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NOTICE OF APPEAL.

Filed August 3, 1928.

New Jersey Supreme Court

HAROLD L. DECKER,
Prosecutor-Appellant,

vs.

AUGUSTUS C. NASH, Recorder of
the Town of Westfield, and
THE RECORDER'S COURT OF THE
TOWN OF WESTFIELD,
Respondents.

*On
Certiorari.
Notice of
Appeal.*

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TAKE NOTICE that the prosecutor appeals to the
Court of Errors and Appeals in the last resort in
all causes in New Jersey from the whole of the
judgment entered in this cause.

E. A. MERRILL,
Attorney of Prosecutor-Appellant.

To Mr. Paul Q. Oliver, Westfield, New Jersey,
Attorney of Respondents.

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GROUNDS OF APPEAL.

Filed August 8, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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HAROLD L. DECKER,
Prosecutor-Appellant,

vs.

AUGUSTUS C. NASH, Recorder of
the Town of Westfield, and
THE RECORDER'S COURT OF THE
TOWN OF WESTFIELD, Union
County, New Jersey,

Respondents.

*On
Certiorari.*

On Appeal.

*Grounds of
Appeal.*

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The prosecutor appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the ground that the Supreme Court erred in the judgment it gave dismissing the writ of certiorari issued herein.

E. A. MERRILL,
Attorney of Prosecutor-Appellant.

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WRIT OF CERTIORARI.

NEW JERSEY SUPREME COURT.

 HAROLD L. DECKER,
*Prosecutor,**vs.*
 AUGUSTUS C. NASH, Recorder of
 the Town of Westfield, and
 THE RECORDER'S COURT OF THE
 TOWN OF WESTFIELD, Union
 County, New Jersey,
Respondents.

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 Writ of
 Certiorari.

The State of New Jersey to Augustus C. Nash, Recorder of the Town of
 (SEAL) Westfield, and the Recorder's Court
 of the Town of Westfield, New Jersey. GREETINGS:

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We being willing for certain reasons appearing by the affidavit of Earle A. Merrill, filed in this cause, to be certified of the proceedings had before the respondents herein, at the Town Hall, in the Town of Westfield, on Friday, January 20, 1928, and of all proceedings collateral thereto, at which time the prosecutor herein was found guilty by a jury in that the said Harold L. Decker "did make or cause, suffer or permit, alterations to be made" in a house known as No. 141 Harrison avenue, of which the said Harold L. Decker was one of the owners, "without having first applied for and obtained a permit therefor from the Inspector of Buildings of said Town of Westfield, in violation of Section 3 of Article II of General Ordinance No. 65,

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Writ of Certiorari.

of said Town of Westfield, entitled, 'An Ordinance to regulate and control the inspection, construction, alteration and repair of buildings in the Town of Westfield,' as amended by General Ordinance No. 403''; and it appearing that notice of this application was given said Paul Q. Oliver, attorney of the respondents:

We do command you that the aforesaid proceedings of the said Recorder and the said Recorder's Court of the Town of Westfield, New Jersey, upon the trial of the said prosecutor for the violation of the said ordinance, as hereinabove set forth, held at the Municipal Building on Friday, January 20, 1928, together with all things touching and concerning said proceedings as fully and entirely as before you they remain to our Justices of the Supreme Court of Judicature, at Trenton, on the 1st day of May, 1928, you certify and send together with this writ, that therein may be done what of right and according to the laws and Constitution of this State ought to be done.

And we do further command you that you include in your return a transcript of the proceedings at the trial, including the motions then made and the testimony then given, and also the proceedings had in said Recorder's Court and before said Recorder on Thursday, February 2, 1928, at which time one William A. McAllister, also one of the owners of said premises at 141 Harrison avenue, was arraigned upon a similar charge. And also the affidavit and complaint based thereon brought against one Edward A. Apgar in and about this same matter.

Return to Writ.

WITNESS, WILLIAM S. GUMMERE, Esq., Chief Justice of our Supreme Court, at Trenton, this 24th day of February, 1928.

EDWARD J. KELLEHER,
Clerk.

E. A. MERRILL,
Attorney of Prosecutor.

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ALLOCATUR.

This writ is allowed; let it be sealed.

Dated, February 18, 1928.

SAMUEL KALISCH,
J. S. C.

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RETURN TO WRIT.

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

In obedience to the command of this writ, directed to Augustus C. Nash, Recorder of the Town of Westfield, of the Recorder's Court of the Town of Westfield, New Jersey, I hereby certify and send, under the seal of the said Recorder's Court of the Town of Westfield to the Honorable Justices of the Supreme Court of Judicature of New Jersey, the transcript of the proceedings of the trial of the case of the Town of Westfield by Frank B. Moffett *v.* Harold L. Decker, together with a copy of the Recorder's docket, testimony, venire, complaint and summons, and also the complaint, summons and copy of the Recorder's docket in the case of the Town of Westfield by Frank Moffett *v.* William A. McAllister, and also the complaint, summons

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Return to Writ.

and copy of the Recorder's docket in the case of
Town of Westfield by Frank B. Moffett *v.*
Edward A. Apgar, together with all papers,
touching and appertaining to the same, as fully
and entirely as before the said Recorder's Court
of the Town of Westfield, County of Union and
10 State of New Jersey, they remain, as is com-
manded.

IN TESTIMONY WHEREOF, I, Augustus C. Nash,
Recorder of the Town of Westfield, County of
Union and State of New Jersey, have hereunto
set my hand as Recorder, and caused the seal
of the Recorder's Court of the Town of West-
field to be affixed, this seventh day of March,
one thousand nine hundred and twenty-eight.

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AUGUSTUS C. NASH,
Recorder of the Town of Westfield.

(SEAL)

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Docket—Town v. Decker.

TRANSCRIPT OF RECORDER'S DOCKET.

Town of Westfield in Union County.

Before Augustus C. Nash, Recorder.

TOWN,	}	<i>On Complaint for Violation Building Code.</i>	10
<i>vs.</i>			
HAROLD L. DECKER.			

Date of complaint, January 5, 1928.

Name and address of complainant, Frank B. Moffett.

Name and address of defendant, Harold L. Decker. 20

Complaint made by Frank B. Moffett, building inspector, under date of January 5th, for violation of Section 3, Article 2, General Ordinance No. 65, as amended by General Ordinance No. 403, complainant alleged that on November 16, 1927, Harold L. Decker, by his agents or servants violated said section.

Summons issued and made returnable on Monday the 9th day of January at 7:30 P. M. Summons served personally on Harold L. Decker on January 6, 1928, by reading same to him and giving him a true copy thereof. Louis W. Pfirrmann, police officer. 30

Adjourned by consent until Thursday, January 12th, at 7:30 P. M. At that time Mr. E. A. Merrill entered a plea of not guilty on the part of the defendant and demanded a trial by jury.

Docket—Town v. Decker.

Venire issued to John W. O'Donnell, constable, to summon twelve jurists for the trial. Trial of this cause was on January 20th, at 2:30 P. M. Mr. Merrill representing defendant and Mr. Paul Q. Oliver representing complainant. Mr. Edward J. O'Brien was sworn as stenographer. Constable called the jury and the following were sworn in as jurors: Robert L. DeCamp, Horace Martin, John Degman, Benjamin Kissam, James G. Casey, Wellsley Curry, Harry N. Taylor, Sr., Louis Cagnassola, Harry Cole, Harry Udell, Walter Segar, Frank L. Miller.

Mr. Frank B. Moffett, Building Inspector of the Town of Westfield, sworn by the complainant. Mr. Moffett testified he issued no permit for the alteration or construction of any building located at No. 141 Harrison avenue, Westfield, N. J., and that on November 16, 1927, an application for building permit was left at his office. Building permit offered in evidence, no objection, admitted. Certified copy of deed of Margaret B. Salisbury, *et als.*, to William A. McAllister and Harold L. Decker, *et ux.*, dated October 27, 1927, covering premises located on Harrison avenue, recorded in Book 1126 of Deeds at pages 347, etc., offered in evidence, no objection, admitted.

Edward A. Apgar, witness sworn on part of the complainant, testified that he was employed to do certain work at No. 141 Harrison avenue, that he had taken off some boards from the side of the doors and also had erected some studding between some doors in the property. That he had left his tools upon the property on November 15, 1927, and had started to work on November 16, 1927, and had left an application at the

Docket—Town v. Decker.

office of Frank B. Moffett on November 16th, Mr. Moffett was not present and the application was left with the young lady in his office.

Mr. Merrill did not offer any testimony or call any witnesses. Counsel for the respective parties summed up and the matter was submitted to the jury. The jury retired and returned and reported that they found a verdict of guilty against the defendant. The Court announced that it would impose sentence on Monday, January 23rd, at 7:30 P. M. On January 23rd, Mr. Merrill and Mr. Decker appeared and the Court imposed a fine of fifty (\$50) dollars and Mr. Merrill requested that the matter be held in abeyance to allow counsel to prepare a writ of certiorari.

AUGUSTUS C. NASH, 20
Recorder.

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*Complaint against Prosecutor.***COMPLAINT.**

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

10 FRANK B. MOFFETT, Building Inspector of the
 Town of Westfield, being duly sworn according to
 law, on his oath complains and says that on or
 about November 16, 1927, Harold L. Decker being
 then and there one of the owners of the house
 known as No. 141 Harrison avenue, in the Town
 of Westfield, aforesaid, did make, or cause, suffer
 or permit alterations to be made in said building
 without having first applied for and obtained
 a permit therefor from the Inspector of Build-
 20 ings of said Town of Westfield, in violation of
 Section 3 of Article II of General Ordinance No.
 65, of said Town of Westfield, entitled, "An
 Ordinance to regulate and control the inspection,
 construction, alteration and repair of buildings in
 the Town of Westfield," as amended by General
 Ordinance No. 403.

Wherefore he prays that the said Harold L.
 Decker may be summoned to answer this com-
 plaint and be dealt with as law and justice may
 require.

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FRANK B. MOFFETT.

Sworn and subscribed before me
 this 5th day of January, nine-
 teen hundred and twenty-eight.

AUGUSTUS C. NASH,
 Notary Public of New Jersey.

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Summons against Prosecutor.

SUMMONS.

UNION COUNTY, ss.

The State of New Jersey to any
Police Officer of the Town of West-
(SEAL) field. GREETING: 10

Whereas complaint on oath has been
made before me the Recorder of the
Town of Westfield, that on or about November
16, 1927, Harold L. Decker being then and there
one of the owners of the house known as No. 141
Harrison avenue, in the Town of Westfield,
aforesaid, did make, or cause, suffer or permit
alterations to be made in said building without
having first applied for and obtained a permit
therefor from the Inspector of Buildings of said
Town of Westfield, in violation of Section 3 of
Article II of General Ordinance No. 65, of said
Town of Westfield, entitled, "An Ordinance to
regulate and control the inspection, construction,
alteration and repair of buildings in the Town
of Westfield," as amended by General Ordinance
No. 403. 20

Therefore you are required to summon the
said Harold L. Decker to be and appear before
me, the Recorder of the Town of Westfield, afore-
said, at the Town Hall, No. 121 Prospect street,
in said Town of Westfield, on Monday, the 9th
day of January, 1928, at 7:30 P. M. o'clock in
the evening to answer the said complaint and to
be further dealt with as law and justice may
require. 30

Summons against Prosecutor.

Given under my hand this fifth day of January, nineteen hundred and twenty-eight.

AUGUSTUS C. NASH,
Recorder of the Town of Westfield.

10 Served the within summons personally on the said Harold L. Decker on January 6, 1928, by reading the same to him, and giving him a true copy thereof.

LOUIS W. PFIRRMANN,
Police Officer.

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*Transcript of Evidence.***TESTIMONY.**

WESTFIELD POLICE COURT.

TOWN OF WESTFIELD, by FRANK
B. MOFFETT,

vs.

HAROLD L. DECKER.

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Transcript of stenographer's notes of evidence taken in the above-entitled matter before the Hon. A. C. Nash, Police Judge, at the Westfield Police Court, City Hall, Westfield, New Jersey, on the 20th day of January, A. D. 1928, at two o'clock, P. M.

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Appearances:

Paul Q. Oliver, Esq., for the complainant.

Earle A. Merrill, Esq., for the defendant.

Edwin J. O'Brien was duly sworn as stenographer by the judge.

The Court: Summons was issued for Monday, January 9, 1928, at 7:30 o'clock, P. M., and was adjourned to Thursday of that week, January 12th, at which time Mr. Merrill demanded a trial by jury.

30

Do I understand, Mr. Merrill, you did enter a plea of not guilty?

Mr. Merrill: Yes, at the original meeting.

The Court: At the time he demanded a jury he entered an appearance and plead not guilty.

(Jury was empanelled.)

40

Transcript of Evidence, Motion to Dismiss.

Mr. Merrill: If the Court please, I have an objection to the jurisdiction, and I do not know whether you wish me to make the motion at this time or after we have selected the jury.

10 The Court: Suppose we select the jury, first, being that you have started.

(The jury, having been empanelled, and found satisfactory, Mr. Oliver made the following statement:)

Mr. Oliver: Before the jury is sworn, if I may interrupt, there are two other cases that were adjourned until this afternoon at two o'clock. The case against McAllister I ask to be adjourned for one week, and the town will dismiss the case against Apgar.

20 The Court: Any objection to that? That will be the order. The motion will be granted.

(The jury were then sworn by the Court.)

The Court: Now, Mr. Merrill.

30 Mr. Merrill: If the Court please, I move to dismiss the complaint on the ground that the affidavit upon which the summons is based is fatally defective for errors appearing upon the face of the affidavit. We are not dealing with a civil suit, nor a pleading, but we are dealing with a quasi-criminal action, and in such action the charge must be specific, and definite, and it cannot be in the disjunctive, when the different things charged are not the same thing. And I would like to call to your attention this definition or statement of the rule with respect to indictment or information, and this is of that general character: An indictment or information must not charge a party disjunctively or alternatively
40 in such manner as to leave them uncertain what

Transcript of Evidence, Motion to Dismiss.

is relied on as the accusation against them. And I would like to give you two or three illustrations of indictments or informations or complaints which have been set aside because in the disjunctive form. There was the case of Cohen against Gray, a Massachusetts case, in which this was the holding of the Court: "It is a general rule that an indictment, information, or complaint—" and this is a complaint—"must not charge a party disjunctively so as to leave it uncertain what is relied on as the accusation against him. That an indictment which averred that X made a forceable entry into two closes of meadow or pasture"—meadow "or pasture"—was held to be bad. So of an information which held "that N sold beer or ale without an excise license."

Mr. Oliver: May I ask in what year the first case was decided about the meadow or close?

Mr. Merrill: I think that goes back to the fifties. It is an early case. And I might say, of course, that those early cases upon the common law are the best cases that can be found. Now the alleged affidavit sets forth that Decker did make alterations or he caused alterations to be made or he suffered alterations to be made or he permitted alterations to be made.

Mr. Oliver: Are you quoting from the affidavit now?

Mr. Merrill: Yes. Reading the exact words of the affidavit, it says this: "Did make or cause, suffer, or permit, alterations to be made." Now the case is quite different and requires different evidence, different mode of treatment whether he made, himself, the alterations, or whether he caused some one else to make them or whether

Transcript of Evidence, Motion to Dismiss.

he suffered or permitted them to be made. I move therefore that the complaint be dismissed on the ground that it is in the disjunctive, is uncertain, and does not support definitely the specific charge covered by the affidavit, the complaint, and the summons.

10 Mr. Oliver: Does the Court want to hear me?

The Court: Yes.

Mr. Oliver: It is not a criminal case. It is a civil case to recover a penalty, and the same practice is here as obtains in the Small Cause Court. The complaint is in the nature of a statement, of a demand, and it is intended to apprise the defendant of the charge which he is to meet. I submit those cases do not apply.

20 Mr. Merrill: If the Court please, I make the further motion that it be dismissed on the ground that there are defects in the affidavit which are not patent and to sustain the allegation that it is defective, I will ask Mr. Moffett to take the stand.

Mr. Oliver: What do you call this?

30 The Court: You cannot have anybody take the stand at this time.

Mr. Merrill: I am asking him to take the stand to sustain the allegation of an imperfection in the affidavit.

The Court: I cannot allow that at this time.

Mr. Merrill: We are dealing now, if your Honor please, with a question of jurisdiction.

40 The Court: If you want to make that motion at the end of Mr. Oliver's case, all right, but I cannot allow you to break in on this case in the

Transcript of Evidence, Motion to Dismiss.

regular procedure in the case. If you want to make your motion at the end of Mr. Oliver's case, all right. Then Mr. Moffett will have undoubtedly been on the stand.

Mr. Merrill: I think I have a right to make it at this time because we are dealing with the foundation of the case, and not with the merits. And my purpose in putting Mr. Moffett on the stand is not with reference to the merits of the case at all, but solely with reference to his affidavit which I challenge, and which goes to the jurisdiction, and insofar as the affidavit is challenged, I think I may put Mr. Moffett on the stand for the purpose of sustaining this charge of lack of jurisdiction which should come up at the inception of the case, and not at the end.

The Court: I will rule that that is a matter for a motion for dismissal at the end of the case.

Mr. Merrill: I will ask, of course, the stenographer to note the objection, and if necessary, the exception.

The Court: Yes. That is perfectly all right. I will state now that any jurors who might have been summoned and have not been called are excused.

A Gentleman in the Audience: How about me, judge? I couldn't get here.

The Court: All right. You are excused with the rest.

Mr. Oliver opens to the jury on behalf of the Town of Westfield.

Transcript of Evidence, Frank B. Moffett, direct.

Mr. Oliver: I do not know whether we follow the practice of the higher court, and ask the defendant to open before the testimony is taken, or not.

10 The Court: Well, I think that is the general practice now in all the courts.

Mr. Oliver: Then I ask we have an opening from the defendant.

Mr. Merrill: If the Court please, the only opening the defendant desires to make is to call attention of the Court to the plea of not guilty already entered.

20 FRANK B. MOFFETT, the complainant, sworn.

Direct examination by Mr. Oliver.

Q Mr. Moffett, you are the Building Inspector of the Town of Westfield, are you not? A Yes.

Q Have you issued a permit to William A. McAllister or to Harold L. Decker or to any other person for making certain alterations in the house, 141 Harrison avenue, Westfield? A
30 No.

Q Was application made for such a permit? A Yes.

Q When was it first made?

Mr. Merrill: If the Court please, I would like to ask if that application was verbal or written?

Mr. Oliver: I will get the written application in. Please do not interrupt.

40

Transcript of Evidence, Frank B. Moffett, direct.

Mr. Merrill: If the Court please, if it is a written application the application is the best evidence and I ask that be produced.

Mr. Oliver: All right. Produce the first application. We will assume there is one. I was trying to proceed in another way.

10

A You have that.

Q I beg pardon. I thought you took it. Yes, sir. One of those? A On November 16th, I think the first application, on or about.

Q Is that the application, the first one? A Yes.

Mr. Oliver: I offer it in evidence, an application for building permit for making alteration to 141 Harrison avenue, purporting to be signed by H. L. Decker, W. L. McAllister, E. A. Apgar, as agent, and verified by Mr. Apgar before Burton D. Settle, on November 16, 1927.

20

Mr. Merrill: No objection.

The Court: All right.

(Paper marked P. 1 in evidence.)

Q Was there any permit issued on that application? A No.

30

Q Do you know whether or not he brought it in on the 16th? The day the application was verified? The day the petition was verified? A I don't know positively. I think it was though.

Mr. Oliver: Cross examine.

40

Transcript of Evidence, Frank B. Moffett, cross.

Cross examination by Mr. Merrill.

Q Was there any other application made except that one that has been put in evidence? A Yes.

10 Mr. Merrill: I will ask counsel to produce it.

(Mr. Oliver produces paper.)

Mr. Merrill: I ask that that be marked for identification unless counsel wishes to put it in evidence at this time.

Mr. Oliver: Well, I don't know that it is material, but I am perfectly willing to accommodate; I will offer it.

20 The Court: All right. It will be admitted.

(Paper marked Exhibit P. 2 in evidence.)

Mr. Merrill: No cross examination.

Mr. Oliver: I offer in evidence a certified copy of deed from Mrs. P. Salisbury and husband to William A. McAllister and Emily S. McAllister, Harold L. Decker, and Eva S. Decker, his wife, conveying the premises in question.

30 (Mr. Oliver hands paper to Mr. Merrill.)

Mr. Oliver: That is all.

The Court: Do you object to that, Mr. Merrill?

Mr. Merrill: No.

The Court: All right. It will be admitted.

(Paper entered in evidence and marked Exhibit C. 3.)

40

Transcript of Evidence, Edward A. Apgar, direct.

EDWARD A. APGAR, a witness on behalf of the complainant, sworn.

Direct examination by Mr. Oliver.

Q Mr. Apgar, you are a builder of the Town of Westfield, aren't you? A I follow that profession. 10

Q Carpenter and builder? A I follow that profession.

Q Yes, sir. And did you do certain work on the property at 141 Harrison avenue?

Mr. Merrill: I object. I object for the moment, but merely for this reason: Mr. Apgar was a defendant in a proceeding of this same character which has now been dismissed, but a new complaint might be made against him, and I will ask the Court that in view of the character of this proceeding he inform Mr. Apgar that he may decline to answer if he thinks his answer might incriminate him. 20

The Court: Well, this is not a criminal case; this is semi-criminal.

Mr. Oliver: It is an action for a penalty, and I have dismissed the charge against Mr. Apgar, and I declare now the town will bring no action against Mr. Apgar, for this violation. 30

Mr. Merrill: That is not binding, and I insist Mr. Apgar may stand on his rights. And that he should be accorded the right which is accorded in criminal proceedings; the Court will take judicial notice of the

Transcript of Evidence, Edward A. Apgar, direct.

fact that throughout the law, where reference is made to cases of this character and the jurisdiction in which it is tried, and the character of the process issued, it all comes under some form of criminal procedure.

10 The Court: I do not see this is a criminal action. It is a quasi-criminal action, if anything.

Mr. Merrill: But a quasi-criminal action where a man may be a prisoner as the result of a conviction entitles him to that protection which he is entitled to, the protection to keep him from becoming a prisoner.

The Court: I will deny your motion.

Mr. Merrill: Please note the objection.

20 (Question repeated by the stenographer.)

A Yes.

The Court: Answer the question.

A Yes.

The Court: Answer so the jury can hear you.

30 A Yes.

Q What days did you do the work, Mr. Apgar? A 16th and 17th.

Q Wasn't it the 15th, 16th and 17th? Well, now, think? Didn't you testify the other night, not long ago, it was the 15th, 16th and 17th? I just want to get it straight? A No; I took my stuff over there on the afternoon of the 15th.

40 Q What? A I took my stuff over there and got ready.

Transcript of Evidence, Edward A. Apgar, direct.

Q On the 15th? A Yes; hauled my stuff.

Q What work did you do there? What did you do, Mr. Apgar?

Mr. Merrill: If the Court please, I would like to renew my objection on the same ground as before and ask the Court to inform Mr. Apgar he might decline to answer if he thinks it might incriminate him. 10

The Court: I will deny it. Go ahead. Answer the question.

A Removed some trim and little plaster. No timbers of any kind.

Q Did you take down a part of the staircase?

A Nothing was built in the house.

Q What? A Temporary. 20

Q What? A Temporary construction it was.

Q Did you take down any stairway, any staircase? A No, sir.

Q Didn't you take down the back staircase?

A No, no, sir.

Q Did you close an opening down to the back staircase? A No, sir.

Q Did you place studding in any part of the house? A I nailed a few studs in, a couple of large openings. 30

Q You did place studding in the openings?

A Yes, sir.

Q Did anybody but you do work in that house? A I didn't do it personally.

Q I mean your men? A Nobody but my men.

Q And I am speaking of you, did you or did you and your men do it? A What my man did.

Q What your man did? A Yes.

Q At whose request was that work done? 40

Transcript of Evidence, Edward A. Apgar, direct.

Mr. Merrill: I object to the form of the question. I think that the question should first be whether it was done at anybody's request. It is assumed it was done by the—

Q It wasn't your house, was it? A No.

10 Q And you did not do the work for yourself, did you? A No, sir.

Q Who did you do it for? A Why, I had the contract with the owner.

Q Who were they? A Mr. Decker and Mr. McAllister.

Q Yes. Did you have a permit? A (Witness holds head negatively.)

Q Had you applied for the permit then? A Yes, sir.

20 Q It appears from this paper here that you verified this application on the 16th day of November, before Burton D. Settle? A Yes, sir.

Q Did you verify that application before you did the work? A Yes.

Q And did you at once take the application to Mr. Moffett? A I did.

30 Q And Mr. Moffett said he would not give you a permit? A He didn't say whether he would or not.

Q What did he say? A He said he wanted to see me the next day.

Q He wanted to see you next day? A The bookkeeper said he wanted to see me.

Q You did not see Mr. Moffett at all? A That day, no.

40 Q Then you verified that on the 16th? A I took it in there and I went back in the afternoon and he hadn't been in and he wanted to see me.

Transcript of Evidence, Edward A. Apgar, direct.

Q You verified this—you made and verified this on the 16th of November? A I did.

Q And on the 15th you had taken your materials to the house, is that right? A Yes.

Q And you went to Mr. Moffett's office and left that with his girl because he was not there?

A I did. 10

Q And then you went back and started to do that work, is that right? A Yes.

Mr. Oliver: Cross examine.

Mr. Merrill: No questions.

Mr. Oliver: That is all.

The Court: That is all.

Mr. Oliver: That is all.

The Court: I suppose you offer the code in evidence? 20

Mr. Oliver: The Court takes judicial notice, as I understand it, of the code.

The Court: Yes.

Mr. Oliver: If you think it is necessary.

The Court: Yes.

Mr. Oliver: Do you want me to get the Town Clerk to prove the code?

The Court: No. That is not necessary, as I understand it, under the law, but the code should be offered. Have you any objection to that? 30

Mr. Merrill: No. I assume if I did object it would simply be necessary to bring the Town Clerk down here. And I don't want to do that.

The Court: All right. To keep the record straight, Mr. Merrill will admit the code.

Transcript of Evidence, Frank B. Moffett, direct.

Mr. Merrill: Now, if the Court please, before putting in the defendant's case, may I at this time question Mr. Moffett with respect to the affidavit which he made which is the basis of the complaint?

10 The Court: You may call him as your witness.

Mr. Merrill: Mr. Moffett?

FRANK B. MOFFETT, recalled, as a witness in behalf of defendant.

Direct examination by Mr. Merrill.

20 Q You made an affidavit which was the basis of this complaint?

The Court: Yes. The affidavit is here. Do you want him to refer to it?

Mr. Oliver: The affidavit is the complaint.

Mr. Merrill: No. I just want him to answer.

A Yes; I took this affidavit or I signed this affidavit.

30 Q And did you make oath that the statements made therein were true?

Mr. Oliver: I object, if the Court please. The affidavit speaks for itself.

The Court: That is correct. It is sworn to.

Mr. Oliver: What is the attempt? That the recorder took an affidavit, made a false certification or what?

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Transcript of Evidence, Frank B. Moffett, direct.

Mr. Merrill: I will bring that out. I wish to take these different allegations up in the order in which they are made in the affidavit and I will start with the word "make."

Mr. Oliver: Now, if the Court please, I object as not being material. The affidavit, the complaint, speaks for itself. The case of the Town is in, and the defendant is on his defense on his merits.

10

The Court: No; I do not see the purpose of this at all.

Mr. Merrill: If the Court please, you will recall the objection I did enter, and I said I wanted to raise the question as to jurisdiction. And you denied my right at that time to make it. And I now propose to attack the validity of this affidavit because I claim it is fatally defective, and I propose to show that it is fatally defective by this deponent himself. And these questions are directed to show that it is fatally defective.

20

The Court: I do not understand how you propose to show it by taking one word out of the affidavit.

Mr. Merrill: No. If the Court please, I am only taking one word at a time, because if I asked him how he knows it was made, I do not want him to give an answer which would only be proper with respect to the same question as to the word "caused." If you will just let me go forward with three or four questions you will see the materiality of it and the purpose of it.

30

The Court: Well, I will have Mr. Moffett answer your question. I do not know whether he can answer or not. I will let you

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Transcript of Evidence, Frank B. Moffett, direct.

try and see for a moment, see what you want to do.

Mr. Merrill: Very well.

10 Q In your affidavit, Mr. Moffett, you set forth that Harold L. Decker did make alterations in said building. What is the source of your information?

Mr. Oliver: Now, I object, if the Court please. It does not make a particle of difference. He has justified the thing now.

The Court: I will deny that line of questioning.

20 Mr. Oliver: An application to dismiss a complaint against him, made on the complaint itself. Most unusual proceeding. Rather interesting, but we have not got time.

30 Mr. Merrill: May it please the Court, I think the question of jurisdiction could be raised at any time, and I want to call your attention to certain definitions of the term "affidavit." I have here about a half dozen judicial definitions. I will only give two of them. One is from Blackstone. "An affidavit is a voluntary oath before some judge or officer of the court to evince the truth of certain facts." The other is from a New Jersey case. Partridge against the Mechanics Bank of Burlington: "An affidavit is a statement in writing declared to be true by the party making it and certified to have been sworn to before him by the officer who takes it." Now, we have here an affidavit in which Mr. Moffett alleges that
40 the basis and foundation of the proceeding,

Transcript of Evidence, Frank B. Moffett, direct.

and if the affidavit is not a true affidavit in a legal sense, the affidavit falls and the proceeding falls with it. And I have a right to ascertain whether the allegations made therein are made of Mr. Moffett's knowledge, which can only be the basis of an affidavit, or whether they are mere allegations without support in fact. He cannot come in afterwards, after he has made an affidavit, and attempt to justify the affidavit by proving subsequently what he said was true. What he has got to prove was at the time he made the affidavit he knew of his own knowledge that things were true, and that is a question of jurisdiction which I am now raising.

10

The Court: That has already been decided, Mr. Merrill, because that case came up before me, and Mr. Apgar testified before me he did the work on that day. And this is a new case and the affidavit was prepared and signed after that date. Therefore, he did have the information at that time. I think you will agree with me that is a true statement of fact. Is that correct?

20

Mr. Merrill: Not quite, if the Court please. This case is the case of Harold L. Decker, and the question is did Harold L. Decker make those alterations? That is the basis, with respect to the making, of the complaint itself. And if Harold L. Decker did not make them then the affidavit is untrue so far as that word is concerned. Then the question comes up did Harold L. Decker cause those alterations to be made? Did Mr. Moffett know of his own knowledge at the time he made this affidavit that that was a fact?

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Transcript of Evidence, Frank B. Moffett, direct.

10 Of course, if he did not, he had no right to make the affidavit, and the affidavit must fall. And the same is true of "suffer" and "permit." I think, if the Court please, I have a right to establish whether the allegations made in the affidavit were at that time known to Mr. Moffett or they were not.

20 The Court: Well, you can ask him whether he knew at that time, if you want to, but I cannot let you pick one word out of an affidavit and go through a long harangue here for nothing. If you want to ask him whether he knew or had knowledge that the affidavit was true on the day he signed it, January 5th, or whatever date it was, ask him that question. I will admit that question if you want to ask him.

30 Q What was the source of information or knowledge which you had upon the basis of which you made your affidavit that Harold L. Decker made or caused or suffered or permitted alterations to be made in the building 141 Harrison avenue? A Well, I heard Mr. Apgar testify that he done work there, and that he had a contract with Mr. Decker, and I was over there and saw the work started.

Q When did Mr. Decker testify that he had made alterations? A I didn't hear Mr. Decker testify, as I know of. I heard Mr. Apgar testify.

Q Did you ever hear Mr. Decker testify to having made any alterations? A I don't know as I did.

Q Did you ever hear him testify as to having caused, suffered, or permitted alterations to be made? A No.

40

Transcript of Evidence, Frank B. Moffett, cross.

Q Then, as a matter of fact, your affidavit is not based on knowledge, but on hearsay? A I know that I saw the work had been done there; the alteration has been started.

Q Did you see Mr. Decker there? A No; but I understand that he is the owner of the house.

Q But you did not see him making any? A 10
No.

Q Did you see any one at work there? A
No.

Q Then I ask you again: Was the affidavit made on information from persons other than Mr. Decker? A Somewhat.

Q Was any of the information on which it was based secured personally from Mr. Decker?

Mr. Oliver: Well, now, what difference 20
does that make?

The Court: Does not make a particle of difference, of course. He can answer the question. It does not make a particle of difference which way he answers.

A What was the question again?

(Question repeated by the stenographer.)

A No. 30

Mr. Merrill: That is all.

Cross examination by Mr. Oliver.

Q You say you went up there and saw that certain alterations had been made. What were the alterations that you saw? A Why, there was trim taken off, some of the door openings, and 2 by 4 joists placed in some of the door openings, especially one between the front hall 40

Transcript of Evidence, Motion to Dismiss.

and a room I presume had been a living-room and another door opening between the hall on the other side partially closed with these 2 by 4 joints, and several of the other openings, door openings, and the first floor had joists, 2 by 4 joists, placed in them which is preparation for closing them up for lath and plaster.

10 Q What, if anything, had been done to any stairway? A Why, there had been some change there, I think a doorway leading from the main stairs to the rear of the house on the first floor, that staircase had been studded up by 2 by 4 joists placed in it.

Mr. Oliver: That is all.

20 The Court: That is all. Any other questions?

Mr. Merrill: No.

The Court: That is all.

Mr. Oliver: That is his case.

The Court: Is that your case?

Mr. Merrill: That is my case.

The Court: It is up to you to sum up.

MOTION TO DISMISS.

30 Mr. Merrill: Now, if the Court please, I renew my motion that the case be dismissed on the ground that it appears by Mr. Moffett's own testimony that what is alleged to be an affidavit is not an affidavit at all; that he has no knowledge, and did have no knowledge that Harold L. Decker made or caused, suffered, or permitted alterations to be made at the premises at 141 Harrison avenue, at the time indicated. There-
40 fore, there was no jurisdiction in the Court to

Transcript of Evidence, Motion to Dismiss.

issue the complaint, and the complaint must fall—summons, rather (change it) to issue the summons, and the summons must fall with the affidavit.

The Court: The motion will be denied, Mr. Merrill.

10

Mr. Merrill: I then move to dismiss for lack of proof. There is no proof identifying the land in the deed which is in evidence with the premises at 141 Harrison avenue. There is nothing in the case which connects 141 Harrison avenue with the defendant Harold L. Decker. There is nothing in the case to prove that the work which was done by Mr. Decker on the 16th constituted an alteration. There is certain work in and about a man's house which can be done without any permit; repairs, for example, minor repairs could be made; work can be done which does not constitute any change in the structure or nature of the house. There is nothing in the case which suggests an alteration within the definition which must necessarily be given as to what constitutes such alteration, as requires a permit. There is no information, no evidence of any kind, as to when Mr. Moffett was there or whether he knows the condition before the condition existed which he testified to, or whether there was any change at that time in it. He has had no information from Mr. Decker, and he has nothing on which to base his assertion or any assertion that the change was made or on about the 16th of November. I, therefore, move—

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The Court: Is that a motion you are making now or summing up?

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Transcript of Evidence, Motion to Dismiss.

Mr. Merrill: No. That is a motion. I therefore move that the complaint be dismissed on the ground that there is no proof of the ownership of that particular property or of any work which would constitute alteration within the terms of the code.

10

The Court: Is not your second motion largely a matter for the jury, on the question of the alteration? What they believe.

Mr. Merrill: No, your Honor, what constitutes an alteration is a matter of law, and the only thing for the jury to determine is whether the work done comes within such definition of an alteration which requires a permit, as the Court shall give them.

20

The Court: Well, I feel that that entire motion is directed more as a matter of a jury question, and you called for a jury, and I will allow that to go to the jury. And I will deny your last motion.

Mr. Oliver: Are you going to sum up?

Mr. Merrill sums up to the jury on behalf of the defendant.

30

Mr. Oliver sums up to the jury on behalf of the prosecutor.

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Transcript of Evidence, Charge to Jury.

CHARGE TO JURY.

At 3:02 P. M. the Court then charged the jury as follows:

Gentlemen of the Jury: I will state that at this time that Mr. Merrill has requested me to charge the jury; I will read the statement to you: This is an action in which, if the defendant is found guilty, the Court may impose a sentence of not more than ninety days in jail. 10

To find the defendant guilty as charged the evidence against him must be such that you are satisfied that he is guilty beyond reasonable doubt; not a mere preponderance of evidence, but beyond a reasonable doubt.

I will state, as Mr. Oliver has already informed you, that you are not to be interested in the penalty in this case. Your province here today is only to determine whether the defendant is guilty or not guilty. The fact as to the punishment is entirely a matter for this court. You will weigh the evidence as submitted to you by the plaintiff and the defendant, and inform the Court whether you find the defendant guilty or not guilty. You are not to take into consideration the question of punishment. 20 30

It is not the law, gentlemen, in this case, that Mr. Oliver must prove him guilty beyond a reasonable doubt. That is purely a criminal case.

Mr. Merrill: I will ask the Court to charge the jury as to what constitutes an alteration, to define an alteration, in the terms of the building code, so that the jury may know what work, either as to extent or character, is such that a building permit must be granted before the work can be done. 40

Transcript of Evidence.

The Court: I will deny to make such a charge to the jury. That is purely a question as to whether you (addressing the jury) will determine whether this was an alteration within the building code.

10 3:39 P. M. Jury re-enters the room, after having retired to deliberate upon a verdict.

The Court: Gentlemen, if you will answer as your names are called. (Jury polled, and all were present.)

The Court: Gentlemen of the jury, have you agreed upon a verdict?

The Jury: We have.

20 The Court: Gentlemen, who shall speak for you?

The Jury: Foreman.

The Court: Mr. Foreman, how do you find? For the plaintiff or for the defendant? What is your verdict?

The Foreman: We find the defendant guilty.

30 The Court: Gentlemen of the jury, you find the defendant guilty? So say you all?

The Jury: We do.

The Court: Any questions?

Mr. Merrill: No. Except I want to make a motion that affects you only.

The Court: All right.

40 Mr. Merrill: I should have called this to Mr. Oliver's attention but I forgot it for the moment. I want to call the attention of the Court to the

Transcript of Evidence.

wording of the Ordinance No. 403, which is an amendment to Ordinance 65, and is referred to in the affidavit, or, rather, in the summons. The second paragraph reads this way: "The owner or owners of any building or part thereof upon which any building in violation of this ordinance may be placed or shall exist * * *" I wish to point out the defect in the ordinance which, to my mind, invalidates it as an ordinance under which any penalty can be imposed in this case. It does not appear that there is any building placed upon that property in violation of any ordinance. 10

The Court: All right, you want that on the record?

Mr. Merrill: Yes. 20

The Court: All right, sir. What do you want to do with it? You want to make your motion for what?

Mr. Merrill: I say I object to any penalty being imposed under the terms of that ordinance.

The Court: All right. Owing to the fact that Mr. Decker is not present I will impose whatever penalty the Court sees fit on Monday night, at 7:30. 30

Mr. Merrill: You mean you would like Mr. Decker present at that time?

The Court: Yes. I would like him present at the time the penalty is imposed. It is quasi-criminal matter. I would like him present on Monday evening, at 7:30.

Mr. Merrill: May it please the Court, I will see that Mr. Decker is present at 7:30 on Monday evening, in the Recorder's Court, in view of the 40

Transcript of Evidence.

fact that the Court rules that it is a quasi-criminal matter, and the defendant should be present when sentence is imposed. You did not pass on my objection.

The Court: I will deny the motion.

10 Mr. Merrill: I would like to have it on the record that it is denied.

The Court: Yes.

I certify that the foregoing is a true and correct transcript of the proceedings taken in the matter hereinbefore set forth at the time and place and on the date hereinbefore set forth.

EDWIN J. O'BRIEN,
Court Stenographer.

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*Complaint against Apgar.***COMPLAINT.**

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

FRANK B. MOFFETT, Building Inspector of the
 Town of Westfield, being duly sworn according 10
 to law, on his oath complains and says, that on or
 about November 16, 1927, Edward A. Apgar did
 build, erect or make or assist in building, making
 or erecting alterations to the house known as
 No. 141 Harrison avenue, in the Town of West-
 field, aforesaid, owned by Harold L. Decker and
 Eva S. Decker, his wife, and William A. Mc-
 Allister and Emily S. McAllister, his wife, with-
 out having first applied for and obtained a per-
 mit therefor from the Inspector of Buildings of 20
 said Town of Westfield in violation of Section 3,
 Article 2 of General Ordinance No. 65 of said
 Town of Westfield entitled, "An ordinance to
 regulate and control the inspection, construction,
 alteration and repair of buildings in the Town of
 Westfield," as amended by General Ordinance
 No. 403.

Wherefore he prays that the said Edward A.
 Apgar may be summoned to answer this com- 30
 plaint and be dealt with as law and justice may
 require.

FRANK B. MOFFETT.

Sworn and subscribed before me
 this 5th day of January, 1928.

AUGUSTUS C. NASH,
 Notary Public of New Jersey.

*Summons against Apgar.***SUMMONS.**

UNION COUNTY, ss.

The State of New Jersey to any
 police officer of the Town of West-
 10 (L. s.) field—GREETING:

Whereas complaint on oath has been
 made before me the Recorder of the
 Town of Westfield, that on or about November 16,
 1927, Edward A. Apgar did build, erect or make
 or assist in building, making or erecting altera-
 tions to the house known as No. 141 Harrison
 avenue, in the Town of Westfield, aforesaid,
 owned by Harold L. Decker and Eva S. Decker,
 his wife, and William A. McAllister and Emily S.
 20 McAllister, his wife, without having first applied
 for and obtained a permit therefor from the In-
 spector of Buildings of said Town of Westfield
 in violation of Section 3 of Article 2 of General
 Ordinance No. 65 of said Town of Westfield en-
 titled, "An Ordinance to regulate and control the
 inspection, construction, alteration and repair of
 buildings in the Town of Westfield" as amended
 by General Ordinance No. 403.

Therefore you are required to summon the said
 30 Edward A. Apgar to be and appear before me,
 the Recorder of the Town of Westfield, aforesaid,
 at the Town Hall, No. 121 Prospect street, in the
 said Town of Westfield, on Monday the 9th day
 of January, 1928, at 7:30 P. M. o'clock in the
 evening to answer the said complaint and to be
 further dealt with as law and justice may re-
 quire.

Summons against Apgar.

Given under my hand this 5th day of January,
Nineteen hundred and Twenty-eight.

AUGUSTUS C. NASH,
Recorder of the Town of Westfield.

Served the within summons personally on the
said Edward A. Apgar on January 5, 1928, by 10
reading the same to him, and giving him a true
copy thereof.

ERNEST LONG,
Police Officer.

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*Complaint against McAllister.***COMPLAINT.**

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

10 FRANK B. MOFFETT, Building Inspector of the
 Town of Westfield, being duly sworn according
 to law, on his oath complains and says, that on
 or about November 16, 1927, William A. McAl-
 lister being then and there one of the owners
 of the house known as No. 141 Harrison avenue,
 in the Town of Westfield, aforesaid, did make, or
 cause, suffer or permit to alterations to be made
 in said building without having first applied for
 and obtained a permit therefor from the In-
 20 spector of Buildings of said Town of Westfield,
 in violation of Section 3 of Article II of General
 Ordinance No. 65 of said Town of Westfield en-
 titled, "An Ordinance to regulate and control the
 inspection, construction, alteration and repair of
 buildings in the Town of Westfield," as amended
 by General Ordinance No. 403.

Wherefore he prays that the said William A.
 McAllister may be summoned to answer this com-
 plaint and be dealt with as law and justice may
 require.

30

FRANK B. MOFFETT.

Sworn and subscribed before me
 this 5th day of January, 1928.

AUGUSTUS C. NASH,
 Notary Public of New Jersey.

40

Summons against McAllister.

SUMMONS.

UNION COUNTY, ss.

The State of New Jersey to any
police officer of the Town of West-
(L. s.) field—GREETING:

Whereas complaint on oath has been 10
made before me the Recorder of the
Town of Westfield, that on or about November
16, 1927, William A. McAllister being then and
there one of the owners of the house known as
No. 141 Harrison avenue, in the Town of West-
field, aforesaid, did make, or cause, suffer or
permit alterations to be made in said building
without having first applied for and obtained a
permit therefor from the Inspector of Buildings
of said Town of Westfield, in violation of Sec- 20
tion 3 of Article II of General Ordinance No. 65
of said Town of Westfield entitled "An Ordi-
nance to regulate and control the inspection, con-
struction, alteration and repair of buildings in the
Town of Westfield," as amended by General
Ordinance No. 403.

Therefore you are required to summon the said
William A. McAllister to be and appear before
me, the Recorder of the Town of Westfield, 30
aforesaid, at the Town Hall, No. 121 Prospect
street, in said Town of Westfield, on Monday the
Ninth day of January, 1928, at 7:30 o'clock in
the evening to answer the said complaint and to
be further dealt with as law and justice may re-
quire.

Given under my hand this 5th day of January,
Nineteen hundred and Twenty-eight.

AUGUSTUS C. NASH,
Recorder of the Town of Westfield. 40

Venire.

Served the within summons personally on the said William A. McAllister on January 5, 1928, by reading the same to him, and giving him a true copy thereof.

ERNEST LONG,
Police Officer.

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VENIRE.

TOWN OF WESTFIELD,
Plaintiff,

vs.

HAROLD L. DECKER,
Defendant.

20

(SEAL)

TOWN OF WESTFIELD,
COUNTY OF UNION, } *ss.*
STATE OF NEW JERSEY.

The State of New Jersey to John W. O'Connell,
Constable of the County of Union:

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You are hereby commanded that you cause to come before the Recorder's Court of the Town of Westfield, holden at the court room, Town Hall, 121 Prospect street, in the said Town and County, on Friday the Twentieth day of January, 1928, at 2 o'clock in the afternoon twelve good and lawful men or women, being citizens of this State, above the age of twenty-one years, and under the age of sixty-five years, by whom the truth of the matter may be better known, and who are in nowise a kin to said plaintiff, and Harold

40

Venire.

L. Decker, defendant, nor interested in the said cause, to make a jury for the trial of the action between the parties aforesaid, because as well the said plaintiff as the said defendant have put themselves on that jury. And have you there the names of those jurors and this writ.

10

WITNESS, AUGUSTUS C. NASH, Esq., Judge of said court at Westfield aforesaid, the Eighteenth day of January, in the year of our Lord Nineteen hundred and twenty-eight.

AUGUSTUS C. NASH,
Recorder of the Town of Westfield.

By virtue of the above Venire Facias, I have duly summoned the following lawful jurors to appear before the Recorder's Court of Westfield, at the time designated:

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1. Robert L. DeCamp.
 - 2.
 - 3.
 4. John Degman.
 5. James G. Casey.
 6. Wesley Curry.
 7. Harry W. Taylor, Sr.
 8. Louis Cagnassolo.
 9. Harry Cole.
 10. Harry Udell.
 11. Walter Seagar.
 12. Frank L. Miller.
- Benjamin Kissam.
Horace Martin.
Dated January 20, 1928.

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Docket—Town v. Apgar.

TRANSCRIPT OF RECORDER'S DOCKET.

Town of Westfield in Union County.
Before Augustus C. Nash, Recorder.

10	TOWN, <div style="text-align: center;"><i>vs.</i></div> EDWARD A. APGAR.	}	<i>On Complaint for Violation Building Code.</i>
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Date of complaint January 5, 1928.

Name and address of complainant, Frank B. Moffett, Building Inspector.

Name and address of defendant, Edward A. Apgar.

20 Complaint—Complaint made by Frank B. Moffett, Building Inspector, under date of January 5th, for violation of Section 3, Article 2, Gen'l Order No. 65 as amended by Gen'l Order No. 403, complaint alleged that on or about November 16, 1927, Edward A. Apgar did build, erect or make or assist in building, making or erecting alterations to the house known as No. 141 Harrison avenue, violating said section. Summons issued and made returnable on Monday the 9th day of

30 January at 7:30 P. M. Summons served personally on Edward Apgar on January 5, 1928, by reading same to him and giving him a true copy thereof. Ernest Long, Police Officer. Adjourned by consent until Thursday, January 12th, at 7:30 P. M.

At that time Mr. Oliver moved that the case of the Town of Westfield *v.* Edward A. Apgar be dismissed.

Motion granted.

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AUGUSTUS C. NASH,
Recorder.

Docket—Town v. McAllister.

TRANSCRIPT OF RECORDER'S DOCKET.

Town of Westfield in Union County.

Before Augustus C. Nash, Recorder.

TOWN,	}	<i>On Complaint for Violation Building Code.</i>	10
<i>vs.</i>			
WILLIAM A. McALLISTER.			

Date of complaint, January 5, 1928.

Name and address of complainant, Frank B. Moffett, Building Inspector.

Name and address of defendant, William A. McAllister. 20

Complaint—Complaint made by Frank B. Moffett, Building Inspector under date of January 5th, for violation of Section 3, Article 2, General Order No. 65 as amended by General Order No. 403. Complaint alleged that on or about November 16, 1927, Wm. A. McAllister did make or cause, suffer or permit to alterations to be made on house known as No. 141 Harrison avenue. Violating said section. 30

Summons issued and made returnable on Monday the 9th of January, at 7:30 P. M. Summons served personally on Wm. A. McAllister on January 5, 1928, by reading the same to him and giving him a true copy thereof. Ernest Long, Police Officer. Adjourned by consent until Thursday, January 12th, at 7:30 P. M.

At that time Mr. Oliver moved that the case of the Town of Westfield *v.* William A. McAllister stand adjourned until Friday, January 27, 1928, at 2:30 P. M. Motion granted. 40

Docket—Town v. McAllister.

January 27, 1928, motion made that case be adjourned until Thursday, February 2, 1928, at 2 P. M.

10 Mr. Oliver notified Court that he desired to withdraw the complaint on February 2, 1928, at 2 P. M. Mr. E. A. Merrill said McAllister appeared as Mr. Oliver did not appear, the case was dismissed.

AUGUSTUS C. NASH,
Recorder.

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REASONS.

Filed March 1, 1928.

NEW JERSEY SUPREME COURT.

HAROLD L. DECKER,

*Prosecutor,**vs.*AUGUSTUS C. NASH, Recorder of
the Town of Westfield, and
THE RECORDER'S COURT OF THE
TOWN OF WESTFIELD, Union
County, New Jersey,*Respondents.*

10

*On
Certiorari.
Reasons.*

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HAROLD L. DECKER, the prosecutor, in the above entitled proceeding to have set aside his conviction in the Recorder's Court of the Town of Westfield, in the County of Union, on January 20, 1928, relies upon the following reasons:

1. Because the affidavit of Frank B. Moffett, upon which affidavit the summons was based, was untrue in that said Frank B. Moffett did not depose of his own knowledge of the facts alleged, but deposed merely from hearsay.

30

2. Because the complaint is in the disjunctive form, and did not properly apprise prosecutor of the particular charge upon which he was to be tried.

3. Because the Recorder, upon being requested so to do, refused to charge the jury what was *the meaning in law of the term "alteration."*

40

Reasons.

4. Because the jury brought in a verdict of "guilty" without specifying of what the prosecutor was found to be guilty.

5. Because the Recorder imposed sentence notwithstanding the objections of prosecutor.

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E. A. MERRILL,
Attorney of Prosecutor.

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ORDER TO TAKE DEPOSITIONS.

Filed February 20, 1928.

NEW JERSEY SUPREME COURT.

HAROLD L. DECKER,

Prosecutor,

vs.

AUGUSTUS C. NASH, Recorder of
the Town of Westfield, and
THE RECORDER'S COURT OF THE
TOWN OF WESTFIELD, Union
County, New Jersey,

Respondents.

10

*On
Certiorari.*

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Application being made for leave to take depositions to be used in the argument of the above-stated cause:

It Is, on this 18th day of February, 1928, ORDERED that said prosecutor and respondents have leave to take depositions, on five days' notice, to be used in the said argument.

SAMUEL KALISCH,
Justice of the Supreme Court.

30

On motion of

E. A. MERRILL,

Attorney of Prosecutor.

Let the above rule be entered on the minutes.

40

DEPOSITION OF WILLIAM A. McALLISTER.

WILLIAM A. McALLISTER, a witness produced on behalf of the prosecutor, being first duly sworn according to law and examined by Mr. Merrill, deposes and says:

10 Q You are one of the owners of premises 141 Harrison avenue, Westfield, New Jersey? A Yes, sir.

Q Did you have occasion to go to Mr. Moffett, Building Inspector, after his refusal to issue a building permit for certain alterations to the premises 141 Harrison avenue? A I did.

Q On what date? A February 2, 1928.

20 Q What was your purpose in seeing Mr. Moffett? A To ask him if he would point out the objectionable features in plans and specifications previously submitted, so that an application for permit might be made for the remainder of the work.

Q Did you see Mr. Moffett? A Yes, I saw Mr. Moffett on February 2, 1928.

Q What was the result?

30 I object to the testimony being taken at this time, because no return to the writ has been made. I object to the testimony as being immaterial to the issue.

Q What was the result of your visit to Mr. Moffett? A I object if that calls for conclusion as to what Mr. Moffett says.

Q What did Mr. Moffett say? A He said it would be better to submit a new plan.

Q Was a new plan submitted? A Yes, sir.

40 Q About what date? A On or about February 9, 1928.

Deposition of William A. McAllister.

Q I show you a blue print and ask you if you recognize that print? A That is the blue print that was submitted to Mr. Moffett on or about February 9, 1928.

Blue print is offered in evidence and marked Exhibit 1 on the part of the prosecutor. 10

I object to the evidence as being absolutely immaterial.

Q Was the print retained by Mr. Moffett or returned?

Objected to as being immaterial.

A Mr. Moffett returned the print to me.

Q What did you do, if anything thereafter, with this blue print? A On February 11th, I mailed the blue print to Mr. Moffett with a letter. 20

Q I show you a letter addressed to Mr. Frank B. Moffett dated February 11, 1928, and signed Wm. A. McAllister, and ask you if you recognize the letter? A That is the letter that I wrote to Mr. Moffett.

By Mr. Oliver.

Q Is that the original? A That is the original. 30

Objected to as being immaterial and irrelevant.

Re-direct.

Q What followed up the sending of this letter and blue print to Mr. Moffett?

Objected to as being immaterial and irrelevant.

A About a week after Mr. Moffett wrote me a letter asking me to call at his office in regard to 40

Deposition of William A. McAllister.

my communication of February 11, 1928, I called to see him, and he returned both the blue print and letter to me, and said that he could not issue any permit for the work, and would not allow it to be done.

10 Q Referring to the blue print (Exhibit 1), how is the work indicated on the blue print which you desired to do?

Objected to, because the blue print speaks for itself.

20 A Some of the work proposed to be done is indicated by cross hatches; shows two new closets, one each in the room marked "Library" and "Dining Room"; two large openings, each closed with doors hung thereon; one door opening to library and one door opening to living room; and it also shows a new closet off the room marked "Sewing Room," and a new door opening from the rear of the living room to the hall.

Cross examined.

Q I suppose you went there to see Mr. Moffett on February 2nd at the suggestion of Mr. Merrill, the attorney of Mr. Decker, did you not?

A That is my recollection.

30 Q And every move you have made since then as to which you have testified to, was made at the suggestion of Mr. Merrill, was it not? A Do you mean that every move taken between Mr. Moffett and myself?

Q Every move made by you about which you have testified. A For the most part I cannot define about things I have taken up with him.

40 Q Most parts you cannot define then, they were done at the suggestion of Mr. Merrill? A Yes.

Deposition of William A. McAllister.

Q Did you do a single thing without the suggestion of Mr. Merrill? A No.

Q Not as to that which is testified to this morning; did Mr. Merrill write that letter? A I wrote that myself.

Q Did he tell you what to say? A My recollection is that he indicated the general tone of the letter; that it was to be sent to Mr. Moffett for that intent. 10

Q What was the intent? A The only intent was to enable the carpenter to go there and do work that would be lawful, and that would not result in any further disturbance or any further trouble for anyone connected with the operation.

Q It was all for the purpose of enabling you to give the testimony that was given today, was it not? 20

Objected to as immaterial.

A I have no knowledge of it being any such purpose.

Q You are interested with Mr. Decker in this building, are you not? A Yes, sir.

Q You are partners in this business? A In this property, yes.

Re-direct.

Q You have testified to the effect that I suggested certain things contained in your letter of February 11th to Mr. Moffett. Can you recall more specifically just what my suggestion was, and why? A Not precisely what your suggestion was. 30

Q Will you state it as precisely as you can? A My recollection is that the contractor said he could not do anything there unless he had some written sanction of it of some kind, and 40

Deposition of William A. McAllister.

that by writing to the Building Inspector it seemed that we must get either an approval or a denial of our right to do any work.

Re-cross.

10 Q Did Mr. Merrill tell you to say it was repair work? A I said that myself.

Q You think that is repair work that you proposed to do according to that blue print? A The most of it, yes.

Q Is there any of it that is not repair work?

Mr. Merrill: If that calls for conclusion I haven't any objection to put it in the record what his conclusion is, but I cannot see that it has any relevancy, as the work speaks for itself.

20 Q You did characterize that work in your letter as repair work? A Yes, sir.

Q Was that at Mr. Merrill's suggestion? A No.

Q That was your own thought that that work constituted repair work? A Yes.

Q Did anybody tell you that you had to have a permit for repair work? A No, sir.

30 Q Did you ever read the ordinance of the Town of Westfield, the Building Code? A Yes, sir.

Q Does that require a permit for repair work? A No.

Q Then, were you not trying to trap the Building Inspector? A No, sir; I certainly was not.

Re-direct.

Q As a matter of fact, before you wrote this letter, this blue print had been submitted to Mr. Moffett? A Yes, it had.

40 Q Mr. Moffett knew of the interior—

Objected to as leading.

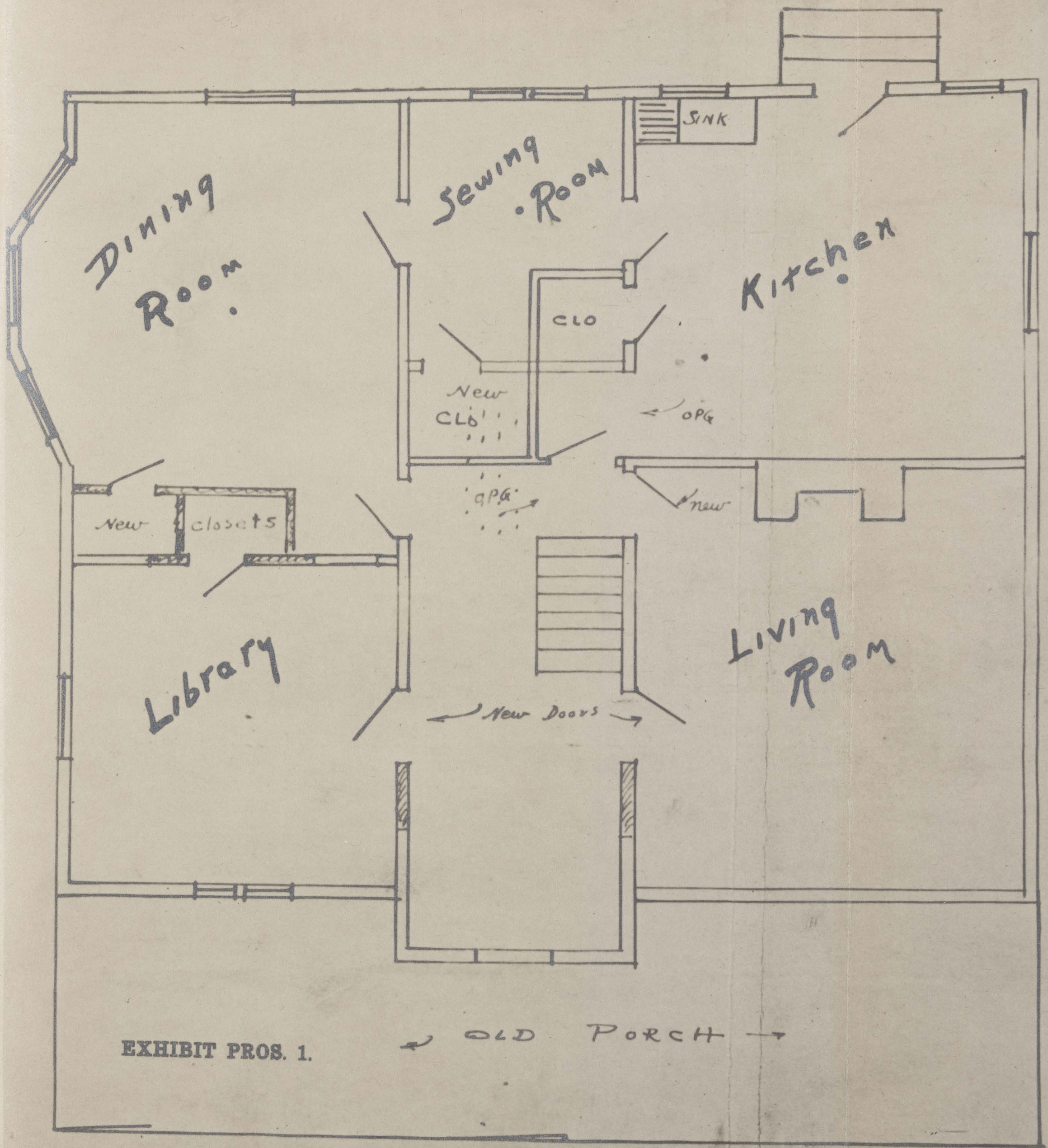
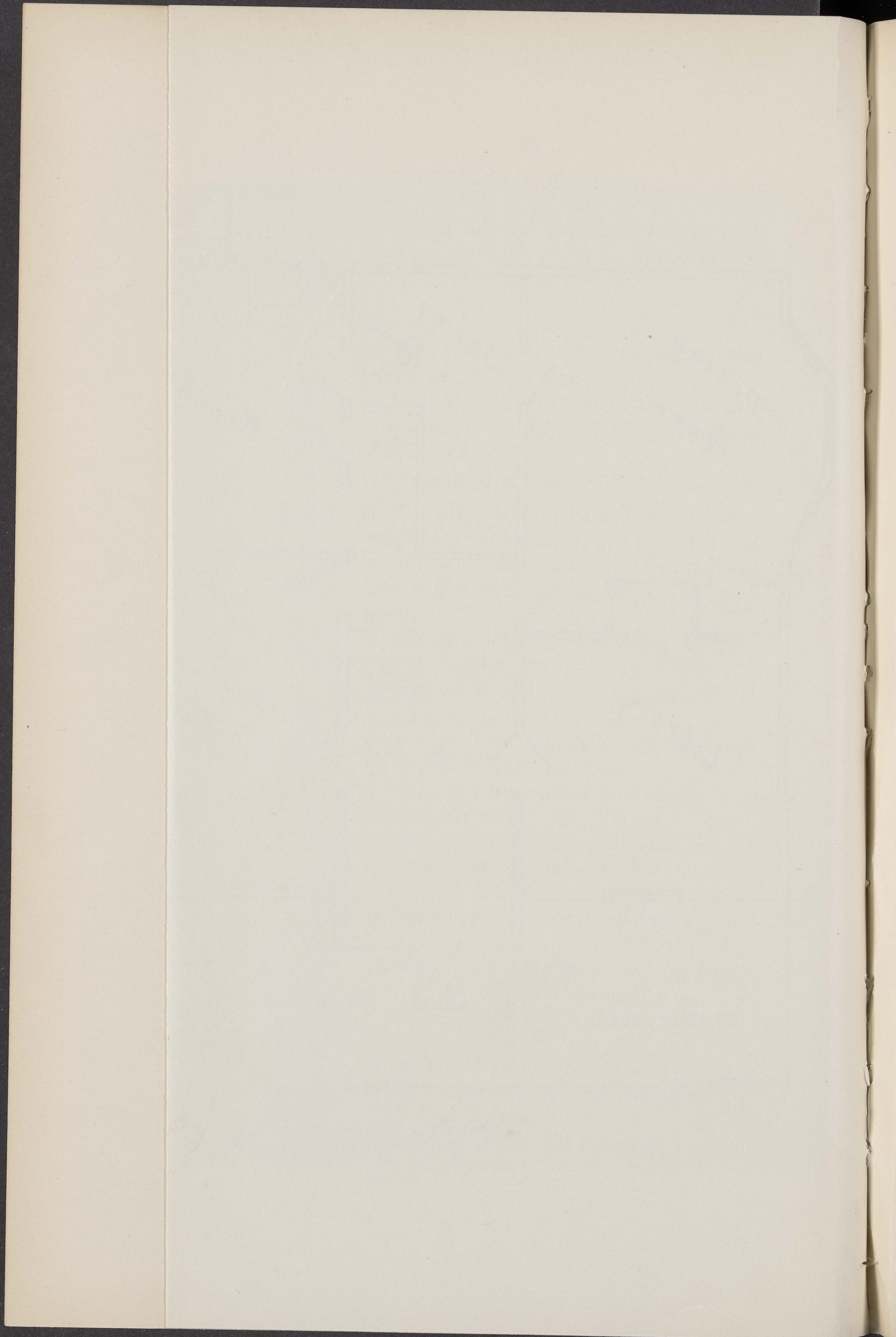


EXHIBIT PROS. 1.

OLD PORCH

FIRST FLOOR
 $\frac{1}{4}'' = 1'0''$



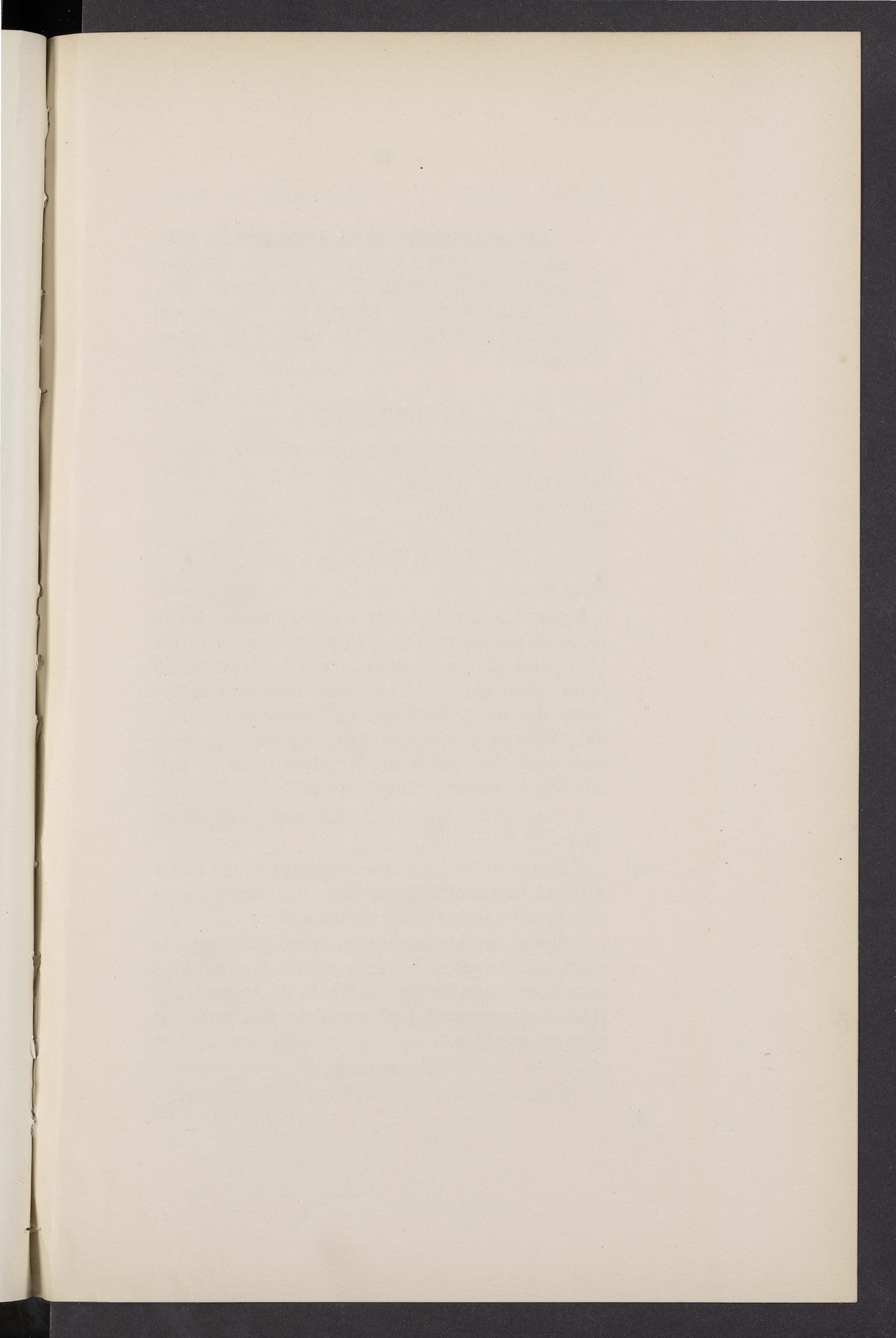


Exhibit Pros. 2.

Letter dated Westfield, February 11, 1928, addressed to Mr. Frank B. Moffett, Building Inspector, Westfield, N. J., and signed "Wm. A. McAllister," is offered in evidence and marked Exhibit 2 on the part of the prosecutor.

10

EXHIBIT PROS. 2.

Westfield, February 11, 1928.

Mr. Frank B. Moffett
Building Inspector,
Westfield, N. J.

Re: No. 141 Harrison Avenue.

Dear Sir:—

20 Referring to the repair work which we desire to do at the above house, in accordance with the blue print plan submitted to you by Mrs. McAllister when she called at your office and talked about the matter with you on Thursday and Friday, February 9th and 10th, we rely on your assurance that under the Building Code no permit will be required for this work.

A copy of the blue print plan mentioned, is attached to this letter.

30 It is understood that the character of the house will not be changed from that of a residence as governed by the existing ordinances.

Relying on this assurance from you that the work can be done lawfully without a building permit, we have instructed Mr. E. A. Apgar, Contractor, to proceed and complete this work as soon as possible.

Yours truly,

Wm. A. McAllister.

40

*Exhibits for Respondent.***EXHIBIT A FOR RESPONDENT.**

Section 3 of Article 2 of General Ordinance No. 65 of the Town of Westfield, entitled, "An ordinance to regulate and control the inspection, alteration and repair of buildings in the Town of Westfield,"

10

That before any person or persons shall erect, raise or alter any building or buildings, the person or persons intending or desiring to erect, raise or alter the same shall first apply for and obtain from the said Inspector of Buildings a permit signed by said inspector and countersigned by the Chairman of the Building Committee, and shall pay for such permit at the rate of two dollars per one thousand of the estimated cost of the building or alteration, provided that no permit shall be issued for a sum less than two dollars.

20

EXHIBIT B FOR RESPONDENT.**GENERAL ORDINANCE NO. 403**

An Ordinance to amend general ordinance No. 65 entitled "An Ordinance to Regulate and Control the Inspection, Construction, Alteration and Repair of Buildings in the Town of Westfield."

30

Be it ordained by the Council of the Town of Westfield, in the County of Union, that Article IV, entitled "Penalties," of General Ordinance No. 65 entitled, "An Ordinance to regulate and control the inspection, construction, alteration and repair of buildings in the Town of Westfield," be and the same is hereby amended to read as follows:

40

Exhibits for Respondent.

The owner or owners of any building, or part thereof, upon which any building in violation of this ordinance may be placed or shall exist; any architect, builder, carpenter or mason who may be employed or assist in the commission of any such violation, and any and all persons who shall
10 violate any of the provisions of this ordinance or fail to comply therewith, or any requirement thereof, or who shall violate or fail to comply with any order or regulation made thereunder, or who shall build in violation of any detailed statement of specification or plans, submitted and approved thereunder, or of any certificate or permit issued thereunder, shall severally, for each and every such violation and non-compliance, re-
20 spectively forfeit and pay a penalty of not more than two hundred dollars (\$200.), or be imprisoned in the county jail for not more than ninety days, and the magistrate before whom such violator shall be convicted may impose such punishment by fine or imprisonment in the county jail, or both, as he in his discretion may see fit, not exceeding the maximum herein fixed, and the permit shall stand revoked until such time as the ordinance is complied with.

30 And be it further ordained that this ordinance shall take effect immediately.

Passed and Adopted Mar. 28, 1927.

OPINION OF SUPREME COURT.

PER CURIAM:

The writ of certiorari was allowed in this case to review the finding of a jury on January 20, 1928, that the prosecutor Harold L. Decker was guilty, in that, he did make or cause, suffer or permit, "alterations to be made" in a house known as No. 141 Harrison avenue in the Town of Westfield, without having first applied for and obtained a permit therefor from the Inspector of Buildings, in violation of Section three of Article II of a General Ordinance, No. 65, of the Town of Westfield.

10

The prosecutor files five reasons, on which he relies for setting aside the conviction of the prosecutor.

20

We have examined the record with the reasons assigned for setting aside the conviction, together with the briefs of the parties filed with the oral argument. Our conclusion is, the reasons are without legal merit. They call for no extended discussion.

The reasons are, First, the affidavit of Frank B. Moffett, on which the summons was based is based upon hearsay. This does not seem to be so. Second, the complaint is in the disjunctive form. Third, the Recorder refused to charge the meaning of the word "alteration." Fourth, because the jury brought in a verdict of guilty. Fifth, because the Recorder imposed sentence. This reason is not discussed in the brief.

30

The conviction of the prosecutor brought up by the writ of certiorari is affirmed and the writ dismissed with costs.

40

RULE DISMISSING WRIT.

Filed May 5, 1928.

NEW JERSEY SUPREME COURT.

10	HAROLD L. DECKER, <div style="text-align: right;"><i>Prosecutor,</i></div> <div style="text-align: center;"><i>vs.</i></div> AUGUSTUS C. NASH, Recorder of the Town of Westfield, etc., <div style="text-align: right;"><i>Defendants.</i></div>	} <i>On</i> <i>Certiorari.</i> <i>Rule Dis-</i> <i>missing Writ.</i>
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20 This cause having been duly argued at the present term of this court by E. A. Merrill, of counsel for the prosecutor, and Paul Q. Oliver, of counsel for the respondents, and the Court having considered the same, and finding no error in the records or proceedings before the Recorder of the Town of Westfield;

It is thereupon ORDERED and ADJUDGED that the writ of certiorari heretofore granted herein be dismissed, with costs.

30

JAMES F. MINTURN,
J. S. C.

40

New Jersey Court of Errors and Appeals

HAROLD L. DECKER, <i>Prosecutor-Appellant,</i>	}	<i>On</i>
<i>vs.</i>		<i>Certiorari.</i>
AUGUSTUS C. NASH, Recorder of the Town of Westfield, etc., <i>Respondent.</i>	}	<i>On Appeal.</i>

BRIEF OF PROSECUTOR-APPELLANT.

This is an appeal from a rule entered by the Supreme Court dismissing a writ of certiorari to review the conviction of the appellant, in the Recorder's Court of the Town of Westfield, for an alleged violation of the building code. Appellant was convicted of no offense particularly specified, for acts done neither by himself nor by his servants or agents and which, had he done them, would have constituted no offense, and upon a complaint which was untrue in law and in fact and differed materially from the complaint described in the docket record. There will not be found in the complaint, in the testimony, or in the docket record, a single act of commission or omission by the appellant, or by his agents or servants.

Harold L. Decker, the appellant, and one William A. McAllister were the owners of a dwelling house. Desiring to make certain alterations they let the contract to a builder, one E. A. Apgar. Apgar went to the office of the building inspector to get a permit to do the work, but as the inspector was then absent the application was left with the stenographer (Case, p. 25, l. 8), and then, on his own initiative, went to the house with one

of his employees, whom he set to work on certain preliminary work for which no permit was required (Case, p. 58, l. 33). The work done was this:

Q What work did you do there? A Removed some trim and a little plaster. (Case, p. 23, l. 15.)

A I nailed a few studs in a couple of large openings. (Case, p. 23, l. 29.)

That is absolutely *all* the testimony as to the work done by Apgar before he learned of the inspector's refusal to issue a permit, and the work was then discontinued. The work was not done, or ordered to be done, by this appellant.

Subsequently the two owners and the contractor were haled into the Recorder's Court on the charge of having violated that provision of the building code which requires a permit to be issued before one shall "erect, raise, or alter" a building. (See Exhibit A, Case, p. 59, l. 5; and Exhibit B, Case, p. 59, l. 28.)

In the complaint against the contractor, Apgar, it was charged that he "did build, erect or make, or assist in building, making, or erecting alterations" without a permit (Case, p. 39, l. 13). The complaint was afterward withdrawn (Case, p. 46, l. 36), although Apgar was the person who, through his employee, actually did the work.

In the complaints against the owners, Decker and McAllister, it was charged that each, severally, "did make, or cause, suffer or permit alterations to be made" without a permit. (Case, p. 10, l. 15; p. 42, l. 15.)

The complaint against McAllister was afterward withdrawn (Case, p. 48, l. 7), although it does not appear that the responsibility of McAllister for the alleged violation was in anywise

different from, or less than, the responsibility of Decker.

The complaint against Decker was tried.

Although there was not a scintilla of evidence connecting Decker with the work done by Apgar, although there was nothing in evidence or by way of definition from which an inference could be raised that the work done was an "alteration," and notwithstanding the charges were in the disjunctive, the court refused to dismiss the proceeding (Case, p. 14, l. 25; p. 32, l. 31), or to instruct the jury (Case, p. 35, l. 34).

The jury brought in as its verdict: "We find the defendant guilty" (Case, p. 36, l. 27), without a finding of the particular offense of which he was guilty. As the record stands this appellant was convicted of one or more unspecified acts no one of which did he do, the doing of which nowhere appears to have been a violation of the ordinance, and for the doing of which (if done) he was not responsible.

The defendant was fined, over objection (Case, p. 37, l. 25), \$50 (Case, p. 9, l. 17).

The conviction was affirmed by the Supreme Court, *Decker v. Nash*, 141 A. 747. (Not officially reported.)

That the building inspector had no right to refuse the permit applied for was subsequently established in the Supreme Court. The application of the owners for a writ of mandamus requiring the building inspector to issue a permit for *all* the work included within the application made by Apgar was granted *McAllister, et als. v. Moffett*, 142 Atl. 556. (Not officially reported.)

POINT I.

The complaint, the basis of the proceeding, is in the form of an affidavit which, being untrue, conferred no jurisdiction upon the court.

An affidavit is the foundation of a proceeding of this character. It is on the strength of the affidavit that the court takes cognizance of such matters and issue its summons; without the affidavit the court is without jurisdiction.

The so-called affidavit (Case, p. 10) of Moffett, the building inspector, purports to be an affidavit of fact, and not one made "on information and belief." An affidavit as to facts based on hearsay is no affidavit. Allegations of facts based merely on hearsay are, in law, untrue.

"Affidavits are usually made to facts, not to opinions."

Summerfield v. Phoenix Assur. Co., 65 Fed. 292-296.

An affidavit "is a statement of facts witnessed by the affiant."

Woods v. State, 134 Ind. 35.

"'Affidavit' is a statement in writing declared to be true by the party making it, and certified to have been sworn to before him by the officer who takes it."

Partridge v. Mech. Bk. of Burlington, 77 N. J. E. 208-211.

An affidavit is a "voluntary oath before some judge or officer of the court, to evince the truth of certain facts." Blackstone.

The affidavit was not only untrue in point of law because based on hearsay, but it was untrue in point of fact. Not only does the record show conclusively that what work was done Apgar's employee did, but it is equally clear that this

appellant did not himself "make alterations, or cause, suffer or permit alterations to be made." There is nothing to connect him in any way, directly or indirectly, with the doing of any work in the house without a permit.

By Moffett's own testimony it appears that he did not see any of the alleged work done, and that all the allegations made in his affidavit were based solely on hearsay. Of his own knowledge he could not say what work was done, by whom, or when.

Q Did you ever hear Mr. Decker testify to having made any alterations? A I don't know as I ever did.

Q Did you ever hear him testify as to having caused, suffered, or permitted alterations to be made? A No. (Case, p. 30, l. 34.)

Q Did you see Mr. Decker there? A No, but I understand he is the owner of the house.

Q Did you see *anyone* at work there? A No.

Q Was any of the information on which it (the affidavit) was based secured personally from Mr. Decker? A No. (Case, p. 31, l. 8.)

The affidavit being untrue in law and in fact, it must be set aside, and being set aside the summons has no support and is void.

POINT II.

The complaint is bad because in the disjunctive, and not properly apprising appellant of the charge upon which he was to be tried.

This proceeding is of a quasi-criminal character. The court may, upon conviction, imprison the offender for a period not exceeding 90 days. Upon such conviction and imprisonment the

offender is branded a "convict." The person so charged is entitled to all the protection the law affords to the presumption of innocence. The charge must be specific in naming the offense so that the defendant may know what he is to meet. The charge was that appellant "did make, or cause, suffer or permit alterations to be made"; but the defense to a charge of having "made" alterations may be wholly different from the defense to a charge that one "caused," or "suffered," or "permitted" alterations to be made. A defendant cannot be required to meet a blanket, or drag-net, charge, and a complaint so drawn must be set aside as being prejudicial to defendant's rights.

"It is a general rule that an indictment, information, or complaint must not charge a party disjunctively, so as to leave it uncertain what is relied on as the accusation against him. Thus an indictment which averred that S. made a forcible entry into two closes of meadow or pasture was held to be bad. So of an information which alleged that N. sold beer or ale without an excise license." *Corn v. Grey*, 2 Gray 501 (Mass.).

In *Owens v. Camden*, 141 Atl. 24 (not officially reported), the prosecutor was charged with practicing dentistry without a license, and upon conviction was fined \$200 in the police court. The *complaint* was that Owens unlawfully conducted his profession without a license; but the *conviction* was of violating the ordinance, and the ordinance specified more than 50 professions and occupations requiring a license.

In setting aside the conviction the court said that:

"The settled legal rule is that nothing will be presumed or intended in favor of the validity of a complaint or of a conviction

had thereon, in proceedings of this character. The mere statement in the complaint that the accused violated section 2, as a dentist, carrying on or conducting the practice of dentistry, without first having obtained a license for that purpose from the department of revenue and finance of the City of Camden is clearly a conclusion drawn from undisclosed facts. * * * It is also to be observed that the conviction does not set out of what particular act the prosecutor was convicted, and this is essential so that he may not be again prosecuted for the same violation. In *Salter v. Bayonne*, 59 N. J. L. 128, the Supreme Court held that a record of conviction must show on its face every necessary ingredient of the offense, must set out the offense with which the defendant is charged, the names of the witnesses and sufficient of the evidence to show that the offense was committed, upon what evidence the conviction was had, and of what offense the offender was found guilty and the judgment which was imposed."

The instant case is on all fours with the case cited above. The complaint fails to set out the acts constituting the offense, while the record of the conviction is wholly barren of the "necessary ingredients of the offense." The record is also fatally defective in that it recites that the "complaint alleged that on November 16, 1927, Harold L. Decker, *by his agents or servants* violated said section" of the ordinance (Case, p. 7, l. 27). The record further states that the jury "found a verdict of guilty against the defendant" (Case, p. 9, l. 12). Guilty of what? Presumably guilty of a violation "by his (Decker's) *agents or servants*"; but the *complaint* makes *no such charge*; the complaint charges that either Decker *himself* "did make" the alleged alterations, or that he *personally* did "cause, suffer, or permit alterations to be made," but neither by

charge nor by proof is it suggested or shown that he caused, suffered, or permitted his "agents or servants" to make the alleged alterations. The form of the *complaint* is quite as consistent with an inference that alterations by a tenant or trespasser were "suffered or permitted."

The record does not show that the appellant was found guilty of the acts charged in the complaint, and the judgment must be set aside. *Knight v. Kinkead*, 141 Atl. 569. (Not officially reported.)

It is to be observed that, in fact, Apgar was not the agent or servant of the owners, but was an independent contractor. He "had the contract with the owner" (Case, p. 24, l. 12). The owners "instructed Mr. E. A. Apgar, contractor, to proceed" (Case, p. 58, l. 35). Apgar "followed the profession" of carpenter and builder (Case, p. 21, l. 12). Mr. Moffett "heard Mr. Apgar testify that * * * he had a contract with Mr. Decker" (Case, p. 30, l. 27). "An independent contractor is defined to be one who, carrying on an independent business, contracts to do a piece of work according to his own methods and without being subject to the control of his employers as to the means by which the work is to be accomplished, but only as to the result of the work." *Kappertz v. The Jerseyman*, 98 N. J. L. 836; *Reisman v. Public Service Corp.*, 82 N. J. L. 464.

POINT III.

The building inspector wrongfully refused a permit.

The reason given by the building inspector for refusing to issue a permit upon Apgar's application was totally without merit or justification.

“He (the inspector) could not see any good reason for the proposed change except to change the building from a one-family house into a two-family house,” notwithstanding the owners disclaimed any intention of doing anything “forbidden under the provisions of the zoning ordinance. This the relator contends he does not propose to do.” A peremptory writ of mandamus was allowed. *McAllister, et als. v. Moffett, et als.*, 142 Atl. 556 (not officially reported).

Still less was the inspector justified in objecting to the trivial amount of work done by Apgar—work which anyone would have a right to do, in his own house, without let or hindrance of any sort. Work to which no objection was made on any ground relating to the building code, or to matters affecting health, safety, morals or general welfare.

There was no justification for the conviction and fining of Decker because the contractor Apgar did some work for which no permit was needed, and which was a trifling portion only of work for which a permit must have been issued in any event.

POINT IV.

The complaint is bad in that it fails to set out the acts the doing of which constituted an “alteration.”

The complaint merely alleges that the prosecutor “did make, or cause, suffer or permit, alterations to be made,” etc. This is bad; the allegation charges the legal conclusion that what was done was an “alteration” without setting forth the facts supporting such conclusion. The prosecutor should have been apprised of the very thing which he was charged with doing, or

causing or permitting to be done, with an allegation that such thing was, in fact, an alteration.

POINT V.

The jury found the defendant "guilty" generally without a finding of guilt of a specific offense.

In order to properly prepare and present a proceeding for relief, or for the review of a conviction, a defendant has a right to know of just what he has been convicted. The reviewing court cannot substitute its opinion for that of the jury, and assume that the jury must have based its finding upon the same view of the case which the reviewing court has.

Nor can the reviewing court be required to conjecture why the record should allege a complaint in a form different from the form put in evidence.

The jury could not find appellant guilty of a specific offense because no specific offense was charged, and because it nowhere appeared that appellant had, directly or indirectly, himself or by his agents or servants, done, caused, suffered or permitted to be done, any work, of any description, in this house. All he had done was to join with his co-owner, McAllister, in the execution of a contract for certain work and, as the contract was not put in evidence, it nowhere appears that the work done by Apgar was within the terms of the contract, or required as incidental to the contract. As between Apgar and the owners, Apgar may have been a mere trespasser. In any event, as an independent contractor Apgar, alone, was responsible for what was done.

SUMMARY.

Error vitiates every step in this proceeding.

The building inspector wrongfully refused to issue a permit.

The affidavit of the building inspector was untrue in law and in fact, and did not confer jurisdiction upon the Recorder's Court.

The record fails to show a conviction for any offense charged in the complaint.

The record sets forth a complaint essentially different from the complaint the foundation of the proceeding.

The record fails to disclose the "necessary ingredients of the offense."

The verdict was a conclusion from undisclosed facts. The conviction does not set out of what particular act appellant was convicted.

The charge against Apgar was dismissed, and the case is barren of any proof that the work done by Apgar was an "alteration."

The charge against McAllister was dismissed, although McAllister, so far as appears, must have been equally guilty with Decker, if Decker was guilty.

The appellant was fined \$50 without a finding of the offense to punish which the fine was imposed, and it is left open to conjecture of what offense the appellant was found guilty.

There was no proof, or offer of proof, that the work done by Apgar was an "alteration," or that it was work for which a permit was required; that is to say, there was no proof of any violation, by anyone, of any provision of the building code.

It would further seem that the conviction could not have been based on the charge, as set forth in the complaint, that appellant, *personally*, "did make or cause, suffer or permit alterations to be made in said building without having first applied for and obtained a permit," for the sufficient reason that no work was done by him.

It would equally seem that it could not have been because the appellant, "*Harold L. Decker, by his agents or servants*, violated said section" of the building code, for the sufficient reason that there was no proof, or offer of proof, that the contractor, Apgar, was an "agent or servant."

The proceedings should be set aside, with costs.

E. A. MERRILL,
Attorney of Prosecutor-Appellant.

125
New Jersey Court of Errors and Appeals

HAROLD L. DECKER, Prosecutor-Appellant,	}	ON
<i>vs.</i>		CERTIORARI.
AUGUSTUS C. NASH, Recorder of the Town of Westfield, etc., Respondent.		ON APPEAL.

BRIEF OF RESPONDENT.

Reason I.

The meaning of this reason is not clear.

It does not appear from the affidavit itself that Mr. Moffett "did not depose of his own knowledge of the facts alleged, but deposed merely from hearsay". It was entirely a matter of conscience with deponent whether from the facts within his knowledge he should boldly make the direct charge or put it upon information and belief. Later the jury upon *their oaths* determined from what they had heard in the case, and declared, that Decker had done what Mr. Moffett had charged him with having done, and Mr. Moffett was justified.

Reason II.

It cannot be denied that this objection is highly technical.

The gist of the charge is that alterations were made in the building, of which prosecutor was part owner, by him or by his agent with his knowledge and consent.

The defendant was responsible for the acts done by his agent, the contractor, unless done without his authority.

“The ordinance in question is purely a police regulation. It has often been held that, where a saloon is open, or liquors are sold, in violation of a statute or ordinance, the owner is guilty of the offense, although he is not present, has no knowledge of it, and has given instructions to the contrary. This court approved that rule in *State v. Constatine* (Wash.), 86 Pac. 384. In that case we quoted from the opinion in *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270, 18 N. W. 365, where Chief Justice Cooley made the statement in effect that many statutes are in the nature of police regulations and impose penalties without regard to any intention to violate them, in order to insure a degree of diligence for the protection of the public that will render violation practically impossible. In the case of *State v. Kittelle*, 110 N. C. 560, 15 L. R. A. 694, 28 Am. St. Rep. 698, 15 S. E. 103, there is a general discussion of this question, and it is there shown by the authorities that the intention is immaterial in this class of cases; that it is the duty of a principal to trust no one to do his work but such as he can safely trust to discharge his whole duty when such police regulations are involved by his work; and that, if he does not do so, the law holds him answerable for the penalty.”

“It is shown that *one cannot by setting another to do his work, and by being himself elsewhere, reap the benefit of his agent's work and escape the consequences of the latter's conduct*; that it would be impossible to effectually enforce a statute or ordinance of this kind if that were permitted, and that it would become a dead letter. Appellant argues that the rule of the liquor cases should not be applied here and that a distinction should be made. We believe no distinction in principle exists. A police regulation has been

provided in each instance, and a penalty has been provided for the violation thereof.”

“The penalty has been provided for the actual violation of the regulation, and not necessarily because of an intent to do so. The violation in each instance was by an agent who was prosecuting the work of the accused. In the case at bar the accused principal was near the work, and, if not actually present to see what was done, it was nevertheless his legal duty to see that the ordinance was not violated. Failing in this, he must suffer the penalty for the violation, since, if it were not so, then, within the reasoning of the authorities, the public would not be adequately assured of protection from violation of the ordinary police regulation.”

City of Spokane, Respt. v. M. Patterson, Appellant, 8 L. R. A. (N. S.) 1104.

A long list of cases decided in various jurisdictions which hold that in cases such as that under review the principal is responsible for the acts of his agents, appears in the note to *Commonwealth v. Sacks* (214 Mass., 72), 43 L. R. A. (N. S.) 1.

The case of *Owens v. Camden*, 141 Atl. 24, referred to in the brief of the appellant, is not in point.

We are concerned with the complaint itself, not with the statement of the Recorder in his docket as to what was alleged therein. The complaint alleged that Decker did make, or cause, suffer or permit alterations to be made in the building without having first applied for and obtained a permit, in violation, etc. (Case, p. 10); it does not charge that Decker by his agents or servants violated said section, as recited by the Recorder.

In this case the complaint charged the defendant with a specific act; in the *Owens* case the difficulty with the complaint was that it charged the defendant with practicing a certain profes-

sion, without stating the specific acts which he did.

As regards the record of the conviction of which counsel, quoting from the opinion in *Owens v. Camden*, complains that it is wholly barren of the necessary ingredients of the offense, counsel has lost sight of the fact that the testimony in this case was taken stenographically and the transcript thereof returned with the writ, under Chapter 208, P. L. 1924.

Hewson v. Newark, 95 N. J. L. 28.

Counsel has also misapplied the opinion of the Court in *Knight v. Kinkead*, 141 Atl. 569.

In that case there was no record of any complaint at all. It was an appeal case in the Common Pleas. The proceedings in the Recorder's Court, according to the opinion, were regular and were not challenged.

The complete copy of the record as returned by the Court of Common Pleas to the Supreme Court was as follows:

“HUDSON COUNTY COURT OF COMMON PLEAS.

The State *vs.* Walter J. Knight.

C. P. No. 22129. On Appeal.

November 4, 1927. Case off until November 15, 1927.

November 15, 1927. Case off until November 18, 1927.

November 18, 1927. Case tried by Judge Robert V. Kinkead.

Witnesses for plaintiff:

Officer McVickar, Boulevard, H. C.
Lieut. Tuttle, Boulevard, H. C.
Officer Carey, Boulevard, H. C.
Dr. Adams.

Witnesses for defendant:

Walter J. Knight
 Mrs. Walter J. Knight
 Counsel for State: James Dolan
 For Defendant: Charles E. S. Simpson.”

Judge Kinkead found the defendant guilty and imposed a fine of \$200 and sentenced him to 30 days in County Jail.

A person does not erect, raise or alter a building with his own hands. When we say that a man is building or is about to build a house, no one understands that he is doing or will do the work himself. The very phraseology of the prohibitory clause connotes acts by agents or servants.

If we had charged that Decker made the alteration, without more, it would have been competent to prove as we did, that Apgar was his contractor and that Apgar did it; but it amounts to exactly the same thing to charge that Decker caused, suffered or permitted Apgar, who was his contractor, to do it.

What the complaint does is to charge the same act in two different ways, not that defendant did one act or some other act.

Certainly, the prosecutor had notice that it was charged that either he or his agent did, at an approximately certain date, make alterations to the house at No. 141 Harrison Avenue of which he was part owner. He knew whether or not he had himself done the work; if he had not done the work, he knew exactly what charge he had to meet.

It cannot be said that he could not meet the charge because of its vagueness, in view of the fact that he did not testify at all.

Can it be said that because of the use of the disjunctive “or” the defendant was or might have been prejudiced in maintaining his defense upon

the merits? If not, the reason can avail prosecutor nothing, because the law provides that "no judgment for the violation of any ordinance shall be reversed for any imperfection, omission, defect in or lack of form, nor for any error except such as shall or may have prejudiced the defendant in maintaining his defense upon the merits."

P. L. 1907, p. 444; 4 Comp. St. 5424, Section 27.

Under this rule the REASON fails by its very phraseology; the word "properly" is fatal.

Reason III.

"The rule as to the definition of terms in instructions is the same in criminal prosecutions as in civil cases. The court in the trial of a criminal case is required to define technical words and expressions, but not words and expressions which are of ordinary understanding and self explanatory."

Branson Instruction to Juries—Section 40.

"The words in question ('prostitution' and 'concubinage') are in general use, and we have no doubt that they were used by the legislature in their general or popular significance. They are in no sense words of art or technical terms, and if it were apprehended that they would not be correctly understood by the jury, counsel should have prepared an instruction defining the words and submitted it to the court to be ruled upon in the usual way. It is but a fair presumption that the jury understood the words in the sense in which they are used in the statute, and that they were used by the court in its charge in the same sense."

Giskie v. State, 71 Wis. 612, as quoted in *State v. Bresee*, 24 L. R. A. (N. S.), at page 107.

“It is not necessary that the meaning of ordinary words and phrases used in the usual and conventional sense should be defined or explained in instructions.”

14 R. C. L., p. 761.

But this reason is not discussed in appellant's brief and seems to have been abandoned.

Reason IV.

There was but one charge before the jury for its consideration. An opportunity was afforded counsel to ask any question he might wish to ask, presumably about the verdict (Case, p. 36, line 32) but he had no question to ask.

In Points III and IV of appellant's brief are discussed matters which are not covered by any REASON and which were not discussed before the Supreme Court.

On page 2 of appellant's brief, a question put to the witness Apgar is quoted, and the answer, and then follows the statement that that is absolutely all the testimony as to the work done by Apgar. The writer overlooked the testimony of the same witness that he nailed a few studs in a couple of large openings (Case, p. 23, line 27) and the testimony of the Building Inspector at the foot of page 31 and the top of page 32 of the printed case.

The weight of evidence is not reviewable on certiorari.

Ruff v. Kebble, 62 N. J. L. 186;
Donnelly, Overseer of Poor v. Friend,
VI Misc. Rep. 247.

Furthermore, no REASON was directed to any alleged lack of evidence.

We respectfully submit that the judgment of the Supreme Court should be affirmed.

PAUL Q. OLIVER,
Attorney of Respondent.

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