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## WRIT

NEW JERSEY, SS.

The State of New Jersey to William S. Topping,  
Martin J. Fineran and Philetus H. Holt, members  
of and composing the Police Pension  
[Seal] Fund Commission of the City of Sum-  
mit, Frederick C. Kentz, City Clerk  
of Summit and the City of Summit.

10

We being willing for certain reasons to be cer-  
tified of certain actions and proceedings taken by  
the Police Pension Fund Commission of the City  
of Summit on June 16, 1925 wherein and whereby  
the application by petition of William Kelly for  
a pension under the Provisions of Chapter 160 of  
the Laws of New Jersey of the year 1920, and  
wherein and whereby they decided that the said  
William Kelly was not a member of the police force  
of the City of Summit and not in any way con-  
nected with the police department of the City of  
Summit, and did take certain proceedings of said  
meeting denying his membership in the police de-  
partment and his right to a pension under the law  
aforesaid, do command you that you certify and  
send to our Justices of our Supreme Court of  
Judicature at Trenton, on the Second day of June,  
Nineteen hundred and twenty-six, all minutes, rec-  
ords, proceedings, resolutions and writings affect-  
ing, touching and concerning the meeting of the  
Police Pension Fund Commission and their deci-  
sion filed on the said June 16th, 1925, wherein and  
whereby said William Kelly was denied a pension  
as a patrolman of the Police Department of the  
City of Summit or in any way connected therewith,  
together with all resolutions, minutes, writings,  
and proceedings touching and appertaining to said  
meeting of the said Police Pension Fund Commis-

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30

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*Writ*

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10 sion held on the day and year last aforesaid as fully and completely as they remain before you, together with this writ, that we may cause to be done what of right and justice and according to law ought to be done.

Witness, William S. Gummere, Esquire, Chief Justice of our Supreme Court at Trenton this 12th day of May, in the year of our Lord one thousand nine hundred and twenty-six.

ALFRED A. STEIN,

Attorney of Plaintiff  
in certiorari.

20

EDWARD J. KELLEHER,  
Clerk.

30

40

## RETURN TO WRIT

To the Honorable, The Justices of the Supreme  
Court of the Judicature of New Jersey:

In obedience to the command of this writ to  
George D. Cornish, Martin J. Finneran and Phil- 10  
etus H. Holt, members of and composing the Police  
Pension Fund Commission of the City of Summit,  
and Frederick C. Kentz, City Clerk, we the said  
George D. Cornish, Martin J. Finneran and Phil-  
etus H. Holt, members composing said Police Pen-  
sion Fund Commission, and Frederick C. Kentz,  
City Clerk of the City of Summit, do hereby cer-  
tify and send to the Honorable Justices of the Su-  
preme Court of Judicature of New Jersey, all min- 20  
utes, records, proceedings, resolutions and writings  
affecting, touching or concerning the action of the  
Police Pension Fund Commission, wherein and  
whereby William Kelly was denied a pension as a  
patrolman of the Police Department of the City  
of Summit, together with all resolutions, minutes,  
writings and proceedings touching or pertaining  
to the same, as fully and entirely as they remain  
before us.

IN WITNESS WHEREOF we have hereunto 30  
severally set our hands this twenty-first day of Jan-  
uary, nineteen hundred and twenty-seven.

George D. Cornish  
Philetus H. Holt  
Martin J. Finneran  
Frederick C. Kentz  
City Clerk.

## TESTIMONY

10 Transcript of testimony and proceedings before Mayor Walter S. Topping, P. H. Holt, and M. J. Finnerman, Members of the Police Pension Commission of Summit, New Jersey, on Friday, October 31, 1924, at 2 P. M., at the City Hall, Summit, New Jersey.

*Appearances:*

Mr. Clement K. Corbin, representing the City of Summit.

20 Hon. Alfred A. Stein and Mr. Samuel Schleimer for Officer William Kelly.

MAYOR TOPPING: The meeting will please come to order.

This is a hearing of the Police Pension Board of the City of Summit on the petition of William Kelly.

The Commission has read over the decision of the court in the certiorari proceedings, and find therein this statement:

30 "This clearly intends that the applicant shall have a hearing with opportunity to prove the facts on which his application is based, and one of them is his membership in the Police Force."

The fact being so stated, the Commission would like counsel for petitioner to address himself particularly to that.

40 Mr. Schleimer: I offer in evidence letter dated March 18, 1905, signed by the Mayor of Summit, appointing William Kelly, the applicant herein,

*Testimony*


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as a member of the police department of the City of Summit, from the nineteenth instant.

(Marked Exhibit P 1.)

"CITY OF SUMMIT. 10  
MAYOR'S OFFICE  
Summit, New Jersey,  
March 18, 1905.

Geo. Wilcox,  
Mayor.

I hereby appoint William Kelly a policeman in the police department of the City of Summit from the 19th inst.

Geo. Wilcox 20  
Mayor.

To be filed with the City Clerk."

I offer in evidence the petition of William Kelly for retirement and pension as a member of the Summit police force, bearing date April 6, 1921.

(Marked Exhibit P 2.)

"To the Police Pension Commission, of the City 30  
of Summit, in the County of Union and State of New Jersey:

The petition of William Kelly residing at No. 32 Park Avenue, in the said City of Summit, County and State aforesaid, respectfully shows:

1. That your petitioner was duly appointed a member of the Police Department of said City, with the rank of patrolman, on the 15th day of 40

*Testimony*

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March 1905, and is still a member of said Police Department with the rank of patrolman.

10 2. That in the month of April 1917 your petitioner then in active service in said department sustained injuries while in the performance of his duty therein which wholly incapacitated him and prevented him from performing his usual duties as such patrolman. That such injuries were duly reported to the proper authorities of said department, and your petitioner was given a leave of absence for the purpose of being treated medically for his said injuries, which leave of absence has been regularly continued to the present time.

20 3. That from the time of the granting of said leave of absence down to and including June 1st, 1917, your petitioner was paid his regular monthly salary as patrolman. That from said last mentioned date your petitioner has received no part of his said salary.

30 4. That your petitioner has since April 1917 been treated by physicians for his said injuries sustained as aforesaid, and has been credibly informed and verily believes that he is not at the present time and will not in the future be physically able to resume his duties as a patrolman. In verification of this statement your petitioner is ready and willing to submit to an examination by any physician selected by your Honorable Board, at such time and place as you may select.

40 5. By reason of the premises your petitioner is entitled to be retired and released as a member of said Police Department of the said City of Summit, County and State aforesaid.

*Testimony*

Your petitioner therefore humbly prays your Honorable Board to retire him as such patrolman and grant to him such pension as he is entitled to under the provisions of an act known and designated as Chapter 160 Public Laws of the State of New Jersey, 1920. 10

Dated February 6th, A. D. 1921.

William Kelly  
Petitioner."

Endorsement: "POLICE PENSION COMMISSION, CITY OF SUMMIT, NEW JERSEY.

In the matter of the application of WILLIAM KELLY for retirement as patrolman and pension." 20

Mr. Schleimer: Can we admit that on November 4, 1919, at a general election, the voters of the City of Summit, adopted the provisions of an act of the Legislature entitled, "An Act providing for a pension of the police officers and policemen in certain municipalities of this state," P. L. 1911, page 104, and the supplements and amendments thereof; P.L. 1914, page 219, and the supplements and amendments thereof? 30

Mr. Corbin: We admit that the act was adopted.

JOHN P. MURPHY, sworn for petitioner.

*Direct examination by Mr. Schleimer:*

Q. You are the Chief of Police of the City of Summit? A. Yes, sir. 40

*John P. Murphy—For Petitioner—Direct*

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Q. You succeeded George Brown as Chief? A. Yes.

Q. When? In 1922, February.

Q. February 1, 1922? A. Yes.

10 Q. What was your position in the Police Department of the City of Summit, New Jersey, prior to your elevation as Chief? A. Captain of police.

Q. How long had you been captain? A. Oh, about twelve years.

Q. Before that you were a sergeant? A. Yes.

Q. As captain of police did you have charge of the records of the Police Department showing the patrol service of the members of the night patrol? A. I did.

20 Q. And have you with you the records of the Summit Police Headquarters, showing the patrol service of patrolmen? A. I have.

Q. Will you produce it? A. What date and month?

Q. I want the record showing the service of policeman Kelly, the last active service, which I think you will find April 23, 1917. A. April 23, 1917, Officer Kelly was on duty; April 24, 1917, reported sick.

30 Q. Those records are in your handwriting? A. They are.

Q. And from that time does the record show that he was carried as sick? A. Well, for a part of the time, it does.

Q. Does it show it until January 1, 1920? A. I think it does.

Mr. Schleimer: I don't want any "think."

40 Mr. Corbin: Give the last date, the exact date that the record shows that patrolman Kelly was carried as sick.

*John P. Murphy—For Petitioner—Cross*

Witness: He was carried as sick until December 31, 1920; that is the last entry.

Mr. Schleimer: I offer these records of the Police Department of the City of Summit in evidence on the part of the petitioner. 10

Mr. Corbin: I object to the offer of the records on the grounds that they are incompetent and irrelevant. The Chief has already testified as to what the records show; they are made in his handwriting. The records themselves have no probative force except as the Chief testifies from them.

Mr. Schleimer: The records are the best evidence, and they are records of the City, and it might become necessary in these proceedings on the part of Mr. Corbin and myself, to afterwards refer to them, and we can only refer to them if they are made a part of these proceedings, and the writings, in any case, are the best evidence. 20

Mayor Topping: They will be received. (Marked Exhibit P 3.)

*Cross examination by Mr. Corbin:*

Q. Chief, when you made this record, did you know of your own knowledge that Mr. Kelly was sick? A. Outside of the fact that he mailed me a certificate from Dr. Keeney, on one occasion, stating that he was sick. 30

Q. You yourself didn't know that he was sick from personal observation? A. No, sir.

Q. When you made the first entry that he was sick, what course did you follow with the succeeding entries to the same effect? A. What caused me to carry him? 40

*John P. Murphy—For Petitioner—Cross*

Q. Did you just copy the entry? A. The fact that he didn't report for duty from that time on caused me to carry his name on the record.

10 Q. Do you recall about when it was that Mr. Kelly brought in this doctor's certificate that you referred to? A. I cannot tell you the exact date of that, no.

Q. I show you a piece of paper signed by C. B. Keeney, dated October 14, 1917, is that it? A. That is the certificate.

Q. Did he bring this to you himself? A. He did.

20 Q. What was the occasion of his bringing this in at that time? A. He came in one evening and gave me the certificate and told me that Dr. Keeney had advised him to go away for a while, and he and his wife were going down South somewhere for the winter.

Mr. Corbin: I offer the certificate in evidence.

Mr. Schleimer: No objection.

(Marked Exhibit R 1.)

30 "CADWELL BENSON KEENEY, M.D.  
9 DeForest Avenue,  
Summit, N. J.

Office Hours 8 to 9 A.M.

2 to 3 and 7 to 8 P.M.

Sundays 2 to 3 or by appointment.

This is to certify that Mr. William Kelley is under my care and is leaving Summit by my advice Oct. 14, 1917.

C. B. KEENEY."

40

*John P. Murphy—For Petitioner—Re-direct*

Q. When did you see him after that? A. I don't think I saw him again after that until the following spring.

Q. Was a leave of absence granted Officer Kelly at the time he brought this certificate in? 10

Mr. Schleimer: I object. The witness was not then Chief and would have no knowledge of that.

A. I cannot say.

Q. The records in the Police Department all went through your hands at that time? A. These patrol sheets.

Q. How about the other records? A. The Chief had charge of the other records. 20

Q. Do you know whether any leave of absence was granted Mr. Kelly? A. I don't know positively; I cannot say.

Q. Did he report to you at any time after that, after he brought in that doctor's certificate? A. No.

*Redirect examination by Mr. Schleimer:*

Q. Chief Murphy, Chief Brown told you that Officer Kelly had reported to him when he was ill and that he had given him a leave of absence? A. I don't recall it. 30

Q. Don't you recall the Chief telling you in the evening that Officer Kelly had reported to him that— A. No, sir, I do not.

Q. Do you recall your testimony in the other hearing in this case? A. I do.

Q. I call your attention to this question, referring to Officer Kelly: 40

*John P. Murphy—For Petitioner—Re-direct*

Q. Do you know whom he reported to?

A. The Chief told me in the evening that he had reported to him."

10 A. There was never any report made to me in regard to a leave of absence; never heard of it.

Q. Did the Chief tell you that Officer Kelly had reported to him regarding his sickness? A. No.

Q. What did Chief Brown tell you? A. The Chief never said anything to me about it.

Q. What did the Chief tell you about that?

Mr. Corbin: I object.

20 Q. Did Chief Brown tell you that Officer Kelly had reported to him?

Mr. Corbin: I object.

A. Reported what to him?

Q. That he was sick. A. I don't know that he ever did; it was understood by every member of the Police Department that Officer Kelly was sick; I don't know that there was any particular conversation between myself and the Chief.

30

Mr. Corbin: I object and ask that the answer be stricken out as mere hearsay and not binding—what was understood around the department.

Q. He reported sick originally, did he not? A. Yes.

Q. And you knew that he went out of the city on the advice of his physician, as the certificate which you produce here shows?

40

*John P. Murphy—For Petitioner—Re-direct*

Mr. Corbin: I object to that question; it calls for a conclusion, the way it is worded, particularly the latter part.

A. I did.

10

Mr. Schleimer: I will call Dr. Keeney.

Mr. Corbin: I object to any testimony of the doctor at the present time; I think we should follow the procedure outlined by the Board in this matter, that the question of jurisdiction be disposed of first. The opinion of the Supreme Court clearly indicates that this is a question to be considered, and of course if Patrolman Kelly was not a member of the force at the time he applied for a pension, he was not entitled to it, and that has been held by the Supreme Court to be a proper fact for the consideration of this Board. It seems to me that it is unnecessary to conflict the matter with the testimony of the doctor, and that the ruling of the Board should stand until this phase of the matter is disposed of.

20

Mr. Schleimer: There is no ruling of the Board to stand, with all due respect. The Supreme Court has held that the hearing was not properly held, and the evidence that should have been adduced, was not adduced.

30

The question is whether or not Officer Kelly was a member of the Summit Police Force, and whether or not he is still a member of the Summit Police Force.

There are only three ways of a member of the police force, ceasing to be such mem-

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*John P. Murphy—For Petitioner—Re-direct*

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ber: one, by his removal by death; another, by his removal by a proper resignation, and third, upon a trial upon charges properly held with notice.

10 Our insistent is that none of these events have transpired. That Mr. Kelly is alive, we all agree on. That he was not tried on any charges and removed by the proper authorities of the members of the police force, Mr. Corbin and I, I think, will agree. That he did not resign as a member of the police force is a fact. That brings us to the question of whether or not he was a member of the police force, and if not performing

20 active duties, why not?

We have already shown you that he reported sick, produced a certificate. It would be necessary for us, in fairness to this Board, regardless of the legal responsibility that is ours, to show this Board by competent, proper evidence, that Mr. Kelly during the intervening time of his reporting sick and the time that he applied for his pension, was suffering from an illness which incapacitated him from performing his duties as a policeman, and this board cannot intelligently pass upon this unless it has that evidence.

30

We insist on our right to offer the evidence.

I owe a duty to this Board as well as to Mr. Kelly, and that is the only case at issue. The Supreme Court said in its opinion Mr. Kelly insisted that he was still a member of the force; and that this Board hadn't decided that he was still a member of the

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*John P. Murphy—For Petitioner—Re-direct*

force. If you are going to decided it on the bare facts that he never resigned and was never dismissed, Mr. Corbin will admit that, and it will dispose of this question, your finding will have to be that he was a member, and that will bring you up to the next point, which I thought you would consider, that if he was not performing his duties, why not, and it is incumbent upon him to show you gentlemen that he was prevented by illness from carrying on his duties as an officer. 10

Mr. Corbin: The point that we rest our motion on is that Mr. Kelly's course of action in connection with the police force was such that it amounted to a resignation; that he absented himself in such a way that it amounted to a resignation. Whether he was sick or not is not involved in the matter. It is a question of his relations to the force and his actions in connection with his absenting himself, and what we propose to show is that his course of action was such that he absented himself without leave of absence, and automatically ceased to be a member of the police force. And in order to show that, it is not necessary to produce medical testimony as to what his actual condition was at that time. 20 30

Mr. Schleimer: I say that there is no such thing, under the Laws of New Jersey, as a man being removed from a police force by automatically absenting himself. If a man did automatically absent himself, it was then incumbent upon the proper auth- 40

*John P. Murphy—For Petitioner—Re-direct*

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10 orities having the police department under its jurisdiction in the City of Summit, to prefer charges against him by reason of his absenting himself, and giving him notice of a hearing of the trial upon these charges; and in that way, and that way only, could Officer Kelly, or any other officer of the police department of the City of Summit, or any other municipality in the State of New Jersey be removed.

Mayor Topping: Is that point covered by the Home Rule Act of 1917?

20 Mr. Schleimer: Yes, that he must be brought up on charges. The Supreme Court has held repeatedly time and time again, and the most recent case is the Rosencranz case, in Westfield, against its Chief, where they removed him and even though they held a trial, the court re-instated him, on account of some impropriety, but the Supreme Court has consistently held that before a policeman can be removed, he must be tried on charges preferred, and duly notified of the hearing, just as it held in this case, that this Board in its innocence held this hearing and refused this pension without notice to Officer Kelly, so that he could have a hearing, and if he was entitled to a hearing on the pension, he would have been entitled to a hearing on his being continued as an officer to which he had been duly appointed.

30  
40 Mr. Corbin: I call the Board's attention to this provision in the Home Rule Act, which seems to cover the matter; it is a proviso, section 3, article 16, of the Act, and reads as follows:

*John P. Murphy—For Petitioner—Re-direct.*

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“Provided that any member of any such police force who shall be absent from duty without just cause for a term of five days continuously, shall, at the expiration of such days, cease to be a member of such police force.” 10

Mr. Schleimer: I repeat that has in mind the fact that he would have to be brought up on charges, and that would have to be proven; because if automatically the Chief could go before the police commission and say Officer Smith was absent five days and hasn't reported, I do not think any of you gentlemen would on that remove him. You would ascertain very promptly, if you did, 20 that the Supreme Court would come back to you for a hearing, as it did in this case, which would have to be brought up, because a man might have been injured in the performance of his duty and be lying in a hospital for ten days. Any number of things could transpire, and under the provisions of that act, before he could be removed, he would have to have a hearing. But that isn't this case. Our insistent is that Officer 30 Kelly was a member of the Police Force and was off by reason of illness, under permission given by your Chief of Police upon the presentation of a certificate. Altogether a different case. Even if that statute meant what it said, without any elaboration, it does not fit this case.

Mr. Corbin: I would like to say this in connection with the testimony of the doctors, that the act provides that the pension 40

*John P. Murphy—For Petitioner—Re-direct*

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10 commission shall call to their assistance the aid of the surgeon or physician representing either the police or fire department, and the person making the application may likewise call to his aid a regularly licensed and practising physician and surgeon.

Mayor Topping: That contemplates calling a physician after petition for pension has been presented?

20 Mr. Corbin: Yes, and the President of the Board of Commissioners is authorized to administer oaths to the physicians, and in case they fail to agree, then the pension commission may call in a third physician, accepted, licensed and practising physician, and the determination of the majority of said three physicians who first being duly sworn in the case, should be reduced to writing and signed by them, and the pension commission shall consider the same in arriving at their decision.

30 I take it that if medical testimony is to be introduced, that the proper way to introduce it is to have a physician for the pension commission and a physician for the petitioner confer; they should first be sworn, and then confer, and see if they can agree on a written report as to their opinion of the petitioner's condition, and that until that is done, it would not be proper to take testimony in the ordinary way of a physician in the case.

40 My feeling is that the case turns on Mr. Kelly's relations to the police force, rather than as to his condition, but if the pension

*John P. Murphy—For Petitioner—Re-direct*

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commission feels that they ought to take the medical testimony, that is something for them to decide. It is a matter largely in their discretion.

Mr. Schleimer: Mr. Corbin states the position perfectly. If this was a case of a policeman on duty, without any question as to whether or not he had been ill prior, and who came to the commission with a petition for retirement, with no question as to whether he was a member of the police force or not, then this commission would have your physician examine him, and if you were satisfied with that, all right. If the applicant was not satisfied, he would call his physician. If they did not agree, a third would be appointed. But do not lose sight of the issue in this case. The City of Summit, as I take it, claims that Officer Kelly is not entitled to a pension, because he is no longer an officer, and that makes it incumbent upon us to show why he did not perform his duty. That is the purpose of calling the physician, to show that at that time he was ill and unable to perform his duty. Altogether a different situation.

If Chief Murphy today applied for retirement on a pension on account of illness, then the procedure Mr. Corbin speaks of should be strictly followed.

Mayor Topping: You don't expect to submit any evidence as to his condition subsequent to the time he presented his application for pension?

Mr. Schleimer: Yes, right up to date, his condition is the same, we will show, be-

*John P. Murphy—For Petitioner—Re-direct*

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*John P. Murphy—For Petitioner—Re-direct*

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Mayor Topping: You don't expect to submit any evidence as to his condition subsequent to the time he presented his application for pension?

Mr. Schleimer: Yes, right up to date, his condition is the same, we will show, be-

*Dr. Cadwell R. Keeney—For Petitioner—Direct*

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10                    cause if I did not do that, and he was last week able to perform his duty and had recovered entirely, it would have been his duty to report, and you gentlemen are entitled to know why he did not; otherwise, you cannot arrive at a proper conclusion, and I will let the doctors tell you what they found as time went on.

                  Mayor Topping: We will receive the testimony.

---

DR. CADWELL B. KEENEY, sworn, for Officer Kelly:

20    *Direct examination by Mr. Schleimer:*

                  Q. You are a practising physician, Doctor, in the State of New Jersey?    A. Yes.

                  Q. Residing where?    A. In Summit, 137 Summit Avenue.

                  Mr. Schleimer: His qualifications are admitted?

                  Mr. Corbin: Yes.

30                    Q. How long have you been practising in Summit?    A. About thirteen years or more.

                  Q. Do you know Officer William Kelly?    A. Yes, sir.

                  Q. The petitioner in this cause?    A. Yes.

                  Q. Have you as a physician treated him?    A. I have.

                  Q. And can you tell us over what period of time?    A. I cannot tell exactly, but it was before 1915.

40                    Q. Was he then a member of the Summit police force?    A. He was.

*Dr. Cadwell R. Keeney—For Petitioner—Direct*

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Q. Can you tell us for what you then treated him? A. I treated him then for rheumatism, tonsillitis, sore throat and trouble with his feet—arthritis—a weakness of the arch of the foot.

Q. So that we may get the benefit of it, what is arthritis? A. It is an inflammation of the joints. 10

Q. Produced from what? A. Produced from what we call ordinarily—the primary cause and the predisposing cause, that is, the direct cause is infection, and the accompanying causes are exposure and chilliness, dampness, and also in the case of joints that are in considerable use, that favors arthritis.

Q. Did his condition become better or more aggravated? A. It became more aggravated. 20

Q. How long did you continue to treat him? A. I treated him at various times to and including the present year. I cannot say—I could refer to a memorandum of my own that I made at the time.

Q. You may refer to it, Doctor. A. But it simply is a ledger memorandum.

Q. You may refer to it to refresh your memory. A. And that goes back to November 7, 1915. I know that I treated Officer Kelly before that time, but this memorandum is covered by that. 30

Q. Did you refresh your mind from anything from your memorandum? A. Simply as to the date, which I am sure went back—I probably could find in other records, which are not very convenient to get at, just previous to that.

Q. In 1917, Doctor, did you ascertain from Mr. Kelly's condition as a physician whether or not he was physically fit to continue his duties as a policeman? A. I cannot particularize as to just 40

*Dr. Cadwell R. Keeney—For Petitioner—Direct*

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which day in 1917, but I know that he was incapacitated.

10 Q. I call your attention to Exhibit R 1 and ask you whether you wrote that? A. Yes, I certainly did.

Q. Does that recall to your mind the date when you knew he was incapacitated? A. Yes, it does.

Q. What is that date? A. October 14, 1917.

Mr. Schleimer: May I have the other certificate?

(Mr. Corbin produces the paper.)

20 Q. I show you a paper and ask you whether the writing on that printed slip is in your handwriting? A. Yes.

Q. Did you at that time make that out? A. Yes.

Mr. Schleimer: I offer in evidence certificate under the signature of Dr. Keeney, bearing date June 18, 1917, certifying that Mr. William Kelly was ill and unable to follow his occupation from May 1 to June 18.

30 (Marked Exhibit P 4.)

“Summit, N. J., June 18, 1917.

This certifies that

Mr. William Kelly  
has been sick and unable to follow his own or other occupation from May 1st to June 18 during which time he was under my professional care.

C. B. Keeney, M. D.”

40 Q. Did you after that make out certificates of that character and give them to Officer Kelly? A. I did from time to time.

*Dr. Cadwell R. Keeney—For Petitioner—Direct*

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Q. I think I asked you before—is his condition such at the present time that he could not perform his duties as a policeman? A. Yes.

Q. And has been ever since you attended him in 1917?

10

Mr. Corbin: I object to that question. He hasn't shown that he attended Officer Kelly with enough regularity to testify on that point.

Q. When did you examine him last? A. May I refer to this record?

Q. Yes. A. I don't know if it shows it or not. This particular card does not show.

20

Q. Do you recall seeing him two or three weeks ago? A. I have seen him within the last two months, I am sure.

Q. His condition then was such that he could not return? A. Absolutely.

Q. Did you continue to treat him from 1917 until two months ago? A. Yes.

Q. For his deficiencies? A. Yes.

Q. At any time during that period had he sufficiently recovered to resume his duties as a policeman?

30

Mr. Corbin: I renew my objection. The doctor must show—this is a long period we have here—a period of over seven years—and it is not sufficient simply to say in general terms that he treated him; he must show that he treated him with sufficient regularity to keep track of the patient's condition, and not just casually. There is a break in this evidence running from the fall of

40

*Dr. Cadwell R. Keeney—For Petitioner—Cross*

of 1917 to the present year, and upon the basis that has been laid the doctor is incapable of answering the question.

10 Mr. Schleimer: I understood the doctor to say that he continued his treatment down to the present year. Am I right?

Witness: Yes, from time to time.

Q. And as often as his condition required it?

A. Yes.

Q. That covered a continuous period from 1917 until this year? A. I am sure I have seen him in every single year, certainly. As to the number of times, I cannot say positively, in each year, but I have seen him in every year.

20 Q. As you continued to examine him from time to time, was his condition improved or worse? A. It varied somewhat; at times there would be improvement, and at times it would be worse, but the general condition, I would say, remained very closely the same.

Q. And at no time had it improved sufficiently to enable him to resume his duties as a police officer? A. Not at any time that I saw him.

30 Q. And when you saw him two weeks ago, his condition was such he could not? A. He could not.

*Cross examination by Mr. Corbin:*

Q. Doctor, when did you see Mr. Kelly next after giving him that certificate R 1? A. I cannot say offhand; may I refer to this ledger account? It may give it and may not.

40 Mr. Corbin: Certainly; refresh your recollection.

Witness: I saw Mr. Kelly March 24, 1918.

*Dr. Cadwell R. Keeney—For Petitioner—Cross*

Q. That was the next time after? A. That is the next time that I have a definite record of here; I may have seen him in between, but my impression is that he went South and that he returned in March, and that I saw him some time after his return. 10

Q. Of your own knowledge you don't know that you saw him in between those dates? A. No.

Q. When did you see him after that? A. I have these notes, which are not complete, that I saw him twice in March, once in April, and then there is a gap, in which my notes don't tell, and I am sure that I did see him; I cannot say how often.

Q. You cannot say how often or when? A. I cannot from this. 20

Q. Can you from memory? A. Approximately I should say that I don't believe there was a period of more than two months that I didn't see him.

Q. During what year, 1918? A. During 1918, after his return from the South.

Q. You have no record as to when you saw him after that date until recently? A. This record is an incomplete record, and I don't know whether I could make it more complete or not from other records. 30

Q. I am asking you what you know. A. Of my own knowledge I wouldn't like to testify to that, except that I have seen Mr. Kelly at various times.

Q. Dr. Keeney, you stated that you gave other doctor's certificates to Mr. Kelly besides the two that have been placed in evidence; why did you give him any of those certificates after you gave him Exhibit R 1, dated October 14, 1917? A. I don't remember either way.

Q. Did you give him some before that date, in 40

*Dr. Cadwell R. Keeney—For Petitioner—Cross*

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10 addition to the certificates put in evidence? A. My impression is that I gave him some before and some afterwards, but I wouldn't like to swear as to whether they were all before that or all after that; I know I made out more than the one; how many, I don't know.

Q. They were principally before that date, weren't they? A. I wouldn't say, I don't know really.

Q. Going back to the time when you gave him that certificate June 18, 1917, Exhibit P 4, did you see Mr. Kelly after that down to the time you gave him R 1, the other certificate? A. I saw him in between those two times, yes.

20 Q. Did you give him a certificate then? A. I cannot say; I don't make any duplicate of this on any stub; it is simply—I just made them out at the time, and I make out, probably, in the course of a year, quite a good many, and I don't remember how many, or whether they were all before or all after.

30 Q. Doctor, will you swear that you gave Mr. Kelly any doctor's certificates after you gave him R 1, dated October 14, 1917? A. No, I cannot swear to it, and I cannot improve the statement I made, that I know I made more certificates than these two; whether they came in between or all before or all after, I cannot say. I made no record of when I issued them, and swearing to them would be swearing to my imagination.

Q. You cannot swear that you did make one after that date? A. I can swear that I made out more than those two.

40 Q. You cannot swear you made out any after? A. I cannot swear that I did or did not either.

*Dr. Cadwell R. Keency—For Petitioner—Re-direct*  
*Dr. William John Davis—For Petitioner—Direct*

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*Re-direct examination by Mr. Schleimer:*

Q. On whose suggestion did Officer Kelly go south? A. On mine. 10

Q. On your advice as his physician? A. Absolutely.

Q. But it was necessary for him to go to another climate? A. Yes.

Q. Who sent Mr. Kelly to Dr. Humphrey? A. I did.

Q. He is a physician who specializes in these diseases? A. Yes.

Q. Do you know who Dr. Humphrey's assistant is? A. I know he has several. 20

Q. Do you know Dr. Davis? A. I do.

Q. Dr. Davis is an assistant of Dr. Humphrey's? A. Yes.

Q. Dr. Davis is here now? A. Yes.

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DR. WILLIAM JOHN DAVIS, sworn for Officer Kelly:

*Direct examination by Mr. Schleimer:*

Q. You are a practising physician in the State of New Jersey? A. Yes. 30

Q. Located where? A. East Orange, New Jersey.

Q. You been practising how long? A. Five years.

Q. You are connected with whom? A. I am assistant surgeon of the New Jersey Orthopaedic Hospital.

Q. Do you know Dr. Humphrey? A. Yes.

Q. Connected with him in any way? I am his assistant. 40

*Dr. William John Davis—For Petitioner—Direct*

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Q. How long have you been with Dr. Humphrey?  
A. Five years.

10 Mr. Corbin: Up to the present time?  
Witness: And still am.  
Mr. Schleimer: The qualifications of the  
doctor are admitted?  
Mr. Corbin: I don't question his quali-  
fications, but I don't want to admit them.

Q. Where were you graduated from? A. Belle-  
vue Hospital, City Hospital, New York City.

Q. When? A. 1918.

20 Q. And after that you went where? A. I took  
a regular two years' prescribed internship.

Q. In Bellevue? A. No, I was at the City Hos-  
pital for a while.

Q. Where? A. Blackwell's Island, and at the  
Flower Hospital, 64th Street and Avenue A, and  
Soho—superintendent of Soho Hospital, Essex  
County.

Q. Do you know William Kelly, the petitioner  
in this case? A. I do.

30 Q. You have known him for how long? A. He  
came to the hospital before my time, but I have  
known—

Mr. Corbin: I object to that, and ask that  
it be stricken out.

Mr. Schleimer: The fact that he came  
there is not hearsay.

Q. Have you a record there? A. Yes.

40 Q. What record have you? A. We have a rec-  
ord of his being admitted to the hospital clinic on  
January 28, 1919.

*Dr. William John Davis—For Petitioner—Direct*

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Mr. Corbin: I ask that that be stricken out; there is no basis laid for introducing the record in evidence, and this witness admittedly knows nothing about the proof of the record and has had nothing to do with it. 10

Q. Have you had to do with the record since?

A. Yes.

Q. And what you call our attention to as beginning January 28, 1919, is the record? A. Yes, that is the hospital records, and they are on file and are our records. If I were to leave tomorrow, anyone could take this record up and go on.

Q. The record that you refer to began January 28, 1919, and is the record that you have since followed up? A. Yes. 20

Q. In the treatment of William Kelly? A. Yes.

Q. What does the record show?

Mr. Corbin: I object to his testifying as to what the record shows.

Mr. Schleimer: I withdraw it.

Q. When did you begin treating Mr. Kelly, if at any time? A. January, 1922, is when I came on. 30

Q. What did you treat him for? A. Arthritis.

Q. What was his condition then? A. He had been treated, and if I may refer—

Mr. Corbin: I object.

Q. What is the history of Mr. Kelly's case as you ascertained it when he came to you personally in January, 1922?

Mr. Corbin: I object to that; that ques- 40

*Dr. William John Davis—For Petitioner—Direct*

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tion may mean reading of the record of some other doctor.

10 Mr. Schleimer: He can do that, or what a patient tells him. It is not only a doctor's privilege, but his duty, to use any means he can to obtain a history of the case, and he has a right, in testifying, to tell what the history was, and how he derived that information.

A. It is hard to testify satisfactorily, because all these records are made, and it makes no difference to me personally whether I am allowed to read it. If I don't read the record, I cannot remember.  
 20 These are my own records.

Mr. Corbin: Are they in your handwriting?

Witness: They are copies of my handwriting.

30 Mr. Corbin: I don't want to be unnecessarily technical, but what I want to do is to exclude mere hearsay testimony as to what some other doctor entered in the record; I want him to testify as to his connection.

Witness: From 1922 is my personal connection, and these are copies of my handwriting. I write them and they are copied from my writing, typewritten, the same as any hospital. You can throw this out as not being my handwriting.

Q. Tell us what the record shows. A. The record shows that dorso flexion—meaning backward  
 40 —was limited at that time; he couldn't get it back

*Dr. William John Davis—For Petitioner—Direct*

as far as was necessary to walk even comfortably. It says here "The right foot was not as bad as the left foot." That is, in other words, it was exaggerated on the left side.

Q. He came under your observation in January, 1922? A. Yes. 10

Q. That is what you are telling me? A. Yes, the previous record—I have got the previous record, too—that is what my notes here say, that dorso flexion was limited, left foot not so bad. He was re-strapped—by that I mean supporting that foot by the means of adhesive tape, so he could walk more comfortably. Then he was strapped on February 14, March 21, May 13, June 6, July 8, 15, 25, September 5, 19, October 17, November 18, January 16, 1923 that would be. He has made twelve visits to the hospital during that year; that was the clinic, and we gave him various medications to try to relieve his condition. It goes up to October 21, 1924; that is the last time I have seen him. 20

Q. Has your treatment been continuous since January, 1922? A. Yes.

Q. To the last date you have given us? A. Yes, October 21, 1924.

Q. Does his condition improve or get worse? A. 30  
It varies; at times we were quite encouraged, and other times, quite discouraged. On June 25, for example, 1923, the foot is very much swollen and worse, and that is the way it goes. "At the present time"—that is October 11—"feet still some swollen."

Q. With that ailment, as you found it, could he perform his duties as a patrolman? A. Not as a patrolman, no, sir.

Q. Will you describe to us what the disease is— 40

*Dr. William John Davis—For Petitioner—Direct*

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you mentioned it in a medical term. A. That is due—I cannot read it?

Q. You can refer to that as the history of the case. A. He appeared at the clinic complaining of  
 10 painful feet—this is the record—and with the history of having had sore throat, tonsilitis and painful feet, immediately we infer that he has had some infection which has caused an arthritis, and arthritis meaning an infected condition of the joint surfaces and around the edges of the joints and the capsules of the joints, that is an infiltration or deposit of lime and salts, due to some irritating substance in the blood. What it is no one is definitely sure, but we believe it comes from some  
 20 poison derived from other sources in the system. It is auto-poison.

Commissioner Holt: Pus from tonsils?

Witness: Any septic condition. If you are compelled to stay on it, fatigue enters into it. The general condition is to form a poison.

Q. He is suffering from that condition? A. Yes,  
 30 indeed.

Q. And from the history of the case can you tell how long he suffered from it prior to 1922? A. No, I cannot; anyone could say—I could look at him now and know that it was a case of long standing. There have been X-Ray pictures taken, which show that there is some bone change.

Q. From the history can you tell whether it continued from 1917? A. No, only what he said. It says he has complained of pain in the feet for four  
 40 years. That was the history he gave us, that he had complained and had trouble, that is all, since 1914.

*William Kelly—For Petitioner—Direct*

Q. And the examination you made and the treatment you gave him justified, in your opinion, the fact that it had been of long standing? A. Yes, we believe it had been.

10

Mr. Schleimer: I offer this as a record showing that it is a record of the hospital.

Mr. Corbin: I object to it on the ground that it is immaterial and incompetent, but I will admit that it is the record of the hospital, as produced by Dr. Davis and from which he testified.

(Marked Exhibit P 5.)

20

WILLIAM KELLY, sworn in his own behalf,

*Direct Examination by Mr. Schleimer:*

Q. Where do you reside? A. 32 Park Avenue, Summit.

Q. Are you a member of the Summit police force?

30

Mr. Corbin: I object to that as calling for a conclusion.

A. I am.

Q. And have been how long?

Mr. Corbin: Same objection.

A. Since 1905.

Q. I show you a paper marked Exhibit P 1, and ask you whether that is the letter of your appointment? A. That is right.

40

*William Kelly—For Petitioner—Direct*

Q. You continued to be a policeman on active duty how long? A. I don't just get you there.

Q. (Last question repeated.)

10 A. From 1905 up to 1917, from April 3rd or 4th, either one of those dates, was the last I worked.

Q. Wasn't it the 23rd. A. I meant the twenty-third; I worked at night; I was doing post night duty.

Q. And on April 24th you did what? A. I was working on night duty, and the last night I worked was on the 23rd.

Q. On the 24th you did what? A. I was sick.

Q. Whom did you report to? Chief Brown.

20 Q. What did you say to Chief Brown? A. I told Chief Brown that I was not able to go to work and I had the doctor and I was home, think, two weeks—about two weeks, about, and the doctor was still coming to the house, and then the doctor wanted me to go away for a while.

Q. What did the Chief say to you, if anything, when you reported? A. He said it was all right, he said, "if you are sick and not able to work."

Q. Did you give the Chief anything at that time? A. Not at that time.

30 Q. When did you? A. About two weeks afterwards, when I went away, two or three weeks; I gave the Chief a certificate when I went first down South.

Q. That is referred to as R 1; who signed the certificate? A. You may not have that.

Q. You gave him the certificate when? A. About two weeks, when the doctor ordered me away.

40 Q. How many certificates did you give Chief Brown, if you can recall, from Dr. Keeney? A. I gave him several of them.

*William Kelly—For Petitioner—Direct*

Q. More than the two that are offered here, marked Exhibits P 4 and R 1? A. Yes, sir.

Q. What was your position in the police department? A. Patrolman.

Q. Did you at any time resign your position as a patrolman? 10

Mr. Corbin: I object to that as calling for a conclusion.

A. No, sir.

Q. At any time since your appointment as a patrolman with the police department of the City of Summit, have you been dismissed from the department? A. I never have. 20

Mr. Corbin: I object to that as calling for a conclusion.

Q. What caused you to cease active duties as a patrolman in the City of Summit? A. I was sick.

Q. And on what date, by reason of illness, did you cease to perform your duties?

Mr. Corbin: He has already answered that. 30

A. From April 24th, 1917, up to the present time.

Q. Have you been able to perform your duties as an active member of the police department of the City of Summit? A. No, sir.

Q. At the time you mentioned in 1917 as becoming ill, what ailment overtook you? A. At that time my feet were bothering me so I wasn't able to walk on them, and all my joints, and I had a severe cough, cold, and my nerves went all to pieces from 40

*William Kelly—For Petitioner—Direct*

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the trouble; that is why the doctor ordered me away.

Q. Any trouble with your arches? A. Trouble with my arches.

10 Q. What was the matter with your arches? A. I cannot say; they were fallen or broken arches; they were flat-footed; Dr. Lawrence and different ones told me that.

Q. Anything the matter with your ankles? A. Swollen ankles. I have one swollen ankle on the left foot.

Q. From April 1917 until the present time you have been under the care of a physician or physicians? A. I have.

20 Q. What physicians? A. I have been under the care of Dr. Humphrey, Dr. Taylor, his assistant, Dr. Davis, and Dr. Keeney.

Q. Are you still under the care of doctors? A. I certainly am.

Q. Were you incapacitated from police duty from the time in 1917 that you mentioned up to the present time? A. Yes, sir.

Q. Where did you receive the injuries which you described and from which you were suffering?

30 A. Doing police duty.

Q. Where? A. Walking the pavements at the silk mill strike, that is my belief of it, and sleeping here in the City Hall, that was my first starting of it. I got a heavy cold, sore throat, chronic trouble; I was off two weeks there one time for that, and then I was at that silk mill strike. I made two months and eighteen days down there, making from fourteen to twenty-four hours. I guess every officer did the same, and I was one of the unfortunate ones

40 that had to fall down.

*William Kelly—For Petitioner—Direct*

Q. Did you say what shifts you were on at that time? A. What?

Q. How long were your duties? Two months and eighteen days I was on one of those strikes.

Q. What were your hours? A. Making from 10 fourteen and one-half to twenty-four hours.

Q. Of what? A. Duty.

Q. In what time? A. I made these hours for the two months and eighteen days, each day. We made from fourteen to twenty-four hours, when the strike broke out; that made twenty-four hours. I guess the rest of the others will say that.

Q. After you were taken ill did you leave Summit? A. Yes, sir.

Q. Why? A. The doctor ordered me away. 20

Q. What doctor? A. Dr. Keeney. He told me to go South, or down through South Jersey, or some place where there would be a different climate, and go to ball games and everything else to take my mind off.

Q. How long did you stay away? A. I was away seven weeks.

Q. Did you return then to Summit? A. Yes.

Q. From that time where did you live? A. 32 Park Avenue, Summit, New Jersey. 30

Q. Where did you go after that, if anywhere, in an endeavor to cure yourself? A. I don't know exactly what month it was in—I think it was in October, the forepart of October, I think, I was up in New York State.

Q. What year? A. The same year, 1917.

Q. Richfield Springs? A. Yes. I took a trip up there.

Q. What for? A. Just for my health.

Q. Where else did you go? A. That is one place. 40  
And I went to Florida in October 19, 1917.

*William Kelly—For Petitioner—Direct*

Q. Did you go to Binghamton, New York? A. Yes, I was through Binghamton and stopped in Binghamton over night.

10 Q. Did you take a trip to Washington? A. Yes, and Baltimore.

Q. After you came back from your visit you remained in Summit three or four weeks; where did you then go? A. I stayed right home all the time until I made that trip up to New York State; I think that was around the forepart of October.

Q. You went South about October, 19, 1917? A. Yes.

Q. Where did you go? A. We went to Lake Helen, Florida.

20 Q. How long did you remain in Florida? A. We were there until the latter part of March.

Q. What did you do there? A. Nothing.

Q. Since you were taken sick in 1917 have you had any other employment? A. No, sir.

Q. Have you been able to do any other work? A. No, sir.

Q. Have you been able to earn any money? A. No, sir.

Q. Have you earned any money? A. No, sir.

30 Q. Have you made any effort to obtain work? A. No.

Q. When you came back from Florida did you see Mayor Franklin of Summit? A. No, sir, not when I came back from Florida.

Q. When did you see him? A. I saw Mayor Franklin before I went to Florida, in September, Labor Day.

Q. Did you ever see him after you came back, to talk to him? A. No, not to talk to him.

40 Q. What can you tell us, if anything, about Labor Day, Monday, 1917? A. Mayor Franklin

*William Kelly—For Petitioner—Direct*

sent for me to come up to the City Hall and he sent Officer Sullivan down after me, through the Chief, and I come up here and saw him.

Q. Did you have a talk with him? A. I did.

Q. What did you want him to do? A. He sent 10  
for me; I didn't ask him anything; he sent for me, and wanted to know the conditions, how I was feeling, and if I was able to come to work; I told him I didn't think I was, but I said I was willing to try it, to try and go to work. I said, "Maybe I can stand it for a day or week or two weeks"; so then he said, "Well, Dr. Dengler is right here, I will have him examine you and see if you are physically fit." I said, "I can answer that ques- 20  
tion, Mayor; I am not physically fit, and I don't think you have three men in that department that are physically fit"; not physically fit, but to pass a physical examination, that is what I meant, at that time; I don't say now, but I said, "I don't think there are three men in the department that will stand a physical examination."

Q. Did he suggest an examination at that time?

A. He was going to have an examination the following week—or on the same week, on Thursday.

Q. Did you decline to have it? A. Yes. 30

Q. And under what condition did you agree to have an examination? A. With Dr. Keeney and his doctor?

Q. Yes.

Mr. Corbin: Ask what he told the Mayor.

Q. What did you tell the Mayor? A. I told him I would be willing to go under an examination by a doctor, if he insisted upon it. 40

*William Kelly—For Petitioner—Direct*

Q. What else? A. He said he would communicate with the doctor and send for him.

Q. With what doctor? A. Dr. Keeney. He was going to communicate with Dr. Keeney.

10 Q. Did you agree to have an examination if you could have your own doctor present? A. Yes.

Q. You said the Mayor said he would communicate with your doctor; he told you that? A. Yes, and send me word.

Q. Did you ever receive word? A. No, I never received word.

Q. Did he ever write you any letters? A. No, sir.

20 Q. Did you ever have any communication with Mr. Franklin other than what you have told us? A. I did when I first was—I think it was around about the middle of June.

Q. What year? A. 1917.

Q. What did you see him about then? A. I came up and asked him what was his object of holding up my check.

Q. What did he say? A. He said he held it up for investigation.

30 Q. How long did he hold it up? A. He is holding it yet.

Q. You don't know that Mayor Franklin is holding it yet? A. He is holding my check out; it was made out and lying on his desk.

Q. Did you see it? A. Yes.

Q. Did he give you any other reason except you say he was holding it up for investigation? A. That was all.

40 Q. Have you ever received any money from the City of Summit since the time you saw Mayor Franklin, and, as you say, he was holding up your pay? A. No, sir.

*William Kelly—For Petitioner—Direct*

Q. When was that? A. That was in June, 1917, the fifteenth, these checks that he held up on me. I got paid for the latter part of April and the month of May. I got my voucher sent to me.

Q. Was it the custom of Summit to pay the members of the Police Department every half month? A. Yes. 10

Q. And when you saw Mayor Franklin, the check that was due to you was from the first to the fifteenth of June, 1917? A. Yes.

Q. Up to that time you had received your checks? A. Yes.

A. And since you had this talk with Mayor Franklin about your examination by a physician have you talked to him? A. No, sir. 20

Q. Were all of the trips which you had to Washington and Baltimore and Vineland and later down south, on the advice of your doctor? A. Yes, sir, on the advice of my doctor.

Q. You are still under the care of physicians? A. Yes.

Q. Are you able now to do police duty on the Summit police force? A. No, sir, I am not.

Q. Whom did Dr. Keeney send you to? A. When he first took hold of my feet and examined my feet he sent me to Dr. Lawrence. 30

Q. What did Dr. Lawrence do for you? A. He looked them over and told me to take Dr. Keeney's advice and go away and get my nerves straightened out, and when I got back and felt better he would take care of my feet.

Q. When you came back whom did you go to? A. In the meantime when I came back Dr. Lawrence had gone into this ambulance company and he had gone away. 40

Q. Whom did Dr. Keeney then send you to, if

*William Kelly—For Petitioner—Direct*

anybody? A. The next one was Dr. Humphrey.

Q. Did you go to Dr. Humphrey? A. Yes.

Q. What did he do for you? A. I had arches made for my feet; he took the impression of my feet, a plaster cast, and I have had five or six sets of arches made there.

Q. What else did he do for your feet? A. He strapped them up, about every two or three weeks I had to go the first year I was there.

Q. How long did you have to wear the straps at a time? A. About ten or twelve days; they loosened up and I kept them off a day or two and then went back.

Q. Were you willing to be examined by Dr. Dengler at the Mayor's request, if your own doctors were present? A. Yes.

Q. Do you know of your own knowledge whether Mayor Franklin consulted with your doctor? A. I don't know; I never heard from him from that day on.

Q. After Dr. Humphrey treated you, who treated you? A. Dr. Humphrey, Dr. Taylor, Dr. Davis, and another doctor has been treating me down there; he strapped up my leg several times—from Dover; I don't recall his name; he is one of the doctors from down at the hospital twice a week.

Q. Were you given a special beat so that you would be near your home? A. Yes.

Q. What beat did you get? A. I will tell you about that beat.

Q. What beat, first? A. I got No. 2 beat.

Q. Where is that? A. East Summit.

Q. In relation to your home? A. I used to pass my house twice down there during my calls when they went in.

*William Kelly—For Petitioner—Direct*

Q. Was that given to you for any reason? A. I asked for it on account I was—the year before I was sick the doctor wanted me—kind of put me on a diet of eating rice and milk, and I used to go in—instead of bringing my lunch up here I would stop in down there and have my lunch before I came up to do Mountain and Oakridge Avenue; I would go on down there at seven o'clock, and I had a call at the fire house, around eight o'clock, I think the call went in, and another one at Spring Lake around nine or nine-fifteen, and back up to the fire house again on Park Avenue, at ten, and then again down at Spring Lake at half-past eleven or twenty minutes to twelve, and then I would go on up and have my lunch and go out. I would be in the house possibly half an hour and then I would go out and go up to Summit and do Mountain Avenue and Oakridge Avenue and the biggest part of the time New England Avenue. That was during the vacation time I did two beats; I guess the records will show for that.

10

20

Q. You say you asked for that beat; whom did you ask? A. I asked Chief Brown.

Q. And at your request he gave it to you? A. Yes.

30

Q. And you told him why? A. Yes, I told him what I was doing and it would be more convenient for me.

Q. I show you a letter dated June 29, 1917, and ask you whether or not you received that? A. Yes.

Q. Whom is it signed by? A. Mayor Ruford Franklin.

Mr. Schleimer: I offer that in evidence.

40

(Marked Exhibit P 6.)

*William Kelly—For Petitioner—Direct*

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"CITY OF SUMMIT

Mayor's Office

Summit, New Jersey,

10

June 29, 1917.

Ruford Franklin, Mayor.

William Kelly, Esq.,  
32 Park Avenue,  
Summit, N. J.

Dear Sir:

20 I beg to acknowledge, with thanks, receipt of  
your letter of June 25th.

I regret that I am obliged to disagree with the  
conclusions of your said letter; and I do not think  
that you ought to feel hurt. I admit that you are  
and have been a sick man, both from your own  
statements and from what I have been told; but  
you have been given every possible consideration  
due to that fact, even to the extent of having a  
special beat to enable you to be near your home  
and to avoid the necessity of sleeping at Head-  
30 quarters like the others.

Furthermore, you are in error when you say in  
your letter that your time off will be found to be  
very small, if compared with other members of  
the force. I have fully investigated that matter,  
personally. The following are the facts as to all  
officers (except Officer McNamara, who, as is well-  
known, was so sick that his life was despaired of;  
but even he, whenever able to be up, did day-duty  
40 at least, instead of night-duty).

*William Kelly—For Petitioner—Direct*

Name	Nights off, from Jan. 1, 1917, to June 15, inclusive	
Brown	None	
Murphy	None	
Sheridan	8	10
Sullivan	8	
Smith	6	
Sigler	21	
Nelson	5	
Gross	6	
Fitzpatrick	1	
P. Kelly	2½	
William Kelly	77	

I have given the entire matter the most careful 20  
 consideration, and I think the suggestion I made  
 to you is fair and just in every respect, both to  
 the city and to yourself, to wit, that you put  
 back in Police Headquarters at once, all your po-  
 lice equipment, uniforms, overcoat, boots, rubber  
 overcoat, etc., and write me a letter requesting  
 leave of absence without pay from June 15 until  
 you are well again, whereupon you may apply to  
 go on active duty again. If you do this at once, I  
 will do as I promised you and sign your pay 30  
 voucher for the period from June 1 to June 15;  
 and shall hope that you will soon be entirely re-  
 covered in health again.

Yours very truly,  
 Ruford Franklin,  
 Mayor."

Q. Mayor Franklin knew you were sick, didn't  
 he?

40

Mr. Corbin: I object to that as calling

*William Kelly—For Petitioner—Direct*

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for a conclusion; the letter will speak for itself.

A. Yes, he did.

10 Q. In the letter he told you he knew you had been and were still a sick man?

Mr. Corbin: I object to questions asking him to construe the letter. The letter speaks for itself.

(No answer.)

Q. How long were you actually patrolling that beat near your home? A. I had it for a year.

20 Q. What beat did you have when you were taken sick? A. I cannot recall that.

Q. Were you on that beat until the night you were taken sick? A. Yes, I was the night I was taken sick; I had that beat for a year until the night I was taken sick.

Q. Had you been sick before you actually gave up work? A. Yes.

30 Q. And when were you first taken sick? A. My first sickness was in 1915, and didn't have very good health from that on.

Q. Do you know what was the cause of your being ill in 1915? A. If I could judge, it was—well, I should say it was sleeping down here in this back room in the City Hall was the worst of it; they put a bed in there for the officers to sleep in, and water running—the dampness off the walls and no ventilation, and being there half the night, and fifteen or twenty in there kicking and hollering and the odor of the place was something awful;  
40 I never could rest.

*William Kelly—For Petitioner—Direct*

Q. When did you first go to the hospital? A. In 1919.

Q. January 28th—I call your attention to the record that Dr. Davis left with us.

Mr. Corbin: I object to using the hospital record to refresh his memory.

10

Q. Where is that hospital? A. I cannot tell you just what street it is on; I know the name of it, too.

Q. What city? A. In Orange, between Broad and Central Avenue. It is two blocks from the fire house on Central Avenue toward Broad, whatever avenue that is.

20

Q. Dr. Keeney referred you to that? A. Yes.

Q. And from the time you first went there until the treatments that Dr. Davis told us about, did you undergo those treatments at the hands of other physicians in the hospitals? A. Yes.

Q. Whom did you report to when you were first taken sick? A. Chief Brown.

Q. What, if anything, did Chief Brown tell you? A. He told me I wasn't able to work and to go home.

30

Q. (Question repeated).

A. I won't say that, because I went home; excuse me; I called him up in the morning and told him of the condition I was in, and wasn't able to work; he said, "Stay home and get well."

Q. After that did you see him with anything from Dr. Keeney? A. I saw him about two weeks afterwards and brought a certificate in to him when away.

Q. Did you bring any certificate to him in June? A. Yes, sir.

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*William Kelly—For Petitioner—Direct*

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Q. What, if anything, did Chief Brown tell you?

A. I told him there was a certificate; I was going away, out of town, by order of the doctors. He said he would put them in the desk; he said, "There  
10 is no use of bothering with them, since you are not feeling well."

Q. Did you after that take him other certificates? A. I took him one or two after that. I took him one when I went to New York State, I gave him a certificate.

Q. At any time were you requested to report for duty? A. No.

Q. Your superior officers knew you were sick? A. Yes, sir.

20 Q. At any time, other than the circumstances that you told us of, with Mayor Franklin, regarding a physician, were you requested to submit to an examination to ascertain whether or not you were fit to do police duty? A. No, sir.

Q. Have you ever been able to do police duty since you were taken sick in April, 1917? A. No, sir.

Q. Have you still retained your badge? A. Yes.

Q. And your uniform? A. Yes.

30 Q. Have you ever been requested to report for duty? A. No, sir.

Q. Did you ever make any effort to resume your duties? A. I did.

40 Q. Did you offer to see whether you were able to do it? A. I reported here in 1920; I came up from the hospital that time, and I asked Dr. Humphrey down there what he thought, would I be able to go back to work, I said, "Sometimes I feel so I might be able to do a little something," and he shook his head and said, "I don't think so, but,"

*William Kelly—For Petitioner—Direct*

he said, "if you want to try it, you can." I come up here and reported to Chief Brown. I said, "Chief, I think I will start in and see if I can do some work." I said "I would like to do day duty; on account of my throat trouble, I don't believe I could stand the night air, and if the officers would be willing enough to let me have day duty, I will be willing to try it." "Well," he said, "did you take it up with the Mayor?" I said, "No, I ain't taking it up with the Mayor." So he said, "Well, I will see him"; so I said, "All right, let me know as soon as you can; I would like to come to work around the middle of the month and try it anyway, around the middle of the month." So anyway it went along for about three or four or five days— it must have been all that—I didn't keep no exact date of it—he communicated with Mayor Merrill, at that time, and Mayor Merrill sent for me to come up here; he said, by the Chief. Officer Dunn come down and left word at the house for me to come up; I come here and met the Mayor about eleven o'clock at his office, and the Mayor wanted to know my condition, and I of course explained that to him the best that I could, and he wanted to know who my physicians was; I told him Dr. Keeney and Dr. Humphrey of Orange, and he said, "All right, I will take it up with your doctors." I said, "All right, Mayor, I wish you would let me know as soon as possible"; so it went along possible for four or five or six days longer; I gave him plenty of time, I thought, to hear from the doctors. I called the Mayor up one night at his residence, and I asked the Mayor if he had any communications from the doctors, and he said yes; he said he had some communication with the doct-

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*William Kelly—For Petitioner—Direct*

ors, and he didn't think I was fit to do police duty, and then he started in to say that he didn't think I was a member of the police department. I said, "Mayor, I don't care to discuss this over the phone,  
 10 I will meet you at your office tomorrow." I come up the next day and met him at his office, and he told me then he had taken it up with the doctors, and the doctors said I wasn't physically fit to do police duty, and I said, "All right, Mayor," and I walked out of his office.

Q. Did Officer Dunn ever come to you and tell you to report for duty? A. Only to come up here and see the Mayor.

Q. Were you ever put back on the police force on  
 20 active duty? A. No.

Q. Were you ever examined by the city physician or any physician of the authorities, to see whether you were fit to do duty? A. Never.

Q. I show you a letter dated Summit, New Jersey, June 25, 1917, and ask you whether that is the letter you wrote to Mayor Franklin, which was answered by Exhibit P 6? A. That is the letter.

Mr. Schleimer: I offer that letter in evidence.  
 30

(Marked Exhibit P 7.)

"Summit, N. J., June 25, 1917.  
 Honorable Ruford Franklin,  
 Mayor of Summit, N. J.

Dear Sir:

In regards to letter you asked me to write you, I have thought over it, and I can not  
 40 make myself understand why my money has been held back.

*William Kelly—For Petitioner—Direct*

When I think of the years I have served and sacrificed the best part of my life, and have lost my health through service. Which I think is plain to be seen, as you know yourself I have always done my duty faithfully. 10

I feel very much hurt, as their has never been any of the other officers money held back before on account of sickness. And I think if compared my time off with other members of the department, you will find mine very small. I am sure sickness isn't a thing we wish for.

Mayor I wish to ask you to do me a favor, now as the new Police Rules have been adopted. I feel you could advance me the month of June salary, and allow me my fifteen days vacation now. As you can understand it has cost me a big sum of money for doctor and trip I had to take, and also the high cost of living. The above will help me out very much now. I hope you will consider this matter. 20

I am Respectfully yours,  
WILLIAM KELLY." 30

Q. Do you recall any one else being sent to you?

A. No, nothing, only the business affairs; once in a while the officers would come down and call on me.

Q. You say you still retain your badge and your uniform? A. Yes, sir, I have a badge, uniform, club and nippers.

Mayor Topping: What did you do with the revolver? 40

*William Kelly—For Petitioner—Cross*

10           Witness: I brought it up and let the Chief have it and the key to the locker; he was putting on some new men off and on and I turned it over to the Chief and thought he might want to use it, I said, until such time as I was able to go to work. I could always get it.

          Q. Did you want it around the house? No, it was enough to carry it around for years, without carry it around the house.

*Cross examination by Mr. Corbin:*

20           Q. Did you return the rest of your police equipment? A. I returned the gun; I give the gun to him.

          Q. And overcoat? A. No, sir; I have my overcoats and blouse coats and everything, clubs, night stick and day stick, and badge, and shield and hat and caps, and everything; I have all of that stuff home.

30           Q. You didn't return the equipment, as requested by Mayor Franklin? A. I returned those things right here (indicating) you have on that list; Mr. Houston, he was a member of the council at that time; I don't know if he was chairman of the Police Committee at that time; he come down to my house and the council requested him to come down and see me, as he knew me, and Mr. Franklin wanted all those things, and he told me to send them up.

          Q. Did you return them? A. Yes, I have a receipt for them.

40           Q. And that included what Mr. Franklin asked

*William Kelly—For Petitioner—Re-direct*

for as police equipment, boots, rubber overcoat, &c.? A. No, sir.

Q. I thought you just said you returned everything he asked for. A. Oh, no, a few of those things I have,—my rubber coat and rubber boots and two overcoats and two blouse coats and pants I guess I wore out. 10

Q. You said just now that you returned what Mayor Franklin asked for. A. No, if I did, excuse me for saying it, but I didn't. I got my badge and everything. I cannot say so, because I haven't; why should I?

Q. Did you ever pay any money to the Summit Police Pension Fund? A. No, sir, only what they owe me. 20

Q. When you reported sick on April 24, did you go to see Chief Brown? A. I went home that morning at four o'clock sick, I wasn't able to get out for over two weeks.

Q. Whom did you report to? A. I called him up on the phone.

Q. When did you see him first? A. About two weeks after, I brought the doctor's certificate in to him that I was going away.

Q. You say you have been sick since 1915? A. 30  
My health has been failing me since 1915.

*Re-direct examination by Mr. Schleimer:*

Q. The pension fund went into effect while you were off sick without pay?

Mr. Corbin: I object to that.

A. Yes. 40

Q. You told us you kept your uniform, your

*William Kelly—For Petitioner—Re-cross*

evercoats; did you say anything about your hat?

A. I have my hat.

Q. Your badge? A. Yes.

10 Q. Anything else? A. Club and rubber boots,  
and rubber coat, pair of nippers.

Q. I show you a paper and ask you whether those are the things that you returned at the request of Mayor Franklin and whether or not that is not a receipt for them? A. Those are the things; I had two pair of nippers.

Mr. Schleimer: I offer that in evidence.

(Marked Exhibit P 8.)

20

“Summit, N. J.

May 20, 1918.

Received from Wm. Kelly  
one Colt Revolver No. 79647  
one leather Revolver Holder  
one flash light  
one Police whistle  
one Pair chain nippers  
one box key  
one locker”

30

G. W. BROWN,  
Chief of Police.”

*Re-cross by Mr. Corbin:*

Q. Did Chief Brown give you a written leave of absence? A. No, sir.

Q. Did he give you any leave of absence at all? A. Yes, he told me to stay off until I got well.

40 Q. That is what he told you over the telephone?

A. No, he told me that when I come up to see him, when I told him I had to go away.

Q. That was two weeks after you had reported

*William Kelly—For Petitioner—Re-direct*

sick? A. And he told me when I was—when I called him on the phone. I told him I was sick and had to have the doctor; my certificate covered that, and when I brought it in, it showed that I was sick.

10

Q. Mr. Kelly, you claim you got sick from sleeping here in the city hall, down in the damp place?

A. Yes

Q. When was that? A. In 1915; January 9, 1915,—no, not January, November.

Q. 1914? A. 1915; November, 1915.

Q. Did you have a physician at that time? A. Yes, sir.

Q. Whom did you have? A. Dr. Keeney.

20

*Re-direct examination by Mr. Schleimer:*

Q. Have you ever been able to do any police duty since April, 1917? A. No, sir.

Q. You never reported for police duty? A. No, sir, only that one time to Mayor Merrill; that was in 1920.

Q. Were you able to do duty then? A. I wasn't by the doctors; I thought maybe I was; I felt that way; I had that spirit to try it.

30

Q. Why didn't you turn in all your equipment when requested to do so? A. I didn't really see any occasion why I should; I hadn't been discharged from the department and I hadn't resigned, and I thought the equipment was in my hands until such time as I could work. We all take care of our clothes and put them away in moth balls; all officers take their winter clothes and things away from here in the winter, and put them away; that has always been customary. I only fol-

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*William Kelly—For Petitioner—Re-direct*

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lowed out the regular routine which we had in this police department. Something which has never been done in the police department is to have a written-to ask for a sick leave of absence for  
10 sickness.

Judge Stein: I would like to inquire from the Commission whether it has called to its assistance the aid of a surgeon or physician representing either the police or fire department, to examine the applicant, as required under the Act.

Mr. Corbin: Yes.

20 Mayor Topping: The Commission answers yes, it has.

Judge Stein: Then I call the commissioners' attention to the language of the Act, which provides that the Commission shall do that: call to their aid the surgeon or physician representing the police or fire department. "The president of the Board of Pension Commissioners is authorized to administer oaths to such physicians (referring to physicians called by the Board and physician which may be called by the applicant), or any other person called with respect to the matter before the Commission, before the Commission shall determine by resolution, whether said person is entitled to the benefits of this act. In case the two physicians called as hereinbefore provided (meaning the one called by the Commission and the one which may be called by the applicant) fail to agree upon the physical condition of the applicant, then the pen-  
30  
40

sion commission may call a third disinterested, licensed and practicing physician and surgeon, and the determination of the majority of said three physicians, who being first duly sworn, shall be reduced to writing and signed by them, and the Pension Commission shall consider the same in arriving at their decision." 10

The Act provides therefore that these persons are to be examined by the Commission, under oath, on this petition.

I request, therefore, that the physician or surgeon which this commission has selected to make this examination, be sworn and examined, and we be given the opportunity to cross-examine. 20

Mr. Corbin: I do not understand that the petitioner has as yet designated any particular practicing physician that he has called to his aid; he has brought two physicians here to testify as to his condition, but neither he nor his counsel has stated that any particular physician has been called to his aid to confer with the physician that has been called to the assistance of the Commission. 30

Judge Stein: We are not obliged to do anything of that kind. The language of the Act speaks for itself, and is easy of interpretation. The whole section, when read together, will show the procedure which the Commission shall follow after a petition of the kind which was filed by this petitioner is presented to the Commission.

Mayor Topping: All that is dependent 40

*William Kelly—For Petitioner—Re-direct*

upon his establishing that he is a member of the police force.

10 Judge Stein: Do I understand that the Commission proceeded on this petition with the idea that it would first have to be established that the petitioner is a member of the police department?

Mayor Topping: Yes.

Judge Stein: Do I understand that the Commission was of the opinion that he was not a member of the police department?

Mayor Topping: The previous record showed that.

20 Commissioner Holt: The answer to his petition shows that.

Judge Stein: Showed what?

Commissioner Holt: That petitioner was not and had not been a member of the police force during the life of the Act.

30 Judge Stein: The Justice of the Supreme Court in dealing with that matter, in deciding the former certiorari, said in his opinion: "It is not denied that he (meaning the petitioner) was duly appointed a policeman in 1905 and served as such until 1917, from which period his connection with the department is a disputed question of fact. It is admitted that he was not removed from his office by the municipal authorities." The court decided that in the former hearing. "But the Commissioners assumed that he had impliedly resigned or abandoned his office, without proof of any facts to support it."

40 Mayor Topping: Just above that I call your attention to the statement: "One of

them is his membership in the police force.”

Judge Stein: One of the facts to be proven, yes. What I want to get is, whether the Commission in setting this down for hearing, set it down only to ascertain whether or not the petitioner was a member of the police department, and whether the further hearing of his petition will be predicated upon that, or whether the Commission conceived it to be its duty, upon the filing of the petition, to proceed according to the provisions of this Act, and call a physician to examine the petitioner on behalf of the Commission. 10

If the Commission did that, we are entitled to have that physician's testimony now. In other words, what I am trying to bring to your mind is, that we are not obliged or required by the Act to try the case piecemeal; first, to prove that he was a policeman, and then thereafter, at some subsequent time, prove that he was disabled and that he is unfit for police duty, on our side only, and come back later in the event the Commission decides that he is a police officer and hear the testimony of the physician. The Act, as I read it, means that when the petition is filed, the procedure is outlined and is mandatory, in that it says the Commission shall call to their aid a physician representing the police or fire department, to examine the applicant. 20 30

Mayor Topping: We shall have to be guided by our attorney's advice.

Mr. Corbin: My understanding is this 40

*William Kelly—For Petitioner—Re-direct*

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10 hearing is called in accordance with the Act, to consider the petition and to comply with the requirements of the act. The Commission has called to its assistance a physician who has examined the applicant, and that physician should be produced when the proper time comes; but I take it that the Commission has the right to govern its course of procedure in an orderly way, as it deems proper, in any particular case, and that while it cannot lawfully deprive the petitioner of any rights he may have to examine any physician called to the assistance of the Commission, that he cannot direct the Commission when that physician shall be called. That is a matter for them. The Act provides that if the physicians called fail to agree, then a third disinterested physician shall be called. I take that provision to mean that these physicians must examine the patient and then enter into consultation, and that of course should be done; but then very likely it is proper—although at present I don't want to absolutely state that I am convinced of that fact—  
20 for the physicians to submit themselves to examination by both parties; but I see nothing in this Act that compels the Commission to call to its aid its physician at this stage of the proceedings.

30  
40 It seems to me that if the physician for the commission is to be called, it is properly a part of the case of the City; it is not a part of the petitioner's case, and that is what is being presented to the commission at the present time.

*William Kelly—For Petitioner—Cross*  
*William Kelly—For Petitioner—Re-direct*

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I want to ask Mr. Kelly another question or two.

*Further Cross Examination by Mr. Corbin:* 10

Q. After you went to see Mayor Franklin in June, 1917, did you ever ask for any further pay?

A. Did I ask for any further pay?

Q. Yes. A. No; one time I was up there asking about my voucher; that was the only thing.

Q. That was the same voucher? A. Yes.

Q. That was that June 15, 1917, voucher? A. Yes.

*Re-direct Examination by Mr. Schleimer:* 20

Q. After that was it when you received this letter of the Mayor, marked P 6, dated June 29, 1917?

Mr. Corbin: I object to the question as leading.

A. After I received the letter, no; I asked them the one time I was up there.

Q. After you received that letter you didn't ask? A. No. 30

Mr. Corbin: You did ask for the voucher previous to that?

Witness: I asked, as I stated, about the voucher.

Judge Stein: Will you admit these Rules? We are willing to admit that Rule 12, adopted July 17, 1917, which reads:

"12. Members of the uniform police force, 40

*William Kelly—For Petitioner—Re-direct*

10 upon making proper requisition therefor to the Captain of Police, may be granted leave of absence with pay for a vacation or other purpose not to exceed sixteen days in any calendar year.

Except with the approval of the Mayor and Fire and Police Committee of the Common Council, not more than fourteen days' leave of absence with pay in any calendar year shall be granted any officer or employe of the Department on account of sickness."

Mr. Corbin: We will admit the rules which were admitted last time.

20 Judge Stein: Will you also admit that Rule 12, which was admitted by counsel, was passed February 17, 1920, which reads as follows:

"12. Members of the uniform police force upon making proper request therefor to the Mayor or Captain of the Police, may be granted leave of absence with pay for a vacation not to exceed sixteen days.

30 When in the discretion of the Mayor and Chief of Police it seems proper so to do and when the rendition of the proper service to the city permits, leave of absence may be granted to members of the force not to exceed two days in each calendar month.

Excepting with the approval of the Mayor and Fire and Police Committee of the Common Council, not more than fourteen days' leave of absence with pay in any calendar year shall be granted any officer or employe of the Department on account of sickness."

40 Rule 12 was subsequently amended by

*William Kelly—For Petitioner—Re-direct*

resolution adopted September 21, 1920, as follows:

“12. Members of the uniform police on making proper request therefor to the Mayor or Captain of the Police, may be granted leave of absence with pay for a vacation not to exceed sixteen days when in the discretion of the Mayor and Chief of Police it seems proper so to do and when the rendition of proper service to the city permits, leave of absence may be granted to members of the force for not to exceed two days in each calendar month. 10

Excepting with the approval of the Mayor and Fire and Police Committee of the Council, not more than fourteen days' leave of absence with pay in any calendar year shall be granted any officer or employe of the Department on account of sickness or for other cause.” 20

The further hearing in this matter is adjourned to a time to be agreed upon between counsel.

30

## EXHIBIT P 5.

NEW JERSEY ORTHOPAEDIC HOSPITAL  
AND DISPENSARY.

No. 2274

Name W. Kelly Age 50 Date Jan. 28, 1919.

Address 32 Park Ave. Summit

Father's Name Nativity Occupation, Police Officer

Mother's Name Nativity

Guardian's Name

40

Referred by Dr. Keeney

William Kelly—For Petitioner—Re-direct

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HEREDITARY HISTORY

PERSONAL HISTORY Has had pain in both feet for four yrs.

10 EXAMINATION Dorso flexion to 120 degrees marked & valgus callosities over distal ends of metatarsal bones swollen ankles.

DIAGNOSIS M. B. F. (arthritic)

1920

TREATMENT Casts for insoles, *raise heels*

Feb. 11 gets insoles Mar. 22, improved May 31 foot re-strapped insoles adj. June 7, insoles adj. June 21 left foot strapped, insoles adj. July 8, D. W. Oct. 11, D. W. Oct 21, D. W. Nov. 8,—— foot strapped Nov. 22, foot strapped 25th foot strapped Dec. 9 Wasserman beg. Dec. 20  
20 strapped Jan. 27, 1920, Ankle strapped D. W. casts for new insoles Feb. 21 Insoles del. March 20 Insoles adj. and foot strapped April 20 feet strapped April 20 foot quite swollen May 15 feet strapped 22nd strapped D. W.

Head Surgeon Dr. Humphries Assistant Surgeon Dr. Taylor.

1921

Name W. Kelly

30 May 4 c. D. W. June 1 c Feet strapped June 26th D. W. July 10c Feet strapped 27 foot strapped 31st Rs Sept. 18 much improved Sep. 28 Foot strapped Oct. 16 strapped; Nov. 6, Feet strapped; Nov. 20, Doing well. Dec. 21, Strapped; Jan. 29 Doing well. March 1 c March 15 Doing Well. March 26 Cast for insole, foot strapped. April 16, Foot strapped and insole delivered. May 10 Foot strapped. May 24 Feet strapped. June 11 Strapped. July 4 Doing well. July 9  
40 X-Ray taken which shows very little bony change July 26 Foot bandaged.

*William Kelly—For Petitioner—Re-direct*

1922

- Aug. 24 Visited, improving. Sept. 10 Doing well.  
 Oct. 1 Foot strapped.  
 Nov. 15 Doing well.  
 Dec. 13 Left foot dorsiflexion very limited, right 10  
 foot not so bad, restrapped.  
 Jan. 10 Feet strapped.  
 Feb. 14 Feet strapped. D. W.  
 March 21 Feet strapped.  
 May 13 Feet strapped.  
 June 6 Feet strapped.  
 July 8 Feet strapped.  
 July 15 Feet strapped.  
 July 25 Feet strapped.  
 Sept. 5 Feet strapped. 20  
 Sept. 19 Feet strapped.  
 Oct. 17 Feet strapped.  
 Nov. 18 Feet strapped.

1923

- Jan. 16 Feet strapped.  
 Apr. 14 Feet strapped.  
 May 19 Feet strapped.  
 June 5th Foot very much swollen.  
 July 3 Has some pain in left arm. Given K. I.  
 July 17 Feet strapped. 30  
 Aug. 16 Feet strapped.  
 Sept. 18 Feet strapped.  
 Oct. 30 Feet still swollen. Given K. I.  
 Dec. 6 Feet strapped.

1924

- Feb. 28 Strapped—Right foot decided improve-  
 ment.  
 Mar. 20—Feet swollen—motion much freer.  
 May 1—Feet strapped.  
 July 29—Strapped 40

*Frederick Kentz—For Petitioner—Direct*

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Visited Aug. 18—Away

Sept. 13—

Oct. 11—Feet still some swollen.

Oct. 21—Feet strapped.

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CONTINUATION of testimony and proceedings before Mayor Walter S. Topping, P. H. Holt and M. J. Finnerman, Members of the Police Pension Commission of Summit, New Jersey, on Thursday, March 12, 1925, at 6:30 P. M., at the City Hall, Summit, New Jersey.

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*Appearances:*

Mr. Clement K. Corbin, representing the City of Summit.

Mr. Samuel Schleimer for Officer William Kelly.

John D. Masterson sworn as stenographer.

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FREDERICK KENTZ, sworn for petitioner,

*Direct Examination by Mr. Schleimer:*

Q. Mr. Kentz, you are city clerk of the City of Summit? A. I am.

Q. And you have been how long? A. Since May, 1912.

Q. Do you know William Kelly, the petitioner?

A. Yes, sir, I know Mr. Kelly.

40

Q. Do you know by reason of your office, that

*Frederick Kentz—For Petitioner—Direct*

he was a member of the Summit Police Force? A. I do know.

Q. As City Clerk of the City of Summit, was it your duty to keep the official pay-roll authorized by the council? A. It was.

10

Q. Have you those? A. I have the pay-rolls of several years back.

Q. Have you the pay-rolls for the years 1917, 1918 and 1919? A. I have the pay-rolls as revised May 1, 1917.

Q. And have you the one revised June 24, 1918? A. Yes.

Q. And have you the one as revised April 1, 1919? A. I have.

Q. During all that time was William Kelly carried on the payroll as a policeman of the City of Summit?

20

Mr. Corbin: I object to what the payroll shows, on the ground that it is not material in this case. The pay-roll is not shown to have any official standing to establish the status of this officer.

A. I find that William Kelly's name was carried on the pay-roll during all that time, but that no payment of moneys was made to him after June 15, 1917.

30

Q. And to what time was his name carried on the pay-roll? A. I have got my pay-roll sheet here. I carried him down through—and he is on the pay-roll as revised by the pay-roll board on April 1, 1919. That must have been down through to January, 1920.

Q. Do you recall that after he was taken sick he was paid one check? According to your testimony

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*Frederick Kentz—For Petitioner—Direct*

in the other case, you answered as follows: "I think he was, yes." A. I think he was paid more than one check after he was taken ill.

10 Q. Did you have any authority for ever taking his name off the pay-roll? A. Well, I make the same answer this time. May I read it?

"No authority of the council except that we had not paid officer Kelly any money since the check of June 15, 1917, had not been paid, and we revised those lists, as you will see, several times since then and put a ring around his name, and I suppose simply that he wasn't getting any more money."

20 Q. You carried him after he no longer received any pay, as a member of the Police Department, and then without any authority dropped him from the pay-roll on January 7, 1920? A. That is right.

Mr. Schleimer: I offer those pay-roll sheets in evidence.

Mr. Corbin: I object to them for the same reason that I asserted before.

(Pay-roll sheets dated May 1, 1917, marked Exhibit 8.)

30 (Pay-roll sheets dated November 1, 1918, marked Exhibit 9.)

(Pay-roll sheets dated April 1, 1919, marked Exhibit 10.)

Q. What does the mark around his name mean?

A. The mark around his name was for my guidance, so that I would not make out his check. I dropped the word out of this first pay-roll "Hold," and that was done by virtue of the fact that Mr.  
40 Franklin, who was Mayor at that time, requested

*Frederick Kentz—For Petitioner—Cross*

no further payments to be made, and that draft was to be held, the check dated June 15, 1917.

*Cross Examination by Mr. Corbin:*

Q. Under whose authority did you make out these pay-roll sheets, Mr. Kentz? A. Why, those pay-roll sheets were the same pay-roll sheets that were in force when I became City Clerk; that was the custom, and I followed out that custom of making out the pay-roll sheets for my guidance. We made out a copy for the City Treasurer and the Mayor at the same time. 10

Q. Did you make them up in pursuance of any resolution of the council? A. No. 20

Q. They were made simply for your convenience and the other city officers, and in the nature of a memorandum; is that correct? A. I should say so, yes.

Q. And not an official record in the sense of being something adopted by the council? A. There was nothing adopted by the council. The council never adopted a pay-roll until here about three years ago.

Q. After Mr. Kelly's name was dropped? A. No, 30 it wasn't then; we changed the whole system about three years ago, by having the pay-roll adopted by resolution.

Q. I don't believe you understood by question. The change was made after Mr. Kelly's name had been dropped from the list? A. After his name had been dropped, yes.

Q. You have seen no orders from the council to put his name on that list? 40

*Frederick Kents—For Petitioner—Re-direct*

Mr. Schleimer: I object. If that is so, the records of the council would show it.

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

10 Q. And have charge of the records of the council? A. Yes, sir.

Q. You didn't answer the previous question. "You have seen no orders from the council to put his name on that list?"

Mr. Schleimer: The records and proceedings of the council are the best evidence of that.

20 A. No, I have received no orders from the council.

Mayor Topping: Officer Kelly was in the employ of the City when you took the position of City Clerk?

Witness: Yes, and his name had been carried on those previous pay-roll sheets, and I carried it right along, right on down to January, 1920.

30 Q. You used those pay-roll sheets for the purpose of making up your checks? A. Yes, sir.

*Re-direct Examination by Mr. Schleimer:*

Q. Those are the only official records of the pay-roll that you kept, of course, during that period?

A. Those are the only ones.

40 Mr. Corbin: I object to that question, because it assumes a fact that the witness has not testified to, that they were official rec-

*Frederick Kents—For Petitioner—Re-cross  
Dr. Maynard G. Bensley—For City—Direct*

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ords; he has testified they were not official records.

Q. Did you ever receive any instructions from the council to take Officer Kelly's name off the list as a policeman? A. No. I did not. 10

Q. Until the system that you spoke of as having been changed in 1922, the system was to keep the pay-rolls as you kept them, and have presented them here? A. That is correct.

*Re-cross Examination by Mr. Corbin:*

Q. Who told you to keep the name off the list? 20

Mr. Schleimer: I object to that.

A. I really don't think anybody told me; we had been carrying him on down through, and in making out my checks, I didn't make out any check for Kelly, so when Mayor Franklin stepped out of office and Mayor Merrill came in there, I said, "What is the use of keeping that name on the list?" That is just what happened. 30

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DR. MAYNARD G. BENSLEY, sworn for the City.

*Direct Examination by Mr. Corbin:*

Q. Dr. Bensley, you are a practicing physician in Summit? A. I am.

Q. How long have you been practicing here? A. Since October, 1919. 40

Q. When were you licensed to practice as a physician? A. In January, 1916, in New York City.

*Dr. Maynard G. Bensley—For City—Cross  
John P. Murphy—Re-called—For City—Direct*

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Mr. Schleimer: The qualifications of the doctor are admitted, Mr. Corbin.

- 10 Q. Have you examined Mr. Kelly? A. I have.  
Q. When did you examine him first? A. Last fall; I can't give you the exact date.  
Q. Some time in October do you think it was?  
A. Yes, sir.  
Q. When did you examine him after that? A. This morning.  
Q. Have you conferred with Dr. Keeney, who appeared in this matter in the prior hearing as Mr. Kelly's physician? A. Yes.
- 20 Q. And were you able to agree? A. Yes.  
Q. You are prepared to make a written report with Dr. Keeney over your signature as to his condition at the present time? A. Yes, sir.

*Cross examination by Mr. Schleimer:*

Q. Did you agree with Dr. Keeney that the condition of Mr. Kelly is such that he could not perform his duties as a policeman? A. Yes.

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JOHN P. MURPHY, recalled for

*Direct examination by Mr. Corbin:*

Q. Chief, did Mr. Kelly report for duty at any time after you became Chief? A. No.

- 40 Q. Did he report for duty before that, during the time when you were Captain, after April, 1917?  
A. No, I think not.

*John P. Murphy—Re-called—For City—Cross*

Q. Has he applied to you for any leave of absence, as Chief? A. Not as Chief, no.

Q. Did he apply for any leave of absence, to you, as Captain? A. He came into police headquarters one day while I was Captain. 10

Q. When? A. I think that was in 1917.

Q. About what month? A. It was in the fall of 1917. I think he came in with a certificate from Dr. Keeney, stating that his condition was such that he deemed it advisable for him to go away for a while, and he did. He went South, I believe, for most of the winter.

Q. Did he apply for a leave of absence, or did he just bring in this certificate? A. He simply came in and handed me this certificate and told me that he was going away for the winter. 20

Q. Did he ever make any application in writing for leave of absence?

Mr. Schleimer: I object.

A. Not to me.

*Cross Examination by Mr. Schleimer:*

Q. And that is as far as your dealings regarding the case of Officer Kelly as a policeman, either as Captain of the Police or Chief of the Police of the City of Summit, goes? A. That is about as far, yes. 30

Q. Officer Kelly told you, when he presented that certificate, did he not, that he was going away under the advice and instructions of Dr. Keeney?

A. Yes.

Q. And that Dr. Keeney told him it was neces- 40

*John P. Murphy—Re-called—For City—Re-direct*

sary for him to go South for his health? A. Yes, sir.

10 Q. As Captain of the Police of the City of Summit, you had charge of the records of the Police Department showing the patrol service of the members of the night patrol? A. I did.

Q. I am going over your testimony of before, and if you want to be refreshed on it, I will be perfectly willing for you to do it. And what was the last time shown that Kelly did active service? A. April 3, 1917, was the last day.

Q. Does the record show when he reported sick? A. He reported sick April 24, 1917.

20 Q. And from that time on, does the record show that he was carried and reported as sick? A. Yes, from that time until January 1, 1920, his name was carried on the patrol sheet as sick.

*Re-direct Examination by Mr. Corbin:*

Q. To your knowledge did the Mayor and the Fire and Police Committee of the council grant Mr. Kelly any leave of absence?

30 Mr. Schleimer: I object on the ground that it would have to be done officially by record, and the record would show it.

A. I couldn't say as to that.

Q. It was not done to your knowledge?

Mr. Schleimer: I object to that. If he has no knowledge, he can't tell. He didn't attend the council meetings.

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Mr. Corbin: Answer the question.

A. Not to my knowledge.

*Frederick Kentz—Re-called—For City—Direct*  
*Frederick Kentz—Re-called—For City—Cross*

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FREDERICK KENTZ, recalled for

*Direct Examination by Mr. Corbin:*

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Q. Mr. Kentz, have you examined your records as Clerk of the City and Clerk of the Council, to see if there was any record with respect to Mr. Kelly having been granted a leave of absence? A. Yes, I made such an examination.

Q. Do you find anything in the City's records with respect to it? A. I find nothing with respect to granting a leave of absence to Mr. Kelly.

*Cross Examination by Mr. Schleimer:*

20

Q. Do you find anything on your records showing any complaint having been filed against Officer Kelly and his having been tried upon charges as an officer, and being dismissed from the force? A. No, sir, no such matter found on the record.

Mr. Schleimer: It is admitted that the City of Summit is acting under the provisions of Chapter 52 of the Laws of 1899, antititled "An Act relating to and providing for the government of cities of this state totalling a population of less than 12,000," Approved March 31, 1899, and the amendments thereto and the supplements thereof.

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*Oliver B. Merrill—For City—Direct*

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OLIVER B. MERRILL, sworn for the City of Summit,

*Direct Examination by Mr. Corbin:*

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Q. Mr. Merrill, were you Mayor of the City of Summit, at one time? A. I was.

Q. From when to when? A. January, 1920, for four years—1920, 1921, 1922 and 1923.

Q. As Mayor, you were head of the Police Department? A. I was.

Q. And were you familiar with your powers with reference to the appointment of policemen? A. I was.

20

Mr. Schleimer: I object on the ground that that is not competent proof in this case.

A. Why, my powers as Mayor in charge of the police, was to have the entire charge of the police, the appointment, the dismissal, if necessary, or anything that came up in connection with the Police Department, according to the ordinances of the City.

30

Q. During that period were you ever furnished with a certificate from a physician as to Mr. Kelly's physical condition? A. I was not.

Q. Did you ever take action towards granting him a leave of absence? A. I never did.

Q. Did he ever apply to you for re-instatement on the Police Force, or to become a member of the Police Force?

40

Mr. Schleimer: I object, until it is first proven that he was ever off the force.

*Oliver B. Merrill—For City—Cross*

A. He came to me some short time after I came in as Mayor and asked to be re-instated on the force; told me about his condition and wanted to be re-instated on the force.

Q. Did he use the word "re-instated"? A. To 10  
the best of my remembrance he did.

Q. Did you ever have any communication with him after that? A. I think he came to see me after that time, sometime afterwards, or else—I don't know whether he came to see me, or whether I saw him—I did talk with him after that.

Q. Did you put him on the force?

Mr. Schleimer: I object on the ground 20  
that the evidence in this case<sup>3</sup> really shows  
Officer Kelly was never removed, or re-  
signed, or was ever dismissed on charges.

Mr. Corbin: Answer the question.

A. I did not.

*Cross Examination by Mr. Schleimer:*

Q. You say you understood your duties as Mayor regarding the police force? A. I thought I did. 30

Q. Then you of course knew that you could not dismiss any member of the police force except after a hearing upon charges preferred upon notice to him?

Mr. Corbin: I object to the question.

A. I had no occasion to dismiss anybody; I never acted on that.

Q. That is not my question. A. Will you please repeat it? 40

(Question repeated.)

*Oliver B. Merrill—For City—Cross*

10 Mr. Corbin: I object to the question. It is assuming matters that do not appear in this case, and asking the witness to make an interpretation of the law to which he has not testified.

A. I don't know as I could tell the exact law in regard to the method of dismissal or not.

Q. You knew as Mayor that a police officer could not be dismissed except upon charges? A. No, I would not say so.

20 Q. I am going to call your attention to your answer at the last trial. This question was asked you by Mr. Collins: "What are your powers with reference to the appointment of policemen, if you know what they are?" And you answered, "As far as appointment of police, and according to the ordinance as I understand it, I have charge of the police affairs, including dismissal on charges."

A. Yes, but that does not say you can't dismiss without charges.

Q. You told Mr. Corbin that you knew your duties regarding the police department as Mayor.

A. Yes, sir.

30 Q. Now, I ask you, having made that statement, whether you didn't know as Mayor, having charge of the police department, that you could not dismiss a member of the police force, without having charges preferred against him, after a hearing upon due notice to him? A. No, I did not.

Q. You didn't dismiss Officer Kelly? A. I did not.

Q. There were no charges preferred against him and no hearing had on them? A. There was not.

40 Q. Now, Mr. Merrill, do you remember that it

*Oliver B. Merrill—For City—Cross*

was you that sent for Mr. Kelly by sending Officer Dunn for him? A. I remember that the Chief asked Mr. Kelly—said Mr. Kelly wanted to see me. No, I did not send Officer Dunn to see him.

Q. Are you positive that Mr. Kelly used the word "reinstatement"? A. To the very best of my knowledge and remembrance. 10

Q. He never made any application in writing to you, did he? As I recall, no, none whatever.

Q. Isn't it true that he discussed with you the possibility of his being able to patrol? A. He talked about patrolling and certain police duties.

Q. And he talked to you about his condition, did he not? A. He did.

Q. And isn't that what you meant by the best of your knowledge and belief, that he applied for reinstatement? A. No. 20

Q. He talked to you then about his physical condition, did he not? A. He did.

Q. And it is possible for you to be mistaken about his having used the word "re-instatement," is it not? A. I don't think so.

Q. Do you remember any conversation you had with him about his never having been dismissed or brought up on charges and never having resigned? A. No. 30

Q. You had never heard it said that he had resigned or been dismissed? A. No.

Q. You knew what physicians were attending him, did you not? A. I think he told me at the time.

Q. That it was Dr. Keeney? A. Dr. Keeney, yes.

Q. Did you ever consult with Dr. Keeney regarding the condition of Mr. Kelly? A. I talked to him about it—I didn't go to see him. 40

Q. And Dr. Keeney told you that in his condition he was not able to resume patrol duties, did he not? A. No, he didn't tell me that.

10 Q. You found out from Dr. Keeney what his condition was? A. I will tell you the circumstances, if you want, just how it was.

Q. You say you found out from Dr. Keeney what Mr. Kelly's condition was? A. In a general way, yes.

Q. And from that you found out he wasn't able in that condition to do patrol duty, did you not? A. I did not.

20 Q. Didn't Dr. Keeney tell you that Officer Kelly was not able to do patrol duty? A. As I remember, Dr. Keeney told me in general about his condition, covering some time past, and about his trouble, of the trouble with his feet, also some trouble with sickness that he had had, but my recollection of it was, it was a general statement of his condition, without any advice as to whether he was able to patrol or do regular duty.

30 Q. You told Dr. Keeney, did you not, that your inquiry was for the purpose of learning whether or not Kelly was fit to do police duty or not? A. yes.

Q. He told you that Officer Kelly was a sick man, did he not? A. He told me that he had been sick.

Q. Didn't he tell you that he still had those symptoms. A. As I recall, he said that he was better than he was, in better condition than he was, but not entirely recovered.

40 Q. Did he not tell you something about Mr. Kelly's broken arches? A. He spoke somethink about fallen arches, as I recall.

Q. Did he also not tell you something about Mr. Kelly having flat feet? A. Yes, that is practically the same statement.

Q. Do you remember him telling you anything about the veins in Mr. Kelly's legs? A. I don't remember about that. 10

Q. Did he tell you anything about his being muscle bound in the limbs? A. I don't remember about that.

Q. Do you remember being told that Mr. Kelly was being treated by both Dr. Keeney and Dr. Humphries? A. In the testimony in the previous case, when asked about Dr. Humphries, I want to change it, because I found out afterwards I did consult with Dr. Humphries. I would like to change that testimony. Will you ask the question again? 20

Q. Do you remember talking with Dr. Humphries? A. I know I never talked with Dr. Humphries.

Q. Did you write him? A. I did.

Q. Did you receive a reply? A. I did.

Q. Did he not write telling you about Mr. Kelly's condition. A. He did.

Q. Did he tell you Mr. Kelly could not do patrol duty? A. My remembrance of that was that the letter said that his condition was—what he had been treating him for, and that he might be good for some duty—partial duty, but not for full duty. 30

Q. Now, having—in all fairness—having been honestly mistaken about your having written to Dr. Humphries, can you not be mistaken about Mr. Kelly's having used the word "re-instated"? A. I think not.

Q. Your testimony regarding Dr. Humphries be- 40

fore was given in September, 1922, was it not? A. Yes.

Q. And your recollection of this transaction was then, of course, much fresher than it is now? A. Evidently not, because I remember more now than I did then.

Q. Have you read your testimony of the last trial? A. I just looked it over.

Q. When? A. Just this evening—glanced it through.

Q. You never dismissed Officer Kelly from the force, did you? A. No, sir.

Q. Do you recall why it was you consulted with Dr. Humphries—whether it was because Mr. Kelly asked you to? A. He spoke about having been treated by Dr. Keeney and Dr. Humphries.

Q. And he told you that they could advise you of his condition, did he not? A. I assume he must have.

Q. And did he not tell you he was perfectly willing for you to discuss with them, for the purpose of ascertaining his unfitness for police duty? A. No, I don't remember that—I don't remember him telling me that.

Q. Do you remember Kelly coming back to you a couple of weeks after his talk to you about these doctors, and your telling him that you had communicated with those doctors and that you could not put him back on patrol duty, because the police department required strong men? A. No.

Q. May that have slipped your memory? A. Not all of it.

Q. What part might or might not? A. I remember talking with him afterwards. As far as telling him about putting him back on patrol duty, I am not sure of that.

*Oliver B. Merrill—For City—Cross*

Q. You wouldn't put a man back on patrol duty after the advice you had with these doctors? A. I wouldn't put him back if he was not on the police force.

Q. He, to your knowledge, was not dismissed? 10

A. I didn't have any knowledge of it.

Q. You knew he had been a policeman? A. Yes, sir, he had been.

Q. You knew from your own observation that he was a policeman? A. Sometime before, yes.

Q. And you had no knowledge of his having been dismissed? A. I had no official knowledge.

Q. Did you have any knowledge of his having been dismissed? A. I never heard of his being dismissed, no. 20

Q. You did say to him, however, at the second interview, "We have to have able-bodied men on the police force," and that you couldn't put him back on the police force? A. I said that in either one of the interviews, yes.

Q. Wasn't that after your talk with Dr. Keeney, and after your talk with Dr. Humphries? A. I wouldn't say definitely it was; I think probably it was. I remember saying I wouldn't put anybody on the police force unless he was in good condition. 30

Q. You meant by that that you could not restore him to duty until you were satisfied he was competent, in fairness to the City of Summit, to perform his duty; isn't that so? A. No, I didn't mean that at all.

Q. What did you mean? A. I meant that I would not appoint him as a policeman.

Q. Why did you use the language that you could not put him back? A. Put him back—make him another policeman again—a re-appointment. 40

Q. You didn't know of his ever being dismissed?

*Oliver B. Merrill—For City—Cross*

A. He came to me as a new man, so far as police duty was concerned.

Q. You knew he had been a policeman? A. Yes, but he had not been for a number of years.

10 Q. You knew that the claim was made that he was off duty by reason of illness? A. No, I didn't know that.

Q. Why did you communicate with his doctors. A. Because he spoke to me about communicating with them about his being re-instated on the force, and I took it up from the point of view, of whether he was able to be re-appointed on the force.

20 Q. When he came to you, you did not inquire into his status as a member of the police force? A. Yes, I asked whether he was on the police roll; if I remember rightly, I asked Mr. Kentz whether or not he was, and I also asked our former mayor whether or not he was a member of the police force.

Q. Did you ever look at that pay-roll yourself? A. I did.

Q. Did you find he had been continued and carried a time on that pay-roll? A. The pay-roll I looked at was in my time, 1920; he was not on the pay-roll in 1920.

30 Q. Did you look back of that and find that he was off by reason of illness? A. No, I didn't see that.

Q. And so far as your actions as mayor were concerned, you did absolutely nothing regarding Officer Kelly's membership on the police force of the City of Summit, one way or the other? A. What do you mean, start any action?

Q. Yes. A. No action.

40 Q. Did you ever go into the records, or inquire as to how long Officer Kelly had been a police officer?

*Oliver B. Merrill—For City—Re-direct*  
*Ruford Franklin—For City—Direct*

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Mr. Corbin: I submit he has answered that.

10

A. No, I don't know how long he was.

Q. And you did not inquire to ascertain as to whether or not he was on the police force when he became ill? A. I don't remember whether I inquired or not.

Q. Did you or not inquire? A. I didn't inquire, that I remember.

Q. Did you inquire to ascertain as to whether or not he had been given a leave of absence or permission to remain from duty by reason of illness? 20

A. No, I did not.

*Re-direct Examination by Mr. Corbin:*

Q. When Mr. Kelly came to you, did you know anything about his case? A. In a general way, yes.

Q. You had never had occasion to look into it up to that time? A. No, I had not any occasion to.

Q. Did you ever appoint Kelly to the police department? A. I did not. 30

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RUFORD FRANKLIN, sworn for the City of Summit,

*Direct Examination by Mr. Corbin:*

Q. You were former Mayor of the City of Summit? A. Yes. 40

*Ruford Franklin—For City—Direct*

Q. Between what dates? A. Between January 1, 1916, and January 1, 1920.

Q. And as such you had authority over the police force of the city? A. Yes.

10 Q. And you were head of the police force? A. yes.

Mr. Schleimer: I move the answer be stricken out.

Q. At the time you took up the office of Mayor, was Mr. Kelly a member of the force? A. Yes.

Q. And you had control thereover and over him? A. Yes.

20 Q. Did he come to you for orders? A. No, I don't think he did—not before 1917.

Q. Now, do you remember the occasion of his illness in 1917, or the claim that he was ill? A. I do.

Q. Did he come to you with a certificate from a doctor at that time? A. Yes.

30 Q. And that certificate, I believe, has been put in evidence and marked Exhibit P 4—it is a doctor's certificate, dated June 18, 1917, from Dr. Keeney, and "certifies that Mr. William Kelly has been sick and unable to follow his own or other occupation from May first to June 18, during which time he was under my professional care." Signed "C. B. Keeney, M. D." A. Yes, he brought me that certificate.

Q. Did you ever receive any other certificate from a physician with reference to Mr. Kelly's condition? A. I don't think I did.

Q. Do you remember his coming to you in June, 1917? A. Yes.

40 Q. Now, will you tell me and tell the commissioners what he said and what you said on that

*Ruford Franklin—For City—Direct*

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occasion? A. The voucher for Mr. Kelly's pay, dated June 15, was presented to me and I refused to sign it. Mr. Kelly had not served more than a few days since the first of January, 1917 I had been for him a number of times and had the Chief send for him a number of times, and he had always refused to come and see me, so I refused to sign his pay check from June 1 to June 15, knowing that that would cause him to come there and see me. He did come to see me, as I recall it, about the eighteenth of June—I say the eighteenth of June, because that date is probably the date of his coming, since that date is the date of the certificate of Dr. Keeney. It was about at that time. He came and asked me why I had not signed his June 15th pay voucher. I told him he had been absent from police duty since the first of January about sixty times up to the first of June, according to the records of the Police Department, and that I felt that that was practically dismissal from the force on his own part, and I couldn't pay any checks until he acted as a policeman. Mr. Kelly then handed me the certificate from Dr. Keeney, which stated Mr. Kelly had been ill from May 15th to that date. I asked Mr. Kelly if he felt that he could not do ordinary desk work. He complained of the dampness of the police room in which the officer slept part of the night—said that he had rheumatism and trouble with his feet, and I said to him that if he would return his equipment and take a vacation, after making proper application for a leave of absence, that I would consider that matter, and if I felt that was proper, I would grant him a leave of absence without pay, for a specified time, until he became better and was able to resume police work. Mr. Kelly then left me, stating he was sat-

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*Ruford Franklin—For City—Direct*

isfied with that. A short time after that I received a letter from him, in which he complained of the matter and said he was not satisfied. That letter, I believe—

10 Q. I show you Exhibit P 7 and ask you if that is the letter you refer to? A. Yes, that is the letter, dated June 25, 1917. In reply to that letter I wrote him. In that letter of June 25th to me, he stated that he was being treated badly, and could not understand why his name was being held back. I replied to him, in a letter which I think is also in evidence.

20 Q. I show you Exhibit P 6, and ask you if that is the letter? A. Yes, that is the letter. In that letter I tabulated the "time off" for the various officers on the force, he having said that other officers had had as much time off, and that showed that he had nights, off—the custom being to speak of nights off, not days off—for seventy-seven nights, from January 1, 1917, to June 15. And in that letter I reiterated my previous suggestion that if he would write me a letter asking for a leave of absence I would consider whether or not when he returned that I might possibly re-appoint him.

30 Q. Did you say anything to him about having a physical examination made? A. Yes.

40 Q. What did you tell him? A. Not at that time; later on, several months after this, he came to me and said that he was much better and would like to go on duty. I told him that he had maintained so strongly before that, that he was not able to do duty, that I could not let him do any duty without having him physically examined, which seemed to be satisfactory to Mr. Kelly, until I asked him if he would attend to be examined. At that time I was chairman of the Draft Board—it was during

*Ruford Franklin—For City—Direct*

the War—and the physical examiner of the Draft Board was Dr. H. P. Dengler, who is now Health Officer of the City of Summit, and I told Mr. Kelly I would have Dr. Dengler examine him, and if Dr. Dengler found he was sound and well, I would consider letting him go on duty. Mr. Kelly refused to consider that, and became quite excited, and said he would not be examined by Dr. Dengler and would not be examined by anybody except his own physician. I repeated to him that it was not for him to be satisfied, but that it was for me to be satisfied, and that if he wanted to act on the force I would have him examined by a physician that I chose, and not by a physician that he chose. After that Mr. Kelly left, seeming to feel quite angry about it, and from that date, to the end of my term, on January 1, 1920, Mr. Kelly never served on the force and never attempted to serve on the force, and asked for no leave of absence, either in writing or otherwise.

Q. Did Mr. Kelly agree to have an examination by Dr. Dengler in the presence of his own doctor?  
A. No, he would not have anything to do with Dr. Dengler.

Q. Did you tell him you would communicate with his doctor and have him send for Mr. Kelly?  
A. Have his doctor send for him?

Q. Yes, have Mr. Kelly's doctor send for him. Mr. Kelly testified on his direct examination in this case that he said—meaning yourself—that “he would communicate with the doctor and send for him.” A. No, I have no recollection of anything of that kind.

Q. And the next question was, “What doctor?” Mr. Kelly replied “Dr. Keeney—he was going to talk with Dr. Keeney.” Did you tell him you were

*Ruford Franklin—For City—Direct*

going to talk with Dr. Keeney, on that occasion?  
A. No.

Q. Or on any other occasion? A. No.

10 Q. Did Mr. Kelly agree to have the examination made by Dr. Dengler, if he could have Dr. Keeney present, or any other doctor on his behalf? A. Not to my recollection; I think not.

Q. You never talked to him again after that time that he refused to be examined by the doctor of the Draft Board? A. I don't think I saw Mr. Kelly again during my term.

Q. And that was along about September, 1917, I think? A. It was in the fall of 1917; I think September or October.

20 Q. Did you have any doubt as to whether Kelly was actually sick?

Mr. Schleimer: I object; it calls for a conclusion, and he not being a physician, I think the Mayor would know as much about that as we do.

A. I had doubts, yes.

Q. What was the occasion of the doubt?

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Mr. Schleimer: I object to that, of course; it would be highly improper. I think Mr. Corbin realizes it himself.

Mr. Corbin: I will let the question stand.

40 A. The only way I can answer that is that Kelly had seemed to be in good physical condition before the war came on; there had been times when I had, as Mayor, called up the signal opposite the railroad station, when Mr. Kelly was on duty there, and he always responded very promptly, but when

*Ruford Franklin—For City—Cross*

the war came, it seemed that that was the first I knew of his being ill or of his claiming to be ill. My feeling was that—

Mr. Schleimer: I object to what the Mayor's feeling was as highly improper. 10  
Witness: I think Mr. Schleimer is right.

*Examination by Mayor Topping:*

Q. Mr. Franklin, you acquainted all the members of the council with the circumstances surrounding this case?

Mr. Schleimer: I object to the question. 20

A. Yes.

Q. And the council informally approved of your handling the case?

Mr. Schleimer: I object; the council cannot do anything informally.

A. I think the council did ratify it for me, informally. 30

*Cross Examination by Mr. Schleimer:*

Q. By record? A. No, not by record.

Q. Don't you want to correct that statement. Was it by judicial action? A. Not by resolution, no.

Q. Not by any record of the council? A. Not by any record that I recall.

Q. And so far as you know, there was no record of the council relating to Mr. Kelly's dismissal 40

*Ruford Franklin—For City—Cross*

from the Police Force? A. I don't think there was.

Q. You knew Dr. Keeney, did you not? A. Yes.

Q. You had confidence in him as a physician, did you not? A. I knew nothing about Dr. Keeney as a physician, except his general reputation. I had a feeling that he was a good doctor.

Q. A doctor of good reputation in Summit? A. He had not been very long in Summit.

Q. You knew he was attending Officer Kelly? A. I knew it after Officer Kelly told me.

Q. You didn't speak to him? A. I think I sent for him or met him and asked him about Kelly.

Q. Did he not tell you Kelly's condition was such that he was not fit for patrol duty at that time?

20 A. No, he did not.

Q. Will you say that so far as your recollection serves you, that Kelly said he was not willing to be examined by another physician? A. Yes sir, I don't think it would escape my memory, because Mr. Kelly got very heated and said he would not be examined by anyone.

Q. Why do you say you have no recollection of his saying he would be willing to be examined by any physician you named, in the presence of his physician? A. Because I have no recollection of it.

Q. At that time was Mr. McNamara on the force? A. Yes.

Q. And I call your attention to your letter to Mr. Kelly, that has been read by you, or handed to you by Mr. Corbin, in which you say you made a list of those officers who had nights off, other than Kelly, and I ask you whether the name of Officer McNamara appears thereon? A. Yes.

40 Q. Where? A. Right here (indicating).

Q. I am talking about the lower section of the

*Ruford Franklin—For City—Cross*

page. A. I am talking about the list. This is the list.

Q. I am talking about the list of hours off. A. Not in the list of hours off. Previously I have excepted Officer McNamara, because he was so sick that his life was despaired of; he came back and did desk duty. 10

Q. Did you take any steps other than to converse with Officer Kelly, to ascertain when he would be able to return to duty? A. Nothing, except a talk with Dr. Keeney, and Kelly having promised to come back and see me and having seen me, it seemed unnecessary to take any further steps. He came back and said he was all right and wanted to go on duty. 20

Q. When was that? A. September or October, 1917, as I have already testified.

Q. Are you sure of that, Mayor. A. I am not sure of the exact date. It was in the fall of 1917.

Q. Do you remember meeting him in October, the eighteenth of October, the day before he sailed for the South? A. No, I do not.

Q. And talking to him about his trip and telling him you hoped he would come back well? A. I don't recall that, but it may be so. 30

Q. You knew he was going South under Dr. Keeney's instructions? A. Only by hearsay.

Q. Didn't Mr. Kelly tell you that? A. No, because he didn't know it at the time.

Q. I am talking about your conversation with him on October 18th, the day before he sailed. A. I have no recollection of the time I met him that day.

Q. On the corner of Union Place. A. I have no recollection of it. 40

Q. You knew he was away? A. He told me he

*Ruford Franklin—For City—Cross*

was away—I didn't know he was away until he came back.

Q. You knew he was away until April, 1918?

A. He never communicated with me during my  
10 term.

Q. Don't you recall getting a certificate on Labor Day, 1917, signed by Dr. Keeney? A. I don't recall it; it is possible I did get another one, but I don't think so.

Q. Do you remember that Officer Kelly came to you as a result of your sending Officer Sullivan for him? A. That was in September or October, 1917.

Q. And didn't he tell you he had been advised by Dr. Keeney that he had to go South for his health?

A. Well, it is possible that he did.  
20

Q. And don't you recall telling him, then, that you hoped he would recover his health and be able to return to duty? A. I think it is very probable I politely hoped he would recover his health.

Q. While you were Mayor there were no charges preferred against Kelly upon which he was dismissed from the force? A. He was not acting on the force.

Q. You are not answering my question. A. No,  
30 there were no charges preferred.

Q. And he was never dismissed upon any charges preferred at a formal hearing? A. You are speaking of official action?

Q. Yes. A. No official action.

Q. You knew he had been a member of the police force? A. Of course I knew it.

Q. It was in May or June, 1917, when you went on the Draft Board? A. Yes, sir.

Q. Dr. Dengler was living then in Union? A.  
40 In Springfield.

*Ruford Franklin—For City—Cross*

Q. That is two or three miles from Summit?

A. A couple of miles from Summit, yes. He was the medical examiner of the Draft Board.

Q. You knew that he had reported sick to the chief, did you not? A. Dr. Dengler? 10

Q. No, Mr. Kelly. A. Yes.

Q. And of course you were not present at police headquarters each day, and you don't know what transpired between the chief and Mr. Kelly, unless you were present? A. Well, I was not physically present at the police headquarters every day. I was in the City Hall every day, and Chief Brown came to see me nearly every day.

Q. What he told you in Kelly's absence would not be admissible? A. I am not going to testify to it, Mr. Schleimer. 20

Q. Did Mr. Keeney tell you about the condition of Officer Kelly's feet? A. Dr. Keeney seemed to be a little indefinite about Kelly's illness. He may have spoken of his feet. He said Kelly seemed to be nervously ill, as if he might be subject to nervous prostration.

Q. Didn't he tell you he was unable to stand on his feet for any length of time? A. I don't think he did. 30

Q. If he did, you have forgotten it? A. If he did, I have forgotten it.

Q. Do you recall Officer Kelly telling you he had been examined by Dr. Lawrence, of the Overlook Hospital? A. I don't remember anything of the sort.

Q. Then as a matter of fact, so far as you learned, you could not tell us whether Officer Kelly was fit or unfit for duty? A. I know he would not submit to a physical examination in order that I might determine that. 40

*Ruford Franklin—For City—Cross*

Q. You don't recall whether he was willing to do it in the presence of his own physician or not?

A. I am quite sure I don't remember whether he said that, but he said he would not be examined by anybody I appointed, but would be examined by any physician he chose himself.

Q. Who was your city physician? A. In 1917?

Q. Yes. A. Dr. English, I think—I really don't remember at the moment.

Q. It was not Dr. Dengler? A. It was not Dr. Dengler. Dr. Dengler was an expert in physical examinations, having examined a good many men in the Draft Board.

Q. And a very young doctor at that time? A. No, he was not very young.

Q. Do you know his age? A. No, I don't.

Q. Don't you know as a matter of fact he is John Denglers' son, still practicing in Springfield; don't you consider him a young man? A. He is not an old man. I don't know how old Dengler is; he seemed to be very competent.

Q. It was you who stopped payment of Kelly's pay check, was it not? A. Yes.

Q. That was done on your own initiative as Mayor of the City? A. In accordance with my duty—with my idea of my duty as Mayor, when a man wasn't serving he should not be paid.

Q. You knew that a man could only be removed on charges? A. I knew there were different ways in which a policeman might cease to be a policeman.

Q. Don't you know there are only three ways? A. No, sir; I know there are more ways than three. I know you have specified three ways, but I think the courts hold there is still another way a policeman may dismiss himself.

*Ruford Franklin—For City—Cross*

Q. Now, do you recall when you last saw Officer Kelly on duty? A. Oh, it must have been some time in 1916.

Q. Now, as a matter of fact, Mr. Mayor, do you know how many certificates you got from Dr. Keeney? A. I know I got one, and I may possibly have gotten another, but I don't think so. 10

Q. And you know Officer Kelly was carried on the police roll and the pay-roll until 1920, do you not? A. I don't know absolutely, because there was no occasion for me to examine—there was no official pay-roll; it was simply an informal memorandum that the City Clerk kept for his own convenience.

Q. You know the police record was an official record? A. The police record was an official record. 20

Q. Do you know that he was carried on that as sick? A. I don't know that of my own knowledge; I never looked it up.

Q. When did you become Mayor, in 1916 or 1917? A. January 1, 1916.

Q. Elected in November, 1915? A. Right.

Q. And what term was it? A. Two years, and I was re-elected two years more. My entire term was from January 1, 1916, until January 1, 1920. 30

Q. And when you became Mayor Chief Brown was the Chief of Police? A. Yes, sir.

Q. And Mr. Murphy was captain? A. Yes, sir.

Q. And they continued as such during your term, did they not? A. Yes, sir.

Q. Chief Brown is now pensioned? A. Yes.

Q. So far as you know, of your own knowledge, you can tell us nothing about the condition of Officer Kelly? A. You mean his physical condition? 40

*Ruford Franklin—For City—Re-direct*

Q. Yes. A. Not of my own knowledge, no.

Q. Did you ever have any talk with Mr. Kelly after your office as Mayor expired? A. I don't think I talked with Mr. Kelly after January 1,  
10 1920, until I saw him here, at the previous session of this hearing. I have no recollection of it.

Q. And what you have told us about what transpired regarding his position on the police force is all that you ever had to do with it in any way while you were Mayor? A. Yes.

Q. There was no action, that you know of, taken in any other way? A. No.

Q. Either by you or the council or the police committee? A. No.

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*Re-direct Examination by Mr. Corbin:*

Q. Did Mr. Kelly offer or express a willingness to be examined by the city physician? A. No.

Q. Where was the office of the Draft Board? A. In the City Hall—here in the Mayor's office.

Q. Was Dr. Dengler a member of that Draft Board? A. Yes.

Q. Was he here in Summit frequently? A.  
30 Pretty nearly every day.

Q. Making examinations in Summit? A. Yes.

Q. It wouldn't have been necessary for Mr. Kelly to have gone to Springfield to be examined? A. No.

*Examination by Mayor Topping:*

Q. At any time during 1917 did Officer Kelly apply for a leave of absence? A. No, sir, neither in 1917 nor any other time.

40 Q. During your term of office? A. During my term of office.

*Ruford Franklin—For City—Re-cross  
William Kelly—Re-called—For Petitioner—Direct*

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*Re-cross Examination by Mr. Schleimer:*

Q. Not to you? A. Certainly, I am speaking of myself.

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Q. You don't know of your own knowledge what transpired between Chief Brown and Kelly? A. No.

Q. You were not physically present at the time he reported to Chief Brown regarding his illness, were you? A. No, I don't think I was.

Q. Do you know as a matter of fact that Officer Kelly still has a badge and some implements of office? A. I don't know of my own knowledge; he says he has; I have been out of office for several years now.

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Q. His badge and some of his other implements were retained by you while you were Mayor? A. Well, so far as I know, yes. I ordered him to return them, not being on the force any longer, and he refused to do it.

Q. That was your own deduction, that he was not on the force? A. Surely.

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WILLIAM KELLY, recalled for,

*Direct Examination by Mr. Schleimer:*

Q. Do you recall talking to Mayor Merrill regarding your position on the police force, when he was Mayor? A. Yes, sir.

Q. Did you ever tell him you wanted to be reinstated on the force? A. Never used that word.

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Q. What did you say to him? A. I came up and

*William Kelly—Re-called—For Petitioner—Direct*

seen the Mayor and told him that I had a talk with Chief Brown, that I would like to try to go to work; I didn't know how long I would last at it, but I thought I would like to give it a try, and I talked to Chief Brown about taking day duty, because I was afraid of the night air, and I would like to try it, and he asked me what was my trouble. Of course, he didn't know anything about my sickness, but he asked me what my trouble was, and I told him if he communicated with my doctors, they could tell him better than I could. He asked me who my doctors was, and I told him Dr. Keeney and Dr. Humphries had been treating me for quite some time. He says, "All right, I will take it up with the doctors and let you know." I walked out of the office and didn't hear from him for about two weeks, and I called him up one night on the phone at his house, and asked him if he had communicated with the doctor. He said, "Yes, and you wouldn't be fit to go on police duty, and another thing, I understand you are not a member of the police department." I says, "Mayor, I don't want to discuss this over the phone," and I said, "I will meet you tomorrow at your office." The next day I went to the office, and when I came in the office the next day, he told me at that time, that the doctor said in my condition I wouldn't be able to do police duty, and that they wanted good strong, able-bodied men on here, which I was at one time, but am no more.

Q. Was that all the conversation? That was all the conversation with Mayor Merrill.

Q. Do you recall seeing Mayor Franklin on Labor Day, 1917? A. I do.

40 Q. What, if anything, did you give him? A. I

*William Kelly—Re-called—For Petitioner—Direct*

had a certificate here; I gave it to him and laid it on his desk, and he laid it down alongside of my voucher.

Q. How did you come to go see Mayor Franklin?

A. Chief Brown sent Officer Sullivan for me. He came down to the house after me. 10

Q. Did you at that time refuse to be examined by any physician that Mayor Franklin named? A. No, sir, I did not.

Q. What did you tell him? A. I told him Dr. Keeney was my physician and I would like to have him here at an examination, and he said, "Well, Dr. Dengler is right here to have you examined now," and he called Dr. Dengler up to the desk and introduced me to him. I says, "Mayor, I would rather have my doctor with me," and he says, "Well, if you would consent to be examined, I would put you back to work." That was one word that he said. I said, "Well, Mayor, Dr. Keeney is out of town now, and he will be home Thursday, and then you can set the time." He says, "All right, I will communicate with Dr. Keeney and Dr. Dengler and set the time and let you know." I says, "All right," and walked out, and there were four or five men on the Draft Board there at that time. That is what I said to Mayor Franklin, and I don't see how he can forget it. 20

Q. Did you ever receive any notice of any time being appointed by Mayor Franklin to have your physician, Dr. Keeney, and Dr. Dengler examine you? A. No, sir, never. 30

Q. Are you a member still of the Summit Police Force? A. I certainly am.

Mr. Corbin: I object to that question. 40

*William Kelly—Re-called—For Petitioner—Cross*

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A. I think I am a police officer as long as I carry that shield. (Witness points to badge on his vest.)

*Cross Examination by Mr. Corbin:*

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Q. You say there were four or five gentlemen there when you came in Mayor Franklins' office, at the time Mayor Franklin was serving on the Draft Board? A. There were.

Q. Who were they? A. One of them, I am pretty sure, was the Mayor of Plainfield and two or three other gentlemen. Dr. Dengler was in there, because the Mayor called Dr. Dengler up and introduced me to him.

20

Q. Anybody else that you know of? A. Them is all I know.

Q. They heard this conversation? A. I don't know if they could or not.

Q. Was Mayor Franklin at the table in his office? No, he was at his desk, back in the corner, and had the screen up by it.

The hearing is adjourned to a day to be fixed by the Commissioners.

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## DECISION

Before the Police Pension Commission of the City of Summit, N. J.

IN THE MATTER

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of the

Petition of WILLIAM KELLY, for retirement and a pension under Chapter 160, Public Laws of the State of New Jersey for 1920.

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For petitioner, HON. ALFRED A. STEIN and  
SAMUEL SCHLEIMER, Esq.

For City of Summit, CLEMENT K. CORBIN, Esq.,  
City Solicitor.

This matter arises under Section 2 of the act providing for the retirement of policemen and firemen, etc., known as Chapter 160 of the Laws of 1920, on petition of William Kelly for retirement and a pension by reason of injuries sustained while in the performance of his duties. The petition was filed February 6, 1921, and this Board, after consideration, denied petitioner's application. Upon review by the Supreme Court on certiorari that court set aside the action of this Board on the ground that the matter had been determined against the petitioner without giving him a hearing, and the matter now comes before this Board for hearing.

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40

*Decision*

10 This Board sat to take testimony on October 31, 1924 and March 12, 1925, and called to its aid a physician representing the Police Department, and said petitioner also called to his aid a regularly licensed practicing physician. Said two physicians, after having been duly sworn, gave testimony as to petitioner's condition and reduced their determination to writing duly signed by them. This Board also heard such other persons as were produced by petitioner and as were produced on behalf of the City of Summit in connection with this proceeding.

20 The determination of said physicians shows, and this Board finds and determines, that William Kelly is unfit for the duties of a patrolman in the Police Department of the City of Summit. However, before the petitioner is entitled to the benefits of the act it is not only necessary that this Board determine the physical condition of an applicant but also the question of his membership in the Police Force. The Supreme Court found that this was a pertinent question to be determined. We quote the opinion of that court when interpreting Section 2 of the Act, as follows:

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"This clearly intends that the applicant shall have a hearing, with opportunity to prove the facts on which his application is based, and one of them is his membership of the Police Force."

We will, therefore, proceed to consider the testimony presented as to petitioner's membership in the Police Force of the City of Summit.

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We find that William Kelly was appointed a

*Decision*

Police Officer of the City of Summit on March 18, 1905, and that he served as such, except for absences on account of sickness or otherwise, until April 23, 1917. That on April 24, 1917 he reported by telephone to the then Chief of Police, George W. Brown, that he was sick and unable to work. Kelly testified that Chief Brown told him over the 'phone to "Stay home and get well." Kelly further testified that in June, 1917, he saw Chief Brown and gave him a physician's certificate. That on or about June 18, 1917, Kelly appeared before the then Mayor Franklin and was informed by Mayor Franklin that if Kelly would return his police equipment and take a vacation, after making proper application for leave of absence without pay, he (Mayor Franklin) would consider the matter and if he felt it was proper, would grant Kelly a leave of absence without pay. On June 25, 1917, Kelly wrote to Mayor Franklin but did not apply for a leave of absence, and on June, 1917, Mayor Franklin, in answer thereto, included therein the following:

"I have given the entire matter the most careful consideration, and I think the suggestion I made to you is fair and just in every respect, both to the city and yourself, to wit, that you put back in Police Headquarters at once, all your police equipment, uniforms, overcoat, boots, rubber overcoat, etc., and write me a letter requesting leave of absence without pay from June 15, until you are well again, whereupon you may apply to go on active duty again. If you do this at once, I will do as I promised you and sign your pay voucher for the

*Decision*

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period from June 1 to June 15; and shall hope that you will soon be entirely recovered in health again."

10 It does not appear that Kelly ever made application to Chief Brown, Captain Murphy, or Mayor Franklin, for leave of absence as required by the rules adopted by the Common Council and in effect during the period from April 24, 1917 to February 6, 1921, the date of his petition to the Commission, nor, in fact, did he ever make any such application.

20 Kelly performed no duty from April 24, 1917, to the date of his petition, February 6, 1921, nor did he report for any duty as a Police Officer until some time in 1920, when, he testified, he reported to Chief Brown and also saw Mayor Merrill. Mayor Merrill testified that Kelly asked to be reinstated. He was informed by Mayor Merrill that the doctor had said he was not physically fit to do full police duty, and the Mayor did not reinstate him.

30 We find that the petitioner, William Kelly, did, in fact, abandon his position as an officer of the Police Department of the City of Summit, in that from June 29, 1917 until "some time in 1920" and to February 6, 1921, the date of his petition, be absented himself continuously from any police duty, without permission, without leave of absence and without just cause.

40 Article XVI, Section 3, of An Act Concerning Municipalities, Chapter 152 of the Laws of 1917, provides, among other things, with reference to the officers and men of every Police Department "that any member of any such police force who shall be absent from duty without just cause for the

*Decision*

term of five days continuously, shall at the expiration of such five days cease to be a member of such police force."

We find that the petitioner, William Kelly, by his action in absenting himself from duty without permission, without a leave of absence, and without just cause from June 29, 1917, had ceased and did cease to be a member of the police force of the City of Summit, prior to the date of his petition to this Commission, and is not entitled to the benefits of the provisions of Chapter 160 of the Laws of 1920. 10

WHEREAS, William Kelly has applied to this Commission for retirement as a patrolman and for such pension as he is entitled to under the provisions of an act known and designated as Chapter 160, Public Laws of the State of New Jersey for 1920, and this Commission having called to its assistance a physician representing the Police Department, and said William Kelly having likewise called to his aid a regularly licensed practicing physician; and said physicians and such other persons as were called with respect to the matter having duly testified under oath, and this Commission having considered the matter, 20 30

BE IT RESOLVED by the Police Pension Commissioners of the City of Summit, that said William Kelly is not entitled to the benefits of the provisions of an act known and designated as Chapter 160, Public Laws of the State of New Jersey for 1920.

Dated, Summit, N. J., June 17, 1925.

W. S. TOPPING, Chairman, 40  
MARTIN J. FINNERAN,  
PHILETUS H. HOLT.

## REASONS

10 The said plaintiff in certiorari by Alfred A. Stein his attorney, comes and prays that the proceedings and judgment of the Police Pension Fund Commission of the City of Summit, taken and rendered June 16, 1925, wherein and whereby it denied the application by petition of the said William Kelly the plaintiff in certiorari for a pension, and wherein and whereby said Commission decided that the said William Kelly, plaintiff in certiorari, was not a member of the Police Department and not in any way connected with said department at the time when the law gave to policemen and firemen the right to a pension, and was not entitled to a pension, may be set aside and reversed and for nothing holden for the following reasons:

20 1. Because the said William Kelly, plaintiff as aforesaid, was appointed a member of the Police Department of the City of Summit, March 15, 1905, with the rank of patrolman, and has ever since that time been a member of said department, and was not dismissed and did not resign, and is still a patrolman of the department.

30 2. Because the voters of the City of Summit at a general election held on November 4, 1919, adopted the provisions of the Act of the legislature entitled, "An act providing for the pensioning of police officers and patrolmen in certain municipalities of this State, Pamphlet laws of 1911 page 104, and the supplements and amendments thereof, pamphlet laws 1914, page 219, and the supplements and amendments thereof, and by reason of the adoption thereof come within the provisions of another certain act of the legislature, Pamphlet laws 1920 page 324, Section 9, which provides, that

40

*Reasons*

said act of the legislature "shall take effect immediately in every municipality in which a fund for the retirement and pensioning of policemen or firemen, or either is now in effect."

3. Because on February 6, 1921, the said William Kelly, plaintiff as aforesaid, then being a member of the police department, petitioned the Police Pension Commission of the City of Summit, for retirement and pension equal to one half of his salary, because of physical injuries sustained while in the service of the department which wholly incapacitated him from performing police duty, was entitled to receive a pension under the law, which pension was denied by said Commission. 10

4. Because the Police Pension Commission aforesaid denied the said William Kelly, plaintiff as aforesaid, a pension on his application for the same, as required by law. 20

5. Because the Police Pension Commission as aforesaid, denied the application of the said William Kelly the plaintiff as aforesaid, for a pension on the ground that he was not a member of the police department of the City of Summit, before or at the adoption by the City of Summit of the provisions of the Police and Firemen's Pension Acts, on June 16, 1925, without legal evidence of any kind before them, in support of their finding, and when in truth and fact he was a member of said police department of said City of Summit, at that time, and is still a member of the Police Department of the City of Summit, and entitled by law to be pensioned. 30

6. Because the said William Kelly, plaintiff as aforesaid, was denied a pension as a patrolman of 40

*Reasons*

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the City of Summit, by said Commission, when he was legally entitled to the same on his application so as aforesaid made by him for such pension.

10 7. Because the said William Kelly, plaintiff as aforesaid, received injuries in April 1917, while a patrolman on the Police force of the City of Summit, which wholly incapacitated him from services as a patrolman, and which injuries so sustained, causing such incapacity, entitled him to make said application by petition to said Commission, and entitled him to a hearing thereon, and a pension of one half of his salary as such patrolman, and the allowance of said pension was unlawfully  
20 denied him by the said Commission.

8. That the Police Pension Commission is not invested with the right to determine, whether a police officer absented himself without just cause, under the statute providing for this, and so forfeit his office.

9. That the Police Pension Commission had no evidence before it, from which it could determine that the said William Kelly, plaintiff as aforesaid, was not a police officer—the only evidence before  
30 it being that he was appointed and did not resign and was not dismissed.

10. That the Police Pension Commission, exceeded the authority invested in it by law, when it attempted to decide that the said William Kelly, plaintiff as aforesaid, had forfeited his office as police officer of the City of Summit, the Commission not being invested with the authority or with the right to remove members of the Police Department from office. That even though the said  
40 William Kelly is alleged to have absented himself

*Reasons*

without leave for more than five days, he could not be dismissed from his office without notice to him and a hearing had, so that he might have an opportunity to explain that he was absent for just cause. 10

11. That there was no legal determination by the proper authority, divesting him of his office of patrolman.

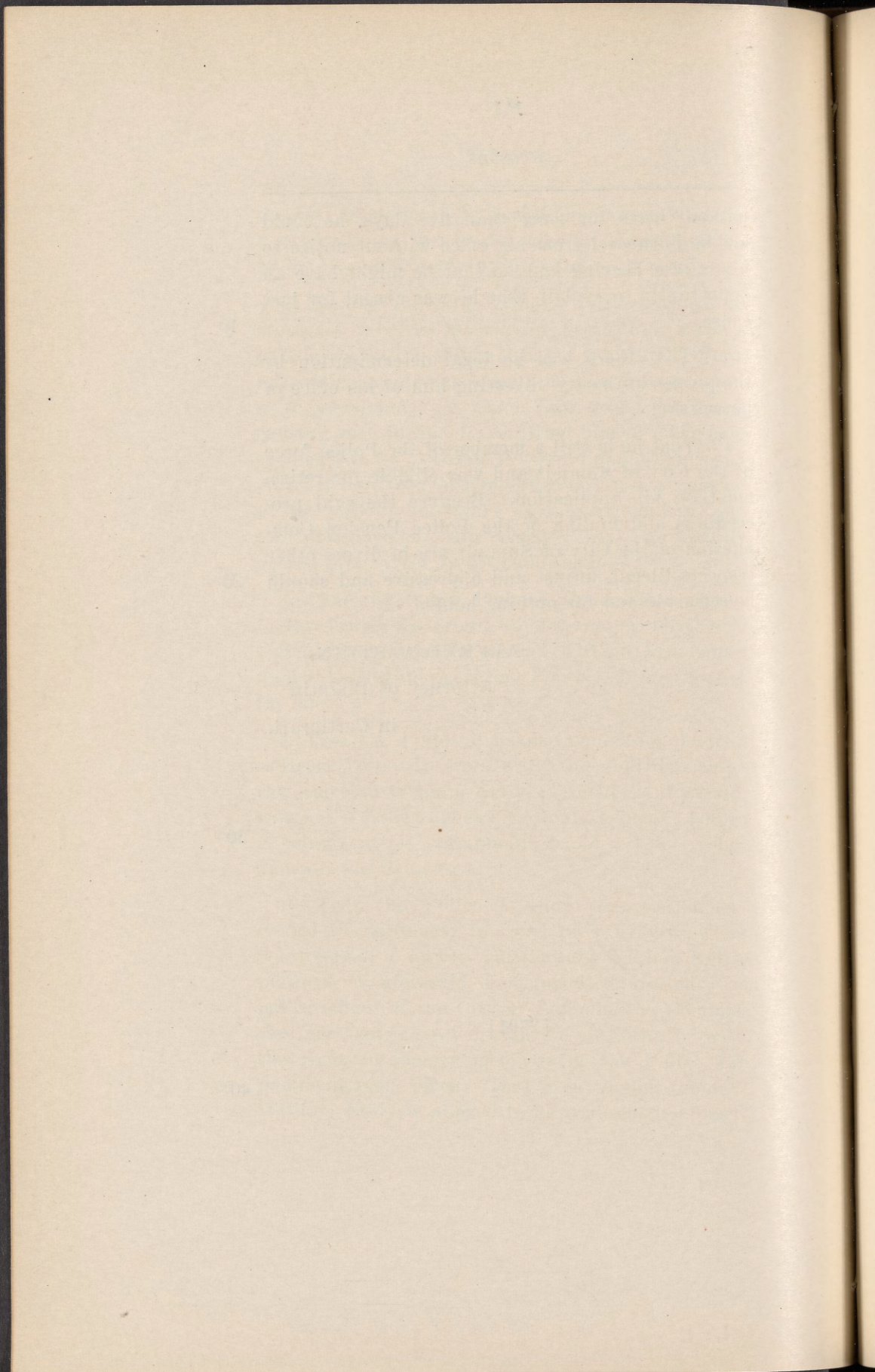
12. That he is still a member of the Police force of the City of Summit and was eligible for retirement on his application. Because the said proceedings and finding of the Police Pension Commission of the City of Summit are in divers other respects illegal, unjust and oppressive and should be set aside and for nothing holden. 20

ALFRED A. STEIN,  
Attorney of Plaintiff  
in Certiorari.

30

[2501]

40



## NOTICE AND GROUNDS OF APPEAL.

NEW JERSEY SUPREME COURT.

WILLIAM KELLY,

*Prosecutor,**vs.*

GEORGE D. CORNISH (amended  
from William S. Topping)  
constituting the Police Pen-  
sion Board of Summit,  
*Respondents.*

*Notice of  
Appeal and  
Grounds of  
Appeal.*

10

To Clement K. Corbin, attorney for respondents.

SIR:

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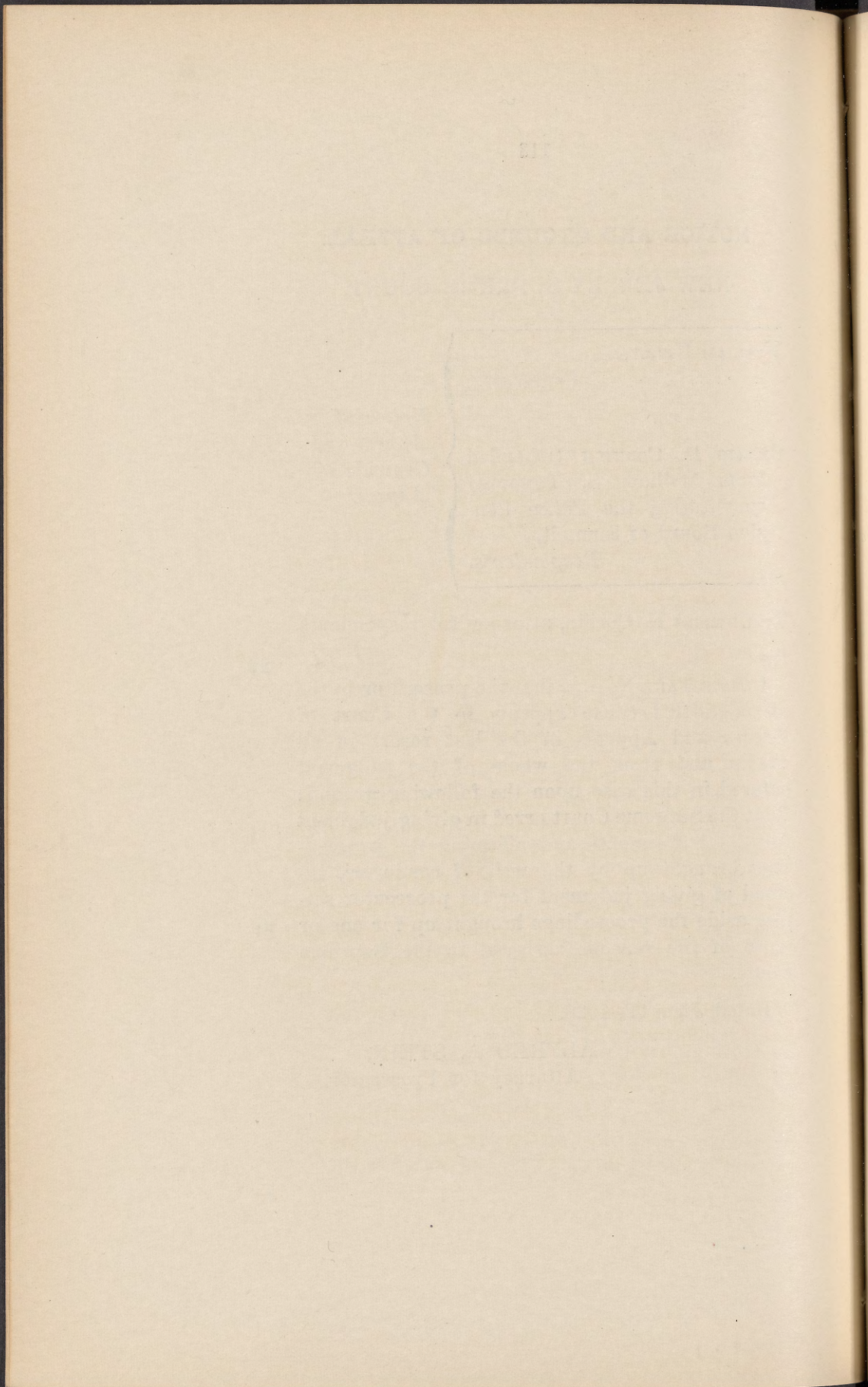
PLEASE TAKE NOTICE, that the prosecutor in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes and from the whole of the judgment entered in this case upon the following ground: That the Supreme Court erred in giving judgment for the respondents and affirming the proceedings brought up by the writ of certiorari, instead of giving judgment for the prosecutor setting aside the proceedings brought up for one or more of the reasons assigned in the Supreme Court.

30

Dated June 22, 1928.

ALFRED A. STEIN,  
Attorney for Prosecutor.

40



**RULE FOR AFFIRMANCE OF JUDGMENT.**

NEW JERSEY SUPREME COURT.

WILLIAM KELLY,

*Prosecutor,*

*vs.*

GEORGE D. CORNISH (amended from William S. Topping), MARTIN J. FINERAN and PHILETUS H. HOLT, members of and composing the Police Pension Fund Commission of the City of Summit, FREDERICK C. KANTZ, City Clerk of Summit and the City of Summit,

*Defendants.*

10

*On  
Certiorari.*

*Rule for  
Affirmance of  
Judgment.*

20

The Court having inspected the transcript of the proceedings of the Police Pension Fund Commission of the City of Summit returned with the certiorari in this cause and the reasons assigned and heard the argument of counsel thereon and having duly considered the same, do order that the decision of the said Police Pension Fund Commission of the said City of Summit and the proceedings brought up by said writ be in all things affirmed with costs.

30

On motion of

CLEMENT K. CORBIN,

Attorney of Defendants.

Rule entered this 16th day of March, 1928.

40

OPINION OF SUPREME COURT.

Filed March 9, 1928.

NEW JERSEY SUPREME COURT.

No. 262 May Term, 1927.

10

WILLIAM KELLY,

*Prosecutor,*

*vs.*

GEORGE D. CORNISH (amended  
from William S. Topping),  
constituting The Police Pen-  
sion Board of Summit,

*Defendants.*

*On  
Certiorari.*

20

Before Justices Trenchard, Kalisch and Katz-  
enbach.

For the prosecutor, Alfred A. Stein.

For the defendants, Clement K. Corbin.

*Per Curiam:*

30

Police Pension Board of the City of Summit  
for a pension under the Police Pension Act,  
which became effective in that city on January 1,  
1920. The Board after a hearing made the fol-  
lowing finding: "We find that the petitioner,  
William Kelly, did, in fact, abandon his position  
as an officer of the Police Department of the City  
of Summit, in that from June 29, 1917, until  
'sometime in 1920' and to February 6, 1921, the  
date of his petition, he absented himself con-  
tinuously from any police duty without per-  
mission, without leave of absence and without  
just cause."

40

*Opinion of Supreme Court.*

By article 16, section 3 of an act concerning Municipalities, chapter 152, of the laws of 1917, it is provided, *inter alia*, "that any member of any such police force who shall be absent from duty without just cause for the term of five days continuously, shall at the expiration of such five days, cease to be a member of such police force." 10

If there was any testimony, before the board which tends to sustain the finding, then, according to the settled legal rule, the finding will not be disturbed.

The record before us discloses, that the last day of active duty of the prosecutor was April 23, 1917. The case is replete with incidents of the prosecutor's absenting himself from doing police duty without permission or without leave of absence and without just cause. There was also testimony in the case from which the board was warranted in finding that the prosecutor had abandoned his position as officer of the police force of the City of Summit, by the potent circumstances appearing, that he applied in 1920 to the mayor for re-instatement, which time was immediately after the Police Pension law had been adopted in that city. It is true that the prosecutor denies that he applied for reinstatement, but as it was a controverted question of fact, its determination was for the board, and its finding will not be disturbed. 20 30

The prosecutor's petition was filed on February 6, 1921. The board after considering the petitioner's application, but without giving him a hearing, denied it. Upon reveiw by the Supreme Court the action of the board was set aside on the ground that the matter had been determined against the prosecutor without giving him a hearing. No further steps seem to have 40

*Opinion of Supreme Court.*

been taken in the matter until 1925, when on June 17th, after a full hearing of the case against the prosecutor, the Pension Board found that the prosecutor was not entitled to a pension upon the facts developed by the testimony, as above indicated. Ten months later a writ of certiorari  
10 was sued out of this court to review the action of the Pension Board.

Since the testimony tends to support the findings of the board, the writ is dismissed, with costs.

20

30

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## New Jersey Court of Errors and Appeals

WILLIAM KELLY,  
*Prosecutor-in-Certiorari,*

*vs.*

GEORGE D. CORNISH (amended  
from William S. Topping),  
and others,  
*Defendants-in-Certiorari.*

*On  
Certiorari.*

*On Appeal  
From Judgment of  
Supreme  
Court Affirming  
Proceedings Brought  
Up.*

*Heard below  
before  
TRENCHARD,  
KALISCH and  
KATZENBACH,  
J.J.*

### BRIEF OF APPELLANT.

*(Italics ours except where otherwise noted.)*

#### Statement of the Case.

This is an appeal from a judgment of the Supreme Court (p. 115), affirming the proceedings of the Police Pension Fund Commission of the City of Summit declining to grant a pension to Prosecutor, William Kelly, claimed to be a member of the Police Department of the City of Summit (decision of the Commission, p. 103, and resolution, p. 107). The opinion of the Supreme Court is printed (p. 116).

The statutes, the construction of which are involved, are: Chapter 160 of the Laws of 1920 (P. L. 1920, p. 324, 2 Cumulative Supplement to

the Compiled Statutes of New Jersey 1911-1924, p. 2376, sec. 136-3900 L), which act provides for the retirement of policemen and firemen in municipalities of this State, etc., and which act is conceded to be in effect in the City of Summit as of the date when prosecutor applied for a pension; Chapter 72 of the Laws of 1911 (P. L. 1911, p. 104, 2 Cumulative Supplement to the Compiled Statutes of New Jersey, 1911-1924, p. 2361, sec. 136-3900 E), an act providing for the pensioning of police officers and policemen in certain municipalities of this State, which act was in effect in the City of Summit prior to the act of 1920 above referred to, having been made applicable in the manner prescribed by the statute at an election held November 4, 1919 (p. 7), and which act *was in effect* while prosecutor was still carried as a member of the Police Department of the City of Summit as "sick" (p. 9); an act (P. L. 1885, p. 163, as amended, 2 Compiled Statutes of New Jersey, p. 2467), which provides for tenure of office of police and for the procedure in case of removal; the act concerning municipalities, commonly called the "Home Rule Act," Article 16 (2 Cumulative Supplement to the Compiled Statutes of New Jersey, 1911-1924, p. 2154, sec. 136-1603), the provisions of which act, so far as material here, are precisely the same as those of the act of 1885 (2 Compiled Statutes of New Jersey, p. 2467).

It was conceded that: Prosecutor became a member of the Police Department on March 18, 1905 (p. 4); he actively served until April 23, 1917 (p. 8); upon April 24, 1917, he reported sick; he was carried upon the records of the Police Department as sick until December 31, 1920 (pp. 8, 9); he was carried on the payrolls of the city until January 7, 1920, at which time he

was dropped from the payrolls by the City Clerk "without any authority" (pp. 68, 71).

There is no question but that from the date that prosecutor reported sick, April 24, 1917 (he was on duty April 23, 1917), he was incapacitated from performing his duties, and the physician who was called to the assistance of the Pension Fund Commission under section 2 of the act of 1920 (2 Cumulative Supplement to the Compiled Statutes of New Jersey, p. 2377, sec. 136-3900 L), agreed with the physician of prosecutor that the condition of prosecutor was such as that he could not perform police duties.

Prosecutor filed his application for a pension on February 6, 1921 (p. 5). The Police Pension Fund Commission, without hearing him, denied a pension upon the ground that he "was not a member of the Police Department at the time the act went into effect, nor had he been in any way connected with it since," although he had been carried on the police records until December 31, 1920.

Upon certiorari, the Supreme Court set aside the action of the Commission (*Kelly v. Merrill*, 1 N. J. Misc. 230), that court stating (p. 231):

"It is not denied that he (the prosecutor) was duly appointed a policeman in 1905 and served as such until 1917, from which period his connection with the department is a disputed question of fact. It is admitted that he was not removed from his office by the municipal authorities, but the commissioners assumed that he had impliedly resigned, or abandoned his office, without proof of any fact to support it. What the commission did was to hold the petition without action for nearly two years, and then without notice to the applicant, decided that he was not a member of the police force, and, therefore, not entitled to the benefit of the act. This was

a judicial act determined against the prosecutor without a hearing, or notice that one would be afforded him."

The Commission then granted a hearing and testimony was produced. The position taken by the city is indicated by the statement of Mr. Corbin, who was counsel for the city, on page 15:

"The point that we rest our motion on is that Mr. Kelly's course of action in connection with the police force was such that it amounted to a resignation; that he absented himself in such a way that it amounted to a resignation. Whether he was sick or not is not involved in the matter. It is a question of his relations to the force and his actions in connection with his absenting himself, and what we propose to show is that his course of action was such that he absented himself without leave of absence, and automatically ceased to be a member of the police force.

\* \* \*"

Counsel relied upon the proviso in the Tenure of Office Act and in the Home Rule Act (2 Cumulative Supplement to Compiled Statutes of New Jersey, 1911-1924, p. 2153, sec. 136-1603), "provided, that any member of any such police force who shall be absent from duty *without just cause* for the term of five days continuously, shall at the expiration of such five days cease to be a member of such police force."

The Pension Fund Commission in its decision (p. 103) found and determined that prosecutor was physically unfit to perform the duties of a patrolman. It then referred to *certain* of the testimony in the case (pp. 104, 105) from which it appeared, taking now *only* the testimony referred to by the Pension Fund Commission, which was *not* all of the testimony in the case as will be hereafter indicated, that: everyone knew that prosecutor was sick from April 23, 1917, and

had, from thence onward, been incapacitated to perform active duty; in June, 1917, he produced a physician's certificate to that effect to the police authorities; he was offered, in June, 1917, a leave of absence without pay (p. 105); in 1920 he applied to be put back on duty (p. 106) but was informed by the municipal authorities that the doctor had said that he was not physically fit (p. 106): and the Commission then determined that prosecutor abandoned his position as an officer of the Police Department in that "until 'some time in 1920' and to February 6, 1921, the date of his petition, he absented himself continuously from any police duty, *without permission*, without leave of absence and without just cause" and the Commission then referred to section 3 of article 16 of the Home Rule Act (2 Cumulative Supplement to the Compiled Statutes of New Jersey, 1911-1924, sec. 136-3900 L, p. 2377), which reads: "that any member of any such police force who shall be absent from duty *without just cause* for the term of five days continuously, shall at the expiration of such five days cease to be a member of such police force."

The Commission apparently conceived that, although offered a leave of absence without pay, in June, 1917, prosecutor's failure to make a *formal application* for such leave of absence without pay was an abandonment of his position and that his remaining away without *that formal leave*, although everybody knew that he was ill and could not perform his duties, was absenting himself from duty "*without just cause*," although he was carried on the records of the department until December 31, 1920, as sick, which was a date after he had asked to be re-instated to active duty in 1920, which request was refused because he was unfit to perform active duties, and he was carried

on the payrolls until January 7, 1920, at which time he was dropped from the pay roll by the City Clerk without notice to him and without authority.

The Supreme Court in its opinion, which resulted in an affirmance of the proceedings brought up by certiorari, indicated that it reached the conclusion it did, not because it conceived that the Pension Fund Commission was right but because "the testimony tends to support the findings of the board" (p. 117). It said: "If there was *any* testimony before the board which *tends* to sustain the findings, then, according to the settled legal rule, the finding will not be disturbed" (p. 117). In so holding we submit the Supreme Court ignored section 11 of the Certiorari Act, 1 C. S. N. J. 405.

The Supreme Court referred to the fact that in 1920 prosecutor applied for "re-instatement" as potent evidence from which the Commission was justified in drawing the conclusion that prosecutor had abandoned his position, but reference to the testimony of Merrill, who was the Mayor of Summit in 1920 and who is the witness who testifies as to this application for "re-instatement," indicates clearly, it seems to us, that what actually occurred was that prosecutor told the Mayor that he would like to go back to some *active* duty. It is true the Mayor says he used the word "re-instate" (p. 77). But it is likewise true that the Mayor consulted with physicians as to whether prosecutor could perform *active* duties (pp. 80, 81). The Mayor knew that prosecutor had been a member of the force and that he had been ill and disabled from performing active duties. He finally says (p. 84):

"A He came to me as a new man, so far as police duty was concerned."

At this time prosecutor was still carried upon the police records as *a member of the force*, "sick," and continued to be so carried until December 31, 1920 (p. 9). The Mayor says that he looked at the city payrolls and that prosecutor's name was not on it in 1920. He had been dropped by the City Clerk January 7, 1920, without notice to him and without authority (p. 68).

The Mayor testified that he had full charge of the Police Department. Had he looked at the records of his own department he would have found prosecutor's name thereon carried as a member of the force "sick" (p. 9).

Prosecutor tells his story as to what occurred between himself and the Mayor in 1920 (pp. 99, 100) and, when the testimony of the Mayor and prosecutor is considered as a whole and the attendant circumstances, it is clear, we submit, that prosecutor never applied for "re-instatement" in the sense of being put back upon the force. He *did* apply to be "re-instated" on some *active* duty.

The very circumstance which the Supreme Court points to as significant, *i. e.*, that this application for "re-instatement" was made after the act of 1920 became effective indicates that the application could *not* have been for re-instatement in the sense of a new appointment, for if prosecutor wanted a pension he was obliged to maintain that he was still a member of the force, and the application must, of necessity, have been to put him back on *active* duty.

The Supreme Court, dealing with this matter of evidence, says:

"It is true that prosecutor denies that he applied for re-instatement, but as it was a controverted question of fact, its determina-

tion was for the board, and its finding will not be disturbed.”

Under the statute, section 11 of the Certiorari Act. 1 C. S. of New Jersey, p. 405, in a case of this kind the burden is put upon the Supreme Court of determining a disputed question of fact. That the Supreme Court refused so to do in the instant case and it is submitted that in this it erred.

It will be argued:

1. There was no evidence before the Pension Fund Commission which warranted the finding of that Commission.
2. The Supreme Court erred in not determining the question, if there were any, of fact involved.
3. The Pension Fund Commission, under the circumstances of this case, had no power or authority to determine that prosecutor had ceased to be a member of the Police Department.

## ARGUMENT.

### I.

**There was no evidence before the Pension Fund Commission which warranted the finding of that Commission.**

We have already referred to the facts that: the prosecutor was appointed as a member of the Police Department of Summit on March 18, 1905 (p. 5); for a period of twelve years, or until April 23, 1917, he served on active duty; on April 24, 1917, he reported sick (p. 8); he was carried on the records of the department as sick until December 31, 1920 (p. 9); he was paid up to and including June 15, 1917 (p. 61); he was carried

on the city payrolls until January 7, 1920 (p. 68); the City Clerk then dropped him from the payroll without authority (p. 68).

Dr. Keeney has been treating prosecutor since before 1915; prosecutor was suffering from arthritis, which is produced by exposure and chilliness, dampness, etc. (p. 21); the condition of prosecutor became aggravated; in 1917 prosecutor's condition became such as that he was physically unfit to continue his duties as patrolman (pp. 21, 22); June 18, 1917, Dr. Keeney gave prosecutor a certificate that he had been ill and was unable to follow his occupation from May 1 to June 18, and, at different times, he gave prosecutor similar certificates (pp. 22, 24); Dr. Keeney continued to treat prosecutor and at *no* time, up to the date of the hearing, had prosecutor improved "sufficiently to enable him to resume his duties as a police officer" (p. 24); on one occasion prosecutor was sent South by Dr. Keeney in an endeavor to get relief; prosecutor also went to Dr. Humphrey, a specialist, at Dr. Keeney's suggestion (p. 27).

Dr. Davis, assistant to Dr. Humphrey, testifies (p. 28) that: in January, 1919, prosecutor was admitted to the hospital clinic suffering from arthritis (p. 29); prosecutor came under Dr. Davis' observation in January, 1922; the treatment of Dr. Davis had been continuous from January, 1922, to the date of the hearing; prosecutor was incapacitated from performing his duties as a patrolman (p. 31).

Dr. Bensley, who was called by the city, and who was the physician called to the assistance of the Commission under P. L. 1920, chapter 160 (2 Cumulative Supplement to Compiled Statutes of New Jersey, p. 2377, sec. 136-3900 L),

agreed with Dr. Keeney that the condition of prosecutor was such "that he could not perform his duties as a policeman" (p. 72), and the Commission found that prosecutor was unfit for the performance of his duties as a patrolman, and it is clear from the testimony that prosecutor had "received permanent disability in the performance of his duty." This permanent disability commenced upon the date that prosecutor reported sick April 24, 1917, and continued to the date of the hearing.

The Pension Fund Commission found that prosecutor came within the purview of the proviso of article 16, section 3 of the act concerning municipalities (2 Cumulative Supplement to the Compiled Statutes of New Jersey, 1911-1924, p. 2153, sec. 136-1603), "provided, that any member of any such police force who shall be absent from duty *without just cause* for the term of five days continuously, shall at the expiration of such five days cease to be a member of such police force."

*If it is contended that permanent disability is not just cause for absence, then it is hard to conceive, we submit, what just cause would be.*

The city officials had full and complete knowledge of the condition of prosecutor and recognized that he was absent *with* just cause.

Prosecutor describes his illness and condition (p. 34, etc.). He says: On the 24th of April, 1917, he reported to Chief Brown of the department, who said that it was all right "if you are sick and not able to work,"; he gave the chief a certificate from a doctor; he was ordered away by his doctor; he gave the chief another certificate in June of 1917, which was produced by the city and marked P. 4. That certificate reads:

"This certifies that Mr. William Kelly has been sick and unable to follow his own or

other occupation from May 1st to June 18th during which time he was under my professional care.”

(p. 22).

Prosecutor continues that: on the advice of his doctors he went to Florida on October 19, 1917 (pp. 37, 38); prior to his leaving for Florida, and between October 14, 1917, the date of the certificate, and October 19, 1917, when he left for Florida, he gave the then Chief of the Police Department, John P. Murphy, a certificate reading as follows:

“This certifies that Mr. William Kelly is under my care and is leaving Summit by my advice. October 14, 1927.”

This certificate was presented and accepted by the police authorities of Summit in *October, 1917*. Murphy, the police chief, testifies to its receipt (pp. 10, 11).

Yet the Pension Fund Commission has found that from *June 29, 1917*, prosecutor was absent from duty “*without just cause for the term of five days continuously*” (pp. 106, 107).

This important certificate of October, 1917, is *not* referred to by the Commission. It is a complete answer to any contention that prosecutor was absent “*without just cause.*”

It is also a complete answer to the contention of the city that, in *June, 1917*, by reason of what occurred between Mayor Franklin and himself, hereafter to be adverted to, prosecutor relinquished his position, for if he had relinquished his position *then*, why *subsequently* should he have produced to the Police Department a certificate of incapacity and also why, *subsequently*, was he carried upon the rolls of the Police Department and upon the payrolls of the city?

Murphy, the present police chief, testifies (p. 12):

“Did Chief Brown (the former chief) tell you that Officer Kelly had reported to him?

Mr. Corbin: I object.

A Reported what to him?

Q That he was sick. A I don't know that he ever did; it was *understood* by every member of the Police Department that Officer Kelly was sick; I don't know that there was any particular conversation between myself and the chief.”

Prosecutor says that he gave other certificates than those produced (pp. 47, 48), and Dr. Keeney corroborates him to the extent that he, Dr. Keeney, gave him other certificates.

The Supreme Court says in its opinion (p. 117):

“The case is replete with incidents of the prosecutor's absenting himself from doing police duty without permission or without leave of absence *and without just cause.*”

We are unable to find in the record *any* instance indicating that prosecutor absented himself, within the language of the statute, “*without just cause.*” The cause was his conceded *inability to perform his police duties.*

The Pension Fund Commission in its decision referred to what it *said* was a fact (based, we submit, upon *no* evidence other than that there was no *formal written* leave of absence, and none was required by *any* rule) that prosecutor absented himself from duty without permission and without leave of absence from June 29, 1917, and the Supreme Court, in the statement just quoted, refers to instances of the prosecutor absenting himself without permission or without leave of absence without, however, specifying them.

Whatever may be the right of the Commission to determine that a person had *automatically* ceased to be a member of the Police Department because he has absented himself *without just cause* within the meaning of Section 3 of Article 16 of the Home Rule Act (2 Cumulative Supplement to the Compiled Statutes of New Jersey, p. 2153, Sec. 136-1603), we submit that it is apparent that the Commission *cannot determine* that prosecutor has lost his rights as a policeman because he absented himself without formal permission or leave for, upon *this issue* at least, he is entitled to be heard upon *charges, for violation of the rules, by the police authorities*, and in this case not only did the police authorities *not* charge him with violation of any rule but *actively acquiesced in his remaining absence and continued to carry him for years upon the records as a patrolman* and there is *no rule* requiring formal or other permission or leave *in a sick case*.

The contention that prosecutor was absent without leave seems to center around what took place between himself and Mayor Franklin in June, 1917. Prosecutor says that he was paid up to the middle of June and then Mayor Franklin held his check out (p. 40). He wrote a letter to Mayor Franklin (Exhibit P. 7, June 25, 1917, p. 50). In that letter he said:

“When I think of the years I have served and sacrificed the best part of my life, and have lost my health through service, which I think is plain to be seen, as you know yourself I have always done my duty faithfully.

I feel very much hurt, as there has never been any of the other officer's money held back before on account of sickness. And I think if compared my time off with other members of the department, you will find

mine very small, I am sure sickness isn't a thing we wish for.

Mayor, I wish to ask you to do me a favor, now as the new Police Rules have been adopted. I feel you could advance me the month of June salary, and allow me my fifteen days' vacation now. As you can understand it has cost me a big sum of money for doctor and trip I had to take, and also the high cost of living. The above will help me out very much now. I hope you will consider this matter."

He received a letter from Mayor Franklin dated June 29, 1917, which reads as follows (p. 44):

"I beg to acknowledge with thanks, receipt of your letter of June 25th.

I regret that I am obliged to disagree with the conclusions of your said letter; and I do not think that you ought to feel hurt. *I admit that you are and have been a sick man*, both from your own statements and from what I have been told; but you have been given every possible consideration due to that fact, even to the extent of having a special beat to enable you to be near your home and to avoid the necessity of sleeping at headquarters like the others.

Furthermore, you are in error when you say in your letter that your time off will be found to be very small, if compared with other members of the force. I have fully investigated that matter, personally. The following are the facts as to all officers (except Officer McNamara, who, as is well known, was so sick that his life was despaired of; but even he, whenever able to be up, did day duty at least, instead of night duty). \* \* \*

I have given the entire matter the most careful consideration, and I think the suggestion I made to you is fair and just in every respect, both to the city and to yourself, to wit, *that you put back in Police Headquarters at once, all your police equipment, uniforms, overcoat, boots, rubber overcoat,*

*etc., and write me a letter requesting leave of absence without pay from June 15th until you are well again, whereupon you may apply to go on active duty again. If you do this at once, I will do as I promised you and sign your pay voucher for the period from June 1 to June 15; and shall hope that you will soon be entirely recovered in health again.*

Yours very truly,

RUFORD FRANKLIN,

Mayor."

In response to that letter prosecutor delivered certain of his equipment, including his revolver, to the chief (pp. 51, 52). He retained, however, his uniform, club and nippers and also retained his badge and was wearing his badge at the time of the hearing before the Commission (p. 102).

Mayor Franklin admits having a conversation with prosecutor in June, 1917 (pp. 86, 87), and he says he told prosecutor:

"The voucher for Mr. Kelly's pay, dated June 15, was presented to me and I refused to sign it. Mr. Kelly had not served more than a few days since the first of January, 1917, I had been for him a number of times, and had the chief send for him a number of times, and he had always refused to come and see me, so I refused to sign his pay check from June 1 to June 15, knowing that that would cause him to come there and see me. He did come to see me, as I recall it, about the eighteenth of June— I say the eighteenth of June, because that date is probably the date of his coming, since that date is the date of the certificate of Dr. Keeney. It was about at that time. He came and asked me why I had not signed his June 15th pay voucher. I told him he had been absent from police duty since the first of January about sixty times up to the first of June, according to the records of the Police Department, and that I felt that that was practically dismissal from the force on his

*own part, and I couldn't pay any checks until he acted as a policeman. Mr. Kelly then handed me the certificate from Dr. Keeney, which stated Mr. Kelly had been ill from May 15th to that date. I asked Mr. Kelly if he felt that he could not do ordinary desk work. He complained of the dampness of the police room in which the officer slept part of the night—said that he had rheumatism and trouble with his feet, and I said to him that if he would return his equipment and take a vacation, after making proper application for a leave of absence, that I would consider that matter, and if I felt that was proper, I would grant him a leave of absence without pay, for a specified time, until he became better and was able to resume police work. Mr. Kelly then left me, stating that he was satisfied with that. A short time after that I received a letter from him, in which he complained of the matter and said he was not satisfied. That letter, I believe—”*

Mayor Franklin then says that he received from prosecutor the letter of June 25, 1917 (Exhibit P. 7), to which he replied by Exhibit P. 6.

It is quite true that after the receipt of the letter from Mayor Franklin of June 29, 1917, prosecutor made no *formal* application for leave of absence without pay nor was such *formal* application necessary. The letter of Mayor Franklin admitted the illness of prosecutor and offered him leave of absence without pay until “*you are well again, whereupon you may apply to go on active duty again.*” The mayor also offered to sign the payroll voucher for the period from June 1st to June 15th. Although there was no *formal* application by prosecutor for leave of absence without pay, and although no *formal* leave of absence was granted, prosecutor was considered to be on leave of absence without pay and *still a member of the department.*

We have already adverted to the fact, that *after* this episode in June, 1917, in October, 1917, prosecutor produced, when he intended to leave for the South upon doctor's orders, a certificate from the doctor (Exhibit R. 1, p. 10), which was *accepted by the authorities and no intimation given to prosecutor that he was no longer a member of the force.*

Some months after this, according to the testimony of Mayor Franklin, prosecutor "came to me and said that he was better and *would like to go on duty*"; instead of telling prosecutor that he was no longer a member of the Police Department, Mayor Franklin, according to his own testimony, said (p. 88):

"I told him that he had maintained so strongly before that, that he was not able to do duty, that *I could not let him do any duty* without having him physically examined, which seemed to be satisfactory to Mr. Kelly, until I asked him if he would attend to be examined."

Mayor Franklin says that prosecutor refused to be examined by the doctors suggested by Mayor Franklin and that

"I repeated to him that it was not for him to be satisfied but that it was for me to be satisfied, and that if he wanted to act on the force I would have him examined by a physician that I chose, and not by a physician that he chose."

And the Mayor then says that prosecutor left in an angry condition of mind.

This was sometime in September or October, 1917.

Prosecutor says that he did see Mayor Franklin but that the mayor said (p. 101) that he would communicate with Dr. Keeney and Dr. Dengler and set the time "and let you know."

He heard nothing further from Mayor Franklin (p. 101).

It is immaterial which story of the conversation is correct. The testimony demonstrates that both prosecutor and Mayor Franklin, long *after* June, 1917, considered that prosecutor was a member of the Police Department, and the only question was as to his going back *on active duty*. He was *not* told that he was not a member of the department. He was *not* told that the department would not accept the certificate in October, 1917 (Exhibit R. 1), *as a sufficient excuse for his remaining absent*. There was *no* charge made against him, because he refused to be examined by Dr. Dengler (if, in fact, he did refuse which he denies), that he was disobeying any orders and *he was not brought up on charges*. *Whatever position he took at that time was acquiesced in*.

It is not contended by Mayor Franklin that prosecutor asked *for reappointment or reinstatement* to the force. On the contrary, Mayor Franklin says that what he asked was to be *restored to active duty*, and there was no suggestion that he was not a member of the force.

Where, then, is there any evidence that prosecutor had abandoned his position as an officer of the police force of the City of Summit?

As we have already stated, the Supreme Court referred to "the potent circumstances appearing, that he applied in 1920 to the mayor for reinstatement, which time was immediately after the Police Pension Law had been adopted in that city."

We have already referred to the testimony of Mayor Merrill, who became such in January,

1920. He testified (p. 77) that prosecutor came to him

“some short time after I came in as mayor and asked to be reinstated on the force; told me about his condition and wanted to be reinstated on the force.

Q Did he use the word ‘reinstated?’ A *To the best of my remembrance he did.*

Q Did you ever have any communication with him after that? A I think he came to see me after that time, sometime afterwards, or else—I don’t know whether he came to see me, or whether I saw him—I did talk with him after that.”

The whole force of this statement of the mayor, as evidence that prosecutor had abandoned his position on the force, depends upon the use of the word “reinstated.”

Mayor Merrill testifies (p. 79):

“Q Are you positive that Mr. Kelly used the word ‘reinstatement’? A To the very best of my knowledge and remembrance.

Q He never made any application in writing to you, did he? A As I recall, no, none whatever.”

An application in writing is required in case of a *new* application to be appointed to the police force.

The mayor then says that they talked about the physical condition of prosecutor and

“Q And it is possible for you to be mistaken about his having used the word ‘reinstatement,’ is it not? A *I don’t think so.*”

The mayor admits that he knew of the illness of prosecutor (pp. 79, 80) and (p. 80):

“Q Didn’t Dr. Keeney tell you that Officer Kelly was not able to do patrol duty? A As I remember, Dr. Keeney told me in general about his condition, covering some time past, and about his trouble with his feet, also some trouble with sickness that

he had had, but my recollection of it was, it was a general statement of his condition, without any advice as to whether he was able to patrol or do regular duty?

Q You told Dr. Keeney, did you not, that your inquiry was for the purpose of learning whether or not Kelly was fit to do police duty or not? A Yes."

Mayor Merrill also made inquiries of Dr. Humphrey.

The mayor had previously testified in this case in September, 1922. The date of the last hearing before the Commission was in June, 1925, about three years later, and yet the mayor says that he remembered more at the time of the hearing before the Commission than he did at the time of his testimony three years before.

Prosecutor testifies as to his talk with Mayor Merrill (p. 99), and says that: he never used the word "reinstate"; after a talk with Chief Brown, he went to the mayor and said that he would like to try active duty in the daytime; the mayor asked who his doctors were and the prosecutor told him "Dr. Keeney and Dr. Humphrey," to which the mayor replied "All right, I will take it up with the doctors and let you know." The prosecutor then walked out of the office and did not hear from the mayor for about two weeks, when he called the mayor on the telephone and asked him if he had communicated with the doctor, and the mayor replied "Yes, and you wouldn't be fit to go on police duty, and another thing, I understand you are not a member of the Police Department." To this statement of the mayor, prosecutor replied that he did not care to discuss that matter over the telephone; that he would meet the mayor the next morning at his office. The next day he went to the office of the mayor, and the mayor told

him that in his condition he would not be able to do police duty "and that they wanted good strong, able-bodied men on here, which I was at one time, but am no more."

Upon the one issue upon which Mayor Merrill's testimony is of any consequence whatever, *i. e.*, whether *prosecutor had abandoned* his position, *it is quite immaterial what the mayor thought*. The important thing is as to whether what the prosecutor said amounted to an admission that he, the prosecutor, had *abandoned* his position, and the only matter that is relied upon, as indicating any such thought upon the part of prosecutor, is his use of the word, according to the mayor, "reinstate."

But as far as the mayor will finally go, upon whether prosecutor used that word or not, is to say that the word was used "to the very best of my knowledge and remembrance" (p. 79), and the mayor says that he does not *think* that he can be mistaken (p. 79).

A careful consideration of the testimony of the mayor indicates, we submit, that it is not probative evidence that prosecutor had abandoned his position.

A very significant fact indicating that prosecutor did not abandon his position, is that there is no evidence that prosecutor had any other position or earned money elsewhere— Why should he have abandoned his position?

We concede, of course, that this court will not review questions of fact which have been determined by the Supreme Court, but there must be *some* evidence of *probative force* to justify the application of the rule and we submit that that evidence is lacking in the case at bar.

In *Baldwin v. Shannon*, 43 N. J. L. 596, the Supreme Court said, by Mr. Justice Reed, at page 602:

“The power of a court to order a non-suit or direct a verdict does not depend upon the absence of *all* testimony in opposition to the case in favor of which the direction is given. The view that a mere scintilla of evidence was sufficient to carry a case to the jury is completely exploded in the English courts.”

“The cases are reviewed in the opinion of Willes, *J.*, in the case of *Ryder v. Wombwell*, heard in the Exchequer Chamber and reported in L. R. 4 Exch. 32. The rule deduced for them and applied to the cause then under consideration was this: Is there evidence from which the jury could *reasonably* come to the conclusion that the facts sought to be proved are established?”

“In the case of *Giblin v. McMullen*, L. R. 2 P. C. 317, 335, Lord Chelmsford approved the rule enunciated in the last-named case in the following words: A course of recent decisions, most of which are referred to in *Ryder v. Wombwell*, has established a more reasonable rule, viz, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, *not* whether there is *literally no evidence*, but whether there is any upon which a jury can *properly* proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.”

“The rule laid down in these cases is adopted by the Supreme Court of the United States in the following cases: *Improvement Co. v. Munson*, 14 Wall. 442, 448; *Pleasants v. Fant*, 22 Wall. 116; and in the courts of New York and Maryland, in the following cases; *Deyo v. N. Y. Central R. R. Co.*, 34 N. Y. 9, and *Davis v. Davis*, 7 Harr. & J. 36.”

“This rule is equivalent, as I understand it, of the statement in the opinion in the

case of *Hartman v. Alden's Ex'rs*, 5 Vroom 518, that the test is whether the verdict if rendered otherwise than as ordered, would have been set aside, or the more specific, and probably more accurate statement in the case of *Denny v. Williams*, 5 Allen 1, that if the case is such that the court would set aside any number of verdicts, then the court should instruct."

The same rule applies where the Supreme Court is reviewing the judicial decision of a statutory tribunal in cases where that court cannot consider the weight of the evidence. The evidence before the special statutory tribunal must be such as that it can *reasonably* come to the conclusion which did. No such evidence exists in the case at bar.

And moreover, although we submit the statute, Section 11 of the Certiorari Act required the Supreme Court to review the facts, *it made no finding of fact.*

The Supreme Court thought it important that the application for *reinstatement* was made immediately after the Police Pension Law had been adopted in the City of Summit, but if the adoption of the Police Pension Law had anything to do with the conduct of prosecutor, it would have induced him to have applied, *not for re-appointment as a policeman*, but for *reinstatement* (if the word "reinstatement" was used) *in his active duties*. Prosecutor knew that if he were a member of the Police Department and disabled he would be entitled to a pension, and, if he were not a member of the Police Department, he would not be entitled to a pension. What possible reason could he have had to apply for a *new appointment* to the police force, which he knew the city might decline for any reason or none? His own interest required that he

should insist upon his position as a policeman and, if he asked for anything, it would be only for "reinstatement" in the *active discharge of his duties*. The word "reinstatement," if it were used, is as applicable, or more so, to reinstatement in his active duties, as it is to a re-appointment.

It is significant that the mayor says on page 84, "He came to me as a new man, so far as *police duty was concerned*." Of course he did, for the mayor had only become such on the 1st of January, 1920, and prosecutor had not served as a policeman since then up to the date of his conversation with the mayor.

We submit that there was no testimony either that prosecutor remained absent from his duties for five days *without just cause*, within the meaning of Section 3 of Article 16 of the Home Rule Act (2 Cumulative Supplement to the Compiled Statutes of New Jersey, 1911-1924, Sec. 136, 1603, p. 2153), or that he was absent without leave or that he disobeyed any rules of the department or that he had abandoned his position.

It is difficult, indeed, it seems to us, to argue, as the city does argue and the Police Commission so found, that prosecutor had ceased to be a member of the Police Department in June, 1917, when he was carried upon the police records until *December 31, 1920*, as a patrolman, "sick" (p. 9) and upon the payrolls of the city until the 7th of *January, 1920*, when, although remaining upon the police records, he was dropped from the payrolls by the City Clerk without authority (p. 68).

## II.

The Supreme Court erred in not determining the question of fact if one was invalued.

It appears from a consideration of the opinion of the Supreme Court that it did not determine any question of fact.

The Supreme Court said (p. 117) "If there was any testimony before the board which tends to sustain the finding, then, according to the settled rule, the finding will not be disturbed." It further said (p. 117) with respect to the issue of abandonment of the office:

"It is true that the prosecutor denies that he applied for reinstatement, but as it was a controverted question of fact, its determination was for the board, and its finding will not be disturbed."

The Supreme Court concluded its opinion by saying:

"Since the testimony *tends* to support the findings of the board, the writ is dismissed, with costs."

But under section 11 of the Certiorari Act, 1 C. S. of N. J. p. 405, the duty is put upon the Supreme Court to determine "disputed questions of fact as well as of law."

If there was any evidence, which we deny, which created a question of fact we submit that the Supreme Court erred in not determining it and that for this reason the judgment of the Supreme Court should be reversed with directions to that court to determine the issue of fact in analogy to what was done in *Atty. Gen. v. Verdon*, 90 N. J. L. 494.

## III.

The Pension Fund Commission, under the circumstances of this case, had no power or authority to determine that prosecutor had ceased to be a member of the Police Department.

Under the Home Rule Act, section 5, article 16, (2 Cumulative Supplement to Compiled Statutes of New Jersey, 1911-1924, sec. 136-1605, p. 2154) a member of the Police Department cannot be removed except upon charges and after the charge or charges shall be publicly examined into by the appropriate board or body upon reasonable notice to the person charged.

The board or authority having the sole power to try and to discharge is the board or body having the authority to appoint.

*Carey v. Plainfield*, 53 N. J. L. 311.

Notwithstanding the fact that section 3 of the act above mentioned contains a proviso that if any member of the police force "shall be absent from duty *without just cause* for the term of five days continuously," he shall "at the expiration of such five days cease to be a member of such police force" it is submitted that before, in fact, the member of the police force shall cease to be such there must be an adjudication, upon trial, that he has been absent for five days *without cause*, and we submit that the only power having the right to make such adjudication is the appointing power.

In the case at bar the appointing power did not conceive that prosecutor was absent *without just cause* and no proceedings were taken to have it so adjudicated. On the contrary, prosecutor was *instructed* to remain away until he had fully recovered and it was recognized by

all concerned that he was ill and unable to perform police duties, and certificates of his inability were presented by him and accepted by the city authorities, as is conceded as late as October, 1917, (and he says other certificates were filed by him later) and he was carried upon the police records until December 31, 1920, and upon the payrolls until January 7, 1920, and yet the Pension Fund Commission has adjudicated that he ceased to be a member of the police force in *June, 1917*, because he had been absent for five days *without just cause*.

The adjudication of the Pension Fund Commission is, therefore, directly contrary to what the conduct of the authorities, having the right to act, indicates. But even if the Pension Fund Commission could determine the question as to whether prosecutor had automatically ceased to be a member of the Police Department because of five days absence without just cause, there is not a scintilla of evidence in the case that he *was* absent "*without just cause*," for it was conceded that he was ill and could not perform his duties and he was treated as absent, "sick."

It was wholly beyond the power of the Pension Fund Commission to adjudicate that prosecutor had ceased to be a member of the Police Department because he was absent *without leave* and therefore had disobeyed a rule of the Police Department, because upon *that* issue, under sections 3 and 5 of the Home Rule Act, above referred to, he was certainly entitled to have charges preferred against him and an adjudication by the board or authority having the power to appoint and discharge and waive compliance with the rules.

Here, again, the evidence shows, beyond dispute, that prosecutor was treated as absent with leave although no *formal* application for leave was ever made.

He was treated by the *proper* authorities as absent with leave without pay. He was offered that leave. (See the letter of Mayor Franklin of June 29, 1917, P. 6, p. 44) and, although he made no *formal* application, in pursuance of that letter he returned certain of his equipment, retaining other of it, however, including his badge, clearly indicating that he considered himself still a member of the Police Department (p. 102).

And that he was considered absent *with* leave, without pay, is indicated by the fact that he was carried on the police records until December 31, 1920, and upon the payrolls until January 7, 1920, when the City Clerk dropped him from the payrolls without authority and without notice to him.

But no rule of the Police Department was produced which prosecutor could be claimed to have violated by remaining absent without special leave, where the absence was caused by illness. The rules of the department produced (pp. 61, 62, 63) all refer to the "granting of leave of absence *with* pay."

There is no requisite in any rule that a special leave of absence must be granted where the member of the police force is absent because of inability to perform his duties. Absence without leave is not equivalent to absence "from duty *without just cause*," as those words are used in section 3 of article 16 of the Home Rule Act, (2 Cumulative Supplement to Compiled Statutes of New Jersey, 1911-1924, sec. 136-1603, p. 2153) for a member of the police force, too ill to perform

his duty, may be absent *with just cause* although without leave.

So with respect to the claim that prosecutor had abandoned his office. If the contention of the municipal authorities was that he had abandoned his office and so had ceased to be a member of the Police Department, it was the duty of the *appointing* power to charge him with having abandoned his office and to give him an opportunity to be heard under article 16 of the Home Rule Act. But the municipal authorities took no such position. On the contrary, they carried him upon the police records as sick until December 31, 1920, and upon the payroll until January 7, 1921, clearly indicating that, at least up to December 31, 1920, the appropriate authority did *not* consider that he had abandoned his position. *No one contended that he had abandoned his position until he filed his application for a pension.* When did he abandon his position? Certainly not up to October, 1917, when he filed a certificate with the municipal authorities that he was too ill to perform his duties, nor up to December 31, 1920, so far as any indication to the municipal authorities was concerned, for if so, why did they carry him upon the police records? He filed his petition for a pension on February 6, 1921, or *a month and six days only* after he had ceased to be carried upon the police records as a patrolman, "sick."

Whether he had abandoned his position or not is a matter resting upon his intent and there is no evidence of probative value that he intended to abandon his position and nothing which he did do led the municipality to perform any act which would lead to the application of the doctrine of estoppel. His retention of his badge and a part of his equipment is plenary evidence that he never abandoned his position.

**Conclusion.**

It is apparent from the testimony, we submit, that it was not until prosecutor filed his petition for a pension on February 6, 1921, that the matter of absence for five days *without just cause*, and the matter of abandonment, was thought of as *an excuse* to avoid the payment to prosecutor of a pension for admitted disability contracted in the discharge of his duties after he had served the City of Summit for a period of twelve years. Up to that time the *appropriate city authorities had treated him as a member of the force as absent, without pay, sick.*

Why, if this man was not considered as a member of the department, when he filed his petition on February 6, 1921, did not the Pension Fund Commissioners act on it *immediately*? Instead the board did nothing for nearly *two* years, and then without notice to him, dismissed the petition. Why the delay? Why was he not *immediately* met with the contention that he was not a member of the force.

It is respectfully submitted that the judgment of the Supreme Court should be reversed and the proceedings brought up by writ of certiorari set aside.

Respectfully submitted,

ALFRED A. STEIN,  
MERRITT LANE,  
Of Counsel with Prosecutor.

**New Jersey Court of Errors and Appeals**

<p style="text-align: center;">WILLIAM KELLY, Prosecutor-Appellant,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">GEORGE D. CORNISH (Amended from William S. Topping) and others, Defendants-Respondents.</p>	}	<p>On Certiorari.</p> <p>ON APPEAL FROM JUDGMENT OF AFFIRMANCE.</p>
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**BRIEF OF RESPONDENTS.**

**Statement of the Case.**

Appellant applied to the respondents, constituting the Police Pension Board of the City of Summit, for a pension under the terms of the Police Pension Act, which became effective in said City on January 1, 1920.

The Board found that the appellant was formerly a member of the Police Force of the City of Summit, and that he is unfit for the duties of a patrolman, but denied him a pension for reasons which they state as follows:

“We find that the petitioner, William Kelly, did, in fact, abandon his position as an officer of the Police Department of the City of Summit, in that from June 29, 1917, until ‘some time in 1920’ and to February 6, 1921, the date of his petition, he absented himself continuously from any police duty, without permission, without leave of absence and without just cause.

"Article XVI, Section 3, of an Act Concerning Municipalities, Chapter 152 of the Laws of 1917, provides, among other things, with reference to the officers and men of every Police Department 'that any member of any such police force who shall be absent from duty without just cause for the term of five days continuously, shall at the expiration of such five days cease to be a member of such police force.'

"We find that the petitioner, William Kelly, by his action in absenting himself from duty without permission, without a leave of absence, and without just cause from June 29, 1917, had ceased and did cease to be a member of the police force of the City of Summit, prior to the date of his petition to this Commission, and is not entitled to the benefits of the provisions of Chapter 160 of the Laws of 1920" (p. 106).

A writ of certiorari was allowed to review this opinion with the result that the Supreme Court affirmed the decision of the Board. The Supreme Court reviews briefly the testimony and finds:

"The case is replete with incidents of the prosecutor's absenting himself from doing police duty without permission or without leave of absence and without just cause" (p. 117).

and concludes its opinion with the comment:

"Since the testimony tends to support the findings of the Board, the writ is dismissed with costs" (p. 118).

This appeal now brings up the judgment of the Supreme Court for review before this tribunal.

The detail facts are set forth in appellant's statement of the case but are interspersed with argument.

We shall deal with the facts on our brief of the argument according to the rules.

**BRIEF OF THE ARGUMENT.****I.**

**There was evidence to support the finding of the police pension fund commission and the decision of the Supreme Court affirming the same.**

*This Court will examine into a finding of fact by the Supreme Court only to ascertain whether there is any legal evidence to support it.*

Some fifteen years ago another policeman by the name of Kelly, who was a member of the Jersey City force, suffered a reduction in rank on account of neglect of duty and misconduct, and took his case to the Supreme Court, which affirmed the conviction. Kelly appealed to this Court, which affirmed the judgment of the Supreme Court saying:

“On a review of the conviction before the Supreme Court on certiorari, that court examined the whole evidence and decided that the conviction was justified by the weight of evidence. The case has again been argued before this court as though a review could again be had on weight of evidence, but under the well settled rule this court will not examine into a finding of fact by the Supreme Court farther than to ascertain whether there is any legal evidence to support it. Our examination satisfies us that there was ample evidence for the board and the Supreme Court to base their findings upon; and we find no prejudicial error in the admission or rejection of evidence or in other rulings by the trial body. The judgment of the Supreme Court will be affirmed.” *Kelly v. Police Commissioners*, 85 N. J. L. 373.

The opinions of both courts are reported together.

That case is exactly in point and it is unnecessary to cite further cases of which there are many in the

reports. Indeed that this is the law is conceded by appellant (brief, p. 21).

Appellant discusses the testimony at great length both in his statement of the case and in Point I of his argument. Even from the argumentative presentation of the facts there made, it is apparent there was evidence to support the finding of facts, and that what appellant desires this Court to do is to review the finding on the weight of evidence and make a new decision. Such a review this Court will not undertake.

It is necessary for us however to point out wherein the facts sustain the decision of the Police Pension Board and the judgment of affirmance by the Supreme Court. We therefore review the evidence chronologically as follows:

March 18, 1905, William Kelly, appellant herein, appointed member of the police force.

April 23, 1917, last day of active duty.

April 24, 1917, reported by telephone to the late George W. Brown, then Chief of Police, that he was sick and unable to work, and thought he would be home about two weeks (p. 34, ll. 10 to 27).

May, 1917, Kelly claims he gave Chief Brown a doctor's certificate and went away for about two weeks (p. 34, l. 30).

June 18, 1917, prior to this date, on a number of occasions, Mayor Franklin had summoned appellant to appear before him but he had always failed to appear, so the Mayor finally refused to sign his pay check for the period from May 1st to June 15th, in the expectation that that would bring him in. The refusal had the desired result and on June 18th Kelly appeared before the Mayor (p. 87), bringing with him a doctor's certificate (p. 86, ll. 25 to 35, Ex. P4, p. 22, ll. 30 to 40). At this time the Mayor asked Kelly if he felt he could not do ordinary desk work but elicited a complaint of the dampness of

the police room where the officer slept part of the night (p. 87, ll. 30 to 35). The Mayor then offered to grant him a leave of absence without pay if he would make the proper application (p. 87, l. 35), but this application was never made (p. 98, l. 37).

It will be seen that Kelly made no effort to report for duty on April 24, 1917. He did not apply for a leave of absence but he was perfectly willing to sit back and draw his pay indefinitely. As long as his pay was forthcoming he did not even comply with the direction of the Mayor to appear before him. When the Mayor finally held up his pay then he appeared quickly enough (p. 87, l. 15) and the June 18th conference with Mayor Franklin took place. At that time the Mayor told him that he considered that he had practically dismissed himself from the force on his own part (p. 87, l. 25). In other words he had abandoned his position which had resulted in an implied resignation. The Mayor offered to consider a proper application for a leave of absence (p. 87, l. 36). Kelly refused to ask for a leave of absence.

June 25, 1917, appellant wrote a letter to Mayor Franklin (Ex. P7, p. 50), in which he complained that his money had been held back, that he had lost his health through service and that his time off compared with other members of the department was very small and requested that the Mayor advance him his salary for the month of June and allow him fifteen days' vacation.

His letter shows that Kelly was familiar with the rule of the Police Department which were at that time being revised and newly adopted (p. 51, l. 20). The rule with respect to leaves of absence is as follows:

“12. Members of the uniform police force, upon making proper requisition therefor to the Captain of Police, may be granted leave of ab-

sence with pay for a vacation or other purpose not to exceed sixteen days in any calendar year.

"Except with the approval of the Mayor and Fire and Police Committee of the Common Council, not more than fourteen days' leave of absence with pay in any calendar year shall be granted any officer or employee of the department on account of sickness" (p. 61, l. 41, to p. 62, l. 17).

June 29, 1917, the Mayor replied to Kelly's letter (Ex. P6, pp. 44 to 45), refusing to advance him his salary for the month of June and suggesting that he make written application for leave of absence without pay (p. 45, l. 28). The Mayor further states that he disagrees with the conclusion stated in Kelly's letter, although he admits that Kelly was a sick man, and points out that every possible consideration had been given to him, that he had been allowed to have a special beat so as to be near his home and takes the trouble to point out in detail that, with the exception of the case of an officer who was so sick that his life was despaired of, he had been absent more times than any other officer since the first of January, *in all seventy-seven nights*. At the end of the letter, Mayor Franklin suggests that he return *at once* to police quarters his equipment, uniforms, etc., and write a letter requesting a leave of absence without pay from June 15th, until he should be well again, whereupon he might apply to go on active duty again. The Police Pension Board of Summit found that from that day William Kelly ceased to be a member of the Police Force of the City of Summit, having abandoned his position and absented himself from duty without permission, without leave of absence and without just cause (p. 106, l. 28).

To this letter Kelly did not reply, he did not report for work; he did not return at once his equipment but waited eleven months before doing so, al-

though appellant's brief would have the court believe he returned it promptly; nor did he take any steps toward keeping his record regular or maintaining his standing on the force. At no time did he ask for a leave of absence or show a willingness or inclination to comply with the directions of the Mayor, who is responsible for the Police Department. He simply stayed away and *if ever there was a case where a municipal employee abandoned his job, it certainly is this case.*

September, 1917, Kelly saw Mayor Franklin having been sent for by the Mayor (p. 39, l. 11). At this time, the Mayor says that Kelly said that he was much better and would like to go on duty, but in view of the fact that he had maintained so strongly that he was unable to do duty, the Mayor insisted upon his taking a physical examination and suggested that he be examined by Dr. Dengler, who was present at the City Hall at the time (p. 88, l. 30, *et seq.*). Kelly admits that the doctor was there at the time (p. 101, l. 19), but he refused to be examined and became quite excited and stated that he would not be examined by any physician except his own. This circumstance impressed itself very forcibly on Mayor Franklin's memory and he testified very positively on the subject (p. 89, ll. 10 to 30; p. 92, ll. 20 to 30; p. 96, ll. 6 to 30). Kelly does not deny that he refused to have Dr. Dengler examine him, but attempts to qualify his denial by stating that he wanted his own physician to be present (p. 39, ll. 20 to 35).

October 18, 1917, appellant went to Chief Murphy, then captain, and presented a doctor's certificate stating that he was under the physician's care and leaving town October 14, 1917 (Ex. R1, p. 10, ll. 30 to 40). He actually went south October 19th (p. 38, l. 16). *No leave of absence was asked for* (p. 73, ll. 18 to 30).

May 20, 1918, appellant returned the equipment belonging to the city in response to Mayor Franklin's request made June 15th previous, and received a receipt therefor from the Chief of Police (Ex. P8, p. 54, ll. 20 to 30).

November 4, 1919, Police Pension Act adopted in the City of Summit.

The record fails to show that he made the slightest move to return to the Police Department, and take up his duties therein, or endeavor to maintain his status by asking for a leave of absence, all through the years 1918 and 1919 (p. 72, ll. 35 to 40; p. 98, l. 38). What could a city employee do more than what this man did to indicate that he had abandoned his position.

In January or February, 1920, appellant went to Mayor Merrill who succeeded Mayor Franklin and asked to be re-instated (p. 77, ll. 6 to 11). The time of this application is significant following so closely upon the adoption of the Police Pension Law and the retirement of Mayor Franklin, on January 1, 1920. Mayor Merrill is positive that the word re-instated was used by Kelly in making his application (p. 79, ll. 10 to 12; ll. 15 to 18; p. 81, ll. 35 to 40). This Kelly denies.

He argues at length in his brief why Mayor Merrill's testimony should be disregarded. We submit that the testimony of Mayor Merrill, who was not in office either at the time that Kelly ceased his active duty, or within two years thereafter, and who had retired from office by the time his testimony was taken, should be given great weight in this connection and is certainly evidence supporting the finding of facts in the court below. Ex-Mayor Merrill is noted for his high degree of fairness in his dealings with all men and should carry great weight, and it is to be noted that no suggestion is made that Mayor Merrill was not disinterested and fair in giving his testimony.

Kelly never contributed to the Police Pension Fund (p. 53, ll. 18 to 20). If he should receive a pension, the other officers on the force would be placed in the position of being forced to contribute to the support of a man who did no duty, received no pay and continuously absented himself for over two and one-half years before the Pension Act took effect in Summit.

Appellant stresses in numerous places the alleged fact that Kelly's name was left, on the record showing patrol service, as sick until December 31, 1920 (p. 9, l. 7). This date to the knowledge of counsel should be December 31, 1919, an error was made in transcribing the testimony; the context if read as a whole clearly shows this to be the fact (p. 30, l. 36; p. 74, l. 21). Much of appellant's argument falls when the proper date is considered. Appellant also points out that his name had been left until January 7, 1920 on the informal memorandum used by the City Clerk to make up his payrolls, although no pay checks had been made to him after June 15, 1917. Both these records are unofficial and really memoranda for the convenience of the officials keeping them. Neither is a roll of the department binding on the city (p. 69). Even if they were official records they would not control this case.

On April 6, 1921, Kelly makes his application for a pension (Ex. P2, p. 5, l. 30). It appears that a period of fifteen months has passed since Kelly has been dropped from the informal records referred to above before he files his petition for a pension.

This course of action as shown by the evidence, certainly supports the finding of facts made by the Police Pension Board and the Supreme Court, and this Court will not review the finding of facts further but will affirm the Supreme Court.

**II.****The Supreme Court determined the facts as required by Section 11 of the Certiorari Act.**

Appellant makes a short argument, based on the Supreme Court's opinion, in an attempt to show that the statement of that court, that the testimony "tends to sustain" the findings of the Board, is not such a determination of disputed questions of fact as is required of that court by Section 11 of the Certiorari Act.

This argument is merely a quibble, and is completely answered by reading in full what the Supreme Court says. We quote at length from the Supreme Court's opinion, as follows (p. 117) :

"If there was any testimony, before the board which tends to sustain the finding, then, according to the settled legal rule, the finding will not be disturbed.

"The record before us discloses, that the last day of active duty of the prosecutor was April 23, 1917. The case is replete with incidents of the prosecutor's absenting himself from doing police duty without permission or without leave of absence and without just cause. There was also testimony in the case from which the board was warranted in finding that the prosecutor had abandoned his position as officer of the police force of the City of Summit, by the potent circumstances appearing, that he applied in 1920 to the mayor for reinstatement, which time was immediately after the Police Pension law had been adopted in that city. It is true that the prosecutor denies that he applied for reinstatement, but as it was a controverted question of fact, its determination was for the board, and its finding will not be disturbed.

"The prosecutor's petition was filed on February 6, 1921. The board after considering the petitioner's application, but without giving him a hearing, denied it. Upon review by the Supreme Court the action of the board was set aside on the ground that the matter had been determined against the prosecutor without giving him a hearing. No further steps seem to have been taken in the matter until 1925, when on June 17th, after a full hearing of the case against the prosecutor, the Pension Board found that the prosecutor was not entitled to a pension upon the facts developed by the testimony, as above indicated. Ten months later a writ of certiorari was sued out of this court to review the action of the Pension Board.

"Since the testimony tends to support the findings of the board, the writ is dismissed, with costs".

Just what more the appellant could ask from the Supreme Court is hard to understand. The Supreme Court considered the question of fact, determined that the facts tended to support the findings of the Board, that "*the case is replete with incidents of the prosecutor's absenting himself*", and that there was testimony "*from which the board was warranted in finding that the prosecutor had abandoned his position*" and consequently did not disturb its findings.

This finding is very similar to that of the Supreme Court in *Kelly v. Police Commissioners*, *supra*, which was sustained by this Court. The finding of the Supreme Court in that case is as follows (p. 373):

"The case has abundance of evidence to support such finding. The existence of the evil was fully proved and there was evidence to show that during the period of prosecutor's reports to the contrary, the vice was existing and that he had been notified or warned of that fact.

"While it is the duty of this court under an existing statute (Pamph. L. 1907, p. 95) to consider and weigh the evidence and has done so, yet we find nothing to disturb the result reached by the police board. Our conclusion is that the conviction was legally made and should be affirmed" (*Kelly v. Police Commissioners*, 85 N. J. L. 373).

The Supreme Court properly considered the evidence and it should be sustained.

### III.

**The finding by the Police Pension Fund Commission on the question of Kelly's membership in the police department was a duty imposed upon the board by statute in order to determine his right to a pension.**

The duty above referred to is imposed by Article XVI, Sec. 3 of the Home Rule Act in the words we have italicized in that Section, which we quote in full as follows:

"3. The officers and men employed in every municipal police department shall severally hold their respective offices and continue in their respective employment during good behavior, efficiency and residence in the municipality wherein they are respectively employed; and no person shall be removed from office or employment in any such police department or from the police force of any such municipality for political reasons, or for any other cause than misconduct, non-residence or disobedience of just rules and regulations established or which may be established for the police force in such municipality; *provided, that any member of any such police force who shall be absent*

*from duty without just cause for the term of five days continuously, shall at the expiration of such five days cease to be a member of such police force; each member and officer of any such police force shall be a citizen of the United States and a resident for two years next preceding his appointment of the municipality in which he is appointed; he must be of good moral character, sound in body and in good health, and able to read and write the English language intelligently; and provided, further, that it shall be lawful for the board, body or person in the respective municipalities of this State having authority to employ members of the police department therein, to employ officers or men temporarily in case of emergency or for parts of years, in cases where their services are not needed through the entire year, and discharge them at the expiration of such temporary employment'* (P. L. 1917, C. 152, p. 359).

A careful reading of this clause is very enlightening. It first provides that the tenure of office shall be during good behavior, efficiency and residence &c., then provides that removal shall not be for any other cause than incapacity, misconduct, non-residence and disobedience of just rules, etc. These two provisions are then qualified with the proviso that any member of such police force who shall absent himself from duty, without just cause, for the term of five days continuously, shall at the expiration of five days cease to be a member of such police force. The following provisions of the section have nothing to do with the proviso but state certain qualifications that each officer and member of the force must have in order to be appointed.

Appellant seems to have confused the duty of the Police Pension Fund Commission to determine the fact of an applicant's membership in the department, with the power of the appointing body to try a delinquent policeman on charges and dismiss him

from the police force. Citing *Carey v. Plainfield*, 53 N. J. L. 311. That case had to do with a trial on charges, and is not in point.

Appellant argues that the words in question do not have their apparent meaning; that the proviso above mentioned is entirely without force in the absence of a trial on charges and a removal from office of the delinquent member who has absented himself. We submit that the act is capable of no such construction. If such meaning was the intention of the framers of the act, it will be seen at once that the proviso is mere surplusage, the provisions of the first part of the section are all sufficient to make possible the removal of an officer for absence from duty. The establishment of a rule providing that an officer who is absent five days continuously without just cause shall cease to be a member of the force, would be an all sufficient basis for the bringing up of a delinquent officer on charges and his dismissal from the force.

The legislature however desired to make certain that no policemen shall be appointed who can continuously neglect their duties and still through political favor remain members of a police force. Far from being inserted in the act for the purpose alleged by appellant, the section in question, when read as a whole, clearly shows the intention of the legislature to safeguard the citizens of the State against the abuse of placing or leaving persons on a police force for political reasons. That political reasons were in the mind of the legislature at the time this section was framed, is shown by the fact that just a few lines ahead of the proviso there is a clause prohibiting the removal of an officer for political reasons. The converse of the situation naturally requires that no person shall be allowed to continue in office for political reasons while absenting himself from duty.

In the case of *Van Horne v. Donnelly*, 96 N. J. L. 345, a janitress in the Fire Department of the City of Trenton applied for retirement on a pension. The Pension Board refused the application "for the sole reason that the relator in the opinion of the members of the commission is not a member of the Fire Department of the City of Trenton, within the meaning of the Act of April 15, 1920, and is not entitled to the benefits of said act." The Court reviewed the record and was of opinion that it would not support the view of the commission. The case bears directly on the point urged by appellant, that the commission was without power to review appellant's membership in the Police Department, and supports our position. The Court reviewed the record on the point and determined the question adversely to the contention of the Pension Board; nowhere does the Court state that it has any doubt as to the Board's power to determine the status of members with respect to the force.

As appellant points out this matter has been the subject of two writs of certiorari, the first of which was argued before Justice Bergen sitting for the Supreme Court, who sent the matter back to the Police Pension Board for re-consideration because no proper hearing had been accorded Kelly. *Kelly v. Merrill*, 1 N. J. Misc. 230. Justice Bergen says, page 231, that Section 2 of the Police Pension Act of 1920,

"Clearly intends that the applicant shall have a hearing; with opportunity to prove the fact on which his application is based, and *one of them is his membership in the Police Force.*" (Italics ours.)

The applicant was given this opportunity and the fact in question was determined against him both by the Board and the Supreme Court.

The Police Pension Board had not only a right, but a duty, to hear the testimony and determine the issue raised as to Kelly's abandonment of his office as policeman.

**IV.**

**The judgment of the Supreme Court  
should be affirmed with costs.**

CLEMENT K. CORBIN,  
Of Counsel with Respondents.

