

New Jersey Court of Errors
and Appeals

JOHN D. FOLEY,

Prosecutor-Appellee,

VS.

THE CITY OF ORANGE,

Respondent-Appellant.

On Certiorari.

CASE.

WILLIAM A. LORD,

Attorney for Prosecutor.

ARTHUR B. SEYMOUR,

Attorney for Respondent.

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WRIT OF CERTIORARI

NEW JERSEY SUPREME COURT

NEW JERSEY, SS.:

To wit, THE STATE OF NEW JERSEY to the
SUPREME City of Orange, GREETING:

COURT We being willing for certain reasons to
SEAL be certified as to a certain resolution passed

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by the Board of Commissioners of the City
of Orange, County of Essex and State of New Jersey, on
October 31, 1916, purporting to find John Foley guilty of
a certain charge made against him, filed with the City
Clerk by John Drabell, Chief of Police, to wit, that said
John Foley had been guilty of conduct unbecoming an
officer of the Police Department of the City of Orange
in violation of Rule 15 of said Department, and dismiss-
ing the said John Foley from membership in the Police

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Department of the City of Orange, and all matters and things pertaining to the same:

10 We do command you that the aforesaid resolution passed by the Board of Commissioners of the City of Orange on said October 31, 1916, together with the records of the meetings of said Board of Commissioners in which said resolution was introduced and adopted, and the records of said Police Department in any way referring thereto, and all other things touching and concerning the same, as fully and entirely as before you they remain, to our Justices of the Supreme Court of Judicature, at Trenton, on February 20, 1917, you certify and send, together with this writ, that therein may be done what of right and according to the laws of this State should be done.

WITNESS WILLIAM S. GUMMERE, Esquire, Chief Justice of our Supreme Court, at Trenton, this tenth day of February, One Thousand Nine Hundred and Seventeen.

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WM. C. GEBHARDT,

Clerk.

WILLIAM A. LORD,

Attorney.

The within writ is allowed.

WM. S. GUMMERE,

C. J.

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RETURN TO WRIT

*To the Honorable the Justices of the Supreme Court of
Judicature of the State of New Jersey:*

I, John J. Byrne, City Clerk of the City of Orange, in the County of Essex, in obedience to the command of the writ hereto annexed, to the City of Orange directed, do hereby certify and send to you a certain resolution passed by the Board of Commissioners of the City of Orange on October 31, 1916, purporting to find John Foley guilty of a certain charge made against him, filed with me by John Drabell, Chief of Police, and dismissing the said John Foley from membership in the Police Department of the City of Orange, together with the records of the meetings of said Board of Commissioners at which said resolution was introduced and adopted, the charges preferred against said John Foley, the testimony taken before said Board and the rules of the said Department so far as they relate to the said charge, and all other things touching and concerning the same as fully and entirely as same remain in my hands or possession, or the possession of The City of Orange, as by the said writ the said The City of Orange is commanded. All of which are hereto annexed.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of The City of Orange, this twenty-third day of February, 1917.

JOHN J. BYRNE,
City Clerk of the City of Orange.

[CITY OF ORANGE
SEAL]

COPY OF CHARGES

Orange, N. J., October 9th, 1916.

*The Honorable Board of Commissioners,
Orange, New Jersey.*

Dear Sir:—

I beg leave to submit the following charges and specifications against Patrolman John Foley.

10 Charges:—Conduct unbecoming a Police Officer.

Specifications:—

FIRST:—The said John Foley on September 20th, 1916, did visit the home of Herbert Macluskey, 9 Ridgehurst Road, West Orange, New Jersey, during the absence of Mr. Macluskey.

20 SECOND:—On September 20th, 1916, about the hour of 12.20 P. M. Herbert Macluskey found the said John Foley and Mrs. Myra Macluskey in a bedroom in Mr. Macluskey's home, 9 Ridgehurst Road, West Orange, both in a partly undressed condition.

All of which is in violation of Rule 15 of the Rules and Regulations and discipline of the Police Department of the City of Orange adopted by the Board of Commissioners of the said City of Orange.

Respectfully submitted,

JOHN DRABELL,

Chief of Police.

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EXTRACT FROM RULES AND REGULATIONS
FOR THE GOVERNMENT OF THE OFFICERS
AND MEMBERS OF THE ORANGE POLICE DE-
PARTMENT, ADOPTED OCTOBER 20, 1914.

DISCIPLINE

Any officer or member of the Force shall be subject to reprimand, suspension, deduction of pay, or dismissal, according to the nature and aggravation of his offense, for any of the following causes: 10

* * * * *

15. Conduct not becoming an officer and a gentleman.

GENERAL RULES

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17. All members of the Police Force shall be considered to be always on duty, and shall appear in full uniform, except when the Director of Public Safety shall deem it proper to allow them to appear in citizen's dress. 20

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EXTRACT FROM RECORDS OF MEETINGS OF
THE BOARD OF COMMISSIONERS

Orange, N. J., Oct. 10th, 1916.

Regular meeting of the Board of Commissioners of the City of Orange, held in the Assembly Chamber, City Hall, Orange, on Tuesday afternoon, October 10th, 1916, at four o'clock.

ROLL CALL

- 10 Present:—Commissioners Calhoun, Kearney, Weth-
ling, Murray and Mayor Minahan:—5.
Absent:—None.

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Commissioner Kearney then presented a communication from John Drabell, Chief of Police, submitting charges and specifications against Patrolman John Foley, which was read and ordered filed.

- 20 Commissioner Kearney then presented the following resolution and moved for its adoption.

WHEREAS, John Drabell, Chief of Police, has filed with the City Clerk of the City of Orange certain charges against John Foley, a member of the Police Force of the City of Orange, and

- 30 WHEREAS, in the opinion of the Board of Commissioners of the City of Orange the said John Foley should be brought to trial upon the said charges.

NOW, THEREFORE, BE IT RESOLVED, That Tuesday the seventeenth day of October, Nineteen Hundred and Sixteen at four o'clock P. M., or as soon thereafter as the matter can be heard at the meeting room of the Board of Commissioners in the City Hall, Day Street, Orange, New Jersey, be and the same is hereby fixed as the time and place for the hearing of the said charges against said John Foley.

- 40 BE IT FURTHER RESOLVED, That a copy of this resolution together with the said written charges be served

upon the said John Foley at least five days before the seventeenth day of October, Nineteen Hundred and Sixteen, either personally or by leaving the same at his usual place of abode with a member of his family above the age of fourteen years as notice of the trial of the said charges.

Daniel F. Minahan,
William A. Calhoun,
William F. Kearney,
Harry D. Wethling, 10
Frank J. Murray.

The Roll being called the resolution was adopted, all voting yea on a call for the yeas and nays.

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On motion by Commissioner Calhoun the meeting adjourned.

JOHN J. BYRNE,
City Clerk. 20

Orange, N. J., October 17th, 1916.

Regular meeting of the Board of Commissioners of the City of Orange, N. J., held in the Assembly Chamber, City Hall, on Tuesday afternoon, October 17th, 1916, at four o'clock.

ROLL CALL

Present:—Commissioners Calhoun, Kearney, Wethling, Murray and Mayor Minahan:—5. 30

Absent:—None.

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Commissioner Kearney then presented the following resolution and moved for its adoption:

RESOLVED, By the Board of Commissioners of the City of Orange, that the trial of John Foley, a member of the Police Force of the City of Orange, be and the same is hereby adjourned to Tuesday, October 31, 1916, at four 40

P. M., the said John Foley having requested, through his counsel, said adjournment.

Daniel F. Minahan,
William A. Calhoun,
William F. Kearney,
Harry D. Wethling,
Frank J. Murray.

10 The Roll being called, the resolution was adopted, all voting yea on a call for the yeas and nays.

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On motion of Commissioner Calhoun the meeting adjourned.

JOHN J. BYRNE,
City Clerk.

Orange, N. J., October 31, 1916.

20 Regular meeting of the Board of Commissioners of the City of Orange, held in the Assembly Chamber, City Hall, on Tuesday afternoon, October 31st, 1916, at four o'clock.

ROLL CALL

Present:—Commissioners Calhoun, Kearney, Wethling, Murray and Mayor Minahan:—5.

Absent:—None.

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30 Commissioner Kearney then moved that the Board consider the evidence in the case of John Foley a member of the Police Force on charges submitted by John Drabell, Chief of Police, which motion was carried, all voting yea on a call for the yeas and nays.

Daniel A. Dugan, Esq., Attorney for Mr. Foley, stated that his client acknowledged receipt of copy of the complaint and of resolution setting forth the time and day for the trial.

40 In view of the City Counsel being called into the case previous to the charges submitted by the Chief of Police,

Commissioner Kearney stated that George W. Perry, Esq., would represent the city.

The following were called to testify in the case, said testimony being taken under oath:—

Chief of Police, John Drabell; Herbert M. MacLuskey, Mrs. Myra MacLuskey, I. J. Finkelstein, John Foley, Mr. and Mrs. B. Goldberg.

After the Board had considered all the evidence in the case, Commissioner Kearney presented the following resolution and moved for its adoption: 10

WHEREAS, the Board of Commissioners of the City of Orange, by a resolution adopted October 10, 1916, ordered that John Foley, a member of the Police Department of the City of Orange, be brought to trial before said Board upon charges filed with the Board by John Drabell, Chief of Police, charging him with conduct unbecoming an officer in violation of Rule 15 of the Rules, Regulations and Discipline of the Police Department adopted by the Board of Commissioners, which said charges are on file with the City Clerk, and 20

WHEREAS, by consent of the Board and of said John Foley, his trial upon the said charges was had before the said Board on October 31, 1916, at 4 P. M., at the meeting room of the Board, City Hall, Orange, in the presence of George W. Perry, Attorney for the City of Orange, and Daniel A. Dugan, Attorney for said John Foley, and the Board having heard the testimony of witnesses sworn on behalf of the City and on behalf of said John Foley, and having considered the same and having heard the argument of said attorneys and considered the same; now, therefore, 30

RESOLVED, That the said John Foley is guilty of the charge made against him, as filed with the City Clerk by the Chief of Police as aforesaid, and does hereby find him guilty of conduct unbecoming an officer of the Police Department of the City of Orange in violation of Rule 15 aforesaid, as charged, and does hereby dismiss said John 40

Foley from membership in the Police Department of the City of Orange.

Daniel F. Minahan,
William A. Calhoun,
William F. Kearney,
Harry D. Wethling.

10 Commissioner Murray moved that the final action by the Board be postponed for one week to allow the Board to carefully consider all evidence in the case from written copies of same to be furnished by the City Clerk, which motion was lost as by the following vote:—

Yeas.—Commissioner Murray—1.

Nays.—Commissioners Calhoun, Kearney, Wethling and Mayor Minahan—4.

The resolution was then adopted as by the following vote:—

20 Yeas.—Commissioners Calhoun, Kearney, Wethling and Mayor Minahan—4.

Nays.—Commissioner Murray—1.

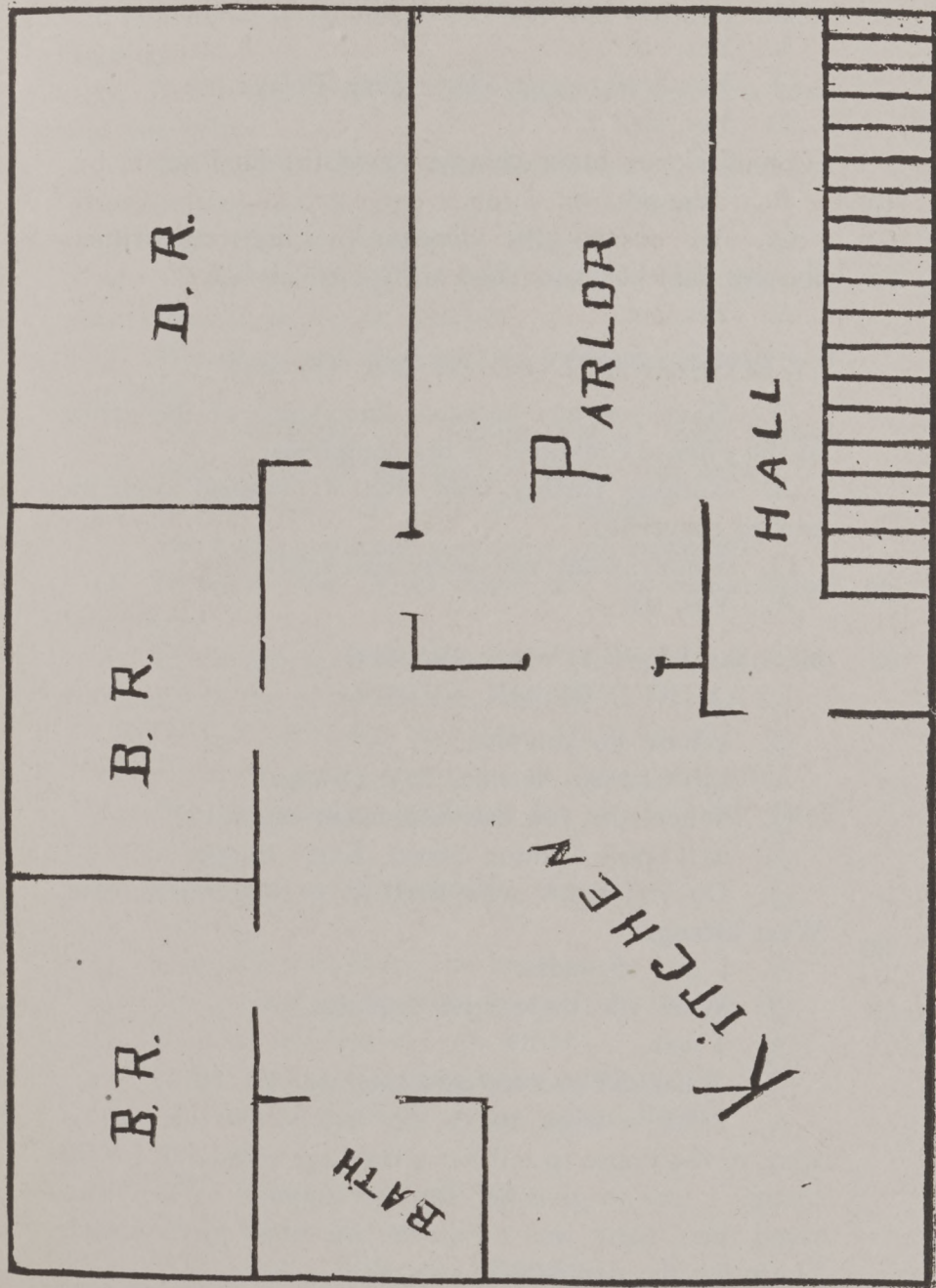
On motion of Commissioner Calhoun the meeting adjourned.

JOHN J. BYRNE,
City Clerk.

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PLAN OF MacLUSKY APARTMENTS



TRANSCRIPT OF TESTIMONY

CHIEF DRABELL SWORN.

BY MR. PERRY:

Q. You are the Chief of Police?

A. Yes, sir.

Q. You have as an officer John Foley?

A. Yes, sir.

Q. Did you make charges against John Foley?

10 A. Yes, sir.

Q. Are these your charges? (Showing witness charges that had been filed with City Clerk.)

A. Yes, sir.

CROSS-EXAMINED BY MR. DUGAN:

Q. Have you any personal knowledge of the nature of the offense contained in the complaint?

A. Nothing further than what I obtained from the parties concerned.

Q. Simply what you have been told?

20 A. Yes, sir.

MR. MACLUSKY WAS SWORN.

EXAMINED BY MR. PERRY:

Q. Where do you live?

A. 456 Central Avenue, East Orange.

Q. Where did you live September 20, 1916?

A. 241 South Clinton Street, East Orange.

Q. Do you know who lived at 9 Ridgehurst Road, West Orange?

30 A. I do; my wife.

Q. Were you there upon that day?

A. I was.

Q. What did you see on September 20, 1916?

A. I left a week and a day before that date and I went to the house to tell her where she could call for the money I was to give her for her support. When I arrived there there was a note on the door which stated: "Left for the dentist's."

40 Q. What did you see after that?

A. I went upstairs and found the doors locked and then went downstairs and got in the parlor window from the porch. Foley was standing in the bedroom. My wife had her skirt off and shoes off and was standing in the bedroom.

Q. What conversation took place between this man and yourself?

A. He said his name was McDermit. I asked my wife his name and she said Andrew McDermit.

Q. How long was he in the place?

A. To my knowledge, at least seven or ten minutes; 10
about time enough to get dressed.

Q. Was there any conversation between yourself and your wife?

A. She said there was nothing wrong, and I said "Any damn fool could see that something was wrong."

Q. In what way was your wife dressed?

A. She had a petticoat and waist and stockings.

Q. In what room of the house did this conversation take place?

A. In the alcove of the kitchen. He came out of the 20
room and to the alcove of the kitchen.

CROSS-EXAMINED BY MR. DUGAN:

Q. How was it that you came to leave your wife?

A. She requested me to leave her so she could have full swing.

Q. Were you not living with your wife?

A. No, sir.

Q. How did you reach the bedroom?

A. By coming in the front room from the door. 30

Q. In what window did you enter?

A. In the parlor, all rooms being upstairs.

Q. Did she live entirely on the second floor?

A. Yes, sir.

Q. Did you live there with her?

A. Up to a week before.

Q. Was there a little girl present?

A. Yes, sir.

Q. After you went in, why was it necessary for you to go to the second-story window? 40

A. The doors being locked.

Q. You went in the house through the front door, which was open, and then went upstairs and found the doors there locked?

A. Yes, sir.

Q. Where was the kitchen located?

A. At the top of the stairs, to the rear.

Q. What do you mean by the alcove of the kitchen?

A. A part of the kitchen, there being two doors leading to the kitchen, it being sort of a corridor.

10 Q. Were you ever convicted of crime?

A. I was.

Q. What crime?

A. Burning down a haystack, malicious mischief.

Q. How much time did you serve?

A. 360 days in the New Jersey Reformatory and about three months in the County Jail at Freehold. (Also said he served time to serve her).

Q. You made the complaint through the Chief of Police against Foley?

20 A. I did.

Q. Did you make complaint to anyone else?

A. No, sir.

Q. Did you appear anywhere else to make a complaint against Foley?

A. I made complaint to Chief Bamford.

Q. Have you appeared in court in this case?

A. I appeared before the Grand Jury.

Q. How long ago?

30 A. On October 6.

Q. It was the Grand Jury that was discharged last week?

A. I suppose so.

Mr. Perry rested for the City.

MR. FOLEY SWORN.

Chief Drabell recalled.

BY MR. DUGAN:

Q. How long has Foley been on the police force?

A. Since December 1st, 1914.

40 Q. Any charges against him?

A. No charges before I made this complaint.

MR. FOLEY EXAMINED.

Q. You are the defendant in this case?

A. Yes, sir.

Q. Do you know Mrs. MacLusky?

A. I do now, but I did not at that time.

Q. Do you know Mr. MacLusky?

A. I do now.

Q. When was that time?

A. On or about September 20. 10

Q. Were you at 9 Ridgehurst Road, West Orange, on September 20?

A. Yes, sir.

Q. How did you come to go there?

A. By request of Miss Myra Day.

Q. How did you come to go to the house where she lived?

A. She said she lived there and invited me to come.

Q. Do you remember the last witness on the stand coming into the house? 20

A. Yes, sir.

Q. What time of the day was it?

A. Little after twelve o'clock.

Q. Where were you and Mrs. MacLusky when Mr. MacLusky came into the house?

A. I was standing in the parlor, fully dressed, upstairs.

Q. Had your hat on?

A. Yes, sir. 30

Q. Had you been there long when he came?

A. I should judge about fifteen or twenty minutes.

Q. How was she dressed?

A. Fully dressed.

Q. Did she have more than a waist?

A. Yes; waist, dress, shoes, fully dressed.

Q. Where was she?

A. She was sitting and I was standing.

Q. Was anyone else present?

A. Yes, there was a little girl present. 40

Q. While you were in there with Mrs. MacLusky was the door locked?

A. Yes, sir, but I did not know it.

Q. How did the child get in?

A. One child was in at the time.

Q. Did Mr. MacLusky come in the parlor window?

A. Yes, sir.

Q. What was the condition of the door at that time?

A. It was unlocked.

Q. Who locked the door?

10 A. I didn't know it was locked.

Q. How did you discover it was locked?

A. I heard the knock; she said the door was locked.

Q. Did you see him coming in?

A. Yes, sir.

Q. Was the key in the door?

A. Yes, sir.

Q. What did Mr. MacLusky say to you?

20 A. He said what are you doing here? Said the young lady was his wife. She told me her name was Myra Day.

Q. How long did you know her?

A. A little over a year.

Q. Did you call on her before this date?

A. Yes, sir.

Q. When did she tell you that the children were her sister's children?

A. A little before then.

Q. Did you ever take her out?

30 A. Two or three times, to moving picture shows.

Q. You were under the impression that she was a single girl?

A. Yes, sir.

Q. The first intimation you had that she was not a single girl was on this date?

A. Yes, sir.

CROSS-EXAMINED BY MR. PERRY:

Q. What time of the day, September 20, did you go to the house?

40 A. It was close to twelve o'clock; about 11.40.

- Q. What time was it when he came in?
- A. A little after twelve o'clock; I don't know exactly what time after twelve.
- Q. How long after you heard the knock at the door did he come in through the window?
- A. About a minute.
- Q. How long after the knock did you open the door?
- A. I don't know.
- Q. You heard the knock and said that someone was at the door?
- Q. Did you not say to her that someone was at the door? 10
- A. No, sir. We heard the knock.
- Q. Did anyone go to the door?
- A. No, sir.
- Q. How long after you unlocked the door did he come in?
- A. It was about a minute or two, I should judge.
- Q. Did you and this young lady have any conversation between the time you heard the knock at the door and when you opened it? 20
- A. I don't remember.
- Q. Was anything said about the knock at the door?
- A. I don't remember.
- Q. Do you remember telling Judge Dugan that there was a knock at the door and that you opened the door?
- A. I do not.
- Q. You are a little uncertain about the knock at the door?
- A. We both heard the knock. 30
- Q. Is the parlor right next to the hall door?
- A. There is a door that leads into that room.
- Q. When you went into the house did you see a note that said she had gone to the dentist's?
- A. No, sir.
- Q. Did she answer the door bell or knock at the door when you came?
- A. Yes, sir.
- Q. Did you close the door after you went in?
- A. I don't remember. 40

Q. Did you walk right in and shut the door, or what happened?

A. I don't know if I closed the door.

Q. Did Mr. MacLusky ask you your name?

A. He said, Who is this? Miss Day answered, It is McDermit.

Q. You say you had your hat and coat on?

A. Yes, sir.

10 Q. When did you put your hat on, when you heard the knock at the door?

A. Yes, sir.

Q. How long have you known this lady?

A. A little over a year.

Q. Did you know her to be married?

A. No, sir.

Q. Did you know she was married?

A. No, sir.

Q. Did you know her before she lived at 9 Ridgehurst Road?

20 A. Yes, sir.

Q. Where did she live?

A. In East Orange somewhere, on Girard Avenue.

Q. Her name was Miss Day then?

A. Yes, sir.

Q. Did you ever walk up and down Main Street, Orange, with Miss Day?

A. Yes, sir. I went to the moving picture show.

30 Q. Did you ever go to a pawnshop in Orange and pay a pawn ticket for Miss Day?

A. No, sir.

Q. Do you know Mr. Finkelstein?

A. No, sir.

Q. Do you know how long Miss Day lived at 9 Ridgehurst Road?

A. I don't know the exact time.

Q. Was it over a year?

A. No, sir.

Q. Have you known her ever since she lived there?

40 A. Yes, sir.

Q. Did she always have the little boy and little girl with her?

A. Mostly all the time they were there. She told me they were her sister's children.

Q. Did the boy call you Uncle Jack?

A. I don't see why he should call me uncle.

Q. You were up there once before?

A. I suppose I was.

Q. Are you positive you were there once before, or not? 10

A. Yes, sir. I was there before September 20.

Q. How many times were you there?

A. Not over three.

Q. You visited Miss Day when she lived at Girard Avenue?

A. Yes, sir.

Q. About once a week?

A. No, sir.

Q. Did you go in the daytime?

A. Yes, sir, except when she was out with me. 20

Q. When you were out with her did you always take her upstairs?

A. I left her at the front.

Q. Do you remember the time you were arrested in the Police Court, downstairs?

A. Yes, sir.

Q. Do you remember having a conversation with Sergeant Heslin, Chief Drabell and Lieutenant Brown at that time? 30

A. The Chief called me into the room. He said Mr. Heslin wanted me and he said he wanted my badge.

Q. What did you say?

A. I asked if I had to go with him and he said yes.

Q. Did you say, how much time you would get for this?

A. I don't know.

Q. Do you remember walking up the street with Mr. Heslin?

A. Yes, sir. 40

Q. Did you say to Mr. Heslin, "How much time do you think I will get for this?"

A. I don't know.

Q. Had you ever been warned by the Chief of Police that you had been travelling around West Orange with a married woman?

A. No, sir.

Q. Did the Chief of Police tell you that you were?

A. No, sir.

10 Q. Do you remember having a conversation with the Chief about your travelling around with a married lady?

A. I believe he mentioned it and I said it was a friend of the family.

BY MR. KEARNEY:

Q. Mr. Foley, you stated you did not know she was a married woman. Did not her own cousin tell you to stay away from her or she would get you into trouble?

A. No, sir.

Q. Do you know her cousin?

A. No, sir.

20 Q. Do you know Mr. Baldwin?

A. I do, but I didn't know that he was a cousin of hers?

Q. Did you have a conversation with Mr. Baldwin in reference to any other lady?

A. No, sir.

JUDGE DUGAN:

Q. Why did you call on her in the daytime?

30 A. Because I was on night work. My duties required me to be out at night.

Q. Did you say anything to Mr. MacLusky in relation to what your name was?

A. She told him my name was McDermit.

Q. Did you say your name was McDermit?

A. I did not. I said that I was calling on her and that if I knew she was his wife I would not have come.

Q. Did you say anything further?

A. No, sir.

40 Q. Did you have any conversation in the alcove or the pantry of the kitchen?

- A. The conversation was in the front room.
- Q. After the conversation you speak of, what did you do?
- A. I was standing there while he was having a conversation with her.
- Q. Did anything else happen?
- A. I went out after the conversation, out of the front door.
- Q. How long after that was it that you gave up your badge to the Chief?
- A. Two nights afterwards. 10
- Q. Who was there?
- A. Lieutenant Brown and Sergeant Heslin.
- Q. You have been under suspension ever since and your pay suspended?
- A. Yes, sir.
- Q. How long have you been off duty?
- A. Since September 22.
- Q. Did anyone ever tell you she was a married woman?
- A. No, sir. 20
- Q. Did you have any idea of getting married to her?
- A. I don't know. A man has to find out who he likes before getting married.
- Q. Where did you take her to moving pictures?
- A. In Orange.
- Q. Did you ever take her out of town?
- A. No, sir.
- Q. Ever take her on excursions?
- A. No, sir. 30
- Q. Mr. Foley, you don't mean to say you were keeping company with her?
- A. Yes, sir.
- Q. How long had she been living there?
- A. I don't know.
- Q. You have known her a year and a half?
- A. Over a year.
- Q. How many times a week did you visit her?
- A. I don't know.
- Q. Twice a week? 40

A. I don't know.

Q. Three times a week?

A. I don't know.

BY MR. DUGAN:

Q. Did she sometimes meet you out?

A. Yes, sir.

BY MR. PERRY.

Q. How many times a week did you meet her?

A. I don't know. I should say an average of once a week.

10 Q. How many times did you meet her during the week of September 20? Did you take her to any moving picture shows during that week?

A. I don't think so.

Q. You didn't care much about her, did you? You only went up there once in a while?

BY MR. WETHLING:

Q. You say you were going with this young lady a year, or over a year?

A. I have known her that long.

20 Q. Been going to moving picture shows and entertainments for about a year or more?

A. I had known her a little over a year.

Q. You called on her this day at her house and been meeting her frequently for a number of weeks, and a strange man walks in and says that she is his wife and you simply walk out without trying to find out?

A. I didn't try to.

BY MR. DUGAN:

30 Q. How old are you?

A. Between twenty-six and twenty-seven.

Q. Did you introduce this young lady to any of your people?

A. I met friends of mine in West Orange and I introduced her to them.

Q. How did you introduce her?

A. As Miss Myra Day.

Q. Did you introduce her to any of your relatives?

A. I introduced her to my mother.

40 Q. How long ago was that?

A. Soon after I had known her.

Q. Where did you introduce her to your mother?

A. It was up near the house.

Q. How did you introduce her to your mother?

A. As Miss Myra Day.

Q. Did your mother know you were keeping company with her?

A. I simply introduced her as a friend of mine.

Q. Did you introduce her to any other relatives of yours?

A. I don't think so.

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BY MR. MURRAY:

Q. What did Mr. MacLusky say to you when he came in?

A. Said, "What are you doing here?"

Q. What did you say?

A. I was to see this young lady.

Q. What did he say?

A. The young lady is my wife.

Q. Did she say anything?

A. When he said that this is my wife I said that I didn't know this was your wife. 20

Q. Did she say anything?

A. I guess she said my name was McDermit.

Q. Did she say that there was nothing wrong?

A. Not that I remember.

Q. Did he say, "Any damn fool could see that something was wrong?"

A. I don't remember his saying anything like that.

Q. Did you tell him your name was McDermit?

30

A. No.

Q. How did she come to say that your name was McDermit?

A. I don't know.

Q. Did he ask her what your name was?

A. I don't remember.

Q. How long did you remain there after he came in?

A. I don't know; about five or ten minutes, I should think.

Q. When you went out did you lock the door?

40

A. The door was unlocked when I went out.

Q. Where were you standing when he came in?

A. In the front room.

Q. Where was she?

A. In the front room.

Q. Where were you when you heard the knock at the door?

A. In the same room.

Q. Were you sitting down?

A. Yes, sir.

10 Q. Was she standing up?

A. I don't know.

Q. When Mr. MacLusky came in, were you sitting down or standing up there?

A. I was standing up and she was standing up.

Q. How was she dressed?

A. Fully dressed.

Q. Did he appear to be angry when he came in the parlor?

A. He seemed to be angry.

20 Q. Did she say anything to you about being the wife of MacLusky at that time.

A. I think she said yes.

Q. Did you turn to her and ask her?

A. I think she said she was his wife.

Mr. Perry then presented the sketch of the different rooms and asked that same be filed as evidence.

MRS. MACLUSKY SWORN.

BY MR. DUGAN:

30 Q. Mrs. MacLusky, do you know John Foley?

A. I do.

Q. How long did you know him?

A. A little over a year.

Q. Where did you meet him?

A. In Orange.

Q. How were you introduced to him?

A. As Miss Day.

Q. Did you tell him your name was Miss Day?

40 A. Myra Day, that is correct.

- Q. Where were you living at that time?
 A. High Street, Orange.
 Q. Did you invite him to call on you?
 A. I did after I knew him well enough.
 Q. On September 20, you remember the incident referred to? Did you invite him to call on you then?
 A. I did.
 Q. How did you invite him?
 A. I told him to call any time.
 Q. Did he come on that day?
 A. He did. 10
 Q. Did your husband come in?
 A. Yes.
 Q. How did he come in?
 A. Through the parlor window.
 Q. What happened?
 A. He asked me what he was doing there. Mr. Foley said he was calling on me.
 Q. What was said by you?
 A. I introduced him as Mr. McDermit.
 Q. It happened to be the first name that came to you? 20
 A. It certainly was.
 Q. How were you dressed?
 A. Skirt, waist, fully dressed.
 Q. How was Foley dressed.
 A. Fully dressed.
 Q. Was he there long?
 A. No, sir.
 Q. How long?
 A. About ten minutes. 30
 Q. Were you standing there together?
 A. Yes, sir.
 Q. Were you living with your husband at the time?
 A. No, sir. He wanted to get a divorce, as he had other attractions elsewhere.
 Q. Why did you take up with Foley?
 A. When I met Mr. Foley my husband was in Rahway and after he was sent to Rahway my folks disliked the name of MacLusky and while he was there all my folks called me Miss Day and all my friends. 40

Q. Did you represent to Foley that those two children were your sister's children?

A. Yes, sir.

Q. You were keeping company with Foley as though you were a single girl?

A. Yes, sir.

Q. And wanted him to think so?

A. Yes, sir.

Q. Why did you do that?

A. Because Mr. Foley had a very smooth disposition
10 and it was a relief to meet a gentleman to talk to.

Q. That is why you continued this company keeping with Foley?

A. Yes, sir.

Q. Were you introduced to his mother?

A. I certainly was.

Q. And introduced as Miss Day?

A. Yes, sir.

Q. Were you introduced to other friends of Foley as
Miss Day?

20 A. Yes, sir.

Q. You went out with him to the movies as though you were keeping company?

A. Yes, sir.

Q. At the time your husband came in was there anything going on between you and Mr. Foley?

A. No, sir.

Q. What was Foley's behavior toward you?

A. Very gentlemanly.

30 Q. Did he ever behave in any other way?

A. I always found Mr. Foley a perfect gentleman.

BY MR. PERRY:

Q. Miss Day, do you know Mr. Finkelstein?

A. I do.

Q. Did you pawn any jewelry with Mr. Finkelstein?

A. I did.

Q. In what name?

A. In the name of MacLusky.

40 Q. Did Mr. Foley go with you to Mr. Finkelstein to redeem the jewelry?

- A. He did not.
- Q. Did Mr. Foley advance you any money to redeem these articles?
- A. No, sir.
- Q. Did he give you any money?
- A. No, sir.
- Q. How long did you know Mr. Foley?
- A. A little over a year; a year and three months.
- Q. During that time you lived in three places?
- A. Yes. High Street, Girard Avenue and Ridgehurst Road. 10
- Q. Did any of your children call Mr. Foley Uncle Jack?
- A. No, sir.
- Q. How many times did he visit you?
- A. I don't know. When he was working days I would meet him at night time, wherever it was most convenient.
- Q. In the daytime he came to the house?
- A. Yes, sir.
- Q. Did you ever meet him outside? 20
- A. I passed through on his post and spoke to him.
- BY MR. KEARNEY:
- Q. Did he ever write to you to meet him on his post?
- A. He did, about a little thing he wanted to ask me.
- BY MR. PERRY:
- Q. Your husband had left you only a little over a week when this took place?
- A. Yes, sir.
- Q. And you knew Mr. Foley over a year? 30
- A. Yes, sir.
- Q. And Mr. Foley never met your husband during that time?
- A. No, sir.
- BY MR. DUGAN:
- Q. Was your husband regular in his habits?
- A. He was until his probation was up.
- Q. Did he go away often?
- A. Every week-end.
- Q. Where? 40

A. He claimed he went to Woodland (?).

Q. You never traced this up?

A. No, sir.

Q. Are you acquainted with Mr. and Mrs. Goldberg?

A. Yes, sir.

Q. When were you introduced to them by Foley?

A. Last March.

Q. How were you introduced to them?

A. As Miss Day.

Q. Did they know you were married until this thing
10 happened?

A. No, sir.

Q. Did they know you were keeping company with
Foley?

A. Yes, sir.

BY MR. PERRY:

Q. Was there an understanding between you and Mr.
Foley that you were always to be known as Miss Day
when you were out in his company?

A. No, sir.

Q. There were times when he was on day duty that
20 you knew of?

A. Why certainly.

Q. Did he ever call on you at night?

A. We always went out in the evening.

Q. Did he ask you if he could call in the evenings, or
not?

A. I do not remember.

Q. You were keeping company with him and no time
30 asked you to call on you at night when he was not on
night duty?

A. Why no, we always went out.

Q. And you would bring him to the house in the
daytime?

A. He would come to the house.

Q. Would you go to the moving picture shows in the
daytime?

A. I would.

Q. Would you go to the moving picture shows at
40 night?

- A. Yes.
- Q. Would Mr. Foley come to the house to meet you?
- A. No.
- Q. Where would you meet him?
- A. I don't just remember the meeting places.
- Q. You do know he never called there at night to see you?
- A. I do.
- Q. And he never asked if he could call there at night?
- A. He never could, working three weeks at night.
- Q. You always told him to meet you on the corner 10
somewhere?
- A. At different places.
- Q. How many times did you go to Mrs. Goldberg's?
- A. I don't remember.
- Q. Did you say anything when you went into Mr. Finkelstein's with Mr. Foley.
- A. I never went in there with Mr. Foley.
- Q. About how many times a week did you see Mr. Foley?
- A. I couldn't tell you. There wasn't any particular 20
number of times; sometimes once, sometimes twice.
- Q. For at least a year back?
- A. Not every week.
- BY MR. MURRAY:
- Q. Was this corridor you refer to as being off the parlor in which Mr. Foley was standing when your husband came in, is that a corridor?
- A. It is.
- Q. Is that what your husband meant by the alcove of 30
the kitchen?
- A. I suppose that was what he meant.
- Q. It was in the alcove of the kitchen you and Mr. Foley were standing when your husband came in?
- A. Yes, sir.
- Q. Did you see him coming in the window?
- A. Yes, sir.
- Q. You speak of your husband as saying he wanted to get a divorce. When did he speak to you about this?
- A. It was a week before he left. 40

Q. He left you the week before that for the purpose of getting a divorce?

A. Yes, sir.

Q. Has he taken any steps since this occurred to get a divorce?

A. I cannot say.

BY MR. CALHOUN:

Q. When Mr. Foley visited you at these various houses, who did he suppose you were living with?

A. My sister.

10 Q. Did you ever introduce him to your sister?

A. No, sir; he thought she was employed out.

Q. Did he ever refer to your sister's husband?

A. I don't recollect.

BY MR. PERRY:

Q. When your husband came in, did you say that nothing was wrong?

A. I told him that Mr. Foley was in no way to blame.

Q. When he knocked at the door did you think it was your husband?

20 A. I did and I didn't, for he was not home for a week previous.

Q. Where were you?

A. In the corridor.

Q. Were you in the same place in the corridor when he came in?

A. In exactly the same place. Mr. Foley went to unlock the door.

Q. And both were standing there when your husband came in the window?

30 A. Yes, sir.

Q. Why were you standing in such a small place?

A. It was right at the parlor entrance.

Q. How was Mr. Foley dressed when your husband came in?

A. Fully dressed.

Q. Did you ever go out with other men?

A. No, sir.

40 Q. Did you put a sign on the door, "Gone to dentist's"?

A. No, sir.

Q. Did you see a sign on the door, "Gone to dentist's"?

A. No, sir.

Q. Were the doors locked?

A. The downstairs doors were locked, but not the upstairs doors.

Q. Why were these doors locked?

A. Because I have been in the habit of being home and always keeping the doors locked. I would naturally lock them.

10

Q. How many children were in?

A. One little girl was there; she's four years old.

Q. Did you know whether there was a sign on the door, or not?

A. I put one on the day previous and don't know if I took it off or not.

MR. GOLDBERG SWORN. Said he lived at 161 Chestnut Street, West Orange.

BY MR. DUGAN:

Q. Do you know Mr. John Foley?

20

A. Yes, for about five years.

Q. Is he a friend of yours?

A. My wife and I have taken a personal interest in him. I always felt he had a good character, has always been industrious, and I have taken quite an interest in the boy for the past five years.

Q. Is he a steady visitor at your house?

A. Yes, sir, for the past four or five years.

Q. Is he there to your knowledge?

30

A. Yes, sir.

Q. Do you know Mrs. MacLusky?

A. I only met Mrs. MacLusky about March. My wife and I were walking through Main Street and Mr. Foley was with her and introduced her as Miss Myra Day.

Q. You didn't know her by any other name?

A. No, sir.

Q. Did you ever know she was a married woman?

A. No, sir.

40

BY MR. PERRY:

Q. And did Mr. Foley ever stop at your house?

A. Yes, sir; very often. I think before he went on the police force he stopped two or three nights a week.

MRS. GOLDBERG SWORN.

Q. You know John Foley?

A. Yes, sir; about five years.

Q. Is he a friend of yours and your husband?

A. Yes, sir.

10 Q. Do you know Mrs. MacLusky.

A. I do now, but knew her as Miss Day formerly.

Q. How did you know her as Miss Day?

A. We were introduced to her as Miss Day; also saw him write letters to her as Miss Day.

Q. Where did you see the letters to Miss Day?

A. They were addressed to her; letters were addressed "Miss Myra Day, c/o Mrs. MacLusky."

Q. What was the idea in addressing her care of Mrs. MacLusky?

20 A. I don't know.

Q. From your knowledge of Foley, if she was a married woman, would he introduce you to her as a married woman?

A. Yes.

Q. Did you think he was keeping company with her?

A. Yes, sir.

BY MR. PERRY:

Q. Did he talk to you much about Miss Day?

30 A. Yes.

Q. Did you ever ask him to bring her to your house?

A. Certainly I did.

Q. What did he say?

A. All right.

Q. Did he bring her up?

A. Yes, he did.

Q. How many times?

A. Several times.

40 Q. Did you ever ask him to bring up Miss Day at night?

A. No, sir.

Q. Did you ever suggest to him that he bring her in the evening?

A. No, sir.

MR. FINKELSTEIN SWORN.

BY MR. PERRY:

Q. Mr. Finkelstein, do you know this gentleman?

A. Yes, sir.

Q. Do you know the young lady?

A. Yes, sir.

10

Q. Did you ever see her in your store, in September, 1915?

A. Yes, sir.

Q. What is this I show you?

A. A pawn ticket, redeemed April 29, 1916.

Q. Who came in with this ticket?

A. Mrs. MacLusky and this gentleman, Mr. Foley.

Q. Did you know his name then?

A. Yes, sir; I knew.

20

Q. What happened then?

A. The young lady handed me the ticket and wanted to take the articles out. She asked me the amount and I told her and she looked at him and he paid for it.

Q. What was said at the time?

A. He said, "Now you got it; keep it out."

BY MR. DUGAN:

Q. You are pretty friendly with the police?

A. More or less.

Q. Is it to your interest to keep in with them?

A. No.

30

Q. Where were you in business before?

A. 72 Orange Street, Newark.

Q. Is it not a fact that you told the police after this matter came up that Mr. Foley came in with this ticket and redeemed it?

A. No. I said from the very beginning, after being consulted in the matter, that she was in there with him. I know it is a fact as I waited on them.

40

BY MR. CALHOUN:

Q. This ticket was redeemed when?

A. Was redeemed in the month of April and stamped on the ticket April 29, but it might have been a few days previous to that.

Q. What impressed it on your mind the conversation had with them?

A. Why for the simple reason that I knew from remarks that she was a married woman.

10 BY MR. DUGAN:

Q. What impressed it on your mind the conversation said?

A. For the simple reason that I knew she was a married woman, from things she told me.

Q. You never met the husband?

A. No, but I know that Foley was not her husband. She has told me that Mr. Foley treated her so much better than her husband.

Q. Was Foley present at the time?

20 A. No.

BY MR. MURRAY:

Q. Did you know Foley at the time?

A. Yes, I knew of him.

Q. You knew him to see him?

A. Yes.

Q. You knew him as a police officer?

A. Yes.

Q. Was he ever in your place before that time?

30 A. No.

Q. Do you remember what time of day they called?

A. I believe it was in the afternoon.

Q. Did you know Mrs. MacLusky before then?

A. Yes.

Q. Was she in your place before?

A. Yes.

Q. Were you intimately acquainted with her?

A. I only knew her through doing business with her.

Q. Was he in the store?

40 A. Yes, he was in the store with her.

CHIEF DRABELL RECALLED.

Q. Do you remember having a talk with Mr. Foley about two months before September 20, concerning his relations with someone in West Orange?

A. Yes, sir.

Q. What was your conversation with Foley?

A. Information had come to me that he was running around with a married woman in West Orange. I brought him into my office and told him about the information, and told him I didn't care to have that thing exist and would like to have him stop it, and I also proposed speaking to Mr. Kearney about it, which I did. He made no answer. 10

Q. Did he say to you that this woman was a friend of the family?

A. He didn't make any reply then.

Q. Did you hear that he had been going around?

A. Yes, sir.

Q. And that she was a married woman?

A. Yes, sir.

Q. Where did you get the information? 20

A. I would not care to state.

Q. Where was the conversation between you and him?

A. In my office.

Q. Was there anyone else present?

A. No, only Foley and I.

Q. When Mr. Foley was brought before you and Sergeant Heslin, what did he say?

A. Sergeant Heslin read the warrant to him. At its conclusion Foley asked if he would have to go to jail for this. I told him I knew nothing about it. 30

BY MR. CALHOUN:

Q. Is it a fact that you notified Mr. Foley?

A. I did. To be candid with you, this information came from a neighbor in Ridgehurst Road.

BY MR. KEARNEY:

Q. Did this neighbor say that if he didn't stay away 40

from there he would be lynched?

A. He stated that the neighborhood was up in arms over it.

BY MAYOR MINAHAN:

Q. Have you since found out that this is the same woman you warned Mr. Foley about?

A. Yes, sir.

BY MR. MURRAY:

10 Q. You say you have since found out this was the same woman. How do you know this?

A. From information I have gotten. I visited the neighborhood and found out before and where the woman lived; also visited the house and neighborhood.

Q. Who was the party who told you?

A. A man by the name of Slattery, living at No. 7 Ridgehurst Road.

MR. FOLEY WAS RECALLED.

BY MR. DUGAN:

20 Q. You heard the Chief testify that he called you one side and stated that a complaint had been made that you were running around with a married woman. What did you say?

A. I stated that it was a friend of the family, assuming he meant the Goldbergs.

Q. Did Commissioner Kearney speak to you about it?

A. Yes, sir.

MR. MACLUSKY RECALLED.

30 BY MR. MURRAY:

Q. Mr. MacLusky, will you tell us again just where Mr. Foley was at the time you went in the house through the window?

A. In the back bedroom.

Q. Did you walk into the bedroom?

A. I could see from the parlor.

40 Q. Is it true, as your wife stated, that at the time you left her, or about that time, you had spoken to her about getting a divorce?

A. No, sir; I left her because she went out at night and came in at three o'clock in the morning. I said I would leave her.

Q. Did you say you would get a divorce?

A. No, sir.

Q. Have you made any effort to get a divorce?

A. I have not.

Q. Did you ask Mr. Foley what his name was?

A. I did.

Q. It was not your wife who told you?

10

A. It was not.

BY MR. DUGAN:

Q. Did you ever write letters to other women?

A. No, sir; not since I was married.

Q. Has not your wife some letters you wrote to other women?

A. No, sir; I never wrote letters to other women since I was married.

MRS. MACLUSKY RECALLED.

Q. Can a person in the parlor see into the bedroom?

20

A. No, sir.

Q. Can they see the bedroom from the door of the parlor?

A. Well, they could if standing by the door.

30

40

New Jersey Supreme Court.

	JOHN D. FOLEY, <div style="text-align: right;"><i>Prosecutor,</i></div>	}	<i>On Certiorari.</i> REASONS.
vs.			
10	THE CITY OF ORANGE, <div style="text-align: right;"><i>Respondent</i></div>		

John D. Foley, the prosecutor of the above writ of certiorari, by William A. Lord, his attorney, comes and prays that the resolution of the Board of Commissioners of the City of Orange passed on October 31, 1916, purporting to find John Foley guilty of a certain charge made against him, filed with the City Clerk by John Drabell, Chief of Police, and dismissing the said John Foley from membership in the Police Department of the City of Orange, and all matters and things touching and concerning the same as fully as they are set forth in the return to the writ of certiorari herein, may be reversed, set aside and for nothing holden, for the following reasons:

1. Because the testimony taken by the said Board of Commissioners at the trial of the said John Foley upon the charge preferred against him did not afford a rational basis for finding him guilty of the charge preferred against him or for dismissing him from the Department.
2. Because the only testimony tending in any way to convict the prosecutor of the charge preferred against him was the testimony of Herbert H. MacLusky, who was not a party to nor interested in the proceedings, which directly tended to incriminate his wife, Myra A. MacLusky, who was also neither a party to nor interested in said proceedings, and for that reason said testimony should have been excluded.

3. Because the rule of the Police Department which the prosecutor was charged with violating did not apply to the conduct of the prosecutor at the time of the alleged offense because he was then off duty, not in uniform and was in another municipality outside the jurisdiction of the Board of Commissioners of the City of Orange.

4. Because the charge preferred against the prosecutor and upon which he was tried and the charge set forth in the aforesaid resolution convicting him and dismissing him from the Police Department did not set forth a violation of the rule mentioned in said charges and in said resolution. 10

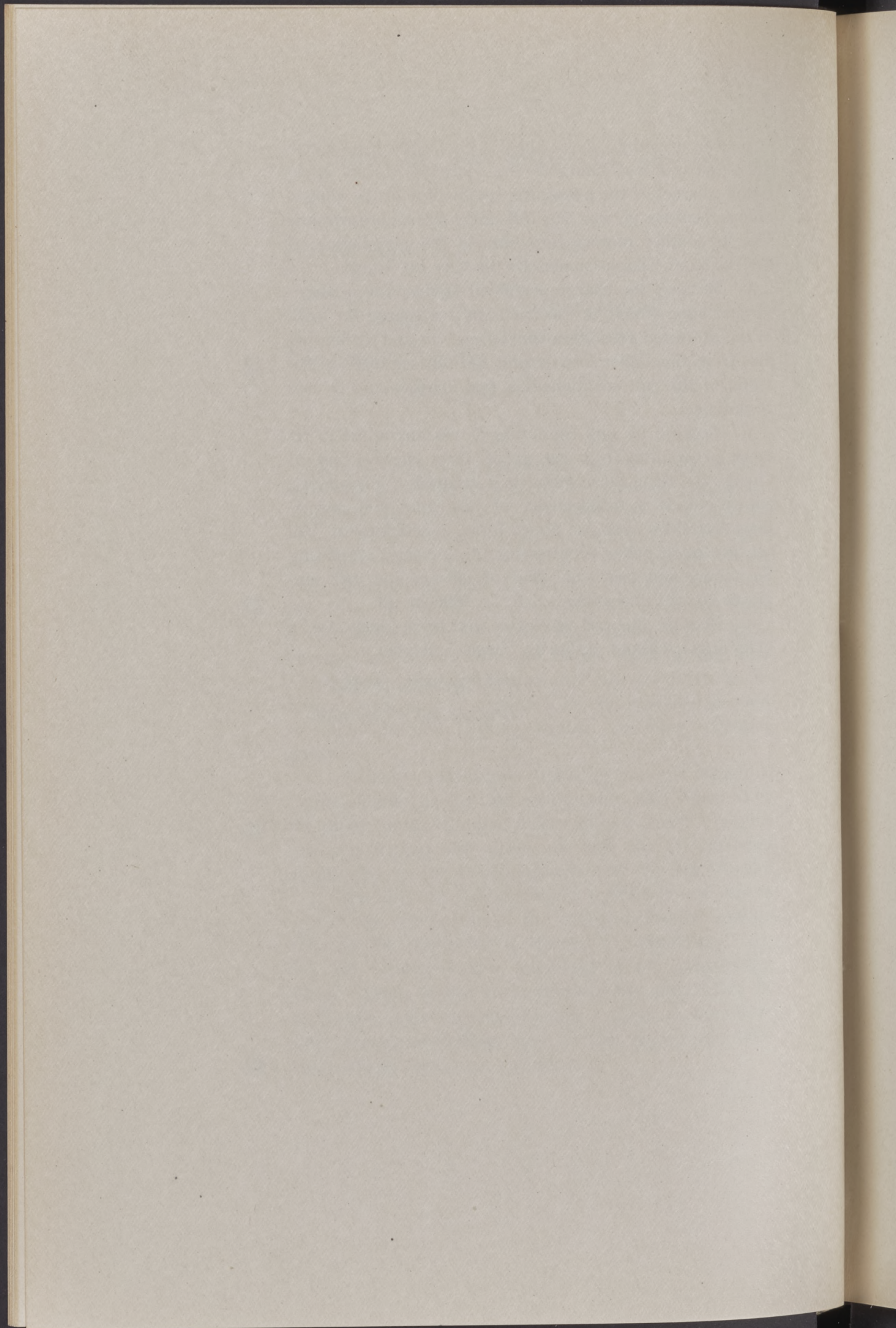
5. Because by said resolution it was attempted to remove prosecutor from the police force of the City of Orange for some cause other than incapacity, misconduct, non-residence or disobedience of just rules and regulations established for said police force, in violation of "An act respecting police departments of cities and regulating the tenure and terms of office of officers and men employed in said departments," P. L. 1886, p. 48. 20

6. Because the said resolution and proceedings are in other ways without authority, illegal and void.

WILLIAM A. LORD,
Attorney for Prosecutor.

30

40



New Jersey Supreme Court

JOHN D. FOLEY, *Prosecutor*,

vs.

THE CITY OF ORANGE,

Respondent.

On Certiorari.
Rule for Judgment.

The writ of certiorari in this cause having been 10
duly served and a return made thereto by the City
of Orange, defendant, and the Court having heard
and considered the evidence and the arguments of
counsel, and being of opinion that the resolutions
and proceedings referred to in said writ and return
thereto are illegal and void;

IT IS THEREUPON ORDERED that the resolu-
tion of the Board of Commissioners of the City of
Orange, passed on October 31, 1916, purporting to 20
find John Foley guilty of a certain charge made
against him, filed with the City Clerk by John Dra-
bell, Chief of Police, to wit, that said John Foley had
been guilty of conduct unbecoming an officer of the
Police Department of the City of Orange, in viola-
tion of Rule 15 of said Department, and dismissing
said John Foley from membership in the Police De-
partment of the City of Orange, and all matters and
things pertaining to the same, as fully as they are
contained in said return to said writ, be and the
same are hereby reversed, set aside and made void. 30

And it is further ordered that the prosecutor in
certiorari recover of the said City of Orange his
costs of suit to be taxed, which shall include all ex-
penses incurred in printing the state of the case and
brief of the prosecutor.

On motion of— WILLIAM A. LORD,
Attorney of Prosecutor.

Entered June 21, 1917.

A true copy.

WM. C. GEBHARDT, *Clerk.*

New Jersey Supreme Court

FEBRUARY TERM, 1917.

JOHN D. FOLEY, <i>Prosecutor</i> , VS. 10 THE CITY OF ORANGE, <i>Respondent</i> .	}	<i>On Certiorari.</i>
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Submitted February Term, 1917;

decided June 7, 1917.

Before Justices Swayze, Minturn and Kalisch.

For the Prosecutor—William A. Lord.

For the respondent—Arthur B. Seymour.

Per Curiam:

20 The prosecutor, John D. Foley, was charged with violating Rule 15 of the police rules, and was tried on the charge by the Board of Commissioners of the City of Orange, found guilty, and dismissed from the force.

The jurisdiction to try the prosecutor is under the Act of 1915, p. 495, section 4, vested in the commissioner of the department of public safety. The Board of Commissioners, sitting as such board, was without jurisdiction to try him. See *Apple v. Atlantic City*, recently decided and not yet reported.
 30 Opinion is on file.

The proceedings must be set aside with costs.

New Jersey Supreme Court

NOVEMBER TERM, 1916.

CHARLES N. APPLE, *Prosecutor*,

VS.

ATLANTIC CITY, *Respondent*.

On Certiorari.

10

Before Justices Swayze, Minturn and Kalisch.

For the prosecutor—C. L. Cole.

For the defendant—Harry Wootton and
Joseph B. Perskie.

Per Curiam:

The prosecutor was a member of the police department of Atlantic City. Charges were preferred against him of conduct unbecoming an officer and a gentleman, and conduct subversive of good order and discipline of the police force, in violation of rules 16 and 17 of the rules and regulations adopted by the police department of Atlantic City, and also for the violation of a resolution passed by the board of commissioners, on April 20, 1916, prohibiting any member or officer of the police department, during the hours of duty, from soliciting votes for or against any candidate for any election, etc. 20

The prosecutor was tried on these charges by the full board of commissioners of Atlantic City, was found guilty and dismissed from the police force. 30

The jurisdiction of the board of commissioners to hear and determine the charges against the prosecutor is challenged.

Prior to the passage of the act of 1915, P. L. 1915, p. 495, section 4, the power to try delinquents in the police department was vested in the board of commissioners, *Herbert vs. Atlantic City*, 87 N. J. L. 98.

After that decision the legislature amended section four so as to include within its terms the distribu- 40

tion of judicial powers, authority and duties as well as those of executive, administrative and legislative character among the five departments in cities under commission government having that number of departments.

Atlantic City has five departments. Each department is under the direction and supervision of a commissioner. By virtue of section 4, as amended, of the act above referred to, the jurisdiction formerly vested in the full board of commissioners to try delinquents in the police department became vested in the commissioner of the department of public safety. *Crane Pros., v. Mayor and Ald., of Jersey City, et al.*, decided at June Term, 1917, opinion not yet reported.

It may be suggested that the accused suffered no harm in this instance because the statutory tribunal which tried him was composed of the full board of commissioners, among which was the commissioner of the department of public safety, which commissioner was vested with the statutory authority to try the accused, and who heard the testimony and voted for the conviction and dismissal of the prosecutor.

But we do not think this is a valid reason for ignoring the behest of the statute. For while it may be true that in the present case no particular harm was done to the prosecutor, by the participation of the full board, in his trial and conviction, we cannot overlook the serious result which would follow the countenancing of the legality of the action of an irregular and extra statutory tribunal as this was. For among the many other good reasons which suggest themselves why the action of the board in the present case must be treated as a nullity is, that to give the acts of such an extra statutory tribunal legal effect necessarily enforces a recognition by this court of the power of such tribunal to retain or remove accused officers, after trial, etc., by a majority vote, in which the commissioner of the department of public safety did not participate, or was in the min-

ority; whereas the statute, in plain terms, casts the responsibility for the conduct of the department of public safety, on the commissioner of such department of which he is the head.

For the reasons given, the conviction of the prosecutor, and the order dismissing him from the police department must be set aside, with costs.

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New Jersey Supreme Court

JUNE TERM, 1916.

PATRICK CRANE, *Prosecutor*,

VS.

THE MAYOR AND ALDERMEN OF
JERSEY CITY, ET AL.,
Respondents.

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Submitted June Term, 1916—Decided.

On certiorari.

Before Justices Swayze, Minturn and Kalisch.

For the prosecutor, Harry Lane.

For the respondents, John Milton.

The opinion of the Court was delivered
by Kalisch, J.

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On the 21st day of October, 1915, the prosecutor, who was a member of the Jersey City Police Department, was dismissed from that body. The ground of his dismissal was conduct unbecoming an officer. The specific charges made against him were that on the 13th day of October, 1915, while on duty at the Jewett Avenue stable, he was ordered by Lieutenant Lynch, his superior officer, to leave the stable door open, whereupon the prosecutor used vile language, assaulted and attempted to shoot Lynch; that

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on the 14th day of October, 1915, the prosecutor, when ordered by Lieutenant Lynch to make out a report regarding his, the prosecutor's, conduct the day previous, used vile and threatening language to the lieutenant and refused to make out the report, and that such conduct was in violation of rule 25, section 34, of the manual of the Jersey City police force.

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The prosecutor, on the 21st day of October, 1915, was put upon trial before Frank Hague, Director of Department of Public Safety. The accused appeared with counsel and objected to being tried by the di-

rector, on two grounds; First, that the director was disqualified to try the cause because in a letter written by that official to the chief of police of Jersey City, he had expressed an unfavorable opinion on the conduct of the prosecutor as a police officer; secondly, that the director was without jurisdiction to try the prosecutor sitting alone, in that the prosecutor was entitled to a trial by the entire board of city commissioners.

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These objections were overruled by the director and the trial proceeded. Witnesses were sworn and examined and cross examined, the accused officer being a witness in his own behalf.

The letter which is made the basis of the prosecutor's claim that the director was disqualified to try the prosecutor upon the charges preferred against him, was embodied in an order made by the director on the 21st day of February, 1915, and which order is designated as "General Order No. 21."

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A part of the letter which the prosecutor claims disqualified the director to sit in judgment, reads, as follows: "This man is constantly reporting sick, and I am convinced that his ailments are only imaginary, with the purpose of shirking his duties. I have stated before in a communication to you that I am determined to drive such men as these out of the department and I only regret that I have not sufficient evidence to place Crane (the prosecutor) before the commissioners on charges, and recommend his dismissal."

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Reading the entire letter it becomes plain that the director was attempting to eradicate an evil that had grown up in the police department, namely, for some officers to feign illness, be relieved from duty on account of illness, and draw full pay. In order to stop this nefarious practice the director used plain and emphatic language. But it is an idle thought to entertain for a single moment that the director was actuated by personal malice against the men in his department generally or against the prosecutor, in

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particular. The director was manifestly actuated by a proper spirit of public service; and it was his duty to protect the public against imposition and to enforce proper and strict discipline in the department of which he was the head and for the proper conduct of which he was answerable to the public.

It is further to be observed that what was said, by the director, in his letter, written some six months prior to the happening of the event, which gave rise to the present charges, has no connection whatever with the charges upon which the prosecutor was tried.

The fact that a superior officer in whom the law has vested the authority to try subordinates upon charges preferred against them has on previous occasions reprimanded or disciplined them for delinquencies in the performance of their duties does not *per se*, in the absence of a statutory mandate forbidding it, disqualify such superior officer from trying them on charges duly preferred against them.

As we are unable to discover any evidence of bias or oppressive conduct on the part of the director, in the trial of the prosecutor, we are forced to the conclusion that he was not disqualified to inquire into and determine the truth of the charges made against the prosecutor.

As to the point made by counsel for the prosecutor, that the director sitting alone was without jurisdiction to try the accused, in that the statute contemplates a trial by the entire board of city commissioners, we find to be without merit.

Prior to the adoption of the act of 1915 (P. L. 1915, p. 494), amending section four of the act of 1913 (P. L. 1913, p. 836), the law required the entire board to sit in a case like the present. *Herbert v. Atlantic City*, 87 N. J. L. 98. In that case the prosecutor was a member of the police department of Atlantic City and was tried by the entire board of commissioners, sitting as a special tribunal for that purpose. The authority of the board to try the case

was objected to by the prosecutor upon the ground that by an ordinance previously adopted by the board, the power attempted to be exercised had been transferred by the board to a single commissioner, the director of the department of public safety.

This court held that since the legislature vested the judicial powers in the board of commissioners, the latter could not lawfully divest itself of such powers and transfer them to the director of public safety.

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Evidently, in view of the ruling of this court in that case, the legislature amended section four of the act of 1913, so as to authorize the board of commissioners to distribute the executive, administrative, judicial and legislative powers, authority and duties into and among five departments in cities having five departments, etc. This was decided in *Brennan v. Jersey City*, at the June term, 1916, by this court in an unreported opinion.

In the present case it appears that board of commissioners by resolution, had conferred upon the director of the department of public safety the judicial powers exercised by him.

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It is next urged, that the prosecutor was dismissed without sufficient evidence to justify his dismissal and that the conviction was against the clear weight of the evidence.

An examination of the evidence leads us to the conclusion that the judgment, pronounced by the commissioner against the prosecutor, is fully supported by the preponderance of the credible testimony in the case.

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Lastly, it is insisted that the proceeding must be set aside because illegal testimony was admitted over objections of counsel for prosecutor. The admission of illegal testimony, in cases tried by a special tribunal like the one whose proceedings we are considering, will not have the effect to invalidate the findings of the tribunal, so long as it appears that there is competent testimony in the case to support

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such finding. In the present case the competent testimony amply supports the judgment of the commissioner.

The writ will be dismissed, and the proceedings affirmed, with costs.

Following is the amendment of 1915, P. L. 1915, page 494, the words in parenthesis showing the amendments:

10 SECTION 4. The board of commissioners shall have and possess all administrative, judicial and legislative powers and duties now had and possessed and exercised by the mayor and city council and all other executive or legislative bodies in said city, and have complete control over the affairs of the city adopting the provisions of this act. The executive, administrative, (judicial) and legislative powers, authority and duties in such city shall be distributed into and among five departments, except that in any
20 city having but three commissioners, three departments shall be designated and provided by the consolidation of the first and third departments and the fourth and fifth departments, as follows:

1. Department of public affairs.
2. Department of revenue and finance.
3. Department of public safety.
4. Department of streets and public improvements.
5. Department of parks and public property.

30 The board of commissioners shall determine the powers and duties to be performed by each department and assign such powers and duties to the appropriate departments, and they shall prescribe the powers and duties of all officers and employees and they may assign particular officers and employees to one or more departments and may require any officer or employee to perform duties in two or more departments, (provided the work required of such officer or employee in such different departments be similar in character) and make such other rules and
40 regulations as may be necessary or proper for the

efficient and economical conduct of the business of the city.

The mayor shall be the director of the department of public affairs, and the board of commissioners shall, at the first regular meeting after the election of its members, designate by majority vote one commissioner to be director of the department of revenue and finance, one to be director of the department of public safety, one to be director of the department of streets and public improvements, and one to be director of the department of parks and public property, except that upon the organization of a board of three commissioners but three departments shall be designated, as above provided, and but three directors voted therefor, and such designation may be changed whenever it appears that the public service would be benefited thereby.

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New Jersey Supreme Court

	JOHN D. FOLEY, <i>Prosecutor</i> ,	}	<i>On Certiorari.</i> <i>Notice of Appeal.</i>
10	VS.		
	CITY OF ORANGE, <i>Respondent</i> .		

Take notice that the respondent, the City of Orange, appeals to the Court of Errors and Appeals of the last resort in all cases, from the whole and every part of the judgment entered in the above stated cause which adjudges that the proceedings of the Board of Commissioners of the City of Orange finding the prosecutor guilty of violating Rule 15 of the police rules of the City of Orange and dismissing him from the police force of said City be set aside with costs.

ARTHUR B. SEYMOUR,
Attorney for Respondent.

Dated, July 13, 1917.

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New Jersey Court of Errors and Appeals

JOHN D. FOLEY, <i>Prosecutor-Appellee,</i>	}	<i>On Appeal from the Supreme Court.</i>	10
VS.			
CITY OF ORANGE, <i>Respondent-Appellant.</i>			

GROUNDS OF APPEAL.

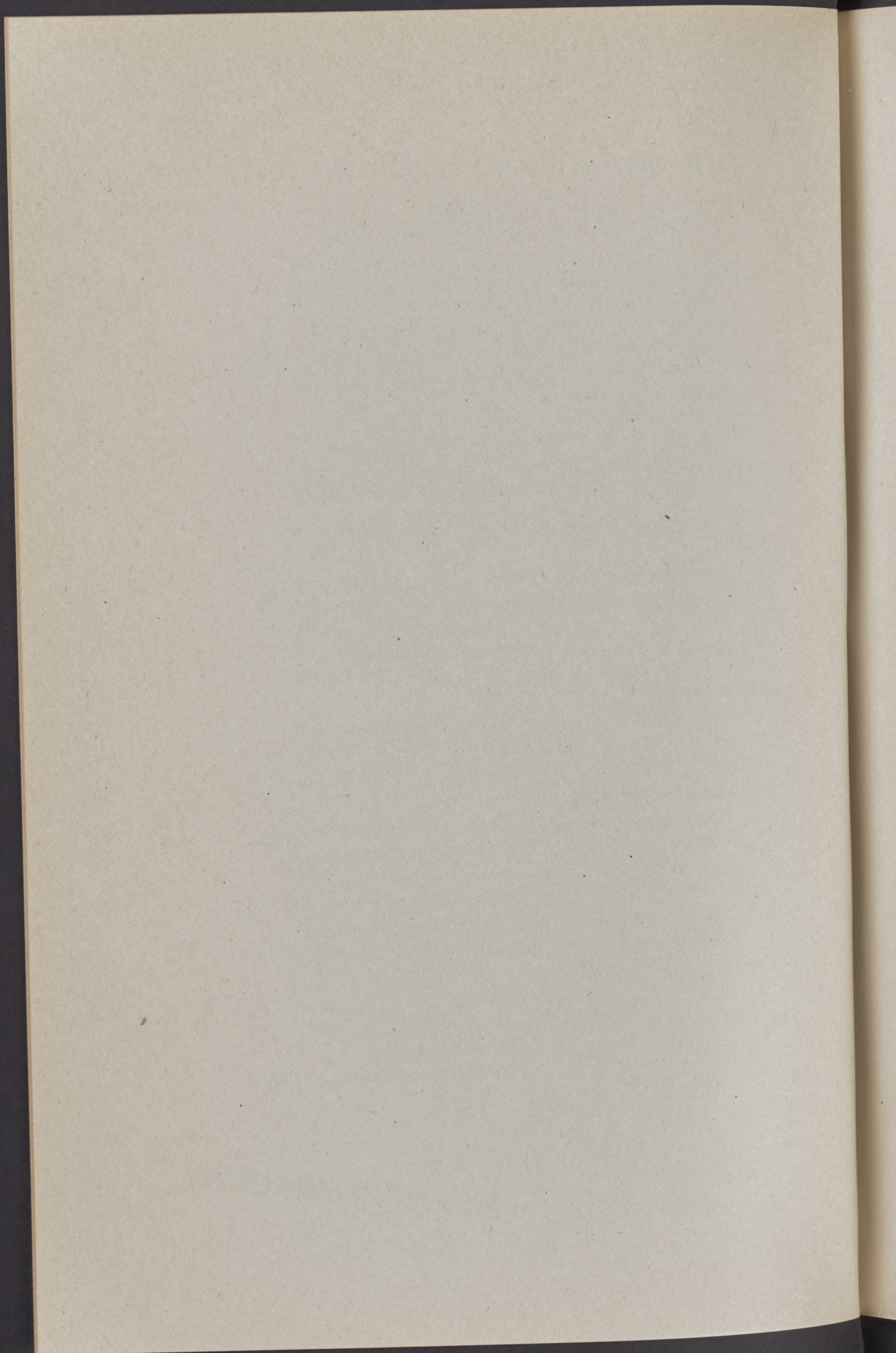
The appellant states the following grounds of appeal.

1. The determination of the Supreme Court that the jurisdiction to try the prosecutor for violating Rule 15 of the police rules of the respondent-appellant was under the Act of 1915, page 495, Section 4, vested in the Commissioner of the Department of Public Safety. 20

2. The determination of the Supreme Court that the Board of Commissioners of the City of Orange sitting as such board was without jurisdiction to try the prosecutor for said violation.

3. The determination of the Supreme Court that the proceedings of the Board of Commissioners of the City of Orange, the respondent-appellant, were illegal and void, and setting aside the proceedings of said Board holding the trial of the said prosecutor of said violation and dismissing him from the police force of the City of Orange. 30

ARTHUR B. SEYMOUR,
*Attorney for
 Respondent-Appellant.* 40



New Jersey Court of Errors and Appeals

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JOHN D. FOLEY, <i>Prosecutor-Appellee,</i> vs. THE CITY OF ORANGE, <i>Respondent-Appellant.</i>	}	<i>On Certiorari.</i>
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BRIEF OF RESPONDENT-APPELLANT.

I.

This appeal is taken from the judgment of the Supreme Court setting aside the proceedings of the Board of Commissioners of the City of Orange on October 31, 1916, dismissing the prosecutor-appellee from membership in the Police Department of said City.

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The Supreme Court set aside proceedings on the ground that the jurisdiction to try the prosecutor-appellee is under the Act of 1915, page 495, Section 4, vested in the Commissioner of the Department of Public Safety. The prosecutor in this case was tried by the full Board of Commissioners.

The Supreme Court in its opinion cited *Apple vs. Atlantic City*, an unreported decision. An examination of *Apple vs. Atlantic City* reveals that it is based upon the decision of the Supreme Court in

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Crane vs. Jersey City, an unreported opinion filed June, 1916, in the Supreme Court. All of the opinions are printed in the State of the Case.

In Apple vs. Atlantic City the Supreme Court says: "The jurisdiction of the board of commissioners to hear and determine the charges against the prosecutor is challenged.

"Prior to the passage of the act of 1915, P. L. 10 1915, p. 495, section 4, the power to try delinquents in the police department was vested in the board of commissioners, Herbert vs. Atlantic City, 87 N. J. L. 98.

"After that decision the legislature amended section four so as to include within its terms the distribution of judicial powers, authority and duties as well as those of five departments in cities under commission government having that number of departments.

20 "Atlantic City has five departments. Each department is under the direction and supervision of a commissioner. By virtue of section 4, as amended, of the act above referred to, the jurisdiction formerly vested in the full board of commissioners to try delinquents in the police department became vested in the commissioner of the department of public safety. Crane, Pros., v. Mayor and Ald. of Jersey City, et al, decided at June Term, 1917, opinion not yet reported."

30 The effect of the amendment of 1915 therefore apparently was to empower cities under commission government to distribute judicial powers as well as those of executive, administrative and legislative character among the five departments. It does not appear from the decision in Apple vs. Atlantic City whether such a distribution was made, but inasmuch as the decision is based upon Crane vs. Jersey City in which distribution was actually made, it must be
40 tion was made.

In *Crane vs. Jersey City* the Court says: "Prior to the adoption of the act of 1915 (P. L. 1915, p. 494) amending section four of the act of 1913 (P. L. 1913, p. 836) the law required the entire board to sit in a case like the present. *Herbert v. Atlantic City* 87 N. J. L. 98. In that case the prosecutor was a member of the police department of Atlantic City and was tried by the entire board of commissioners, sitting as a special tribunal for that purpose. The authority of the board to try the case was objected to by the prosecutor upon the ground that by an ordinance previously adopted by the board, the power attempted to be exercised had been transferred by the board to a single commissioner, the director of the department of public safety. 10

"This court held that since the legislature vested the judicial powers in the board of commissioners, the latter could not lawfully divest itself of such powers and transfer them to the director of public safety. 20

"Evidently, in view of the ruling of this court in that case, the legislature amended section four of the act of 1913, so as to authorize the board of commissioners to distribute the executive, administrative, judicial and legislative powers, authority and duties into and among five departments in cities having five departments, etc. This was decided in *Crane v. Jersey City*, at the June term, 1916, by this court in an unreported opinion. 30

"In the present case it appears that the board of commissioners by resolutions, had conferred upon the director of the department of public safety the judicial powers exercised by him."

It does not appear in the printed case at bar that the Board of Commissioners of the City of Orange by resolution or otherwise distributed its judicial powers or delegated the power of trial to the Commissioner of Public Safety and unless it does so appear it must be assumed that the Board still posses- 40

ses such powers, in view of the fact that its power to try the prosecutor was not challenged in the Supreme Court or before the Board at the trial of the prosecutor.

II.

10 Because the testimony taken by the said Board of Commissioners at the trial of the said John Foley upon the charge preferred against him did not afford a rational basis for finding him guilty of the charge preferred against him or for dismissing him from the department.

20 This Court will not weigh the evidence taken before the Board for the purpose of reaching an independent conclusion on the question of the guilt or innocence of the prosecutor but will only consider such evidence for the purpose of determining whether or not it affords a rational basis for the judgment against him. If it does, then no matter whether the evidence be weak or strong this Court will not interfere.

Reilly vs. Mayor, etc., of Jersey City, 64 N. J. L. 508.

The charge against the prosecutor was that he violated one of the rules of discipline, as follows:

30 "15. Conduct not becoming an officer and a gentleman." (See page 4 of the case.) The conduct charged was that the prosecutor was found in the bedroom in the home of Mrs. Myra MacLuskey, wife of Herbert MacLuskey, both in a partly undressed condition.

The husband, Mr. MacLuskey, testified (page 13) that he went upstairs in his house and found the doors locked and then got in the parlor window from the porch. That when he arrived there was a note on the door which stated, "Left for the dentist's." (See bottom of page 12 and top of page 13.)

40 The prosecutor and Mrs. MacLuskey were stand-

ing in the bedroom (line 3, page 13). She was dressed in a petticoat, waist and stockings (line 17, page 13). The prosecutor gave his name as McDermitt (page 13, line 8).

The prosecutor in his defense stated that he did not know a Mr. Finkelstein (line 32, page 18). And on page 33 Finkelstein, a pawn broker, stated that the prosecutor and Mrs. MacLuskey redeemed some articles at his store April 29, 1916. Chief Drabell, 10 of the Orange Police Department, testified that when the officer brought the prosecutor into his office upon his arrest that the prosecutor after hearing the warrant read asked the Chief if he would have to go to jail for this (page 35, line 30). The Chief also testifies, (page 35, line 6), that he informed the prosecutor that he had information that he was running around with a married woman in West Orange and requested him to stop it, but that the prosecutor made no denial. He also testifies that he afterwards 20 ascertained that the married woman referred to was Mrs. MacLuskey (page 36, line 10).

Both the prosecutor and Mrs. MacLuskey admit that the prosecutor was in her house on September 20, 1916 (see page 25, line 19).

The Commissioners had a right to believe the testimony outlined above and evidently did believe it and had little faith in the defendant's testimony or that of his witnesses.

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III.

Because the only testimony tending in any way to convict the prosecutor of the charge preferred against him was the testimony of Herbert H. MacLuskey, who was not a party to nor interested in the proceedings, which directly tended to incriminate his wife, Myra A. MacLuskey, who was also neither a party to nor interested in said pro- 40

ceedings, and for that reason said testimony should have been excluded.

In the argument for the allowance of the writ the prosecutor's attorney cited the case of *State vs. Wilson*, 31 N. J. L., page 77, to sustain this point, but this case does not sustain it, nor does the case of *Munyon vs. State*, 62 N. J. L., page 1. These cases do not apply because:

10 First.—The testimony of Mr. MacLuskey did not directly charge his wife with a crime which is of the grade of indictable offences, and

Second.—His testimony charged or imputed to the prosecutor conduct unbecoming an officer and a gentleman. At most the husband's evidence merely imputed a crime and in the case of *State vs. Wilson* the distinction between imputing a crime and evidence which criminales is pointed out. Under the rule as stated by Professor Greenleaf, on page 80 of
20 the opinion in this case, MacLuskey's evidence was admissible. The rule is stated as follows:

“But though the husband and wife are not admissible as witnesses against each other, where either is directly interested in the event of the proceeding, whether civil or criminal, yet in collateral proceedings not immediately affecting their mutual interests, their evidence is receivable, notwithstanding it may tend to criminate or may contradict the other.”

In *Munyon vs. State* the opinion sustains the ad-
30 missibility of the evidence of MacLuskey.

There was no objection made to the admission of this testimony at the hearing.

Munyon vs. State, 62 N. J. L., page 1.

IV.

Because the rule of the Police Department which the prosecutor was charged with violating did not apply to the conduct of the prosecutor at the time
40 of the alleged offense because he was then off duty,

not in uniform, and was in another municipality outside the jurisdiction of the Board of Commissioners of the City of Orange.

Rule 15, alleged to be violated as well as rule 17, both being set forth on page 5 of the case, are rules concerning discipline. Rule 15 provides that a member of the police department shall be subject to dismissal for conduct not becoming an officer and a gentleman, and rule 17 of the general rules provides 10 that all members of the police force shall be considered to be always on duty. Upon the application for the writ, the prosecutor's attorney cited the case of *Winters vs. Police Commissioners*, 77 N. J. L. 153, to sustain his point under this heading. The charge in that case was a violation of a rule providing that "each member in his conduct and deportment must be quiet, civil and orderly" (see syllabus); and the prosecutor insisted that the Board of Commissioners of Jersey City had no rule applying to the general 20 conduct of an officer and the Supreme Court held that the rule quoted would not be presumed to apply to the conduct of a member when excused from duty or to his deportment in private life and that to have such affect the rule should clearly express such purpose.

In *Alcutt vs. Police Commissioners*, 37 Vroom, the Supreme Court held that a rule against conduct unbecoming an officer and a gentleman is violated by an officer saying of one of the Police Commissioners, 30 that he was a "liar and you could not believe him under oath."

Alcutt vs. Police Commissioners, 66 N. J. L., 173.

The offense in the *Alcutt* case was committed in a public saloon by the officer while off duty and not in uniform (see page 174).

And in *Herbert vs. Atlantic City*, 87 N. J. L., page 98, it was held that a police officer who attempt to collect money for the keeper of a bawdy 40

house and in the attempt used loud and profane language and attempted to go to the room of a guest in a hotel, was guilty of misconduct and of behavior unbecoming an officer, and that it afforded no legal ground of excuse to the charge of misconduct for which the police officer was removed that he was not on duty when he committed the act complained of.

10 In the Herbert case the Supreme Court says in its opinion :

20 "It is argued for the prosecutor that because he was not on duty at the time as a police officer when the episode related occurred, therefore, the quoted section of the statute is not applicable to him. In other words, the contention practically is that a police officer when off duty may misbehave and misconduct himself as much as he pleases, namely, he may be engaged openly in conduct tending to reflect upon the morale and discipline of the police force and department, without being held to account for such misbehavior or misconduct. If this were so, then the discipline and morale of the police force, which the legislature evidently intended to secure by the provision of the statute referred to, is seriously threatened, and its efficacious object of requiring good behavior and denouncing misconduct of a police officer will be signally defeated."

30 The prosecutor in this case may be said to have been engaged openly in conduct tending to reflect upon the morale and discipline of the police force and department.

V.

40 Because the charge preferred against the prosecutor and upon which he was tried and the charge set forth in the aforesaid resolution convicting him and dismissing him from the Police Department did not set forth a violation of the rule mentioned in said charges and in said resolution.

The charge specifies that the prosecutor was found in the bedroom of a married woman in a partly undressed condition; it sets forth the time and the place and the names of the persons involved and charges conduct not becoming an officer and a gentleman and is specific enough to notify the prosecutor of what he was charged.

VI.

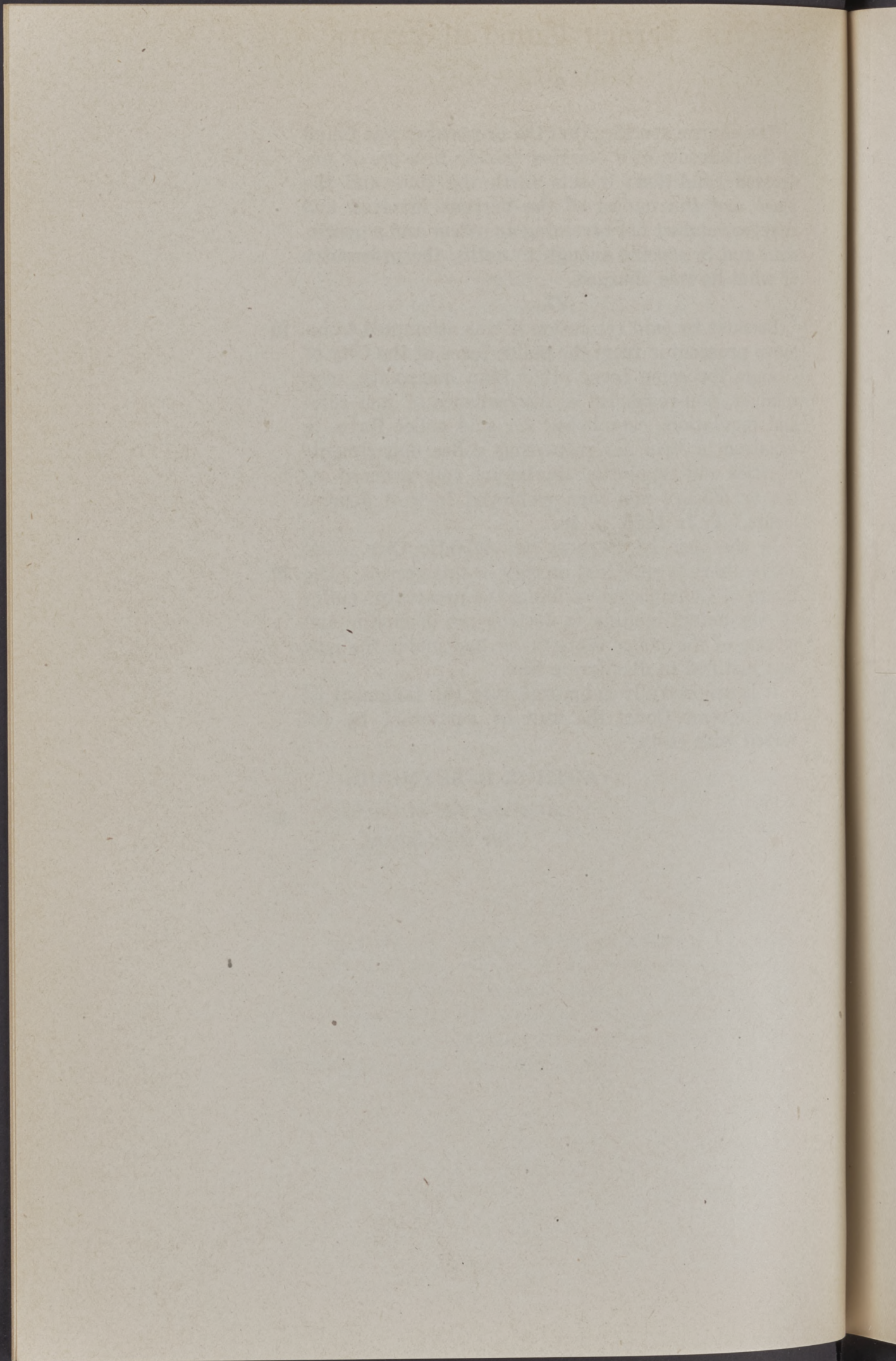
Because by said resolution it was attempted to remove prosecutor from the police force of the City of Orange for some cause other than incapacity, misconduct, non-residence or disobedience of just rules and regulations established for said police force, in violation of "An act respecting police departments of cities and regulating the tenure and terms of office or officers and men employed in said departments," P. L. 1886, p. 48. 10

In the case of Herbert vs. Atlantic City, cited above, there is sufficient answer to this reason. The Board of Commissioners found the prosecutor guilty of misconduct tending to destroy the discipline and morale of the police department and under the rule was justified in dismissing him. 20

It is respectfully submitted that the judgment of the Supreme Court the writ of certiorari be reversed with costs.

ARTHUR B. SEYMOUR,

Attorney and of Counsel 30
for Respondent.



New Jersey Court of Errors and Appeals

JOHN D. FOLEY,

Prosecutor-Appellee,

v.

THE CITY OF ORANGE,

Respondent-Appellant.

On Appeal.

On Certiorari.

BRIEF OF PROSECUTOR-APPELLEE

The judgment of the Supreme Court setting aside the proceedings of the Board of Commissioners of the City of Orange, which found the prosecutor guilty of violating rule 15 of the police rules of the City of Orange and dismissing him from the police force, should be affirmed for the reasons given by the Supreme Court in its opinion handed down June 7, 1917, because jurisdiction to try the prosecutor under the act of 1915 (page 495, section 4), was vested in the Commissioner of the Department of Public Safety, and not in the Board of Commissioners which tried him, citing the case of *Apple v. Atlantic City* and not yet reported at the time of the preparation of this brief, and for the further reasons presented in the Supreme Court, as follows:

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FIRST. *The testimony taken by the Board of Commissioners at the trial of the prosecutor did not afford a rational basis for finding him guilty of the charge preferred against him and dismissing him from the Department.*

We are fully aware that if there was evidence, whether weak or strong, which formed a rational basis for the judgment against him this Court will not upset it. *Dodd v. Camden*, 27 Vroom 258; *Reilly v. Jersey City*, 35 Vroom 508, 510. We contend, however, that in this case there was no testimony which formed a rational basis for finding the prosecutor guilty. A perusal of the uncontradicted testimony shows that the prosecutor, who was a young, unmarried man, was introduced to a young woman as Miss Myra Day; that the latter told him that she was living with her sister, a Mrs. MacLusky (p. 16, l. 19, p. 24, l. 38) who had a little boy and a little girl

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(p. 19, l's. 1 to 4), but who, she led Foley to believe, was "employed out" (p. 30, l. 11); that this Miss Day invited Foley to call upon her (p. 25, l. 3) in the daytime when she was looking after the supposed children of her sister, and Foley being employed at night; that Foley called upon her frequently, took her to moving picture shows, introduced her to his friends and relatives as "Miss Day," and, in fact, kept company with her as if she were a single girl (p. 26, l. 4), and wrote her letters addressed in the same way, as testified to by Mrs. Goldberg, a disinterested witness (p. 32, l. 17); that things so proceeded until September 20, 1916, when Foley, the prosecutor, was calling on the supposed Miss Day at her home, in the afternoon, the little MacLusky girl, four years old, being present (p. 13, l. 36, p. 16, l. 4), when there was a knock at the door of the MacLusky apartments (p. 16, l. 12), whereupon the supposed Miss Day told Foley that the door was locked, although he did not before know it was locked (p. 16, l. 10), and that she was in the habit of keeping the doors locked (p. 31, l. 7). Then a man came in the parlor window from the front porch and asked Foley what he was doing there and told him that the young lady, who he had thought was Miss Day, was his (the man's) wife, and this was the first that Foley knew that the young woman was married. Foley was fully dressed and had his hat on and had been there about fifteen or twenty minutes (p. 15, l's. 27 to 32). All this testimony was uncontradicted, and the fact that Foley always supposed that the so-called Miss Day was a single woman is corroborated by the testimony of Mr. and Mrs. Goldberg, to whom she was introduced as such by Foley. Foley thus learned for the first time that the Miss Day with whom he had been keeping company was really Mrs. MacLusky and that the MacLusky children were her children; and it also developed that her husband, when Foley first met her, had been serving time in the Reformatory, where he had been sent for a year, after having been convicted of the crime of "burning down a hay stack, malicious mischief," (p. 14, l. 13).

40 The only material testimony taken which was disputed

was that of Foley (p. 15, l's. 33 to 36) and of Mrs. MacLusky (p. 25, l's. 22-23) to the effect that Mrs. MacLusky was fully dressed, with skirt, waist and shoes, whereas Mr. MacLusky, the only witness to the contrary and a self-confessed criminal convict, etc., said "she had a petticoat and waist and stockings" (p. 13, l. 17) and that she had her "skirt off and shoes off" (p. 13, l. 4). He also said that Foley and Mrs. MacLusky were in the bedroom, and if his testimony is true he must have seen them from the parlor through the open door of the parlor and the open door of the bedroom on the other side of the kitchen (see plan, p. 11), for they also had a conversation in the alcove of the kitchen, which is between the bedroom and the parlor (see plan, p. 11, also p. 13, l. 18). MacLusky also said that Foley gave his name as McDermit, but this is denied by both Mrs. MacLusky and Foley, and as MacLusky testified himself that his wife told him Foley's name was Andrew McDermit (p. 13, l. 8) it is fair to assume that what occurred was that Mrs. MacLusky told her husband that Foley was Andrew McDermit and that Foley naturally assented to this assertion, having found himself unexpectedly confronted by an indignant married man, with his wife, who he had before supposed to be single, and not knowing what else to do. So that even if the uncorroborated testimony of MacLusky, who, it is not denied, left his wife every week-end, to go to Woodland, he claimed (p. 27, l. 38, p. 28, l. 1), were to be believed, it would only show that Mrs. MacLusky had her skirt off (she might have been changing it) and her shoes off (she might have been changing them or she might have had slippers on) and that Foley was standing there fully dressed and with his hat on ready to go with a little girl present and the bedroom door open.

While it might be indiscreet for a gentleman to cross the threshold of the bedroom of a young woman supposed to be single when she had her skirt off, surely this was not a serious enough offence to warrant charging and convicting Foley of a breach of a rule of discipline of the Department against conduct not becoming an officer and a gentleman.

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The testimony of Chief Drabell that he had warned Foley against keeping company with a married woman (p. 35, l's. 1 to 12) amounts to nothing because Foley believed that the Chief was referring to Mrs. Goldberg (p. 36, l. 24).

At best, the uncorroborated testimony of MacLusky could simply raise a suspicion that Foley had been guilty of some improper conduct with Mrs. MacLusky. But certainly a majority of the Board of Commissioners (one voting in the negative), (p. 10, l. 22) were not justified
 10 in voting to dismiss Foley, as the testimony, as pointed out, did not afford a rational basis for such finding, and their action should be reversed.

SECOND. *The only testimony tending in any way to convict the prosecutor of the charge preferred against him was the testimony of Herbert H. MacLusky, who was not a party to nor interested in the proceedings, but whose testimony, if it amounted to anything, tended to incriminate his wife, Myra A. MacLusky, who was also
 20 neither a party to nor interested in said proceedings, and for that reason said testimony should have been excluded, which would have left no testimony upon which the prosecutor could have been found guilty.*

A husband cannot, in a collateral proceeding, be a witness directly to charge his wife with a crime which is of the grade of indictable offences. *State v. Wilson and Wagner, 2 Vroom 277.*

A wife in a suit between others may not testify to any matter for which if true her husband may be indicted.
 30 *Stewart v. Johnson, 3 Harrison 87.* Of course, the same is true as to the testimony of a husband.

In *Ware v. State, 6 Vroom 553, 556*, the Court says:

“The ground on which it is contended that a wife should be excluded from giving any evidence against her husband is that it is against the policy of the law, which aims at preserving harmony and peace between husband and wife, and therefore excludes such evidence. The cases above referred to, and the decisions on which they
 40 rest, have settled that that policy only extends to such

evidence as charges crime. But had they not so limited the rule, I apprehend that the act of 1870, chapter fifty-three, must be held to limit the rule of exclusion in the same manner. That act expressly authorizes and compels husband and wife to testify against each other, except in criminal actions, and one or two other matters not affecting this question. The supposed policy of the law to preserve harmony between man and wife, by excluding their evidence against each other in any case except criminal cases, is changed by this act, declaring that they shall be witnesses in all other cases directly for or against each other. I do not think that this act should be construed further to change the rule, and to permit them in collateral suits to give evidence charging crime or indictable offences. In criminal proceedings against either, they are still excluded. And the rule founded on the policy must be that the exclusion should still prevent either from testifying to facts directly charging the other with crime." 10

In this case it is true that MacLusky did not give direct evidence that his wife had committed a crime, but it tended to show that she had, if it showed anything that was material to the issue. Either Foley and Mrs. MacLusky had committed adultery in the West Orange house and Mr. MacLusky's testimony was calculated to convict them of this, or their meeting there was entirely proper and the charge against him must have fallen. Under these circumstances, we contend that the rule above referred to applies. MacLusky's testimony in this collateral proceeding, if it amounted to anything, was to incriminate her and should have been excluded, thus putting an end to the case against him. For this reason the action of the Commissioners in finding him guilty as charged should be reversed. 20 30

THIRD. *The rule of the Police Department which Foley was charged with violating did not apply to the conduct of the prosecutor at the time of the alleged offence because he was then off duty, not in uniform and was in another municipality outside the jurisdiction of the City of Orange.* 40

Foley called on Mrs. MacLusky, who he knew as Miss Day, in the daytime, because he was on night work and his duties required him to be out at night (p. 20, l's. 28-30). It is true that one of the "General Rules" of the Department was that all members of the Police Force should be considered to be always on duty, and should appear in full uniform, except when the Director of Public Safety should deem it proper to allow them to appear in citizen's dress (p. 5, l. 20). The punctuation of this rule, I think, would indicate that the clause "and shall appear in full uniform," which is set off by commas, is parenthetical, and that when the Director of Public Safety deems it proper he can allow a policeman to appear in citizen's dress, when he will not be considered as on duty. But whether or not this interpretation of the rule is correct or not, it is clear that the intent and meaning of this rule is that a policeman is to be considered always on duty for the making of arrests within the limits of the City of Orange and otherwise conserving peace and enforcing the laws and ordinances within the jurisdiction of the City of Orange, whether he is on post or not; and it does not mean that he is actually on duty when he is sound asleep in bed taking needed rest, or when he is spending his vacation in another State, or has a leave of absence to visit the Pacific Coast, etc.

The rule that the prosecutor is charged with violating does not come under the same title of "General Rules" as the rule I just quoted, but comes under the title "Discipline" (p. 5, l. 6), and provides that "any officer or member of the force shall be subject to reprimand, suspension, deduction of pay, or dismissal, according to the nature and aggravation of his offence" for "conduct not becoming an officer and a gentleman."

As pointed out by the Chief Justice in granting the writ in this case, it could hardly be successfully argued that an indiscreet act by a policeman while on a leave of absence in California could come within the scope of a rule of discipline of the Orange Police Department forbidding conduct unbecoming an officer and a gentleman.

I am fully aware that in the case of *Alcutt v. Police*

Commissioners, 37 Vroom 173, 174, it was held that a similar rule forbidding conduct unbecoming an officer and a gentleman could be violated by an officer while "not actually clothed in the uniform of his office and not actually engaged in the performance of police work"; but in that case it did not appear that the rule in question was catalogued under the head of "Discipline"; and, furthermore, the offence in that case took place within the city limits and was clearly a breach of discipline in the Department because the prosecutor was charged with calling one of the Police Commissioners, his superior officer, a liar; while in our case the rule in question comes under the head of "Discipline" and not under the head of "General Rules" and the offence in question took place outside the city limits, in the Town of West Orange, and had nothing to do with the discipline of the Department. Furthermore, the later case of *Winters v. Police Commissioners*, 48 Vroom 153, and in which the case just cited (*Alcutt v. Police Commissioners*) is cited, and which we contend is on all fours with our case, must be considered to overrule the *Alcutt* case so far as it is inconsistent therewith. In this later case (*Winters v. Police Commissioners*, 48 Vroom, 154) Judge Voorhees said:

"The evidence shows that the prosecutor, a married man, was calling upon a married woman at her home in the absence of her husband, and that the husband, having returned unexpectedly, the prosecutor secreted himself in a bedroom where he was found by the husband and driven from the house. The evidence warrants the conclusion that the prosecutor desired to conceal his presence in the house, and that his purpose was not a proper one, for if his visit was that of a friend, and the object of his call was that which he gives, there was no reason why he should undertake to conceal himself from the husband or any other accidental caller" * * * * *

"It is undoubtedly true that it was the intent of the act not only to prescribe as a ground for dismissal the violation of the established rules of a police department, but the most casual reading will show that the legislative purpose was to make misconduct involving moral turpitude

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equally a ground for dismissal, and that, too, whether such misconduct occurred when such officer was on duty or not. Whether an act of a lower degree would not likewise be a valid cause for dismissal, it is not necessary to determine.

10 "It would be strange, indeed, if, under the term 'misconduct,' a member could not be dismissed for habitual drunkenness, or for theft, or forgery, or any other act of a criminal nature. And it may be that the commission of immoral acts, such as are proved in the present case, could not be considered other than 'misconduct' under the statute. We think, therefore, that misconduct under the statute may be charged whether it occurs during duty hours or at other times *according to the nature of the act and its natural and probable effect upon the discipline and tone of the force.*

20 "Indeed, one of the qualifications for appointment is good moral character, and that the appointee shall not have been guilty of a crime involving moral turpitude. By inference, the necessity for such qualifications fortifies the above construction.

30 "The difficulty in this case, however, lies in the form of the written charges. The charges so preferred are specified to be in violation of rule 9. Rule 9 provides that 'each member in his conduct and deportment must be quiet, civil and orderly.' It is found in a book entitled 'Rules and Regulations of the Police Department,' promulgated by the department. These rules are for 'the better government and discipline of the department.' Manifestly they are rules for the guidance and governance of the members of the police force in the performance of their duties, that is, while actually engaged therein. It will not be presumed that the authorities intended to establish a code of morals regulating the private life of the officers at all times and under all circumstances, unless an intention so to do clearly appears in the rules, Rule 9 is evidently regulative of the demeanor of officers while on duty, and does not apply to their conduct when excused from duty or to their deportment in private life.

40 It was within the power of the police board to formulate

a rule to reach the conduct of officers when not on duty (Alcutt v. Police Commissioners, 37 Vroom 173), but to have that effect the rule *should clearly express such purpose*. The charge, by reference to rule 9, is narrowed, and the proof does not sustain it when thus limited by the rule.

“The trial was conducted with the formality requisite for such a tribunal to observe and sufficient for securing a fair trial to the accused under the act. Reilly v. Jersey City, 35 Vroom 508. In reviewing the testimony offered we think it was ample to convict the defendant of misconduct, but by the written charges the offence was confined to a violation of rule 9, and the proof being that the offence was committed while the prosecutor was excused from duty, it is not sufficient to convict him of such violation, hence there must be a reversal and the conviction must be set aside.” 10

I fail to see how a case much more directly in point could be conceived. The evidence against the policeman in that case was much stronger than the evidence here, and yet the conviction was held to be illegal because it did not show a violation of the rule in question, which was a rule of conduct and discipline, as in this case. In both cases the rules in question were not drawn so as to include within their scope the acts of officers when not in the actual performance of their duty and to their private conduct, which could in no way affect the discipline of the Department, and for this reason the conviction and dismissal of Foley should be set aside. 20

FOURTH. *The charge preferred against the prosecutor and upon which he was tried and the offence of which he was convicted did not constitute a violation of the rule he was charged with violating, because he was only charged and convicted of conduct “unbecoming an officer,” instead of “conduct not becoming an officer and a gentleman,” which is the language of the rule (p. 5, l. 16).* 30

The word “gentleman” used in this connection undoubtedly means a well-bred man, which is the most gen- 40

eral universal meaning of the word. There are lots of things that a man might do which would be unbecoming an officer but not unbecoming a gentleman, for instance, walking into a saloon in this city and taking a drink at the public bar. On the other hand, a man might do many things which would not be unbecoming an officer but would be unbecoming a gentleman, for instance, conveying food to one's mouth on a knife. This certainly would be unbecoming a gentleman, or, in other words, a well-bred man; but it would not be conduct unbecoming an officer. The charge to bring the prosecutor within the language of the rule should have been that he was guilty of conduct not only unbecoming an officer but unbecoming a gentleman as well, and the resolution finding him guilty and dismissing him from the Department should have also followed this language. As it did not, it seems to me plain that the charge filed against him as drawn did not set forth a violation of Discipline Rule 15 (p. 4), nor did the resolution convicting and removing him from the Department (p. 9), and for this reason the action of the Commissioners should be set aside.

As the prosecutor was not removed for incapacity, misconduct, non-residence, or disobedience of just rules and regulations established for the police force of Orange his removal was illegal under the Police Tenure of Office Act (C. S., 2467), and his conviction and dismissal from the Department should, therefore, be reversed and set aside.

WILLIAM A. LORD,
Attorney for Prosecutor - Appellee

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