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Notice of Appeal.

(Filed .)

10

New Jersey Supreme Court

PATRICK FITZPATRICK, *et als.*,
Plaintiffs-Appellants,

v.

CITY OF PASSAIC,
Defendant-Appellee.

Action at Law.
Notice of Appeal.

20

To Joseph J. Weinberger, Esq., Attorney of Defendant-Appellee.

SIR:

TAKE NOTICE that the plaintiffs do hereby appeal from the whole of the judgment of reversal entered in the New Jersey Supreme Court, to the Court of Errors and Appeals, in the last resort in all causes.

30

Dated: December 4th, 1928.

GROSS & GROSS,
Attorneys and Counsel of
Plaintiffs-Appellants.

40

Grounds of Appeal.

(Filed .)

NEW JERSEY SUPREME COURT.

10

PATRICK FITZPATRICK, *et als.*,
Plaintiffs-Appellants,

v.

CITY OF PASSAIC,
Defendant-Appellee.

Action at Law.
On Appeal.

The appellants state the following grounds of appeal:

20

1. That the New Jersey Supreme Court erred in reversing the judgments recovered by the plaintiffs herein against the defendant in the District Court of the City of Passaic.

GROSS & GROSS,
Attorneys and Counsel of
Plaintiffs-Appellants.

30

40

Order of Reversal.

NEW JERSEY SUPREME COURT.

PATRICK FITZPATRICK, <i>et als.</i> , <i>Plaintiffs-Appellees,</i>	}	Action at Law.	10
<i>v.</i>			
CITY OF PASSAIC, <i>Defendant-Appellant.</i>			

This matter coming on to be argued before Part 3 of the New Jersey Supreme Court, presided over by Justices Trenchard, Kalisch and Lloyd, in the presence of Joseph J. Weinberger, of counsel for the City of Passaic, and Isaac Gross, Esq., Frederick S. Ranzenhofer, Esq., and William George, Esq., of counsel for the plaintiffs-appellees, and the Court having, by a written opinion filed on November 23rd, 1928, reversed the judgments heretofore entered in the above entitled cause,

20

It is, therefore, on this 28th day of November, 1928, ORDERED that the judgments entered in the above entitled cause, be and the same are hereby reversed, with costs to be taxed, and the record be remitted to the Court below to be proceeded with according to law and the practice of said Court.

30

Entered Nov. 28, 1928.

On Motion of Joseph J. Weinberger, Attorney of Defendant-Appellant.

A true copy.

FRED L. BLOODGOOD,
Clerk.

40

Opinion.

NEW JERSEY SUPREME COURT,

#402 MAY TERM 1928.

10

PATRICK FITZPATRICK, *et als.*,
Plaintiffs-Respondents,

v.

CITY OF PASSAIC,
Defendant-Appellant.

Argued May 2, 1928. Decided November ,
 1928.

20

On Appeal from Passaic District Court.

For Appellant: JOSEPH J. WEINBERGER.

For Respondents: GROSS & GROSS, WILLIAM
 GEORGE, FREDERICK RANZENHOFER.

Before—Justices TRENCHARD, KALISCH and LLOYD.

The opinion of the court was delivered by
 LLOYD, J.:

30

Judgments were rendered for the plaintiffs, po-
 licemen and firemen of the city of Passaic, for
 salaries claimed to be due them from the city
 under promotions made by Commissioner Preiskel,
 director of public safety, on May 16, 1927. The
 City appeals.

40

The history of the cases is that on May 10, 1927,
 Preiskel, who had been one of the five commis-
 sioners of the city for the four years preceding,
 was defeated for re-election. His term would ex-
 pire on May 17, 1927. On the day before, May 16th,
 he as director of public safety made twenty-three

Opinion.

promotions in the police and fire departments, there being at that time in the police department ninety-seven members and in the fire department eighty-six. When the new commission organized on May 17th, one Turner was selected as director of public safety. Turner never recognized the promotions, nor were they confirmed by the board of commissioners. Thereafter and until the bringing of these suits the plaintiffs continued the performance of their former duties and received and accepted the compensation attached thereto. 10

Late in the year 1927 these actions were begun to recover the difference in salary between that previously received and that which would be due them if filling the offices to which they were promoted. No service in the new positions was ever performed. 20

The city contends that these promotions were against public policy; that it is an attempt to try title to office, and that the court erred in not giving judgments for the defendant because the plaintiffs never performed any duties in the offices to which they had been promoted.

Without going into the propriety or the validity of the wholesale promotions thus made by the commissioner on the eve of the expiration of his term of office, we think the judgments were wrong for the reasons last urged. In the decision of this court in the case of *Hoboken v. Geer*, 27 N. J. L. 265, the nature of the relation between a municipality and one of its officers was carefully considered and the result reached that the "appointment to public office during a term of years and the acceptance of such office is not a contract between the government and an individual that the officer will serve or that the government will pay during 30 40

Opinion.

the period * * *. It is at most a contract that while the party continues to perform the duties of the office he shall receive the compensation which may from time to time be provided by law." That the right of recovery is dependent on the performance of the duties is recognized in the case of Erwin *v.* Jersey City, 60 N. J. L. 141, and the principle received approval by the Court of Errors and Appeals in the case of Stuhr *v.* Curran, 44 N. J. L. 181, wherein it was said that "The right to the office or compensation does not grow out of any contract between the government and the officer but arises from the rendition of the services," and in the very recent case of Roberts *v.* Orange, 102 N. J. L. 721, the language used in both Hoboken *v.* Geer and Stuhr *v.* Curran is cited with approval and from it is to be extracted the view that the right to emolument in public office "must be regarded as having no legal existence except as arising out of the rendition of service for which they are compensatory." The plaintiff below at most held title to the office and nothing more. Having performed no service there was nothing upon which they could predicate a right to compensation.

30 The judgments are reversed.

Notice of Appeal.

(Filed January 21, 1928.)

PASSAIC DISTRICT COURT.

PATRICK FITZPATRICK (and nine
others),

Plaintiffs,

v.

CITY OF PASSAIC,

Defendant.

10

Notice of Appeal.

To Frederick S. Ranzenhofer:

SIR:

20

Take Notice that the defendant, City of Passaic, hereby appeals to the New Jersey Supreme Court from the judgments of the Passaic District Court rendered in the above stated actions on the 13th day of January, nineteen hundred and twenty-eight.

JOSEPH J. WEINBERGER,
City Counsel,
Attorney for Defendant City
of Passaic.

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Docket Entries.

81

679

State of New Jersey, }
 County of Passaic, } ss.:

10 IN THE DISTRICT COURT OF THE CITY OF
 PASSAIC.

Before—Hon. THOMAS E. DUFFY, Judge.

PATRICK FITZPATRICK

v.

CITY OF PASSAIC.

Action on contract.
 Demand \$199.92.
 Pl'ff. Att'y. F. S.
 Ranzenhofer.
 Def't. Atty. Jos. J.
 Weinberger.

20 Nov. 26, 1927, state of demand filed and summons
 issued in the above stated cause, returnable Dec.
 7, 1927, at 9:30 o'clock in the forenoon and was
 returned as follows:

Served this summons November 28th, 1927, by
 reading the same to Daniel J. Dunphy, Dep.
 City Clerk, agent of the defendant corporation
 and delivering to him a copy thereof.

30 JOHN P. GRANEY,
 Sergeant-at-Arms.

Dec. 7, 1927, Listed and adjourned to Dec. 21-Jan.
 6, 1928,-13

Jan. 13, 1928, Hearing by the court.

A. August Dye, Stenographer, Sworn.

Witnesses for the plaintiff were:

Patrick Fitzpatrick, sworn

Arthur C. Bolton “

Abram Preiskel “

40 William J. Buckley “

Docket Entries.

Irving Evansky	“	
Albert Bednarz	“	
Edward Belli	“	
Albert Huppert	“	
Joseph Gallagher	“	
Martin Farrell	“	10
Cornelius Miller	“	
John J. Noonan	“	

Witnesses for the defendant were:

Benjamin F. Turner, sworn	
William J. Fitzgerald	“
Joseph Greeley	“

This case was tried together with cases 81-677,
678; 680; 681; 682; 683; 684; 686; 687.

20

The evidence being closed and submitted to the Court, judgment was given by the Court in favor of the Plaintiff and against the Defendant, for the sum of \$199.92 in this case and the sum of \$199.92 in the case of Albert Huppert vs. City of Passaic; the sum of \$100.92 in the case of William Buckley vs. City of Passaic; the sum of \$100 in the case of Irving Evansky vs. City of Passaic; the sum of \$100.00 in the case of Albert George Bednarz vs. City of Passaic;

30

the sum of \$100.00 in the case of Edward Belli vs. City of Passaic; the sum of \$199.92 in the case of Joseph Gallagher vs. City of Passaic; the sum of \$199.92 in the case of Martin J. Farrell vs. City of Passaic; the sum of \$199.92 in the case of Cornelius Miller vs. City of Passaic; the sum of \$100.00 in the case of John J. Noonan vs. City of Passaic.

January 21, 1928, Defendant filed Notice of Appeal.

40

District Court Summons.

Jan. 28, 1928 Filed Appeal Bond covering all cases.

10 I, the undersigned, clerk of the Passaic District Court, do hereby certify that the above is a true copy of page 679, docket 81 and the true amounts of judgments entered in the several cases above mentioned.

D. DEMURO,
Clerk.

Dated: January 28, 1928.

District Court Summons.

20 City of Passaic, } To Wit: THE STATE OF NEW
County of Passaic, } JERSEY, To Sergeant-at-Arms
of the District Court or any
Constable of said County:

SUMMON

[L. S.] City of Passaic
to appear before the District Court of the City of Passaic, to be held at the District Court Room, in the O'Leary Building 125 Prospect St., in the said City, on the 7th day of December, A. D., 1927
30 at 9:30 o'clock in the forenoon, to answer unto

Patrick Fitzpatrick,

in an action on Contract
Demand Five hundred Dollars. Hereof fail not,

Witness: THOMAS E. DUFFY, Esquire, Judge of said Court at Passaic aforesaid, the 26th day of November in the year of our Lord, One Thousand Nine Hundred and Twenty-seven.

40

D. DEMURO,
Clerk.

State of Demand.DISTRICT COURT OF THE CITY OF
PASSAIC.

PATRICK FITZPATRICK, <i>Plaintiff,</i>	}	On Contract. 10 State of Demand.
<i>v.</i>		
CITY OF PASSAIC, <i>Defendant.</i>		

Plaintiff residing in the City of Passaic, County of Passaic and State of New Jersey, says that:

1. On May 16, 1927, plaintiff was duly appointed to the rank of Captain of Police of said City of Passaic by Abram Preiskel, then and being at the time Director of Public Safety of said City of Passaic, and as such having complete jurisdiction over the Police Department of said City of Passaic, and the full power and authority to make the appointment of plaintiff as hereinabove set forth; and plaintiff did thereupon, upon his said appointment, duly qualify as such Captain of Police of said city. 20

2. That by virtue of an ordinance of said City of Passaic, passed September 25, 1923, and thereafter duly adopted by said municipality as provided by law on November 6, 1923, upon the vote of the legal voters of said City of Passaic, the salary of Captains of Police of said City was duly fixed at the sum of \$3,100.00 per annum. 30

3. Prior to the appointment of plaintiff as such Captain of Police, plaintiff was a member of the Police Department of said City of Passaic with 40

State of Demand.

the rank of Sergeant of Police for which the annual salary was fixed as aforesaid, at the sum of \$2,700.00.

10 4. That said salaries so fixed by said City of Passaic are payable to the members of the Police Department thereof, semi-monthly on the first and fifteenth days of each and every month.

20 5. Plaintiff has at all times since his appointment as Captain of Police, as aforesaid, been ready, able and willing and did so tender himself to the defendant to perform the duties of his rank as such Captain of Police and has been ever since said date and still is entitled to the remuneration and compensation so fixed by law for the rank of Captain of Police of the said City of Passaic, to wit; the semi-monthly salary of \$129.16, but said defendant has failed and refused to pay the said sum to plaintiff.

30 6. Plaintiff was entitled to receive from defendant as such Captain of Police the sum of \$1,549.92 but defendant has paid on account thereof only the sum of \$1,350.00 leaving a balance due and owing to plaintiff from defendant of the sum of \$199.92.

Judgment will be demanded for the sum of \$199.92.

FREDERICK S. RANZENHOFER,
Attorney of Plaintiff.

GROSS & GROSS,
WILLIAM GEORGE,
Of Counsel.

District Court Summons.

City of Passaic, }
County of Passaic, } To Wit: THE STATE OF NEW
JERSEY, To Sergeant-at-Arms
of the District Court or any
Constable of said County:

SUMMON

10

[L. S.] City of Passaic
to appear before the District Court of the City of
Passaic, to be held at the District Court Room,
in the O'Leary Building 125 Prospect St., in the
said City, on the 7th day of December, A. D., 1927
at 9:30 o'clock in the forenoon, to answer unto

Albert Huppert

in an action on Contract

Demand Five hundred Dollars. Hereof fail not,

20

Witness: THOMAS E. DUFFY, Esquire, Judge of
said Court at Passaic aforesaid, the 26th day of
November in the year of our Lord, One Thousand
Nine Hundred and Twenty-seven.

D. DEMURO,
Clerk.

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State of Demand.

DISTRICT COURT OF THE CITY OF
PASSAIC.

10	<p style="text-align: center;">ALBERT HUPPERT, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">CITY OF PASSAIC, <i>Defendant.</i></p>	<p style="text-align: center;">On Contract. State of Demand.</p>
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Plaintiff residing in the City of Passaic, County of Passaic and State of New Jersey, says that:

20 1. On May 16, 1927, plaintiff was duly appointed to the rank of Lieutenant of Fire Department of the City of Passaic by Abram Preiskel, then and being at the time Director of Public Safety of said City of Passaic, and as such having complete jurisdiction over the Fire Department of said City of Passaic, and the full power and authority to make the appointment of plaintiff as hereinabove set forth; and plaintiff did thereupon, upon his said appointment, duly qualify as such Lieutenant of Fire Department of said City.

30 2. That by virtue of an ordinance of said City of Passaic, passed September 25, 1923, and thereafter duly adopted by said municipality as provided by law on November 6, 1923, upon the vote of the legal voters of said City of Passaic, the salary of Lieutenant of Fire Department of said City was duly fixed at the sum of \$2,900.00, per annum.

40 3. Prior to his appointment he was a fireman at \$2,500.00 per year, of the standing of five years and over.

State of Demand.

4. That said salaries so fixed by said City of Passaic are payable to the members of the Fire Department thereof, semi-monthly on the first and fifteenth days of each and every month.

5. Plaintiff has at all times since his appointment as Lieutenant of Fire Department, as aforesaid, been ready, able and willing and did so tender himself to the defendant, to perform the duties of his rank as such Lieutenant of Fire Department and has been ever since said date and still is entitled to the remuneration and compensation so fixed by law for the rank of Lieutenant of Fire Department of the said City of Passaic, to wit, the semi-monthly salary of \$120.83, but said defendant has failed and refused to pay the said sum to plaintiff. 10
20

6. Plaintiff was entitled to receive from defendant as such Lieutenant of Fire Department, the sum of \$1,449.96, but defendant has paid on account thereof only the sum of \$1,250.04, leaving a balance due and owing to plaintiff from defendant of the sum of \$199.92.

Judgment will be demanded for the sum of \$199.92. 30

FREDERICK S. RANZENHOFER,
Attorney of Plaintiff.

GROSS & GROSS,
WILLIAM GEORGE,
Of Counsel.

District Court Summons.

City of Passaic, } To Wit: THE STATE OF NEW
 County of Passaic, } JERSEY, To Sergeant-at-Arms
 of the District Court or any
 Constable of said County:

SUMMON

10

[L. S.]

City of Passaic

to appear before the District Court of the City of
 Passaic, to be held at the District Court Room,
 in the O'Leary Building 125 Prospect St., in the
 said City, on the 7th day of December, A. D., 1927
 at 9:30 o'clock in the forenoon, to answer unto

William Buckley,

in an action on Contract

20 Demand Five hundred Dollars. Hereof fail not,

Witness: THOMAS E. DUFFY, Esquire, Judge of
 said Court at Passaic aforesaid, the 26th day of
 November in the year of our Lord, One Thousand
 Nine Hundred and Twenty-seven.

D. DEMURO,
 Clerk.

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State of Demand.

DISTRICT COURT OF THE CITY OF
PASSAIC.

<p style="text-align: center;">WILLIAM BUCKLEY, <i>Plaintiff,</i></p>	}	10
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v.

<p style="text-align: center;">CITY OF PASSAIC, <i>Defendant.</i></p>	}	On Contract. State of Demand.
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Plaintiff residing in the City of Passaic, County of Passaic and State of New Jersey, says that:

1. On May 16, 1927, plaintiff was duly appointed to the rank of Lieutenant of Detectives in the Police Department of said City of Passaic by Abram Preiskel, then and being at the time Director of Public Safety of said City of Passaic, and as such having complete jurisdiction over the Police Department of said City of Passaic, and the full power and authority to make the appointment of plaintiff as hereinabove set forth; and plaintiff did thereupon, upon his said appointment, duly qualify as such Lieutenant of Detectives of said City.

2. That by virtue of an ordinance of said City of Passaic, passed September 25, 1923, and thereafter duly adopted by said municipality as provided by law on November 6, 1923, upon the vote of the legal voters of said City of Passaic, the salary of Lieutenants of Detectives of said City was duly fixed at the sum of \$2900. per annum.

3. Prior to his appointment he was a policeman

State of Demand.

of the standing of five years and over at \$2500.00 per year.

10 4. That said salaries so fixed by said City of Passaic are payable to the members of the Police Department thereof, semi-monthly on the first and fifteenth days of each and every month.

20 5. Plaintiff has at all times since his appointment as Lieutenant of Detectives, as aforesaid, been ready, able and willing and did so tender himself to the defendant, to perform the duties of his rank as such Lieutenant of Detectives and has been ever since said date and still is entitled to the remuneration and compensation so fixed by law for the rank of Lieutenant of Detectives of the said City of Passaic, to wit; the semi-monthly salary of \$120.83, but said defendant has failed and refused to pay the said sum to plaintiff.

6. Plaintiff was entitled to receive from defendant as such Lieutenant of Detectives, the sum of \$1,449.96, but defendant has paid on account thereof only the sum of \$1,250.04 leaving a balance due and owing to plaintiff from defendant of the sum of \$199.92.

30 Judgment will be demanded for the sum of \$199.92.

FREDERICK S. RANZENHOFER,
Attorney of Plaintiff.

GROSS & GROSS,
WILLIAM GEORGE,
Of Counsel.

District Court Summons.

City of Passaic, } To Wit: THE STATE OF NEW
County of Passaic, } JERSEY, To Sergeant-at-Arms
of the District Court or any
Constable of said County:

SUMMON

10

[L. S.]

City of Passaic

to appear before the District Court of the City of
Passaic, to be held at the District Court Room,
in the O'Leary Building 125 Prospect St., in the
said City, on the 7th day of December, A. D.,
1927 at 9:30 o'clock in the forenoon, to answer
unto

Irving Evansky,

in an action on Contract

Demand Five hundred Dollars. Hereof fail not,

20

Witness: THOMAS E. DUFFY, Esquire, Judge of
said Court at Passaic aforesaid, the 26th day of
November in the year of our Lord, One Thousand
Nine Hundred and Twenty-seven.

D. DEMURO,
Clerk.

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State of Demand.**DISTRICT COURT OF THE CITY OF
PASSAIC.**

10

IRVING EVANSKY,
Plaintiff,

v.

CITY OF PASSAIC,
Defendant.

On Contract.
State of Demand.

Plaintiff residing in the City of Passaic, County of Passaic and State of New Jersey, says that:

20

1. On May 16, 1927, plaintiff was duly appointed to the rank of Sergeant of Police in the Police Department of said City of Passaic by Abram Preiskel, then and being at the time Director of Public Safety of said City of Passaic, and as such having complete jurisdiction over the Police Department of said City of Passaic, and the full power and authority to make the appointment of plaintiff as hereinabove set forth; and plaintiff did thereupon, upon his said appointment, duly qualify as such Sergeant of Police of said City.

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2. That by virtue of an ordinance of said City of Passaic, passed September 25, 1923, and thereafter duly adopted by said municipality as provided by law on November 6, 1923, upon the vote of the legal voters of said City of Passaic, the salary of Sergeant of Police of said City was duly fixed at the sum of \$2700.00, per annum.

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3. Prior to his appointment he was a policeman of the standing of five years and over at \$2500.00 per year.

State of Demand.

4. That said salaries so fixed by said City of Passaic are payable to the members of the Police Department thereof, semi-monthly on the first and fifteenth days of each and every month.

5. Plaintiff has at all times since his appointment as Sergeant of Police, as aforesaid, been ready, able and willing and did so tender himself to the defendant, to perform the duties of his rank as such Sergeant of Police and has been ever since said date and still is entitled to the remuneration and compensation so fixed by law for the rank of Sergeant of Police of the said City of Passaic, to wit; the semi-monthly salary of \$112.50, but said defendant has failed and refused to pay the said sum to plaintiff.

6. Plaintiff was entitled to receive from defendant as such Sergeant of Police the sum of \$1350.00, but defendant has paid on account thereof only the sum of \$1250.00 leaving a balance due and owing to plaintiff from defendant of the sum of \$100.00.

Judgment will be demanded for the sum of \$100.00.

FREDERICK S. RANZENHOFER,
Attorney of Plaintiff.

GROSS & GROSS,
WILLIAM GEORGE,
Of Counsel.

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State of Demand.

DISTRICT COURT OF THE CITY OF
PASSAIC.

ALBERT GEORGE BEDNARZ,
Plaintiff,

v.

CITY OF PASSAIC,
Defendant.

On Contract,
State of Demand.

10

Plaintiff residing in the City of Passaic, County of Passaic and State of New Jersey, says that:

1. On May 16, 1927, plaintiff was duly appointed to the rank of Sergeant of Police in the Police Department of said City of Passaic by Abram Preiskel, then and being at the time Director of Public Safety of said City of Passaic, and as such having complete jurisdiction over the Police Department of said City of Passaic, and the full power and authority to make the appointment of plaintiff as hereinabove set forth; and plaintiff did thereupon, upon his said appointment, duly qualify as such Sergeant of Police of said City.

20

2. That by virtue of an ordinance of said City of Passaic, passed September 25, 1923, and thereafter duly adopted by said municipality as provided by law on November 6, 1923, upon the vote of the legal voters of said City of Passaic, the salary of Sergeant of Police of said City was duly fixed at the sum of \$2,700.00, per annum.

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3. Prior to his appointment he was a policeman of the standing of five years and over at \$2,500.00 per year.

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State of Demand.

4. That said salaries so fixed by said City of Passaic are payable to the members of the Police Department thereof, semi-monthly on the first and fifteenth days of each and every month.

10 5. Plaintiff has at all times since his appointment as Sergeant of Police, as aforesaid, been ready, able and willing and did so tender himself to the defendant, to perform the duties of his rank as such Sergeant of Police and has been ever since said date and still is entitled to the remuneration and compensation so fixed by law for the rank of Sergeant of Police of the said City of Passaic, to wit; the semi-monthly salary of \$112.50, but said defendant has failed and refused to pay the said
20 sum to plaintiff.

6. Plaintiff was entitled to receive from defendant as such Sergeant of Police, the sum of \$1,350.00 but defendant has paid on account thereof only the sum of \$1,250.00 leaving a balance due and owing to plaintiff from defendant of the sum of \$100.00.

Judgment will be demanded for the sum of \$100.00.

FREDERICK S. RANZENHOFER,
Attorney of Plaintiff.

30

GROSS & GROSS,
WILLIAM GEORGE,
Of Counsel.

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State of Demand.DISTRICT COURT OF THE CITY OF
PASSAIC.

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EDWARD BELLI,	}	On Contract. State of Demand.
<i>Plaintiff,</i>		
<i>v.</i>		
CITY OF PASSAIC,		
<i>Defendant.</i>		

Plaintiff residing in the City of Passaic, County of Passaic and State of New Jersey, says that:

20

1. On May 16, 1927, plaintiff was duly appointed to the rank of Sergeant of Police in the Police Department of said City of Passaic by Abram Preiskel, then and being at the time Director of Public Safety of said City of Passaic, and as such having complete jurisdiction over the Police Department of said City of Passaic, and the full power and authority to make the appointment of plaintiff as hereinabove set forth; and plaintiff did thereupon, upon his said appointment, duly qualify as such Sergeant of Police of said City.

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2. That by virtue of an ordinance of said City of Passaic, passed September 25, 1923, and thereafter duly adopted by said municipality as provided by law on November 6, 1923, upon the vote of the legal voters of said City of Passaic, the salary of Sergeant of Police of said City was duly fixed at the sum of \$2,700.00 per annum.

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3. Prior to his appointment he was a policeman of the standing of five years and over at \$2,500.00 per year.

State of Demand.

4. That said salaries so fixed by said City of Passaic are payable to the members of the Police Department thereof, semi-monthly on the first and fifteenth days of each and every month.

5. Plaintiff has at all times since his appointment as Sergeant of Police, as aforesaid, been ready, able and willing and did so tender himself to the defendant, to perform the duties of his rank as such Sergeant of Police and has been ever since said date and still is entitled to the remuneration and compensation so fixed by law for the rank of Sergeant of Police of the said City of Passaic, to wit, the semi-monthly salary of \$112.50, but said defendant has failed and refused to pay the said sum to plaintiff. 10

6. Plaintiff was entitled to receive from defendant as such Sergeant of Police, the sum of \$1,350.00 but defendant has paid on account thereof only the sum of \$1,250.00 leaving a balance due and owing to plaintiff from defendant of the sum of \$100.00. 20

Judgment will be demanded for the sum of \$100.00.

FREDERICK S. RANZENHOFER,
Attorney of Plaintiff. 30

GROSS & GROSS,
WILLIAM GEORGE,
Of Counsel.

District Court Summons.

City of Passaic, } To Wit: THE STATE OF NEW
 County of Passaic, } JERSEY, To Sergeant-at-Arms
 of the District Court or any
 Constable of said County:

SUMMON

10

[L. S.]

City of Passaic

to appear before the District Court of the City of
 Passaic, to be held at the District Court Room, in
 the O'Leary Building, 125 Prospect St., in the said
 City, on the 7th day of December, A. D., 1927, at
 9:30 o'clock in the forenoon, to answer unto

Joseph Gallagher,

in an action on Contract

20

Demand Five hundred Dollars. Hereof fail not.

Witness: THOMAS E. DUFFY, Esquire, Judge of
 said Court at Passaic aforesaid, the 26th day of
 November in the year of our Lord, One Thousand
 Nine Hundred and Twenty-seven.

D. DEMURO,
 Clerk.

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State of Demand.

DISTRICT COURT OF THE CITY OF PASSAIC.

<p style="text-align: center;">JOSEPH GALLAGHER, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">CITY OF PASSAIC, <i>Defendant.</i></p>	}	<p style="text-align: center;">On Contract. State of Demand.</p>	10
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Plaintiff residing in the City of Passaic, County of Passaic and State of New Jersey, says that:

1. On May 16, 1927, plaintiff was duly appointed to the rank of Lieutenant of Fire Department of the City of Passaic by Abram Preiskel, then and being at the time Director of Public Safety of said City of Passaic, and as such having complete jurisdiction over the Fire Department of said City of Passaic, and the full power and authority to make the appointment of plaintiff as hereinabove set forth; and plaintiff did thereupon, upon his said appointment, duly qualify as such Lieutenant of Fire Department of said City. 20
2. That by virtue of an ordinance of said City of Passaic, passed September 25, 1923, and thereafter duly adopted by said municipality as provided by law on November 6, 1923, upon the vote of the legal voters of said City of Passaic, the salary of Lieutenant of Fire Department of said City was duly fixed at the sum of \$2,900.00, per annum. 30
3. Prior to his appointment he was a fireman at \$2,500.00 per year, of the standing of five years and over. 40

State of Demand.

4. That said salaries so fixed by said City of Passaic are payable to the members of the Fire Department thereof, semi-monthly on the first and fifteenth days of each and every month.

10 5. Plaintiff has at all times since his appointment as Lieutenant of Fire Department, as aforesaid, been ready, able and willing and did so tender himself to the defendant, to perform the duties of his rank as such Lieutenant of Fire Department and has been ever since said date and still is entitled to the remuneration and compensation so fixed by law for the rank of Lieutenant of Fire Department of the said City of Passaic, to wit, the semi-monthly salary of \$120.83, but said defendant
20 has failed and refused to pay the said sum to plaintiff.

6. Plaintiff was entitled to receive from defendant as such Lieutenant of Fire Department, the sum of \$1,449.96, but defendant has paid on account thereof only the sum of \$1,250.04 leaving a balance due and owing to plaintiff from defendant of the sum of \$199.92.

30 Judgment will be demanded for the sum of \$199.92.

FREDERICK S. RANZENHOFER,
Attorney of Plaintiff.

GROSS & GROSS,
WILLIAM GEORGE,
Of Counsel.

District Court Summons.

City of Passaic, } To Wit: THE STATE OF NEW
 County of Passaic, } JERSEY, To Sergeant-at-Arms
 of the District Court or any
 Constable of said County:

SUMMON

[L. S.]

City of Passaic

10

to appear before the District Court of the City of
 Passaic, to be held at the District Court Room, in
 the O'Leary Building, 125 Prospect St., in the said
 City, on the 7th day of December, A. D., 1927, at
 9:30 o'clock in the forenoon, to answer unto

Martin J. Farrell,

in an action on Contract

Demand Five hundred Dollars. Hereof fail not,

20

Witness: THOMAS E. DUFFY, Esquire, Judge of
 said Court at Passaic aforesaid, the 26th day of
 November in the year of our Lord, One Thousand
 Nine Hundred and Twenty-seven.

D. DEMURO,
 Clerk.

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State of Demand.

DISTRICT COURT OF THE CITY OF PASSAIC.

10	<p style="text-align: center;">MARTIN J. FARRELL, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>v.</i></p> <p style="text-align: center;">CITY OF PASSAIC, <i>Defendant.</i></p>	<p style="text-align: center;">On Contract. State of Demand.</p>
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Plaintiff residing in the City of Passaic, County of Passaic and State of New Jersey, says that:

20 1. On May 16, 1927, plaintiff was duly appointed to the rank of Lieutenant of Fire Department of the City of Passaic by Abram Preiskel, then and being at the time Director of Public Safety of said City of Passaic, and as such having complete jurisdiction over the Fire Department of said City of Passaic, and the full power and authority to make the appointment of plaintiff as hereinabove set forth; and plaintiff did thereupon, upon his said appointment, duly qualify as such Lieutenant of Fire Department of said City.

30 2. That by virtue of an ordinance of said City of Passaic, passed September 25, 1923, and thereafter duly adopted by said municipality as provided by law on November 6, 1923, upon the vote of the legal voters of said City of Passaic, the salary of Lieutenant of Fire Department of said City was duly fixed at the sum of \$2,900.00, per annum.

40 3. Prior to his appointment he was a fireman at \$2,500.00 per year, of the standing of five years and over.

State of Demand.

4. That said salaries so fixed by said City of Passaic are payable to the members of the Fire Department thereof, semi-monthly on the first and fifteenth days of each and every month.

5. Plaintiff has at all times since his appointment as Lieutenant of Fire Department, as aforesaid, been ready, able and willing and did so tender himself to the defendant, to perform the duties of his rank as such Lieutenant of Fire Department and has been ever since said date and still is entitled to the remuneration and compensation so fixed by law for the rank of Lieutenant of Fire Department of the said City of Passaic, to wit, the semi-monthly salary of \$120.83, but said defendant has failed and refused to pay the said sum to plaintiff. 10
20

6. Plaintiff was entitled to receive from defendant as such Lieutenant of Fire Department, the sum of \$1,449.96, but defendant has paid on account thereof only the sum of \$1,250.04 leaving a balance due and owing to plaintiff from defendant of the sum of \$199.92.

Judgment will be demanded for the sum of \$199.92. 30

FREDERICK S. RANZENHOFER,
Attorney of Plaintiff.

GROSS & GROSS,
WILLIAM GEORGE,
Of Counsel.

District Court Summons.

City of Passaic, } To Wit: THE STATE OF NEW
 County of Passaic, } JERSEY, To Sergeant-at-Arms
 of the District Court or any
 Constable of said County:

SUMMON

10

[L. S.]

City of Passaic

to appear before the District Court of the City of Passaic, to be held at the District Court Room, in the O'Leary Building, 125 Prospect St., in the said City, on the 7th day of December, A. D., 1927, at 9:30 o'clock in the forenoon, to answer unto

Cornelius Miller,

in an action on Contract

20 Demand Five hundred Dollars. Hereof fail not,

Witness: THOMAS E. DUFFY, Esquire, Judge of said Court at Passaic aforesaid, the 26th day of November in the year of our Lord, One Thousand Nine Hundred and Twenty-seven.

D. DEMURO,
 Clerk.

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State of Demand.

DISTRICT COURT OF THE CITY OF
PASSAIC.

CORNELIUS MILLER,

Plaintiff,

v.

CITY OF PASSAIC,

Defendant.

On Contract.
State of Demand.

10

Plaintiff residing in the City of Passaic, County of Passaic and State of New Jersey, says that:

1. On May 16, 1927, plaintiff was duly appointed to the rank of Lieutenant of Fire Department of the City of Passaic by Abram Preiskel, then and being at the time Director of Public Safety of said City of Passaic, and as such having complete jurisdiction over the Fire Department of said City of Passaic, and the full power and authority to make the appointment of plaintiff as hereinabove set forth; and plaintiff did thereupon, upon his said appointment, duly qualify as such Lieutenant of Fire Department of said City.

20

2. That by virtue of an ordinance of said City of Passaic, passed September 25, 1923, and thereafter duly adopted by said municipality as provided by law on November 6, 1923, upon the vote of the legal voters of said City of Passaic, the salary of Lieutenant of Fire Department of said City was duly fixed at the sum of \$2,900.00, per annum.

30

3. Prior to his appointment he was a fireman at

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State of Demand.

\$2,500.00 per year, of the standing of five years and over.

10 4. That said salaries so fixed by said City of Passaic are payable to the members of the Fire Department thereof, semi-monthly on the first and fifteenth days of each and every month.

20 5. Plaintiff has at all times since his appointment as Lieutenant of Fire Department, as aforesaid, been ready, able and willing and did so tender himself to the defendant, to perform the duties of his rank as such Lieutenant of Fire Department and has been ever since said date and still is entitled to the remuneration and compensation so fixed by law for the rank of Lieutenant of Fire Department of the said City of Passaic, to wit, the semi-monthly salary of \$120.83, but said defendant has failed and refused to pay the said sum to plaintiff.

30 6. Plaintiff was entitled to receive from defendant as such Lieutenant of Fire Department, the sum of \$1,449.96, but defendant has paid on account thereof only the sum of \$1,250.04 leaving a balance due and owing to plaintiff from defendant of the sum of \$199.92.

Judgment will be demanded for the sum of \$199.92.

FREDERICK S. RANZENHOFER,
Attorney of Plaintiff.

GROSS & GROSS,
WILLIAM GEORGE,
Of Counsel.

State of Demand.

DISTRICT COURT OF THE CITY OF
PASSAIC.

10

JOHN J. NOONAN,
Plaintiff,

v.

CITY OF PASSAIC,
Defendant.

On Contract.
State of Demand.

Plaintiff residing in the City of Passaic, County of Passaic and State of New Jersey, says that:

20

1. On May 16, 1927, plaintiff was duly appointed to the rank of Sergeant of Police in the Police Department of said City of Passaic, by Abram Preiskel, then and being at the time Director of Public Safety of said City of Passaic, and as such having complete jurisdiction over the Police Department of said City of Passaic, and the full power and authority to make the appointment of plaintiff as hereinabove set forth; and plaintiff did thereupon, upon his said appointment, duly qualify as such Sergeant of Police of said City.

30

2. That by virtue of an ordinance of said City of Passaic, passed September 25, 1923, and thereafter duly adopted by said municipality as provided by law on November 6, 1923, upon the vote of the legal voters of said City of Passaic, the salary of Sergeant of Police of said City was duly fixed at the sum of \$2,700.00, per annum.

40

3. Prior to his appointment he was a policeman of the standing of five years and over at \$2,500.00 per year.

State of Demand.

4. That said salaries so fixed by said City of Passaic are payable to the members of the Police Department thereof, semi-monthly on the first and fifteenth days of each and every month.

5. Plaintiff has at all time since his appointment as Sergeant of Police, as aforesaid, been ready, able and willing and did so tender himself to the defendant, to perform the duties of his rank as such Sergeant of Police and has been ever since said date and still is entitled to the remuneration and compensation so fixed by law for the rank of Sergeant of Police of the said City of Passaic, to wit: the semi-monthly salary of \$112.50, but said defendant has failed and refused to pay the said sum to plaintiff.

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6. Plaintiff was entitled to receive from defendant as such Sergeant of Police, the sum of \$1,350.00 but defendant has paid on account thereof only the sum of \$1,250.00 leaving a balance due and owing to plaintiff from defendant of the sum of \$100.00.

Judgment will be demanded for the sum of \$100.00.

FREDERICK S. RANZENHOFER,
Attorney of Plaintiff.

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GROSS & GROSS,
WILLIAM GEORGE,
Of Counsel.

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Testimony.

PASSAIC DISTRICT COURT,

PASSAIC, N. J.

10

PATRICK FITZPATRICK, *et als.*,*v.*

CITY OF PASSAIC, N. J.

} Action at Law.

Passaic, N. J., Jan. 13, 1928; 10:00 A. M.

Hearing before—Hon. THOMAS E. DUFFY, Judge.

APPEARANCES:

20

Hon. WM. GEORGE, ISAAC GROSS, Esq., and
FREDK. S. RANZENHOFER, Esq., for the
Plaintiffs;Hon. JOS. J. WEINBERGER, City Counsel, for
the City of Passaic, Defendant.(The case was heard before the Court, without
a jury.)

(A. Augustus Dye, sworn as the stenographer.)

30

Mr. Weinberger: Your Honor, I desire to enter
a special appearance for the purpose of making
my motion, first, that this court has no jurisdiction
to try title of office, and I maintain that, on the
State of Demand, that it is clearly a question of
title of office; and secondly, that there is no cause
of action alleged in the State of Demand. I make
that motion for the purpose of having my record
straight at this time, that this court has no juris-
diction.

40

Testimony.

The Court: The court will deny that motion, subject to a final determination of the case.

Mr. Weinberger: Allow me an exception, your Honor.

The Court: Yes.

Mr. Weinberger: And may I just make a general appearance, without prejudice, your Honor please? 10

The Court: Let it be so noted on the record.

Mr. Gross: May I ask the other side, whether it will concede that on the dates mentioned in the State of Demand, when these appointments were made,—I think they were made May 15th and May 16th,—whether it will concede that Abram Preiskel was a member of the Board of Commissioners of the City of Passaic and Director of Public Safety of that City and in charge by virtue thereof of the Police and Fire Departments of that City? 20

Mr. Weinberger: I will not concede that, because that is one of my points, and I claim, of course, when the time comes, I will prove it, that the departments were not properly distributed; that while Abram Preiskel may have been the Director of Public Safety, yet he had no right to make any appointments unless it is confirmed by the Board. 30

Mr. Gross: I am not asking his right to make the appointments. I am asking whether you will concede that he was the Director of Public Safety of the City, and as such had control over the Police Department and the Fire Department?

Mr. Weinberger: I will say that he had no control.

Mr. Gross: Will you concede that he was Director of Public Safety? 40

Patrick Fitzpatrick, direct.

Mr. Weinberger: I will concede that he was Acting Director of Public Safety.

Mr. Gross: Of the City of Passaic?

Mr. Weinberger: Of the City of Passaic, without power of making appointments, as we claim.

10 PATRICK FITZPATRICK, produced as a witness in his own behalf, having been first duly sworn, was examined by Mr. George, and testified as follows:

Q. Mr. Fitzpatrick, where do you live? A. 50 Henry Street.

Q. In the City of Passaic? A. Yes, sir.

Q. How long have you been a resident of the City of Passaic? A. Oh, over thirty years.

20 Q. You are now a member of the Police Department of this City? A. Yes.

Q. And were such on the 16th of May, 1927? A. Yes.

Q. When were you appointed to the Police Department of this City? A. In 1911.

Q. With the rank of what? A. Sergeant.

Q. Now, in May 16th, of last year, what was your salary? A. \$2,700.00.

Q. Per year? A. Per year.

30 Q. Payable in what form? A. Twice a month, 1st and the 15th.

Q. 1st and the 15th; do you know what that sum, the monthly pay was? A. Amounted to \$225.00 a month.

Q. What is your present rank?

Mr. Weinberger: Objected to.

A. Sergeant.

40 Mr. Weinberger: Go ahead.

Patrick Fitzpatrick, direct.

Q. That was in May, 1927, wasn't it? A. Well, I got promoted to Captain.

Mr. Weinberger: I object to that and ask that it be stricken out, if your Honor please, as calling for a conclusion of this witness. That is not the proper method of proving rank in a police department. 10

Mr. Gross: I will say this, we will ask your Honor to permit the answer to stand, subject to the objection, subject to being connected. We cannot call every witness at every time he objects to connect it up then.

The Court: The court will allow it, subject to being connected up. If it is not properly connected, the court will strike it out. 20

Q. When were you appointed?

Mr. Weinberger: Of course, my objection goes to the same line of questions.

The Court: The same objection, and same ruling.

A. May the 16th, I believe.

Q. By whom? A. Commissioner Preiskel.

Q. Beg pardon? A. Commissioner Preiskel. 30

Q. He was the commissioner of what? A. Public Safety.

Mr. Weinberger: I object to that. That that is not the proper method of proving who was in the office.

Mr. George: I will concede the same objection.

The Court: Same objection, same ruling and exception allowed. 40

Patrick Fitzpatrick, direct.

Q. Were you qualified after being appointed—

Mr. Weinberger: I object.

Mr. George: Please let me state the question before you make your objection.

10 Q. Were you qualified under your appointment as Captain by Commissioner Preiskel, Director of Public Safety, after your appointment?

Mr. Weinberger: I object to the question on the ground that is not the proper method of proving whether he was qualified.

A. (Interrupting.) Yes.

20 The Court: Same ruling and exception allowed.

Q. Were you qualified? A. Yes.

Q. Took the oath of office? A. Took the oath of office.

Q. As Captain of Police of this City? A. Yes, sir.

Mr. Weinberger: My objection is, of course, to all of this line of examination. I do not want to appear captious.

30 The Court: The stenographer will note that all of these questions are objected to by counsel for the City, and that the court overrules the objection, subject to proper connection by the plaintiffs, on the presentation of their case, with the reservation that if it is not properly connected, it will be stricken from the testimony.

Q. Who administered the oath, Captain? A. Mr. Bolton.

40 Q. Who is Mr. Bolton? A. City Clerk.

Patrick Fitzpatrick, direct.

Q. Of what City? A. Passaic.

Q. Upon your appointment by the Director of Public Safety as Captain of the Police Department of this City, were you presented with this certificate of appointment by the City Clerk, after you were sworn? A. Yes.

10

Mr. Weinberger: My objection is—

Mr. George: That is offered in evidence.

Mr. Weinberger: Objected to as not the proper method of proving appointment.

The Court: The court will allow it with the same reservation.

(Marked P-1 in evidence.)

Q. I show you a letter, purporting to be signed by Abram Preiskel, Director of Public Safety, directed to you, and ask you if you received that from the then Director of Public Safety? A. Yes.

20

Mr. George: Offered in evidence.

Mr. Weinberger: Objected to on the ground that it is not evidential, not binding, and not relevant to this issue.

The Court: I will allow it, with the same reservation.

(Marked P-2 in evidence.)

30

Q. Now, after your appointment and qualification, Captain, were you ready, able and willing to perform the duties assigned to you under the direction of the Captain of Police?

Mr. Weinberger: Objected to as leading.

The Court: Objection overruled.

Mr. Weinberger: Allow me an exception.

The Court: Yes.

A. Yes.

40

Patrick Fitzpatrick, cross.

Q. You are still ready, willing and able to perform those duties connected with this office, as Captain of Police? A. Yes.

10 Q. Since your appointment as Captain of Police, on May 16, 1927, have you received any increase in your salary over the amount that you received as a member of the Police Department prior to May, 1927? A. No.

Mr. George: That is all.

Cross examination by Mr. Weinberger:

Q. Have you approached Commissioner Turner, telling him that you have no desire—

20 Mr. George: Objected to as immaterial—
Mr. Weinberger: I haven't finished my question.

Q. Did you approach Commissioner Turner and tell him that you had no desire to proceed in any lawsuit against the City?

Mr. George: Objected to as immaterial and incompetent.

A. No.

30 The Court: Objection sustained.

Mr. Weinberger: Your Honor, allow me an exception?

The Court: Exception allowed.

Q. Who is your superior in the Police Department in the City of Passaic? A. There are four superiors—Acting Capt. DeGroot, Lt. Vander-Hoven, Lt. Vreeland and Lt.—

40 Q. Did you tender yourself to any of them in uniform? A. No.

Q. Did you purchase a cap or badge or anything

Patrick Fitzpatrick, cross.

or any uniform with the designation of Captain thereon? A. No.

Q. Did you serve in any capacity as a Captain? A. No.

Q. From the time that you received this alleged piece of paper? A. No. 10

Q. Huh? A. No.

Q. You have performed the duties of a Sergeant continuously for how many years, down to date? A. Oh, seven years.

Q. Did you submit yourself to Commissioner Turner— A. No.

Q. —and ask him to assign you to duty as a Captain? A. No.

Q. Did you submit yourself to any superior officer in the City of Passaic, and ask them at any time, since you received this alleged certificate, requesting them to assign you to duty as a Captain in the Police Department? A. No. 20

Q. You have said nothing and did nothing since you received that alleged certificate of appointment since the time you received it; is that correct? A. What is that?

Q. You said nothing and did nothing to any of your superior officers? A. Well, we were told— 30

Q. Will you answer my question?

Mr. George: He is trying to.

A. No.

Mr. George: If you will permit him to.

Q. To your superior officers, I am asking you? A. No.

Q. There is deducted from your salary, or of each Patrolman, how much for the pension fund? A. 2 per cent. (2%). 40

Mr. Weinberger: That is all.

Patrick Fitzpatrick, redirect.

Redirect examination by Mr. George:

Mr. George: Just one or two questions, please, with the Court's permission.

10 Q. Captain, who is the present Director of Public Safety of the City of Passaic? A. Benjamin Turner.

Q. Beg pardon? A. Benjamin Turner.

Q. Now, after having been appointed and qualified, as you testified, did you then confer with your attorneys—

Mr. Weinberger: Of course—

Q. (Continuing)—Mr. Gross and myself?

20 Mr. Weinberger: —objection is noted to this question?

The Court: Note the objection to this question, with the same ruling, and exception allowed.

A. Yes.

30 Mr. George: I call upon the defendant to produce original of letter dated August 11, 1927, addressed to Benjamin F. Turner Director of Public Safety, of the City of Passaic.

Mr. Weinberger: I haven't been served with any notice to produce, that I know of.

Mr. George: It was subpoenaed, actually subpoenaed.

Mr. Weinberger: Have you subpoenaed Mr. Bolton to produce that letter?

Mr. George: Is Mr. Bolton here?

40 Mr. Weinberger: Yes, he is here. Just let me see the letter myself in order to save time.

Patrick Fitzpatrick, redirect.

Mr. George: Certainly (producing carbon copy).

Mr. Weinberger: We have got such a letter.

Mr. George: Let us have the original, please. 10

Mr. Weinberger: I haven't it here.

Mr. George: Will you consent—

Mr. Weinberger: Yes, that is a copy.

Mr. George: —copy of the original?

Mr. Weinberger: Yes.

Q. After having been appointed and qualified as Captain of Police, you conferred with your attorneys, Mr. Gross and myself, did you not? A. Yes.

Q. Did you leave it to your attorneys to present your position to the Director of Public Safety? A. Yes. 20

Mr. Weinberger: Objected to on the ground not binding on the City of Passaic.

Q. Did you authorize the sending of a letter, of which this is a copy, signed by you, addressed to the Director of Public Safety?

Mr. Weinberger: Signed by him? 30

Q. (Continued.) Signed by the attorneys rather? A. Yes.

Q. You authorized that? A. Yes, sir.

Q. Authorized it to be signed by Mr. Gross and myself as your attorney? A. Yes, sir.

Q. This stated your position with respect to offering yourself for duty as Captain and the—

Mr. Weinberger: Objected to.

A. (Interrupting.) Yes. 40

Q. —and the rank? A. Yes, sir.

Arthur D. Bolton, direct.

Mr. George: Offered in evidence.
(Marked P-3 in evidence.)

Mr. George: That is all.

Recross examination by Mr. Weinberger:

10 Q. You do not know what the contents of that letter are, referring to P-3? A. No, not now, I do not.

Mr. Weinberger: That is all.

Redirect examination by Mr. George:

Q. Have you read it just now? A. I didn't read it, no.

Q. Will you please read it? A. Yes, sir.

20 Q. Did you authorize that letter to be written by us as your attorneys to the present Director of Public Safety of Passaic? A. Yes, sir.

Mr. George: That is all.

ARTHUR D. BOLTON, produced as a witness on behalf of the plaintiffs, having been first duly sworn, was examined by Mr. George, and testified as follows:

30 Q. Mr. Arthur D. Bolton is your name? A. Yes.

Q. You are the present City Clerk of the City of Passaic? A. Yes, sir.

Q. How long have you been City Clerk of this City? A. Since 1922.

Q. Have you in your custody and with you at the present time ordinance dated or passed September 25, 1923, fixing the salaries of members of the Police Department of the City of Passaic? A. I have.

40 Q. Will you please produce it?

Arthur D. Bolton, direct.

Mr. Weinberger: With reference to what particular office, Mr. George?

Mr. George: All of them.

A. (Witness produces paper.)

Q. This is the original? A. Yes, sir.

10

Q. Duly passed? A. Yes, sir.

Mr. George: Offer it in evidence.

Mr. Weinberger: No objection.

(Marked P-4 in evidence.)

Q. Have you in your possession ordinance passed September 25, 1923, fixing the salaries of members of the Fire Department of the City of Passaic? A. Yes (producing paper).

Q. This was duly passed on that date? A. Yes.

20

Mr. George: Offered in evidence.

Mr. Weinberger: No objection.

(Marked P-5 in evidence.)

Q. This ordinance was adopted in pursuance of the referendum, wasn't it? A. Yes.

Q. Approved by a majority of the legal votes of the City of Passaic? A. Yes.

Q. That is true as to both of these ordinances? A. Yes.

30

Q. This is the commission form of government in the City of Passaic, isn't it? A. Yes.

Q. Having how many commissioners? A. Five.

Q. Consisting of a Director of Public Safety, Director of Parks and Public Property, Director of Public Improvements, Director of Revenue, and a Director of Public Affairs,—and Director of Streets & Public Improvements; is that right? A. Right.

Q. May 16, 1927, who was the Director of Public Safety? A. Abram Preiskel.

40

Mr. George: That is all.

Arthur D. Bolton, cross.

Cross examination by Mr. Weinberger:

Q. Up to what hour? A. Noon.

Q. Well, now, Mr. Bolton, have you the organization meeting of the Board of Commissioners of the City of Passaic, of 1923? A. Yes.

10 Q. Will you produce that, please? A. (Witness produces minute book.)

Q. Will you refer to the organization meeting and inform the court whether or not there was an assignment of the powers and duties to each commissioner? Yes or no. A. Repeat that, please.

Q. (Repeated by stenographer, as above.) (Added by Mr. Weinberger.) At the organization meeting I am referring to, 1923? A. No.

20 Q. Was there, at any time from May 17, if that is the date of the organization meeting, 1923, down to the expiration of the four year period for which the various commissioners were elected, an assignment or a distribution of the powers of the various commissioners? A. No.

Q. Now, do you know of your own knowledge, whether Sgt. Fitzpatrick accepted his salary as a Sergeant all of the way down to date?

Mr. Gross: That is objected to.

30 A. I do.

Mr. Weinberger: I am just asking, if he knows. I am not trying to prove that he did. I will have the checks here.

40 Q. This book which you produced here has a record, has it not, of every meeting of the Board of Commissioners from the date of their organization in 1923, down to date? A. No, that book don't contain all of those meetings, that ends—goes up to September, 1923; that is Vol. 29, I think.

Arthur D. Bolton, cross.

Q. What book does? A. That would be two books that would carry it on down to date, Nos. 29, 30 and 31.

Q. What is that book that you were referring to? A. I think that is No. 29 (is it?), which contains the minutes of the Board of Commissioners from May 15, 1923, up to and including October 2, 1923. 10

Q. You have the other books up in the City Hall, have you? A. I have.

Q. Have you examined them, Mr. Bolton— A. Yes, sir.

Q. —with reference to whether or not there was an assignment and a distribution of the powers—

Mr. George: Just a moment; that is objected to. 20

Mr. Weinberger: He will bring all of the books down from the City Hall.

Mr. Gross: No, we say that question calls for a conclusion of law.

Mr. Weinberger: Just what is the question?

Q. (As repeated by stenographer.) Have you examined them with reference to whether or not there was an assignment and a distribution of the powers (continued by Mr. Weinberger) to the various commissioners from May 17, 1923, down to the expiration of their term, May 16, 1927? 30

Mr. Gross: I object to the question, if your Honor please, on the ground that calls for a conclusion of law.

Mr. Weinberger: May I say this, Judge Duffy, that if Mr. Gross insists that we—

Mr. Gross: I will withdraw the objection. I want all of this out. 40

Arthur D. Bolton, cross.

Mr. Weinberger: So do I.

Mr. Gross: Counsel has said he did not want to be captious, although I think he is extremely so. I will withdraw the objection, and let the witness answer.

10 Q. What is the answer, Mr. Bolton? A. No, there was not.

Q. Do the official journals of the records of the City Hall show that? A. Yes.

Q. You say that they are in Journals 29, 30 and 31? A. Yes.

Q. Will you see that they are produced here, Mr. Bolton? A. At once?

20 Q. When you get through with the witness stand, if you will, please.

Mr. Weinberger: That is all.

Cross examination by Mr. Gross:

Q. Mr. Bolton, when you answer that the powers and duties were not assigned, what do you mean?

Mr. Weinberger: I object to what he means.

30 The Court: The court will allow the question.

Mr. Weinberger: Allow me an exception.

The Court: Exception is allowed.

A. I mean that each commissioner was elected to each separate department without assigning powers.

40 Q. You mean then that when it appears at your organization meeting on May 8, 1923, that certain departments were assigned to the respective commissioners, that that does not constitute an assignment of their powers and duties?

Arthur D. Bolton, cross.

Mr. Weinberger: That is objected to; the books speak for themselves, if your Honor please. All that that book shows, if I can understand it correctly, is that they were elected by the various commissioners to a department but no powers or duties were assigned by resolution. 10

The Court: You mean that there was not an apportionment of the various functions of the City government to each department?

Mr. Weinberger: That is correct.

Mr. Gross: The law does that, your Honor.

Mr. Weinberger: The law does not do that; the law says you must assign by resolution. 20

Mr. Gross: We will deal with that when we get to the argument.

Q. I suppose you do not want to mark this original minute book, but will you read from your organization meeting of May 8, 1923, and see whether— A. That is May 15th, if I might correct you.

Q. Was that it? A. May 15th.

Q. May 15th, 1923? A. Yes.

Q. (Continuing.) —and see whether there is any reference there to the assignment of any member of the Commission of the City of Passaic to the office of Director of Public Safety? A. I will read it. 30

Q. Yes, sir. A. (Reading.) "On motion of Commissioner Regner, Abram Preiskel was nominated and elected as Director of Public Safety; on call of roll, yeas, 4, Johnson, Pettersen, Regner, Dwyer; excused, 1, Preiskel." 40

Q. Was that designation of Preiskel to the Di-

Arthur D. Bolton, redirect.

rectorship of the Department of Public Safety of Passaic ever changed during his entire incumbency? A. No.

Q. When did the Commission Government first take effect in the City of Passaic? A. In 1911.

10 Q. Since that time, which of the directors of the City of Passaic was in charge of the Police and Fire Departments of that City? A. I will give them to you from memory as best I can. The first Director of Public Safety—

Q. Well, I mean, Mr. Bolton, was it always the Director of Public Safety? A. Yes.

Mr. George: Now, Mr. Bolton, may I ask another question, with the Court's permission?

20

By Mr. George:

Q. This certificate, P-1, bears your signature, does it not? A. Yes, sir.

Q. That is the certificate showing that the oath of office of Captain of Police of the City of Passaic was administered to and was given by Patrick Fitzpatrick?

30

Mr. Weinberger: Objected to; it speaks for itself, I think.

Mr. George: Of course it does—

Q. But was it done in your presence? That is the question? A. If I can see the—

Q. Does that bear your signature? A. Yes, that is my signature.

Q. What does that indicate to you? A. But that is not the Oath of Appointment (Office); that is the certificate.

40

Q. Have you the oath here? A. (Referring to

Arthur D. Bolton, redirect.

papers.) This oath is correct, but this does not bear my signature.

Q. Who is G. R. Greer? A. He was at that time Chief Clerk in the City Clerk's Office.

Q. Authorized to administer oaths, in that office, to members of the Police Department? A. Yes. 10

Q. That is an authentic oath? A. Yes.

Mr. George: Offered in evidence.

Mr. Weinberger: Objected to on the ground it is not relevant.

The Court: The court will overrule the objection and allow an exception.

(Marked P-6 in evidence.)

Q. Have you the original, Mr. Bolton, of a letter addressed to Commissioner Turner, of which this paper marked Exhibit P-3 is a copy? A. I haven't; no, sir. 20

Q. Do you recall receiving it or seeing it at all? A. I recall seeing about eleven of these letters, I think, in September, about the middle of September.

Q. How did you come to see them? A. Through the Director of Public Safety.

Q. Commissioner Turner? A. Yes, sir. 30

Mr. George: That is all.

The Court: The court would like to ask Mr. Bolton one question.

By the Court:

Q. Did you examine the minutes of the Board of Commissioners from the inception of Commission Government in the City of Passaic to ascertain whether or not there had ever been a distribution of the different functions of the city to the various departments? A. Why, yes. 40

Arthur D. Bolton, recross.

Q. You did? A. (Indicates affirmatively.)

Q. Was there ever a distribution of the various functions of City government to the departments?

A. Yes, sir.

The Court: That is all.

10

By Mr. Gross:

Q. And the functions of the Department of Public Safety included the jurisdiction over the Police and Fire Departments?

Mr. Weinberger: That is objected to; the records speak for themselves.

Mr. Gross: We haven't got them here. He may be able to recall.

20

Mr. Weinberger: Would it be fair to ask this man to say what that shows?

Mr. Gross: If he knows.

Mr. Weinberger: How does he know?

Mr. Gross: Let's find out, that is the question.

The Court: He may answer if he knows.

A. Yes.

30

Mr. Weinberger: Of course, this calls for a conclusion on the part of this witness; which is not the best evidence; I do not know what it says.

The Court: Well, the reason for the court's question, Mr. Weinberger, so that if there was an attempt to show that there was never a distribution of the functions of the City government to the various departments, either for a specified term or an elective term—

40

Mr. Weinberger: Right.

The Court (continuing): —and the court

Abram Preiskel, direct.

endeavored to ascertain whether there had ever been a distribution of the functions of City government to the different departmental heads. Mr. Bolton said that there had.

Mr. Weinberger: Wouldn't the best evidence of what they distributed be the original ordinance or whatever it may be? 10

Mr. George: That was not your Honor's question. Your Honor's question was if he examined. We have not gone into any details other than concerning the jurisdiction over the Police and Fire Departments by the Director of Public Safety, and he answered they were under his jurisdiction.

The Court: Anything further? 20

Mr. George: That is all with this witness.

ABRAM PREISKEL, produced as a witness on behalf of the plaintiffs, having been first duly sworn, was examined by Mr. George, and testified as follows:

Q. Mr. Preiskel, on May 16, 1927, were you Director of Public Safety of the City of Passaic? A. I was. 30

Q. When were you elected to that office? A. In 1923; first time in 1919, I think it was.

Q. At the organization meeting of the Commission after your election, were you assigned to the Department of Public Safety? A. I was.

Q. And as such, during your entire incumbency in that office, did you have control and jurisdiction over the Police and Fire Departments of the City of Passaic? A. I did. 40

Abram Preiskel, direct.

Q. And as such did you make appointments to the Police Department— A. I did.

Q. —and Fire Department? A. I did.

Q. Did you make promotions in the Police and Fire Departments? A. I did.

10 Q. I show you a letter, and ask you if you addressed that to the plaintiff, Patrick Fitzpatrick? A. I did.

Q. Did you promote him in rank, as a member of the Police Department of this city? A. I did.

Q. When? A. May 16th.

Q. And this letter, marked P-2, is in confirmation of that appointment? A. It is.

20 Q. Were you present when the oath of office was taken by him? A. I am not positive; I think I was, but I am not sure, however.

Q. Do you recall what time of the day it was that you made the appointment? A. About nine o'clock in the morning.

Q. Of the 16th of May? A. Of the 16th of May.

Q. 1927? A. 1927.

Mr. George: Is there any objection, Mr. Weinberger, to proving the others?

30 Mr. Weinberger: Subject to the court, Mr. George.

Mr. George: I mean, to save time.

Mr. Weinberger: Of course, in the event that any of these officers and firemen do not take the stand—

The Court: It will be stricken from the record.

Mr. Weinberger: I just want it stricken out with reference to those certain plaintiffs.

40 The Court: Yes.

Abram Preiskel, direct.

Mr. Weinberger: It being the understanding that each and every plaintiff is to take the stand, otherwise their testimony or any testimony let in will be stricken out.

Q. Did you appoint John Noonan to a promotion in the Police Department of this city to the rank of Police Sergeant? A. I did. 10

Q. At what time of the day? A. Same time.

Q. On the 16th of May? A. Same time; I made all of the appointments at the same time.

Q. All of the appointments and promotions at the same time? A. Correct.

Q. That applies to John Noonan? A. It does.

Mr. George: I offer this in the Noonan case. 20

(Marked P-1 in evidence.)

Q. Did you promote Edward Belli to the rank of Sergeant of Police at the same time? A. I did.

Mr. George: I offer this.

(Marked P-1 in evidence.)

Q. Did you promote Irving Evansky in the Police Department, at the same time, to the rank of Sergeant? A. I did. 30

Mr. George: I offer this.

(Marked P-1 in evidence.)

Q. Did you appoint Albert Hubbard or promote him to Lieutenant of the Fire Department at the same time? A. I did.

Mr. Weinberger: Of course, my objection will be noted.

The Court: The objection will be noted, 40

Abram Preiskel, direct.

and the court's ruling will be noted, in each instance, and an exception allowed.

Mr. Weinberger: On the ground that this is attempting to test the title to office.

10 Q. Did you promote William Buckley to Lieutenant of Detectives at that same time? A. I did.

Mr. George: I offer this.
(Marked P-1 in evidence.)

Q. Did you promote Cornelius Miller to Lieutenant in the Fire Department at that same time? A. I did.

Mr. George: I offer this.
(Marked P-1 in evidence.)

20 Q. Did you promote Albert G. Bednarz to Sergeant of Police at that same time? A. I did.

Mr. George: I offer this.
(Marked P-1 in evidence.)

Q. Did you promote Martin Farrell to Lieutenant of the Fire Department at that same time? A. Yes, sir.

30 Mr. George: I offer this.
(Marked P-1 in evidence.)

Q. And Joseph Gallagher as a Lieutenant of the Fire Department at that same time? A. I did.

Mr. George: I offer this.
(Marked P-1 in evidence.)

40 Q. And these letters which are addressed to the various persons named, whom you have said you have appointed, were sent by you in confirmation of that appointment? A. Right.

Q. All of those appointments, you say, were

Abram Preiskel, cross.

made at about nine o'clock in the forenoon of May 16, 1927? A. Correct.

Q. While you were Director of the Department of Public Safety of the City of Passaic? A. Yes.

Mr. George: I offer these letters in each case. 10

(Marked P-2 in evidence.)

(Stenographer's Note: The foregoing exhibits, marked P-2, were ten in number, and applies only to the individual case; the same applies to exhibits marked P-1, ten in number.)

Mr. George: That is all.

Cross examination by Mr. Weinberger:

Q. What was the day of the last appointment that you made? On the 17th of May? 20

Mr. George: Objected to as irrelevant, immaterial and incompetent.

Q. May 16th and 17th, I take it?

The Court: As I understand, these today were all dated the 16th; they were all May 16th, from the Commissioner's testimony.

Mr. Weinberger: I do not know that. 30

Q. Did you make any on the morning of the 17th? A. That I couldn't say; the letters of appointment will show that. I am not in position at this time to say.

Q. During your term of office, of 1923, the last term of your office, was there a distribution of any of the duties of the departments of the various commissioners? A. During my term of office?

Q. Or were you just elected to the office of Director of Public Safety? A. I was elected; as to 40

Arthur D. Bolton, direct.

the distribution of the powers or anything of that kind, I am not in position to say. The records at the City Hall would show that.

Q. How many appointments were there in all?

A. I think, twenty-one or twenty-two.

10 Q. They were all made, you say, on the 16th of May, to the best of your knowledge? A. To the best of my knowledge.

Q. To the fireman and policemen? A. To the firemen and policemen.

Q. What was the total amount of employes, with reference to the Fire and Police Departments, if you know, at that time?

20 Mr. George: That is objected to as immaterial, irrelevant and incompetent.

Mr. Weinberger: I think I have a right to show that these appointments are all as against public policy.

Mr. George: It is objected to on the further ground that the question of public policy is not involved in this issue.

Mr. Weinberger: I think it is.

30 Mr. George: Well, if that be true, I think, every litigation, however great or small, involves public policy.

The Court: The court will sustain the objection and will allow an exception.

Mr. Weinberger: Allow me an exception. That is all.

ARTHUR D. BOLTON, recalled by the plaintiffs, having been previously sworn, was examined by Mr. George, and testified as follows:

40 Q. Mr. Bolton, I show you this oath and ask you

Patrick Fitzpatrick, cross.

if that oath was in due form, and if the oaths of office of each particular office, was duly administered and signed by the person named in each document? A. Yes.

Mr. George: That is offered in evidence; the same thing is true of the oath. This first one is of Edward Belli; the one you have in your hand is Martin— 10

Mr. Weinberger: We will stipulate on the record that all of them took their oaths, so that you can save time.

Mr. George: All right, it is admitted on the record, that the oath of Belli, Albert Hubbard, Irving Evansky, Albert Bednarz, Cornelius Miller, Joseph Gallagher, William Buckley, Martin Farrell, as well as Patrick Fitzpatrick, were duly administered by the City Clerk of the City of Passaic. 20

The Witness: Yes.

Mr. George: That is all.

Mr. Weinberger: I would like to recall Sgt. Fitzpatrick for just one question, if he is in the courtroom or around here. I just want to ask him one question that slipped my mind. 30

PATRICK FITZPATRICK, previously sworn, was recalled for further cross examination by Mr. Weinberger, and testified as follows:

Q. You received your salary as a Sergeant down to date? A. Yes.

Q. By check or cash? A. By check.

Q. You cashed the checks, did you? A. Yes.

Q. You never made a demand for any more 40

William Buckley, direct.

money from any superior officer in the Police Department or from Commissioner Turner? Yes or no. A. No.

Q. That is all. A. We were told that he would not recognize the appointments.

10

Mr. Weinberger: I object and ask that it be stricken out as being irrelevant.

The Court: Strike it out.

Redirect examination by Mr. Gross:

Q. You were about to say that you did make such application through your lawyer? A. Through the lawyer, yes.

20

Q. This letter that has been marked in evidence here as P-3— A. Yes.

Q. —that you read while you were on the witness stand before? A. Yes.

Mr. Gross: All right; that is all.

WILLIAM BUCKLEY, produced as a witness in his own behalf, having been first duly sworn, was examined by Mr. George, and testified as follows:

30

Q. Mr. Buckley, where do you live? A. Passaic.

Q. Well, Passaic is a pretty big place. A. 262 Main Avenue.

Q. How long have you lived in Passaic? A. Born here, thirty-five years.

Q. You are a member of the Passaic Police Department? A. Yes, sir.

Q. Have been how long? A. Since August 1, 1916.

40

Q. On May 16, 1927, was there any change made in your rank? A. Yes, sir.

Q. What is that? A. To Lieutenant of Detectives.

William Buckley, cross.

Q. Appointed by whom? A. Commissioner Preiskel.

Q. After the appointment, you received formal notice of your appointment? A. I did.

Q. Did you take your oath of office as a Lieutenant of Detectives? A. Yes, sir. 10

Q. What was your salary prior to that date of appointment? A. \$2,500.00 a year.

Q. Have you received any change of salary since that date? A. No, sir.

Q. Have you, through your attorneys, expressed a willingness, readiness and ability to perform your duties coincident with your rank under your promotion? A. Yes, sir.

Mr. Weinberger: Of course, I object to that as calling for a conclusion, your Honor please. 20

The Court: Same objection, same ruling, and the court will allow it, and allow an exception.

A. Yes, sir.

Q. Have you since the 16th of May, 1927, the date of your appointment, been ready, willing and able to perform all of the duties of that office? A. Yes, sir. 30

Q. What was your salary prior to the date of your appointment? A. \$2,500.00 a year.

Q. You have received no change in salary since that date? A. No, sir.

Mr. George: Cross examine.

Cross examination by Mr. Weinberger:

Q. Did you ever submit yourself to Commissioner Turner from the day of this alleged appointment down to date? A. No, sir. 40

William Buckley, cross.

Q. Did you receive your salary as a Patrolman down to date? A. Yes, sir.

Q. Of this City? A. Yes, sir.

Q. By check? A. Yes, sir.

Q. You cashed the checks? A. Yes, sir.

10 Q. Did you submit yourself to Lieut. McCarthy, Lt. VanderHoven, Lt. Vreeland, or any of your superior officers at any time, since this alleged appointment? Yes or no. A. I submitted myself, yes, to Chief Zober, a little after taking the oath. I was starting on my vacation, so he told me to go ahead on my vacation. When I came back the new Director had taken office, and the Chief assigned me to the desk.

Q. As what? A. Desk Officer.

20 Q. Patrolman? A. Yes.

Q. You submitted yourself to Chief Zober? A. Yes, sir.

Q. When? A. Immediately after taking the oath, I come down to the Chief's office.

Q. When was that? A. On the 16th of May, 1927.

Q. For what purpose? A. I told him, I said, "I am Lieutenant of Detectives," asking to be assigned. He said, "Go on your vacation."

30 Q. Well, you received a check directly after that, didn't you? A. On the 30th.

Q. As a Patrolman? A. Last of the month, I did; yes, sir.

Q. Did you say anything to your Director or to your new superior officer, or to any superior officer, and state, "How is it, my check is only for a Patrolman's salary?" A. I mentioned it to the Chief, but I had seen my lawyer, and he told me it would be all right.

40 Q. Never mind what your lawyer told you. You

William Buckley, cross.

saw the Chief; you knew the Director was the head of the Department of Public Safety, did you not?

A. Yes.

Q. Did you go to see him? A. No, sir.

Q. Why not? A. I had read in the newspapers that he would not recognize any one of these appointments. 10

Q. You based it on what the newspapers had to say; is that it? A. Yes.

Q. Therefore, you did not present yourself; is that correct? A. Yes, sir.

Q. You are acting as a Patrolman now? A. Yes, sir.

Q. Drawing your salary as such? A. Yes, sir.

Q. How long did you act as a Desk Patrolman? A. About three or four months. You mean, after the new Director took office? 20

Q. Yes. A. A week, maybe six days.

Q. From what you read in the newspapers, you were advised, you said, that the Director of Public Safety refused to recognize these alleged appointments? A. Yes.

Q. Huh? A. Yes.

Q. He refused to recognize your title to office as a Lieutenant of Detectives? A. Yes, sir. 30

Q. Did you go to speak to him? A. No, sir.

Q. Why not? A. I didn't deem it advisable.

Q. You did not deem it advisable? A. No, sir.

Q. What do you want—your salary or the office? A. Both.

Q. Why didn't you go to see him? A. I asked Mr. George, and he said, it wasn't necessary.

Q. Mr. George, of Jersey City? A. Yes, sir.

Q. Assistant Prosecutor of Hudson County?

Mr. George: No, just "Mr. George of Jer- 40

Irving Evansky, direct.

sey City"; I am not drawing any salary out here.

Mr. Weinberger: That is all, Mr. Buckley.

Redirect examination by Mr. George:

10 Q. Mr. Buckley, I show you copy of a letter addressed to the Director of Public Safety, Mr. Turner, and ask you if you authorized me as your attorney, as well as Mr. Gross, as your attorney, to direct that letter to Commissioner Turner? A. Yes, sir.

Mr. George: That is offered in evidence. (Marked P-3 in evidence in *Turner v. City of Passaic.*)

20 Mr. George: That is all.

Recross examination by Mr. Weinberger:

Q. You have never performed the duties of a Lieutenant of Detectives from the date of your alleged appointment down to date? Am I right or wrong? A. No.

Q. In other words, you have not? A. I haven't.

30 Mr. Gross: We admit that. We want to perform them. That is just what we are suing for.

Q. Is that what you are suing for, you want to perform—

Mr. George: No one knows it any better than you.

40 IRVING EVANSKY, produced as a witness in his own behalf, having been first duly sworn, was examined by Mr. George, and testified as follows:

Q. You live in the City of Passaic? A. Yes, sir.

Irving Evansky, cross.

Q. And have for how long? A. Twenty-nine years.

Q. You have been a member of the Police Department of this City for how long? A. Close onto seven years.

Q. Were you promoted to the rank of Sergeant on May 16, 1927? A. Yes, sir. 10

Q. By Commissioner Preiskel, who was then Director of Public Safety? A. Yes, sir.

Q. What was your salary prior to that appointment? A. \$2,500.00 a year.

Q. Have you since that time been ready, willing and able to perform the duties of Sergeant of Police in the City of Passaic? A. I have.

Q. Have you received any difference in salary since May 16, 1927? A. No, sir. 20

Q. I show you copy of a letter and ask you if that is a copy of a letter authorized by you for your attorneys to direct to the Director of Public Safety? A. Yes, sir.

Mr. George: That is offered in evidence.

Mr. Weinberger: Same objection.

The Court: Same objection, same ruling, and an exception allowed.

Mr. George: Cross examine. 30

Cross examination by Mr. Weinberger:

Q. You never performed the duty of a Sergeant of Police from the date of this alleged certification of appointment? A. No, sir.

Q. Down to date, is that correct? A. Yes, sir.

Q. You received your salary in full as a Patrolman from the City of Passaic? A. Yes, sir.

Q. By check? A. By check.

Q. You cashed the checks? A. Yes, sir. 40

Irving Evansky, cross.

Q. Did you ever tender yourself to any of your superior officers, who were in charge, including Chief Zober? A. No, sir.

Q. Or to Commissioner Turner, from the date of your alleged appointment? A. No, sir.

10 Q. Why not? A. Because the newspapers said that the Commissioner would not recognize our promotion.

Q. Well, having read it in the newspapers, did you go to see the Commissioner? A. Through my lawyers.

Q. I didn't ask you that, Officer. Did you go to see the Commissioner? A. No, sir.

Q. You didn't think it necessary? A. No, sir.

20 Q. Who assigned you to the various posts in the Police Department? A. The Lieutenants.

Q. Did you go to see the Lieutenant? A. No, sir.

Q. You didn't think that was necessary? A. No, sir.

Q. Huh? A. No, sir.

Q. You have acted as a Patrolman, received a Patrolman's salary down to date? A. Yes, sir.

Q. You are a Traffic Officer? A. Yes, sir.

30 Q. And have been a member of the department how many years? A. Close to seven years; I don't know the exact date.

Q. Huh? A. I don't know the exact date; it is almost seven years.

Q. When were you appointed to the Police Force of the City, Officer? A. The 1st of this August will be seven years.

Q. You received salary in full, you said, as far as Patrolman's salary, down to date? A. Yes, sir.

40 Q. What you want is title; is that correct?

Irving Evansky, redirect-recross.

Mr. George: Just a minute. That is objected to. We are not trying title here.

The Court: The pleadings in the case speak for themselves.

Mr. Weinberger: I think I have a right on cross examination to ask this gentleman what he wants. 10

The Court: The court will allow the question.

Q. What you want is the title? A. Title and pay.

Q. You want the title and the pay? A. (No answer.)

Mr. Weinberger: That is all.

Redirect examination by Mr. George: 20

Q. As a good police officer, you take orders from your immediate superiors, do you not? A. Yes, sir.

Q. You have been seeing your superiors every day since the date of your appointment? A. Yes, sir.

Q. And were always ready and willing to take their orders coincident with Lieutenant or Sergeant, whatever your appointment was? A. Yes, sir. 30

Mr. George: That is all.

Recross examination by Mr. Weinberger:

Q. But you never asked them or spoke to them about it? A. That is all (indicating).

Q. Thought it was unnecessary on account of an article in the newspapers? A. Yes, sir.

Mr. Weinberger: That is all. 40

Albert G. Bednarz, direct.

By Mr. George:

Q. You did talk with your lawyers, of course, and authorized that letter to be sent? A. I did.

Mr. George: That is all.

10 *By Mr. Weinberger:*

Q. By your lawyers, you mean whom? A. Mr. George and firm of Gross and Gross, and Mr. Ranzenhofer.

Mr. Weinberger: I see.

20 ALBERT G. BEDNARZ, produced as a witness in his own behalf, having been first duly sworn, was examined by Mr. George, and testified as follows:

Q. You live in the City of Passaic, Sergeant Bednarz? A. Yes, sir.

Q. Have been a member of the Police Department in this city for how many years? A. Since August 1, 1916.

Q. Were you promoted to the rank of Sergeant in its Police Department on the 16th of May, 1927?

30 A. Yes, sir.

Mr. Weinberger: Of course, my objection is noted to all of this line of examination.

The Court: Same objection, same ruling, and exception.

Q. What was your salary prior to the date of that appointment? A. \$2,500.00 a year.

Q. Have you received any difference in your salary? A. No.

40 Q. From the date of your promotion in May, 1927? A. No.

Albert G. Bednarz, cross.

Q. Have you been ready, willing and able at all times to perform the duties coincident with the rank of Sergeant since the date of your appointment? A. Yes.

Q. How is that salary payable—monthly or bi-monthly or semi-monthly, or what? A. Semi-monthly. 10

Q. I show you a letter and ask you if that is a copy of a letter that you authorized your attorneys myself and Mr. Gross, to direct to the Director of Public Safety, Mr. Turner? A. Yes, sir.

Q. You were always ready to take orders from your superiors? A. Yes, sir.

Q. And to perform the duties of the rank of Sergeant? A. Yes, sir.

Mr. George: That is all. 20

Cross examination by Mr. Weinberger:

Q. You received your salary of Patrolman down to the date you brought this suit as a Policeman? You received your salary? A. Yes.

Q. By check and cashed the check? A. Yes, sir.

Q. Did you ever demand any more money from anybody,—Commissioner Turner, Lt. McCarthy, or anybody who is your superior? A. No. 30

Q. Huh? A. No.

Q. You performed only the duties of a Police Officer? A. Yes, sir.

Q. You were paid for that? A. Yes, sir.

Q. You never submitted yourself to any of your superior officers, did you? A. I did.

Q. What? A. I did.

Q. I haven't finished my question yet. (Continuing.) With reference to asking them, concerning this alleged promotion? A. I did. 40

Q. To whom? A. Chief Zober.

Albert G. Bednarz, cross.

Q. When? A. Right after I received that certificate of appointment.

Q. When was that? A. That was in May, the 17th.

10 Q. You knew Chief Zober was not the head of that department, didn't you? A. Well, he was my superior.

Q. So is every Sergeant your superior. A. Well, I went to the Chief.

Q. What for? A. I produced to him my certificate of appointment, and I asked him what further I shall do, and he says, "Wait until you are notified."

Q. "Wait until you are notified," and did you go to Commissioner Turner? A. No.

20 Q. Why not? A. I thought it better to wait for the Chief.

Q. You knew that the Director of Public Safety was the head of the department, didn't you? A. Yes.

Q. What? A. Yes.

Q. Did you ever go to him and tell him? A. No.

Q. Did you ever ask for any more salary? A. No.

30 Q. Did you ever ask anybody for any more salary? A. No.

Q. Why not? A. I was told to wait; I waited.

Q. Told you to wait for what? For your money? A. No, until I am told what to do, what I have got to do.

Q. That is why you waited; you are still waiting, are you? A. I am.

Q. Huh? What you want is your title to the job, is that it? A. Yes, sir.

40 Q. What title do you want? A. I am appointed for Sergeant.

Edward Belli, direct.

Q. You want the money too, I suppose? A. Yes, sir.

Q. Huh? A. Yes, sir.

Mr. Weinberger: That is all.

10

EDWARD BELLI, produced as a witness in his own behalf, having been first duly sworn, was examined by Mr. George, and testified as follows:

Q. Sergeant Belli, where do you live? A. 64 Bloom Street.

Q. How long have you lived in Passaic? A. About seventeen years.

Q. How long have you been a member of the Passaic Police Department? A. About six and one-half years. 20

Q. Were you promoted to the rank of Sergeant? A. Yes, sir.

Mr. Weinberger: Of course, my objection to the question, your Honor please, is noted?

The Court: Yes, and allowed and exception noted.

Q. When? A. On May the 16th, 1927. 30

Q. By Abram Preiskel, then Director of Public Safety? A. Yes, sir.

Q. What was your salary prior to the date of your appointment? A. \$2,500.00 a year.

Q. Have you received any other salary than that of a Policeman? A. I have not.

Q. Since the date of the appointment? A. I have not.

Q. Have you been always ready, willing and able to perform the duties of a Sergeant of Police 40

Edward Belli, cross.

in the City of Passaic since the date of your promotion in May, 1927? A. Yes, sir.

10 Q. I show you a copy of a letter which was directed to Benjamin F. Turner, Director of Public Safety of the City of Passaic, and ask you if you authorized Mr. Gross and myself, as your attorneys, to send that letter to Commissioner Turner? A. Yes, sir.

Mr. George: Offered in evidence.
(Marked P-3 in evidence in *Belli v. City of Passaic.*)

Mr. George: That is all.

Cross examination by Mr. Weinberger:

20 Q. You worked as a Police Officer, and were paid down to date for it; is that correct? A. Yes, sir.

Q. You have been a policeman for six and a half years? A. Yes, sir.

Q. Did you ever present yourself at any time to any of your superior officers or the Commissioner after you received this alleged certificate of appointment? A. I did.

Q. To whom? A. To Chief Zober.

30 Q. When? A. On May, the 17th.

Q. What for? A. I presented myself to Chief Zober as a Sergeant of Police, ready to perform my duties as such.

Q. Did you? A. I did.

Q. As a Sergeant of Police? A. I did.

Q. You performed your duties? A. I said, "I am ready to perform my duties."

Q. Oh, but you didn't perform the duties of a Sergeant of Police? A. I did not.

40 Q. You acted as patrolman and do act today even; is that correct? A. I do.

Edward Belli, cross.

Q. Now, what did Chief Zober say? A. He said, "Wait."

Q. Wait for what? A. Until you are assigned.

Q. Wait until you are assigned, by whom? A. By him.

Q. Well, did he say, "by me"? A. He said, "Wait until you are assigned." 10

Q. He didn't say by him, then? A. No, he did not.

Q. Wait until you are assigned; you are still waiting? A. I am.

Q. What you want is your title as a Sergeant, isn't that so? A. And my salary, too.

Mr. George: I object to what he wants. He is suing for money. 20

The Court: The court has allowed that question, and will continue to allow it.

Q. You never purchased a badge of any kind, as a Sergeant of Police? A. That is given.

Q. What did you have to buy? A. Nothing.

Q. Huh? A. Nothing.

Q. Did you ever demand it? A. I demanded it from Chief Zober.

Q. Demanded what? A. I demanded to go on duty as a Sergeant. 30

Q. Did you demand the badge? A. Well, that goes automatically.

Q. Did you demand it? A. I did not.

Q. Did you demand a raise in salary? A. I did not.

Q. You accepted the checks which you got as a patrolman? A. I did.

Q. You cashed the checks? A. I had to.

Q. Never asked anybody for the difference in pay? A. I did not. 40

Albert Hubbard, direct.

Q. Who is the boss of the entire department?

Mr. George: Objected to—

A. Department of Public Safety Commissioner.

Q. You knew that? A. I did.

10 Q. Why didn't you go to see him? A. We go to the chief.

Q. What? A. We go to the chief.

Mr. Weinberger: That is all.

ALBERT HUBBARD, produced as a witness in his own behalf, having been first duly sworn, was examined by Mr. George, and testified as follows:

20 Q. Mr. Hubbard, you live in the City of Passaic, and are connected with the Passaic Fire Department? A. Yes, sir.

Q. Have been for how long? A. Thirteen years.

Q. Were you promoted to the rank of Lieutenant of the Fire Department? A. Yes, sir.

Q. On May 16, 1927? A. Yes, sir.

Q. By whom? A. Commissioner Abram Preiskel.

Q. He was the then Director of Public Safety?

30 A. He was the then Director of Public Safety.

Q. What was your salary prior to that appointment? A. \$2,500.00.

Q. Have you received any difference in salary since that time? A. No, sir.

Q. Were you always ready, willing and able to perform the duties of Lieutenant of the Fire Department? A. Yes, sir.

40 Q. In the City of Passaic from the date of your appointment down to the present date? A. Yes, sir.

Albert Hubbard, cross.

Q. And are still ready, willing and able to do so? A. Yes, sir.

Q. Did you authorize Mr. Gross and myself as your attorneys to forward a letter, of which this is a copy, to the Director of Public Safety, Commissioner Turner? A. Yes, sir.

10

Mr. George: Offered in evidence.

(Marked P-3 in evidence in case of Hubbard v. City of Passaic.)

Mr. George: I think that is all.

Cross examination by Mr. Weinberger:

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

Q. You were paid down to date your salary as a fireman? A. Yes, sir.

20

Q. Is that correct? A. Yes, sir.

Q. You performed no duties in your alleged elevated capacity as a what? A. Lieutenant.

Q. Who is your superior in the Fire Department? A. Chief.

Q. Who is the head of the Fire Department or boss of the Fire Department? Who is the Director of Public Safety? A. Commissioner Turner.

Q. Did you ever submit yourself to him? A. No, sir.

30

Q. Why not? A. Because I had read statements in the papers whereby he refused to recognize us.

Q. Having read those statements in the paper, nevertheless, you did not go near him, did you? A. No, sir.

Q. Huh? A. No, sir.

Q. Why not? Was there any ill-feeling in the department?

40

Albert Hubbard, cross.

Mr. George: That is objected to as immaterial.

Mr. Weinberger: I have a right to show the motive, why this man did not go.

10 Mr. George: That is objected to, whether there was any ill-feeling. There is always feeling in any department.

Mr. Weinberger: I will withdraw it.

Q. You never presented yourself to any of your superior officers and demanded recognition as a Lieutenant, did you? A. I did.

Q. To whom? A. To Lieut. Greeley.

Q. Lieut. Greeley; what is the first name? A. Joseph.

20 Q. When was that? A. Around May 30th or 31st, I am not sure of the exact date; I gave it to him in writing on a report.

Q. You gave what to him in writing? A. On a theatre report.

Q. Gave what to him in writing? A. The title, my title, asking him to make myself a Lieutenant.

30 Q. Yes? A. The card was brought up to headquarters and returned back to me, and I met the Chief, and he told me that he hadn't got any word from City Hall, to change that card to Fireman, which I did.

Q. So they refused to recognize your title? A. Yes.

Q. Or your office there; is that right? A. Yes.

Q. You told them? A. Yes.

Q. You accepted your salary by check and cashed it? A. Yes, sir.

40 Q. Did you ever speak to Commissioner Turner to demand that he assign you as a Lieutenant? A. No, sir.

Albert Hubbard, redirect.

Q. Did you ever speak to Chief Bowker? A. No, sir; not after that card was changed; that is all.

Q. Well, you did not present the card to Chief Bowker? A. I did so, and asked whether I had to make other cards out.

10

Q. This was on May 30th? A. Around May 30th or 31st.

Q. You have acted as a Fireman from the date of your alleged appointment down to date and have been paid for it? A. Yes, sir.

Q. You have not acted as a Lieutenant, have you? A. Not from the date of appointment.

Mr. Weinberger: That is all.

Redirect examination by Mr. George:

20

Q. You came in contact with your superiors daily, do you not? A. Yes, sir.

Q. And were you always ready to accept orders to perform the duties connected with the office of Lieutenant of the Fire Department? A. Yes, sir.

Q. And you have not received any orders? A. No.

Q. Whatever orders you have received, you have obeyed? A. Yes, sir.

30

Mr. George: That is all.

By Mr. Weinberger:

Q. You haven't instituted any mandamus proceedings to have them compelled to put your name on the payroll as a Lieutenant?

Mr. George: Objected to.

The Court: Objection sustained.

Mr. Weinberger: Exception.

The Court: Exception will be allowed.

40

Mr. George: That is all.

Joseph Gallagher, direct.

JOSEPH GALLAGHER, produced as a witness in his own behalf, having been first duly sworn, was examined by Mr. George, and testified as follows:

10 Q. Mr. Gallagher, you have lived in the City of Passaic for how long? A. Twenty-three years.

Q. And have been a member of the Fire Department in this City for how long? A. August 5, 1916.

Q. Were you appointed to a superior rank in the Fire Department? A. Yes.

Q. On May 16, 1927? A. Yes, sir.

Q. By the then Director of Public Safety, Abram Preiskel? A. Abram Preiskel.

Q. To the rank of Lieutenant? A. Lieutenant.

20 Q. What was your salary prior to the date of your promotion? A. \$2,500.00 a year.

Mr. Weinberger: Of course, I object.

The Court: The same objection will carry through all of this testimony.

Q. Have you received any difference in salary since the date of your promotion? A. No, sir.

30 Q. Have you always been ready, willing and able to perform the duties of Lieutenant of the Fire Department of the City of Passaic? A. Yes, sir.

Q. I ask you to look at this copy of a letter, and ask you if you directed the original, or authorized us as your attorneys, Mr. Gross and myself, to forward a letter of which that is a copy to the Director of Public Safety? A. Yes, sir.

Mr. George: Offered in evidence—

(Marked P-3 in evidence in case of Gallagher v. City of Passaic.)

40 Mr. George: —and that is all.

*Joseph Gallagher, cross.**Cross examination by Mr. Weinberger:*

Q. You have acted as a Sergeant and been paid as a Sergeant from the date of your alleged appointment down to date; is that correct? A. No, sir; I have not been presented with orders.

10

Q. And he made you what, a Captain?

Mr. George: No, Lieutenant.

A. No, Lieutenant.

Q. What is your alleged promotion to be? A. How far up?

Q. Yes. A. Lieutenant.

Q. What were you before that? Plain fireman? A. Plain fireman.

Q. Oh, you have been paid as a fireman from the date of your alleged appointment as a Lieutenant, down to date; is that correct? A. Yes, sir.

20

Q. By check? A. Yes, sir.

Q. You cashed the checks? A. Yes, sir.

Q. Did you ever complain to anybody, asking for more money? A. I made a report to my Captain of the Company.

Q. I asked you, did you complain, ask for more money? A. No.

Q. To Commissioner Turner, Chief Bowker, or to any City official in power? A. No, sir.

30

Q. You have performed the duties of a fireman only; is that correct? A. To now; yes, sir.

Q. And have since this alleged certification and appointment? A. Yes, sir.

Q. What you want to get is the title to the office, too? A. Yes, sir; and the money, too.

Q. You want the title to office and the money, too. Have you instituted mandamus proceedings?

A. No.

40

Joseph Gallagher, et cetera.

Mr. Gross: I object to that.

The Court: He said, "No" before the objection.

10 Q. Have you instituted any other proceedings, demanding that the Commissioner of Public Safety or the persons in power to appoint you to the office which you are seeking?

Mr. George: That is objected to.

Mr. Gross: We object to that. We charge we have been appointed. We do not need an appointment when we have an appointment already.

The Court: The Court will sustain the objection and allow an exception.

20 Mr. Weinberger: Allow me an exception.

Q. Did you ever tender yourself to Commissioner Turner— A. No, sir.

Q. —telling him that you desired to be assigned as a Lieutenant of the Fire Department? A. No, sir.

Q. Did you ever tender yourself to anybody? A. Yes, sir.

30 Q. Who is your superior? A. To my captain of the company I belong to.

Q. Captain who? A. Capt. Cunningham or Campbell—used to be Cunningham.

Q. Who? A. James A. Campbell.

Q. You know he had no right to assign you? A. As my senior, he is my boss.

Q. You know he had no right to assign you or to give you your orders? A. The orders is if you want orders to see your boss, supposed to go up through the proper channels.

40 Q. To go up to whom? A. To the Chief and wherever it goes from there.

Joseph Gallagher, cross.

Q. Where does it go from the Chief? I do not know. A. That is up to the Chief; I do not know.

Q. You do not know who the head of the Department is? A. Chief Bowker.

Q. Commissioner Turner is what? A. Commissioner of Public Safety. 10

Q. He is not the head of the Department, according to you? A. No, I do not mean it in that light.

Q. What do you mean? A. You asked me, did I report to anybody; I said, to my Captain, yes, as a Lieutenant.

Q. You asked what? A. I told him I was a Lieutenant and he congratulated me.

Q. He congratulated you as a Lieutenant. Was that all that happened? A. That is all that happened. 20

Q. He congratulated you? A. Yes.

Q. Well, when you saw you did not get your checks as Lieutenant, did you see anybody? A. No.

Q. In power? A. No.

Q. Why not? You had the Captain's congratulations, you said. A. Yes, sir; that is all I got.

Q. That is all you got outside of your salary as a Fireman, you mean? A. Yes, sir. 30

Q. Are you on the waiting list, too?

Mr. George: Just a minute; I object; I do not know what Mr. Weinberger means by "waiting list." I am on several now.

Mr. Weinberger: I am, too.

Q. Mr. Gallagher, did you ever institute mandamus proceedings—

Mr. George: Objected to as immaterial. 40
The Court: Objection sustained.

Martin J. Farrell, direct.

Mr. Weinberger: Your Honor, allow me an exception.

The Court: Exception will be allowed.

10 Q. Did you ever institute any other proceedings outside of this suit against the City in the District Court to compel the City officials to put your name on the payroll as a Lieutenant of the Fire Department?

Mr. Gross: Objected to.

The Court: Objection sustained.

Mr. Weinberger: Your Honor, allow me an exception.

The Court: Exception allowed.

Mr. Weinberger: That is all.

20

MARTIN J. FARRELL, produced as a witness in his own behalf, having been first duly sworn, was examined by Mr. George, and testified as follows:

Q. Mr. Farrell, you live in Passaic? A. Yes, sir.

Q. How many years have you lived here? A. Thirty-eight years.

30 Q. How long have you been a member of the Fire Department? A. June 30, 1913.

Q. You were promoted to the rank of Lieutenant on May 16, 1927? A. Yes, sir.

Q. By Abram Preiskel, then Director of Public Safety of this City? A. Yes, sir.

Q. What was your salary prior to that? A. \$2,500.00 a year.

Q. Have you received any difference in salary since that time? A. No, sir.

40 Q. Have you always been ready, willing and able and are you still ready, willing and able, to per-

Martin J. Farrell, cross.

form the duties of a Lieutenant of the Fire Department of this City? A. Yes, sir.

Q. I show you a copy of a letter addressed to Benjamin F. Turner, Director of Public Safety, and ask you if you authorized the original of that letter—

10

Mr. Weinberger: Of course, my objection to the same line, your Honor please.

The Court: The court will instruct the stenographer, just as heretofore, on all of the other cases, that the same objection applies to this testimony, and the court rules the same way, and exception allowed in each instance.

A. Yes, sir.

20

Q. You authorized the original of that letter to be sent by Mr. Gross and myself as your attorneys to Commissioner Turner? A. Yes, sir.

Mr. George: Offered in evidence.
(Marked P-3 in evidence in case of *Farrell v. City of Passaic.*)

Mr. George: That is all.

Cross examination by Mr. Weinberger:

30

Q. You were by this alleged certificate of appointment to receive what title? A. Lieutenant of the Fire Department.

Q. How long have you been on the Fire Department? A. Since June 30, 1913.

Q. You received your salary in full as a Fireman down to the institution of this suit? A. Yes, sir.

Q. You never acted as a Lieutenant of the Fire Department, performing the services as a Lieuten-

40

Martin J. Farrell, cross.

ant of the Fire Department, from the time of your alleged appointment; is that correct? A. Yes, sir.

Q. Did you ever present yourself to Commissioner Turner? A. No, sir.

10 Q. Demanding to know why he would not recognize you? A. No, sir.

Q. Or your appointment? A. No, sir.

Q. Why not? A. The papers stated that he would not recognize it.

Q. What papers was this? A. Passaic papers.

Q. Passaic papers? A. Passaic News.

The Court: Daily or Sunday papers.

The Witness: Daily—

20 Q. Both papers? A. Both.

Mr. George: I cannot get the significance of that, if your Honor please.

The Court: For your information, Mr. George, the only Democratic paper is a Sunday paper.

Q. Now, Mr. Farrell, you never presented yourself to any of your superior officers, did you? A. No, sir.

30 Q. When you received your checks as a Fireman, you never demanded from anybody the difference between a Fireman's salary and a Lieutenant's salary? A. No.

Q. By the way, there is a difference, is there not? A. There is a difference.

Mr. Weinberger: That is all.

By Mr. Weinberger:

40 Q. Just one more question. Did you ever institute mandamus proceedings?

Mr. George: Object—

Cornelius Miller, direct.

Q. (Continuing.) Or any proceedings with reference to compelling the City of Passaic to put your name on the payroll in your alleged appointed capacity?

Mr. George: Objected to.

The Court: Objection sustained and exception allowed.

Mr. Weinberger: Allow me an exception.

10

CORNELIUS MILLER, produced as a witness in his own behalf, having been first duly sworn, was examined by Mr. George, and testified as follows:

Q. Mr. Miller, you live in the City of Passaic?

A. Forty-three years, born here, 1885.

20

Q. That dispenses with the necessity of asking you one or two other questions. You are a member of the Fire Department and have been for how long? A. Since July 1, 1916.

Q. Were you promoted to the rank of Lieutenant in the month of May, 1927? A. I was.

Q. What date in May? A. I think it was on the morning of the 16th; on the 17th we got sworn in by Mr. Bolton, he swore me in, the City Clerk.

Q. What was your salary prior to the date of promotion? A. \$2,500.00 a year, payable twice a month.

30

Q. Beg pardon? A. Payable twice a month.

Q. Have you received any difference in salary from the date of your appointment? A. I have not.

Q. Have you ever since your promotion been ready, willing and able to perform the duties of Lieutenant of the Fire Department in this City?

A. Always have, and up until the date of promotion I have acted.

40

Cornelius Miller, cross.

Q. You mean, even prior to the date of promotion? A. I acted, before the promotion.

Q. So that you were quite familiar with the duties, if called upon to perform them? A. Yes, sir.

10 Q. I show you a copy of a letter addressed to Benjamin F. Turner, Director of Public Safety, and ask you if you authorized Mr. Gross and myself as your attorneys to forward the original of that letter to him? A. I did.

Mr. George: I offer it in evidence and that is all.

(Marked P-3 in evidence in case of *Miller v. City of Passaic.*)

Cross examination by Mr. Weinberger:

20 Q. You received an alleged promotion from Fireman to what? A. Lieutenant.

Q. How long have you been on the Fire force? A. July 1st I will be on twelve years.

Q. Well, now, you received your salary in full down to date as a Fireman? A. Yes, sir.

Q. By check and cashed the checks? A. Yes, sir.

30 Q. Did you ever complain to Commissioner Turner or anybody, demanding the difference in salary? A. I did not.

Q. There is a difference in the salary? A. Yes, sir; around \$400.00 a year.

Q. Well, now, did you ever institute mandamus proceedings or any other proceedings before you instituted this suit to compel the City to put your name on the payroll, or the officials to put your name on the payroll, as a Lieutenant of the Fire Department?

40 Mr. George: That is objected to.

Cornelius Miller, cross.

The Court: Objection sustained; exception allowed.

Mr. Weinberger: Allow me an exception.

Q. Did you ever submit yourself to Commissioner Turner at any time, demanding that he recognize your promotion? A. No, sir. 10

Q. Did you ever submit yourself to anybody? A. To my Captain, who is still over the Lieutenant.

Q. Who is that Captain? A. Capt. Fitzgerald.

Q. You knew he had no right to make a promotion, didn't you? A. For anything, you mean?

Q. I say, you knew he had no right to make a promotion, didn't you? A. Oh, I knew he had no right to make a promotion, I knew that; but he receives all orders from Headquarters and he, in turn, issues them to where they are supposed to be issued. 20

Q. He receives orders from whom? A. From Headquarters.

Q. Huh? A. From Headquarters.

Q. Who is Headquarters? A. Chief Bowker.

Q. Who is Chief Bowker, who is he under? A. He is under Commissioner Turner.

Q. He is in the hospital now, isn't he? A. I do not know where he is. 30

Q. Huh? A. I do not know where he is; I read he was, in the paper, there, but I didn't see him there.

Q. Now, you never have acted as a Lieutenant? A. I did act as a Lieutenant.

Q. I mean, since the date of your alleged promotion? A. No, sir; I have not.

Q. You want us to understand that you were directed to act as a Lieutenant since the date of this appointment? A. Not since the date of this, al- 40

Cornelius Miller, cross.

though I have had orders, the same as I have had, to pick up and go back to quarters; I didn't know whether they was recognizing me then or not.

Q. Issued to go back to what? A. To pick up and go back to quarters.

10 Q. What does that mean? A. That means, when you are at a fire, when you get the orders from the acting Chief, to go back to quarters, you get whatever is on the ground, all ladders that are around, and so on, and pick up to go, and go to quarters.

Q. You mean to say you got orders to do some work, and you did it, as a Fireman? A. That is what I done; I done as I was told.

20 Q. You do not mean that you were acting as a Lieutenant since the date of this alleged appointment? A. As a rule—

Q. Since the date of this alleged appointment? A. I understand you.

Q. Am I right or wrong? A. I understand you.

Q. You did not act, Mr. Miller? Is that correct, Mr. Miller? A. I did not act.

30 Q. Have you instituted any character of proceedings of any kind, to compel the Commissioners or the Officials of the City of Passaic, to put your name on the payroll, or to recognize your title to office?

Mr. Gross: That is objected to.

Q. (Continuing.) Excepting this suit just now?

Mr. Gross: He is now instituting in this court, before your Honor, a suit to compel the city of Passaic to pay him what is due him under that promotion.

40 Mr. Weinberger: Which I think is premature.

The Court: Objection sustained.

John Noonan, direct.

Mr. Weinberger: Your Honor, allow me an exception.

The Court: Exception allowed.

Mr. Weinberger: That is all.

10

JOHN NOONAN, produced as a witness in his own behalf, having been first duly sworn, was examined by Mr. George, and testified as follows:

Q. Mr. Noonan, you live in the City of Passaic?
A. Yes, sir.

Q. For how long? A. Born in the City of Passaic.

Q. How long have you been a member of the Passaic Police Department? A. It was the sixteenth year last August.

20

Q. Were you promoted—to the rank of what?
A. Sergeant.

Q. Sergeant, on May 16, 1927? A. Yes, sir.

Q. By Abram Preiskel, then Director of Public Safety? A. Yes, sir.

Mr. Weinberger: My object—

The Court: It is the same, carries all through, and exception allowed.

30

Q. What was your rank before your promotion?
A. Traffic Officer.

Q. As a ranking Patrolman? A. Patrolman.

Q. Your salary was what prior to your promotion? A. \$2,500.00 a year.

Q. Have you received any difference in salary since the date of your promotion in May, 1927? A. No, sir.

Q. Have you, ever since the date of your promotion in May, 1927, been ready, willing and able

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John Noonan, cross.

to perform the duties of Sergeant of Police in the City of Passaic? A. Yes, sir.

10 Q. I show you a copy of a letter addressed to Director Turner, and ask you if you authorized me as your attorney, and Mr. Gross as your attorney, to forward that letter to Mr. Turner? A. Yes, sir.

Mr. George: That is offered in evidence. (Marked P-3 in evidence in case of Noonan v. City of Passaic.)

Mr. George: Cross examine.

Cross examination by Mr. Weinberger:

20 Q. You acted as a patrolman, for which you received your salary, down to the date, of this suit? Is that correct? A. Yes, sir.

Q. You never performed the duties of that office for which you alleged you received this alleged certificate of appointment, did you? A. No, sir.

Q. Did you ever submit yourself to Commissioner Turner? A. No, sir.

Q. Or to any of your superior officers demanding that you be assigned? A. No, sir.

30 Q. Or recognized? What you want is your title to office, is it? A. Yes, sir.

Mr. Gross: I object to that, your Honor please, as to what he desires. This is a suit for salary.

The Court: The court has allowed the question.

Q. You also want higher pay? A. Yes, sir.

40 Q. The difference in pay between your alleged appointment and your office as patrolman; is that correct? A. Yes, sir.

Defendant's Motion for Nonsuit.

Q. You never demanded this salary from anybody, did you? A. No, sir.

Q. Or the difference in salary? A. (No answer.)

Q. Did you ever institute mandamus proceedings of any kind or character—

Mr. Gross: I object.

10

Q. (Continuing)—or any other kind of proceeding to put your name on the payroll as a sergeant?

Mr. Gross: Objected to.

The Court: Objection sustained, and exception allowed.

Q. You cashed the checks which you got from the city? A. Yes, sir.

Mr. Weinberger: That is all.

20

Mr. George: Now, if your Honor please, your Honor probably notices that there has been no proof by these various parties as to the amount actually due. Your Honor will observe that there is in evidence the salary that they have been receiving.

The Court: Just the difference in salary, which is a mere matter of calculation.

Mr. George: Yes, sir. With that statement, we rest.

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THE PLAINTIFFS REST.

DEFENDANT'S MOTION FOR NON-SUIT.

Mr. Weinberger: I ask for a non-suit—I do not think we ought to be embarrassed—we are trying all of these cases at once, I take it, as, at the outset, I said, I would like to dispose of all of these cases, in which no proof has been presented.

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Defendant's Motion for Nonsuit.

The Court: I see no objection.

Mr. Weinberger: I would ask for a nonsuit; as far as I am concerned, it is out of the docket.

Mr. George: We have no objection to the nonsuit.

10 The Court: It is just the case of Thomas McCann.

Mr. George: Yes, we have tried ten out of the eleven.

The Court: In the case of Thomas McCann *v.* the City of Passaic, a non-suit will be allowed.

Mr. Weinberger: Now, your Honor please, I move for a non-suit on the grounds,—

20 First, that the testimony conclusively shows that this is a suit concerning salary, indirectly affecting a question relating to title to office, and I think your Honor will agree with me, that there has been an issue raised in this case, that this title to office has been refused to be recognized, and before they can institute a suit for salary they must establish their right to title to office by a proceeding instituted before they institute this suit. (Citing .) So I say to you, we are entitled to a non-suit in this case, because
30 it is a case involving a question of title to office, and they have got to, first, establish that right in a court of competent jurisdiction.

Secondly, they are not *de facto* officers or *de jure* either, because their title to office is questioned. They admit they have not served.

And, third, your Honor please, there has been no assignment admittedly since the organization meeting of 1923,—that is the testimony in the case
40 —assigning the powers, and I say the Walsh act—

Defendant's Motion for Nonsuit.

I will show your Honor the case that says that before that was amended the whole Board had to try them,—and if the whole Board had to try a man or appoint men or confirm a man, then I say, as a matter of law, that Preiskel, who was then the Police Commissioner, had no right to make any appointment any more than any one of the Commissioners. And I differentiate the case of *Heinzman v. Sykes*; that was a *quo warranto* proceeding, question of title to office, I am not sure of it, but I do not think your Honor please, that that point was raised, whether there was a distribution of the powers; and I make a distinction between the assignment of powers and electing a commissioner to the Office of Director of Public Safety, and I therefore say—and, furthermore, your Honor please, I think this is a very important point, on the ground of public policy, that there should be a non-suit for this reason. Here was a whole list of promotions, nineteen, I think, in number, which might be equivalent to the entire number of the police force, and if that can happen in the last moments of a man's term in office, I say that I do not think the courts would go so far as to recognize the validity or the alleged validity of an appointment of that kind, made of that character. There is no proof that these men were deserving of the appointments. I did not go into that. But I think on the ground of public policy, first, and second, on the ground that the powers have never been assigned to the proper commissioners, and therefore he was without power,—and it is admitted that the appointments were not confirmed; and, thirdly, that on the ground on a question of title to office, this court is without jurisdiction; and, fourthly, on the ground that they

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Arthur D. Bolton, direct.

have not performed the duties to which they are alleged to have been appointed, and therefore we are entitled to a non-suit.

10 The Court (after extended argument by counsel): The motion for non-suit will be denied, and an exception will be allowed.

Mr. Weinberger: Your Honor, allow me an exception.

The Court: Yes; we will now take a recess until 2:15.

(Noon Recess.)

January 13, 1928; 2:15 P. M.

DEFENDANT'S CASE.

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ARTHUR D. BOLTON, produced as a witness on behalf of the defendant, having been previously sworn, was examined by Mr. Weinberger, and testified as follows:

Q. Mr. Bolton, you were City Clerk, City of Passaic, in May of 1923? A. Yes.

Q. Can you fix the date when the Board of Commissioners of the City of Passaic organized in 1923?

30 A. On the 15th of May, at twelve o'clock.

Q. Of what year? A. 1923.

Q. Was or was not there resolution or resolutions introduced, distributing the powers to the various members of the Board of Commissioners?

Mr. Gross: I object to that as calling for a conclusion.

Q. Have you the record?

Mr. Weinberger: Withdraw it.

40

Mr. Gross: Introduce the records.

Arthur D. Bolton, direct.

Q. Have you the records here, the official records of the City of Passaic, showing the organization meeting in May, 1923? A. I have.

Q. Will you just turn to it, please? By the way, you are the custodian of records, and keep them?
A. Yes.

10

Q. They are made under your supervision, are they? A. They are.

Q. These records? A. They are.

Q. Will you turn to the organization meeting of May 15, 1923? A. (Witness does as directed.)

Q. Have you got it, Mr. Bolton? A. I have.

Q. Just read what it says. You have the official minutes of the first organization meeting in May 1923? A. May 15, 1923. (Reading.) "First meeting of the Board of Commissioners of the City of Passaic, who were elected at a Special Municipal Election, held Tuesday, May 8, 1923, was held at the City Hall on Tuesday, May 15, 1923, at twelve o'clock, noon. The City Clerk called the meeting to order. On call of roll, the following Commissioners responded: McGuire, Preiskel, Pettersen, Regner and Johnson, 5."

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"Commissioner Johnson moved that John H. McGuire be nominated as Mayor. There being no other nominations made,

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Commissioner McGuire was elected Mayor by the following vote: Yeas, 4, Johnson, Pettersen, Regner, Preiskel; excused, 1, McGuire."

"On Motion of Commissioner Preiskel, John J. Regner was nominated and elected as General Director of Revenue and Finance, on call of roll; yeas, 4, Johnson, Petterson, Preiskel and McGuire; excused 1, Regner."

"On motion of Commissioner Regner, Abram Preiskel was nominated and elected as Director of

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Arthur D. Bolton, direct.

Public Safety; on call of roll; yeas, 4, Johnson, Petterson, Regner, McGuire; excused, 1, Preiskel."

10 "On motion of Commissioner Preiskel, Anton L. Pettersen was nominated and elected as Director of Streets and Public Improvements, on call of roll; yeas, 4, Johnson, Pettersen, Preiskel, McGuire; excused, 1, Pettersen."

"On motion of Commissioner Pettersen, John R. Johnson was nominated and elected as Director of Parks and Public Property, on call of roll; yeas, 4, Pettersen, Preiskel, Regner, McGuire; excused, 1, Johnson."

"The Commission then adjourned."

20 Q. Now, do the official minutes of the City of Passaic, kept by you, show that at any time subsequent to the organization meeting, that resolutions or ordinances of any kind or character were introduced assigning and distributing the powers to the various Commissioners in charge of the various departments? A. No.

Q. When did the term of those Commissioners who were sworn in at the meeting of May 15, 1923, expire? A. On the 17th of May, 1927, at twelve o'clock, noon.

30 Q. When was the Commission Government Election held for May, 1927? A. May the 10th.

Q. The Commissioners held over until May the 17th, noon, at twelve o'clock, when their terms officially expired? A. Yes.

Q. Then they were administered with new oaths and assumed their new duties; is that correct? At noon, on the 17th of May? A. Correct; on the 17th.

40 Q. Was there, at that time, resolutions introduced distributing the powers—

Arthur D. Bolton, direct.

Mr. Gross: I object to that on the ground—

The Court: Objection sustained, immaterial to this issue.

Mr. Weinberger: Your Honor, allow me an exception, because of the fact that on May 17th some of these appointments were made. 10

The Court: The record discloses they were all made on the 16th, Mr. Weinberger.

Mr. Weinberger: I will qualify that. I want an exception, your Honor please.

The Court: You may have it.

Q. You have, have you not, the letters of Commissioner Preiskel, addressed to you, concerning the alleged appointments or elevations and promotions of various men? A. Yes. 20

Q. Now, will you tell us—just take them out, if you will, please. Will you tell us the time, in each instance, of those which you have, when they were received by you, and the contents of the message to you?

Mr. George: Of course, the time that it was received by him would be objectionable. The question is: When were the appointments made? 30

The Court: Why, wouldn't the time that they were sworn in be the most official time?

Mr. George: Exactly.

Mr. Weinberger: I might say this, Judge, they may be dated on one day, but if they are not received by some particular person at a time fixed, I think that, for the purpose of the record, we must know when 40

Arthur D. Bolton, direct.

those alleged appointments were supposed to have been made.

10 The Court: Before a man can be sworn into office, he must present his certificate of appointment to the City Clerk; isn't that correct?

Mr. Weinberger: No, I am not basing it on that. All Mr. Bolton has, from what I can learn, a letter was addressed to him, to Mr. Arthur D. Bolton, wherein Commissioner Preiskel, Director of Public Safety, says, "I hereby appoint such-and-such person to the position of Lieutenant of the Police Department. Kindly—"

20 The Court: Wouldn't he have those letters prior to the swearing in of the person named in the letter?

Mr. Weinberger: Yes, when he received them officially in the City Hall, and any letter that goes there, they put on a stamp of the hour and the day when it is received by them.

30 The Court: I do not see where there would be any objection, since it shows prior to the time of the taking of the oath.

Mr. Weinberger: Oh, it is prior.

The Court: The court will allow it.

Q. Just read that, Mr. Bolton. A. May 16, 1927.

Q. Whose appointment was that alleged appointment? A. This is Patrick Fitzpatrick.

40 Q. All right. A. (Reading.) "Mr. Arthur D. Bolton, City Clerk, Passaic, New Jersey. Dear Sir: Please be advised that I have this date promoted Patrick Fitzpatrick from Sergeant of Police to Captain of Police, to take effect immediately as of above date. Yours very truly. Abram

Arthur D. Bolton, direct.

Preiskel, Director of Public Safety." This letter is dated May 16, 1927.

Q. Received when? A. And was received in the City Clerk's Office on May 16, 1927, at about 3:15 P. M.

Q. Was that alleged appointment ever acted upon or confirmed by the Board of Commissioners of the City of Passaic? A. No. 10

Q. In other words, there was no confirmation; is that correct? A. Right.

Q. By the Board of Commissioners? A. Right.

Q. Now, read the next one.

Mr. Gross: I take it that these are similar.

Mr. Weinberger: They are not. 20

Mr. Gross: All right.

A. This is dated May 16, 1927. (Reading.) "Mr. Arthur D. Bolton, City Clerk,—"

Q. What is the date of that, Mr. Bolton? A. May 16, 1927. (Continuing.) "Mr. Arthur D. Bolton, City Clerk, Passaic, New Jersey. Dear Sir: Please be advised that I have this date promoted Edward Belli from Police Officer to Sergeant of Police to take effect immediately as of above date." Received in the Office of the City Clerk on May 17th at five minutes after ten, A. M. Next one? 30

Q. Yes. Do you know how it was brought to the City Clerk, whether it was by mail or personally by the officer, if you recall, Mr. Bolton? A. I do not, Mr. Weinberger.

Q. All right; go ahead. A. (Reading.) "May 16, 1927. Mr. Arthur D. Bolton, City Clerk, Passaic, New Jersey. Dear Sir: Please be advised that I have this date promoted Albert Hubbard from Fireman to Lieutenant of Fire Department, 40

Arthur D. Bolton, direct.

to take effect immediately, as of above date. Yours very truly. Abram Preiskel, Director of Public Safety." Received in the Office of the City Clerk on May 16, 1927, at 3:15 P. M.

10 Q. Each one of these you are reading, was there ever any one of them confirmed by the Board of Commissioners? A. No. Shall I proceed with all of them?

Q. Yes. A. (Reading.) "May 16, 1927, Mr. Arthur D. Bolton, City Clerk, Passaic, New Jersey. Dear Sir: Please be advised that I have this day promoted Officer Irving Evansky to Police Sergeant, to take effect immediately, as of above date. Yours very truly. Abram Preiskel, Director of Public Safety." Received in the office of the City Clerk May 16th at 3:15 P. M.

20 "May 16, 1927. Mr. Arthur D. Bolton, City Clerk, Passaic, New Jersey. Dear Sir: Please be advised that I have this day promoted Martin Farrell from Fireman to Lieutenant in the Fire Department, to take effect immediately as of above date. Yours very truly. Abram Preiskel, Director of Public Safety."

30 Q. Was that—what is the date of that? Go ahead.

Mr. Gross: All the 16th, Mr. Weinberger.

Q. I think you read one the 17th.

Mr. Gross: All the 16th; one was received on the 17th.

A. They are all dated the 16th.

Q. None of these appointments were confirmed by the Board of Commissioners? A. No.

40 Q. No resolution introduced to confirm them?
A. No.

Arthur D. Bolton, direct.

Q. All that you know about it is that you received the letter which you read in the particular instance, is that correct? A. Yes, sir.

Q. How many letters did you receive in all? A. In all, in the neighborhood, around twenty.

Q. Twenty? A. Maybe nineteen, twenty-one or twenty-two. 10

Q. Now, Mr. Bolton, when was the last meeting held of the Board of Commissioners before the 17th of May, noon, 1927? A. (Examining minutes.)

Q. Was it the day before? A. The meeting previous to the organization of the Board of Commissioners was May, 1927—the meeting previous to that was held on the 10th of May, 1927.

Q. Was that the date of the election? A. That was the date of the election. 20

Q. Did they or did they not have any special meeting before the 17th of May, 1927? A. They did not.

Q. The last official meeting was the 10th of May, Mr. Bolton? A. Right.

Q. According to your records? A. Right.

Mr. Weinberger: I do not think it necessary nor do I think Mr. Gross wants me to offer the entire record. I think I have read enough into the record, and I do not want to burden the record with a lot of City minutes. 30

Mr. Gross: That is all right.

The Court: I do not know whether those letters were offered or not, Mr. Weinberger.

Mr. Weinberger: I think Mr. Gross got them in in his case, but I wanted to show the time of their receipt. 40

Arthur D. Bolton, direct.

Mr. George: These are the original letters which were received by the City Clerk, which we intended to put in, which they have just presented here.

10 Q. Mr. Bolton, upon receipt of these letters which you read, you issued what is called a certificate of appointment? A. I did.

Q. Who asked you to do that? A. These different firemen and policemen.

Q. The policemen and the firemen did? A. They came up and were willing to be sworn in, and there was nothing else for me to do but to swear them in.

20 Q. Subsequently there was never any official action taken by the Board of Commissioners down to this very date, on these very letters which you have received? A. No.

Q. When did Commissioner Turner take office? 17th of May at noon, of 1927? A. Yes.

Q. He was sworn in, and he is your Director of Public Safety today? A. He is.

Q. You testified that there were resolutions distributing the powers at the first organization meeting; is that correct?

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Mr. Gross: No, we object to that.

Q. (Continuing.) In 1927?

The Court: That was ruled out as immaterial and exception allowed.

Mr. Weinberger: May I ask my question so that the record may be straight?

(Question repeated by stenographer.)

40 Mr. Weinberger: I ask an exception. That is all.

Arthur D. Bolton, cross.

Cross examination by Mr. George:

Q. Mr. Bolton, these letters which you received from Commissioner Preiskel, was it in pursuance of those letters, and the presentment before you of the recipients of those promotions that you administered the oath? A. Yes. 10

Q. In regular form? A. In regular form.

Q. As was done in the case of every other appointment theretofore made?

Mr. Weinberger: Just a minute. That is objected to on the ground that you cannot compare any other with these, which I say were done irregularly.

Mr. George: He is the City Clerk, and he administered the oath. He knows whether or not he did the right thing or did not do the right thing. 20

Mr. Weinberger: May I have my objection noted, that whatever he did was not binding in this particular matter, that he might have done a lot of other things pursuant to someone else's advice?

Mr. George: Then we want to find out whether he acted irregularly in this case.

Mr. Weinberger: I do not think you can do it in that manner. 30

The Court: The Court will sustain that objection. The Court will allow the question, though, to the nature of this effect, that is, "Was it done in the usual course of business of the City Clerk's Office?"

Mr. George: Which is just the substance of what I wanted to ask.

Mr. Weinberger: May I have my exception noted to that question? 40

The Court: You may have an exception.

Arthur D. Bolton, cross.

Q. In issuing the certificates of promotion as have been received in evidence, and the administering of the oath of office, was that done in the regular order of business by you as City Clerk, as theretofore? A. Yes.

10

Mr. Weinberger: May I have my objection noted?

The Court: Objection noted; exception allowed.

Q. Prior to May, 1923, had there ever been any distribution of powers or authority, to your knowledge—

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Mr. Weinberger: Just a minute. That is objected to on the ground that that is not binding on this administration, your Honor, that is, what they did in 1911 or '15 or '16 is not binding.

The Court: That is, in substance, the same question the Court asked this morning. The Court will allow the question and note your exception.

30

Q. (Continuing.) That is, distribution of authority or power among the Commissioners? A. By ordinance in 1911.

Q. Have you a copy of that here? Have you the record itself here? A. I think counsel has a copy of it.

40

Mr. George: Let me see it, please.

Mr. Weinberger: (Producing paper.)

Mr. George: Is this the original?

Mr. Weinberger: Huh?

Mr. George: Where is the original? Will you consent that this is a copy?

Arthur D. Bolton, cross.

Mr. Weinberger: Is this a copy, Mr. Bolton?

The Witness: It is; yes, sir.

Mr. George: This is offered in evidence. Of course, at this time, I would like to have it marked for identification.

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Mr. Weinberger: I do not understand that he can offer anything in evidence on our case.

Mr. George: I just said that. I realize that I cannot offer it in evidence at this time. I ask that it be marked for identification, unless counsel is willing to save the time of the court and consent to its being received in evidence at this time.

Mr. Weinberger: As whose exhibit?

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Mr. George: As our exhibit.

Mr. Weinberger: I have no objection to his offering it as his exhibit.

Mr. George: All right; it is ours, then.
(Marked P-7 in evidence.)

By Mr. Weinberger:

Q. Mr. Bolton, just a minute. What is the date of that? A. 1911 what? What month and what date? A. November 28, 1911.

30

By Mr. George:

Q. Mr. Bolton, do you know of any other ordinance or resolution which provides for the distribution of powers and authority among the various commissioners other than the ordinance marked P-7? Do you know of any other? A. Up to date?

Q. Yes. A. Yes.

Q. Any subsequent to that, dealing with the dis-

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Arthur D. Bolton, cross.

tribution of authority? A. Up to date, do you mean?

Q. Yes. A. Yes.

Q. No, no, between the date of that ordinance, P-7, and May 17th? A. No.

10

Mr. Weinberger: May 17th, of what year?

Mr. George: 1927, of course, which was the last part of the term of office of Commissioner Preiskel.

Q. There has been none? A. No.

Q. In pursuance of that ordinance, were the various—was the business of the City of Passaic conducted in the light of the directions of that ordinance which has been received in evidence, from
20 the date of its adoption, to the 16th or the 17th day of May, 19—

Mr. Weinberger: Wait a minute—

A. As far as I know—

Mr. Weinberger: —please.

Mr. George: He is almost as bad as you are—

30

Mr. Weinberger: —which is why I wanted to object before you got a chance to put the answer in.

(Continuing.) I want to object on the ground, your Honor please, that the records of the City of Passaic are the best evidence. Whatever Mr. Bolton might say is only based on hearsay, I suppose, and I do not think the City ought to be bound by what Mr. Bolton is going to testify about that.

40

The Court: Objection sustained.

Mr. George: That is all.

Benjamin F. Turner, direct.

Redirect examination by Mr. Weinberger:

Q. But you are sure between May—between the month of May, 1919, and down to May, 1923, including the 17th of May, that there was no distribution of the powers after an organization meeting for the terms of the officers which started in 1919? A. In 19—

10

Mr. George: I object to that; that calls for a conclusion of law.

The Court: Isn't that apparent?

Mr. Weinberger: That is all. I won't press it.

BENJAMIN F. TURNER, produced as a witness on behalf of the defendant, having been first duly sworn, was examined by Mr. Weinberger, and testified as follows:

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Q. You are the Director of Public Safety of the City of Passaic, New Jersey? A. Yes, sir.

Q. You officially took oath at noon on the 17th of May, 1927; is that correct? A. Yes, sir.

Q. Did you at any time, either directly or indirectly, recognize any of the alleged appointments made by letter of your predecessor in office—

30

Mr. George: I object to that—

Q. —from the time you took office down to the present date?

Mr. George: I object to that; whether he recognized them or not does not at all affect the rights of these plaintiffs.

The Court: The court will allow the question.

40

Benjamin F. Turner, cross.

A. I did not.

10 Q. Did you direct any of these gentlemen, viz., Joseph Gallagher, Irving Evansky, Albert Hubbard, Albert Bednarz, Cornelius Miller, Martin J. Farrell, Edward Belli, Patrick Fitzpatrick, or any of the officers or firemen who have instituted suit against the City of Passaic, to proceed or take part in any of the alleged offices to which they were alleged to have been promoted? A. I did not.

Q. They have performed the duties which they had been prior to your election, when you took office? A. Yes, sir.

20 Q. And they have never since performed any of the duties to which they have been alleged to have been promoted; is that correct? A. They have not.

Q. Did you, as a Commissioner, at any time, or the Board of Commissioners, confirm any of the actions of your predecessor with reference to these nineteen letters of alleged appointment or promotion? A. I did not, nor the Board of Commissioners did not.

Mr. Weinberger: That is all.

30 *Cross examination by Mr. George:*

Q. You were a Captain of Police prior to your election of City Commissioner? A. I was a Captain of Detectives, a member of the Police Department.

Q. Yes. Who was your superior? A. Richard O. Zober, Chief of Police, and Abram Preiskel, Director of Public Safety.

40 Q. The latter of whom you recognized as the man in authority over the Department of Public Safety? Right? A. Repeat that, please.

Q. (Repeated by stenographer as above)? A. The latter, did you say?

Benjamin F. Turner, cross.

Q. The latter, Mr. Preiskel? A. Yes, he was the constituted authority at that time; yes, sir.

Q. On those occasions, during the four years that he was Director of Public Safety, he made appointments as well as promotions, which you recognized; didn't you? 10

Mr. Weinberger: Just a minute. That is objected to on the ground what Commissioner Turner did when he was a Captain of Detectives is not binding on the City of Passaic.

Mr. George: I will connect that. If I do not, I will consent it be stricken out.

Mr. Weinberger: That makes no difference, your Honor please, I maintain, whether Capt. Turner recognized at that time; he had nothing to say, whether they were good or bad; he was a Captain of Detectives. He was not officially in power or control. His status was different at that time than it is now. 20

Mr. George: He was a superior officer, in a position to give orders to his inferiors, appointed by his superior, Abram Preiskel, Director of Public Safety. 30

The Court: Amend the question to include what his course was in the regular police business, and the court will allow it.

Mr. George: I will do so.

Mr. Weinberger: Exception.

The Court: Exception allowed.

The Witness: What is the question?

Q. (Repeated by stenographer.) On those occasions, during the four years that he was Director of Public Safety, he made appointments as well as 40

Benjamin F. Turner, cross.

promotions, which you recognized; did you? (Continued by Mr. George.) And which appointments and promotions were made in the regular order of Police business or business in the Department of Public Safety? A. I received no promotions and
10 I received no recognition.

Q. I didn't ask you that, Commissioner. I asked you whether or not you recognized those appointments or promotions of your superior, which were made in the regular course of Police business?

Mr. Weinberger: Your Honor please, he has answered that. Maybe Mr. George is not familiar. Capt. Turner testified there were no promotions in the Detective Bureau during that term of office.
20

Mr. George: Let him testify then, won't you?

Mr. Weinberger: He has testified; he has answered.

A. To use the words of Mr. Weinberger, there was no promotions in the Detective Bureau. I received very few orders; in fact, no orders.

Q. Well, did you ever come in contact in all those four years that Preiskel was Director of Public Safety with any promotions or appointments which subsequently resulted in the assignment to your Department of Detectives? A. Any
30 promotions that were made in the Police Department did not concern me.

Q. None at all? Did you know of any? A. Why, yes, there was appointments made, but I cannot tell whose or what they were now.

Q. I am not asking you what they were. But you do know, however, that Commissioner Preiskel did make some appointments during those four
40 years? A. He made the Chief of Police, yes.

Benjamin F. Turner, cross.

Q. What was his name? A. Richard O. Zober.

Q. And he remained Chief of Police even after you were elected City Commissioner, didn't he?

Mr. Weinberger: That is objected to; that is not binding or relevant in this issue. 10

Mr. George: I won't press that.

Q. Did you take orders from Chief Zober? A. Any that—

Mr. Weinberger: Just a minute. That is objected to. What difference does it make if he took orders, or not?

Mr. George: He testified that Zober was appointed Chief of Police by Preiskel. The question is as to how far he recognized the authority of Commissioner Preiskel or took orders from Chief Zober. 20

Mr. Weinberger: What difference does that make. He was in charge of the Detective Bureau, I submit.

Mr. George: Withdraw the question.

Q. You testified, Commissioner, that those men whose names were mentioned by Mr. Weinberger, as were allegedly promoted, did not work since May 16, 1927? 30

Mr. Weinberger: He has not testified to that, your Honor please. He said they did no work—

Mr. George: —under the alleged promotion.

Mr. Weinberger: That is right.

Q. Is that a fact? A. These men whose names were mentioned to me here, they have not been 40

Benjamin F. Turner, cross.

recognized by me and they have not been assigned to do any of the work mentioned.

Q. And the reason they have not been— A. Excuse me; they are still filling the duties as they were when I became Director of Public Safety.

10 Q. And the reason they did not perform the duties as would be consistent with the promotions was because of the writing by you of this letter to Chief Zober; isn't that so?

Mr. Weinberger: May I look at that letter, first?

Mr. George: Oh, yes, when it is offered in evidence.

20 Mr. Weinberger: No, before he looks at it. May I have the courtesy of looking at the letter?

Mr. George: Sure.

Mr. Weinberger: If you don't mind.

Mr. George: Have any courtesy you like.

Mr. Weinberger: What is the question?

(Question repeated by stenographer.)

30 Mr. Weinberger: Objected to as calling for a conclusion, your Honor please. By the way, this letter is dated June 4th. I do not know how Mr. George got it. It is an official communication, directed to the Chief of Police of the City of Passaic, and is evidently an official communication. How they got it in their hands, I do not know.

Mr. George: Got it by good sleuthing. What difference does it make? It is here now.

Mr. Weinberger: I am curious to know how he got the letter.

40 Mr. George: I will tell it to you privately.

Benjamin F. Turner, cross.

Mr. Weinberger: No, I would like to know.

The Court: The court will allow the question, and allow you an exception.

Mr. Weinberger: Allow me an exception.

A. That is the document of the Police Department, is it not? 10

Q. Never mind that. Come on, give me an answer to my question.

The Witness: I am asking your Honor a question.

The Court: I suppose it is.

Mr. Weinberger: What is the question?

The Witness: I would like to know how it got out of the files of the Police Department. 20

Q. For the moment, I will pass up my original question, Commissioner; and ask you, if you are reluctant to answer that first question, because that letter which you now have is a confidential communication? A. What letter?

Q. The one you have in your hand. A. No, that is a letter to the Chief of Police of the City of Pas-
saic, at that time. 30

Q. Then, it is not a confidential communication?

A. It is a record of the Police Department.

Q. Yes, and all records of the Police Department, you have no objection to being made public, have you? A. I certainly do have an objection to them being handed out promiscuously without authority.

Q. Well, you then would object to that letter, or the contents of it, being given out promiscuously, wouldn't you? 40

Mr. Weinberger: We have no objection to that letter.

Benjamin F. Turner, cross.

Mr. George: Wait; this is interesting.

Mr. Weinberger: Just a minute, your Honor please; I think—this is for the purpose of the record—Commissioner Turner gave that order to the Chief.

10 Mr. George: If you want to take the stand, you can do so. But I want this witness to testify because I have one or two other questions, I would like to ask.

The Court: Ask your questions, and address your objections to the Court.

Mr. Weinberger: May I say this, your Honor please? The question is irrelevant and immaterial to this particular issue.

20 The Court: As I understand, the question has not yet been completed.

(Question repeated by stenographer.)

The Court: What is the objection?

Mr. Weinberger: I object to any further discussion along this line. What difference does it make, not relevant to the issue here.

Q. You did direct, Commissioner, Chief Zober not to make any assignments under any promotions, did you not,— A. I did; yes, sir.

30 Q. This is not a confidential communication, is it? A. Insofar as, if it is not regular, according to law, and insofar as to its being needed here, if it was wanted, it could be gotten through due process of law.

Q. How do you know it was not gotten that way? A. I stated, if it was not regular—

Q. It was, through subpoena. A. You mentioned nothing about it being gotten here through due process of law.

40 Mr. Weinberger: I disagree with counsel

Benjamin F. Turner, cross.

that it was gotten legally, because the custodian of the official records of the Police Department is the Director of Public Safety and the Chief Clerk. I might say, for the purposes of the record, that they were not subpoenaed here to bring it in. I do not know how the Commissioner would testify; I do not know. 10

Mr. George: If Commissioner Turner sent me a letter, the Commissioner is not the custodian of that letter.

A. When that letter was sent, that was sent to the gentleman who received it, as a member of the Department, and it belongs in the files of the Police Department. 20

Q. And as far as the contents are concerned, you gave all of that information, and considerably more, to the newspapers, for publication, didn't you?

Mr. Weinberger: Just a minute. That is objected to. The contents of the letter speak for themselves. What he said to the newspapers, the newspaper is the best evidence, or the reporter who got it. 30

The Court: I sustain the objection.

Q. You wrote this letter to Chief Zober? A. I certainly did; yes, sir.

Mr. George: I offer this in evidence. You have consented?

Mr. Weinberger: As your exhibit.

Mr. George: Sure, as our exhibit, I am offering it.

(Marked P-8 in evidence.)

Mr. George: That is all. 40

*Benjamin F. Turner, redirect.**Redirect examination by Mr. Weinberger:*

Q. You refused to honor these appointments, Commissioner Turner. Tell us why.

Mr. George: That is objected to.

10

The Court: Objection sustained.

Mr. Weinberger: Allow me an exception.

Q. One more question. Did those men ever demand of you personally, as Director of Public Safety, that they be assigned to any particular department or elevated to the position which they allege they maintained or received by virtue of these letters from Abram Preiskel, addressed to the Clerk? A. They did not, not one.

20

Q. Did they ever come to you—just take that stand, for a moment, if you will, please. A. (Witness resumes stand.)

The Court: Mr. Weinberger, did any of them on direct examination say that they ever went to the Commissioner?

Mr. Weinberger: I just want it in the record.

30

Mr. Gross: They say they wrote the Commissioner—authorized their attorney to write the Commissioner.

Q. Commissioner Turner, did they ever demand of you any increased salary? A. They did not.

Q. In accordance with these letters of May 16th by former Commissioner Preiskel? A. They did not, not one of them.

Q. They have been performing the duties of their office which they had before these alleged letters of May 16, 1927? A. Exactly.

40

Q. They have not performed the duties of any

Benjamin F. Turner, redirect.

office to which they were alleged to have been promoted? A. No, sir.

Q. Anybody? A. No, sir.

Q. How many were there, in all, Commissioner, if you recall, who received these letters? A. If my memory serves me right on that—

10

Q. Of alleged promotion? A. I might not be positive,—twenty-three, I think, firemen and policemen.

Q. How many were in the both departments? How many men were there altogether?

Mr. George: We object to that, immaterial.

A. Members of the departments?

Mr. Weinberger: I think that is material.

20

The Court: I do not see where it is material.

Mr. Weinberger: On the ground that these appointments are contrary to public policy. You cannot make wholesale appointments, nineteen men in this department, and make nineteen promotions of nineteen men. I think the courts have something to say.

30

The Court: The court will allow the question.

A. There was ninety-seven members of the Police Department at that time, and I do not know the exact number of superior officers, until I might make myself familiar with the facts as they were then.

Q. How many firemen, about? A. I think there were eighty-six firemen in the department.

40

Benjamin F. Turner, recross.

Q. And there were twenty-three alleged promotions? A. Twenty-three alleged promotions.

Mr. Weinberger: That is all.

Recross examination by Mr. George:

10 Q. Just a moment. You did, however, receive demands from the attorneys for these persons? A. I received letters from the firm of Gross & Gross, demanding that I assign these men to the positions that they were said to have been appointed to, but if you will—

Q. As well as to pay them the salaries? A. —one minute, I won't be so sure about that. If I had one of the letters—?

20 Q. I will get you one.

Mr. Weinberger: I might say, in fairness to the Commissioner, he turned the letters over to me and I still have them.

A. Yes, shortly after August 11th, I received letters from Gross & Gross.

Q. And you wholly ignored them? A. I did; yes, sir.

30 Q. And in answer to Mr. Weinberger's question as to whether these men had ever presented themselves for assignment under their promotions, or made demands for the increased salary, commensurate with their promotions, under the ordinances fixing the salaries, you answered that they never had. The reason for it is that it would not have done them any good if they had.

Mr. Weinberger: Objected to.

A. If you want me to give reasons—

40 Q. I don't want to know your reasons. I want

Benjamin F. Turner, recross.

to know would you have recognized their demands?

Mr. Weinberger: Just a moment.

Mr. George: Withdraw the question.

The Witness: If I could volunteer, I would tell you. 10

Mr. George: That is all.

Mr. Weinberger: Now, your Honor please, I do not like to burden this record. I have Lt. McCarthy here, Lt. VanderHoven, and Lt. Vreeland, and they will testify that these men did not appear.

Mr. Gross: They themselves said so, with one or two exceptions.

Mr. Weinberger: If you will stipulate on the record. 20

The Court: There were a couple that presented themselves to Chief Zober, according to the testimony and two officers in the Fire Department. Other than that, I do not recall. I think Capt. Campbell's name was mentioned, Capt. Fitzgerald's name was mentioned, and other than that none of them claim that they presented themselves to the Lieutenant or any other officer. 30

Mr. Weinberger: May I stipulate on the record, if Officers Vreeland, Lt. VanderHoven, Lt. McCarthy, were here, that they would testify to the effect that these men,—and who were in charge of the morning, noon and night shifts,—that these men never, at any time, presented themselves to those officers for the purpose of asking to be assigned to duty in the alleged capacities to which they were alleged to have been pro- 40

William J. Fitzgerald, direct.

moted by the letters of May 16th of former Commissioner Preiskel.

Mr. Gross: We consent to that.

10 WILLIAM J. FITZGERALD, produced as a witness on behalf of the defendant, having been first duly sworn, was examined by Mr. Weinberger, and testified as follows:

Q. Did you ever have authority on May 15th, 16th or 17th, 1927, to assign anybody to any office other than the one which he was performing, relating to Firemen in the Fire Department of the City of Passaic? A. No, sir.

20 Q. Did you ever assign to duty any Fireman in the City of Passaic, and tell him to perform the duties of a station higher than the one he was, on either May 15th, 16th or 17th, 1927? A. On those dates?

Q. Yes, on those dates? A. No, sir.

Q. Had you authorization to usurp the functions of the Director of Public Safety— A. No.

Q. —or the Chief of the Fire Department? A. No, sir.

30 Q. Who is the head of the Fire Department of the City of Passaic, and who was on May 17, 1927, from noon? A. Commissioner Turner.

Q. Who was on May 16th? A. Mr. Preiskel.

Q. Did he ever authorize you to assign men to any elevated office— A. No, sir.

Q. —by virtue of an alleged appointment? A. (No answer.)

40 Q. Did a Fireman by the name of Miller ever come to you, and did you ever assign him, tell him, to perform duties other than the one he was performing at the time? I am referring specifically

William J. Fitzgerald, direct.

to matters of appointment and promotion. Did you ever tell him to carry out any alleged promotion in the form of any duties whatever? A. Yes, sir.

Q. What is that? A. Yes, sir.

Q. Were you authorized? A. Why, yes.

10

Q. What? A. Yes, sir.

Q. By whom? A. Why, the fact that I was Captain, and went out of the house, I would leave Miller in charge of the company.

Q. I am talking about, did you tell him to perform the duties of a Captain or a Lieutenant? A. At what time?

Q. At any time? A. Why, yes, surely, frequently.

Q. By virtue of what? A. Well, the fact that I was leaving quarters, it was up to me to leave somebody in charge.

20

Q. Oh, you mean that you left him in charge of the station house? A. Firehouse, if I was leaving for anything.

Q. If you were going out to lunch? A. That is the idea.

Q. Did you ever recognize him as a Lieutenant?

Mr. George: I object to that.

30

A. I had no right to make him Lieutenant, not at all.

Q. You had no right to make him Lieutenant?

A. I couldn't make him a Lieutenant; no, sir.

Q. Huh? A. No, sir.

Q. Did he ever ask you to recognize him as a Lieutenant? A. Yes, he brought me in his certificate, to tell me he had been appointed.

Q. What did you tell him? A. I told him it was not up to me.

40

Lieutenant Greeley, direct-cross.

Q. Whom did you tell him it was up to? A. I told him it was not up to me.

Mr. Weinberger: That is all.

Mr. George: I think that is all, Captain.

10

LT. GREELEY, produced as a witness on behalf of the defendant, having been first duly sworn, was examined by Mr. Weinberger, and testified as follows:

Q. You have been a member of the Fire Department for how many years? A. Eighteen over.

Q. You were on the 16th of May, 1927, Lieutenant of the Fire Department of the City of Passaic?

20

A. Yes, sir.

Q. Who was the Director of Public Safety on the 16th of May, 1927? A. Commissioner Turner.

Q. No, the 16th of May. A. 16th of May?

Q. Yes, the day before. A. Oh, Commissioner Preiskel.

Q. Did a fireman by the name of Hubbard ever come to you and ask you to be assigned to Lieutenant's duties? A. No, sir.

30 Q. Had you any authority, if he did come to you? A. No, sir.

Q. Who was the boss of the Fire Department? A. Chief Bowker was the executive officer.

Q. Who was over him? A. I guess, Commissioner of Public Safety.

Mr. Weinberger: That is all.

Cross examination by Mr. George:

Q. Who was he? Preiskel? A. At what time is that?

40

Q. May 16th? A. Commissioner Preiskel.

Mr. George: That is all.

Benjamin F. Turner, direct.

BENJAMIN F. TURNER, recalled as a witness on behalf of the defendant, having been previously sworn, was examined by Mr. Weinberger, and testified as follows:

Q. On the 17th of May, when you took office as Director of Public Safety, did you authorize Chief Zober at any time to make promotions or recognize promotions or give orders to any subordinate?
A. I did not.

10

Q. Who was in charge and who was the only one who could give orders? A. Myself.

Q. And did you give orders concerning any person—of the people who received the alleged appointments on the 16th of May or the morning of the 17th of May? A. I gave orders to see that those appointments should not be recognized.

20

Q. To whom did you give the order? A. Richard O. Zober, Chief of Police.

Q. Did you give the orders to every member of the Department, other than the Chief? A. I expected that those orders would be conveyed to every member of the Department.

Q. Was there anyone authorized, outside of yourself, on the 17th of May, directly after noon, when you were sworn in and took the office, to give any orders with reference to recognizing any alleged promotions or to exercise any of the duties outside of your orders to the person you had delegated? A. There was not.

30

Mr. Weinberger: That is all.

Mr. George: No questions.

Mr. Weinberger: Oh, just one more thing.

Q. Did Chief Zober ever tell you at any time or request you to recognize the appointments of any of these men?

40

Motion for Direction of Verdict.

Mr. George: I object to that as immaterial.

Mr. Weinberger: Withdraw it.

Mr. George: That is all.

Mr. Weinberger: Defendant rests.

10

(The defendant rests.)

Mr. George: That is all.

(Both sides rest.)

DEFENDANT'S MOTION FOR DIRECTED VERDICT.

20

Mr. Weinberger: Now, I would like to renew my motion, your Honor please, for the direction of a verdict on the ground, first, that this court has no jurisdiction to try the question of title to office, which apparently this is;

On the second ground, that any alleged remarks made by Chief Zober have not been testified to be with power;

Third, on the ground that these men have waived their right, if they ever had any, by accepting their old salary;

30

Fourth, on the ground that they have failed to institute legal proceedings to have themselves declared in good standing, that their appointments were valid, before they can start suit;

Fifth, that this is an attempt to collaterally have your Honor pass upon the legality of their alleged promotions, which necessarily would involve the question of title to office, and that this court has no jurisdiction to make such an adjudication;

40

Sixth, that the Director of Public Safety, as the uncontradicted testimony is, was without power

Findings of the Court.

to make these alleged promotions, because of the fact that the uncontradicted testimony is that there was no distribution of the powers after the organization meeting of May 15, 1923, down to and including May 17, 1927, at noon; and therefore, that the Director of Public Safety was without jurisdiction, the appointments not having been ratified or confirmed by the Board of Commissioners, and therefore it was an act of *ultra vires* and is not binding on the City of Passaic; 10

And I also urge any and all other reasons which I did advance on the motion for a non-suit.

The Court: Except the motion is in the nature of a direction of verdict.

Mr. Weinberger: It is a motion for the defense.

The Court: In that nature. 20

Mr. Weinberger: It is a motion for the defense.

The Court: Any summation?

(Counsel for the respective parties briefly summed the case to the Court.)

Findings of the Court.

The Court: It seems to me from the facts adduced in this case, that the appointments of these persons, the present plaintiffs, by Abram Preiskel, at a time when he was Director of Public Safety, and qualifying under those appointments by the several plaintiffs directly after their appointments, under the laws of our state, would constitute a valid appointment, that this court could not question. 30

The City of Passaic, through its now Director of Public Safety, or through its Legal Department, contested the right of these plaintiffs to the posi- 40

Findings of the Court.

10 tion to which they were appointed; that they should have gone to the Supreme Court in order to test the validity of the appointments. It would seem foolhardy for plaintiffs, such as these, to go into the Supreme Court to have the Supreme Court confirm what to all intents and purposes is a legal appointment.

In the absence of any construction of the Supreme Court, this court must accept the appointments made by a man who was clothed with the authority to make valid appointments; and the court finds that the plaintiffs are entitled to recover the difference in their pay.

The judgment will be—

20 In the case of Martin J. Farrell, for the sum of \$199.92;

In the case of Irving Evansky, judgment will be for the plaintiff, in the sum of \$100.00;

In the case of Albert Hubbard, judgment will be for the plaintiff, in the sum of \$199.92;

In the case of Edward Belli, judgment will be for the plaintiff, in the sum of \$100.00;

In the case of Patrick Fitzpatrick, judgment will be for the plaintiff, in the sum of \$199.92;

30 In the case of Joseph Gallagher, judgment will be for the plaintiff, in the sum of \$199.92;

In the case of John J. Noonan, judgment will be for the plaintiff, in the sum of \$100.00;

In the case of William Buckley, judgment will be for the plaintiff, in the sum of \$199.92;

In the case of Cornelius Miller, *against* the City of Passaic, judgment will be for the plaintiff, in the sum of \$199.92;

40 In the case of Albert George Bednarz, plaintiff, *v.* City of Passaic, judgment will be for the plaintiff, in the sum of \$100.00.

Affidavit and Certification.

And I have already allowed a non-suit in the McCann case, and the court will allow you an exception.

Mr. Weinberger: As to each one of the plaintiffs.

The Court: As to each one of the plaintiffs. 10

(End of Case.)

Affidavit of Stenographer.

I, A. AUGUSTUS DYE, a Court Stenographer, having offices in the Passaic County Court House, Paterson, New Jersey, do hereby swear that the foregoing transcript in the above entitled causes, is a true and accurate transcript of the proceedings therein, to the best of my ability. 20

So help me God.

A. AUGUSTUS DYE.

Sworn and subscribed to before }
me this 16th day of January, }
A. D. 1928. }

PETER J. MCGINNIS,
Master in Chancery of N. J. 30

Certification of Judge.

I, THOMAS E. DUFFY, do hereby certify that the foregoing is a true and correct transcript of the proceedings in the above entitled causes had before me on the 13th day of January, A. D. 1928.

THOMAS E. DUFFY,
Judge of the Passaic District Court 40
of the City of Passaic, New Jersey.

*Exhibits.***Exhibit P-1.**

CERTIFICATE OF APPOINTMENT

City Clerk's Office, Passaic, N. J.

10 This is to Certify, that on May 16, 1927, Abram
Preiskel, Director of Public Safety appointed
Patrick Fitzpatrick to the office of Captain of Po-
lice in and for the City of Passaic, for the term of

Given under my hand and Seal
Seal of the of said City this 17th day of
City of Passaic May nineteen hundred and twen-
ty-seven.

A. D. BOLTON,
City Clerk.

20

Exhibit P-2.

May 16th, 1927.

Mr. P. Fitzpatrick,
50 Henry Street,
Passaic, N. J.

Dear Sir:

30 Please be advised that I have this day promoted
you to the rank of Captain of Police, to take effect
immediately as above date.

Very truly yours,

ABRAM PREISKEL,
Director of Public Safety.

40

*Exhibits.***Exhibit P-3.**

August 11th, 1927.

Benjamin F. Turner,
 Director of Public Safety of the City of Passaic.

Dear Sir:

10

I represent Mr. Patrick Fitzpatrick, who was duly appointed and commissioned to the office of Captain of Police, of your City, on the 16th day of May, 1927.

He has thus far failed to be actually assigned to duty in accordance with his rank, or to receive the compensation thereof, although he has tendered himself, and still does tender himself ready to perform the duties of the rank to which he was thus appointed.

20

On behalf of my said client, I demand that you immediately assign him to duty, in accordance with his rank, and pay him the compensation to which he is entitled thereunder, from the day of his appointment.

Unless this demand is acceded to by you, I shall, on behalf of my client, institute the necessary proceedings for the recognition by you of his appointment, as aforesaid.

30

Yours truly,

IG:FSR:IW

*Isaac Guss***Exhibit P-1.**

CERTIFICATE OF APPOINTMENT

City Clerk's Office, Passaic, N. J.

This is to Certify, that on May 16, 1927, Abram Preiskel, Director of Public Safety appointed

40

Exhibits.

tenant of Fire Department, of your City, on the 16th of May, 1927.

He has thus far failed to be actually assigned to duty in accordance with his rank, or to receive the compensation thereof, although he has tendered himself, and still does tender himself ready to perform the duties of the rank to which he was thus appointed. 10

On behalf of my said client, I demand that you immediately assign him to duty, in accordance with his rank, and pay him the compensation to which he is entitled thereunder, from the day of his appointment.

Unless this demand is acceded to by you, I shall, on behalf of my client, institute the necessary proceedings for the recognition by you of his appointment, as aforesaid. 20

Yours truly,

IG:FSR:IW

Isaac Guss

Exhibit P-1.

CERTIFICATE OF APPOINTMENT

City Clerk's Office, Passaic, N. J. 30

This is to Certify, that on May 16, 1927, Abram Preiskel, Director of Public Safety appointed William Buckley to the office of Lieutenant of Detectives in and for the City of Passaic, for the term of

Seal of the City of Passaic of said City this 17th day of May nineteen hundred and twenty-seven.

A. D. BOLTON, 40
City Clerk.

*Exhibits.***Exhibit P-2.**

May 16th, 1927.

Mr. William Buckley,
106 Grant Street,
Passaic, N. J.

10

Dear Sir:

Please be advised that I have this day promoted you to the rank of Lieutenant of Detectives, to take effect immediately as above date.

Very truly yours,

ABRAM PREISKEL,
Director of Public Safety.

20

Exhibit P-3.

August 11th, 1927.

Benjamin F. Turner,
Director of Public Safety of the City of Passaic.

Dear Sir:

30

I represent Mr. William Buckley, who was duly appointed and commissioned to the office of Lieutenant of Detectives, of your City, on the 16th day of May, 1927.

He has thus far failed to be actually assigned to duty in accordance with his rank, or to receive the compensation thereof, although he has tendered himself, and still does tender himself ready to perform the duties of the rank to which he was thus appointed.

40

On behalf of my said client, I demand that you immediately assign him to duty, in accordance with his rank, and pay him the compensation to

Exhibits.

which he is entitled thereunder, from the day of his appointment.

Unless this demand is acceded to by you, I shall, on behalf of my client, institute the necessary proceedings for the recognition by you of his appointment, as aforesaid.

10

Yours truly,

Isaac Gross

IG:FSR:IW

Exhibit P-1.

CERTIFICATE OF APPOINTMENT

City Clerk's Office, Passaic, N. J.

This is to Certify, that on May 16, 1927, Abram Preiskel, Director of Public Safety appointed Irving Evansky to the office of Police Sergeant in and for the City of Passaic, for the term of

20

Given under my hand and Seal of said City this 17th day of May City of Passaic nineteen hundred and twenty-seven.

A. D. BOLTON,
City Clerk.

30

Exhibit P-2.

May 11th, 1927.

Mr. Irving Evansky,
82 Spring St.,
Passaic, N. J.

Dear Sir:

Please be advised that I have this day promoted

40

Exhibits.

you to the rank of Police Sergeant, to take effect immediately, as above date.

Very truly yours,

ABRAM PREISKEL,
Director of Public Safety.

10

Exhibit P-3.

August 11th, 1927.

Benjamin F. Turner,
Director of Public Safety of the City of Passaic.

Dear Sir:

20

I represent Mr. Irving Evansky, who was duly appointed and commissioned to the office of Police Sergeant, of your City, on the 16th day of May, 1927.

He has thus far failed to be actually assigned to duty in accordance with his rank, or to receive the compensation thereof, although he has tendered himself, and still does tender himself ready to perform the duties of the rank to which he was thus appointed.

30

On behalf of my said client, I demand that you immediately assign him to duty, in accordance with his rank, and pay him the compensation to which he is entitled thereunder, from the day of his appointment.

Unless this demand is acceded to by you, I shall, on behalf of my client, institute the necessary proceedings for the recognition by you of his appointment, as aforesaid.

40

IG:FSR:IW

Yours truly,

Isaac Guss

*Exhibits.***Exhibit P-1.**

CERTIFICATE OF APPOINTMENT

City Clerk's Office, Passaic, N. J.

This is to Certify, that on May 16, 1927, Abram
Preiskel, Director of Public Safety appointed 10
Albert G. Bednarz to the office of Sergeant of Po-
lice in and for the City of Passaic, for the term of

Given under my hand and Seal
of said City this 17th day of May
Seal of the City of Passaic nineteen hundred and twenty-
seven.

A. D. BOLTON,
City Clerk.

20

Exhibit P-2.

May 16th, 1927.

Mr. Albert G. Bednarz,
65 Third Street,
Passaic, N. J.

Dear Sir:

Please be advised that I have this day promoted
you to the rank of Police Sergeant to take effect 30
immediately as above date.

Very truly yours,

ABRAM PREISKEL,
Director of Public Safety.

40

*Exhibits.***Exhibit P-3.**

August 11th, 1927.

Benjamin F. Turner,
Director of Public Safety of the City of Passaic.

10 Dear Sir:

I represent Mr. Albert G. Bednarz, who was duly appointed and commissioned to the office of Sergeant of Police, of your City, on the 16th day of May, 1927.

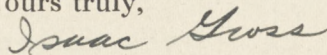
20 He has thus far failed to be actually assigned to duty in accordance with his rank, or to receive the compensation thereof, although he has tendered himself, and still does tender himself ready to perform the duties of the rank to which he was thus appointed.

On behalf of my said client, I demand that you immediately assign him to duty, in accordance with his rank, and pay him the compensation to which he is entitled thereunder, from the day of his appointment.

30 Unless this demand is acceded to by you, I shall, on behalf of my client, institute the necessary proceedings for the recognition by you of his appointment, as aforesaid.

IG:FSR:IW

Yours truly,

**Exhibit P-1.**

CERTIFICATE OF APPOINTMENT

City Clerk's Office, Passaic, N. J.

40 This is to Certify, that on May 16, 1927, Abram Preiskel, Director of Public Safety appointed Ed-

Exhibits.

ward Belli to the office of Sergeant of Police in
and for the City of Passaic, for the term of

Seal of the City of Passaic
Given under my hand and Seal
of said City this 17th day of
May nineteen hundred and twenty-seven.

10

A. D. BOLTON,
City Clerk.

Exhibit P-2.

May 16th, 1927.

Mr. Edward Belli,
64 Palmer Street,
Passaic, N. J.

20

Dear Sir:

Please be advised that I have this day promoted
you to the rank of Police Sergeant of Police, to
take effect immediately, as above date.

Very truly yours,

ABRAM PREISKEL,
Director of Public Safety.

30

Exhibit P-3.

August 11th, 1927.

Benjamin F. Turner,
Director of Public Safety of the City of Passaic.

Dear Sir:

I represent Mr. Edward Belli, who was duly ap-
pointed and commissioned to the office of Sergeant
of Police, of your City, on the 16th day of May,
1927.

40

Exhibits.

10 He has thus far failed to be actually assigned to duty in accordance with his rank, or to receive the compensation thereof, although he has tendered himself, and still does tender himself ready to perform the duties of the rank to which he was thus appointed.

On behalf of my said client, I demand that you immediately assign him to duty, in accordance with his rank, and pay him the compensation to which he is entitled thereunder, from the day of his appointment.

20 Unless this demand is acceded to by you, I shall, on behalf of my client, institute the necessary proceedings for the recognition by you of his appointment, as aforesaid.

Yours truly,

Isaac Gross

IG:FSR:IW

Exhibit P-1.

CERTIFICATE OF APPOINTMENT

City Clerk's Office, Passaic, N. J.

30 This is to Certify, that on May 16, 1927, Abram Preiskel, Director of Public Safety appointed Cornelius Neil Miller to the office of Lieutenant of Fire Department in and for the City of Passaic, for the term of

Given under my hand and Seal
 Seal of the City of Passaic of said City this 17th day of
 May nineteen hundred and twenty-seven.

40

A. D. BOLTON,
 City Clerk.

*Exhibits.***Exhibit P-2.**

May 16th, 1927.

Mr. Neil Miller,
182 Washington Pl.,
Passaic, N. J.

10

Dear Sir:

Please be advised that I have this day promoted you to position of Lieutenant of Fire Department to take effect immediately as above dated.

Very truly yours,

ABRAM PREISKEL,
Director of Public Safety.

20

Exhibit P-3.

August 11th, 1927.

Benjamin F. Turner,
Director of Public Safety of the City of Passaic.

Dear Sir:

I represent Mr. Cornelius Miller, who was duly appointed and commissioned to the office of Lieutenant of Fire Department, of your City, on the 16th day of May, 1927.

30

He has thus far failed to be actually assigned to duty in accordance with his rank, or to receive the compensation thereof, although he has tendered himself, and still does tender himself ready to perform the duties of the rank to which he was thus appointed.

On behalf of my said client, I demand that you immediately assign him to duty, in accordance with his rank, and pay him the compensation to

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Exhibits.

which he is entitled thereunder, from the day of his appointment.

10 Unless this demand is acceded to by you, I shall, on behalf of my client, institute the necessary proceedings for the recognition by you of his appointment, as aforesaid.

Yours truly,

Isaac Guss

IG:FSR:IW

Exhibit P-1.

CERTIFICATE OF APPOINTMENT

City Clerk's Office, Passaic, N. J.

20 This is to Certify, that on May 16, 1927, Abram Preiskel, Director of Public Safety appointed John Noonan to the office of Police Sergeant in and for the City of Passaic, for the term of

Given under my hand and Seal
Seal of the City of Passaic of said City this 17th day of
May nineteen hundred and twenty-seven.

30 A. D. BOLTON,
City Clerk.

Exhibit P-2.

May 16th, 1927.

Mr. John Noonan:

Dear Sir:

40 Please be advised that I have this day promoted you to the rank of Sergeant of Police of the City

Exhibits.

of Passaic, to take effect immediately, as of above date.

Very truly yours,

ABRAM PREISKEL,
Director of Public Safety.

10

Exhibit P-3.

August 11th, 1927.

Benjamin F. Turner,
Director of Public Safety of the City of Passaic.

Dear Sir:

I represent Mr. John Noonan, who was duly appointed and commissioned to the office of Police Sergeant, of your City, on the 16th day of May, 1927.

20

He has thus far failed to be actually assigned to duty in accordance with his rank, or to receive the compensation thereof, although he has tendered himself, and still does tender himself ready to perform the duties of the rank to which he was thus appointed.

On behalf of my said client, I demand that you immediately assign him to duty, in accordance with his rank, and pay him the compensation to which he is entitled thereunder, from the day of his appointment.

30

Unless this demand is acceded to by you, I shall, on behalf of my client, institute the necessary proceedings for the recognition by you of his appointment, as aforesaid.

Yours truly,

Isaac Gross

40

Exhibits.

Exhibit P-1.

CERTIFICATE OF APPOINTMENT

City Clerk's Office, Passaic, N. J.

10 This is to Certify, that on May 16, 1927, Abram
Preiskel, Director of Public Safety appointed
Joseph Gallagher to the office of Lieutenant of
Fire Department in and for the City of Passaic,
for the term of

Given under my hand and Seal
Seal of the of said City this 17th day of
City of Passaic May nineteen hundred and twenty-seven.

20 A. D. BOLTON,
City Clerk.

Exhibit P-2.

May 16th, 1927.

Mr. Joseph Gallagher,
Passaic, N. J.

Dear Sir:

30 Please be advised that I have this day promoted
you to position of Lieutenant of Fire Department
to take effect immediately as above date.

Very truly yours,

ABRAM PREISKEL,
Director of Public Safety.

*Exhibits.***Exhibit P-3.**

August 11th, 1927.

Benjamin F. Turner,
 Director of Public Safety of the City of Passaic.

Dear Sir:

10

I represent Mr. Joe Gallagher, who was duly appointed and commissioned to the office of Lieutenant of Fire Department, of your City, on the 16th day of May, 1927.

He has thus far failed to be actually assigned to duty in accordance with his rank, or to receive the compensation thereof, although he has tendered himself, and still does tender himself ready to perform the duties of the rank to which he was thus appointed.

20

On behalf of my said client, I demand that you immediately assign him to duty, in accordance with his rank, and pay him the compensation to which he is entitled thereunder, from the day of his appointment.

Unless this demand is acceded to by you, I shall, on behalf of my client, institute the necessary proceedings for the recognition by you of his appointment, as aforesaid.

30

Yours truly,

Isaac Gurs

IG:FSR:IW

Exhibit P-1.

CERTIFICATE OF APPOINTMENT

City Clerk's Office, Passaic, N. J.

40

This is to Certify, that on May 16, 1927, Abram Preiskel, Director of Public Safety appointed

Exhibits.

Martin Farrell to the office of Lieutenant of Fire Department in and for the City of Passaic, for the term of

10 Seal of the City of Passaic Given under my hand and Seal of said City this 17th day of May nineteen hundred and twenty-seven.

A. D. BOLTON,
City Clerk.

Exhibit P-2.

May 16th, 1927.

20 Mr. Martin Farrell,
171 Van Buren St.,
Passaic, N. J.

Dear Sir:

Please be advised that I have this day promoted you to the rank of Lieutenant of Fire Department to take effect immediately as above date.

Very truly yours,

30 ABRAM PREISKEL,
Director of Public Safety.

*Exhibits.***Exhibit P-3.**

August 11th, 1927.

Benjamin F. Turner,
Director of Public Safety of the City of Passaic.

Dear Sir:

10

I represent Mr. Martin Farrell, who was duly appointed and commissioned to the office of Lieutenant of Fire Department, of your City, on the 16th day of May, 1927.

He has thus far failed to be actually assigned to duty in accordance with his rank, or to receive the compensation thereof, although he has tendered himself, and still does tender himself ready to perform the duties of the rank to which he was thus appointed.

20

On behalf of my said client, I demand that you immediately assign him to duty, in accordance with his rank, and pay him the compensation to which he is entitled thereunder, from the day of his appointment.

Unless this demand is acceded to by you, I shall, on behalf of my client, institute the necessary proceedings for the recognition by you of his appointment, as aforesaid.

30

Yours truly,

Isaac Guss

IG:FSR:IW

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**Amended Specifications of Determinations of
the District Court With Respect to Which
Defendant-Appellant is Dissatisfied in
Point of Law.**

NEW JERSEY SUPREME COURT.

10

PATRICK FITZPATRICK (and nine
others),
Plaintiffs-Appellees,

v.

CITY OF PASSAIC,
Defendant-Appellant.

On Appeal.

Amended Specifi-
cations of the
District Court
with respect to
which defendant-
appellant is
dissatisfied in
point of law.

20

The Appellant urges the following reasons for reversal of the judgment rendered in the above entitled action in favor of the plaintiffs, Patrick Fitzpatrick (and nine others), and against the defendant:

30

1. The Court erred when it rendered a judgment in favor of the said plaintiffs and against the defendant.

2. The Court erred when it refused to non-suit the plaintiffs for the reason that the Court had no jurisdiction to try these cases.

3. The Court erred when it refused to non-suit the plaintiffs for the reason that this was a suit where title to office was concerned, and the plaintiffs had not instituted the proper proceedings.

40

4. The Court erred when it refused to non-suit the plaintiffs for the reason that they had not actually performed any services which would entitle them to a judgment.

Amended Specifications of Determinations.

5. The Court erred when it refused to non-suit the plaintiffs for the reason that the powers and duties of each Commissioner were never assigned to the proper Commissioners by resolution, and that the alleged appointments were therefore illegal, void and of no effect. 10

6. The Court erred when it refused to non-suit the plaintiffs for the reason that these alleged appointments were invalid because they were against public policy.

7. The Court erred when it refused to grant a motion for a judgment in favor of the defendant, the City of Passaic, for the reason that the Court had no jurisdiction to try the question of title to office. 20

8. The Court erred when it refused to grant a judgment in favor of the defendant for the reason that plaintiffs had waived their rights by accepting their old salaries.

9. The Court erred when it refused to grant a judgment in favor of the defendant for the reason that the plaintiffs had failed to institute the necessary legal proceedings to validate their alleged appointments before the plaintiffs instituted these suits. 30

10. The Court erred when it refused to grant the defendant's motion for a judgment in behalf of the defendant for the reason that these suits were a collateral attack upon the right to title to office.

11. The Court erred when it refused to grant the defendant's motion for a directed verdict for the reason that the uncontradicted testimony was that there had been no distribution of the powers 40

Exhibit.

and duties to the Commissioners and that those alleged appointments were therefore invalid.

JOSEPH J. WEINBERGER,
City Counsel of Passaic.

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Exhibit.

An Ordinance to assign and distribute all legislative and administrative powers, authority and duties into and among the several departments of the Board of Commissioners of the City of Passaic, N. J. and to determine the powers and duties to be performed, and to assign to the several departments the various City Offices and subordinate departments and boards.

20

Be it Ordained by the Board of Commissioners of the City of Passaic:

Section I. All legislative powers, authority and duties are hereby vested in the Board of Commissioners; it shall levy all taxes; apportion and appropriate all funds and approve all bills, accounts, pay rolls and claims and order payment thereof; it shall, by ordinance, create such sub-ordinate boards and appoint such officers as it may deem necessary for the proper and efficient conduct of the affairs of the City, and fix and determine their respective terms of office and salaries; it shall declare the cost of all street improvements, sidewalks, sewers and other work, improvements or repairs which may be specially assessed; it shall make, or authorize the making, of all contracts and no contract shall be binding or obligatory on the city, unless expressly authorized by ordinance or resolution adopted by the Board of Commis-

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Exhibit.

sioners. All contracts and all ordinances or resolutions, making contracts or authorizing the making of contracts, shall be drawn by the City Counsel, or be submitted to such officer for approval before the same are made or introduced.

All directors of departments and officers are the agents of the Board of Commissioners, and their acts shall be subject to review and revocation by the Board of Commissioners. Every director or officer shall from time to time, as required by law or ordinance, or whenever he shall deem necessary for the good of the public service, report to the Board of Commissioners, in writing, respecting the business of his department or office, or matters connected therewith.

Department of Public Affairs.

Section II. The Director of the Department of Public Affairs, under the designation "Mayor," shall have and exercise all the powers and perform all the duties provided or prescribed by law or the ordinances of the City not in conflict with the provisions of this ordinance. As such Director of the Department of Public Affairs he shall have general supervision and oversight over all departments and officers in the City; he shall be the chief executive officer and representative of the City, shall sign all contracts on behalf of the City and shall have charge of and cause to be prepared and published all statements and reports required by law or ordinance, or by resolution of the Board of Commissioners.

The Mayor's Office, City Clerk, Legal Department, Overseer of the Poor, City Physician, Almshouse, Municipal Hospital and Board of Health, and all of the officers and employees of any of the

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Exhibit.

above and all other officers or functionaries created by law or ordinance and not distributed or assigned to some other department, are hereby distributed and assigned to the Department of Public Affairs.

10

Department of Revenue & Finance.

Section III. The Director of the Department of Revenue & Finance shall have charge of and supervision over all accounts and finances of the city, and all officers, boards and departments required to keep or make financial accounts, records, or reports. He shall examine or cause to be examined all financial records or accounts required to be kept in any of the offices, boards or departments of the City, and shall cause proper financial accounts and records to be kept and proper reports to be made. In addition to the annual examination of the books and accounts of the City required by law, he shall from time to time in his discretion, or at the request of the Board of Commissioners, audit or cause to be audited, the accounts of every officer or employee who does or may receive or distribute money. He shall have charge and supervision over all printing by and for the City, other than legal or official printing required by law. He shall examine, or cause to be examined and report to the Board of Commissioners upon all bills, accounts, pay rolls and claims before they are acted upon or approved.

20

30

The Sealer of Weights and Measures, Tax Collector's office, Board of Assessors, City Treasurer, City Comptroller and the District Court, their respective offices or departments and all employees therein, and all bookkeepers and accountants are hereby distributed and assigned to the Department

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Exhibit.

of Revenue & Finance, and shall be under the supervision and direction of the Director thereof.

The Director of the Department of Revenue & Finance shall collect or cause to be collected all license fees, franchise taxes, rentals or other moneys which may be due or become due to the City. He shall report to the Board of Commissioners any failure to pay moneys due to the city with such recommendation in relation thereto as he may deem proper. 10

Department of Public Safety.

Section IV. The Police Department, and all officers, policemen, and employees therein and all police stations and property and apparatus used in said police department; the Fire Department and all officers, firemen and employees therein, and all fire stations and property and apparatus used in said Fire Department; the fire and police alarm system, and all property and apparatus belonging thereto; The Building Inspector, Police Justice and Police Court Clerk are all distributed and assigned to the Department of Public Safety. 20

The Director of Public Safety shall have charge or and supervision and direction over all officers and employees assigned to said department, and over all said property and apparatus. He shall have charge of the purchase of horses, apparatus and supplies for the said department, and for the offices and departments assigned thereto. He shall have charge of and supervision over the liquor traffic, including the wholesale and retail sale of all kinds of intoxicating beverages; over the issuing of all licenses and permits (other than sewer and street opening permits) and of the enforcement of the laws and ordinances regulating the same. He 30 40

Exhibit.

shall have charge of the erection and maintenance of all Bill boards, and the enforcement of all ordinances relating thereto.

10 The Director of the Department of Public Safety shall have charge of and supervision and direction over all theatres, moving picture shows, opera houses and other places of amusement, and shall have charge of the enforcement of all ordinances of said City, or laws of the State relative to said thereto, moving picture shows, opera houses and other places of amusement.

Department of Streets and Public Improvements.

20 Section V. The Director of Streets and Public Improvements shall superintend and take charge of all public works, the cleaning of streets and public places, the entire erection, making and re-construction of all street improvements, sidewalks, sewers, bridges, viaducts and other improvements and of the repair thereof where not otherwise assigned. He shall approve the estimation of the City Engineer, which may be made from time to time of the cost of such work as the same progresses, and accept any work done or improvement made, when complete according to contract; and
30 perform such other duties as may be provided or required by ordinance or resolution. He shall have charge of the issuing of all sewer and street opening permits. He shall have control and supervision over the collection, removal and disposal of all garbage and ashes, and control and supervision of the public dumping grounds and dumps. Except as otherwise assigned, he shall have supervision over all public service utilities and all persons or corporations rendering service to the city
40 under any franchise, contract or grant made or

Exhibit.

granted by the City or State, and shall report to the Board of Commissioners, or other proper officer, any failure of such person or corporation to render services in accordance with, or otherwise to observe the requirements or conditions of the franchise, contract or grant under which such public utility is operated. 10

The City Engineer and Engineer's Department and employees therein, Superintendent of Streets, Assistant Superintendent of Streets, and other employees connected therewith, and the Inspector of Sewers and Inspector of Garbage Department and City Dump are hereby assigned to the Department of Streets and Public Improvements and shall be under the supervision and direction of the Director thereof. 20

Department of Parks and Public Property.

Section VI. The Director of Parks and Public Property shall have charge and supervision over all the public parkes, playgrounds and pleasure grounds in the City, and all officers and employees in or about City Parks, playgrounds and pleasure grounds or kept or used in connection therewith. He shall have charge and supervision over the City Hall and janitor thereof, and the park grounds adjoining said City Hall. He shall have charge of and supervision over the Municipal Building and janitor thereof. 30

He shall have charge of the City Public libraries and officers and employees connected therewith. He shall have charge of the erection, alteration, maintenance and repair of all other public buildings. He shall have charge of and supervision over all street parkings and park ways and all other property owned or controlled by the city and 40

Exhibit.

not assigned to some other department. He shall have charge of enforcing the provisions of law and ordinances relating to the improvement and care of the parks and plantings and care of trees therein and upon the streets and avenues of the City.

10 He shall have such assistance from the City Engineer and Engineering Department as may be necessary in surveying, laying out improvements and otherwise improving the parks, and may, on application, receive assistance from other officers and departments of the City. He shall have supervision over and direction of the lighting of the streets and avenues, public grounds, and public buildings of the City, and of the supply of water to the City for fire purposes, flushing sewers and drains and

20 other City uses; and shall report to the Board of Commissioners any failure on the part of the corporations supplying such lighting and water to the City to furnish adequate service or to comply with the requirements of their respective franchises, contracts or grants under which such corporations are operated.

Appointments of Assistants and Employees.

30 Section VII. Except as otherwise provided, by law or ordinance, the Director of each department shall appoint or employ such assistants and employees as may be necessary to the efficient conduct of the service of the Department.

Rules and Regulations.

40 Section VIII. That the Director of each department shall make and enforce such rules and regulations, not inconsistent with the law, or ordinances or rules and regulations adopted by the Board of Commissioners, as may be necessary to secure ef-

Exhibit.

ficient conduct of the service of his department or the business in charge thereof.

Section IX. This ordinance shall take effect at the expiration of ten days from the date of final passage.

10

Passed at a regular meeting of the Board of Commissioners, held Nov. 28, 1911.

THOMAS R. WATSON,
City Clerk.

George N. Seger

J. Hosey Osborn

John H. Kehoe

William A. Reid

A. D. Sullivan

Commissioners

20

30

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New Jersey Court of Errors and Appeals

PATRICK FITZPATRICK, *et als.*,
Plaintiffs-Appellants,

v.

CITY OF PASSAIC,
Defendant-Respondent.

On Appeal from
Supreme Court.

BRIEF OF PLAINTIFFS-APPELLANTS.

Plaintiffs-appellants appeal from a judgment of the Supreme Court reversing judgments obtained by them in the District Court of the City of Passaic, for certain legal salaries due them as policemen and firemen duly promoted to advanced ranks in their respective departments.

The Facts.

The City of Passaic is governed by a Board of Commissioners under the Walsh Act, and on May 16th, 1927, Abram Preiskel, then being the Director of Public Safety of said City, promoted plaintiff-appellant Fitzpatrick to the rank of Captain of Police, from the rank of sergeant in that department. His legal annual salary as sergeant had been \$2,700.00 and by law the salary of Captain of Police of said municipality was fixed at \$3,100.00 per annum (see State of Demand, p. 11).

Plaintiff Huppert was promoted by the said Director on the same day from the position of fireman in the Fire Department of said City to the office of Lieutenant of the Fire Department (see State of Demand, p. 14).

Since the principles applicable are identical in each of the ten cases which were presented together to the Trial Court and to the Supreme Court, we deem it unnecessary to burden this Court with further statements concerning the promotion of each of the ten plaintiffs.

By an ordinance adopted by the City of Passaic (State of Case, p. 154, at p. 157), jurisdiction over the Police and Fire Departments, including all officers, policemen and employees therein, was assigned to the Department of Public Safety. This ordinance was adopted on November 28th, 1911, and no other action of said municipality has ever been taken to change the designation, assignment or jurisdiction of said department.

Plaintiffs were duly notified of their said promotion and thereupon took the oaths of their respective offices before the City Clerk of the said City of Passaic and certificates of appointment were duly issued to them respectively by the City Clerk of said City (see Exhibits, pp. 134 to 151).

A new administration came into office in said City two days after the appointment of the appellants and although the appellants were at all times ready, able and willing to fulfil the duties of the ranks to which they were respectively appointed and which they had taken oaths duly filed in the City's archives to perform, they were entirely ignored and were not assigned to such duties. Their attorney did thereafter write to the Director of Public Safety on behalf of each of the appellants tendering themselves ready to perform the duties of the rank to which they were appointed and demanding compensation for the higher rank to which they had been so appointed (see as an example Exhibit P-3, p. 135). They were, however, not so assigned to duty, nor was their increased compensation paid to them and hence actions were brought on their behalf in the District Court of

the City of Passaic for the recovery of the difference in the legal compensation to which they were entitled in the advanced rank to which they were appointed, and that which had been paid to them respectively in the inferior ranks from which they had been advanced. These actions resulted in judgments in favor of the plaintiffs-appellants in the District Court, which judgments were reversed by the Supreme Court under its opinion, which is printed in the State of the Case, page 14.

We respectfully contend that the Supreme Court committed error in reversing said judgments.

THE LAW.

POINT I.

The Supreme Court erred in holding that appellants were not entitled to the compensation claimed.

It is the settled law of this State that the determination of questions of fact by a Judge sitting without a jury, are final and conclusive if there is any evidence to support such finding.

Power, &c. Equipment Co. v. Grodensky,
2 N. J. Mis. Rep. 787;
Israelow v. Kreitzer, 2 N. J. Mis. Rep. 154;
Hurlbutt v. Mausoleum, 1 N. J. Mis. Rep.
552 (aff'd. 2 N. J. Adv. Rep. 1138).

Plaintiffs allege in their respective states of demand, that they have, at all times since their respective appointments, been ready, able and willing and did tender themselves ready, able and willing to perform the duties of the rank to which they respectively had been so appointed, but that the said defendant had failed and refused to pay

them the compensation to which they were entitled by virtue of such appointment. The proofs are plenary to sustain this allegation. Besides there are the letters addressed to the Director of Public Safety by counsel for the appellants (Exhibit P-3, p. 135) to which no reply had ever been made.

The District Court Judge, in order to arrive at his conclusion in awarding judgments for the plaintiffs respectively, must have found, as a fact, that plaintiffs, since their appointment, had been ready, able and willing to perform the duties of the rank to which they were respectively appointed and every intendment of law should on this appeal, be made in favor of such finding.

See

Smarak v. Segusse, 91 N. J. L. 57;

O'Niell v. Pearse, 87 N. J. L. 382 (affd. 88 N. J. L. 733);

Kein v. Katz, 92 N. J. L. 406;

Steinmeyer v. Phenix Cheese Co., 91 N. J. L. 351.

The Supreme Court reversed the judgments of the District Court in favor of appellants solely upon the theory that the appellants had not rendered the services for which they sought compensation, and which they were awarded by the judgment of the Court below. In this we contend that the Supreme Court erred.

It is undoubtedly true, that the right of an officer to compensation does not grow out of any contract between the municipality and the officer, but it is, we contend, also true that the right to compensation does not depend upon the rendition of services. It is our contention that the right to compensation or emoluments of public officers is incidental to the office, and that the holder of

an office is entitled thereto whether he performs the services incidental to his office or not, so long as he is ready and willing to perform them, and that an officer is entitled to the emoluments of his office although he is prevented from performing the same or is not assigned to duty so that he might perform them. Of course, if such officer refuses to perform the duties of his office he is subject to dismissal and discharge, but until so dismissed or discharged, is the holder of the office and entitled to the emoluments thereof. Thus the Supreme Court, in the case of *Jardot v. City of Rahway*, 127 Atl. Rep. 799 (not yet officially reported), in adopting the opinion of the Court of Appeals of the State of New York, in the case of *Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536, at p. 538, quotes from the opinion of FINCH, J., as follows:

“We have often held that there is no contract between the officer and the state or municipality by force of which the salary is payable. That belongs to him as an incident of his office, and so long as he holds it; and when improperly withheld he may sue for it and recover it. When he does so he is entitled to its full amount, not by force of any contract, but because the law attaches it to his office; and there is no question of breach of contract or resultant damages out of which the doctrine invoked has grown.”

In the instant case plaintiffs credited on account of their claims, the salaries received by them from the municipality in their lower grades on account of what was due them in their higher ranks in accordance with the principle laid down in this State in the case of *Hansen v. Jersey City*, 77 N. J. Law 394. In the opinion in the case of *Jardot v. City of Rahway*, above cited, the Court also quotes from *1 Dillon on Municipal Corporations* (5th Edition) §429, p. 745, as follows:

“When an officer entitled by law to a fixed annual salary has been prevented for a time, through no fault of his own, from performing the duties of his office and during that time earned wages in another and different employment, he cannot be compelled, in an action to recover his unpaid salary, to deduct the amount earned.”

Many cases bearing on this subject will be found in 53 A. L. R., page 824, etc. On page 926, 53 A. L. R., is cited the case of *Bullis v. Chicago*, 235 Ill. 472, which holds:

“If a legally appointed policeman was wrongfully prevented from performing the duties of his office, he may recover his salary for the time during which he was so prevented, and his earnings, or opportunity to earn, during that time, are immaterial, the right to office carrying with it the right to the salary.”

Every case which we have been able to examine holds that an officer whose salary is fixed by law is entitled to that salary not as under a contract of employment but as incident to the office.

People v. Bradford, 267 Ill. 486;
Terre Haute v. Burns, 69 Ind. A. 7;
Luth v. Kansas City, 203 Mo. A. 110;
Cousins v. Manchester, 67 N. H. 229;
Fitzsimmons v. Brooklyn, 102 N. Y. 536;
O'Donnell v. New York, 128 App. Div. 186;
Thomas v. Hamilton County, 88 Ohio St. 489;
Hampton v. Jones, 105 Va. 306;
Rhodes v. Tacoma, 97 Wash. 341;
Hooker v. McLennan, 236 Mass. 117.

The reports of the decisions of our own State are replete with cases holding that where an officer had been improperly dismissed or sus-

pended, after adjudication of such improper action, he is entitled to compensation during the period of such suspension although no services whatever were rendered by him during that time.

We are not here claiming the right to compensation by virtue of any contractual relationship between the respective appellants and the City, and we respectfully maintain that the cases cited in the opinion of the Supreme Court have no application whatsoever. In the case of *Hoboken v. Gear*, 27 N. J. Law 265 the officer was removed for cause and sought to recover from the City. Before his reinstatement he sought to recover the salary claimed to be due him, and the Court properly held that under the charter of the City, the Council may remove any person appointed by it for cause, and the claimant having been so removed, could not recover for compensation during the period of his discharge, for the very obvious reason that his employment was not contractual in nature as commonly exists between an employer and employee for a fixed term where a discharge before the end of the term so fixed by the contract would constitute a breach thereof entitling the employee to damages.

In the case of *Roberts v. The City of Orange*, the police officer sought to recover compensation for a period when he was not able to perform any services because of his illness. He was not prevented by any act of the municipality from performing his duties.

The case of *Erwin v. Jersey City*, 60 N. J. Law 141, merely holds that an officer *de facto* who renders services without dishonesty or fraud on his part, may recover the compensation provided by law therefor.

Stuhr v. Curran, 44 N. J. Law 181,

holds that an action cannot be maintained by the *de jure* officer against the *de facto* officer for fees paid to the latter while in possession of the office for services rendered by him during that time in good faith and under the belief that he was the duly elected candidate thereto. None of the cases cited in the opinion of the Supreme Court in the instant case holds that a duly appointed officer who holds himself ready, able and willing to perform the duties of his office, but is prevented from so doing or is not assigned by his superior to the performance of the duties required of him, may not recover the compensation incidental to his office. Logic would seem to be against any such rule, for supposing a person duly elected or appointed to office did not meet with the approval of his superior all that the latter would be required to do would be to assign no duties to such appointed or elected officer to perform. The officer would under his oath of office be required to hold himself at all times in readiness for the performance of such services as were within the scope of his duties and refrain from engaging in other undertakings, and yet under the rule laid down by the Supreme Court in the case at bar, would be entitled to no compensation unless he actually performed services. Of course if these appellants had failed in their duties, the municipality might take appropriate action for their dismissal, but until this is done, we respectfully contend that they were entitled to recover their compensation and that the learned Judge of the District Court who rendered the judgments in their favor, was correct in his holdings.

The judgment of the District Court was in entire accord with the determination of the case of *Hansen v. Jersey City*, 77 N. J. Law 394. The only

distinction between the cases at bar and the *Hansen* case is, that in the latter case the police officer had been reduced in rank and thereafter, after litigation, reinstated and was permitted to recover the salary incident to his higher rank, although between the time of his reduction and reinstatement, he had performed no services in the higher rank ostensibly because not assigned to any duties of that rank, whereas here, the converse situation exists that the officers were not assigned to duty in their higher rank, but were required to perform services in the lower rank from which they had been promoted. The principle however, applicable to both cases seems to us to be the same.

POINT II.

The plaintiffs-appellants were legally and properly appointed.

As far as the record in this case indicates, the Director of Public Safety promoted ten men in both the Police and Fire Departments, for their loyalty of service to the public. There is no proof in this case that such promotions were unnecessary or improper, or that there was no room or vacancy in the higher ranks, to which these men were appointed. The presumption is that the appointment was valid and that the appointee is an officer *de jure*.

O'Neill v. Bayonne, 99 N. J. Law 493 (Err. & App.).

Nowhere in this record is the good faith of the Director of Public Safety who made these appointments impugned or questioned. Not a single taxpayer or citizen of the City of Passaic has attempt-

ed to question the validity or propriety of these appointments by certiorari or other objection or protest. These appellants took the required oath of office before the City Clerk of the City and received from him a duly authenticated certificate of appointment under the seal of the City, the oaths subscribed were by the City Clerk deposited in the archives of the City and were produced by him and offered in evidence. The fact that these appointments were made shortly before the Director making them was leaving office, when he desired to reward these men for their loyalty and efficiency of service, should not militate against their rights. If he had the right to make these appointments a year or a month before the expiration of his term, he had the right to do so at any time while he was in authority and vested with the power. If he abused his power, that question could not be gone into except in some proceeding to review the validity of the appointments, but no such proceeding was taken by anybody. That the Director of Public Safety was vested with the power and authority, and for that matter with the duty, in appropriate cases, to make such appointments or promotions, is not only evident from the ordinance of the City of Passaic (p. 157) but from an examination of the authorities, thus:

In *Oliver v. Daly*, 134 Atl. Rep. 870 (not yet officially reported), it is held that the duties and powers relating to the Police and Fire Departments is in the Director of Public Safety.

The Supreme Court in *Sykes v. Heinzman*, 100 N. J. Law 12, lays down the rule that under the Walsh Act each director has the sole and exclusive power of appointment within his department and uses the following language:

“Subsequently, the statute was amended so as to include judicial powers among those to

be distributed among the various departments; and, in construing the scope of the effect of this amendment the Court of Errors and Appeals in the case of *Foley v. Orange*, 91 N. J. L. 554, declared that it 'placed the judicial power appropriate to any one of such departments upon precisely the same footing as the executive and administrative powers; that is, to be exercised by the Commissioner of such department, and not by the board itself as a body.' The pertinent expression in this judicial utterance is that the executive and administrative powers of the municipal government are, under this statute, to be exercised by the respective commissioners presiding over the several departments, and not by the whole body of commissioners. The determination of the question before us, therefore, depends upon whether the making of an appointment to a subordinate municipal office is the exercise of an executive or administrative power. That the power to appoint a city comptroller was vested in the municipality of Passaic prior to its adoption of the Walsh Act, and that it was then exercised by the common council of the city, is conceded by the relator. This power, therefore, was either transferred to the new board of commissioners by the provision of section 4 of the statute above set out or it did not pass to the board at all. In the latter event, the board had no authority to fill the office, and the relator, consequently, has no status to challenge the right of the respondent to hold it. It goes without saying that neither of the parties to this litigation suggests so absurd a construction of the act of 1911, and the acknowledgment that this power was transferred to the board of commissioners carries with it, by necessary implication, the admission that it is either an executive or a legislative one. This being the effect of the statute, and these powers being required by the statute to be distributed among the several departments of the city government, we are of opinion that the power to appoint a city comp-

troller passed to the director of revenue and finance, and is, in the language of the Court of Errors and Appeals, to be exercised by him as the head of his department, and not by the board of commissioners as a body.

"It is argued against the view which we have indicated that because in the same section of the statute it is also provided that the board of commissioners as a body shall at their first meeting or as soon as may be after organization, appoint such officers as it may deem necessary for the proper and efficient conduct of the affairs of the city, and that these officers so appointed may be removed by the board at any time for cause, it is apparent that it was not the legislative purpose that the power of appointment to subordinate offices in the various departments of the municipal government should be distributed among the directors of those departments. But the statutory provision which is referred to only applies to first appointments, and does not, as we think, indicate a purpose on the part of the legislature that this power should not be subsequently distributed, together with all other executive and administrative powers, among the different departmental heads; for the legislative mandate directing the distribution of these powers is general and without limitation, containing no suggestion that the power of appointment to subordinate offices should be segregated from all other executive and administrative powers and should not be included in the distribution of those powers.

"The conclusion which we reach is that the appointment of the respondent to the office of City Comptroller by the Director of Revenue and Finance was a valid one, and that, consequently, the respondent is entitled to judgment on the demurrer."

It is said in *McArt v. Belleville*, 98 N. J. Law 396, on page 400, that under the Walsh Act the appointment of Patrolmen is vested solely in the Director of Public Safety by whatever name called.

That case is different from this in that there, the action was brought by a patrolman who had actually performed the service, and as such was entitled to be paid as a *de facto* officer.

The case of *Sykes v. Heinzman, supra*, has been followed and cited with approval in subsequent decisions.

Indeed in the case at bar, toward the end of the opinion of the Supreme Court, it seems to be conceded that appellants held title to the office. This case is not like *Van Sant v. Atlantic City*, 68 N. J. Law 449, or *Keegle v. Hudson County*, 99 N. J. Law 26, in which cases it was held that an action could not be maintained for salary alleged to have accrued after dismissal from service and while the order of dismissal remains unreversed. In this case there was no order of dismissal and the appointment of the appellants to the offices for which they have, in the District Court, recovered compensation, remains unimpaired.

POINT III.

Appellants are not in this action seeking to try title to office.

We discuss this point because it was raised by the respondent in the Court below. We have no quarrel with the general proposition that title to office may not be tried otherwise than by *quo warranto*. This case, however, is not one for such proceeding. There is no incumbent alleged to be usurping the offices which the appellants claim. In *quo warranto* the judgment would be one of ouster and here there is no one to oust.

The appellants holding title to the office must of necessity have some remedy. Were they dismissed from office they might bring certiorari to review the legality of their dismissal, but no such

step had been taken by the municipality. There is no incumbent in the office and they may therefore not bring *quo warranto*. Were the legality of the title to the office the matter in contest between these appellants and others we would readily concede that they would not be entitled to recover until their title had been first established. Had the appellants been removed from office, they could not recover until the municipal action of dismissal or removal were set aside by certiorari, because the order of dismissal or removal is presumed valid until adjudged otherwise, and could not be attacked collaterally. But here we have duly authorized authority making appointments to office and proper qualification by the appointees, presumed to be valid and unaffected by any proceedings, and the defendant seeking to attack the validity of these appointments collaterally, which under the case of *Van Sant v. Atlantic City*, 68 N. J. Law 449, presenting the converse proposition, may not be done. Here every step required to be taken toward the validity and regularity of the appointments was taken, the appointment, oath of office and certificate of appointment under the seal of the City. These remain unimpaired, and we respectfully maintain may not be questioned collaterally.

O'Neill v. Bayonne, 99 N. J. Law 493.

That in order to maintain *quo warranto* there must be a usurper with whom the contest to the title to the office is to be carried on, is held in

Haines v. Camden, 47 N. J. Law 454;
Roberson v. Bayonne, 58 N. J. Law 325.

Furthermore, in the cases cited under Point I of this brief, the actions were as here, for the recovery of the emoluments of the office to which

the respective plaintiffs were entitled by law. If this were not permissible then persons legally appointed to office, as were these appellants under the circumstances here existing, would have no remedy at all and the legal maxim "That where there is a right, there is a remedy" would be meaningless.

POINT IV.

The acceptance by the appellants of the moneys paid them did not constitute a waiver of their right to claim what was legally due them.

In the Court below it was argued by the respondents that because the appellants had accepted checks for the amount of salaries theretofore paid to them in their prior capacities, they had waived their rights to the salaries to which they were legally entitled in their new and higher ranks. No authority is cited for such a proposition and we respectfully submit that there is none. The appellants were fully justified in accepting what was being paid to them and crediting it as they did in these actions, on account of what was their due. The same situation existed in the case of *Hansen v. Jersey City*, 77 N. J. Law 394, and the Court there held that the appellants were entitled to recover the difference in salaries. So here. Appellants merely accepted all that the municipality would pay them, and they had no other means than the institution of these suits to recover what legally they were entitled to have. Appellants did not nor were they required to sign any receipt that what they were getting was in full payment or satisfaction for what they were entitled to receive, and certainly they should not be held to have been required, at their peril, to renounce what was be-

ing paid to them, and which they required to use to support themselves and their families pending this litigation.

POINT V.

The appointments of appellants were not against public policy.

It was urged by the respondent in the Court below, that the appointments of appellants were against public policy.

Again adverting to the rule that the findings of the District Court Judge are conclusive, we desire to point out that the learned Trial Judge did not so find, and that there is not a scintilla of evidence in the entire case upon which such finding might have been based. But if there had been such evidence, the finding of the Trial Judge to the contrary, would have been conclusive. The legal presumption is against the invalidity of the appointments and is in favor of recognizing the official acts of constituted authority as being valid. There are involved in these cases but ten promotions, including both the Police and Fire Departments of the City of Passaic. The differences in salaries between what appellants had been paid prior to their promotion and what was due them thereafter, will appear by the amounts of the judgments rendered in these cases to be quite insignificant in so far as the municipality is concerned. Commissioner Preiskel promoted these appellants because of their loyal and efficient service to the municipality under him. Is there anything against public policy in the due recognition and appreciation by promotion of public officers, particularly in the Police and Fire Departments? How else could these men have been rewarded? The fact that they were so promoted by Commissioner

Preiskel only a short time before he retired from office is of no consequence. If he had the right to promote them a month or a year before the expiration of his term, he had a similar right to do so a day before the expiration of his term. His good faith is nowhere impugned in the record. Not a single authority was cited by counsel for the proposition he seeks to maintain on this point, and we respectfully submit that none can be found.

In the case of *Carroll v. City of Bayonne*, 124 Atl. Rep. 613 (not yet officially reported) the policemen and firemen were appointed four days before the term of office of the outgoing commission expired and upon the newly elected commission assuming to exercise its office, attempted to rescind the resolution so appointing numerous firemen and policemen. The Court held that the rescinding resolution was passed prior to the time when the incoming commissioners were legally entitled to act and set aside the rescinding resolution.

The same litigation came before this Court in *Carroll v. Bayonne*, 128 Atl. Rep. 234 (not yet officially reported) upon a new resolution of rescission and the Court again set said rescinding resolution aside, although the same was passed after the incoming board was admittedly in office and functioning. If such appointments were against public policy, it is strange that the Court did not for such reason set aside the appointing resolution which carried many more appointments of entirely *new men* to the Police and Fire Departments than the promotions here involved. These respondents had served the City for several years, faithfully and efficiently, and it certainly was within the power of the Director of their Department to recognize such service by promoting them. If

appointments of new men shortly before the term of the appointing power expires is good, certainly should promotions of those tried and found true be held valid.

It is respectfully submitted that the plaintiffs-appellants were entitled to recover the difference between the salaries paid to them and the salaries to which they were entitled by law as found by the District Court of the City of Passaic, and that the judgment of the Supreme Court, reversing the judgments in favor of plaintiffs-appellants, is erroneous and should be reversed, and the judgments of the District Court of the City of Passaic, should be affirmed, with costs.

Respectfully submitted,

GROSS & GROSS,
Attorneys and of Counsel for
Plaintiffs-Appellants.

ISAAC GROSS,
Of Counsel.

New Jersey Court of Errors and Appeals

PATRICK FITZPATRICK, *et als.*,
Plaintiffs-Appellants,

vs.

CITY OF PASSAIC,
Defendant-Respondent.

ON APPEAL
FROM
SUPREME
COURT.

BRIEF OF THE DEFENDANT-RESPONDENT, THE CITY OF PASSAIC.

Statement of Facts.

The New Jersey Supreme Court (Trenchard, Kalisch and Lloyd, JJ.) in an opinion reported in 6 N. J. Adv. Rep. 1782, reversed judgments recovered in the Passaic District Court against the City of Passaic, on January 13th, 1928.

The City had appealed from these District Court judgments which were given in favor of the plaintiffs, policemen and firemen of the City of Passaic, for salaries claimed to be due them from the City under alleged promotions made by former Commissioner Preiskel, on May 16th, 1927.

On May 10th, 1927, Abram Preiskel who had been one of the five Commissioners of the City for eight years preceding, was defeated for re-election. Although Preiskel was selected as Commissioner of Public Safety, no resolution was ever passed distributing the various powers, duties and authority among the various Commissioners as is required by the Walsh Act. On the day before his

term would expire, May 16th, Preiskel as Director of Public Safety made twenty-three alleged promotions in the police and fire departments, *there being at that time in the police department ninety-seven members and in the fire department eighty-six*. One of the letters notifying of these alleged promotions was not received officially in the Passaic City Hall until May 17th, 1927, fifteen minutes after 10 A. M., just one hour and fifty-five minutes before Commissioner Abram Preiskel's term of office expired. Thirteen of the alleged promotees immediately refused to accept the alleged promotions.

On May 17th, the newly elected Commissioners organized, and Commissioner Turner was selected as Commissioner of Public Safety. At the organization meeting a resolution was introduced distributing the powers of the different departments among the various Commissioners; the powers and duties of the Director of Public Safety being assigned to Commissioner Benjamin F. Turner.

These alleged promotions were never recognized by Commissioner Turner. The Board of Commissioners of the City of Passaic never confirmed the alleged promotions. Thereafter and until the bringing of these suits the plaintiffs continued the performance of their *former* duties and received and accepted the compensation attached thereto.

On November 26th, 1927, eleven of the alleged promotees filed states of demand *based on contract actions* and caused summons to be issued from the Passaic District Court. These suits were instituted on *contract* in order to recover the difference in pay which the plaintiffs were receiving, and that which they claimed they were entitled to under the alleged appointments if they had performed their services. From the entry of judgments in favor of the plaintiffs, the City appealed to the New Jersey Supreme Court and respectfully urged the following reasons for reversal:

The District Court had erred when it had refused to non-suit the plaintiffs, in as much as the plaintiffs could not legally try title to their offices in suits upon contract for salary; the alleged promotions were illegal and made without authority because no resolution was introduced distributing the powers of the Director of Public Safety to Abram Preiskel; the District Court had erred when it had refused to non-suit the plaintiffs for the reason that they had not actually performed any services which would have entitled them to judgments in suit upon contract; the District Court had erred when it had refused to grant the motion for a judgment for the defendant because the plaintiffs had waived any rights which they might have had when they accepted their old salaries; and because the alleged promotions were invalid because they were made against public policy.

The New Jersey Supreme Court reversed the judgments, and the plaintiffs now appeal. We respectfully urge that the judgment of the New Jersey Supreme Court be in all things affirmed.

POINT I.

The Supreme Court correctly decided that the appellants were not entitled to salaries from the City of Passaic for services which they had never performed.

(In answer to Point I, Appellants' Brief.)

The *legal question* respectfully presented to the Supreme Court was *whether a contractual relation existed between the City of Passaic and police officers whose alleged promotions were never legally recognized*. It was urged below and we re-

spectfully urge at the present time that the states of demand did not allege a cause of action. An examination of them will disclose that they are all based on a *contractual relation*. Nowhere, however, throughout the entire case is there any scintilla of evidence that the plaintiffs performed any services by reason of their alleged promotions. On the contrary, every one of the plaintiffs testified that they had not performed the services called for by their alleged promotions, but continued to perform their original duties. We fail to perceive under what contractual theory the plaintiffs can recover against a city for services which they have not performed.

Patrick Fitzpatrick, one of the plaintiffs alleged to have been promoted to the rank of Captain, testified as follows:

“Q. Did you purchase a cap or badge or anything or any uniform with the designation of Captain thereon? A. No.

“Q. Did you serve in any capacity as Captain? A. No.

“Q. From the time you received this alleged piece of paper? A. No.

“Q. Huh? A. No.

“Q. You have performed the duties of a Sergeant continuously for how many years, down to date? A. Oh, seven years.

“Q. Did you submit yourself to Commissioner Turner? A. No.

“Q. And ask him to assign you to duty as a Captain? A. No.

“Q. Did you submit yourself to any superior officer in the City of Passaic and ask them at any time, since you received this alleged certificate, requesting them to assign you to duty as a Captain in the Police Department? A. No.

“Q. You have said nothing and did nothing since you received the alleged certificate of appointment since the time you received it, is that correct? A. What is that?

“Q. You said nothing and did nothing to any of your superior officers? A. Well, we were told.

“Q. Will you answer my question? A. No.

“Q. To your superior officers, I am asking you? A. No” (State of Case, p. 46, ll. 41 through to page 47, l. 38).

From the testimony of Irving Evansky (Case, p. 71, ll. 33-36):

“Q. You never performed the duty of a Sergeant of Police from the date of the alleged certificate of appointment? A. No, sir.

“Q. Down to date, is that correct? A. Yes, sir.”

And, again,

“Q. Did you ever tender yourself to any of your superior officers, who were in charge, including Chief Zober? A. No, sir.

“Q. Or to Commissioner Turner from the date of your alleged appointment? A. No, sir.

“Q. Why not? A. Because the newspapers said that the Commissioners would not recognize our promotion” (Case, p. 72, ll. 1-12).

To the same effect was the testimony of Albert G. Bednarz (p. 75, l. 24; Edward Belli (p. 78, ll. 38-41); Albert Hubbard (p. 83, ll. 13-17); Joseph Gallagher (p. 85, ll. 28-36); Martin J. Farrell (p. 89, ll. 36, through to p. 90, ll. 1-14); Cornelius Miller (p. 93, ll. 34-37); and John Noonan (p. 96, ll. 18-28).

It appears to us that the appellants urge that salary is incidental to public office. This contention, we respectfully submit, is not now properly before this Court. *All the states of demand are based upon contract, and upon this ground alone can the plaintiffs recover.*

Chief Justice Green in the masterly opinion of *Hoboken vs. Gear*, reported in 27 N. J. Law 265, decided, at p. 276:

“*The plaintiff then claims, and must recover solely on the ground of his contract. The amended declaration contains no averment of service. He insists that his appointment to office was a contract on the part of the City to pay him a stipulated salary for a specified service during a given time, and that, having been unlawfully discharged from that service, he is entitled, by virtue of the contract, to recover for the whole period covered by the contract. The declaration is founded on the contract, and upon this ground alone can the plaintiff recover*” (Italics ours).

We invite the attention of the Court to the headings of each one of the states of demand filed herein and show that they are based *on contract*, and therefore unless services were actually rendered, the plaintiffs cannot recover.

The appointment of a police officer bears no analogy to a private contract between individuals for service. *Hoboken vs. Gear, supra*, at page 277.

The Court in *Hoboken vs. Gear, supra*, speaking of the relationship of a municipality and a police officer said at page 278:

“It is at most a contract that *while the party continues to perform the duties of the office*, he shall receive the compensation which may from time to time be provided by law” (Italics ours).

Quoting from the case of *Hoboken vs. Gear, supra*, beginning at page 278, the Court held:

“In *Connor vs. The Mayor, Aldermen, and the Commonalty of the City of New York*, 1 Selden 296, Ruggles, Ch. J., delivering an opinion in the Court of Appeals of New York, said the prospective salary or other emoluments are not the property of the state. They are not property at all. They are like daily wages unearned, and which may never be earned. The incumbent may die or resign, and his place be filled and the wages earned

by another. The right to the compensation grows out of the rendition of the services, and not out of any contract between the government and the officer that the services shall be rendered by him, S. C., 2 Sand. Sup. Court R. 355" (Court's italics).

"In the People, on the relation of Perry vs. Thompson, 25 Barb. R. 73, an application was made by one of two contestants to the office of mayor of Albany for a mandamus to the chamberlain of the city to compel the payment of the applicant's salary as mayor for one year. The application was refused, on the ground that the salary was a debt, and might be recovered by suit against the corporation like any other debt. But in that case, as appears by the report (and more fully in the report of Morgan vs. Quackenbush, 22 Barb. 72), *the applicant had been in the actual possession of the office and had discharged its duties*" (Italics ours).

"And in the recent case of Muncho vs. The Mayor, etc. of New York, decided by the Superior Court at December term, 1858, the complaint alleges not only that the plaintiff was appointed a policeman, and entitled to the exercise of the office during the term of two years, *but that during the whole of that period he performed the duties of the office*" (Italics ours).

We respectfully submit that the appellants in their brief have drawn an incorrect conclusion from the case of *Stuhr vs. Curran*, wherein Justice Van Syckel wrote the opinion for the Court of Errors and Appeals which is reported in 44 N. J. Law 181. An examination of that case will disclose that the appellants therein urged the very same reason as the appellants herein, namely, that "compensation of a public officer is incident to the true title". Respondent therein contended, as the City of Passaic does now, that "an office and the prospective fees of the officer are not property; the right to fees and salary grows out of

service performed." The Court upheld this contention in affirming the judgment below and at page 191 decided:

"No countenance should be given to the notion that public offices are created for the benefit of office holders. In this country, where the cases almost uniformly discard the idea of proprietary interest in such offices, the logical sequence is that the right to emolument must be regarded as having no legal existence except as arising out of the rendition of services for which they are compensatory."

And so also, the case of *Erwin vs. Jersey City*, decided by the Court of Errors and Appeals of New Jersey and reported in 60 N. J. Law 141. Chief Justice Magie carefully noted that the public officer in that case "*had accepted the position and performed its duties,*" and reviewing the case of *Stuhr vs. Curran, supra*, said at page 149:

"It was declared that, in this country, public office was not property, and public officers had no proprietary interest in their offices and it was deduced therefrom that the right to the emoluments of the office arose, not out of the title to the office, but out of the actual rendition of services for which such emoluments were designed to be compensatory."

And so also, the very recent opinion of the Court of Errors and Appeals of New Jersey, in the case of *Roberts vs. Orange*, decided in 1926, and reported in 102 N. J. Law 721. We respectfully invite the attention of this Court to that portion of the opinion which appears on page 722:

"*Notwithstanding the decisions in other states*, which apparently, support that contention, it seems to me that the question is decided in this state by the case of *City of Hoboken v. Gear*, 27 N. J. L. 265; * * * an

appointment to a public office, therefore, either by government or by a municipal corporation, under a law fixing the compensation and the term of its continuance, is neither a contract between the public and the officer that the service shall continue during the designated term, nor that the salary shall not be changed during the term of office. It is at most a contract that while the party continues to perform the duties of the office, he shall receive the compensation which may from time to time be provided by law."

And again:

"The case of *City of Hoboken v. Gear*, above mentioned, provides that 'the right to the compensation grows out of the rendition of the services.' The opinion in the case of *Stuhr v. Curran*, 44 N. J. L. 181, in an opinion by Mr. Justice Van Syckel (at p. 191), says: 'The emoluments of office are presumed to be nothing more than an equivalent for the labor it imposes.' "

And as a result of the fact that no services were rendered by the plaintiff, a policeman, judgment was given in favor of the defendant, the City of Orange. *Thus, even though in that case the plaintiff had undisputed title to the public office of policeman, the Court decided that unless actual services were rendered, the plaintiff was not entitled to his salary. In this case, 'a fortiori' the title of the alleged promotees was never recognized. The appellant cites decisions in other States, whereas our own Court of Errors and Appeals has repeatedly held that the right to compensation grows out of the rendition of services.*

The appellants on page 6 of their brief cite the case of *Hooker vs. McLennan*, 236 Mass. 117. In that case the Court held that "the right of a public officer to compensation, can be assigned before his services have been fully performed, such a

right being 'property'." *Obviously this is contrary to the theory adopted by the exhaustive cases decided by our own Court of Errors and Appeals.*

The case further held that "compensation due and payable to a municipal officer may be recovered in an action of contract." *This, in our opinion, is also contrary to the law of our State which holds that there is no contractual relationship between a municipality and a public officer.*

The case of *Thomas vs. Board of Commissioners of Hamilton County*, 88 Ohio St. 489, cited on page 6 of appellants' brief, merely held that an assistant city solicitor designated as a prosecuting attorney was entitled to receive compensation allowed by law *for such services.*

The case of *Terre Haute vs. Burns*, 69 Ind. A. 7, cited on page 6 of the appellants' brief merely held that an engineer, removed from office *who still continued doing the work* was entitled to his salary.

In the case of *Cousins vs. Manchester*, 67 N. H. 229, cited on page 6 of the appellants' brief, the city fireman *had actually rendered services* and was entitled to compensation therefor, the Court holding that:

"A person is not entitled to a salary of a public office unless he both obtains and exercises the office" (*Farrell vs. Bridgeport*, 45 Conn. 191).

To justify a recovery by a *de jure* officer there must be both due title to the position and service therein. *Jayne vs. Drorbaugh*, 63 Iowa, 711; *Brown vs. Tama County*, 122 Iowa 745, 757. Also cases cited in 1 Dillon on "Municipal Corporations" page 744, n. and especially the case of *Erwin vs. Jersey City*, 60 N. J. Law 141.

The case of *McArt vs. Belleville*, 97 N. J. L. 396, was cited by the plaintiffs at the trial below, but

it is apparent that that case can have no effect upon the present case. McArt actually performed services for the City of Belleville, and was entitled to compensation for such rendition of services. *But that is not the case here.*

In the instant case, all of the plaintiffs testified that they did not perform the services called for under their alleged promotions. On the contrary, they continued to discharge their usual duties up to the time of these suits. They were never in the actual possession of the alleged higher offices, and never discharged the duties of such offices.

The cases cited by the appellant with respect to the *factual determinations* of the District Court Judge, can have no effect in as much as it is admitted that only *a legal question* is involved herein. But without going into that matter more fully, any determination that the alleged promotees were ready to perform their services was contrary to the *very evidence of all the plaintiffs themselves who had testified that they had not tendered themselves to their superiors, nor had they purchased the necessary incidentals to the alleged promoted offices.*

The appellants in their brief admit that they took the oath required of them for the higher offices. There was no performance of these duties by the men alleged to be promoted, duties which they swore to perform. Finally, for the reason that all the states of demand are based upon contracts and because there is no contractual relationship, and further because there was no rendition of service for which the plaintiffs were entitled to recover, we respectfully submit that the judgment of the Supreme Court was correct in deciding that the present appellants were not entitled to any compensation.

POINT II.

The plaintiffs-appellants were illegally appointed.

(In Answer to Point II.)

At the outset, we desire to correct the improper impression made by the appellants' misstatement in their brief below that the City of Passaic had evidently recognized sixteen of the alleged promotions. There is no such proof, and this statement is absolutely untrue, since these sixteen men never sought recognition of these so-called promotions.

The uncontradicted testimony disclosed that there was no distribution of the powers among the various commissioners at their organization meeting on May 15th, 1923, and that there was no distribution of the powers during their term of office which continued up to May 17th, 1927, at noon.

Quoting from the testimony of Arthur D. Bolton, City Clerk of Passaic, which appears on page 52 of the State of the Case, ll. 19-25:

“Q. Was there at any time from May 17th, if that is the date of the organization meeting, 1923, down to the expiration of the four year period for which the various commissioners were elected, an assignment or a distribution of the powers of the various commissioners? A. No.”

Section 4 of the Walsh Act provides among other things, the following:

“The Board of Commissioners shall determine the powers and duties to be performed by each department and assign such powers and duties to the appropriate departments, and they shall prescribe the powers and du-

ties of all officers and employees, and they may assign particular offices and employees to one or more departments and may require any officer or employee to perform duties in two or more departments, and make such other rules and regulations as may be necessary and proper for the efficient and economical conduct of the business of the city."

Buohl vs. Beverly, 90 N. J. L. 44, was a case in which the Supreme Court (Swayze, Minturn and Kalisch, JJ.), construed Section 4 of the Walsh Act, and Mr. Justice Swayze says on page 45:

"There can be no doubt that the object of the Walsh Act was to concentrate all the powers of the municipality in the commissioners provided for by that act. The language of Section 4 is explicit."

The appellants on page 2 of their brief expressly admit that no ordinance was ever introduced assigning the powers, duties and authority of the Department of Public Safety to Abram Preiskel. *We submit that unless the concentrated powers were delegated by resolution to the various commissioners, any attempt to usurp them would be unwarranted and therefore illegal. Further, that unless the power to promote policemen was assigned to the Director of Public Safety in accordance with Section 4 of the Walsh Act, the power to promote police officers was subject to the confirmation of the entire Board of Commissioners as part of their concentrated powers. The Board of Commissioners of the City of Passaic never confirmed the alleged promotions made by Commissioner Abram Preiskel and such promotions were therefore illegal.*

We desire to call the attention of the Court once more to Section 4 of the Walsh Act. When reference is made to the assignment of powers the

word "shall" is used. In other parts of this same section, the term "may" is used. We submit that the use of the word "shall" was purposely made by the Legislature and that its intention was to make the assignment of powers compulsory. *For this reason, we respectfully submit that the appointments were illegal, and that the judgment of the Supreme Court be affirmed.*

POINT III.

The plaintiffs-appellants are collaterally seeking to try title to public office in suits for salary.

(In Answer to Point III.)

An examination of the argument in Point III of the appellants' brief discloses that the plaintiffs-appellants, in our opinion, entirely misconceive their own rights, if they have any, as well as the remedies which they are required to pursue to sustain such questionable rights.

The suits involved in the present cases were actions of debt upon contract against the City of Passaic to recover salaries claimed to be due to the plaintiffs under their alleged new offices. *Title to these offices was never recognized to be in the plaintiffs. These suits were instituted for the purpose of compelling the Director of Public Safety to admit the plaintiffs to the legal possession of the alleged promotions by way of actions for salary.*

This, we submit, was an attempt to try title to office and the Court could not do so collaterally. *If the plaintiffs were wrongfully denied recognition by the Director of Public Safety, his action must be attacked by a direct proceeding to determine the legality of the said alleged promotions.*

Quoting from the syllabus in the case of *Van Sant v. Atlantic City*, 68 N. J. Law 449 (Gummere, C. J.; Van Syckel, Fort and Garretson, JJ.:

1. "A policeman in a city who claims to have been illegally removed from his office because no cause was alleged or complaint made or hearing given him, cannot maintain an action for salary alleged to have accrued after dismissal remains unreversed.

2. "Title to office cannot be tried collaterally in an action for salary."

Justice Fort, speaking for the Supreme Court, says in that case:

"Whether there was or was not a proper proceeding for dismissal cannot be inquired in collaterally. It must be reversed by a direct proceeding to set aside the illegal removal before suit for salary can be maintained, or by a mandamus, to compel the city to restore him to the office. *Hoboken v. Gear*, 27 Law 265 was a suit by a policeman for his salary after removal, as he alleged, without cause, as in this case and Chief Justice Green there says: '*Aside from the objection that there was no contract between the parties, upon which the plaintiff can rely for a recovery, the action cannot be sustained upon reasons of public policy. It is a new mode of trying, in a collateral way, by an action for the salary, the title to a public office* (Italics ours).

If the plaintiff was improperly removed, the law furnishes other and more efficient and appropriate remedies. But whatever may be the proper form of the remedy, or whether there be any, it is clear that an action of debt upon contract against the city is not the appropriate mode of redress."

In *Keegle v. Hudson County*, 99 N. J. Law 26, (Trenchard and Parker, JJ.), the Court in a *per curiam* opinion, decided on page 28:

“The rule seems to be well settled in this State that in the absence of any judicial ascertainment of the illegality of the discharge, or any agreement that it was illegal, no suit for salary for any period when the plaintiff did not actually perform the service will lie until the illegality is admitted, or ascertained by a proper proceeding” (Italics ours).

And also in *Dinkle v. Hudson County*, 5 Misc. 326, 136 Atl. 420 the Supreme Court (Gummere, C. J., Trenchard and Minturn, JJ.), once more held that a suit for salary could not be maintained until any improper dismissal of a public officer was reversed.

“As was pointed out by this Court in the case of *Van Sant v. Atlantic City*, 68 N. J. L. 449, the official or body ‘charged with the duty of discharging an employe or person holding a position is acting judicially when so doing. His action is subject to review, and may be reversed. Until reversed, it stands. Whether there was or was not a proper proceeding for dismissal cannot be inquired in collaterally. It must be reversed by a direct proceeding to set aside the illegal removal before suit for salary can be maintained, or by a mandamus to compel the municipality to restore his position or employment.’ This principle was reiterated by this Court in the case of *Keegle v. Hudson County*, 99 Id. 26; affirmed on opinion below, 130 Atl. Rep. 919, the opinion rendered in that case stating that ‘public policy forbids the settlement of contested issues, as to the legality of municipal action in the matter of offices or positions, in a suit for salary, where the right to salary is dependent upon the legality of a discharge * * *. The rule seems to be well settled in this State that, in the absence of any judicial ascertainment of the illegality of the discharge or any agreement that it was illegal, no suit for salary for any period when the plaintiff did not actually perform the service

will lie until the illegality is admitted or ascertained by a proper proceeding.' ”.

Other cases of *direct action* to establishing right to office are proceedings to compel placing name upon payroll of municipality; to compel the acceptance of bond of county collector; to compel the township committee to accept the oath of office and bond of a constable; to compel the delivery of books and papers of the city to the claimant as city treasurer; and to compel the delivery of a commission to one claiming the office of Surrogate:

The State v. The Governor, I Dutch 331-345;

State, Stokes v. Freeholders, 6 Vr. 217;

Prickett's Case, Spencer 134;

O'Donnell v. Dusman, 10 Vr. 677.

In the instant case, the alleged promotions were never recognized (Case, page 113, l. 28, through to page 114, l. 5). The alleged promotees never performed any new duties. We invite the attention of the Court to the testimony of Irving Evansky, one of the plaintiffs, which can be found on page 73, of the State of the Case, ll. 14 to 19. All of this testimony will show that all the plaintiffs testified themselves that what they wanted in their suit for salary was title to the alleged promotions.

“Q. What you want is the title? A. Title and pay.”

Again, we have the testimony of Albert G. Bednarz, another plaintiff, Case, p. 76, ll. 37 and 38.

“Q. Huh? What you want is your title to the job, is that it? A. Yes, sir.”

On page 85 of the Case, ll. 36-40, is the testimony of Joseph Gallagher, another plaintiff:

“Q. What you want to get is the title to the office too? A. Yes, sir, and the money too.”

Q. You want the title to office and the money too. Have you instituted mandamus proceedings? A. No.”

The testimony of John Noonan, another plaintiff, appears on page 96, ll. 29 and 30.

“Q. Or recognized? What you want is your title to office, is it? A. Yes, sir.”

It is thus apparent from the testimony of the plaintiffs themselves, that the real material question in dispute in these suits for salary was the title to the offices to which the men claim to have been promoted.

It is interesting to note the contents of Exhibit P-3, offered by the plaintiffs themselves and mention of which is made on page 2 of their brief. We desire to particularly call the attention of this Court to the last paragraph which reads as follows:

“*Unless this demand is acceded to by you, I shall, on behalf of my client, institute the necessary proceedings for the recognition by you of his appointment aforesaid.*” (Italics ours.)

This language is unambiguous. It presents the crux of the plaintiffs' case and is an admission of their intentions. *The plaintiffs have not instituted any other suits for any appropriate remedy, if any there be. The suits in the Passaic District Court were the only proceedings taken by the plaintiffs for recognition of their appointments. This procedure can mean nothing else but an attempt to try title to office in an action upon contract for salary.* This the District Court could not do collaterally and any attempt to do so,

we respectfully submit was error. It is absolutely clear that the promotions were unnecessary and improper because the proof discloses that by reason of the alleged promotions there was an officer for every two men. We fail to perceive how the appellants can argue that the good faith of Abram Preiskel is not impugned when all the proof in the case conclusively shows that the alleged promotions, made on the eve of the expiration of the commissioner's term, were absolutely unnecessary.

Oliver vs. Daly, 134 Atl. Rep. 870 (not yet officially reported), mentioned on page 10 of the appellants' brief, came before the Court upon *certiorari* proceedings. *Sykes vs. Heinzman*, 100 N. J. Law 12, mentioned on the same page of the appellants' brief, was presented to the Court upon information in the nature of *quo warranto*. *O'Neill vs. Bayonne*, 99 N. J. Law 493, were brought in the Supreme Court by writs of *certiorari*. *Haines vs. Camden*, 47 N. J. Law 454, cited on page 14 of the appellants' brief, was brought before the Court on *certiorari*. *Roberson vs. Bayonne*, 58 N. J. Law 325, also came before the Court on *certiorari*. None of these cases, we respectfully submit can be cited for the proposition that title to office can be tried in suits in District Court upon contract for salary. Indeed, an examination of the appellants' argument in Point III of their brief discloses that the plaintiffs-appellants in our opinion, entirely misconceive their own rights, as well as the remedies which they are required to pursue to sustain any rights that they may have.

We urge that there is no merit in the plaintiffs' contention that the suits were for salary only. *What was the effect of the judgments awarding the increase of salary? Such salary became due*

upon the establishment of the right to the alleged promoted offices. What the District Court in reality did when it gave judgment for the plaintiffs, was to establish the right to their offices, which was in dispute. In this manner the District Court attempted to try title to office, and, we respectfully submit, that this collateral manner of doing so was erroneous, and for that reason the judgment of the Supreme Court in reversing the judgment of the District Court should be affirmed.

POINT IV.

The acceptance by the appellants of their usual salaries constituted a waiver of any rights which they might have had.

(In Answer to Point IV).

All of the plaintiffs testified that they received their old checks and cashed them up to the time these suits were instituted.

William Buckley, one of the plaintiffs testified on page 68 of the Case, ll. 1-9:

“Q. Did you receive your salary as a patrolman down to date? A. Yes, sir.

Q. Of this city? A. Yes, sir.

Q. By check? A. Yes, sir.

Q. You cashed the checks? A. Yes, sir.”

To the same effect was the testimony of Patrick Fitzpatrick, page 65, ll. 36-40; Irving Evansky, p. 71, ll. 36-40; Albert G. Bednarz, page 75, ll. 24-27; Edward Belli, page 79, ll. 33-40; Albert Hubbard, page 82, ll. 36 and 37; Joseph Gallagher, page 85, ll. 19-24; Martin J. Farrell, page 90, ll. 29-32; Cornelius J. Miller, page 92, ll. 25-28; and John Noonan, page 97, ll. 18 and 19. The appellants on page 15 of their brief accuse

us of citing no authority for this proposition. Of course, this accusation is obviously without any merit. *The duties of the public office which the men were occupying by reason of their acceptance of their old salaries were incompatible with the duties of any alleged promotion to other public office.*

“‘The rule’, says Parke, J., in a leading English case on this subject, ‘that where two offices are incompatible they cannot be held together, is founded on the plainest principles of public principles of public policy, and has obtained from very early times.’”

Per Parke, J., *Rex vs. Patteson*, 4 Barn. & Adol. 9; 1 Nev. & Mann. 612. 1 Dillon on “Municipal Corporations,” section 417, page 725:

“The rule under consideration is not limited to corporate office, but extends both in its principle and application, *to all public office.*”

1 Dillon on “Municipal Corporations”, section 419, page 726.

Thus, the rule is laid down that two offices are incompatible where the holder cannot, in every instance, discharge the duties of each. *When the plaintiffs-appellants in this case performed their usual duties and accepted their old checks and cashed these checks, such performance was incompatible with their discharging the duties of any other public office. For this reason the judgment of the Supreme Court should be affirmed.*

POINT V.

The alleged promotions were invalid because they were made against public policy.

(In Answer to Point V.)

Throughout the appellants' brief they have conveniently created presumptions in their own favor. Repeatedly they have presumed alleged appointments to be good which were never legally recognized as valid. Twenty-three promotions are alleged to have been made by Abram Preiskel, *six days after he was defeated, and just one day before his term of office expired.* The entire police department of the City of Passaic consisted of ninety-seven members, while there were eighty-six men in the fire department. Obviously, there was no necessity for such wholesale promotions, and their only effect was to burden the City with additional expenses. Under these alleged appointments there was one officer for every two men.

Abram Preiskel was the Director of Public Safety of the City of Passaic for eight years. Assuming, but not admitting that he had the power to do so, he had the opportunity of promoting these men during this period. Instead of doing this, he waited until the last day of his term of office. There was no proof that the men were deserving of their appointments. Under the belief that there is strength in the plural, the appellants have repeatedly asserted in their briefs that they were promoted because of their loyal and efficient services, although there was absolutely no proof to that effect. Further, why this *sudden recognition? The purpose of these alleged promotions is apparent. They could have no other effect but to entirely disturb and disrupt the*

police and fire departments of the City of Passaic.

These alleged appointments were purely political favors. If the Commissioner of Public Safety could promote twenty-three men in a small department at one time, after he had been defeated by the public, he could promote the entire department during his last day in office. Obviously this could not be the intent of the Walsh Act. For this reason, we respectfully submit that the alleged appointments were invalid as against public policy.

Conclusion.

For the reasons that the alleged promotees were not entitled to compensation in suits upon contract for salaries for services which they had never performed; because the powers and duties of the Director of Public Safety had never been assigned to Abram Preiskel as required by the Walsh Act; because the plaintiffs-appellants are attempting to collaterally try title to their offices in suits upon contract for salary; because the plaintiffs-appellants have waived any rights which they might have had by accepting and cashing the checks of their usual offices; by reason of the incompatibility of the public offices; and finally because these alleged political promotions were against public policy, *it is respectfully submitted that the judgment of the Supreme Court be affirmed, and the appeal dismissed.*

Respectfully submitted,

JOSEPH J. WEINBERGER,
Attorney and of Counsel
for the Respondent, the
City of Passaic.

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