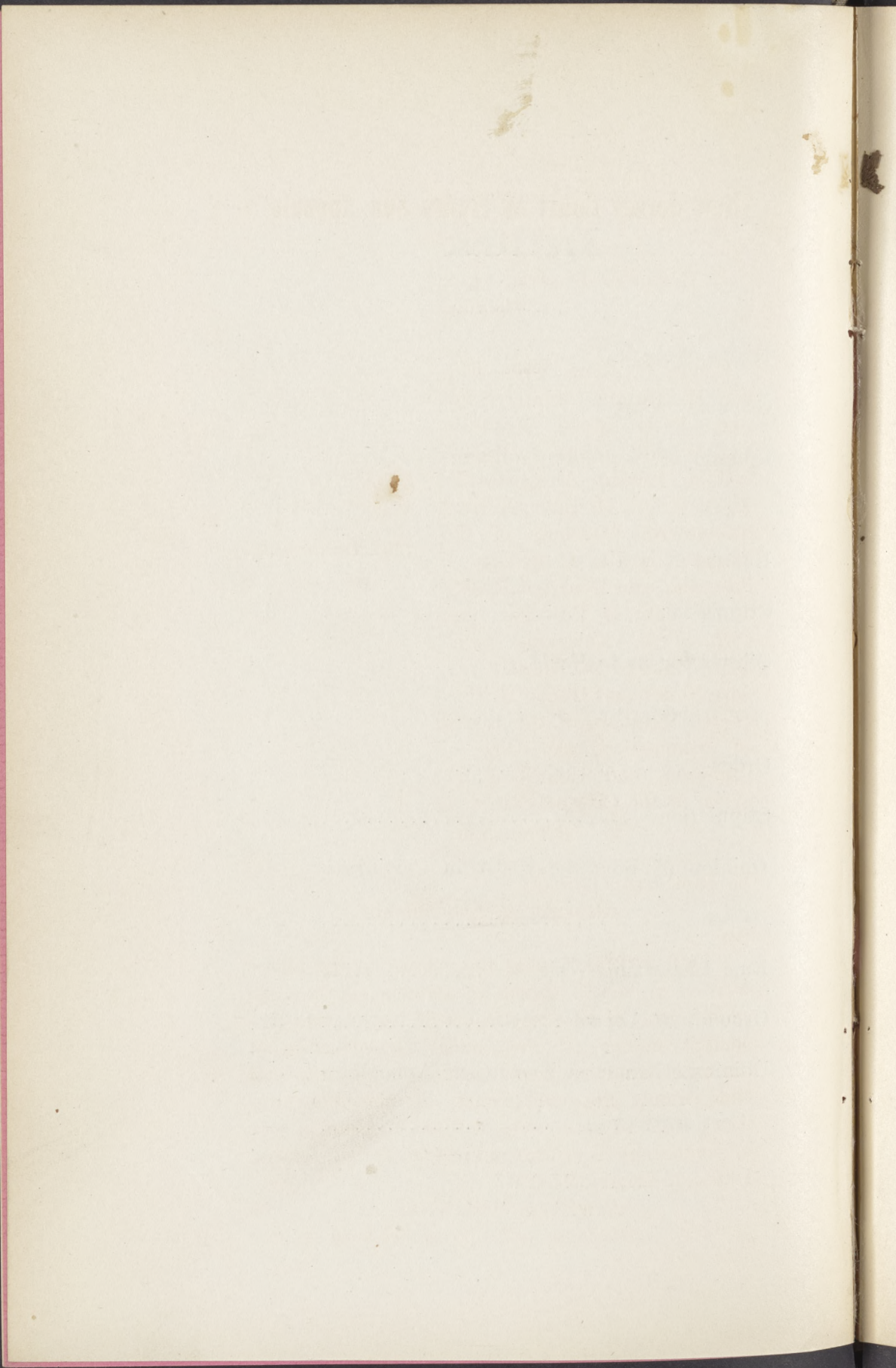


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(Filed, )

## New Jersey Court of Errors and Appeals

*Notice of Appeal*

J. Alexander Browne,  
*Relator,*

vs.

Edwin C. King, Pres; Edwin R. Morris, Achille Sabitino, Peter Muse, Franklin Van Winkle, James J. Maher, William Decker, Alexander D. Riley, Frank M. Barr, Nathan Rabinowitz, Members of the Board of Health of the City of Paterson, and Board of Health of the City of Paterson, and Clifford L. Newman, President; Edward W. Russell, Isadore Simon and Henry H. Parmalee, Members of the Board of Finance of the City of Paterson, and Board of Finance of the City of Paterson

*Respondents.*

10  
*On Mandamus.*

20

To Hon. Francis Scott,  
Attorney of Respondents.

Sir:

TAKE NOTICE, that the relator in the above entitled cause, J. Alexander Browne, hereby appeals to the New Jersey Court of Errors and Appeals, from the judgment, order or proceeding of the New Jersey Supreme Court, whereby the said New Jersey Supreme Court, at the February term, 1917, of said court, refused to grant a writ of mandamus to relator, as prayed for by relator. Dated February 27, 1917.

WARD & MCGINNIS,  
*Attorneys and of counsel with relator.*

30

1-B

*Grounds of Appeal*  
(Filed, )

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

J. Alexander Browne,  
*Relator,*

vs.

Edwin C. King, Pres; Ed-  
win R. Morris, Achille Sabi-  
tino, Peter Muse, Franklin  
10 Van Winkle, James J. Maher,  
William Decker, Alexander D.  
Riley, Frank M. Barr, Nathan  
Rabinowitz, Members of the  
Board of Health of the City of  
Paterson, and Board of Health  
of the City of Paterson, and  
Clifford L. Newman, Presi-  
dent; Edward W. Russell, Isa-  
dore Simon and Henry H. Par-  
malee, Members of the Board  
20 of Finance of the City of  
Paterson, and Board of Fi-  
nance of the City of Paterson.

*Respondents.*

To Francis Scott,  
Attorney of Respondents.

Sir:

30 TAKE NOTICE that the following is the  
ground of appeal, upon which the relator appeals  
to the New Jersey Court of Errors and Appeals.

1. That the Supreme Court should have grant-  
ed the writ of mandamus as prayed for.

Respectfully,

WARD & McGINNIS,

*Attorneys of Relator.*

*Application for Mandamus*

(Filed, )

NEW JERSEY SUPREME COURT.

November Term, 1916.

---

J. Alexander Browne,  
vs.  
Board of Health of Paterson.

---

Submitted November term, 1916; 10  
Decided February, 1917.

APPLICATION FOR MANDAMUS.

Before Justices Swayze, Minturn and Kalisch.  
Ward & McGinnis, for relator.  
William I. Lewis, for respondent.

*Per Curiam.*

Dr. Browne claims to be Health Officer of Paterson. Dr. Clay is in possession of the office. Previous litigation has been inconclusive as to the right to the office. The Supreme Court on a certiorari by Dr. Clay reviewed action of the Civil Service Commission adverse to him and dismissed the writ upon the ground that *Dr. Browne was entitled to the office*. The Court of Errors and Appeals *affirmed the judgment* but not on the merits; it held that certiorari to the Civil Service Commission was not the proper way to raise the question. We are now asked for a man 20 30

*Application for Mandamus*

damus on the Board of Finance of Paterson to compel the payment of the salary to Dr. Browne. This would be proper *if the title to the office were settled*. The relator thinks it is settled as far as this court is concerned by our prior decision. But after the expression of the view of the Court of Errors and Appeals the opinion of this court ceased to be important except as an expression of the opinion of a learned judge. It was held that the court was without jurisdiction. What we are now  
 10 asked to do is to determine the title to a public office in a proceeding by mandamus substantially against the City to which the incumbent is not made a party. Obviously that cannot be done. But even if Dr. Clay could properly be made a party to a mandamus, he could not be concluded. He is entitled to be heard before a jury on a quo warranto.

*Leeds v. Atlantic City*, 52 N. J. Law, 332, is  
 20 relied on. But the point of that case was that the relator had never been out of office and that the court had upon certiorari annulled the only thing which challenged the relator's right. If Dr. Browne had secured the setting aside of the proceedings appointing Dr. Clay, he would perhaps be in the position of Leeds. But as the case stands, he is not entitled to the salary unless he is entitled to the office; the title to the office is necessarily in question and can only be determined on a quo warranto.

30 Let the application be denied with costs.

(Filed )

## New Jersey Supreme Court

J. Alexander Browne,  
*Relator,*

vs

Edwin C. King, Pres.; Edwin R. Morris, Achille Sabitino, Peter Muse, Franklin Van Winkle, James J. Maher, William Decker, Alex. D. Riley, Frank M. Barr, Nathan Rabinowitz, Members of the Board of Health of Paterson, and Board of Health of the City of Paterson, and Clifford L. Newman, President; Edward W. Russell, Isadore Simon and Henry H. Parmalee, Members of the Board of Finance of the City of Paterson, and Board of Finance of Paterson,

*Respondent*

10

*On Mandamus.*

20

### Rule to Show Cause.

Upon reading the affidavit of J. Alexander Browne, filed in the above cause, it is ordered, that the said Edwin C. King, President; Edwin R. Morris, Achille Sabitino, Peter Muse, Franklin Van Winkle, James J. Maher, William Decker, Alexander D. Riley, Frank M. Barr, Nathan Rabinowitz, Members of the Board of Health of the City of Paterson, and Board of Health of City

30

*Rule to Show Cause.*

of Paterson, and Clifford L. Newman, Edward W. Russell, Isadore Simon and Henry H. Parmalee. Members of the Board of Finance of the City of Paterson, and Board of Finance of City of Paterson, do show cause before this court at the State House, Trenton, New Jersey, on Tuesday, the seventh day of November, 1916, at 10:45 o'clock in the forenoon of that day, why a preemptory or alternative writ of mandamus should not be issued out of and under the seal of this Honorable Court directed to them and each of them, commanding each and enjoining each of them to pay or cause to be paid to the relator the salary due to him as health officer of the city of Paterson from the twelfth day of January, 1915, to the date of the granting of said writ of mandamus:

It is further ordered that both parties have leave to take affidavits and submit briefs.

Dated October 7th, 1916.

20

James F. Minturn,

*J. S. C.*

On Motion of Ward & McGinnis,  
*Attorneys of Relator.*

30

*Stipulation.*

(Filed )

## NEW JERSEY SUPREME COURT.

J. Alexander Browne,  
*Relator,*

vs

Edwin C. King, Pres.; Edwin R. Morris, Achille Sabitino, Peter Muse, Franklin Van Winkle, James J. Maher, William Decker, Alex. D. Riley, Frank M. Barr, Nathan Rabinowitz, Members of the Board of Health of the City of Paterson, and Board of Health of the City of Paterson, and Clifford L. Newman, President; Edward W. Russell, Isadore Simon and Henry H. Parmelee, Members of the Board of Finance of the City of Paterson, and Board of Finance of the City of Paterson,

*Respondents.*

10

*On Application  
for Mandamus.*

20

**Stipulation.**

It is hereby stipulated and agreed that the following are and shall be the relevant facts to be considered and applied upon the hearing of the above stated matter. 30

A controversy having arisen as to whether or not the Board of Health on the 12th day of January, 1915, was justified in declaring that a vacancy existed in the office or position of Health

*Stipulation.*

Officer of the City of Paterson, which office had theretofore been filled and conducted by J. Alexander Browne; that the said Board of Health as a result of its action in declaring said vacancy existed, had elected or attempted to elect to the office, Thomas A. Clay.

10 That said Clay thereupon entered into the office or position aforesaid and thence hitherto has been the sole incumbent thereof and has discharged its duties, while the said Brown ceased thence hitherto to perform or discharge any of such duties, though tendering himself at various times as being ready and willing to.

The Civil Service Commission as a result of an appeal by the said J. Alexander Browne, inquired into the controversy, and declined to recognize the validity of the action of said Board of Health of the City of Paterson in the proceedings as above related.

20 That, however, the salary of the said Clay as Health Officer as aforesaid was entered on the usual list or pay roll and forwarded to the Civil Service Commission for its certificate that the prosecutor had been appointed in pursuance of law and of the rules of the Civil Service Commission made in accordance with law. That said Civil Service Commission refused to make the certificate above mentioned.

30 Thomas A. Clay thereupon took out a writ of certiorari to review the proceedings of the Civil Service Commission as aforesaid, and the cause came on for argument before the Supreme Court at the June Term, 1915; that on the 4th of January following, an opinion was filed by the Supreme Court dismissing the writ of certiorari; that an appeal was taken by the prosecutor, Thomas A. Clay, to the Court of Errors and Appeals,

*Stipulation.*

and that court at the June Term, 1916, affirmed the judgment of the Supreme Court in dismissing said writ of certiorari.

The case as argued before the Supreme Court and the Court of Errors and Appeals was upon an agreed state of facts of which the following is a copy:

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20

30

*Stipulation as to Facts.*

(Filed )

## NEW JERSEY SUPREME COURT.

---

 Thomas A. Clay,  
*Prosecutor,*

vs

 The Civil Service Commis-  
 sion of New Jersey, the Board  
 of Health of the City of Pater-  
 son, and J. Alexander Browne,
*On Certiorari.*

10

*Respondents.***Stipulation as to Facts.**

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

20

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

An Ordinance to Establish a Board of Health  
 The Board of Aldermen of the City of Paterson  
 do ordain as follows:

30

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

Section 2. The Board of Health of the City of Paterson shall consist of seven members who

*Stipulation as to Facts.*

shall be selected as follows: Four members shall be nominated by the Mayor and approved by the Board of Aldermen and the remaining three members shall be the City Physician, the Registrar of Vital Statistics and the Health Inspector.

Section 3. The first appointments by the Mayor shall be as follows: One member to serve for three years, one member to serve for four years, one member to serve for five years and one member to serve for six years. Thereafter when a vacancy shall occur among the appointed members, by reason of the term of office expiring, the appointment shall be for three years; in case of death or resignation or removal appointment shall be made for the unexpired term. 10

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

Section 5. The term of office or mode of appointment of the City Physician and Registrar of Vital Statistics, as regulated by the Charter of the City of Paterson, shall not be affected by this ordinance. 20

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

Section 7. Regular meetings of the Board of Health shall be on the second Tuesday of each month, at an hour to be fixed by the said board. Special meetings may be called by the president or any two of the members at any time. The president shall also call a special meeting at any time when requested so to do by any five physicians practicing in the city, or by any twenty- 30

*Stipulation as to Facts.*

five taxpayers or by direction of the Board of Aldermen.

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

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

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

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

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

*Stipulation as to Facts.*

Section 13. The Health Inspector shall be the executive officer of the Board of Health. It shall be his duty to enforce the health ordinances of the city, to investigate and examine into all complaints of nuisances made to him or which shall come under his notice; to keep a record of such complaints, and when he deems sufficient cause to exist he shall notify the persons responsible for any nuisance to abate the same within a reasonable time; and in case said person shall fail to do so, he shall take action before the recorder to recover the penalty fixed for the violation of the ordinances violated. He shall perform such duties as are required by this board, or the Board of Health, and shall take monthly reports to the Board of Health. 10

Section 14. All fines or penalties collected for violations of any ordinances made by the Board of Health, shall be paid into the City Treasury and the City Counsel shall prosecute all cases brought by said board. 20

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

Passed November 13th, 1882.

Samuel Murray,

*President of the Board of Aldermen.*

Approved November 13th, 1882.

David T. Gillmor,

*Mayor.*

30

Attest: Will Hague,  
*City Clerk.*

Second:—That under said ordinance the Board of Health therein provided was duly established and organized, and a Health Inspector appointed

*Stipulation as to Facts.*

according to its provisions, who acted as the executive officer of said board.

10 Third:—That on the tenth day of November, A. D., 1903, said J. Alexander Browne was duly appointed as such Health Inspector, accepted the office and entered upon the discharge of his duties; that the following is a copy of the minutes of the meeting at which he was appointed. “On motion the board proceeded to elect a Health Of-  
ficer for the ensuing term of three years. J. Alexander Browne, M. D., was nominated by Commissioner Van Noort; B. C. Magennis, M. D., was nominated by Commissioner Van Winkle.

Ballot No. 1:

For Magennis—Banta, Van Winkle, 2.

For Browne—Hurley, Pollitt, Van Noort, McBride, 4.

Health Officer Magennis did not vote.

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

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

30 A communication from the City Clerk, calling the attention of the board to an amendment of an ordinance entitled, “An ordinance to establish a Board of Health, Approved November 13th, 1882.” Section No. 12 of the ordinance was amended to read as follows: “The Health Officer shall be paid an annual salary of fifteen hundred dollars and give bonds to the amount of two thousand dollars. A motion that the communication be received and the conditions of the ordinance complied with was adopted. That thereafter said

*Stipulation as to Facts.*

Browne was paid and received a salary of fifteen hundred dollars per annum.

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

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

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

Tuesday evening, January 14th, 1913.

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

Lawyer Ward contended that the board should not proceed to the election of a Health Officer as under the Civil Service Law there was no vacancy; quoting the letter received from the Civil Service Commission.

In reply to the president, City Counsel Merrey advised the board to proceed with the election.

Elias J. Marsh, M. D., was nominated by Commissioner Todd. Jos. V. Bergen, M. D., was nom-

*Stipulation as to Facts.*

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

On motion the nominations were closed.

Ballot No. 1:

For Marsh—Todd, Leal, 2.

For Bergen—Briody, 1.

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

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

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

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

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

30 At a meeting of the Board of Health held Feb. 11th, 1913, a letter was read from the Civil Service Commission, under date of January 21st, 1913, in which according to an opinion of the Attorney General the Health Officer is in the competitive class and is therefore protected.

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

*Stipulation as to Facts.*

## Attendance.

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

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

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

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

10

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

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

Ballot No. 1:

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

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

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

20

Fourth:—That the said J. Alexander Browne from the time of his first election in 1903 to and including December 29th, 1914, attended the meetings of the said Board of Health, participated in its business and voted upon the various motions considered by the board at such meetings.

30

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

*Stipulation as to Facts.*

## An Ordinance.

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

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

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

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

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

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

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

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

Passed December 7th, 1914.

Wallace R. King,

*President Board of Aldermen.*

Approved December 9th, 1914,

Robert H. Fordyce,

*Mayor.*

Attest: T. Simpson Standeven,

*City Clerk.*

*Stipulation as to Facts.*

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

By Commissioner Decker:

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

Commissioner Van Winkle stated that he would like to have an opinion from the City Counsel as to whether or not it was proper to go into the election of a Health Officer and moved that “we defer action on this matter until the next meeting of the board, which was duly seconded by Vice-President Maher. 10

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

Health Officer J. Alex. Browne protested against the action of the members of the board, stating that there was no vacancy. 20

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

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

Gentlemen:

Having heard rumors to the effect that your body was contemplating my removal as Health Officer, I hereby enter this formal protest against any such action on your part for the following reasons, viz., 30

First—That it would be a direct violation of the decision of the Civil Service Commission of the State of New Jersey made by it on or about

*Stipulation as to Facts.*

December 15th, 1912, by placing the Health Officer of Paterson, New Jersey, in the competitive class of the Civil Service.

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

10

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

J. Alex. Browne, M. D.,

Health Officer,

Paterson, N. J.

Dear Sir:

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

20

Yours very truly,

(Signed) Gardner Colby,

*Chief Examiner and Secretary.*

30

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

Fourth—That it would be a direct violation of the statute of the State of New Jersey as outlined in Chapter 156, Laws of 1908, approved

*Stipulation as to Facts.*

April 10th, 1908, entitled, "An act regulating employment, term and discharge of certain officers and employees of this state and the various counties and municipalities thereof, and providing for Civil Service Commission and defining its powers and duties," Sections Nos. 14-17 and 24 of the above laws being violated.

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

(Signed) J. Alex. Browne,

*Health Officer.* 10

January 4th, 1913.

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

I would further present the following:

"With reference to your inquiries as to the proper classification of the Health Officer in the City of Paterson, I note that you state that this position is classified in other municipalities in the competitive class, but that in Paterson that the Health Officer is also a member of the Board of Health and is appointed for a definite term as a member of the board. This situation arises from the fact that the Health Board of Paterson was organized prior to the act of 1887, and under a previous act. Section 11 of this act, however, provides that any Board of Health then existing in any city shall be continued under the authority of this act. Section 58 of this act provides that any person licensed as a Health Officer shall be eligible to appointment as such officer at any local Board of Health. 20 30

"It is my judgment therefore, that there is no statutory provision which requires a Health Officer of the Paterson Board of Health to be a member of the board and that he should there-

*Stipulation as to Facts.*

fore, be classed in the competitive class of the classified service.”

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

*Health Officer.*

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

10 City Counsel Merrey stated that there was no question about this matter. The decision of the Attorney General clearly states that this position has been classified in the competitive class of the Civil Service and the term is fixed for an indefinite term, depending upon good behavior, under the Civil Service Act. “I have never heard why such a classification is improper and the Board of Health cannot elect a Health Officer as there is no vacancy.”

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

On motion by Commissioner Garrison the nominations were closed.

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

30 For Dr. Clay—Commissioners Barr, Decker, Garrison, Morris, Rabinowitz, President Randall.  
Against Clay—Commissioners Maher and Van Winkle.

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

On the announcement of the vote, President Randall declared Dr. Thomas A. Clay elected

*Stipulation as to Facts.*

Health Officer of the City of Paterson, N. J., for a term of three years.

By Dr. J. Alex. Browne:

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

President Randall:

“On the ground that there is a vacancy.”

On motion the board adjourned.

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

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

William I. Lewis, 20  
*Atty. of Prosecutor.*

Ward & McGinnis,  
*Attys. of Respondent.*

That on the 21st day of August, 1915, the court filed a memorandum calling for further facts to be certified, and counsel for the respective parties made a further stipulation as for the facts desired. The memorandum in question and the further stipulation of facts is as follows:

*Memorandum by the Court.*

(Filed                      )

## NEW JERSEY SUPREME COURT.

June Term, 1915.

10	<div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: center;"> <p>Thomas A. Clay, <i>Prosecutor,</i></p> <p>vs.</p> <p>Civil Service Commission, et al.,</p> <p><i>Respondents.</i></p> </div> <div style="font-size: 4em; line-height: 1; margin-left: 10px;">}</div> </div>
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**Memorandum by the Court.**

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

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

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

*Memorandum by the Court.*

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

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

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

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

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*Order.*

(Filed \_\_\_\_\_ )

NEW JERSEY SUPREME COURT.

June Term, 1915.

10	Thomas A. Clay,	}	<i>Certiorari.</i>
	<i>Prosecutor,</i>		
	vs.		
	Civil Service Commission,	}	
	et al.,		
	<i>Respondents.</i>		

**Order.**

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

- 30 1. Whether the City of Paterson, or its Board of Health, or both, is or are subject to the Civil Service Law by adoption or subsequent legislation.
2. Whether the prosecutor is the incumbent of the office involved in this proceeding and is in possession of the same.
3. Whether his salary was entered in the usual list and forwarded to the Civil Service Commission for the usual certificate.

*Order.*

4. Whether said commission refused to certify it.

It is further ordered that such additions to the state of case be delivered to the sergeant-at-arms of this court on or before the fifteenth day of October, A. D., 1915, and that all parties have leave to file within the same time such additions to their respective briefs as they deem fit.

Let this rule be entered.

C. W. Parker,  
*J. S. C. in the Court.* 10

We hereby consent to the making of the above order.

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

20

30

*Stipulation.*

(Filed )

## NEW JERSEY SUPREME COURT.

June Term, 1915.

10	Thomas A. Clay, <i>Prosecutor,</i>	}	<i>Addition to State of Case.</i>
	vs.		
	Civil Service Commission, et al., <i>Respondents.</i>		

**Stipulation.**

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

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

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

*Stipulation.*

act entitled, "A further supplement to the act entitled, 'An act to establish in this state Boards of Health and a Bureau of Vital Statistics, and to define their respective powers and duties,' approved March thirty-first, one thousand eight hundred and eighty-seven," approved April 8th, 1903; and has been in possession of the same during all times since his election, has acted as the general agent of the Paterson Board of Health in the enforcement of its ordinances and the sanitary laws of this state within the territorial jurisdiction of said board. 10

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

4. That said commission refused to make the certificate above mentioned. 20

William I. Lewis,

*Attorney for Prosecutor.*

Ward & McGinnis,

*Attorneys for all Respondents.*

The opinion of the Supreme Court based upon the foregoing facts is as follows:

*Opinion.*

(Filed Jan. 4, 1916).

## NEW JERSEY SUPREME COURT.

June Term, 1915.

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 Thomas A. Clay,  
*Prosecutor,*

vs.

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


---

**Opinion.**

Submitted October 15, 1915; decided December, 1915.

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

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

30 On Certiorari.

Before Justices Parker, Minturn and Kalisch.  
 For the Prosecutor, William I. Lewis.

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

For Respondent Browne, Ward & McGinnis.

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

*Opinion.*

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

It is thus manifest that the title to an office or position is provided; and the point is made at the outset, that certiorari is not the proper remedy. If the subject of dispute is a "position," certiorari is proper. *McGrath v. Bayonne*, 85 N. J., L. 188. If an office, certiorari is still proper in a case such as this, where an incumbent challenges some official action calculated to interfere with his enjoyment of the office. *Moore v. Bradley Beach*, 94, Atl. 316, and cases cited. 10

We pass to the merits.

In 1882 the City of Paterson, through its Board of Aldermen, passed an ordinance based on the act of 1880 (P. L. p. 206) and 1881 (P. L. p. 160) 20  
organize a Board of Health of seven members. Three of these were to be the City Physician, Health Inspector and Registrar of Vital Statistics; the other four were to be appointed for original terms of three, four, five and six years, and thereafter for three years each. The Health Inspector was to be a physician appointed by the Board of Health, and to hold office for three years and until his successor should be appointed and qualified. The effect of this was to leave the Board of Health incomplete until it appointed the Health Inspector, whereupon he became the seventh member *ex officio*. 30

This ordinance remained unchanged until December 7, 1914, although in the interim several health acts were passed by the legislature, notab-

*Opinion.*

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

During the interval, between 1882 and 1914, over thirty years, the board presumably appointed a Health Inspector every three years under the ordinance. At all events it appointed Dr. Browne in 1903 and re-appointed him in 1906 and 1909. In 1912 he was not re-appointed, but held over notwithstanding some attempted action by way of appointment until January, 1915, when prosecutor, Clay, a member of the new board of ten was appointed by the board as Health Officer and took possession of the office, ousting Browne. Paterson in November, 1912, had adopted the Civil Service Act of 1908, and the commission having put the Health Officer on the competitive list, Browne appealed to them, and the commission made the order now complained of, besides refusing to certify Clay's salary.

The case would present some intricate and difficult questions for solution if we considered the ordinance of 1882 as amended in 1914 to be a material factor in the situation; but we do not so

*Opinion.*

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

We consider, then, that Dr. Browne's original appointment in 1903 rested in law on Section 31 of the acts of 1887, which provided for the fixing of a term of office by the board. No such term appears to have been fixed. Evidently that prescribed by the ordinance was relied on. He seem to have been actually holding over in office when the Civil Service Act went into effect, and to have remained therein for over two years thereafter. No claim is made that the office of Health Officer

*Opinion.*

under the act of 1887 is not lawfully classified by the commission. The office claimed by Clay is that existing under the health laws of the state, i. e., the act of 1887 and that of 1903, C. S. 2675, pl. 56, 57, 58, providing for examination and certification of Health Officers. This is the same office to which, as we have just said, Dr. Browne was appointed. There is only one such office at present, and he is protected in his tenure thereof by the Civil Service Law and the classification thereunder. Consequently Dr. Clay could not lawfully be appointed thereto, and no legal injury is done him by the order complained of. *Loper v. Millville*, 53 N. J. L. 362.

The writ of certiorari will be dismissed with costs.

Thereupon, on the 11th day of January, 1916, a rule dismissing the certiorari was entered in the following form:

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30

*Rule Dismissing Writ.*

(Filed )

## NEW JERSEY SUPREME COURT.

<p>Thomas A. Clay,  <i>Prosecutor,</i></p> <p style="text-align: center;">vs.</p> <p>The Civil Service Commission of the State of New Jersey, et al.,  <i>Respondents.</i></p>	}	10
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**Rule Dismissing Writ.**

The court having inspected the transcript and proceedings of the Civil Service Commission of the State of New Jersey returned with the certiorari in this case, the reasons for reversing the order of said commission, and heard the argument of counsel thereon, and having duly considered the same, do order that the writ of certiorari herein be, and the same hereby is, dismissed, with costs. 20

Entered January 11, 1916.

On motion of

John W. Westcott,

*Attorney General of New Jersey.*

That said Clay then appealed to the Court of Errors and Appeals and filed the following grounds of appeal. 30

*Grounds of Appeal.*

(Filed )

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10	Thomas A. Clay, <i>Prosecutor-Appellant.</i>	}	<i>On Appeal from Supreme Court.</i>
	vs.		
10	Civil Service Commission, et al., <i>Defendants-Respondents.</i>		

**Grounds of Appeal.**

The appellant states the following grounds of appeal.

- 20 1. Because the judgment of the Supreme Court adjudged that the writ of certiorari in the above stated cause should be dismissed.
2. Because the judgment of the Supreme Court adjudged that the writ of certiorari in the above stated cause should be dismissed with costs.
3. Because the judgment of the Supreme Court adjudged that the term of office held by J. Alexander Browne was not three years.
- 30 4. Because the judgment of the Supreme Court adjudged that the term of office held by J. Alexander Browne was not a fixed term.
5. Because the judgment of the Supreme Court adjudged that the office of Health Inspector held by said Browne was subject to the jurisdiction, rules, orders and classification of the Civil Service Commission.
6. Because the judgment of the Supreme Court adjudged that the term of office of J. Alexander

*Grounds of Appeal.*

Browne, as Health Inspector of the City of Paterson had not expired when the prosecutor was elected to said office.

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

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

9. Because the judgment of the Supreme Court adjudged that the office of Health Inspector held by said Browne was not created by and did not exist under the provisions of an ordinance of the Board of Aldermen of the City of Paterson passed on or about the thirteenth day of November, A. D., eighteen hundred and eighty-two, under and by virtue of the provisions of an act of the legislature approved March 11, 1880, and an act relating to local Boards of Health approved March 22, 1881. 10

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

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

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

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

William I. Lewis,  
*Attorney of Appellant.*

*Opinion.*

That said Court of Errors and Appeals affirmed the judgment of the Supreme Court and delivered the following opinion.

(Filed )

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10 Thomas A. Clay,  
vs.  
The Civil Service Commission and J. Alexander Browne,

Appeal from a judgment of the Supreme Court.  
For the appellant, William I. Lewis.

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

20 For J. Alexander Browne, Ward & McGinnis.  
The opinion of the court was delivered by Gummere, C. J.

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

*Opinion.*

tion, was illegal and contrary to the provisions of the Civil Service law. It is therefore ordered that Dr. Browne be reinstated to the position of Health Officer, from which he has been illegally ousted."

The judgment of the Supreme Court dismissing the writ was rested upon the conclusion that the appointment of Dr. Clay to the position of Health Officer was without warrant of law; that Dr. Browne was legally entitled to hold that position; and that consequently no legal injury was done to Dr. Clay by the order made by the Civil Service Commission of which he complains. 10

We are entirely satisfied that the writ of certiorari was properly dismissed by the Supreme Court; but we do not base our conclusion upon the grounds given by that court for its action. Dr. Clay insists that the action of the Civil Service Commission was an adjudication of the title to the position of Health Officer. The respondents insist that it was a mere expression of opinion with relation to the matter investigated by the board, and did not have and was not intended to have any mandatory force. 20

It is not necessary to determine which of these contentions is sound; for, whether the action complained of be merely the expression of an opinion or whether it be an attempted adjudication of the rights of the two gentlemen with relation to the position of Health Officer of Paterson, it is not the proper subject of review by certiorari. 30

If it be considered a mere expression of opinion, it is sufficient for the disposition of the matter to reiterate what was said by Mr. Justice Garrison, speaking for the Supreme Court, in the case of *Newark vs. Fordyce, et al*, decided at the February term, 1916, viz.: "A writ of certiorari

*Opinion.*

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

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

30 It is argued on behalf of Dr. Clay that he is injuriously affected by the order of the Civil Service Commission because, on the basis of the conclusion reached by it and expressed therein, the board has refused to certify a payroll containing provision for the payment to him of the compensation to which he is entitled as the Health Officer of the City of Paterson either *de jure* or *de facto*. But his remedy for the wrongful refusal of the Civil Service Commission to certify the payroll (if such refusal be wrongful) is not the suing out

of a certiorari to test the soundness of the grounds upon which that refusal was rested, but an application for a mandamus to compel the performance by the board of a legal duty which the statute of its creation has imposed upon it. *Comp. Stat. p. 3805; sec. 82.*

The judgment under review will be affirmed.

Endorsed:

“Filed June 27, 1916,  
Thomas F. Martin,  
Clerk.”

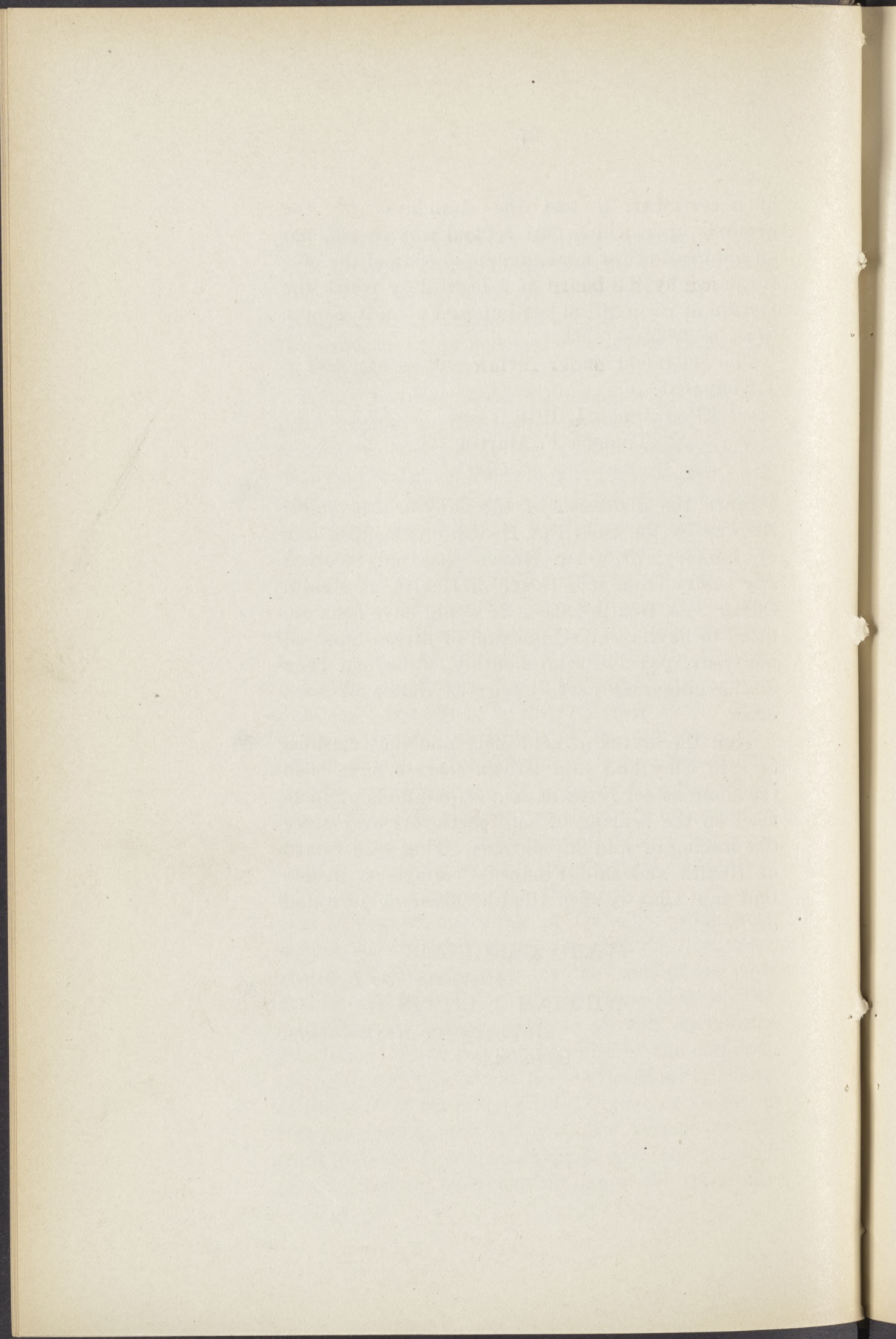
Since the dismissal of the said J. Alexander Browne by the Board of Health on the 13th day of January, 1915, Dr. Browne has not received any salary from said Board of Health, as Health Officer. As Health Officer he would have been entitled to have received the sum of fifteen hundred per year, payable semi-monthly, if he had been discharging and performing the duties of such office.

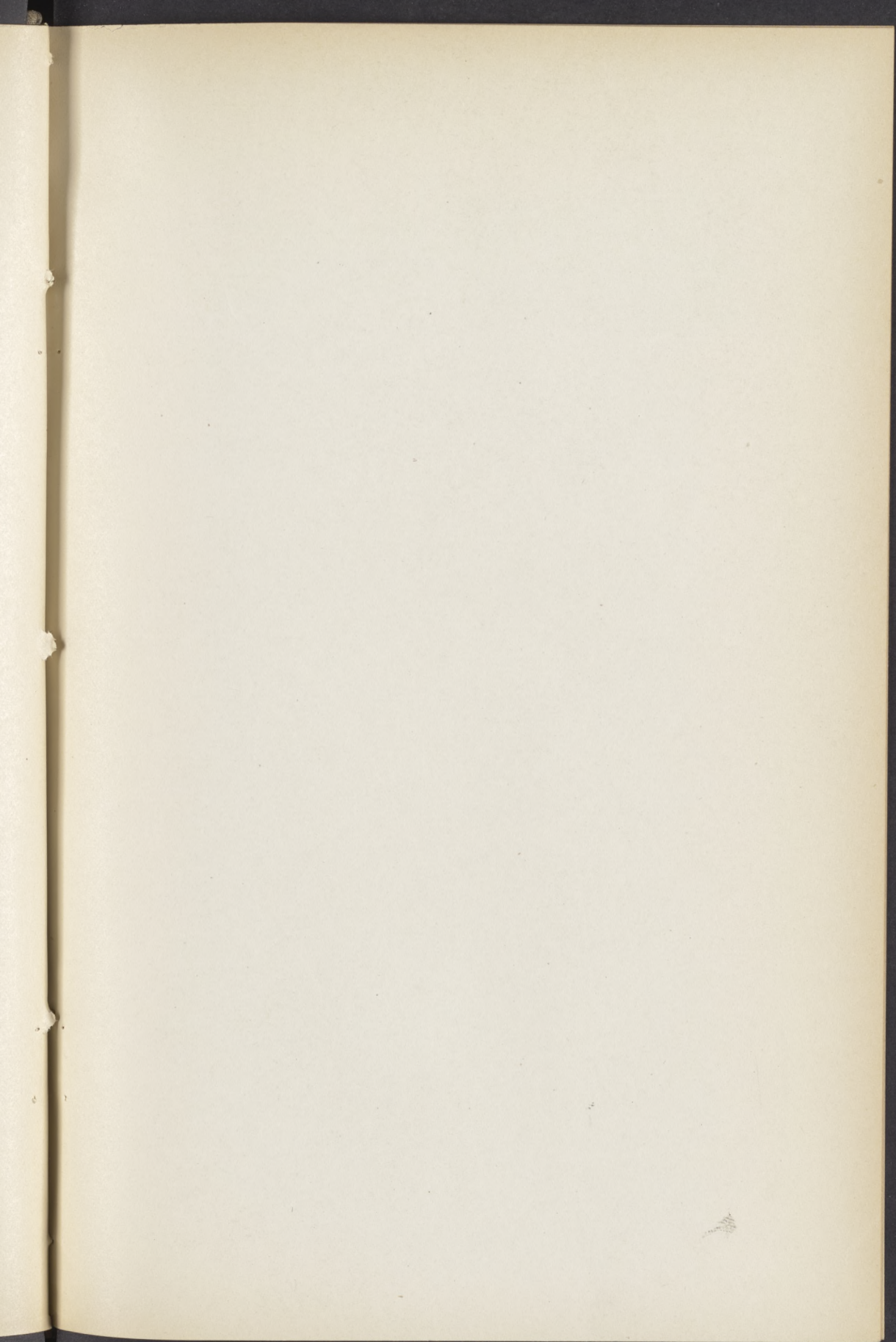
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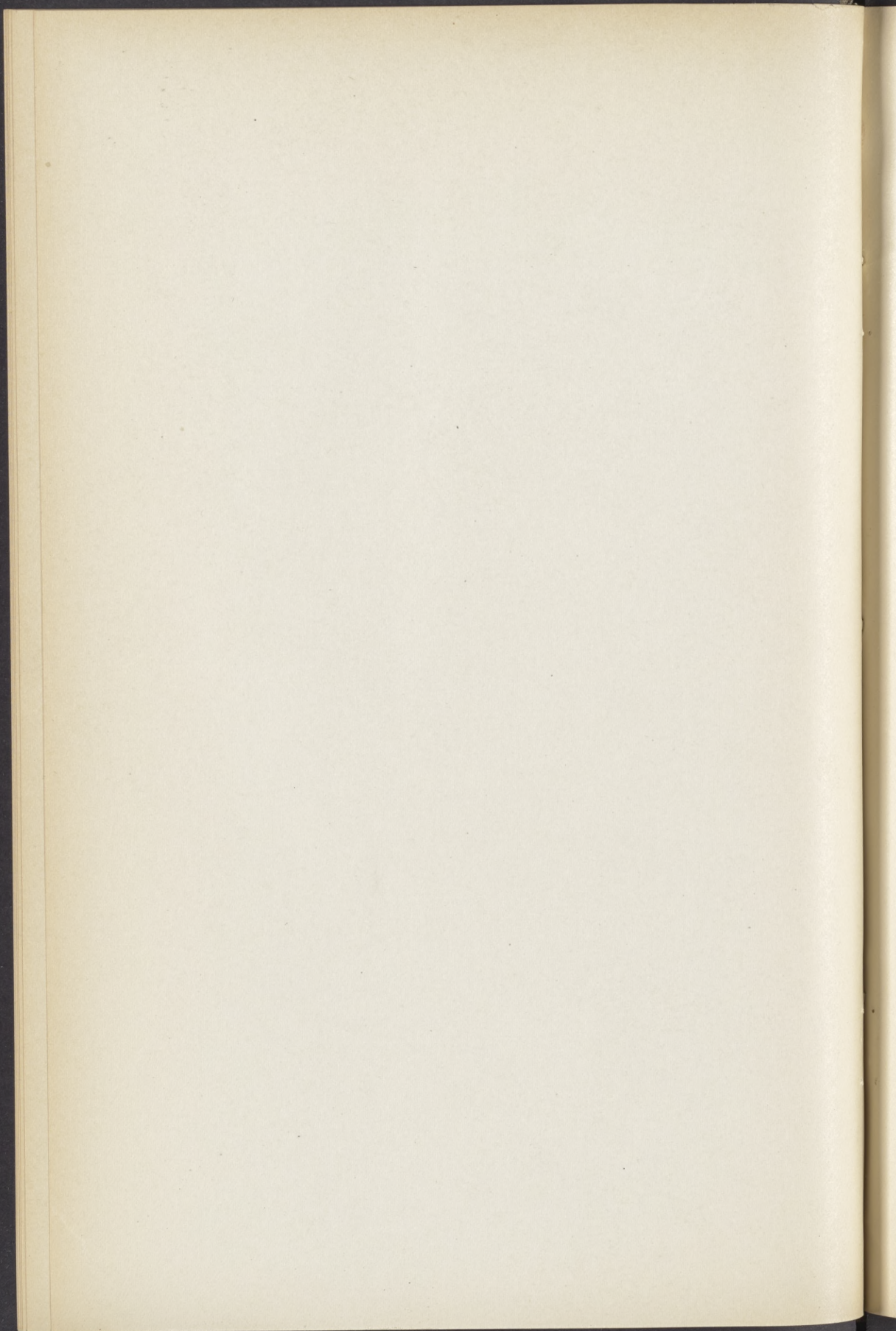
That the status of said office and the relations of said Clay and said Brown thereto have been the same as set forth in said stipulations of facts used on the hearing of said certiorari ever since the making of said stipulations. That said Board of Health and said Finance Commission insists that said Clay is such Health Officer *de jure* and *de facto*.

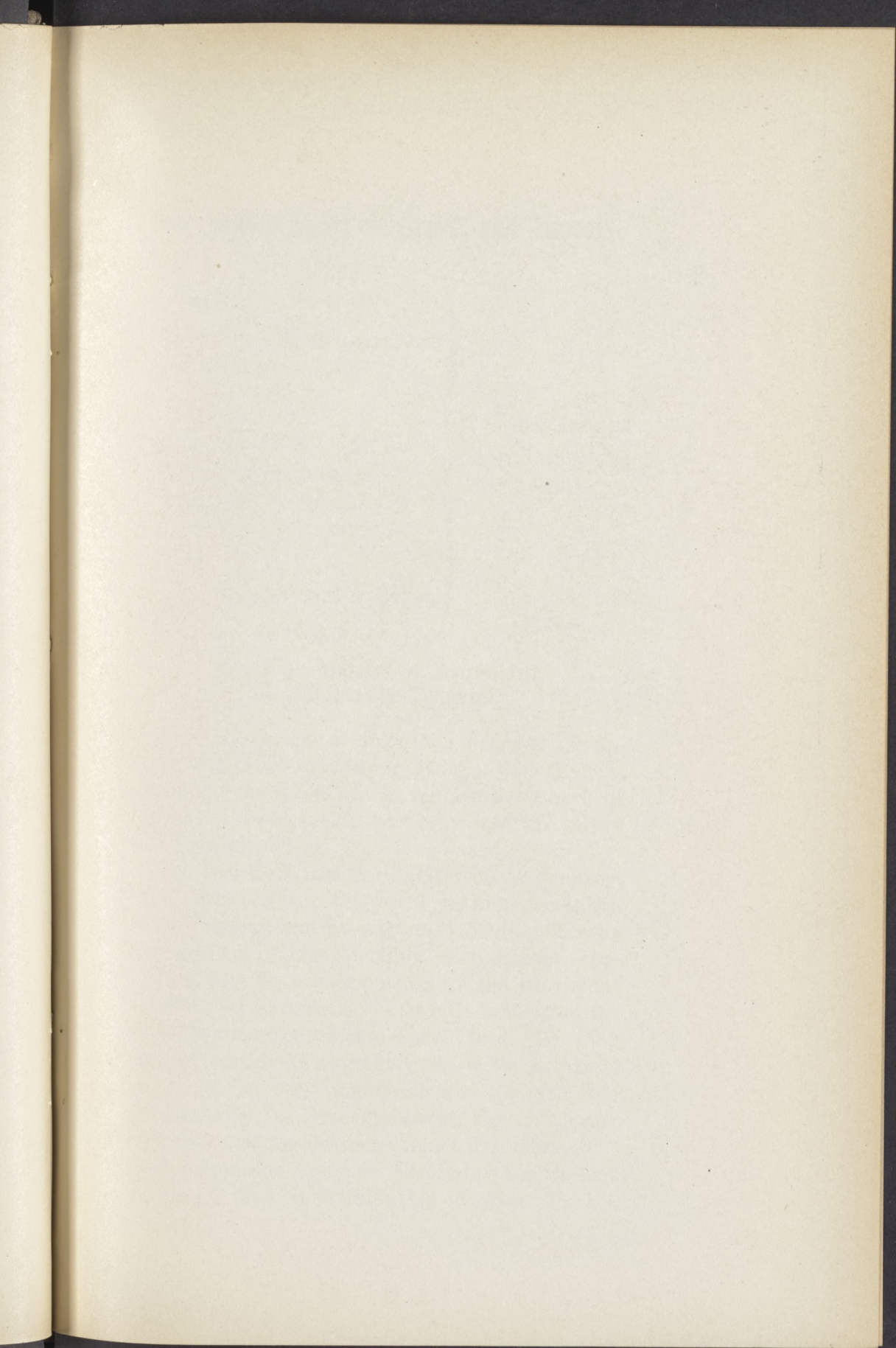
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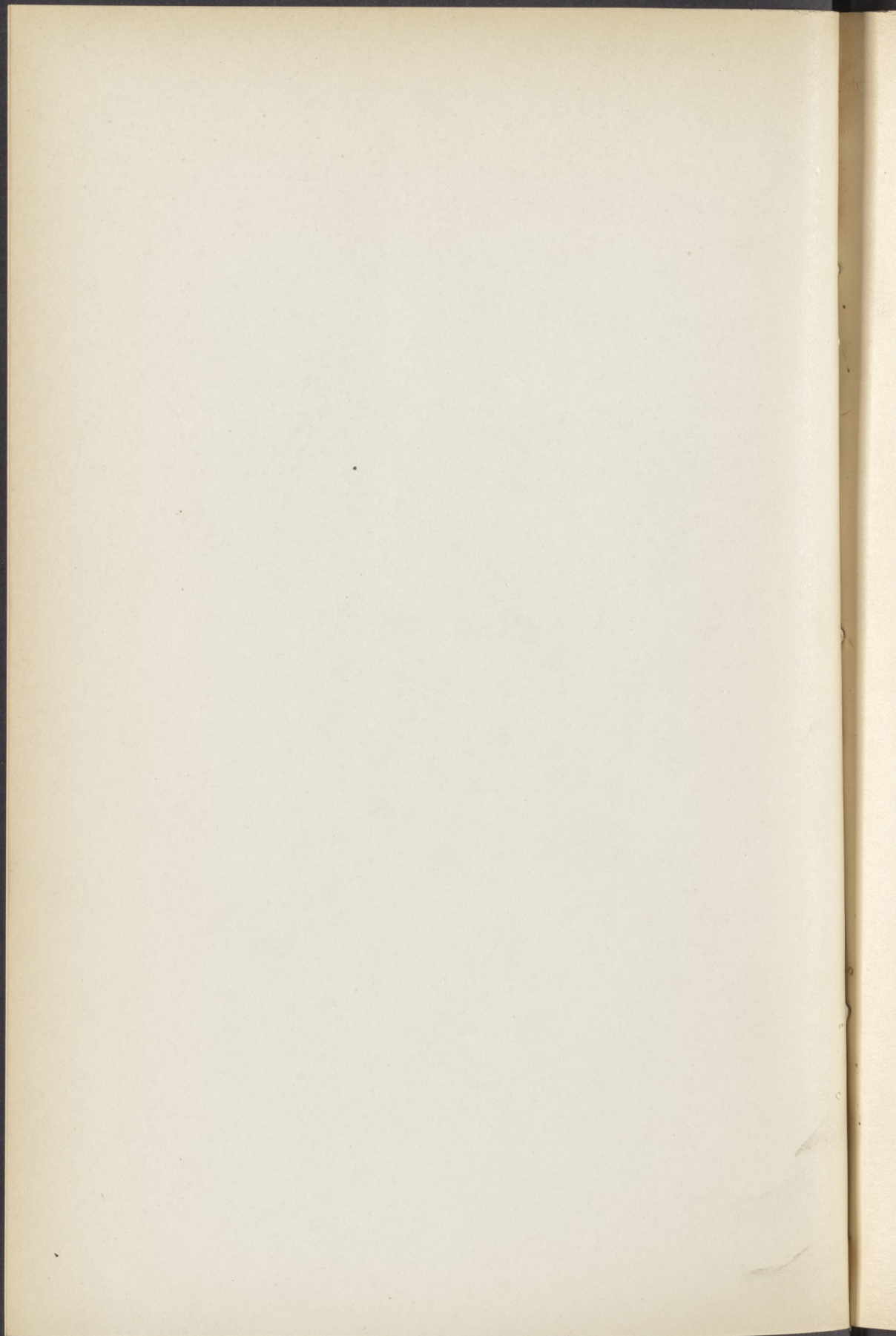
WARD & McGINNIS,  
*Attorneys for Relator.* 30  
WILLIAM I. LEWIS,  
*Attorney for Respondents.*  
*Opinion.*











## New Jersey Court of Errors and Appeals

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J. Alexander Browne,

Relator-Appellant,

vs.

Edwin C. King, and  
others, constituting  
Board of Health of  
the City of Paterson,  
*et al.*

Respondent-Appellee.

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On Mandamus on  
Appeal from Su-  
preme Court.

### Brief on Behalf of Appellant, J. Alexander Browne.

This is an appeal from the decision of the Supreme Court refusing to grant a writ of mandamus to the appellant to require the Board of Health of Paterson to pay appellant his salary as health officer.

The Board of Health of Paterson in January, 1915, declared Dr. Browne's position as health officer, vacant, and attempted to fill the office by the election of one Dr. Clay. Dr. Browne contended that he was protected by the provisions of the Civil Service Act, in which contention the Civil Service Commission upheld him. Dr. Clay then by certiorari sought to review the action of the Civil Service Commission and his writ was dismissed by the Supreme Court, and on appeal, this action of the Supreme Court was affirmed.

The Supreme Court in dismissing the writ of certiorari filed an opinion by Justice Parker

wherein the whole merits of the case, were considered. Dr. Browne was held to be the lawful incumbent to the office. This case is reported in 88 N. J. L. p. 502. An examination of this opinion will show that Justice Parker went very exhaustively into the whole subject.

Notwithstanding the opinion of the Supreme Court and the Court of Errors & Appeals, in the certiorari matter, the Board of Health refused to recognize Dr. Browne as health officer or to pay him his salary. Dr. Browne claimed that he was at all times ready and willing to perform the duties of his office, which fact appears in the state of case, and applied for a writ of mandamus to the Supreme Court. The controversy as to who was entitled to the office, was, by virtue of the decision of the Supreme Court, in the certiorari case so far as that court was concerned, at an end. The Supreme Court, however, in the case at bar took a different view and claimed by its opinion, which appears in the State of case, page 26, that inasmuch as the Court of Errors and Appeals had affirmed the Supreme Court in dismissing the writ, but on a different ground, that therefore the opinion of the Supreme Court in the certiorari case was not in the mandamus case, Counsel dissents from this view and hence this appeal.

### POINT I.

The Supreme Court having, in the certiorari case, passed upon the title of Dr. Browne to the position of health officer, and having decided such question upon its merits, the decision is, in

all other controversies, between the same parties, *res adjudicata*. There can be no doubt but that the Supreme Court, in the certiorari case, had gone into the question of Dr. Browne's title to the position of health officer. Almost the entire opinion of Justice Parker deals with this question.

It was because of the finality of this opinion on the question of the title to office, that counsel sought to obtain the writ of mandamus in the Supreme Court. When the case came before the Supreme Court, however, on mandamus, the Supreme Court took the stand that in view of the opinion of the Court of Errors and Appeals, the Supreme Court's opinion, in the certiorari case was to "be considered a mere expression of opinion." The basis of Justice Gummere's opinion was that a contest for public office could not be decided by a certiorari. This is undoubtedly true, but it is our insistence that this does not alter the situation with regard to the Supreme Court. Notwithstanding the opinion of the Court of Errors and Appeals, the fact remains that the Supreme Court dismissed the writ of certiorari, and that the Court of Errors and Appeals affirmed that dismissal so that the decision of the Supreme Court stands firm in all respects. The fact that the Court of Errors and Appeals adopted a different ground as its reason for dismissing the writ of certiorari, does not alter the fact that the Supreme Court in the mandamus case, had before it, the same parties, the same facts, necessarily the same point in controversy and under the doctrine of *stare decisis*, it would

be bound in all other like controversies between the same parties to follow its earlier decision.

This was the view taken, Justice Minturn speaking for the Supreme Court on the quo warranto case brought by Dr. Browne and decided shortly before the opening of the June term of this year. Exactly the same point was in controversy as in the mandamus and certiorari cases, and Justice Minturn felt bound by the decision of the Supreme Court in the certiorari case. In this opinion he said:

“In determining the legal question presented by this information, I am naturally confronted with the inquiry as to what legal effect is to be attributed to the deliverance of Mr. Justice Parker speaking for this Court, in the case of *Clay v. Civil Service Commission*, 88 L. 502. That case was upon certiorari and in effect determined that the relator was regularly appointed to the office in question, and that his tenure thereof was protected by the Civil Service act, and the classification made thereunder, and that as a result of such appointment and tenure the attempted appointment of Dr. Clay to the same office was necessarily invalid. This information disclosed no change in the situation presented to the Court in that case, excepting the fact that the Respondent claims to have succeeded by appointment to the status occupied by Dr. Clay; otherwise the status of the parties in fact remains unchanged. The inherent difficulty is accepting the pronouncement of the Supreme Court as dispositive of the rights of the respective parties

to the litigation arises not from any change in status, but entirely from the fact that the Court of Errors and Appeals upon review affirmed the result reached by the Supreme Court but upon different grounds.

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

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

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

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

The fact that the adjudication was reached through the medium of an inappropriate

legal vehicle of transmission, may affect its value in an appellate tribunal, but the essential value of any precedent is the congruency and applicability of its reasoning to the situation sub judice; for with Coke we must conclude *Ratio legis est anima legis*, 7 Co. 7.

Or as expressed by a more modern commentator, "adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason."

1 Kent, 473.

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

If the Court takes our view, the remaining question to be considered is: "Is Doctor Browne entitled to pay during the time he has been prevented from exercising his office?" This will be considered in the next point.

## POINT II.

### **WE CONTEND THAT DR. BROWNE IS ENTITLED TO PAYMENT OF HIS SALARY FROM JANUARY, 1915, WHEN THE ATTEMPTED REMOVAL TOOK PLACE.**

By the agreed facts in the state of case, Dr. Browne would be entitled to his salary from January 13, 1915, at the rate of \$1,500 a year. That Dr. Browne did not actually render ser-

VICES in the office, but he was at all times ready to do so and did at various times tender himself ready and willing to discharge all the duties of the office. These tenders were refused. As the courts have said over and over again, a man is not required to go through idle ceremony, and having made sufficient tender, he was not obliged to continue this performance.

### POINT III.

#### THE RELATOR IS ENTITLED TO A PREMPTORY WRIT OF MANDAMUS.

If Dr. Browne is entitled to the office and performs his duties or is ready and willing to do so, he is entitled to his salary. The payment of the discretion of the payment of his salary would have been purely a ministerial duty without any discretion by the Board of Health or the Finance Commission to alter the amount of payment or withhold any part of it, but preemptorily enjoined by law as absolute and official. In such a case a writ of mandamus will not only lie, but is the only method pointed out by law. (See Cyc. 26, p. 139, etc.)

This rule is well settled in this State in reference to mandamus being the proper remedy in a case like that at bar in the following cases:

*Warmolts v Keegan*, 69 N. J. L. p. 186;  
*The State v. Griscom*, 8 N. J. L. p. 136;  
*State ex rel, Wilson v. Swain*, 60 N. J.  
L. p. 115.

In the above cited cases a mandamus issued to compel the officer to perform such ministerial duty.

That mandamus is the proper method is fully pointed out in the case of Leeds v. Mayor, etc. of Atlantic City, et al., 2 N. J. L. 332. In that case the right to the office was considered on the application for a mandamus, wherein in the case at bar the right to the office as already determined by this Court. The facts in the Leeds case, however, are similar to the case at bar. Leeds who was a police sergeant of Atlantic City had entered upon his office and held it until the City Counsel declared it vacant, and held an election to fill the same.

In this election one Samuel Loder was declared elected, and thereupon entered upon the duties of said office, and continued to perform same, the City Authorities declining to recognize Leeds "notwithstanding his refusal to surrender his equipments and his occasional performance of official duty." The Court in that case held:

"Elections based upon mistake of fact of misconceptions of law may impart a color of right which will bar the allowance of a mandamus, but palpable disregard of law rendered the action by which an office is seized merely colorable, and in a clear case will be brushed aside, as affording no obstruction to the exercise of a plain legal duty."

In the Leeds case the Court cited with approval the case of the State v. Paterson, 35 N. J. L. 190. In that case it appeared that the office of City Treasurer could only be filled by a majority meeting of the Board of Aldermen. The defend-

ant had been admitted to office by the election of less than a majority. Under the application for mandamus the Court passed upon the title to said office and refused to recognize the incumbent a defacto officer.

It is respectfully submitted that the decision of the Supreme Court refusing the writ of mandamus should be reversed and said court be directed to issue a preemptory writ.

Respectfully submitted,

WARD & McGINNIS.

Attorneys and of counsel with  
relator-appellant.

June term, 1917.

and had been examined in detail by the decision of  
 less than a majority. Under the act, however, for  
 maintaining the Court passed upon the law in  
 said office and refused to recognize the validity  
 had a definite effect.

It is respectfully submitted that the decision  
 of the Supreme Court relating to the act of 1887  
 should be reversed and said act be re-  
 pealed to issue a permanent act.

WARD & MCKINNEY

Attorneys at Law  
 100 North Dearborn Street  
 Chicago, Ill.

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THE CITY OF PORTLAND

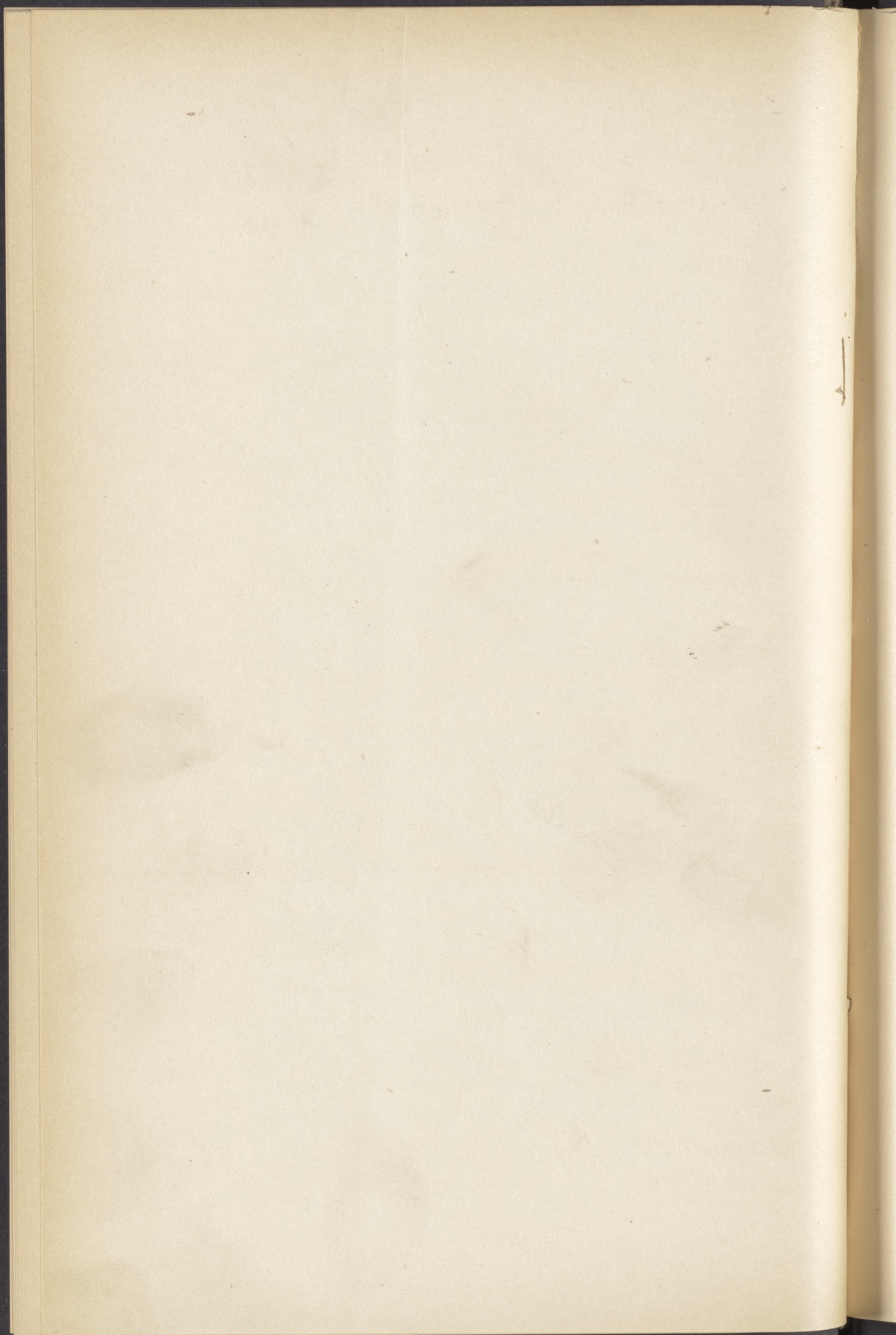
Resolved, That the City of Portland do hereby...

RESOLUTION

Resolved, That the City of Portland do hereby...

Resolved, That the City of Portland do hereby...

Approved by the City Council, this 1st day of...



## New Jersey Court of Errors and Appeals

J. Alexander Browne,  
*Relator-Appellant,*

vs.

Edwin C. King, et als., Mem-  
bers of the Board of Health of  
the City of Paterson, Board of  
Health of the City of Paterson,  
Clifford L. Newman, et als.,  
Members of the Board of Fi-  
nance of the City of Paterson,  
and Board of Finance of Pat-  
erson,

*Respondents-Appellees.*

On Mandamus.

Appeal from  
Supreme Court.

### I.

#### Brief for Respondents—Appellees.

This appeal, it may be inferred from the notice of appeal (Case 1), is from a "judgment, order or proceeding of the New Jersey Supreme Court" refusing to grant a writ of mandamus to relator. No such "judgment, order or proceeding" appears in the record as exhibited by the state of the case.

While no exception has been made to the state of the case, and no motion has been made to dismiss the appeal, it is suggested to the court that it is without jurisdiction to hear the appeal, even though it be assumed that there is a judgment or order of the Supreme Court refusing the writ, —for the constitutionality of no statute is involved.

*Matlack v. Lloyd*, 82 N. J. L. 739.

*Neptune Twp. v. Mannion*, 73 N. J. L. 816.

*Layton v. State*, 4 Dutch. 575.

## II.

The Rule to Show Cause required respondents to show cause why a peremptory or alternative writ of mandamus should not issue commanding "each" of the respondents.

"to pay or cause to be paid to the relator the salary due to him as Health Officer of the City of Paterson from the 12th day of January, 1915, to the granting of said writ of mandamus."

The respondents showed the following reasons why the writ should not issue:

A. It does not appear that the relator has a clear legal right to the performance of the act for the performance of which the writ is prayed.

B. The law affords another adequate and specific remedy to secure the enforcement of the alleged right and the performance of the alleged duty which it is sought to coerce.

### A.

#### **Relator's Right Is Not Clear.**

The stipulation of facts shows that on November 10, 1903, the relator was appointed for a term of three years as Health Inspector of the Board

of Health of Paterson (Case p. 10, l. 3) under an ordinance of the city (Case pp. 6, 7, 8 and 9); that he was again appointed from time to time, and that on January 12th, 1915, Thomas A. Clay was elected in the place of the relator (Case p. 18, l. 20). That said Clay has been the incumbent of the office during all times since his election as aforesaid and has acted as general agent of the Board of Health in the enforcement of its ordinances and the sanitary laws of this state within the territorial jurisdiction of the board and has been the *de facto* Health Officer (Case p. 24 and p. 37). It further shows that the respondents insist that Clay is such Health Officer *de jure* and *de facto*.

It further appears that the title to the office in question is not only in dispute but has been vigorously litigated (Case p. 20 to 37) and that no conclusion as to the title has as yet been reached. A certiorari was allowed Dr. Clay for the purpose of attacking a resolution of the Civil Service Commission declaring Dr. Browne the lawful incumbent of the office and refusing to certify the pay roll of the Board of Health, thus depriving Dr. Clay of his salary. Two questions were involved in the consideration of the certiorari; one, the right to indirectly determine the title to the office by such writ; the other whether Dr. Clay or Browne was the *de jure* officer.

The Supreme Court held certiorari to be a proper remedy (Opinion; case p. 27, ll. 8-18), and decided that the *de jure* title was in Dr. Browne, whereupon a judgment, or rule for judgment, was entered *dismissing the writ*, (case p. 31). Dr. Clay then appealed to the Court of Errors and

Appeals. The later court affirmed the judgment below, not upon the ground that Browne was the *de jure* officer, but that the action of the Civil Service Commission, in that instance, was not the subject of review by certiorari (Opinion; case p. 34-37).

From the foregoing, it is submitted, it appears that Dr. Browne has no clear legal right to the salary of Health Officer. Such clear legal right would consist at least, of a clear legal title to his office. No such title clearly appears. On the other hand, it appears that his title is in dispute; that Dr. Clay is the incumbent of the office, and that the respondent boards regard the latter as the *de jure* and *de facto* officer.

That an unsettled and real dispute as to the right of the relator to any salary, in any form of action, exists is made manifest by the opinions of the Supreme Court and the Court of Errors and Appeals in the certiorari proceedings.

The judgment of the Supreme Court settled nothing in respect to the title. It was a judgment dismissing the writ of certiorari, only. Assuming that the opinion of the court upon which the judgment was entered incidentally decided the title, yet such incidental decision was nullified by the Court of Errors, which expressly held that the Supreme Court had no jurisdiction to pass upon the question of title in the certiorari proceedings.

“Whether the action complained of be merely the expression of an opinion or whether it be an attempted adjudication of the rights of the two gentlemen with rela-

tion to the position of Health Officer of Paterson, it is not the proper subject of review by certiorari." (Opinion; case p. 35, l. 27).

That the dispute is real, appears from, among other things, the following parts of the opinions referred to. The Supreme Court said:

"The case would present some intricate and difficult questions for solution if we considered the ordinance of 1882 as amended in 1914 to be a material factor in the situation, but we do not so consider it." (Case p. 28, l. 34). "We consider then, that Dr. Browne's original appointment in 1903 rested in law on section 31 of the acts of 1887, which provided for the fixing of a term by the board. No such term appears to have been fixed."

On the appeal from the judgment of the Supreme Court, one of the grounds stated was as follows:

"Because the judgment of the Supreme Court adjudged that the term of office held by J. Alexander Browne was not a fixed term." (Case p. 32, l. 28).

That there was substantial ground for the consideration of such objection appears from the stipulation in the case which showed that Dr. Browne had on each occasion of his election been elected for a *fixed term of three years* (case pp. 10, 11), which, under the well established rule,

would take his office out of the control of the Civil Service Commission. In addition to the ground just stated there were twelve other grounds of appeal, involving, among other things, the question as to whether the ordinance of 1882 was a material factor in the situation, and the "intricate and difficult questions" arising thereon.

Though it be assumed that an officer holding his office *de facto* and *de jure*, having an undisputed title, may establish his right to his salary and recover it by mandamus, the writ will not be allowed under such circumstances as the present.

"This writ is never issued except in cases where the legal obligation to perform the act commanded to be done is clear."

*State v. Jacobus*, 26 N. J. L. 136;

*State v. Nicholson*, 35 N. J. L. 397.

"It is now well established that a writ of mandamus will only be directed to enforce a clear legal right. If there exists a fair doubt respecting the right of the public or of the relator to mandamus, some other form of remedy must be sought."

*Hugg v. Ivins*, 59 N. J. L. 142.

*O'Donnell v. Dusman*, 39 N. J. L. 677, 686  
as instances.

It is further well settled that the title to office will not be determined in a mandamus proceeding to which the incumbent is not a party. *O'Donnell v. Dusman*, 39 N. J. L. 677. Though the title may

be inquired into collaterally, yet the return of a board of election is conclusive in such a proceeding; *ibid.*

It is submitted that the fact, appearing in the stipulation, that the Board of Health, in whom is invested the power to elect the Health Officer, recognizes Dr. Clay and not Dr. Browne, and that Dr. Clay is in actual possession of the office and discharges its duties is entitled to the same conclusive weight as the return of an election board. If so, the writ should not go, for Dr. Browne's right to his salary must at the very least, be supported by a right to the office, which right is *prima facie* shown by the stipulation to be in Dr. Clay.

“When disputed questions arise as to the title to a public office, the incumbent *de facto* is regarded as vested by his commission with *prima facie* evidence of his right, and as entitled to the emoluments of the office until the state by a proper proceeding has revoked the authority it had previously invested him.”

*High Ex. Leg. Rem.* sec. 108.

*Erwin v. Jersey City*, 60 N. J. L. p. 141.

*Erinkerhoff v. Jersey City*, 64 N. J. L.  
p. 225.

“Where there is an actual incumbent of an office, holding his position, and exercising its functions under color of right, mandamus will not lie to a state auditor to compel him to audit the claim of another per-

son for the salary of the office. In such case it is a sufficient objection that a conflict of title is presented, which can be determined only by proceedings in *quo warranto* \* \* \* and the title to an office will not be determined in a proceeding by mandamus to compel payment of its salary to a claimant of the office.”

*High Ex. Leg. Rem.* sec. 103, and cases cited.

B.

**The Law Affords Another Adequate and Specific Remedy.**

(a)

QUO WARRANTO.

It is evident from a perusal of the stipulation that the *real* purpose of the writ is to try the title to an office of which Dr. Clay is the incumbent and Dr. Browne the claimant. The only mode by which Dr. Browne can have that question settled is by *quo warranto*.

“Mandamus is not a mode in which title to office can be tried.”

*Worthley v. Steen*, 43 N. J. L. 542, 544.

The rule stated by Mr. High is,

“If it be apparent to the court that instead of a proceeding whose object is only to get possession of the books and insignia of the office, the writ is invoked in reality to test the title of the office, and that the question of title is the real point in issue, it will refuse to lend its aid by mandamus.”

*High on Ex. Leg. Rem.* sec. 77.

The rule as stated has been quoted with approval in *O'Donnell v. Dusman*, 39 N. J. L. p. 681.

(b)

*The relator's adequate and specific remedy, if any he has, is by an action at law to recover his salary, and mandamus will not lie.*

The general rule as stated by Mr. High is as follows:

“The first point to be observed in determining whether the courts will interfere in this class of cases is whether any other legal and specific remedy exists, by action at law or otherwise, adequate to afford relief to the party aggrieved. And the rule is too firmly established to admit of doubt or controversy, that if there be any other adequate and specific remedy, such as an action at law against the corporation, by which relief may be had by the aggrieved claimant, mandamus will not lie to compel municipal authorities, or their auditing boards or officers, either to audit or to pay claims against the corporation. Indeed the rule is simply the application of the

principle which underlies the entire jurisdiction by mandamus, that the existence of another adequate and specific legal remedy is a bar to relief by this extraordinary writ, and the courts will put in requisition their extraordinary powers only in cases where no remedy may be had in the usual course of proceedings at law."

*High on Ex. Leg. Rem.*, sec. 339.

And the particular rule as follows:

"In conformity with the general rule, it is held that mandamus will not lie to municipal authorities requiring them to pay salaries which are due from the corporation to its officers, a salary being regarded as an indebtedness of the corporation which may be enforced by an action of assumpsit or by an action on the case for neglect of corporate duty, and mandamus is not designed for the collection of debts."

*Ibid.*, sec. 341.

In New Jersey the rule as stated by Mr. High is well established. It was first considered by Chief Justice Beasley in *Little v. Union Township*, 37 N. J. L. p. 87. In it a mandamus was prayed to direct the payment by the township of money due for work and labor. The Chief Justice approvingly quotes the following from the text of *Dillon's Municipal Corporations*, Vol. 2, sec. 686. His words are:

“We have seen that it is a general rule, relating to the writ under consideration, that it will not lie if there be a plain and complete remedy by the more ordinary processes of the law, and this principle has been applied to the mode of compelling municipal corporations to meet their liabilities and obligations. Therefore, it has been generally, but not uniformly, held, if the creditor may bring suit against the corporation and obtain a judgment, which may be enforced and rendered effectual by ordinary execution, that mandamus will not lie to compel payment in advance of judgment obtained, and this view is the one most consistent with principle, when the matter stands wholly unaffected by legislation.”

In *Elmendorf v. Jersey City*, 41 N. J. L. 135 it was decided,

“A writ of mandamus will not be allowed to enforce the payment, by the city of Jersey City, of an amount awarded by the report of a referee appointed by a judge and confirmed by him, by statute, for work done outside of a contract for a public improvement. The legal remedy is by action on the award.”

This case cited with approval *Cleveland v. Jersey City* 39 N. J. L. p. 629, wherein it was held,

“Where a statute ordering a compulsory arbitration by a city, is of doubtful construction, and the legal right under it is not clear, and an award is made to which proper objections are stated, the party claiming its enforcement against the city must use the ordinary remedy, by action on the award, and is not entitled to mandamus.”

And this was so held notwithstanding the fact that the statute providing for the arbitration expressly declared that the award should be final and binding on all parties and not subject to review, thereby attempting to make the payment of the award a mere ministerial act.

It is true that there are cases holding that where the payment of money will result from the performance of a merely ministerial act which it is the clear duty of the officer to perform, that a mandamus will direct it to be done. In the *Little case, supra*, it was said, “If a statute should direct an ascertained sum of money to be paid to an ascertained person \* \* \* the process in question might be used to coerce such payment in case of default.” This was the principle involved in *Strong v. Collector*, 41 N. J. L., 232, and in *Cowenhoven v. Collector*, 43 N. J. L. 117. The reason for its issuance is stated in the latter case by Justice Dixon as follows: “It is also clear that the duty imposed upon the Collector by the act of April 2, 1873, is such that, in a proper case, the court would enjoin its performance by mandamus. The act requires him to pay, upon the mere certificate of the clerk and surrogate. This

duty is ministerial, precise, and expressly commanded by statute as pertaining to his public office, and there is no other means of enforcing it than by this writ."

But in the case at bar no statute fixes the salary, nor requires any precise person to pay it, nor designates the person to whom it is to be paid. The duty to be performed by the respondents involves a duty not wholly ministerial, or precise. They must determine who is the person entitled to the salary and whether he has earned it. By the civil service law they must certify his name to the civil service commission, if he be under the jurisdiction of that body as he claims, and in return they must send their statutory certificate to the officers of the municipality before they would be authorized to make payment.

*Comp. St.* p. 3805, p. 82.

But aside from the general principles of the law governing the issuance of the writ of mandamus, it is submitted that it has been substantially decided by this court that before an officer *de facto* and *de jure*, can recover his salary by mandamus, he must first have brought an ordinary action at law and established his claim by judgment. In *Hugg v. Ivins* 59 N. J. L. 139, Hugg prayed a mandamus to compel the County Collector to pay him \$500 out of county funds for services to the members of a usurping board of freeholders. Among the reasons given in the opinion for refusing the writ was the following:

*“But conceding that the board was legally organized and conceding that the services had been performed in defending the title of the members to their position, still mandamus would not be the proper remedy to enforce the claim, although the resolution had been adopted ordering the payment. Mandamus is not the proper remedy, in the absence of statutory provision, to collect a debt against a municipal corporation or its officers until the claim therefor has been adjudicated upon, and has been merged into a judgment at law.”*

Though the present application is for the ordering of the payment of a particular kind of *debt*, to wit, a *salary*, there seems under the circumstances, to be no difference in principle between the two cases. Further, in view of the opinion of the Supreme Court in the Clay certiorari, the office of Health Officer is not held under the ordinance, which fixes a salary, but under the Health Act of 1887, under which no salary appears to be fixed. If this be so nothing appears to the court showing that any salary has been fixed by resolution or otherwise, or that any is due.

It is respectfully submitted that the appeal be dismissed or the proceedings below affirmed.

Wm. I. Lewis,

*Of Counsel with Respondent-Appellees.*

