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INDEX.

	PAGE
Summons	1
Complaint	2
Answer	5
Reply	8
Testimony	9
Motion for Non-Suit	57
Charge	58
Postea	63
Judgment	64
Notice of Appeal	65
Grounds of Appeal	66

TESTIMONY.

WITNESSES FOR PLAINTIFF.

William J. Tyrell:	
Direct	10
Cross	23
Re-direct	26
Re-cross	27
J. Allen Hooper:	
Direct	27
Edward J. Douress:	
Direct	28

	PAGE
Elsie Hoffman:	
Direct	28
Harry B. Salter:	
Direct	30

WITNESSES FOR DEFENDANTS.

John H. Broemel:	
Direct	32
Cross	36, 50
Bert A. Waters:	
Direct	38
Cross	39
Re-direct	46
William P. Hanson:	
Direct	47
Cross	48
Re-direct	50
James V. Burke:	
Direct	51
Cross	52

Summons.

STATE OF NEW JERSEY to JAMES V. 10
BURKE, BERT A. WATERS, WILLIAM
(L. S.) P. HANSON, FRANK J. CODEY and
JOHN H. BROEMEL: You are sum-
moned to answer the annexed com-
plaint of William J. Tyrrell, in the
New Jersey Supreme Court. AND TAKE NOTICE
that unless you file your answer to said com-
plaint with the Clerk of said New Jersey Supreme
Court, at Trenton, within twenty days after ser- 20
vice upon you of this writ and the annexed com-
plaint, the plaintiff may proceed in the suit and
judgment may be entered against you.

WITNESS WILLIAM S. GUMMERE, Chief Justice
of our Supreme Court, at Trenton, this 2nd day
of August, 1929.

FRED L. BLOODGOOD,
Clerk.

JAMES M. BURKE,
Attorney. 30

Complaint.

(Filed August 2, 1929.)

NEW JERSEY SUPREME COURT,
MERCER COUNTY.

10

WILLIAM J. TYRRELL,
Plaintiff,*vs.*JAMES V. BURKE, BERT A. WATERS,
WILLIAM P. HANSON, FRANK J.
CODEY and JOHN H. BROEMEL,
individually and jointly,
Defendants.Action at Law.
Complaint.

20

Plaintiff William J. Tyrrell, residing in the City of Trenton, County of Mercer and State of New Jersey, says that:

FIRST COUNT.

30

1. During the month of July, 1927, and for more than fourteen months thereafter, James V. Burke, Bert A. Waters, William P. Hanson, Frank J. Codey and John H. Broemel were members of the Board of Embalmers and Funeral Directors of the State of New Jersey.

2. That the above-named defendants were appointed as members of the Board of Embalmers and Funeral Directors of the State of New Jersey pursuant to Chapter 156, Laws of 1927.

40

3. That the above-named defendants, during the time above described, constituted the Board of Embalmers and Funeral Directors of the State of New Jersey, and continued to constitute that Board during all that period or a major portion thereof, beginning in the month of July, 1927.

Complaint.

4. That the Secretary and other officers of that Board were selected by the members of the Board and acted for the members of that Board and for each of them, under their direction, as their agent in the performance of the various powers and duties of those members collectively and individually. 10

5. Unless for good cause or legal reason, it was the duty of the members of that Board collectively and individually, to issue or cause to be issued a license which would entitle an applicant or candidate for such license to transact the business of embalming where such applicant or candidate conformed with all the provisions of Chapter 156, Laws of 1927, together with the rules and regulations adopted by that Board, pursuant to said Act. 20

6. The plaintiff conformed with all the provisions of Chapter 156, Laws of 1927, and the rules and regulations adopted by the above-named Board, pursuant to that Act.

7. Through the negligence and gross negligence of the members of the Board, individually and collectively, and through the negligence and gross negligence of their agent and the agent of each of them, the members of the said Board individually and collectively failed and neglected to issue, or cause to be issued, a license to the plaintiff entitling him to transact the business of embalming. 30

8. By reason of such negligence and gross negligence, the plaintiff was wrongfully, illegally and unjustly prevented from transacting the business of embalming from the month of August, 1927, until August 15, 1928; and he was deprived of 40

Complaint.

much income and remuneration thereby; he was deprived of an earlier establishment in the said business and the consequent greater income and remuneration each year thereafter, and will be deprived of such greater income and remuneration thereby; and he was caused great worry and humiliation; and he suffered loss of repute in such business; and he was compelled to expend much unnecessary time and money in an effort to obtain such license.

By reason of the foregoing, plaintiff demands as damages the sum of \$15,000.00.

SECOND COUNT.

1. Paragraph 1 of the First Count is made Paragraph 1 of this Count.

2. Paragraph 2 of the First Count is made Paragraph 2 of this Count.

3. Paragraph 3 of the First Count is made Paragraph 3 of this Count.

4. Paragraph 4 of the First Count is made Paragraph 4 of this Count.

5. Paragraph 5 of the First Count is made Paragraph 5 of this Count.

6. Paragraph 6 of the First Count is made Paragraph 6 of this Count.

7. The above-named defendants, individually and collectively, wilfully and maliciously refused to issue or cause to be issued a license which would entitle the plaintiff to transact the business of embalming in the State of New Jersey.

8. By reason of such wilful and malicious refusal, the plaintiff was wrongfully, illegally and

Answer.

unjustly prevented from transacting the business of embalming from the month of August, 1927, until August 15, 1928; and he was deprived of much income and remuneration thereby; he was deprived of an earlier establishment in the said business and the consequent greater income and remuneration each year thereafter, and will be 10
deprived of such greater income and remuneration thereby; and he was caused great worryment and humiliation; and he suffered loss of repute in such business; and he was compelled to expend much unnecessary time and money in an effort to obtain such license.

By reason of the foregoing plaintiff demands as damages the sum of \$15,000.00.

Plaintiff demands as damages the sum of \$15,000.00. 20

JAMES M. BURKE,
Attorney of Plaintiff.

Answer.

(Filed August 19, 1930.)

The above defendants, answering the complaint, say that: 30

FIRST COUNT.

1. Defendants admit paragraphs one, two and three of the first count.

2. Defendants deny the allegations contained in paragraph four of the first count, except that they admit that the secretary and other officers are selected by the members of the board. 40

Answer.

3. Defendants deny the allegations contained in paragraph five of the first count.

4. As to the allegations contained in paragraph six of the first count, defendants have no knowledge or information sufficient thereof to form a belief.

5. Defendants deny paragraphs seven and eight of the first count.

SECOND COUNT.

Defendants repeat paragraphs one, two, three, four and five of the first count, and the same are made part hereof.

First separate defense to first and second counts.

The defendants aver that they are appointed as a state board or body and that as individuals or collectively (unless they are assembled as a state board or body) are incapable of performing any act or acts as alleged in the complaint and further aver that any act or acts done by them when assembled as a state board or body, are done as such board or body and defendants further aver that the plaintiff entered into a stipulation with the Attorney General for the State of New Jersey, as follows:

“It is understood and agreed by the parties of the above entitled cause that it is not the intention of the plaintiff to bring action against the Board of Undertakers and Embalmers, as such, and that the plaintiff will not attempt in this suit, to move in any manner against the Board of Undertakers and Embalmers, as such, or to recover or attempt to recover any judgment against the said Board, as such.”

*Answer.**Second separate defense to first and second counts.*

That the plaintiff did on or about the fourth day of September, 1927, receive the following notice:

“You have passed the recent examination for embalmer, but not for funeral director. Your certificate and license card will follow. You cannot open an establishment in the State of New Jersey if you hold only one license.” 10

That on December 9th, 1927, plaintiff requested information concerning the date of the next examination for funeral director and the defendant John H. Broemel avers that he advised the plaintiff that the date of the next examination would be January 25th, 1928, and that plaintiff did on January 25th, 1928, again take the examination for funeral director, but failed to pass the same. 20

Defendant John H. Broemel further avers that on December 22nd, 1927, he advised the plaintiff that he could practice embalming, but could not open an establishment if he held only one license and again on February 27th, 1928, plaintiff was informed that there was nothing to prevent him from engaging in embalming, and again on April 22nd, 1928, defendant John H. Broemel avers that he orally told plaintiff that he could engage in embalming until such time as the evidence of the license could be issued. 30

Third separate defense to first and second counts.

That between December, 1927, and July, 1928, plaintiff did practice the business of embalming. 40

Reply.

Defendants reserve the right to move to strike out the complaint, on the ground that it does not disclose a cause of action, at or after the trial.

PH. F. SAUER,
Attorney for Defendants.

10

Reply.

(Filed August 22, 1930.)

The plaintiff replying to the answer of the defendants says that:

20 1. He denies the allegations in the first separate defense to the first and second counts, except such part thereof that alleges that the plaintiff entered into the stipulation therein set forth.

2. He denies the allegations made in the second separate defense to the first and second counts.

3. He denies the allegation made in the third separate defense to the first and second counts.

30

JAMES M. BURKE,
Attorney for Plaintiff.

40

Testimony.

NEW JERSEY SUPREME COURT,
No. 18, MERCER CIRCUIT—MAY TERM, 1931.

<p style="text-align: center;">WILLIAM J. TYRELL, Plaintiff, <i>vs.</i> JAMES V. BURKE, BERT A. WATERS, WILLIAM P. HANSON, FRANK J. CODEY and JOHN H. BROEMEL, individually and jointly, Defendants.</p>	}	<p style="text-align: right;">10</p> <p style="text-align: right;">Action at Law.</p>
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Transcript of shorthand notes of testimony, etc., taken in the above-entitled cause on the trial thereof before Hon. A. Dayton Oliphant, Circuit Court Judge, and a jury, at the Court House, Trenton, New Jersey, on Wednesday, May 27, 1931.

Appearances:

JAMES M. BURKE for the plaintiff.	30
PHILIP F. SAUER for the defendants.	
(Jury empaneled and sworn.)	
(Mr. Burke opened for the plaintiff.)	
(Mr. Sauer opened for the defendants.)	

40

William J. Tyrell, Plaintiff—Direct.

WILLIAM J. TYRELL, the plaintiff, sworn.

Direct examination by Mr. Burke:

Q. Mr. Tyrell, you are the plaintiff in this case?

A. Yes, sir.

10 Q. Where do you live? A. 15 Greenwood Avenue.

Q. What is your occupation? A. Embalmer.

Q. In 1927 did you take an examination under the Board of Embalmers and Funeral Directors?

A. Yes, sir.

Q. What month of that year? A. The third day of August.

Q. Do you know what men constituted that Board? A. Yes, sir.

20 Q. Will you say who they were?

Mr. Sauer: That is admitted.

A. Mr. Waters, Mr. Broemel and Mr. Burke.

Q. Do you know who is the secretary of that Board? A. Yes, Mr. Broemel.

Q. In August of that year did you take an examination for embalmer? A. The third day of August, yes.

30 Q. Do you know whether or not you were successful in that examination? A. Yes, I was successful.

Q. Do you know what your mark was? A. 82.

Q. How do you know that? A. The secretary showed me on the papers over at his office.

Q. How long after you passed the examination? A. That was in January.

The Court: January of 1928?

The Witness: Yes, sir.

William J. Tyrell, Plaintiff—Direct.

Q. Had you ever been notified that you would not have a license?

Mr. Sauer: I object to that.

The Court: Objection sustained.

Q. How did you come to see your paper at the office of the secretary of this Board? A. I wrote to Senator Edwards and told him I had taken the examination and I could not seem to be given a license at the time. 10

Q. After you wrote to Senator Edwards did you receive a letter from the secretary of the Board? A. Yes.

Q. I show you a letter and ask you if you know what that is? A. Yes; that is a letter he sent me to call at his office after Senator Edwards had written him. 20

Q. Will you read that to the jury? A. (Reading) "Mr. William Tyrell, 15 Greenwood Avenue, Trenton, N. J., Dear Sir: We are in receipt of a letter from Senator Edwards, with regard to you obtaining an embalmers' and funeral directors' license. If you will call at this office, the writer shall be glad to discuss the matter with you, and answer any questions you may want to ask. Will you please advise when you will call, in order that the writer may be at the office? Very truly yours, John H. Broemel." 30

Q. What was the date of that letter? A. December twenty.

The Court: What year?

The Witness: 1927.

Q. Did you go to his office in answer to that letter? A. Yes.

Q. About what time did you go to Mr. Broemel and talk with him? A. January 10, 1928. 40

William J. Tyrell, Plaintiff—Direct.

Q. Will you please relate that conversation?

A. In his office, in Newark, New Jersey.

Q. Please state the conversation as best you can recall it from the time you went in the office until you left. A. I went in and I introduced myself to him and he kind of got a little hot and he said, "We have a letter here from Senator Edwards and he wants to know why you can't get a license". He said, "All I can tell him is that you can't pass". He said, "You seem politically inclined".

Mr. Sauer: I object to these comments.

The Court: He may give the conversation.

The Witness: He said, "You seem politically inclined". I said, "I have a right to it". And he said, "We don't give any licenses like that. It has to be a fair examination". I said, "I passed a fair examination, I guess". He said, "We can't give out licenses—we can't give you your license and not somebody else who ain't got any political friends". And he went back into a room where there were portieres dividing and he asked, "What was Mr. Tyrell's standing in embalming?" And the answer was, "He passed the test". And Mr. Broemel came out to me and he asked my number and I said, "Fifty-five". He came over with the papers and he said, "Your average is eighty-two on the test". He said, "Mr. Bert Waters marked your papers".

Q. Who was he? A. He is the secretary now. He was a member of the Board then. He said, "Bert Waters marked your papers". I said,

William J. Tyrell, Plaintiff—Direct.

“What does that mean?” He said, “Well, I don’t know nothing about it”. And I said, “You ought to know without any argument”. And he said, “You didn’t make the funeral directors”. I said, “No?”

Q. What did you understand by that statement, that you did not make the funeral directors’ examination? A. I did not pass that, he said. 10

Q. That was a separate examination? A. Yes.

Q. Did that have anything to do with this? A. Nothing at all to do with the embalmer’s license at all. That was a separate test altogether. He said I did not make it, and I couldn’t argue about it. He said I did not make it and I said, “Well, I made the embalmer’s license; what about that? Is that a separate or joint license?” That kind of took him by surprise and he sat there and rubbed his head and he said, “That is a separate license, all right. We want to keep it until you become a full-fledged man.” There is no argument about it. You have to take it that way. 20

Q. Do you remember the conversation when you left there? Was there any further conversation? A. With Mr. Broemel?

Q. Yes, at that time? A. Not at that time, no.

Q. Now, prior to this conversation, did you receive a notice that you had passed that examination? A. I received notice I was unsuccessful in the examinations. 30

Q. After this conversation did you do anything further to try to get this license card?

The Court: How did you receive that notice?

The Witness: By mail.

The Court: Have you got it?

The Witness: No, sir. I destroyed it. 40

William J. Tyrell, Plaintiff—Direct.

Q. What did you next do in order to obtain this license? A. That is when I wrote to Senator Edwards and asked him—or told him about me taking the examination and I couldn't pass and I didn't know why, and then I got a letter from the secretary here and he asked me to call.

10 Q. That was previous to this conversation? A. That was before this conversation. The conversation was on January tenth.

Q. When did you get in touch with Senator Edwards? A. In December.

Q. Who did you see next? Did you get a license or what did you do next? A. I appealed to Governor Moore, through his secretary, Mr. Bloodgood.

20 Q. About what date was that? A. I just cannot recall the date. It was somewhere around about in March, I guess, as near as I can recollect.

Q. Had you been directed, soon after this conversation with Mr. Broemel, the secretary, to report for another examination, that is, the funeral directors' examination? A. Yes. He told me the next one would be held in January, the month that I was there, and he would notify me of the date.

30 Q. I show you a letter and ask you what that is? A. That was a notice about coming for examination January twenty-fifth.

Q. What date is that letter? A. That is dated January thirteenth.

Q. Now, before this letter was written to you, had you been told that you passed the embalmers' examination? A. Yes, I was told January tenth.

Q. And your mark was— A. Eighty-two.

The Court: Let me see that letter.

40 Q. Do you recall what date you wrote Governor Moore? A. No; I cannot recall the date. I think it was in March.

William J. Tyrell, Plaintiff—Direct.

Q. Did you get a response to your letter? A. Yes.

Q. Were you notified again by the secretary to come to his office concerning this license? A. Yes; I asked again about the license and he told me to call at his office.

Q. I show you this letter and ask you if that is that letter where he again tells you to come to his office? A. Yes. 10

Q. How long was that letter written after you had been told that you had passed the examination? A. I was told I passed the examination in January, and this is dated March sixteenth.

Q. What took place when you called there on that occasion? A. All kinds of arguments.

Q. To whom did you talk? A. Mr. Broemel.

Q. Tell us what the substance of that conversation was. A. I asked for the license and he said, "You don't need it. You can do the work." I said, "I know I can do the work. I have done it for eight or ten years." And he said, "You can engage in the practice". I said, "Embalming?" He said, "Yes. You have a letter from me." I said, "You notified me I was unsuccessful". He said, "You got a letter stating you could take the next examination, in January. That is enough." 20 30

Q. Have you that letter? A. That is that letter here. He said that was all I needed.

Q. What was in that letter? Was there anything in there to authorize you to— A. No, it just stated, "Through an error two dates were placed on the recent postal sent you relative to the forthcoming examination". And I only had to take one examination.

Q. Did you know what was necessary before you could engage in the practice of embalming? A. Yes. I must have a license. 40

William J. Tyrell, Plaintiff—Direct.

Q. Did you tell him that? A. Yes.

Q. What did he say? A. He said I did not need it. The law calls for a license. That is the practice of embalming. That is what they told me over there.

10 Q. Did you have any other conversation with him on this date? A. No, I did not.

Q. Did you talk to anyone else on this occasion? A. I had seen the president, Mr. Burke, in February, and I told him what my trouble was, and he said, "How do you know you passed?" I said, "Well, I seen my papers". He was the president of the Board. In February I went to Mr. Burke's office and I introduced myself to him and I explained to him that I had passed my examination for an embalmer's license, and he said, "How do you know?" And I said, "I seen my papers". He said, "You did?" I said, "Yes. My average was eighty-two. I have asked Mr. Broemel for a license and he won't give it to me." He said, "I didn't know it". And he had some licenses in his desk there, from the January examination, and he went through those licenses, and he said, "Your license ain't here". And I said, "It isn't?" And he said, "No". And he called Newark, and he said, "What is the matter now?" And I told him. And he said, "Is this you John? I have a man in my office by the name of—" "What did you say your name was?" I said, "Tyrell". "—by the name of Tyrell, and he says he passed the embalmers' examination". And I didn't know what the answer was, and he said, "Oh, he did? Have you his name on the roll?" He said, "Yes". He said, "All right". He said, "Go to him and he will give it to you. You are entitled to it." He wouldn't do anything for me and I walked out of his office.

20

30

40

William J. Tyrell, Plaintiff—Direct.

Q. Did you get a license subsequently? A. Yes, Mr. Waters issued a license to me with a very nice letter.

Q. On this day when you had the conversation with Mr. Burke there were a lot of license cards from the January examination? A. Certificates about the size of this. They were on his desk, and he looked through there and he said: "Your license isn't here." 10

Q. Did you ever have any conversation with Mr. Waters, the other member of the Board? A. No.

Q. I show you this letter and ask you if you know what that is? A. That is a letter I got from Mr. Waters, the secretary, today.

Q. What date? A. Dated August thirteenth.

Q. Will you tell us what that letter says? A. (Witness reads letter.) 20

Q. He was then secretary? A. He was then secretary of the Board.

Q. When had you seen the Governor previous to this? A. That was in March I appealed to the Governor.

Q. Did you get a response from the Board at that time concerning the Governor's communication to them? A. Yes. I had a letter from Governor Moore stating that he would see I was given a fair deal. 30

Q. Did this license accompany that letter? A. Yes.

Q. From the time you took the examination until the time you received your license, did you do anything in order to qualify yourself for that license? After you took the examination, did you do anything further as far as any qualifications were concerned in order to get the license? A. No. 40

William J. Tyrell, Plaintiff—Direct.

Q. So that if you were qualified for a license in August of 1928 you were qualified for it in August, 1927?

10 The Court: There is no question but what he was qualified for a license right after he took the examination, if he passed, and he apparently did.

Q. Now, the first year that you worked as an embalmer, after you got your license, what were your approximate earnings from embalming?

Mr. Sauer: I object to that.

The Court: On what ground?

20 Mr. Sauer: I think it calls for a conclusion.

The Court (after discussion): I will allow it.

Q. What were your approximate earnings in the practice of embalming? A. I guess close into a thousand dollars the first year, 1929. I started right with Mr. Wagner. I had done work for the rest of them.

Q. Were you in a position in August of 1927 to go into the business? A. Yes.

30 Q. Had you any money laid aside to put yourself up in the business? A. I should say about \$1,500.

Q. What happened to that \$1,500? A. I had to live on it.

Q. So that in August of 1928, after you received this license, did you have any money with which to enter the business? A. No, sir.

Q. What were you compelled to do then? A. After I got the license?

40 Q. Yes. A. I was compelled to go into the business of embalming, which I did.

William J. Tyrell, Plaintiff—Direct.

Q. Were you as well equipped or were you in a position to earn money in 1928 as well as you were in 1927? A. Yes.

Q. Were you in a position to advertise, and so on? A. Yes.

Q. In 1928? A. No, not 1928. I got the license in 1928.

10

Q. I mean, had you been able to go in business in August, 1927, were you then better equipped to start in business? A. Yes.

Q. Do you know whether or not this affected your reputation in your business? A. Well, yes, I guess it did. Quite a number of people would ask me what the trouble was, and "Couldn't you pass, or what is the matter?"

Q. When you say, "Quite a lot", can you make that more explicit? A. A number of people. When I would be out with somebody else, even after I got my license, they would ask me if the trouble was settled and had I got my license, that they had seen it in the paper.

20

Q. For how long a period did these conversations with various people in the community take place?

The Court: What difference does that make?

Mr. Sauer: I object.

30

Mr. Burke: If it continued even up to the present time it shows the shadow that was cast upon him in the beginning.

The Court: This is an action for damages.

Mr. Burke: For damage to his reputation in the past and future.

The Court: I do not see anything in the complaint about it.

Mr. Burke: Loss of repute.

40

William J. Tyrell, Plaintiff—Direct.

Mr. Sauer: No.

(After argument.)

The Court: I think it is too speculative.

Q. In your business of embalming you do such other work as undertaking? A. Yes.

10 Q. Have they commented to you about this difficulty with the Board? A. Yes, that it wasn't right, or something like that. They didn't say much about it because they didn't care to give me any argument that way about it. They are in the same business, of course.

Q. Do you know whether or not the undertakers with whom you talked are afraid of the Board or their power?

20 Mr. Sauer: Objected to as calling for a conclusion.

Mr. Burke: I am asking if he knows.

The Court: Objection sustained.

Q. After you got your license have you since learned that an agent of this Board had gone to various undertakers to find out whether or not you had practised during the period previous to receiving your license? A. Yes.

30 Q. Do you know how many undertakers, to your knowledge? A. I believe it is three. I understood two or three.

Q. And that was after they had told you you could practise but they would not issue you a license? A. Yes.

Q. In going about trying to get a license and going to Jersey City and Newark and so on, were you compelled to spend money?

40 Mr. Sauer: I object. He did not testify he went to any particular place. I think he said he went to Newark once.

The Court: Objection overruled.

William J. Tyrell, Plaintiff—Direct.

Q. Were you compelled to spend money? A. Carfare.

Q. Any other expenses? A. No. Something to smoke and something to keep myself going a little bit.

Q. How do you fix your expenses in going about trying to obtain this license? A. I had to spend carfare, and I had— 10

Q. How much? A. It is \$3.46 I think for the return to Newark.

Q. Did you go anywhere else except Newark? A. Yes; I went to Jersey City.

Q. How long would it take on these trips? A. I would spend four or five hours probably. I would have to wait until I would see the man.

Q. Did you make any other trips? A. No.

Q. Now, because of this trouble were you in any way humiliated among the members of the community? A. Yes. 20

Mr. Sauer: I object to that. I do not see where that is an element of damage.

Mr. Burke: We allege in here that he was caused great worryment and humiliation.

The Court: Well, he says, "Yes". I will let it stand. 30

Q. In what way were you humiliated, what caused the humiliation? A. Well, I was all upset; I was worried; I could not make a living; I had no license.

Q. Did the fact you could not do anything about it bother you? A. I could not do anything about it. Nobody seemed to have any power to do anything for me.

Q. Over how long a period of time did you try to get this license? A. From January up until 40

William J. Tyrell, Plaintiff—Direct.

June when I went to the Trenton Times and then they went after them.

Q. Did you worry about your predicament? A. Yes.

Q. And you had set aside a small sum of money to hold you over? A. Yes.

10 Q. Did any of that go? A. It all went.

Q. Did this worriment affect your regular routine? A. Oh, yes. I could not sleep at night. I would have to sit downstairs, and if somebody would play the radio I could just kick it off the table; and I couldn't go out; I didn't want to go out and meet anybody, because they would all say, "Did you get over your trouble yet?" I didn't want to do that.

20 Q. Over how long a period did this last? A. From the time I took the examination.

Q. Did it affect your physical being? A. Well, yes. I didn't have any desire to eat.

Q. Did it affect you with reference to weight? A. Yes; I lost weight.

Mr. Sauer: I object to this line of testimony. Unless he expects to show by medical testimony—

The Court: I will allow it.

30 Q. How much weight did you lose in a year? A. I think I would lose about fifteen pounds, anyway. I couldn't eat any breakfast.

Q. Did other people comment upon your condition? A. Oh, yes. Neighbors used to tell my wife about it. They did not come to me and tell me about it.

40 Q. Do you know whether or not Mr. Broemel, the Secretary of this Board, came to Trenton when the suit was instituted and complained to other members of your business? A. Yes, he came just

William J. Tyrell, Plaintiff—Cross.

about the time he received the summons, if I am not mistaken.

Q. That is the other undertakers? A. I believe the Mercer County Funeral Directors had a meeting that night.

Q. Do you know whether or not the undertakers are in fear of the Board and their power? 10

Mr. Sauer: I object to that.

The Court: Objection sustained.

Mr. Burke: That is all.

Cross-examination by Mr. Sauer:

Q. Mr. Tyrell, in August, 1927, you took both examinations; is that correct, embalmer and funeral director? A. Yes, the third day of August, embalmer, and the fourth day of August, funeral director. 20

Q. How soon after that did you receive official notice you had passed your embalmer examinations? A. Practically the last of the month.

Q. Within thirty days? A. Yes.

Q. Did you at the same time receive notice you had failed to pass the funeral director's examination? A. All in one.

Q. Have you got that notification with you? A. No, sir. I destroyed it after my wife had seen it. 30

Q. Do you recall what was in the notification? A. Yes; it was a letter dated—I just can't recall the date, but it said, "We regret to announce you were unsuccessful in the examinations. You have the opportunity to take them over without an additional fee."

Q. Did you get one or two letters? A. Only one letter.

Q. You say you did not receive any letter stating you had passed the embalmer's examination? 40

William J. Tyrell, Plaintiff—Cross.

A. I was notified I was unsuccessful in the examinations. That meant both of them.

Q. You are sure about that? A. I know it; yes.

Q. Didn't you just say a minute ago you were notified in the latter part of the month that you had passed? A. In January of 1928.

10 Q. Within thirty days after you had taken the examination? A. I was notified I was unsuccessful in the examination, yes.

Q. When was the first time you knew you had passed the embalmer's examination? A. January 10, 1928.

Q. Did you see Mr. Broemel on December fourteenth? A. No, sir.

Q. Did you see him on December twenty-seventh? A. No, sir.

20 Q. Are you sure about that? A. Yes, sir.

Q. (Showing witness paper.) Is this your handwriting? A. Yes, sir.

Q. And that letter states that you should call on December twenty-seventh? A. "Your letter of December twentieth—I will advise you to call at that office on Tuesday, December twenty-seventh."

Q. Did you call on December twenty-seventh?

30 A. I do not think I did, because that was right around Christmas.

Q. Would you say you did not call? A. Yes; I would say I did not call.

Q. When you spoke with Mr. Broemel on January tenth—

The Court: Mr. Sauer, what difference would it make whether he called or not? From your opening, he was never given a license. You know what the Act is as well as I do. The Act says that the secretary must issue the license, and that this man

40

William J. Tyrell, Plaintiff—Cross.

has no right to practice unless he has that license. These people were acting under a statute which compelled them to do certain things and which prevented this man from doing certain things until he had a license from this Board, which was never granted to him.

10

Mr. Sauer: He was not prevented from operating, if your Honor please.

The Court: If you will read the statute you will see that he was. It says he must be issued a license, and it makes it a misdemeanor for him to practice without a license.

Mr. Sauer: We will show where it was impossible for them to issue it.

The Court: That is ridiculous. I can get a thousand licenses printed in a day, and you know it. Let us get down to the meat of this thing.

20

Q. Now, Mr. Tyrell, you say in 1929 you made approximately a thousand dollars? A. Approximately, yes.

Q. Will you tell me how much you receive for embalming a body? A. I receive ten dollars, from Mr. Wagner.

30

Q. For embalming? A. Yes, and \$5 from the other man.

Q. For each body? A. For each one, yes, straight embalming.

Q. Do you keep any books? A. No; I didn't keep any books.

Q. Is that an approximate guess? A. That is approximately, yes, sir.

Q. Now, you stated that you had \$1,500 with which to go in business? A. Yes.

40

William J. Tyrell, Plaintiff—Re-direct.

Q. What kind of business were you going in?

A. The business of embalming.

Q. What equipment did you need for that business? A. Well, you need the fluid and the instruments and a board or two and candelabra or something of that kind.

10 Q. How much do the instruments cost? A. Oh, well, there is different prices on the instruments. I haven't any list of them. Some is twenty-five or thirty-five, different prices for different instruments.

Q. Then you were furnishing supplies, weren't you, for practicing funeral directing? A. No, sir.

20 The Court: What difference does that make anyway? The statute says that three licenses shall be issued—one for embalming, one for funeral directing, and one for the two combined. Now, this man, according to your opening, was entitled to a certificate as an embalmer. He did not get it. Now, let us hear why he did not get it.

Mr. Sauer: I have nothing further.

Re-direct examination by Mr. Burke:

30 Q. If you fail or miss any examination repeatedly you say you pay an additional fee? A. Yes. You have two opportunities. It is \$15 for each application. Now it has been raised to \$25.

Q. Within the last year or two? A. Yes, I think this coming year.

Q. So if you fail twice you must again pay more money into the Board? A. Fifteen dollars for each one, yes.

40 Q. Do you know where the money goes? A. No, I don't know, only it goes to the members of the Board, I suppose.

Mr. Burke: That is all.

William J. Tyrell, Plaintiff—Re-cross.

J. Allen Hooper, for Plaintiff—Direct.

Re-cross-examination by Mr. Sauer:

Q. You only paid in \$15 for embalming, didn't you? A. Fifteen dollars for embalming and \$15 for funeral directing.

Q. And you failed in funeral directing? A. So Mr. Broemel said, yes. He said I failed in the embalmers also. 10

J. ALLEN HOOPER, sworn for the plaintiff.

Direct examination by Mr. Burke:

Q. Mr. Hooper, what is your occupation? A. Undertaker. 20

Q. Do you know who is the agent or inspector of the Board of Embalmers of the State of New Jersey? A. Mr. Carroll.

Q. Is he in Court this morning? A. Yes, sir.

Q. Did he ever ask you a question of this nature or this import: "Has Tyrell been doing any work for you?" at a time prior to the time that Tyrell got a license? A. Yes.

Q. Can you fix it more definitely, about how long it was prior to the time he got a license? A. Before he received his license? 30

Q. Yes. A. No; I do not know.

Q. But it was prior? A. It was prior, and I know he did not have a license then.

Mr. Burke: That is all.

The Court: Have you any cross-examination?

Mr. Sauer: No cross-examination.

Edward J. Douress, for Plaintiff—Direct.

Elsie Hoffman, for Plaintiff—Direct.

EDWARD J. DOURESS, sworn for the plaintiff.

Direct examination by Mr. Burke:

10 Q. Mr. Douress, you are engaged in the profession or business of undertaking and embalming?

A. Yes.

Q. Do you know Mr. Carroll, the agent or inspector of the Board? A. Yes.

Q. Did he ever ask you whether or not Mr. Tyrell did any embalming for you prior to the time he got a license? A. I do not know about prior, but he asked me did he do embalming for me, but I cannot say whether it was prior to when he got his license or not.

20 Q. Did he ask you that question, whether or not he did embalming? A. Yes; he asked if he did some of my embalming, and I said, "Yes".

Q. Prior to the time he got a license?

Mr. Sauer: Objected to as leading.

The Court: I understood Mr. Douress to say he could not tell whether it was before or after he had his license.

The Witness: Yes, sir; that is right.

30 Mr. Burke: That is all.

Mr. Sauer: No cross-examination.

ELSIE HOFFMAN, sworn for the plaintiff.

Direct examination by Mr. Burke:

Q. Miss Hoffman, where do you live? A. 7 Greenwood Avenue.

40 Q. Where does Mr. Tyrell live? A. 15 Greenwood Avenue.

Elsie Hoffman, for Plaintiff—Direct.

Q. Do you know him well? A. I do.

Q. How long have you known him? A. About thirteen years.

Q. Do you recall, in 1927, having any conversation with him concerning this license with the Board of Undertakers and Embalmers? A. I do.

Q. Can you tell us what the conversation was? 10
A. Well, he was sick and nervous and having a lot of trouble—

Mr. Sauer: I object to that.

The Court: Yes.

Q. In 1927, about August, compared to August, 1928, was there any change in his physical appearance or in his nervous condition? A. No, there was not. 20

Q. What was his condition during the latter part of 1927 and the early part of 1928, with reference to nervousness?

Mr. Sauer: Objected to. The witness is not qualified.

The Court: Objection overruled. She may tell what she saw.

A. Well, he was sick and very nervous and doctored all the time. 30

Q. Did his physical appearance change any?

A. Do you mean after?

Q. Yes. A. Yes, he would appear sick.

Q. In what way? A. Well, as I say, it is nervousness, that is all.

Q. Could you tell whether he had any unusual mental state, from his conversation?

Mr. Sauer: Objected to.

The Court: Objection sustained. 40

Harry B. Salter, for Plaintiff—Direct.

Q. Do you know whether or not he lost any weight?

Mr. Sauer: Objected to.

A. He did.

10 The Court: She may say, if she knows.
The Witness: Yes, he did. He was a very stout man before this happened.

Q. Did you notice a change in his nervous condition? A. He was very nervous. He would not stand and talk to you; he would run away from you; he could not talk to you.

Mr. Burke: That is all.

20 Mr. Sauer: No cross-examination.

HARRY B. SALTER sworn for the plaintiff.

Direct examination by Mr. Burke:

Q. Mr. Salter, you are the State Auditor of New Jersey? A. Yes.

30 Q. Are you familiar with the act under which the Board of Embalmers and Funeral Directors operate? A. Only in a general way. I do not know all of the provisions.

Q. Do you know whether any department of the State has any contact with this organization by way of direction of disposal of the moneys which they receive?

Mr. Sauer: I object.

The Court: I do not see the materiality of it, Mr. Burke.

40 (After discussion.)

The Court: Well, I will allow it.

Harry B. Salter, for Plaintiff—Direct.

Q. Do you as State Auditor have any supervision over the books of this Board? A. No.

Q. Do you have a right to touch those books or even direct that they be inspected?

The Court: Is this one of those boards that has the collection and disposition of the moneys that come into it by way of examination fees and license fees, and so forth?

10

The Witness: Yes, sir; it is.

Q. Can you direct that Board in any way whatever? A. No, sir.

Q. Or criticize them in any manner?

Mr. Sauer: I object to that.

The Court: Objection sustained. I suppose we can all criticize them if we want to.

20

Q. Do you know if there is any limit to the amount of money that they might collect?

Mr. Sauer: I object to that.

The Court: He may answer it. I think that is self-evident.

A. Well, I do not know hardly how to answer that question, as to whether there is a limit. The amount that they might collect depends solely on the number of applicants they have for admission to the profession.

30

Q. Do you know, under that act, whether there is any limit to the disposition or any supervision as to the disposition of any money that they expend? A. None beyond their own board, so far as I can ascertain by the act.

Mr. Burke: That is all.

Mr. Sauer: No questions.

40

John H. Broemel, for Defendants—Direct.

Mr. Burke: That is the plaintiff's case.

Mr. Sauer: I would like to move for a non-suit at this time on the ground, first, there is no evidence of any negligence shown as to the individuals. If any, it would be against the State Board as a body.

The Court: I will hold the motion. I want to see what these men have to say.

JOHN H. BROEMEL SWORN for the defendants.

Direct examination by Mr. Sauer:

20 Q. Mr. Broemel, you are a member of the State Board of Embalmers and Funeral Directors of the State of New Jersey? A. I was in 1927.

Q. When were you appointed? A. On July 1st, 1927.

Q. When did your term expire? A. In 1929.

Q. Were you the secretary of the Board from July 1, 1927, until your term expired? A. Until July 1, 1928.

30 Q. What were your duties as secretary of the Board? A. To keep a general record of the action of the Board, and answering communications and doing the work of a secretary.

Q. Did your Board conduct an examination on or about August, 1927? A. Yes.

Q. And was Tyrell one of the applicants? A. Yes.

Q. Do you know what examinations he took? A. He took the embalmers and the funeral directors.

40 Q. Did he pass the embalmers? A. Yes.

Q. Did he pass the funeral directors? A. No, sir.

John H. Broemel, for Defendants—Direct.

Q. When anybody passes an examination do you notify them? A. Yes.

Q. By what means? A. At that time we used a general letter to notify the men who had passed the examination.

Q. Do you recall what that letter stated? A. It was something like this, "This is to certify that you have passed—" whatever examination it was, and "—that this letter can be used in lieu of a license or card until the same is issued". 10

Q. What was the reason for that? A. It was a new Board and we had to order our certificates and get stones made and make a renewal of the old license and it took quite some time to get this thing working, in working shape, being a green Board, and one thing and another, and it delayed matters a little in getting these certificates out. 20

By the Court:

Q. How long does it take to get certificates printed? A. I do not imagine it would take long to get them printed, but we had to get these stones made and plates made for them.

Q. How long does that take? A. It took over two or three months to get the thing in shape.

Q. Two or three months to get licenses ready to issue? A. Yes. You see, there was a new act there entirely, that eliminated the old licenses, and we had to start in new. 30

Q. Why didn't you issue this man a license when you got them, then? A. We—

Q. Why didn't you issue him a license as the Act required, when you got the licenses? A. We sent the letters out—

Q. Why didn't you issue the license as the Act required? A. We didn't have them printed. 40

Q. You got them in two or three months. A. For the old members.

John H. Broemel, for Defendants—Direct.

Q. How many embalmers are there in the State? A. There is something like twelve hundred now, I think.

Q. How long does it take to make out 1,200 cards? A. It doesn't take long to make a card out.

10 Q. This man passed his examination in August, 1927? A. Yes, sir.

Q. And he never got his license while you were secretary, did he? A. No, sir.

Q. Why not? A. As I said, we were in the beginning of this organization—

Q. How long were you secretary of this Board after August, 1927? A. Until July.

Q. July what date? A. July 1, 1928.

Q. A year? A. Yes.

20 Q. And you never issued this man his license? A. No, sir.

Q. Why not? A. It was just simply that we didn't issue any licenses to these men that had failed in the first examination.

Q. He did not fail, did he? A. They always take two examinations—

Q. He did not fail in the embalmer's examination? A. Not in the embalmer's, no, sir.

Q. And you knew the act you were operating under? A. Yes, sir.

30 Q. You knew that he was entitled to a license as an embalmer? A. Yes.

Q. But you never issued it to him? A. No, sir, because we figured that the letter would answer the purpose until we sent him the certificate.

Q. Weren't you operating under the statute? A. Yes.

Q. And you knew that statute? A. I did not know it familiarly.

40 Q. You were secretary of this Board? A. Yes.

Q. Hadn't you read it? A. I read it over.

John H. Broemel, for Defendants—Direct.

Q. Didn't you know he could not practice without a license? A. I knew he could not practice any more than he was entitled to.

Q. You read the Act, did you not? A. Yes.

Mr. Burke: It is Section 7, I think, on page 299.

10

Q. You knew that the Act provided that no person shall engage in the business of embalmer unless he shall have a license issued by your Board, and that he was subject to a penalty if he did it without a license? A. That is the reason I sent this letter out to all those who passed, to give us an opportunity to get these things.

Q. Did it take a year to do that? A. No. I had a lot of other work to do on that, your Honor.

20

The Court: That is all.

By Mr. Sauer:

Q. How many took this particular examination in August, 1927? A. Something like a hundred.

Q. Do you recall when all of those hundred received their licenses? A. No, sir, not all of them. There were some failed in both examinations.

Q. I mean the ones who passed. A. They did all receive a notification.

30

Q. When did they all receive their cards or certificates, how long afterward? A. I do not know just exactly how long after.

By the Court:

Q. Well, you know it was not a year after, don't you? A. Yes, I do. There were some of them didn't get them in a year.

Q. And a lot of them got them long before the year? A. Well, a lot of them didn't pass.

40

John H. Broemel, for Defendants—Cross.

Q. This man passed. A. The embalmer's, yes.

By Mr. Sauer:

10 Q. Was it your function to see whether people who also passed both examinations were issued one license?

The Court: The statute provided what he should do. What difference does this make?

Mr. Sauer: Take the witness.

Cross-examination by Mr. Burke:

20 Q. How many took the examination in January of 1928? A. There was on an average as a rule a hundred takes the examination at a time.

Q. You got \$25 for each applicant? A. Fifteen, it was at that time.

Q. It has been raised to \$25, has it not? A. Yes.

Q. It was lower than that before, wasn't it? One time it was \$5, was it not? A. No.

Q. At any rate, under the Act, what is the maximum that you can charge an applicant for taking the examination? A. I do not know. We charged \$15 at that time.

30 Q. They raised it to twenty-five? A. Yes.

Mr. Sauer: I think the Act provides for that, if your Honor please.

Q. Twenty-five dollars was the maximum that you could charge, is that so? A. If the Act says so.

Q. That is what they had to charge? A. They had to, yes.

40 Q. And if they failed twice, they have to pay \$25 more? A. Yes.

John H. Broemel, for Defendants—Cross.

By the Court:

Q. This man passed his examination in August, 1927? A. Yes, sir.

Q. You got these certificates then within two or three months? A. Yes, sir.

Q. You knew that this man was anxious for his certificate and was seeing people with regard to it in the first part of 1928, didn't you? A. Yes, sir. 10

Q. Why didn't you give him a certificate then, when you had them? A. I told him at that time—

Q. Why didn't you give it to him then, if you had the certificates and knew he was waiting and wanted to get it? A. I don't know, any more than we were waiting until he passed both examinations, to give it to him at that time. There was no personal reason I had about it. I did not know the man; I did not know who he was. 20

By Mr. Burke:

Q. Do you have a copy of the letter which you notified Tyrell that he passed? A. No, because I had a general letter that I sent out.

Q. Do you remember what date it was? A. Thirty days after the examination we generally send those letters out. 30

Q. (Showing witness paper.) Is that the letter you mean? A. No; this was for the forthcoming examination. We had sent these letters out right after the examination.

By the Court:

Q. Are you still a member of this Board? A. No, sir, I am not. 40

Bert A. Waters, for Defendants—Direct.

BERT A. WATERS, sworn for the defendants.

Direct examination by Mr. Sauer:

10 Q. Mr. Waters, you are a member of this State Board of Embalmers and Funeral Directors? A. I am.

Q. When did you become a member? A. July 1, 1927.

Q. Are you still a member of the Board? A. I am.

Q. You are the present secretary, is that correct? A. Yes.

Q. When did you become secretary? A. July 1, 1928.

20 Q. You were the gentleman that issued the license to Mr. Tyrell in August, 1928? A. Yes, sir.

Q. When you first became secretary, when did you first learn Mr. Tyrell had not received his license? A. By receiving a communication from A. Harry Moore, former Governor.

Q. And from that communication, what did you do? A. I immediately issued the man's license.

Q. Now, you conducted an examination in August, 1927? A. Yes, sir.

30 Q. How many took that examination, about? A. Approxiamtely a hundred.

Q. Were all of the licenses issued to this one hundred? A. No, sir.

40 Q. When was the last one issued? A. The activities of the secretary's office prior to 1928 I cannot speak about. When I took office July 1, 1928, I found some thirty-eight or forty men that had not received licenses. Immediately after I received the letter from A. Harry Moore I published in the trade papers an advertisement requesting all those that had taken the examination

Bert A. Waters, for Defendants—Cross.

and passed to kindly get in touch with me so I could send out their certificates and cards, as I had no records that I could go by.

Q. You had no record? A. No, sir.

Q. What is your business? A. Funeral director.

Q. How long have you been a funeral director? 10
A. Twenty-five years.

Q. Are you familiar with the embalming business as well? A. Yes.

Q. Are you also an embalmer? A. Yes.

Q. Can you tell me what equipment is necessary to go into the embalming business? A. A case of embalming fluid and an embalming kit and some business.

Q. What does the kit consist of? A. Instruments and a couple of bottles. 20

Q. What would be the price of those instruments? A. Anywhere from \$50 up.

Q. Up to what? A. One hundred and twenty-five dollars.

Mr. Sauer: Take the witness.

Cross-examination by Mr. Burke:

Q. You have been on this Board ever since this new Act was passed? A. Yes. 30

Q. And you are familiar with those powers; you are familiar thoroughly with them? A. Yes.

Q. While you were just a member of the Board did you ever have any records of any kind? A. No, sir.

Q. So that if you marked anyone's papers you would not take the trouble to find out whether that man had been issued a license? A. The usual procedure, under my own routine, I would know; but under the old routine I would not know. 40

Bert A. Waters, for Defendants—Cross.

Q. Did you mark these papers? A. I don't know.

Q. If Mr. Broemel says you did would you say he was mistaken? A. I would not say until I saw the paper.

10 Q. If you marked Tyrell's paper, what would you have done after that to see that the paper you marked—or the man was entitled to a license, if he got one. A. All who passed the examination, their names would come before the Board at the next regular meeting and by resolution then those men would become licensed under the State of New Jersey.

Q. Would you see that those men received the licenses? A. No. That is what we have a secretary for.

20 Q. He worked under your direction, did he not? A. Under the direction of the Board; not under mine alone, but under every member of the Board.

Q. A man that you knew was entitled to a license, you told him— A. I didn't tell him anything.

Q. But you both understood it was his duty to get them out? A. Yes.

30 Q. So that to get the license out he acted for you, is that right? If he had not done it would have done it, isn't that true? A. I could not have done it.

Q. Why not? A. I was not the secretary of the Board.

Q. You never did anything to see that the men you knew deserved licenses got their licenses? A. Yes; we voted in the next regular meeting for them to get their licenses.

40 Q. Do you know whether Tyrell was ever voted a license? A. Yes.

Q. At what meeting? A. At the same meeting all the other names came in as passing the exami-

Bert A. Waters, for Defendants—Cross.

nation. I imagine that would be the meeting in September or October; I am not sure.

Q. Did you know when the papers were marked?

A. The papers were marked in September. I imagine it would be the October meeting.

Q. Do you recall that Tyrell was directed to be voted a license in October? A. I wouldn't say I could remember their names, no, sir. 10

Q. Did all the people who had passed the first one receive licenses? A. I couldn't say that. I had nothing to do with it. The secretary in 1927 took care of that.

Q. Did you feel that you had no responsibility for what the secretary failed or neglected to do? A. I felt as though I had the interest of the State of New Jersey, and I tried to uphold it and live up to it. 20

Q. What did you do beside voting in favor of granting a license? A. I followed the duties that were necessary as a member of the Board.

Q. What other specific act did you do beside voting? A. Sat at hearings and passed on violations and so forth.

Q. How often did you have a meeting? A. We met once a month, the first Thursday of every month.

Q. Did you have a system whereby complaints are made to the Board or brought to the attention of the Board? A. Yes. A person making a complaint would have to sign an affidavit and the complaint is sent to the Secretary's office and it is given to the inspector to make an inspection. 30

Q. I mean with reference to a person who had not received a license. Did you have any procedure— A. I would not know anything about that.

Q. Then did you, as a member of the Board, think it was necessary that some provision be 40

Bert A. Waters, for Defendants—Cross.

made to assure the granting of licenses? A. Not unless it was brought to me personally, and then I would naturally take it up at the meeting, which I did. I had no way of knowing, because I was only in the Secretary's office in 1927—

10 Q. All you know about is what came to you?
A. What was called to my attention personally.

Q. You have been subpoenaed to bring the record of your receipts and expenditures? A. Yes.

Q. Have you brought that? A. Yes.

Q. Can you tell me the receipts of the Board for the year 1930?

Mr. Sauer: Objected to as immaterial.

The Court: Objection sustained.

20 Q. Do you know who keeps a record of the disposal or disposition of the moneys which are received by the Board? A. That is the Secretary's business.

Q. Who directs where the money should go or who should get it? A. Every member of the Board.

Q. Is there any check whatsoever as to the disposition of that money? A. Yes.

30 Q. Will you tell us what that check is? A. Every dollar of that money is paid out by voucher; the voucher has to be passed by a resolution of the Board, and there is a report made monthly to the State Budget Commissioner, in Trenton, as to the expenditures of the Board. The Board is self supporting and every penny that is spent by the Board is sent to the budget commissioner in Trenton.

40 Q. How much does the secretary and treasurer get? A. The treasurer gets \$100 and the secretary \$1500 a year.

Bert A. Waters, for Defendants—Cross.

Q. What are his duties besides issuing licenses?

A. Whose duties?

Q. The secretary. A. The general duties of a secretary.

Mr. Sauer: I think the Act prescribes that.

10

Q. Is there any maximum sum which can be paid your inspector? A. Yes.

Q. What is it? A. The inspector's salary is as high as \$5000, if we want to pay it to him.

Q. You are limited to \$5000? A. Yes.

Q. By the Act? A. No.

Mr. Sauer: Then I do not see where any of this is material in this case.

The Court: I do not either.

20

Mr. Sauer: I object.

Q. Are you responsible to anyone for the disposition of this money? A. I am responsible to the State of New Jersey.

Q. Are your books ever audited? A. Yes, sir.

Q. By whom? A. By a concern, audited by the State, I believe. They are audited every six months by a New York concern.

Q. This money that you are responsible to the State of New Jersey for, have you ever turned in one penny since you have been on the Board, since 1927, to the State of New Jersey? A. No; we did not have it to turn in.

30

Q. Let me see if this is not the fact, that last year, of \$18,068, that you spent as expenses \$18,040.

Mr. Sauer: I object.

The Court: Objection sustained.

40

Bert A. Waters, for Defendants—Cross.

Q. Did Broemel or anyone else ever mention any trouble with Tyrell prior to the letter you got from Governor Moore? A. No, sir.

Q. You knew absolutely nothing about it? A. Not a thing.

10 Q. Do you know of anyone else who complained that they had not received a license? A. No, sir. I found about thirty-eight men who had not received it and I sent them communications and sent their certificates and license cards. None of them had made any complaint, as far as I know.

Q. Was there a communication from an organization of undertakers in Mercer County in the early part of 1928, urging you to issue licenses, that you know of?

20 Mr. Sauer: I object to that.

The Court: I will allow it.

A. No, not that I know of, and had they sent a communication, we do not affiliate ourselves in any way with any funeral directors' association.

Q. If you got a communication to the Board, what would you do, cast it aside? A. I would answer it immediately.

Q. Do you know whether those communications came in? A. I did not receive any.

30 Q. What do you mean when you say you do not affiliate yourselves with any association? A. Because the Board has got to divorce itself from any association.

Q. Would you be affiliated by investigating a complaint? A. No, sir.

Q. Do you know of any other letters directed to the Board, written by Governor Moore or Senator Edwards? A. No, sir. I know of a letter sent to me by A. Harry Moore.

40

Bert A. Waters, for Defendants—Cross.

Q. Do you know the exact date of that? A. No. It is in the file. I think it was some time in April of 1928; April or May, I am not sure; I may be wrong.

Q. Do you have the letter? A. Yes. That is the last letter in the file. I may be wrong on the date.

10

Mr. Sauer: Was this letter sent to you personally?

The Witness: Yes.

Mr. Sauer: I object to it.

The Court: I will allow it.

Q. Now, this letter is addressed to you and dated August tenth. Did you receive one before that? A. No, sir. I received several letters from him, but not in the Tyrell matter.

20

Q. Did you receive a letter prior to this from Governor Moore concerning Tyrell? A. No, sir.

Q. Do you know of any letter that was received by your Board from Senator Edwards concerning Tyrell? A. No, not to my knowledge.

Q. This letter is dated August tenth, and you issued the license what date? A. Immediately after that letter, I think.

Q. Will you read this letter to the jury? A. "Dear Friend: I am informed that some time ago Mr. William J. Tyrell, of 15 Greenwood Avenue, Trenton, passed the embalmers' examination, and is entitled to a license. His case seems to be causing a great deal of newspaper notoriety, and if there isn't any good reason why he should not receive this license I think it would be the part of wisdom to issue it. With kindest regards, I am, Very truly yours, A. Harry Moore."

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Q. That is August tenth? A. Yes.

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Bert A. Waters, for Defendants—Re-direct.

Q. And on August thirteenth you issued the license? A. Yes, sir.

Q. But in July you knew there was trouble about Tyrell? A. No, sir.

Q. You did not know until August tenth? A. No, sir.

10 Q. Do you recall a meeting of the Board held in the Stacy Trent in June of 1928? A. Probably so.

Q. Do you recall that it was discussed at that meeting and there was considerable newspaper notoriety in the papers on that day? A. That might be, but not to my knowledge.

Q. Now, when letters were addressed to the Board in the usual course of events, were they brought to the attention of all the Board? A. Yes.

20 Q. Do you know now whether letters were written by Senator Edwards prior to this letter by Governor Moore? A. I wouldn't say; no. You asked before if the letter came to me and I said no.

Q. I am asking now, do you know whether or not Senator Edwards wrote to the Board back in January or February? A. He may have. I could not say. Probably it may have been read at a Board meeting, but I would not say so.

30 Q. Have you gone over the correspondence concerning this case? A. No, sir.

Q. You have never gone over the correspondence in preparation for trial? A. No, sir.

Q. And today you do not know what notice the Board had that Tyrell did not have a license, except that letter from Governor Moore? A. That is all, sir.

Mr. Burke: That is all.

Re-direct examination by Mr. Sauer:

40 Q. Any action taken by the Board was done in its meetings? A. Yes.

William P. Hanson, for Defendants—Direct.

Q. Regular monthly meetings? A. Yes.

Q. And individual members have no other powers? A. No, sir.

WILLIAM P. HANSON sworn for the defendants. 10

Direct examination by Mr. Sauer:

Q. Mr. Hanson, are you a member of this State Board? A. Yes.

Q. Were you a member in July, 1927? A. Yes.

Q. Do you recall this examination in August, 1927? A. I do.

Q. Do you know Mr. Tyrell? A. I know him now, since I saw him, but I did not at that time.

Q. Can you tell us what the routine was subsequent to the examination, what was done after the examination was held? A. We went over the papers in September. 20

Q. Was that done at the Board meeting? A. At the Board meeting. Two days were set for that, to go over the papers.

Q. To mark the papers in the Board meeting? A. Yes.

Q. What happened to the results? A. After we got through with the examining of the papers we opened the envelopes and looked at the figures in there, and those who passed or who didn't pass, and then the secretary notified each one, or was supposed to. 30

Q. That is the general routine? A. Yes.

Q. Do you know whether they issued licenses in the latter part of 1927? A. I think they did.

Q. Do you know whether they were all issued at that time? A. I could not say.

Q. Any action taken by the Board is done at all of its meetings? A. At all of its meetings. 40

William P. Hanson, for Defendants—Cross.

Cross-examination by Mr. Burke:

Q. You said some licenses were issued in 1927.

A. Some old ones. I do not know about the new ones.

10 Q. You have been on the Board since 1927? A. Yes, sir.

Q. And the first examination was the one Mr. Tyrell took, was it not? A. Yes.

Q. And there was by reason of that examination some licenses issued in 1927? A. Yes.

20 Q. What would you do to see that any paper that you had marked, that that person who had that paper received a license? A. It was always left up to the secretary, unless someone called my attention to it personally, and then I investigated, naturally.

Q. Suppose the secretary did not do it, did you feel it was your duty to do it?

Mr. Sauer: Objected to.

The Court: Objection sustained.

Q. If the secretary did not do it would you do it? A. I would do all I could in my power, certainly.

30 Q. Well, did you do anything except mark the paper and tell the secretary to issue it? A. That is all I ever did.

Q. When did you first know that Mr. Tyrell had any trouble whatever with your Board? A. When we received the letter from A. Harry Moore.

Q. What date was that? A. I think around August, 1928.

40 Q. That was the first information of any kind that you— A. That I had, yes.

William P. Hanson, for Defendants—Cross.

Q. I mean, through the newspapers— A. I did not see any newspaper clippings, none whatever.

Q. Do you recall attending a meeting at the Stacy-Trent in June of 1928? A. Yes, sir.

Q. Do you recall there being discussed, that particular case, the Trenton case? A. I heard something spoken about the Trenton case but I did not hear the name of who it was. 10

Q. Then when you say you did not know anything about it until Governor Moore's letter, that was not so, was it? A. Sir?

Q. You did hear something about it in June? A. Not about Mr. Tyrell.

Q. Well, about the Trenton case? A. There were several Trenton cases in our routine work.

Q. There were other complaints? A. Yes.

Q. Who were they? A. I do not know whether I can mention names offhand. 20

Q. When you found out there was a complaint in Trenton did you find out whether it was someone you were concerned with? A. No, sir.

Q. You did not do anything about it at all? A. No, sir.

Q. Then if you marked the paper and Mr. Broemel arbitrarily refused to issue a license, so far as you were concerned, it was no business of yours? A. It was always left to the secretary. 30

Q. Did you still leave it to the secretary? A. I don't know about that.

Q. You knew about it when you were at the Stacy-Trent, didn't you? A. No, sir. We were busy at the Stacy-Trent.

Q. You were too busy in June to find out what it was, and you did not do anything until you got the letter from Governor Moore?

The Court: He said he did not know of this case. 40

William P. Hanson, for Defendants—Re-direct.

John H. Broemel, for Defendants—Cross.

Q. Do you recall any letters at all concerning Tyrell from Edwards or Moore prior to that last one? A. No, sir; I do not.

10 *Re-direct examination by Mr. Sauer:*

Q. Did you ever know of any formal complaint made to the Board at its meetings, that Mr. Tyrell did not receive his license? A. I don't know; I think not.

Q. Did you attend all meetings? A. I have, all meetings in four years.

Mr. Burke: I want to recall Mr. Broemel for a minute.

20 Mr. Sauer: Do you make him your own witness?

Mr. Burke: It is for further cross-examination.

JOHN H. BROEMEL, re-called.

Further cross-examination by Mr. Burke:

30 Q. Mr. Broemel, did you ever have a conversation with Mr. Schick, of Trenton, of the Trenton Evening Times, in June of last year, telling him a license would be issued to Mr. Tyrell immediately? A. I do not think I know Mr. Schick.

Q. Do you recall having a conversation concerning Mr. Tyrell in June, at which conversation you told a reporter a license would be issued immediately? A. Yes, somebody came in the meeting and I told him a license would be issued.

40 Q. Do you recall the reason you gave for not having issued it before? A. No, sir; I do not.

James V. Burke, for Defendants—Direct.

JAMES V. BURKE, sworn for the defendants.

Direct examination by Mr. Sauer:

Q. Mr. Burke, are you a member of this State Board of Funeral Directors? A. Yes, sir.

Q. Were you a member in July, 1927? A. Yes, sir.

Q. Do you recall that you conducted an examination in August of 1927? A. Yes, sir.

Q. Do you know Mr. Tyrell? A. No, I do not know him. I have seen him once or twice, I think.

Q. Where? A. At my office.

Q. Where is your office? A. 13 Oakland Avenue, Jersey City.

Q. Do you recall when you saw him in your office? A. Yes; I think it was in 1928. I do not know whether it was April or May. He walked into my office one day and asked me if Mr. Burke was in, and I told him I was the man, and he said he wanted to see me, and he said: "I come down to see about my license." I said: "What license?" "My embalmer's license," I said: "Who are you?" He said: "I am Mr. Tyrell, of Trenton." "Well, did you pass the examination?" And he said "yes". "How do you know?" He said: "I got a letter from the secretary stating that I passed my examination." "And you got no license card yet?" He said "no". "Do you know who passed on your papers?" He said: "Bert Waters." "Now, I will tell you what to do", I says, "this Board is pretty straight"——

Mr. Burke: Objected to.

The Court: He may give the conversation.

James V. Burke, for Defendants—Cross.

The Witness: I said: "You go up and see Mr. Waters right away, and if Mr. Waters passed on your papers he won't stand for anything like that and he will see you get your license." I asked him to sit down, and he said he wouldn't sit down; he seemed kind of nervous. And I said: "I will tell you what I will do. We have a monthly meeting in the Court House in Newark on the first Thursday of every month." That would be about six or seven days from the time I had the conversation with him. And I said: "You come out to that meeting, and if you passed the examination I will see that the Board gives you your card." No, he wouldn't do that.

20 Q. Did he come out to that meeting? A. No, he wouldn't do that for me; he did not come out.

Q. Was there any complaint made to the Board at its monthly meetings regarding Mr. Tyrell? A. That I do not know; I could not say. I think I suggested that myself, about Mr. Tyrell. That was the next meeting after I asked him to come down, and he wouldn't come down, and I tried to persuade him. I said: "If you passed you will get your card all right. I will see that you get it." No, he would not come down. And I said: "I see I can't do anything with you; you are too stubborn. If you will do as I tell you you will be all right", but he said he wouldn't do it, he was going to see the Governor, and with that he walked out, and I have never seen him afterward.

Cross-examination by Mr. Burke:

40 Q. That was in February, was it not? A. I do not know whether it was February or May. It

James V. Burke, for Defendants—Cross.

was in 1928, anyhow. It was after the second examination, I think.

Q. Why did you say February or May? Might it have been March? A. I think it was May; it was a couple of months before the new Board was going in. That Board went out in June.

Q. That would make it around March or April? 10
A. Right around there; I think it was April.

Q. And it was before he had seen Governor Moore? A. He said he was going to see Governor Moore.

Q. At the next meeting you brought this up?
A. Now, before I go any further, let me explain this thing—

Q. Did you do that?

The Court: Answer the question. 20

Q. At the next meeting you said: "What is this trouble about Tyrell?" A. I brought it up, yes.

Q. Who was there? A. All the members of the Board.

Q. What did they say? A. They said he would get his license all right, and Mr.— I was going to tell you something.

Q. What is it? A. I rang up the secretary about this license.

Q. You did not testify about that on your direct examination. 30

The Court: Proceed. Answer the question.

Q. As soon as this happened, when Tyrell came to see you, you called Broemel and Broemel told you he passed and you told Tyrell he would get a license? A. That is after he went out I called Mr. Broemel. 40

James V. Burke, for Defendants—Cross.

Q. He was not present when you called him? A. No; I called him up in his office.

Q. Did you hear him testify that he was there when you called Broemel? A. Hear who testify?

Q. Did you hear Mr. Tyrell testify to being there when you called Broemel? A. No; that was
10 after he went out of the office.

Q. How do you know that? A. I saw him go out the door.

Q. Do you know how he could have learned about this conversation in any way, all he has testified to on direct examination concerning this conversation? A. He might have got it from the secretary.

Q. What was your conversation with Broemel at that time? A. I immediately rang him up and
20 I said, "Is this you, John?" He said, "Yes". And I said, "Mr. Tyrell is here complaining about his license, that he passed the examination and he has got no license." And he said, "That is all right. I wrote him a letter stating that it is all right and he can do all the embalming he wants to on that letter." I said, "Mr. Tyrell did not tell me that."

Q. Did you understand the letter would be authority to him to go in business? A. To go on
30 embalming until he got his card.

Q. Didn't you know that he was compelled to have a license to do business? A. He had a letter that it was all right and he was entitled to go on embalming.

By the Court:

Q. Why did he not get his license, if you know?
40 A. That is all I know about that, as I am telling you.

James V. Burke, for Defendants—Cross.

Q. After you talked with Mr. Broemel was there any reason that you know of that he did not get his license? A. He said, "As soon as we get the cards we will give it to him."

Q. You had cards all the time, did you not? A. Yes, but there was a lot that hadn't got their license cards up to that time.

10

Q. It was not because you could not get cards, was it? A. Well, that was up to the secretary. We left that to the secretary, after this man passed.

By Mr. Burke:

Q. At that meeting when you spoke about Tyrell complaining, were there any resolutions passed or did anything happen? A. The secretary says, "I will attend to that. He will get his card."

20

Q. And did the individuals leave it up to the secretary to see that that was done? A. Yes.

Q. Did you ever speak to Mr. Waters about this, personally? A. I did speak to him.

Q. Was that about the same time? A. Yes.

Q. About what month, about the same month, March, or whatever it was? A. I think it was the same month, and the next meeting I think I spoke to him.

30

Q. What conversation did you have with Mr. Waters? A. I just told him Mr. Tyrell was around about it and wanted his card.

Q. What did he say ought to be done? A. He said he ought to get it if he passed, and it was up to the secretary whether he sent him a card, and I thought he would get a card.

Q. That was in March? A. No; that was in May.

Q. Do you recall that meeting at the Stacy-Trent when this matter was brought up in June

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James V. Burke, for Defendants—Cross.

of 1928, the meeting of the Board at the Stacy-Trent Hotel in Trenton? A. That I could not tell you.

Q. Now you say that when you talked with Tyrell concerning his license he seemed highly nervous and upset? A. He was nervous, yes.

10 Q. Had you ever seen him before? A. Not to my knowledge.

Q. He seemed unreasonable to you? A. He would seem all right to me. I have nothing against the man. I was working in his favor.

By the Court:

Q. Let me ask you, Mr. Burke, whose signatures did this license bear? A. The secretary's and mine signatures was on the card.

20 Q. Did you make them up or the secretary? A. The secretary would make them up.

Q. You had been signing licenses right along, had you not? A. Oh, yes.

Q. You were signing licenses that were given to you by the Secretary? A. Yes.

By Mr. Burke:

Q. At any subsequent meeting after this was brought to the attention of the Board was the subject ever mentioned, was Tyrell ever mentioned in any other meeting? A. I do not think it was. I thought it was all settled up.

Mr. Burke: That is all.

Mr. Sauer: That is the defendants' case. I just want to make known to the Court that the other defendant, Mr. Codey, is ill, and he does not know anything more than these gentlemen.

40 The Court: Do both sides rest?

Motion for Non-Suit.

Mr. Burke: There was one witness, but I think we can do without him.

Mr. Sauer: Now, if the Court please,—

The Court: The jury may be excused until one-thirty.

Mr. Sauer: I think that from the testimony or the evidence shown there is no negligence shown, and the only thing I imagine is the failure to issue this particular license and if there was any such failure to issue such a license this was a State Board and the remedy should have been by mandamus. I fail to see where they are liable individually.

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The Court: Have you any cases on it?

Mr. Sauer: Not in that particular point. The complaint alleges that the secretary was the agent for them individually. I do not think there has been any agency proved, and anything that was done was done by these men as a Board. They had no power individually. There was nothing they could do individually.

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The Court: The secretary could have done it. The secretary could have issued the license, according to his own statement.

(After discussion.)

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The Court: I will hold it until after recess.

(At 12:30 o'clock in the afternoon a recess was taken until 1:30 o'clock in the afternoon.)

The Court: The motion will be denied and an exception allowed.

(Mr. Sauer summed up for the defendants.)

(Mr. Burke summed up for the plaintiff.)

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Charge.

The Court (Oliphant, J.): Ladies and gentlemen of the jury. This is a suit by William J. Tyrell, as plaintiff, against James V. Burke, Bert A. Waters, William P. Hanson, Frank J. Codey and John J. Broemel, as defendants. The defendants were members of the Board of Embalmers and Funeral Directors of the State of New Jersey. Mr. Broemel was its secretary.

The Legislature of this State, during the session of 1927, passed an Act creating this Board. That Act took effect on March 28, 1927, and the Board was thereafter appointed. That Act provided for the number of members who should compose this Board. It also provided that the said Board shall elect from its number a president and secretary and a treasurer, who shall serve for one year and until their successors shall be elected and qualify. The Act further provided that "No person shall engage in the business of embalming, or preserving in any manner dead human bodies, unless he shall have a license as embalmer granted by the Board of Embalmers and Funeral Directors of the State of New Jersey in full force and effect and shall otherwise have complied with the provisions of this Act." A further provision of the Act was, as follows: "If the Board shall be satisfied that the applicant is of good moral character and is over twenty-one years of age and is possessed of the necessary efficiency and qualifications in accordance with the terms of this Act and of such rules and regulations as the Board may, from time to time, adopt, in pursuance of the provisions of this Act, the Board shall issue to such applicant the license applied for, which said license shall expire upon the first day of October then next following." The Act further provided:

Charge.

“Each license granted by the Board shall be under the seal of the Board, and signed by the president or such person or persons as may be designated by the Board for that purpose, and shall specify the name of the person to whom issued and said license shall be non-transferable and non-assignable.” The Act further provided that “The Board shall grant licenses as embalmers, licenses as funeral directors and licenses as embalmers and funeral directors and no person shall carry on the business of both embalming and funeral directing unless he shall have, in full force and effect, a license or licenses permitting him to carry on both kinds of business and shall have otherwise complied with the provisions of this Act.”

It appears that the plaintiff in this case, Mr. Tyrell, took both examinations in August of 1927; that he failed to pass the examination for funeral director; that he passed the examination for embalmer, and there is evidence that he secured on that examination a mark of eighty-two per cent. He says that he was advised that he failed to pass either examination. Mr. Broemel says that he was advised that he had failed in the examination for funeral director but had passed the one for embalmer. He was never issued a license as provided for in the statute and therefore could not, under the statute, act as an embalmer. He had several communications with Mr. Broemel, the secretary of the Board, and there is also in evidence several communications from public officials, or men who were public officials during this time, with relation to the issuing of this license. He also saw Mr. Burke, who was at that time the president of the Board. I think the testimony was that he saw him some

Charge.

time during the first part of 1928. But, even though he had passed this examination in August, 1927, he was never issued a license until the following August, when there was a new secretary of the Board, Mr. Waters, and after a letter from the Governor had been written.

10 There is no question in this case but that this plaintiff was entitled to this license after he had passed this examination. There is no question in this case but that he did not receive this license until over a year, or a year, after he was entitled to it, nearly a year after he was entitled to it. He says that by reason of his not having this license he was denied an opportunity to practice his profession. The statute provided that he could not
20 practice his profession without this license which the Act provided this Board should have issued to him.

 This statute gave this Board the right to adopt rules and regulations. The Act provided that the license should have been signed by the president of the Board. The testimony is, as I remember it, that it was the rule and practice of the Board after an examination for them to vote on the issuance of the licenses to the successful applicants, and that thereafter it was the duty of the
30 secretary to prepare those licenses, sign them and send them to the president for his signature.

 Mr. Tyrell says that he saw Mr. Burke and Mr. Burke said, if I remember his testimony correctly, that he brought it up at a meeting of the Board, but there is no evidence that anything was done after that. Mr. Waters and Mr. Hanson, I believe it was, said that they knew nothing of this situation until it was brought to Mr. Waters' attention through the letter of the Governor.
40

Charge.

Mr. Tyrell brings this suit, alleging that the members of this Board and the secretary of this Board were negligent in the performance of their duties. The statute that I have referred to gave them certain specific duties to perform. If the secretary of this Board failed to perform the duties which the statute placed upon him, if he failed to perform those duties wilfully, or if he knew what should have been done and negligently failed to perform those duties, then he is responsible for the damages, if any, that this plaintiff suffered as the result of his neglect. If the members of this Board either knew the situation or as reasonably prudent persons should have known the situation, then they are liable to respond in damages to this plaintiff for the injuries he has sustained. If they did not know of this situation and as reasonably prudent people should not have known of this situation, then the members of this Board, one or as many as did not know of this situation, then they are not liable to respond to this plaintiff in damages. But, as I say, if they knew of this situation and, knowing the situation, failed to perform the duties that this Act provided they should perform, or if they should have known of this situation as reasonably prudent people, that is those that knew of the situation and neglected to perform it, or those that as reasonably prudent people should have known of the situation and did not, then they are liable to respond in damages.

The plaintiff has the duty of proving his case to you by a fair preponderance of the believable evidence. That is, he must prove to you that there was a wilful neglect on the part of one or more of these defendants, and he must prove to you that as reasonably prudent people they should

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Charge.

10 have known the situation as it existed. If he has failed to prove that to you by a fair preponderance of the believable evidence, he is not entitled to a verdict as against one or more of these defendants and under those circumstances your verdict would be in favor of the defendants and against the plaintiff, that of no cause of action. If he has borne that burden which the law places upon him, then he is entitled to a verdict against one or more of these defendants, as you find the case to be, under the rules I have given you. And if he is entitled to a verdict he is entitled to be fairly and reasonably compensated for the damages he sustained as the natural and proximate result of this negligence on the part of one or more of these defendants. That would include loss of income which he has suffered by reason of the neglect, if any, on the part of one or more of these defendants. It would also include the mental pain and suffering, if any, which he has undergone as the natural and proximate result of this neglect, if there was any such neglect, and any outlay of money that he has made as a result of the neglect on the part of one or more of these defendants, if there was any such neglect. The duty of proving damages remains in the plaintiff, as well as proving negligent acts of the defendants. You may retire and reach your verdict.

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I might say to you that your verdict may be in favor of all defendants and against the plaintiff, that of no cause of action, or it may be in favor of some of the defendants and against the plaintiff, that of no cause of action, or in favor of the plaintiff and against one or more of the defendants, in such sum as you determine the plaintiff is entitled.

40

Postea.

(Filed May 29, 1931.)

This case was tried before Judge A. Dayton Oliphant with a jury at the Mercer County Circuit on May 27th, 1931.

The jury rendered a general verdict against James V. Burke, Bert A. Waters, William P. Hanson, Frank J. Codey and John H. Broemel and in favor of the plaintiff in the sum of Thirty-four hundred dollars (\$3,400.00). 10

A. DAYTON OLIPHANT,
Judge.

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Judgment.

(Filed May 29, 1931.)

\$3400.00
84.60

10 \$3484.60

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendants for the sum of three thousand four hundred dollars, besides costs to be taxed *nisi*.

Entered May 29, 1931.

20 On motion of
JAMES M. BURKE, Atty.

30

40

Notice of Appeal.

(Filed June 26, 1931.)

NEW JERSEY SUPREME COURT,
MERCER COUNTY.

<p style="text-align: center;">WILLIAM J. TYRELL, Plaintiff-Appellee,</p> <p style="text-align: center;"><i>vs.</i></p> <p>JAMES V. BURKE, BERT A. WATERS, WILLIAM P. HANSON, FRANK J. CODY and JOHN H. BROEMEL, individually and jointly, Defendants-Appellants.</p>	<p style="text-align: right;">10</p> <p style="text-align: right;">On Appeal. Notice.</p> <p style="text-align: right;">20</p>
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To:

JAMES M. BURKE, Esq.,
Attorney for Appellee.

Take notice that the appellants, James V. Burke, Bert A. Waters, William P. Hanson, Frank J. Cody and John H. Broemel, appeal 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. 30

Dated: June 10th, 1931.

MERRITT LANE,
Attorney for Appellants.

Grounds of Appeal.

(Filed July 3, 1931.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10

WILLIAM J. TYRELL,
Plaintiff-Appellee,*vs.*JAMES V. BURKE, BERT A. WATERS,
WILLIAM P. HANSON, FRANK J.
CODY and JOHN H. BROEMEL,
individually and jointly,
20 Defendants-Appellants.Action at Law.
On Appeal
from
Supreme Court,
Mercer Circuit.
Grounds of
Appeal.

Defendants-appellants write down the following grounds of appeal in the above-entitled matter:

1. The Court erred in declining to grant the motion to non-suit.

2. The Court erred in declining to direct a verdict in favor of the defendants.

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3. There is error manifest in the record in this: that the complaint does not set forth a cause of action and the judgment entered has no legal basis to support it.

MERRITT LANE,
Attorney for and of Counsel with
Defendants-Appellants.

(Service acknowledged June 29, 1931.)

40

New Jersey Court of Errors and Appeals

WILLIAM J. TYRELL,
Plaintiff-Respondent,

vs.

JAMES V. BURKE, BERT A. WATERS,
WILLIAM P. HANSON, FRANK J.
CODY and JOHN R. BROEMEL,
individually and jointly,
Defendants-Appellants.

Appeal from
Supreme Court,
Mercer County.

Tried by
Oliphant, Judge,
and a jury.

Defendants'
Appeal from
Judgment of
\$3,400.00.

BRIEF OF APPELLANTS.

(Italics, etc., mine, except where otherwise noted.)

Statement of the Case.

The suit was brought by plaintiff against defendants and both counts are based upon the failure of defendants, who were members of the State Board of Embalmers and Funeral Directors, to issue a license to plaintiff as an embalmer, the charge being that he passed his examination in the month of August, 1927, and that defendants were guilty of negligence and gross negligence and were responsible for the "negligence and gross negligence of their agent and the agent of each of them" (paragraph 7, First Count); and that they "individually and collectively, wilfully and maliciously" refused to issue such license (paragraph 7 of Second Count) (Complaint, p. 2).

The answer denied the negligence and, by a First Separate Defense (p. 6), set up the following:

"First Separate Defense to First and Second Counts.

The defendants aver that they are appointed as a state board or body and that as

individuals or collectively (unless they are assembled as a state board or body) are incapable of performing any act or acts as alleged in the complaint and further aver that any act or acts done by them when assembled as a state board or body, are done as such board or body and defendants further aver that the plaintiff entered into a stipulation with the Attorney General for the State of New Jersey, as follows:

‘It is understood and agreed by the parties of the above entitled cause that it is not the intention of the plaintiff to bring action against the Board of Undertakers and Embalmers, as such, and that the plaintiff will not attempt in this suit, to move in any manner against the Board of Undertakers and Embalmers, as such, or to recover or attempt to recover any judgment against the said Board, as such.’ ”

The reply took issue upon the affirmative statements of the answer except that it admitted that plaintiff had entered into the stipulation mentioned in the First Separate Defense (p. 8).

Plaintiff said: he passed his examination for an embalmer in August, 1927 (p. 10); he did not receive his license and finally communicated with the then Senator Edwards, who communicated with the Board, and the secretary of the Board wrote plaintiff to call and see him, which plaintiff did on January 10, 1928 (p. 11); he was informed that he had not passed his examination for funeral director (p. 13); upon inquiry of the secretary of the Board he was told by him that they did not desire to grant an embalmer's license without a funeral director's license (p. 13); on further inquiry of the secretary of the Board, plaintiff was advised that he could do the work of embalming because he had been notified by letter that he had passed the examination; subsequently he took the matter up with a member of the Board (p. 16) and

thereupon the license was granted on August 13, 1928 (p. 17).

On cross-examination there developed great indefiniteness as to when plaintiff was notified that he had been successful in the embalmers' examination, his statement being first (p. 23), in effect, that he had been notified that he had passed the embalmer's examination and had failed in the funeral director's examination within thirty days after he had taken the examination in August, 1927, and then (p. 24) he says that he was notified that he had been unsuccessful in both examinations and that he received such notification in January, 1928; but then it appears that there was correspondence between the parties as to his license in December, 1927 (p. 24). Aside from the matter of damages, the above represents plaintiff's case.

One of the defendants, Broemel, who is a member of the Board and the secretary, testified for defendants that, immediately upon plaintiff passing the embalmer's examination, a letter was sent to him "something like this, 'This is to certify that you have passed—' whatever examination it was, and '—that this letter can be used in lieu of a license or card until the same is issued' ". The secretary explained that the certificate was not issued because of delay in getting certificates printed and then because it was desired that an embalmer's license and a funeral director's license be issued at the same time and it was considered that the notification would take the place of a license in the meantime (p. 34); this letter was sent to plaintiff within thirty days after he had taken the examination (p. 37).

Plaintiff was not the only one who had not received a license; some thirty-eight or forty men were treated in the same way (p. 38); the papers were marked in September and, at the next meeting of the Board in October, the Board ordered licenses

issued to those who had passed (pp. 41, 47); the issuance of the licenses was left by the members of the Board to the secretary (pp. 40, 49); the licenses are made up by the secretary but signed by all the members of the Board (p. 56).

At the close of plaintiff's case a motion to nonsuit was made (p. 32) which was held until the conclusion of the whole case at which time that motion, and, as I understand the record (p. 57), a motion to direct a verdict in favor of defendants, was made and denied and an exception allowed.

The case went to the jury under the charge of the Court, and, as to the liability of defendants, the Court charged as follows (p. 61):

“If the secretary of this Board failed to perform the duties *which the statute placed upon him* (there were none relevant to this case), if he failed to perform those duties wilfully, or if he knew what should have been done and negligently failed to perform those duties, then he is responsible for the damages, if any, that this plaintiff suffered as the result of his neglect. If the members of this Board either knew the situation or as reasonably prudent persons should have known the situation, then they are liable to respond in damages to this plaintiff for the injuries he has sustained. If they did not know of this situation and as reasonably prudent people should not have known of this situation, then the members of this Board, one or as many as did not know of this situation, then they are not liable to respond to this plaintiff in damages. But, as I say, if they knew of this situation and, knowing the situation, failed to perform the duties that this Act provided they should perform or if they should have known of this situation as reasonably prudent people, that is those that knew of the situation and neglected to perform it, or those that as reasonably prudent people should have known of the situation and did not, then they are liable to respond in damages.”

The result was a verdict for plaintiff of \$3,400 (p. 63), upon which judgment was entered (p. 64) and from that judgment this appeal is taken (Notice of Appeal, p. 65; Grounds of Appeal, p. 66).

Argument.

The complaint does not charge defendants individually with any specific act of negligence. While Broemel was secretary of the Board he is not charged with negligence *as such*. He is only charged with negligence *as a member of the Board*. In the fourth paragraph of the first count, repeated in the second count, it is alleged that the secretary and other officers of the Board, were selected by the members of the Board and "acted for the members of that Board and for each of them, under their direction, as their agent in the performance of the various powers and duties of those members collectively and individually."

The duty cast upon defendants which it is claimed was not properly performed is stated in the fifth paragraph of the first count, repeated in the second count, as "the duty of the members of that Board to issue or cause to be issued a license * * *".

In the first count the charge of liability is contained only in the 7th paragraph and that charge is against *all members of the Board* and so in the 7th paragraph of the second count there is no charge against any member of the Board, such as Broemel, for any act performed in any capacity as secretary or what not but is against them *as members of the Board*, the charge being wilfulness and maliciousness in their failure, as members of the Board, "to issue or cause to be issued a license".

The act is found in Supplement to Comp. Statutes of N. J., 1925-1930, p. 1919, sec. 225-20, and provides, section 225-22, for the selection of a secretary and treasurer, and, section 225-23, gives the secretary the care and custody of the seal and provides that the secretary shall keep a record of all the proceedings of the Board and makes it the duty of the secretary, whenever requested so to do, to certify over the seal of the Board, whether the records kept by the Board show or fail to show a license to carry on the business of embalming or funeral directing or the issuance of any renewal or whether any person has or has not a license in full force and effect, but does not impose any duty upon the secretary with respect to the issuance of licenses. That duty is cast upon *the Board* by section 225-28 in the following language:

“If the board shall be satisfied that the applicant is of good moral character and is over twenty-one years of age and is possessed of the necessary efficiency and qualifications in accordance with the terms of this act and of such rules and regulations as the board may, from time to time, adopt, in pursuance of the provisions of this act, *the board shall issue to said applicant* the license applied for, which said license shall expire upon the first day of October then next following. All examination papers shall be kept on record by said board.”

And by section 225-30 the act provides:

“Each license granted by the board shall be under the seal of the board, and signed by the president or such person or persons as may be designated by the board for that purpose. * * *.”

No rule or regulation of the Board was proven to show that any duty was cast upon the secre-

tary of the Board *as such* with respect to the issuance of licenses. The statute places the duty *upon the Board* and does not place any duty, with respect to the issuance of licenses, upon the secretary and I repeat that the complaint does not attempt to place responsibility upon Broemel because of any act performed, or omitted to be performed, by him *as secretary*. On the contrary, the complaint is against the members of the Board *as such* and their liability is predicated, in the first count, upon their negligence and gross negligence and upon the negligence and gross negligence of their agent and the agent of each of them, and, in the second count, upon their wilfulness and maliciousness in refusing to issue or to cause a license to be issued.

If the charge of the Court in the following language (p. 61)—“If the secretary of this Board failed to perform the duties which the statute placed upon him, if he failed to perform those duties wilfully, or if he knew what should have been done and negligently failed to perform those duties, then he is responsible for the damages, if any, that this plaintiff suffered as the result of his neglect” was intended to permit the jury to find a verdict against defendant Broemel for his negligence *as secretary of the Board*, as distinct from his negligence as a member of the Board, then the Court submitted an issue to the jury which was not within the pleadings and is the subject of an assignment of error on the record (Ground of Appeal 3). The language only can be conceived proper in this case if the word “secretary” is only to be considered as identifying a particular member of the Board. Moreover, the Court referred to duties which the *statute* placed upon him (the secretary). There are no duties placed upon the secretary which are at all material in this case except such as are placed upon every other member of the Board.

POINT I.

The duty being placed upon the Board as such, there is no liability of the members for negligence of any kind or description or for malice.

The general rule is stated in 46 Corpus Juris, title "Officers", p. 1045, sec. 329, in the following language:

"A public officer, who is a member of a corporate body upon which a duty rests, cannot be held liable for the neglect of duty of that body. If there be a refusal to exercise the power of such body, it is the refusal of the body, and not of the individuals composing it."

It is also stated in 22 Ruling Case Law, p. 487, sec. 165: title "Public Officers", in the following language:

"The question of the liability of a public officer for the wrongful act of a corporate body of which he is a member has not often been presented to the courts for adjudication. The rule, however, appears to be established that a public officer, who is a member of a corporate body upon which a duty rests, cannot be held liable for the neglect of duty of that body. If there be refusal to exercise the power of such body, it is the refusal of the body, and not of the individuals composing it. The official action of its different members is merged into the official action of the board itself as an entity."

The cases support the text.

Monnier v. Godbold, (1906), 116 La. 165, 40 So. 604, 5 L. R. A. (N. S.) 463, is directly in point. In that case a State Board of Pharmacy omitted to issue a license to the plaintiff and he sued for the

incidental damages. It was conceded that the license should have been granted and the sole question was whether the members of the Board were liable for their refusal to issue it. In that case, as in the case at bar, no particular officer of the Board was pointed out by the statute as having executive powers and in that case, as in the case at bar, the record does not show that the Board itself delegated the duties to any particular person, and the Louisiana Court said—"No such power or duty is thrown upon the secretary." The Court further said:

"As said by the court of appeals of New York in *Bassett v. Fish*: 'It is true that if any one of the defendants (members of the corporation) had done a wrongful act, wilfully or negligently, upon the premises of the district, from whence injury came to teacher or scholar, he would ordinarily be liable; but not because he was a trustee or a member of the board of education, but because he was the person doing the act. So it may be that if one of them had been duly charged by the corporate body as its agent or servant, distinct from his relation as a corporator, with duty and responsibility, the neglect of which brought damage to another, he would be liable as a private person therefor. For generally the servant or agent will be liable, as well as the superior of him, for his neglect of duty. But it is not seen how a member of a corporate body, upon which body a duty rests, can be held individually liable for the neglect of its duty by that body. There is no duty upon him to act individually. His duty is as a corporator, and it is (his duty) to act in the corporation in the way prescribed for its action and by the use of its powers and means. And if there is neglect to exert its powers or all its means, it is the neglect of the body, and not of the individuals composing it. Hence we are unable to find reason for upholding the judgment against those of the defendants

who were not personally charged by the corporate body with a duty as its agent or servant.'

In the case before us the act complained of was not one of commission, but of omission (a refusal to grant a certificate), and the action or nonaction of the corporate body was one with which the defendants were connected exclusively in their positions as members of the board. Nothing which they did or could do, simply as individuals, could alter the situation. As individuals, they were strangers to the act complained of. The official action of the different members became merged in the ultimate action of the board itself as an entirety."

To the same effect is *Blanchard v. Burns*, 110 Ark. 515, 162 S. W. 63, 49 L. R. A. (N. S.) 1199, in which it was claimed that the members of a special school district were individually responsible for failure to comply with the provisions of the statute directing the taking of a bond from a contractor for public work conditioned upon paying all indebtedness for labor and material, upon which bond any person to whom there was due any sum for labor or material furnished might bring an action. The Court held no and cited *Monnier v. Godbold*, 116 La. 165, 5 L. R. A. (N. S.) 463, 40 So. 604, 7 Anno. Cases 768, and said (p. 1201):

"It will be observed that the statute does not, in terms, impose any liability, either on the school district or the officers. If any liability exists at all, it must be by virtue of a breach of duty by the directors as individuals. The language of the statute, in referring to the officers, does so in an official, and not in an individual, capacity. *It is not intended to impose any duty as individuals, but as officials representing the public.* In other words, so far as it applies to improvements made for a school district, it means the district itself, and

the duty is only imposed on the officers as the representatives of the district, *collectively in their representative capacity, and not as individuals.*"

In *Pidgeon Thomas Iron Co. v. Leflore County*, 135 Miss. 155, 99 So. 677, suit was brought by plaintiff, who had furnished materials to the contractor on a bridge construction job for the county, claiming that defendants as members of the Board of Supervisors and individually were liable for neglecting to demand a bond from the contractor. The Court held there was no liability. The language of the Court is as follows (p. 679):

"The next question presented for decision is: Did the failure of the Board of Supervisors to take the bond required by chap. 217 of the laws of 1918 constitute such negligence on the part of the members of such board as to render them individually liable to the plaintiff for the value of material furnished the contractor?"

The Board of Supervisors of a county is created by statute for special purposes, and it exercises only such powers as are conferred by statute, either expressly or by implication, and it is charged with the performance of such duties as are imposed by statute. *In the discharge of the duties imposed upon the board the members thereof act in an official and not an individual capacity, and any neglect or failure in the exercise of its powers or discharge of its duties is the default of the board, and not of the individuals composing it, and they are not liable for such default unless made so by statute.* Chapter 217, laws of 1918, does not in terms impose any duty upon the members of the board as individuals, but only as officials representing the public, and it does not impose any individual liability for the defaults of the board in respect to the duties thereby imposed upon it."

In *Johnson v. Marsh*, 82 N. J. L. 4, an action for libel was brought against the defendants, who composed the "Board of Protectors of Franklin Township in the County of Gloucester" who were appointed under the act of the legislature entitled "An act for the prevention of drunkenness", to recover damages for the publication by the Board of a notice to a licensed saloon keeper instructing him to desist and refrain from selling liquor to certain persons, among others, plaintiff. It appeared at the trial that the name of the plaintiff was given to the president of the Board by persons in whose truthfulness the Board had confidence but that the Board made no independent investigation of the habits of plaintiff with respect to the use of intoxicating liquors. The Supreme Court, speaking by Mr. Chief Justice Gummere, said:

"It is settled in this state that the members of a public board, acting in the performance of a public duty, and under a public statute, are not personally liable in a civil action for damages arising out of their acts, providing what they do is done in good faith. *Valentine v. Englewood*, 47 Vroom 509. The board of protectors of Franklin township is a public board. The duties imposed upon it by the act of April 20th, 1909, are public duties. The action which is made the subject of the present suit was done in the performance of that duty. Consequently, they are not liable to the plaintiff for any injury resulting to him from the notice sent by the board to the saloonkeeper, notwithstanding the fact that he (the plaintiff) was not addicted to the excessive use of intoxicating liquor—as appeared from the proofs in the cause—unless it appeared that in sending the notice the board did not act in good faith."

POINT II.

Defendants cannot be held liable for the negligence of the secretary of the Board.

I have already adverted to the fact that there is no proof of any negligence of the secretary of the Board *as such* for the statute imposes no duty upon the secretary of the Board with respect to these licenses which it does not impose upon *every* member of the Board and no rule or regulation was proven delegating any duty to the secretary if it were within the power of the Board to delegate such a duty where the statute imposes the duty upon them as a Board.

But had there been such a delegation of duty the members of the Board could not be held liable for negligence in the performance of that duty.

The general rule is stated in 46 *Corpus Juris*, title "Officers", p. 1045, sec. 330, in the following language:

"The doctrine of *respondeat superior* applicable to the relation of master and servant does not apply to a public officer so as to render him responsible for the acts or omissions of subordinates whether appointed by him or not, unless he, having the power of selection, has failed to use ordinary care therein, or unless he has been negligent in supervising the acts of such subordinates, or has directed or authorized the wrong."

And the rule is also expressed in 22 Ruling Case Law, p. 487, sec. 166, in the following language:

"Public officers and agents of the government are not liable for the acts or defaults, negligence or omissions of subordinate officials in the public service, whether appointed by them or not, unless they direct the act com-

plained of to be done, or personally co-operate in the negligence from which the injury results. Where the subordinates have been appointed by them it is sufficient if they have employed trustworthy persons of suitable skill and ability, and have not been negligent in selecting such subordinates.”

The cases support the text.

Hilton v. Oliver, 204 Cal. 535, 269 Pac. 425 (1928), 61 A. L. R. 297, and at page 300 there is an extensive note upon the subject.

And see *Maguire v. Grant*, 25 N. J. L. 356.

POINT III.

The verdict cannot be sustained only as to defendant Broemel, who was secretary of the Board.

This matter has already been argued. Summarized, the argument is that the complaint does not charge, as against him, any negligence *as secretary* and that the proofs did not show any duty cast upon his *as secretary* with respect to these licenses.

The motion to non-suit and to direct a verdict as to him should have been granted as well as to the others.

Moreover, there is no charge in the complaint of any duty cast upon Broemel as secretary of the Board. The only charge in the complaint with respect to any duty cast upon *any* of the defendants is contained in paragraph 5 of the first count, repeated in the second count, which is in the following language:

“5. Unless for good cause or legal reason, it was the *duty of the members of that Board* collectively and individually, to issue or cause

to be issued a license which would entitle an applicant or candidate for such license to transact the business of embalming where such applicant or candidate conformed with all the provisions of chapter 156, laws of 1927, together with the rules and regulations adopted by that Board, pursuant to said Act."

Any judgment against defendant Broemel, as distinct from the other defendants, would, therefore, be without the issue and would create error manifest in the record.

POINT IV.

There is manifest error in the record (Third Ground of Appeal).

An examination of the complaint, the answer and reply, the reply admitting the allegation of the first separate defense to the effect that the suit was not against the "Board of Undertakers and Embalmers" as such but against the individual members of the Board, as indeed the complaint indicates, will show that the judgment has no basis to support it for the reason that (a) the complaint is confined to a charge against the individual members of the Board for negligence, wilfulness or maliciousness in the performance of a duty cast by the statute, not upon the individual members of the Board, but upon the Board as such, and (b) because the complaint in its first count charges the individual members of the Board for the alleged negligence of the secretary, and the rule of law is that the individuals composing the Board cannot be held for the negligence of their subordinates, and the law does not cast upon the secretary of the Board any duties with respect to the subject matter of the issuance

of licenses, and because the complaint does not set forth any duty cast upon the secretary of the Board, the charge in the complaint, paragraph 5, with respect to duties being that it was "the duty of the members of that board collectively and individually to issue or cause to be issued a license".

This error being manifest in the record needs no exception or objection in the court below.

Margales vs. Goldberg, 101 N. J. L. 75.

It is respectfully submitted that the judgment should be reversed.

MERRITT LANE,
Of Counsel for Appellant.

PHILIP F. SAUER,
Attorney for Appellant.

New Jersey Court of Errors and Appeals

Between

WILLIAM J. TYRELL,
Plaintiff-Respondent,

and

JAMES V. BURKE, BERT A. WATERS,
WILLIAM P. HANSON, FRANK J.
CODY and JOHN R. BROEMEL,
individually and jointly,
Defendants-Appellants.

Appeal from
Supreme Court,
Mercer County.

REPLY BRIEF OF APPELLANTS TO SUP- PLEMENTAL BRIEF OF RESPONDENT FILED BY LEAVE OF COURT.

The cases cited by plaintiff-respondent in his supplemental brief filed by leave of Court have no application to the situation now before this Court, nor is the question in this case as put by plaintiff-respondent at page 2 of his supplemental brief as follows: "Can the individuals composing this Board be held responsible for *wilful* negligence in the violation of a plain *ministerial* duty imposed by them by the statute." The question as claimed by plaintiff-respondent as the issue here has two imperfections:

1. No plain *ministerial* duty is cast upon *either* the board or the members of the board by the statute. The statute, as pointed out on page 6 of our original brief, Supp. to Com. Stat. of N. J., 1925-1930, page 1919, sec. 225-20, etc., contains no directions to *the members of the board* or to the secretary of the board (so far as the issues involved in this case are concerned) its commands being directed to the "*board*" as such and in-

stead of the statute providing for "*ministerial* duties," the duties conferred upon the board are in the highest degree matters of *discretion* and, indeed, involve the exercise of "judicial" discretion.

Throughout his supplemental brief plaintiff-respondent has referred to cases in which were involved purely ministerial acts such as *Amy v. Barkholder*, 11 Wall 136, 20 L. Ed. 101, in which the supervisors of the county had refused to obey the command of a peremptory writ of mandamus issued out of the United States District Court for the District of Iowa commanding them to levy a tax to meet a judgment which had been obtained in that court.

Clark v. Miller, 54 N. Y. 528, involved the failure of a public officer to obey the law which cast upon him the duty of presenting a reassessment to the Board of Supervisors. Instead of so doing the public officer "* * * presented the original assessment by the Commissioners" which was a plain violation of the mandate of the statute.

The distinction between duties which are *purely* ministerial and those which are not is pointed out in all of the cases and text books and Cyclopedic authorities such as *43 Corpus Juris*, title "Municipal Corporations," sec. 1198, page 714, mentioned by plaintiff-respondent and is indicated likewise in the note to *Robinson v. Chamberlain*, 90 American Decisions, page 729, where the rule is stated:

"Public officers acting within the scope of their authority are not answerable in damages for the consequences of their acts, *unless done maliciously and with intent to injure.*"

And *43 Corpus Juris*, title "Municipal Corporations," sec. 1198, page 714, mentioned by plaintiff-respondent, states the rule as follows:

"Municipal officers, like other officers, are immune from liability for the injurious effects of the discharge of discretionary duties,

unless they act corruptly or exceed their authority, or unless it is shown that they acted wilfully and maliciously, with the express purpose of inflicting injury upon plaintiff
* * * ,”

And reference to the right of plaintiff-respondent to earn his living as an embalmer under the provisions of the Constitution of the United States, for which proposition the Yick Wo case, 118 U. S. 356, 30 L. Ed. 220; *Douglas v. Noble*, 261 U. S., p. 165, 67 L. Ed. 590, and *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60, are cited, is beside the point, for, assuming that the legislature of New Jersey had no right to confer the powers which it did upon the board, the members of the board cannot be held civilly for exercising the powers conferred upon them.

If plaintiff-respondent was entitled under the Constitution of the United States to work as an embalmer and the legislature, or the board acting under the provisions of legislation, was depriving him of that right, his remedy was to go forward and exercise the right and raise the question upon any proceedings which might be taken to prevent him from continuing in business, which has been held in this State in an analogous case to be a proper procedure.

Durkin Lumber Co. v. Fitzsimmons, 106
N. J. L. 183.

2. The second imperfection contained in the question as put by plaintiff-respondent (p. 2) is that the case was not submitted to the jury upon the issue of “*wilful negligence*” in the violation of a plain ministerial duty, as clearly indicated by the charge of the Court quoted at page 4 of our original brief. The jury was permitted to predicate the liability of the secretary of the board (upon whom no duties were cast by the statute

which were not cast upon the other members of the board, so far as the issue here is involved) upon *either* "wilful negligence" on his part or *any* negligence, and the jury was permitted to predicate the liability of the other members of the board upon the negligence, wilful or otherwise, of the secretary of the board which they as reasonable, prudent men should have known (see Point II of our Original Brief, p. 13).

Plaintiff-respondent treats the case as one which went to the jury upon the issue of "good faith" so as to bring it within *Johnson v. Marsh*, 82 N. J. L. 4. The difficulty is that the case was not submitted to the jury upon any such issue.

It is, of course, immaterial whether the board was incorporated or no. The "board" was a governmental agency and the cases mentioned under Point I, page 8, of our original brief are directly in point, and neither in the original brief or the supplemental brief of plaintiff-respondent are they distinguished or even mentioned.

We submit the following authorities are controlling upon the issue as to whether the individual members of the board under the circumstances of this case are liable for negligence,

46 Corpus Juris, title "Officers," p. 1045, sec. 329;

22 Ruling Case Law, p. 487, sec. 165;

Monnier v. Godbold (1906), 116 La. 165, 40 So. 604, 5 L. R. A. (N. S.) 463 (directly in point);

Blanchard v. Burns, 110 Ark. 515, 162 S. W. 63, 49 L. R. A. (N. S.) 1199;

Pidgeon Thomas Iron Co. v. Leflore County, 135 Miss. 155, 99 So. 677;

Johnson v. Marsh, 82 N. J. L. 4.

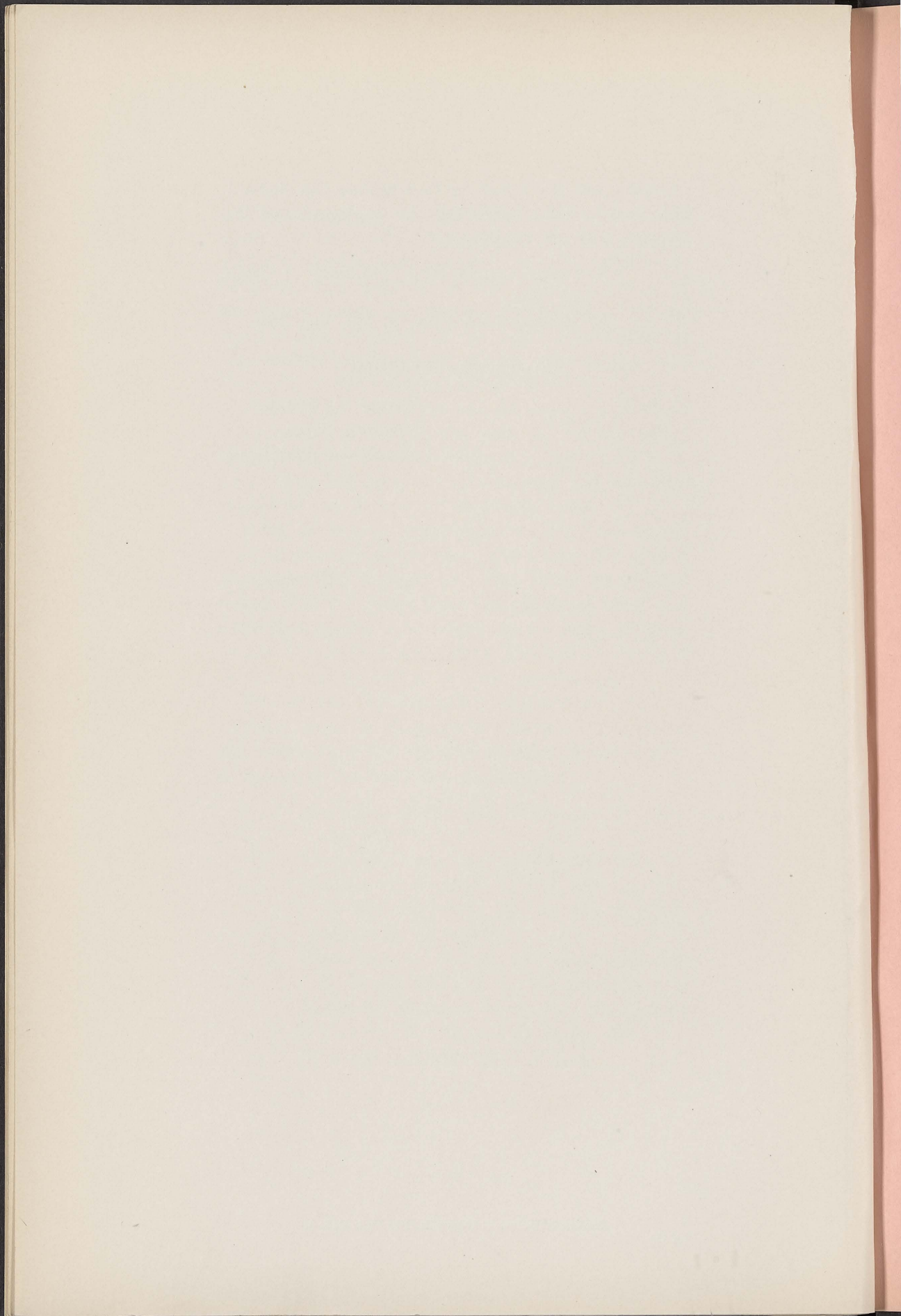
And upon the point as to whether the defendants can be held liable for the negligence of the secretary of the board see

46 Corpus Juris, title "Officers," p. 1045,
sec. 330;

22 Ruling Case Law, p. 487, sec. 166.

Respectfully submitted,

PHILIP F. SAUER,
MERRITT LANE,
Of Counsel for Appellant.



INDEX.

	Page
Summons	1
Complaint	2
Schedule A	3
Demanded for Bill of Particulars	5
Answer	7
Reply	8
Notice	9
Postea	11
Notice of Appeal	13
Substitution	13
Grounds of Appeal	14
Depositions	18
Motion for Non-Suit	40
Verdict	42
Certificate of Judge	43

DISPOSITIONS.

Plaintiff's

Lloyd Fisher—	
Direct	23
Harry L. Stout—	
Direct	25
Frank G. Carlisle—	
Direct	26
Cross	27
Re-direct	28
Re-cross	29
William Sandness—	
Direct	33
George H. Bryant—	
Direct	36
Cross	37
Re-cross	40

