Act concerning the term of office and appointment of certain officers in cities of the second class of this State," known as Chapter 63 of the Laws of 1904, as amended by Chapter 32 of the Laws of 1911. By Section 1 of said Act, it is provided as follows:

"Any collector of taxes, receiver of taxes, city treasurer, clerk, city attorney, physician, street

commissioner, surveyor or overseer of the poor hereafter appointed in cities of the second class prior to the first day of January, one thousand nine hundred and five, shall hold office only until said first day of January, one thousand nine hundred and five, and thereafter it shall be lawful for the board of aldermen, common council or other governing body of any such city to make appointments to any or all of said offices for a term of three years; said term of office shall commence the first day of January last preceding or next succeeding the fixing thereof as said board of aldermen, common council or other governing body may by like vote direct; *provided*, that no such term shall commence earlier than the first day of January, one thousand nine hundred and five; and when such term shall have been fixed the incumbents or persons thereafter chosen, for any of the above-named offices, shall hold office until the expiration of the term so fixed, and their successors, when chosen, shall hold office for a like term of years."

By virtue of said Act the Board of Aldermen of the City of Perth Amboy did enact an Ordinance entitled "An Ordinance relating to the duties of the collector of revenue, fixing the amount of his official bond and his salary, and fixing his term of office." Which Ordinance reads as follows:

"Be it ordained by the City of Perth Amboy:

30 Sec. 1. A collector of revenue shall be appointed by the council for the term of three years, commencing January 1st, preceding his appointment.

Sec. 2. The salary of the collector of revenue shall be three thousand dollars per annum, payable in equal monthly payments.

Sec. 3. The penalty of the official bond of the collector of revenue shall be \$30,000.

Sec. 4. The collector of revenue shall receive all moneys due to the city, whether for the taxes, assessments or otherwise, and deposit the same daily to the credit of the City.

Sec. 5. He shall pay over monthly or oftener, as the council may direct, all moneys collected by him to the city treasurer.

Sec. 6. He shall make monthly reports to the council, submitting a record of all his proceedings affecting the revenues of this city. 10

Sec. 7. He shall at the end of each fiscal year file in the office of the city clerk a duplicate of proceedings affecting said revenue and it shall be his duty, with as little delay as possible after his induction into office, to proceed at law on the securities of any predecessor in office who may be delinquent in paying over to the treasurer funds collected by him belonging to the city.

Sec. 8. All fees received by the collector of revenue under any law of State or ordinance of the city now in force or hereafter enacted shall be paid over to the city treasurer for the use of the city. 20

Sec. 9. This ordinance shall take effect January 1st, 1920."

Said Ordinance was approved by the Mayor, February 27, 1919.

2. Notwithstanding my said appointment and my continuing in possession of said office and performing the duties of said office, said Board of Aldermen of the City of Perth Amboy did on January 2, 1923, unlawfully elect James A. Mullen to succeed me in said office and thereby threaten to disturb me in the enjoyment of my term of office. 30

3. I am informed that the Council of the City of Perth Amboy does intend to direct the Police Department of the City of Perth Amboy to forcibly remove me from my office in the City Hall of the City of Perth Amboy.

4. I have also been requested by the City Clerk of the City of Perth Amboy, who claims to have been directed to do so by the Board of Aldermen, to deliver all papers and records of the City to the said James A. Mullen.

I, therefore, pray for a Writ of Certiorari issuing out of the New Jersey Supreme Court for the purpose of removing from my way the said proceedings of the said Board of Aldermen which I apprehend may be used
 10 unlawfully to eject me from the said office.

Sworn and subscribed to this 19th day of January, 1923.

JOSEPH E. HORNSBY.

MATTHEW F. MELKS,
Notary Public of New Jersey.

NEW JERSEY SUPREME COURT.

20

JOSEPH E. HORNSBY,
Prosecutor,

vs.

BOARD OF ALDERMEN OF THE
 CITY OF PERTH AMBOY, CITY
 OF PERTH AMBOY, AND JAMES
 A. MULLEN,

Defendants.

30

WRIT OF CERTIORARI.

(Filed February 5, 1923.)

STATE OF NEW JERSEY. The State of
 New Jersey, to the City of Perth Amboy,
 [SEAL.] Board of Aldermen of the City of Perth
 Amboy, and James A. Mullen, Greeting:
 We being willing for divers causes to be
 certified of the appointment of a Collector of Revenue

of the City of Perth Amboy at a meeting of the Board of Aldermen of the City of Perth Amboy held January 3, 1923, we command you that you send under your seal to our New Jersey Supreme Court, at Trenton, on the third day of February, 1923, the proceedings aforesaid, with all things attached concerning the same as fully as they remain before you, together with this writ that we may further cause to be done thereupon what of right should be done.

Witness, William S. Gummere, Esq., Chief Justice 10
of our Supreme Court, at Trenton, this 19th day of January, nineteen hundred and twenty-three.

ENOCH L. JOHNSON,
Clerk of the Supreme Court.

LEO GOLDBERGER,
Atty.

This writ is allowed. Let it be sealed.

J. J. BERGEN,
Jus. Sup. Ct. 20

RETURN TO THE WRIT.

In obedience to the command of this writ, directed to the Board of Aldermen of the City of Perth Amboy, City of Perth Amboy, and James A. Mullen, I do hereby certify to the Honorable Justices of the Supreme Court of New Jersey a record of the meeting of said Common Council and proceedings, together with all 30
things touching and concerning the same, as fully and entirely as they remain before me.

In witness whereof I have hereunto set
[SEAL.] my hand and the seal of the City of Perth
Amboy, February 2d, 1923.

PHILIP P. COSTELLO,
City Clerk.

The Council of the City of Perth Amboy, N. J., consists of six aldermen, one from each ward, and an alderman-at-large.

The following is an extract of Council minutes showing proceedings of the regular meeting of the Board of Aldermen of the City of Perth Amboy, N. J., held January 2d, 1923, regarding the appointment of a Collector of Revenue.

10 "January 2d, 1923.

"Regular meeting of the Council of the City of Perth Amboy, N. J., held January 2, 1923. The members present were Aldermen Sofield, Waters, Patten, McGuire, Clark, Riedy and Alderman-at-Large Galvin.

"On motion, the Board went into the election of officers.

"For Collector of Revenue for a term of three years, as prescribed by law, beginning January 1st, 1923, Mr. James A. Mullen and Henry Sandbeck were nominated.

20 Mr. Mullen was elected by the following vote: For Mr. Mullen: Waters, Patten, McGuire, Galvin. For Mr. Sandbeck: Clark. Messrs. Sofield and Reidy did not vote."

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

30 I hereby certify that the foregoing is a full and true extract from the minutes of the meeting of the Council of the City of Perth Amboy, N. J., held January 2, 1923, so far as said minutes pertain to the appointment of James A. Mullen as Collector of Revenue of the City of Perth Amboy.

Witness my hand and corporate seal this
[L. S.] second day of February, 1923.

PHILIP P. COSTELLO,
City Clerk.

NEW JERSEY SUPREME COURT.

JOSEPH E. HORNSBY,

*Prosecutor,**vs.*BOARD OF ALDERMEN OF THE
CITY OF PERTH AMBOY, CITY
OF PERTH AMBOY, AND JAMES
A. MULLEN,*Defendants.*

} Certiorari.

10

REASONS.

(Filed February 5, 1923.)

The said prosecutor comes and prays that the nomination and appointment by the Common Council of the City of Perth Amboy of a Collector of Revenue, at a meeting held January 2d, 1923, may be set aside for the following reasons: 20

1. At the time of the election of said Collector of Revenue, the prosecutor was incumbent of the office of Collector of Revenue under appointment made by the Common Council of City of Perth Amboy, on January 3d, 1921, under and by virtue of an ordinance adopted by the Common Council of the City of Perth Amboy, and approved by the Mayor, February 27, 1919, and also by virtue of chapter 63 of the Laws of New Jersey for the year 1904. 30

2. Said appointment and election was made without notice to the prosecutor or any hearing thereon.

LEO GOLDBERGER,
Attorney of Prosecutor.

NEW JERSEY SUPREME COURT.

10	JOSEPH E. HORNSBY, <i>Prosecutor,</i> <i>vs.</i> BOARD OF ALDERMEN OF THE CITY OF PERTH AMBOY, CITY OF PERTH AMBOY, AND JAMES A. MULLEN, <i>Defendants.</i>	} } } } }	Certiorari. Agreed State of Facts.
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STIPULATION.

(Filed February 16, 1923.)

It is agreed by and between counsel of the respective parties, that the affidavit filed in this cause and upon which the said writ was allowed; the return to the writ, setting forth the nomination and appointment of a Collector of Revenue at the council meeting of the Council held January 2d, 1923, and copy of the appointment of a Collector of Revenue by the Council on January 5th, 1920 (annexed hereto), shall be considered as if the same were depositions in this cause, and that the said cause shall be determined upon said agreed state of facts (as upon depositions) as if on final argument.

30	LEO GOLDBERGER, <i>Attorney of Prosecutor.</i> DAVID WILENTZ, <i>Attorney of Defendants.</i>
----	---

(ADDITIONAL AGREED STATE OF FACTS.)

It is agreed that at a regular meeting of the Council of the City of Perth Amboy held January 5th, 1920,

Ellsworth B. Walker was nominated. Mr. Walker was elected Collector of Revenue for a term of three years by the following vote: Wilson, Waters, Patten, Andersen, Reidy, Clark, Wester. (The entire Board.)

It is further agreed that the said Walker in the latter part of the year 1920 departed this life; and that at a meeting of the Council of the City of Perth Amboy held December 20, 1920, the following resolution was adopted:

"WHEREAS, By reason of the death of Ellsworth B. Walker, Collector of Revenue, a vacancy exists in said office, and 10

WHEREAS, This Board is not yet ready to appoint a Collector of Revenue to fill the unexpired term of said office; be it

Resolved, That Joseph Hornsby, former assistant to the Collector of Revenue, be and hereby is authorized to receipt in behalf of the city for all taxes and assessments paid to the city and further to endorse in the name of the city all checks paid to the city for taxes and assessments until the appointment of a Collector of Revenue." 20

It is also agreed that at a meeting of the Council of City of Perth Amboy, held January 3, 1921, the said Joseph E. Hornsby was elected as Collector, as shown by extract of minutes as follows:

"For Collector of Revenue for the term prescribed by law Mr. Joseph E. Hornsby was nominated and elected by the following vote: For Mr. Hornsby: Sofield, Waters, Patten, Andersen, Reidy, Wester. Mr. Clark not voting. Mr. Clark objected to this procedure, stating that Mr. Hornsby should be elected to fill the unexpired term of the latter collector, E. B. Walker." 30

It is also agreed that said Joseph E. Hornsby has filed the surety bond as required by ordinance, and that said bond is for a term of three years.

It is further agreed that the Collector collects per annum approximately the sum of one million dollars in

taxes. It is further agreed that the said Joseph E. Hornsby is now in actual possession of the said office.

It is also agreed that the City of Perth Amboy is a second class city, and that its governing body consists of a common council, composed of six aldermen and one alderman-at-large.

It is also agreed that said James A. Mullen has filed his bond, and has taken the oath of office.

LEO GOLDBERGER,

Attorney of Prosecutor.

DAVID WILENTZ,

Attorney of Defendants.

10

NEW JERSEY SUPREME COURT.

JOSEPH E. HORNSBY,
Prosecutor,

vs.

BOARD OF ALDERMEN OF THE
CITY OF PERTH AMBOY, CITY
OF PERTH AMBOY, AND JAMES
A. MULLEN,

Defendants.

} On Certiorari.

20

RULE.

(Filed February 17, 1923.)

30

The court having inspected the transcript of proceedings of the Board of Aldermen of the City of Perth Amboy, N. J., removed by the writ in the cause and having duly considered the reasons filed, and having considered the briefs of counsel therein, do Order that the nomination and election of James A. Mullen as Collector of Revenue at the meeting of the Board of Aldermen on January 2d, 1923, be and is hereby set

aside, made void and for nothing holden, with costs to be taxed.

Entered on February, 1923.

On motion of

LEO GOLDBERGER,
Attorney for Prosecutor.

NEW JERSEY SUPREME COURT. 10

JOSEPH E. HORNSBY,

Prosecutor,

vs.

BOARD OF ALDERMEN OF THE
CITY OF PERTH AMBOY, CITY
OF PERTH AMBOY, AND JAMES
A. MULLEN,

Defendants.

} On Certiorari.

NOTICE OF APPEAL FROM JUDGMENT OF SUPREME COURT. 20

(Filed March 24, 1923.)

*To the Board of Aldermen of the City of Perth Amboy,
and City of Perth Amboy:*

Take notice that the defendant, James A. Mullen, appeals to the Court of Errors and Appeals from the whole of the judgment entered in the above stated cause on the following grounds: 30

1. The appointment of the defendant, James A. Mullen, by the defendant, City of Perth Amboy, was lawful.

2. The appointment of the Prosecutor in January, 1921, to the office of Collector of Revenue for the City of Perth Amboy was for the unexpired term of Ellsworth B. Walker, which expired on January 1st, 1923.

3. Because the Supreme Court gave judgment in favor of the Prosecutor and against the defendants.

4. Because the judgment of the Supreme Court should have been in favor of the defendants and against the Prosecutor.

DAVID T. WILENTZ,
*Attorney for and of Counsel with Appellant-
Defendant, James A. Mullen.*

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

10 ISIDOR DUBROW, of full age, being duly sworn, according to law, upon his oath deposes and says that on the 23d day of March, 1923, he served a copy of the within notice of appeal upon the Board of Aldermen of the City of Perth Amboy and the City of Perth Amboy, by leaving a copy of said notice with Philip Costello, City Clerk, at the City Hall in the City of Perth Amboy.

ISIDOR DUBROW.

Sworn and subscribed to before me this 24th day of
20 March, 1923.

G. GEO. GOLDMAN,
Attorney at Law of New Jersey.

NEW JERSEY SUPREME COURT.

JOSEPH E. HORNSBY,
Prosecutor, }
vs. } On Certiorari.
30 JAMES A. MULLEN ET AL.,
Defendants. }

NOTICE OF APPEAL FROM JUDGMENT OF
SUPREME COURT.

(Filed March 24, 1923.)

*To Leo Goldberger, Esquire, Attorney for Prosecutor,
Joseph E. Hornsby:*

SIR—Take notice that the defendant, James A. Mullen, appeals to the Court of Errors and Appeals

from the whole of the judgment entered in the above stated cause on the following grounds:

1. The appointment of the defendant, James A. Mullen, by the defendant, City of Perth Amboy, was lawful.

2. The appointment of the Prosecutor in January, 1921, to the office of Collector of Revenue for the City of Perth Amboy was for the unexpired term of Ellsworth B. Walker, which expired on January 1st, 1923.

3. Because the Supreme Court gave judgment in favor of the Prosecutor and against the defendants. 10

4. Because the judgment of the Supreme Court should have been in favor of the defendants and against the Prosecutor.

DAVID T. WILENTZ,

*Attorney for and of Counsel with Appellant-
Defendant, James A. Mullen.*

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

20

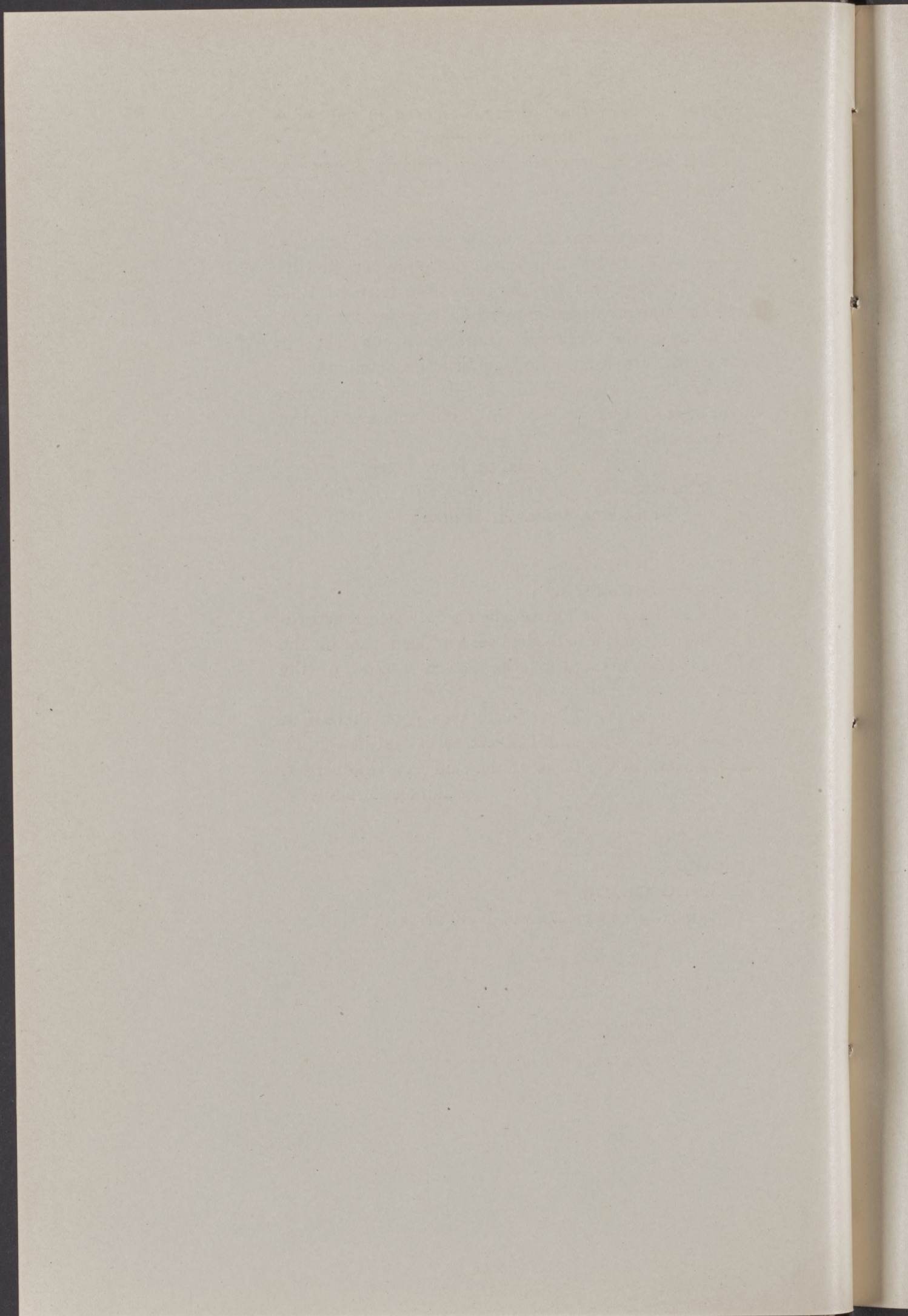
ISIDOR DUBROW, of full age, being duly sworn according to law, upon his oath deposes and says that on the 16th day of March, 1923, he served a copy of the within Notice of Appeal upon Leo Goldberger, attorney for the Prosecutor, by leaving a true copy thereof at his office, at No. 119 Smith Street, with Matthew F. G. Melko, a clerk in the office of the said Leo Goldberger.

ISIDOR DUBROW.

Sworn and subscribed before me this 19th day of March, 1923. 30

G. GEO. GOLDMAN,

An Attorney at Law of New Jersey.



NEW JERSEY SUPREME COURT.

JOSEPH E. HORNSBY, Prosecutor,	} On Certiorari.
vs.	
JAMES A. MULLEN ET AL., Defendants.	

OPINION.

(Filed February 17, 1923.)

Argued November Term, 1922, before Justice BERGEN.

LEO GOLDBERGER, for Prosecutor.

DAVID T. WILENTZ, for Defendants.

Memorandum by

BERGEN, J.—The facts not in dispute are, that on January 5, 1920, Ellsworth B. Walker was elected by the Common Council of Perth Amboy Collector of Revenue for the city for the term of three years under a statute which permitted that action, P. L. 1904, page 151; that Walker died during the year, and in January, 1921, the prosecutor was duly elected to succeed him “for the term provided by law,” and has since been serving under that appointment, and if the term of his appointment be for three years it will not expire until January 1, 1924.

The Common Council, conceiving that his appointment was only for the unexpired term of Walker, passed a resolution electing the defendant Mullen as Collector of Revenue for the city of Perth Amboy “for a term of three years as prescribed by law,” and also adopted a resolution requiring prosecutor to surrender to Mullen all books and papers relating to that office.

The prosecutor is still in possession of the office and brings certiorari to set aside the two resolutions, as an interference with his performance of the duties of his office.

It is admitted by defendants that if the law of 1904 is still in force he has no legal standing to have the resolution enforced, but he claims that by the provisions of the statute of 1905, P. L. 14, so much of the act of 1904 as relates to the term of office of certain officials of cities like Perth Amboy, a city of the second class, was repealed, and that an appointment of officers of such a municipality can only be for an unexpired term, and that consequently rélator's term expired January 1, 1923.

The difficulty with defendants' claim is that this court has held otherwise in *McCrellis v. Curran*, 86 N. J. L. 398, in which the Chief Justice, speaking for this court, said "the Act of 1904 dealing with the terms of certain officers in cities of the second class is, therefore, not at all effected by the later act of 1905." This, until reversed by an appellate court, is binding on the Supreme Court, and the argument of the defendant that it is erroneous in law cannot be considered. The prosecutor is entitled to have the two resolutions, brought under review by this writ, set aside with costs, and it is so ordered.

New Jersey Court of Errors and Appeals

JOSEPH E. HORNSBY,
Prosecutor-Appellee,

vs.

BOARD OF ALDERMEN OF THE CITY
OF PERTH AMBOY, CITY OF
PERTH AMBOY and JAMES A.
MULLEN,
Defendant-Appellant.

On Certiorari.

Appeal.

BRIEF OF PROSECUTOR-APPELLEE.

Statement.

This is an appeal from the Supreme Court by James A. Mullen to review the appointment by the Council of the City of Perth Amboy of a collector to replace the prosecutor-appellee.

The facts are substantially set forth in the State of the Case, and briefly show:

1. That an ordinance fixing term of collector was passed and approved February 27, 1919.
2. That January, 1920, Ellsworth B. Walker was elected collector for a term of three years and that he died the latter part of said year.
3. That January 3, 1921, the appellee was elected for the term "prescribed by law."
4. January 2, 1923, the appellant, James A. Mullen, was elected for a term of three years "prescribed by law to succeed Hornsby."
5. That said Hornsby was at that time and is at the present time incumbent of the said office.

ARGUMENT.

Point 1.

The proceedings in the Supreme Court being more IN REM than INTER PARTES, the appeal should be dismissed.

The said appellant was not a necessary party in the court below, as all that was desired in the Supreme Court was a decision affirming or reversing the *Corporate Act* of the City relating to the appointment of appellant, it is more *in rem* than *inter partes*. As was stated in *Siedler v. Freeholders*, "In such a cause our jurisdiction is complete, when we have brought the subject matter within our power, by a writ that has given the corporation notice of our purpose, and does not need that we should have before us those who have acquired or attempted to acquire rights on the basis of the action under review."

Siedler v. Freeholders, 39 N. J. L. 632.

The said appellant was merely a nominal party and in order for him to maintain an appeal he should be injuriously affected, and having no CONTRACTUAL rights, his standing in this court cannot be sustained. The writ having been allowed to review the CORPORATE act, the City of Perth Amboy is the only party having the right to appeal (which it has refused to do).

Siedler v. Freeholders, 39 N. J. L. 632;

3 Cor. Jur. 628, &c.;

Allen v. Freeholders, 71 N. J. L. 247;

McFall v. Dover, 70 N. J. L. 518.

In the latter case it will be observed that Tippitt was made a party at the request of the Court in order to ascertain whether the writ would lie, because it had not been made to appear whether or not he was incumbent of the office, nor had

the prosecutor shown whether or not he was in office.

Point 2.

The APPELLEE'S term was for three years ending January 1, 1924.

The appellant argues that Hornsby's appointment was only for the unexpired term of Walker, viz., until January 1, 1923. That therefore after this latter date there was a vacancy, and that the effect of the appointment of appellant on January 2, 1923, entitled him to hold office for a term of three years. This contention is based upon the provision of said section 5 of the said act of February 28, 1901, entitled "An Act relative to the time of election appointment and terms of office of officers elected or appointed in CITIES in this State" (p. 41), the section relied upon declares that "All vacancies in office in any city of this State arising from or created by any other cause than expiration of term of office shall be filled for the unexpired term only." This provision, however, so far as relates to the office in question in cities of the SECOND class was repealed by said section 2 of the Act of 1904 referred to (specifically set forth in brief of appellant) and reads as follows: "All acts or parts of acts inconsistent with the provisions of this act are hereby repealed." The contention of the appellant that this repealer was in turn repealed by said section 5 of the act of February 15th, 1905 (p. 14), was repudiated by the Chief Justice in the case of

McCrellis v. Curran, 86 N. J. L. 398.

The said act of 1904 has been construed and held constitutional.

McCrellis v. Curran, 86 N. J. L. 398;
Schneider v. Atkinson, 86 N. J. L. 392.

In the latter case the Chief Justice has this to say: "The statute requires that each appointee shall hold office to which he is appointed for a definite time to be fixed by Common Council and that WITHOUT REGARD to the conditions under which he is appointed."

The said act of 1905 (p. 14) (specifically set forth in brief of appellant) does not apply to Cities.

Wright v. Campbell, 74 N. J. L. 609.

If the legislature had intended that it should apply to first or second-class cities, it certainly would have so stated, and would not have mentioned various municipalities of a lower rank. The general rule of construction is that municipalities of a HIGHER rank than those named in the statute are not intended.

Stout v. Glen Ridge, 59 N. J. L. 201.

Point 3.

The appellant cannot be removed before his term except upon charges and a hearing had thereon.

If the Council intended to remove Hornsby before the expiration of his term, charges should have been preferred (if any grounds it had) and given him the opportunity to defend himself.

Murphy v. Freeholders, 92 N. J. L. 604.

It is urged that the appeal should be dismissed and the decision of the Supreme Court affirmed.

Respectfully submitted,

LEO GOLDBERGER,
Attorney for and of Counsel
with Appellee.

NEW JERSEY Court of Errors and Appeals

JOSEPH E. HORNSBY,
Prosecutor-Appellee,

vs.

BOARD OF ALDERMEN OF THE CITY
OF PERTH AMBOY, CITY OF
PERTH AMBOY, AND JAMES A.
MULLEN,
Defendant-Appellants.

} On Certiorari.
} Appeal.
} BRIEF.

Brief of Defendant-Appellant.

The appeal of the appellant brings up for review the judgment of the Supreme Court (Case, page 15) setting aside two resolutions, one electing the appellant James A. Mullen as Collector of Revenue for the City of Perth Amboy "for a term of three years as prescribed by law," and the other requiring the appellee, Joseph E. Hornsby, to surrender to Mullen all books and papers relating to that office.

STATEMENT OF FACTS.

In the month of January, 1920, Ellsworth B. Walker was elected Collector of Revenue for a term of three years. In the latter part of 1920 Walker died. On

January 3d, 1921, Hornsby was elected to succeed Walker "for the term prescribed by law."

On January 2d, 1923, the Board of Aldermen of the City of Perth Amboy elected Mullen for the term of three years as prescribed by law to succeed the said Hornsby.

Counsel for the respective parties agreed that the affidavit (Case, pages 1, 2 and 3.) and the stipulation (Case, pages 8 and 9,) shall be considered as if the same were depositions in this case and that the said cause shall be determined upon said Agreed State of Facts. The contention of the prosecutor-appellee is that the term prescribed by law is three years. The defendant-appellant maintains that the prosecutor-appellee's appointment was for Walker's unexpired term ending December 31st, 1922. If the term of the appellee was for the unexpired term of Walker and not three years, then the judgment should be reversed, otherwise the judgment should be affirmed.

The appellant seeks to set aside the judgment of the Supreme Court for the following reasons (Case, page 11):

1. The appointment of the defendant, James A. Mullen, by the defendant, the City of Perth Amboy, was lawful.
2. The appointment of the prosecutor in January, 1921, to the office of Collector of Revenue for the City of Perth Amboy was for the unexpired term of Ellsworth B. Walker, which expired on January 1st, 1923.
3. Because the Supreme Court gave judgment in favor of the prosecutor and against the defendants.
4. Because the judgment of the Supreme Court should have been in favor of the defendants and against the prosecutor.

The appellant argues in this brief all of the foregoing reasons under one title in order that his views may be more conveniently considered, and will incorporate herein all of the legislation on the subject as is deemed pertinent to the decision of the case.

STATUTE OF 1901.

Extracts from Laws of 1901, chapter 18, page 41 :

An Act relative to the time of election and appointment and terms of office of officers elected or appointed in cities in this State.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Hereafter, in all cities in this State, all officers required to be elected therein at any municipal or charter election, shall be voted for and elected on the first Tuesday after the first Monday of November in each year, and with the same registration and upon the same official ballots required by law for the election of State and county officers and not otherwise; and the said ballots voted as aforesaid for such officers shall be canvassed, and the result of any such election therefor shall be determined as now provided by law in the case of county officers, and certified to the clerk of such city; it being the intention hereby to consolidate the municipal or charter election in cities with the general or State elections.

4. The terms of office of all officers (except justices of the peace) hereafter elected in any city shall commence at twelve o'clock noon on the first day of January next succeeding their election, and continue for the respective terms of years now fixed by law; and the terms of office of all officers hereafter appointed by the mayor of any city, or appointed or chosen by the common council or other governing body of any city, except to fill vacancies, shall commence on the first day of January of the year in which they are appointed, and continue for the respective terms of years now fixed by law, when said term is for a definite period; *provided, however,* that no appointment of any officer shall be made by the mayor of any city for a term of office to commence after the expiration of the term of said mayor, or by the common council or other governing

body of any city for a term of office to commence after the expiration of the term of any member of said common council or other governing body.

5. All vacancies in offices in any city of this State arising from or created by any other cause than expiration of term of office, shall be filled for the unexpired term only; vacancies in elective offices shall hereafter be filled at the next general or State election, and not otherwise.

STATUTE OF 1904.

P. L. 1904, chapter 63, page 151 :

An Act concerning the term of office of certain officers in cities of the second class of this State.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Any collector of taxes, receiver of taxes, city treasurer, clerk, city attorney, physician, street commissioner, surveyor or overseer of the poor, hereafter appointed in cities of the second class prior to the first day of January, one thousand nine hundred and five, shall hold office only until said first day of January, one thousand nine hundred and five, and thereafter it shall be lawful for the board of aldermen, common council or other governing body of any city, to make appointments to any or all of said offices for a term of three years; said term of office shall commence the first day of January last preceding or next succeeding the fixing thereof as said board of aldermen, common council or other governing body may by like vote direct; *provided*, that no such term shall commence earlier than the first day of January, one thousand nine hundred and five; and when such term shall have been fixed the incumbents of persons thereafter chosen, for any of the above-named offices, shall hold office until the expiration of the term so fixed, and their successors, when chosen, shall hold office for a like term of years.

2. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed; *provided*, that nothing herein contained shall abridge the term of office of any person heretofore appointed; *and provided*, that this act shall not apply to cities where such officers are now or may be elected by popular vote.

3. This act shall take effect immediately.

Approved March 25, 1904.

STATUTE OF 1905.

Extracts from Laws of 1905, chapter 3, page 14:

An Act relative to the time of election and appointment and terms of office of officers elected or appointed in towns, townships, boroughs and other municipalities in this State.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

5. All vacancies in offices in any town, township, borough or other municipality of this State arising from or created by any other cause than expiration of term of office shall be filled for the unexpired term only.

8. All acts and parts of acts, special or general, inconsistent with the provisions of this act are hereby repealed.

POINT ONE.

CHAPTER THREE OF THE LAWS OF 1905 IS OPERATIVE AS TO CITIES.

1. The words "and other municipalities" in this State embraces cities.

The appellant contends that chapter 3 of the Laws of 1905 repealed chapter 18 of the Laws of 1901 and chapter 63 of the Laws of 1904. This contention depends, first, upon the conclusion that the 1905 Act is operative as to cities. In *Wright v. Campbell*, 74 N. J. L. 82, at

page 86, Mr. Justice Garretson, referring to the Act of 1905, held as follows:

“The words ‘other municipality,’ in the first and second sections, cannot be held to include the county itself or the corporation of the board of chosen freeholders created for the county. The first section applies only to municipalities which at municipal or charter elections by the voters elect certain officers, as, for example, chosen freeholders; counties nor boards of freeholders hold any such elections.

“The words ‘other municipality,’ in the third and fourth sections, it seems to me, must mean like municipality to town, township, borough, etc., a municipality possessed in the same characteristics as towns, townships, boroughs—the leading characteristic in this legislation being the power of holding an election by the people for officers.”

This case was carried to the Court of Errors and Appeals in 74 *N. J. L.* 609, where the judgment of the Supreme Court was affirmed.

In the case of *Ludlam v. Dallas*, 82 *N. J. L.* 122, at page 124, will be found the assertion of the Supreme Court that the phrase “other municipalities” in the 1905 Act herein referred to, is sufficiently descriptive of cities to include them. To quote from the learned Justice who spoke for the court:

“In *Wright v. Campbell*, 45 *Vroom* 83, this court held that the words ‘other municipalities,’ contained in a similar title in the Act of 1905, page 14, meant a like municipality to a town, township, etc.—that is, a municipality possessed of the same characteristics as towns, etc., the leading one being the power to hold an election by the people for offices. This case was affirmed (43 *Id.* 609), and the reasoning there indirectly leads to the conclusion that the phrase ‘other municipalities’ is sufficiently descriptive of cities to include them.”

An opposite view is taken by the Supreme Court in *McCrellis v. Curran*, 86 N. J. L. 398, at page 400, where it interprets the opinion of the Court of Errors and Appeals in *Wright v. Campbell*, *supra*, adverse to the contention of the appellant. A perusal of the opinion does not disclose that to be the view of the higher court. It will be noted that Mr. Justice Bergen decided the case at bar (Case, page 16,) upon the authority of *McCrellis v. Curran*.

Chief Justice Gummere sat in the case of *Wright v. Campbell* in the Court of Errors and Appeals and also in the *McCrellis v. Curran* and the *Ludlam v. Dallas* cases. How his Honor can reconcile the cases above alluded to the appellant is at a loss to know.

The Chief Justice in the Court of Errors and Appeals opinion in *Wright v. Campbell* and also in the *McCrellis v. Curran* case refers to the 1905 Act as being an exact transcript of the 1901 Act except where the word "city" or its plural appears in the earlier statute, the words "town, township, borough or other municipality," or their plurals, are substituted in the later statute. An examination of the statutes, *supra*, will disclose that section one of the 1905 Act contains the following provision in addition to those found in section one of the 1901 Act:

"Provided that nothing herein contained shall be construed to affect the election of any member of any board of education or school trustee."

2. Full effect should be given, if possible, to all parts of a statute.

In *Steel v. Board of Chosen Freeholders of Passaic et al.*, 89 N. J. L. 809, Mr. Justice Trenchard, delivering the opinion of the Court of Errors and Appeals, says:

"The cardinal principle for the construction of statutes is that they are to be so construed that, if possible, full effect shall be given to all parts of the statute. A statute ought upon the whole to be so construed that, if it can be prevented, no

clause, sentence or word shall be superfluous, void or insignificant."

It necessarily follows from an application of the above rule, that the words "other municipalities" in the Act of 1905 include cities.

3. Common law and legislative classification of municipalities indicates Act of 1905 is operative as to cities.

For the purpose of legislation, regulating the internal affairs of municipalities, there are two sorts of classifications known to the law. To quote from Chief Justice Depue in the case of *Lewis v. Jersey City*, 66 N. J. L. 584, at page 586:

"First, the common law classification of municipalities into counties, cities, boroughs, towns, townships and villages. This classification is independent of statutory prescriptions; it rests on the common law and is recognized by the Constitution of this State. Hence an act of the Legislature which applies to anyone of these political subdivisions is *per se* a general law, within the meaning of the constitutional provision. But the subdivision of common law municipalities into subordinate classes is a legislative classification, and legislation with respect to any of such classes depends upon the appropriateness of the legislative classification. A system of classification which will merely individualize the political districts of the State to which the act shall be applied is plainly insufficient. Something more is required than mere designation by such characteristics as would serve to identify. The classification must rest on some characteristics or peculiarity plainly distinguishing the places included from those excluded and making the legislation fit and appropriate to those included and inappropriate to those which are omitted. It must embrace all and exclude none, whose conditions and wants render such legislation equally appropriate to them as a class."

Is there anything in the language of the statute that could justify excluding cities any more than towns? If the words "and other municipalities" in the 1905 Act do not embrace cities, what do they embrace having specifically referred to towns, townships and boroughs.

Under the common law classification of municipalities, the Act of 1905 would be operative as to counties, cities, boroughs, towns, townships and villages. The purposes of the 1905 legislation, however, cannot and do not meet any requirement of a county, and it would be absurd to make the Act of 1905 operative as to counties. As to the other subdivisions, cities, etc., the 1905 Act is operative in the same degree. The legislative classification would indicate that the words "other municipality" in the 1905 Act was intended to be operative as to cities as well as villages, towns, townships and boroughs; all municipalities having like characteristics, the leading characteristic being to elect its own officers.

4. Legislative intent may be considered where usual meaning is unsatisfactory.

Statutes may be interpreted:

(a) By their ordinary and usual meaning.

(b) Where this is unsatisfactory, an indication of purpose by the lawmaker would induce the Court to give it a signification other than that which is said to be the usual one.

"Banta v. Richards, 42 N. J. L. 498."

The Legislature by the 1905 Act intended to combine and consolidate the 1901 Act relating to cities, together with the 1904 legislation relating to cities of the second class into one act covering towns, townships, boroughs and other municipalities, and thereby effectuating a complete system, since they all possess like characteristics in the legislation which come by necessity under review. Under the 1904 Act it was made possible for scheming politicians to frustrate the will of the people by appointing a man for three years, and before the expiration of that term having him tender his resignation and then reappoint him or appoint some other person, not

for the unexpired term, but for a term of three years. Such a situation must have confronted the Legislature and was remedied by the 1905 Act.

It is interesting to note that the same Legislature in 1905 passed only two other acts using the words "towns, townships, boroughs and other municipalities," and in them specifically exclude cities, as, for instance, in the following titles. If the Legislature of 1905 did not intend to include cities in the phrase "other municipalities" in the act herein referred to, why have they not excluded them as they have in the other two acts?

Chapter 178 of the Laws of 1905, page 333:

"An Act establishing the fiscal year in all towns, townships, boroughs, villages and other municipalities, excepting first and second class cities, and the time for publishing and filing the various reports of the officers of the same."

Chapter 201 of the Laws of 1905, page 369:

"A Supplement to an act entitled 'An act concerning the settlement and collection of arrearages of unpaid taxes, assessments and water rates or rents in towns, townships, boroughs and other municipalities, except cities of this State, and imposing and levying a tax, assessment and lien in lieu and instead of such arrearages, and to enforce the payment thereof, and to provide for the sale of lands subject to future taxation and assessment,' approved May eighteenth, eighteen hundred and ninety-eight."

It is plain from the substance of the 1905 Act that it is in itself a complete and perfect system for the holding of elections in all municipalities (other than counties).

In *Roche v. Mayor, etc., of Jersey City*, 40 N. J. L. 257, at page 26, the Court held as follows:

"Every statute must be considered according to what appears to have been the intention of the Legislature, and even though two statutes, re-

lating to the same subject, be not in terms repugnant or inconsistent, if the later statute is clearly intended to prescribe the only rule which should govern the case provided for, it will be construed as repealing the original act.

"The rule does not rest strictly upon the ground of repeal by implication, but upon the principle that when the Legislature make a revision of a particular statute, and frames a new statute upon the subject matter, and from the framework of the act it is apparent that the Legislature designed a complete scheme for this matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions contained in the later act as the only one obligatory."

And in *Bracken v. Smith*, 39 *Eq.* 169, the Court held:

"Where there are two statutes on the same subject passed at different dates, and it is plain from the framework and substance of the last that it was intended to cover the whole subject and to be a complete and perfect system of itself, the last act must be held to be a legislative declaration that whatever is embraced in it shall prevail, and whatever is included is discarded and repealed."

The Act of 1905 should supersede the 1901 Act in view of the reasoning in the case of *Burlington v. Estlow*, 43 *N. J. L.* 13, at page 15, where the Supreme Court adopted the law in *Sedg. S. & C. Con.* 126, as follows:

"It is one of the settled rules of construction that a statute is impliedly repealed by a subsequent one, revising the whole subject matter to which the first appertains."

A fortiori in the 1905 Act contains an express repealing clause of all special and general legislation. It is

true that the 1904 Act refers to cities of the second class, but the intention of the Legislature to repeal it is made clear by the repealing clause of the 1905 Act, *supra*.

If the Act of 1905 herein referred to is operative as to cities, all vacancies in offices in the City of Perth Amboy arising from or created by any other cause than the expiration of term of office should be filled for the unexpired term only. Therefore, the term of the prosecutor-appellee was for the unexpired term of Walker, expiring December 31st, 1922, and the appointment of the defendant-appellant on January 1st, 1923, was lawful.

I respectfully submit that the judgment brought up by this appeal should be reversed.

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