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Notice of Appeal.

(Filed January 28, 1919.)

New Jersey Supreme Court.

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MARY E. MAITLAND, Plaintiff-Respondent, v. BOARD OF POLICE COMMISSIONERS OF THE CITY OF GARFIELD, Defendant-Appellant.	}	Action at Law.
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To Messrs. Weinberger & Weinberger:

Sirs:

Take notice that the defendant-appellant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause.

Dated, January 23rd, 1919.

30

MACKAY & MACKAY,
Attorneys of Defendant-Appellant.

40

Summons.

The State of New Jersey to Board of Police Commissioners of the City of Garfield and the City of Garfield:

10 You are summoned to answer annexed
 [L.S.] complaint of Mary E. Maitland, administratrix, in an action at law in the Supreme Court.

And take notice that unless you file your answer to said complaint with the Clerk of the said Court, at Trenton, within twenty days from the service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

20 Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this 18th day of November, nineteen hundred and eighteen.

 ENOCH L. JOHNSON,
 Clerk.

Weinberger & Weinberger,
 Attorneys.

30

40

Complaint.

(Filed November 18, 1918.)

NEW JERSEY SUPREME COURT.**BERGEN COUNTY.**

MARY E. MAITLAND, administra-
trix,

Plaintiff,

v.

BOARD OF POLICE COMMISSIONERS
OF THE CITY OF GARFIELD and
the CITY OF GARFIELD,

Defendants.

10

Action at Law.

20

Plaintiff, residing in the City of Garfield, in the
County of Bergen and State of New Jersey, says:

1. By an Act of the Legislature of the State of
New Jersey, entitled "An Act Providing for the
Pensioning of Police Officers and Policemen in
Certain Municipalities of this State," provision was
made for the payment to every member of the
Police Department having paid into the fund the
amount prescribed in accordance with law and
upon his having fully complied with all the condi-
tions imposed upon by said membership.

30

2. On the 29th day of December, 1908, John
Maitland, husband of Mary E. Maitland, the plain-
tiff in said cause, was duly appointed to the office
of patrolman for the Borough of Garfield, now
the City of Garfield, and that a certificate was duly

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Complaint.

issued by the said Borough showing such appointment.

10 3. That as such member of the Police Department of the Borough of Garfield, County of Bergen and State of New Jersey, the said John Maitland continued from the date of said appointment down to November 1st, 1917, when he lost his life in the performance of duty, directly as a result of sickness and illness contracted while in the performance of actual duty.

4. The said John Maitland has in all respects complied with the payment of dues and all other conditions prescribed under and by virtue of the laws controlling and regulating pension funds.

20 5. Under and by virtue of the laws of the State of New Jersey regulating said pensions, the defendant became obligated to pay unto the widow and children of the said John Maitland, upon his decease, a pension equal to one-half of the amount of the salary of such member of said police force at the time of his death.

30 6. There is due unto the plaintiff the sum of fifty dollars for each and every month since the death of the said John Maitland, in all aggregating the sum of \$600.00, together with such future payments as shall become due and payable in accordance with the law of this State.

7. Defendant paid on account, the sum of one hundred and fifty dollars, leaving a balance due of four hundred and fifty dollars.

8. As to the remainder of the payments to become due in the future, under the pension law,

Answer of Board of Police Commissioners.

plaintiff reserves the right to bring action therefor as they become due.

Judgment will be claimed in this cause for the sum of four hundred and fifty dollars.

WEINBERGER & WEINBERGER,
Attorneys of Plaintiff.

10

Answer of Board of Police Commissioners.

(Filed November , 1918.)

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

MARY E. MAITLAND, administra-
trix,

Plaintiff,

v.

BOARD OF POLICE COMMISSIONERS
OF THE CITY OF GARFIELD and
the CITY OF GARFIELD,
Defendants.

Action at Law.

20

Defendant, Board of Police Commissioners of the City of Garfield, of the County of Bergen and State of New Jersey, answering the plaintiff's complaint says:

30

1. It has no knowledge sufficient to form a belief as to the matters alleged in paragraph one of the plaintiff's complaint because the particular act of the Legislature to which the plaintiff refers is not mentioned in said paragraph of plaintiff's complaint, and, therefore, denies the same.

40

Answer of Board of Police Commissioners.

10 2. Defendant is informed and believes that the said John Maitland, husband of Mary E. Maitland, was on December 29th, 1908, appointed to the office of patrolman of the Borough of Garfield, now the City of Garfield, but it has no knowledge as to whether or not a certificate was issued by the Borough showing such appointment, and, therefore, denies that part of this paragraph.

20 3. Defendant admits that John Maitland continued to act as a patrolman for the Borough of Garfield, now the City of Garfield, down to November 1st, 1917, but denies that he lost his life in the performance of duty directly as a result of sickness and illness while in the performance of actual duty.

4. Defendant denies paragraph four of the plaintiff's complaint.

5. Defendant denies paragraph five of the plaintiff's complaint.

6. Defendant denies paragraph six of the plaintiff's complaint.

30 7. Defendant denies paragraph seven of the plaintiff's complaint.

8. Defendant denies paragraph eight of the plaintiff's complaint.

MACKAY & MACKAY,
Attorneys for Defendant, Board
of Police Commissioners.

Answer of City of Garfield.

(Filed November , 1918.)

NEW JERSEY SUPREME COURT.**BERGEN COUNTY.**

MARY E. MAITLAND, administra-
trix,

Plaintiff,

v.

BOARD OF POLICE COMMISSIONERS
OF THE CITY OF GARFIELD and
the CITY OF GARFIELD,

Defendants.

Action at Law.

10

20

Defendant, City of Garfield, a municipal corpo-
ration of the County of Bergen and State of New
Jersey, answering the plaintiff's complaint says:

1. Defendant has no knowledge of the matters
and things alleged in paragraph one of the com-
plaint as therein particularly set forth, and, there-
fore, denies the same.

2. Defendant has no knowledge sufficient to
form a belief as to the matters alleged in para-
graph two of the plaintiff's complaint, and, there-
fore, denies the same.

30

3. Defendant has no knowledge sufficient to
form a belief as to the matters and things alleged
in paragraph three of the plaintiff's complaint
in the year 1917, and, therefore, denies the same.

40

Answer of City of Garfield.

4. Defendant denies paragraph four of the plaintiff's complaint.

5. Defendant denies paragraph five of the plaintiff's complaint.

10 6. Defendant denies paragraph six of the plaintiff's complaint.

7. Defendant denies paragraph seven of the plaintiff's complaint.

8. Defendant has no knowledge as to the matters and things alleged in paragraph eight of the plaintiff's complaint, and, therefore, denies the same.

MACKAY & MACKAY,
Attorneys for Defendant,
City of Garfield.

20

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Appearances.**BERGEN COUNTY SUPREME COURT.**

MARY E. MAITLAND, administra-
trix,

Plaintiff,

v.

BOARD OF POLICE COMMISSIONERS
OF THE CITY OF GARFIELD,
Defendant.

Action
at Law.

10

Hackensack, N. J., December 18th, 1918.

Before—Hon. WILLARD W. CUTLER, Judge, and a
Jury.

20

APPEARANCES:

For the Plaintiff, WEINBERGER & WEIN-
BERGER, Harry Weinberger, Esq., of
Counsel.

For the Defendant, MACKAY & MACKAY,
Howard Mackay and Wm. J. Morrison,
of Counsel.

The jury was empanelled, accepted and sworn.

30

Mr. Weinberger opened the case to the jury on
behalf of the plaintiff.

Mr. Morrison: We ask for a non-suit on Mr.
Weinberger's opening. He opens his case on a
claim for the administratrix and founds it on the
act entitling the widow and children, not the estate.

The Court: How about that, Mr. Weinberger?

Mr. Weinberger: If your Honor please, I take

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Opening.

10 it that under the law we would be compelled to bring the action for the benefit of the estate; that point is not raised, if your Honor please, in the case, as a matter of fact; but I think, under the law, the proper person to bring the suit would be the person appointed administratrix, for the reason that this is a continuing action, and as such there may be a question—if that is so, I ask that the word “administratrix” be stricken out as mere surplus. We allege in our complaint—

The Court: What is your complaint?

Mr. Weinberger: The plaintiff, residing in the City of Garfield, in the County of Bergen and State of New Jersey, says:

20 1. By an Act of the Legislature of the State of New Jersey, entitled “An Act Providing for the Pensioning of Police Officers and Policemen in certain municipalities of this State,” provision was made for the payment to every member of the Police Department having paid into the fund the amount prescribed in accordance with law and upon his having fully complied with all of the conditions imposed upon by said membership.

30 2. On the 29th day of December, 1908, John Maitland, husband of Mary E. Maitland, the plaintiff in said cause, was duly appointed to the office of patrolman for the Borough of Garfield, now the City of Garfield, and that a certificate was duly issued by the said Borough showing such appointment.

40 3. That as such member of the Police Department of the Borough of Garfield, County of Bergen and State of New Jersey, the said John Maitland continued from the date of said appointment down

Opening.

to November 1st, 1917, when he lost his life in the performance of duty, directly as a result of sickness and illness contracted while in the performance of actual duty.

4. That said John Maitland has in all respects complied with the payment of dues and all other conditions prescribed under and by virtue of the laws controlling and regulating pension funds.

10

5. Under and by virtue of the laws of the State of New Jersey regulating said pensions, the defendant became obligated to pay unto the widow and children of the said John Maitland, upon his decease, a pension equal to one-half of the amount of the salary of such member of said police force at the time of his death.

20

6. There is due unto the plaintiff the sum of fifty dollars for each and every month since the death of the said John Maitland, in all aggregating the sum of six hundred dollars, together with such future payments as shall become due and payable in accordance with the law of this State.

7. Defendant paid on account, the sum of one hundred and fifty dollars, leaving a balance due of four hundred and fifty dollars.

30

8. As to the remainder of the payments to become due in the future, under the pension law, plaintiff reserves the right to bring action therefor as they become due.

Judgment will be claimed in this cause for the sum of four hundred and fifty dollars.

And the words administratrix are surely surplusage. I don't even refer, if your Honor please, to the fact that she was appointed administratrix.

40

Opening.

In reading the law, I concluded as Mr. Morrison does, that this was a debt due her at the time.

The Court: Were there any children?

10 Mr. Weinberger: There were three minor children, and a serious question came into my mind as to whether there wouldn't be an administration necessary, but as I read the act it would appear that that would go right to Mrs. Maitland. As a matter of law, I submit that the complaint alleges a *prima facie* case of action insofar as her rights are concerned, and that she is the plaintiff seeking to recover four hundred and fifty dollars; and, as a matter of fact, there is no reference in the complaint as to the point of administration. I
20 thought that if she got the money there might be a question as to whether or not it would inure to the benefit of the children and an administration would be necessary.

Mr. Morrison: The complaint is made out in the name of this lady, and while it is not stated in the opening paragraph, it is apparent by reference to the paper that it is Mrs. Maitland as administratrix who sues.

30 The Court: I don't think there is any question about the law that she is entitled—the only question in my mind is whether or not she can recover for the children, whether they have to bring suit in the name—whether the children would have to bring it. That is the only question.

Mr. Morrison: Our point is that the proper plaintiff has not brought the suit into court. We are not sued by the proper parties under the act. It is not for us to point out who should sue us; it is for Mr. Weinberger.

40 The Court: You may amend, Mr. Weinberger.

Mary E. Maitland, direct.

Mr. Weinberger: May I ask that the words administratrix be stricken out?

The Court: Yes, you amend by striking out the word.

Mr. Weinberger: Mrs. Maitland, will you be sworn, please?

10

Mr. Weinberger: Perhaps I should state on the record that I should amend it so as to add Mary E. Maitland as a party plaintiff, so if there is any question—

The Court: Yes, you may amend.

Mr. Morrison opened the case to the jury on behalf of the defendants.

MARY E. MAITLAND, the plaintiff, called as a witness on her own behalf, being duly sworn, testified as follows:

20

Direct examination by Mr. Weinberger:

Q. Mrs. Maitland, where do you live? A. Garfield.

Q. And how long have you lived in Garfield? A. Close onto twenty years.

Q. How old are you, Mrs. Maitland? A. Forty-three.

Q. You were married, I believe, to Mr. John Maitland? A. Yes, sir.

30

Q. When? A. February the 22nd.

Q. What year? A. Nineteen—oh, twenty years ago.

Q. Twenty years ago? A. Yes.

Q. On the 22nd day of February, twenty years ago, is that right? A. Yes.

Q. You lived with your husband where during the twenty years of married life? A. In Garfield.

40

Mary E. Maitland, direct.

Q. Were there any children born of that marriage? A. Three.

Q. And their names? A. John, Walter and Harold.

10 Q. The ages of the three children are what? A. Over sixteen.

Q. Walter is sixteen? A. No, John is over sixteen; Walter is fifteen, and Harold is ten.

Q. Where are the children now? I mean, where do they live now? A. With me.

Q. The same place? A. Yes.

Q. Your husband, John Maitland, was a police officer, was he not? A. Yes, sir.

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

20 Q. I show you a certificate purporting to be a certificate of appointment of your husband as police officer, and ask you whether or not that is a certificate of appointment which he received at the time he was appointed police officer in the City of Garfield (handing paper to witness)? A. (Referring) Yes, sir.

Mr. Weinberger: I offer that in evidence.

The Court: It may be marked.

(Marked Exhibit P-1.)

30 Q. How old was your husband, Mrs. Maitland, at the time he died? A. Forty years.

Q. Of age? A. Yes, sir.

Q. And what was the condition of his health during the time that he lived with you up to the time that he first got sick? A. I always found him to be well and healthy.

Q. Did he ever have a doctor or need of a doctor? A. Not that I can recall.

40 Q. Well, did he ever have a doctor? A. No.

Mary E. Maitland, direct.

Q. How tall a man was he? A. I should say five foot.

Q. Five foot? Well, was he—supposing I get up for a minute. Was he taller than I, or shorter than I? A. Something like this gentleman here (indicating).

10

Q. Which gentleman? A. The second gentleman on the jury right here.

Mr. Weinberger: May I ask you your height, sir?

A Juror: Five, eight and a half.

Q. He was built along the lines of the gentleman— A. Yes, about like that, yes.

Q. Built on the same lines as that gentleman? A. Yes.

20

Q. Pretty stocky, well-built man? A. Yes.

Mr. Morrison: If the Court please, I have to object to leading.

Mr. Weinberger: She has pointed out a gentleman, and I am trying to get that on the record.

Mr. Morrison: The jury sees the gentleman.

Q. Supposing you tell us in your own way, Mrs. Maitland, whether your husband was a delicate, little fellow, or robust gentleman or what he was. Just tell us in your own way. A. Well, he was a big, big man, he took a—he was fortyfour—forty-six across, so you can judge from that.

30

Q. Across where, the chest? A. The chest.

Q. All right. Well, was he a weak or strong man? A. I think he was a good, strong man.

Q. You think so? A. Well, I know it.

Q. And during the time that he was on the police

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Mary E. Maitland, direct.

force, what was the condition of his health? A. He was always well.

Q. Did he work days or nights or both? A. Well—

10 Q. Changing from time to time? A. Well, they had different shifts.

Q. During the whole period that your husband served on the police department up to the time that you claim he got sick, was he regular in the performance of his duties as police officer? A. Well, I guess—

Q. Did he attend to his duties? A. Well, I guess he did.

Q. Well, do you know? Tell us what you know. A. I never knew of any fault against him.

20 Q. I don't mean fault. Did he go to work daily? A. Yes.

Q. That is what I mean. A. Yes.

Q. Now, when did your husband die? A. On November the first.

The Court: What year?

Q. What year? A. 1917.

Q. And where was he at the time that he died? A. Home in the house.

30 Q. How long had he been sick? A. Only nine days.

Q. Do you recall the occasion that he last went to work? A. On a Monday night.

Q. What kind of a night was that? A. It was a foggy night.

Q. What kind of weather? A. Damp, blustery.

Q. What time did he go to work? A. Quarter to eight when he left from home.

40 Q. In the evening or morning? A. In the evening.

Mary E. Maitland, direct.

Q. Had he been working regularly up to that time? A. Yes.

Q. Did he have his dinner home that night? A. He had supper with us.

Q. You and your three children? A. Yes, sir.

Q. And left? A. Yes, sir.

10

Q. When did you next see him after a quarter of eight that evening? A. Not till he came in, four o'clock in the morning.

Q. And how did he come in? A. He come in and he complained he was very sick.

Q. Well, who brought him there, or did he come alone? A. He came home alone.

Q. Well, had he been on duty that night? A. Yes, sir.

Q. Do you know where? A. In Outwater Lane.

20

Mr. Morrison: That must be hearsay.

The Court: Yes; only what you know yourself.

Mr. Weinberger: I will connect everything by witnesses.

The Court: You may strike that out.

Q. Now, he came home alone, you say, at four in the morning? A. From the police station he came home alone.

30

Q. Do you know of your own knowledge where he was on duty that night? A. Up at Outwater Lane.

Q. How do you know that fact? A. I know it from a lady that walked home with him, that was talking to him just a minute before that.

Mr. Morrison: That is hearsay.

Q. Did you at any time speak to Chief Forss con-

40

Mary E. Maitland, direct.

concerning the matter or any of the police authorities? A. Not that I can recall.

Mr. Morrison: I ask that that be stricken out.

10 Mr. Weinberger: I consent that it be stricken out.

The Court: Yes, strike it out.

Q. He came in at four o'clock? A. Yes, sir.

Q. And when he got in at four o'clock, what was his condition? A. He was sick.

20 Q. What was the matter with him? Just tell the Court and jury. A. He told me—he came in, four o'clock, and he called me by my name, and I got up about quarter after four, and he said, "I am awful sick," and I said, "What happened to you?" He says, "At this hour of the morning, I wouldn't like to get the doctor out so early," and I said, "What happened to you, John?" He says, "Oh, I took a chill on my beat."

Mr. Morrison: I object to what he may have stated unless it was in contemplation of death.

30 The Court: You didn't object to his going ahead. You don't want me to strike it out now, do you?

Mr. Morrison: I won't press it any further.

The Court: Don't tell what he told you, Madam. Let it stand as it is.

Q. You had a conversation with him. What happened then? A. Then he went to bed.

40 Q. Did he ever get up out of bed after that? A. No more than just to the bath room.

Mary E. Maitland, direct.

Q. And did you have any doctor in attendance?

A. Right away.

Q. Who? A. Doctor Reid.

Q. And where is he a practitioner at? A. In Garfield.

Q. Was he the doctor who attended him from that time until your husband died? A. Yes.

10

Q. Where was your husband from the time—what was his condition of health from that time on until the time he died? A. From what time?

Q. From the time he came home that morning until the time that he died? A. He was sick.

Q. Well, what was the matter? A. Well, he didn't know himself. He said he didn't know what was the matter.

Q. The morning he came home, what was he suffering with? A. A heavy cold.

20

Q. Did you have a nurse in charge? A. Yes, sir.

Q. Is she here? A. Yes, sir.

Q. Who was the nurse? A. Mrs. Koepf.

Q. How long did she remain in your house? A. For the nine days she lived with me.

Q. Now, how much was your husband receiving as a salary from the City of—Borough of Garfield, or City of Garfield? A. I think they were getting twelve hundred dollars a year.

30

Q. Twelve hundred dollars a year? A. Yes; I think so.

Q. And after your husband died, did you receive any moneys from the pension fund? A. I received three checks.

Q. For how much? A. Each \$50.00.

Q. And for what months was that, Mrs. Maitland? A. For November, December, and the 15th of December; that was the last I got.

40

Erwin William Reid, direct.

Q. You said December twice, did you? A. First—

Q. I notice that you used the month of December twice. Did you mean two payments in December? A. Yes, the first of December, and the fifteenth.

Q. And in all you received, you say, how much? A. \$50.00.

Q. The total amount, altogether? A. One hundred and fifty.

Q. \$150.00? A. Yes, sir.

Mr. Weinberger: If your Honor please, I was going to ask whether I could call the doctor. Doctor Reid just came in.

The Court: Yes, you may do that; I will allow that to be done. You may step aside. (Witness excused.)

ERWIN WILLIAM REID, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Weinberger:

Q. Doctor Reid, you are a practicing physician of this State? A. Yes, sir.

Q. And have been how many years? A. Three years.

Q. And admitted to practice how many years? A. Three years.

Q. Did you know Mr. John Maitland? A. I did.

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

Q. Will you just state to the Court and jury, first, the kind of a man he was, size and stature, and so forth? A. Why, he seemed to be a perfectly healthy man, as near as I could see.

Erwin William Reid, direct.

Q. Height? A. Why, I should imagine about five feet, nine.

Q. Five foot, nine? A. Yes.

Q. A robust type man? A. He seemed to be; yes.

Q. You were first called in in October when he got sick, were you not? A. Yes, sir. 10

Q. And treated him until he died? A. I did.

Q. On the first of November, 1917? A. I didn't get the—

Q. He died on the first of November, 1917? A. Yes.

Q. Will you just describe what his condition was when you first came there, and what it developed into, and how he died, the cause of death?

A. Why, there seemed to be a bad cold of a grippe condition, and then after about twenty-four hours it developed into an ordinary acute lobar pneumonia. 20

Q. And what was the cause of death? A. Lobar pneumonia.

Q. You say that pneumonia was caused through this cold? A. Undoubtedly was, yes.

Q. Do you remember when you first came to the house? A. I don't remember the exact date, no.

Q. It was early in the morning, wasn't it? A. I think it was; yes. 30

Q. Did you know Mr. Maitland before that time? A. I did.

Q. What kind of a man was he? A. Why, he seemed to be a very good man. You mean physically?

Q. Yes. A. Why, he seemed to be perfectly healthy as near as I could tell.

Q. What kind of cheeks did he always have? A. Ruddy. 40

Mary E. Maitland, direct.

Q. Did you see him as a police officer? Was he an active man on the police department? A. He was.

Q. Would you call him a perfectly healthy looking specimen of a human being? A. Why, he seemed to be, yes.

Mr. Weinberger: That is all.

Mr. Morrison: No questions.

Mr. Weinberger: That is all, Doctor.

MARY E. MAITLAND, the plaintiff, recalled for further direct examination, testified as follows:

Direct examination by Mr. Weinberger:

20 Q. Did you ever receive any more money than that \$150.00 which you have just referred to? A. No, sir.

Q. Did you receive your husband's last month's pay? A. Yes, sir.

Q. Was there any money deducted for the pension fund? A. I don't think so.

Q. Well, do you know? A. I don't—now, wait, just give me one second to think. I cashed that check. I think there was \$49.00.

30 Q. So that there was something deducted? A. I am sure.

Q. Now, Mrs. Maitland, when your husband came in that morning at about quarter of four, or quarter after four—what was his usual hour to come home? A. Four o'clock.

Q. In the morning? A. Yes.

Q. And did he go right to bed? A. Right to bed.

40 Mr. Weinberger: Now, if your Honor please, I am going to refer to conversations,

Mary E. Maitland, direct.

but I didn't want to ask the questions—I think anything which he may have stated at that time would be evidential on the theory that it is part of the *res gestae*, and I take it counsel will interpose objection, and I thought I had better put the proposition generally before the Court.

10

The Court: I will hear what counsel has to say.

Mr. Morrison: I don't know quite what Mr. Weinberger means to do. Are they her conversations with the husband?

Mr. Weinberger: Yes.

Mr. Morrison: We would object to those on the ground that they would be hearsay at this time unless it was in anticipation of death within a few hours; self-serving statements for his own benefit or the benefit of his family when he first came home cannot be admissible here.

20

Mr. Weinberger: The point I make, your Honor, is that a conversation that a person has concerning a fact of illness and a doctor coming in immediately upon being called, are part of the *res gestae*, the thing happening. We claim that the sickness which he met with that night would be evidential; in other words, that a police officer who was shot out in the street came in with a bullet wound would be evidential because I think that is part of the *res gestae*, and I think that any statement that the husband made to the wife at the time of the occurrence would be admissible. I think that is one of the exceptions to the rule; it is part of the *res gestae*. I am not speaking now of a

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Mary E. Maitland, direct.

dying declaration; I am not seeking to offer it on the theory of a dying declaration. I don't think it was, personally.

The Court: There isn't any evidence to show there is a dying declaration.

10 Mr. Weinberger: No, there isn't.

The Court: I will sustain the objection at the present time. If you can find me any authority by which I can allow it, I will allow you to put it in later. The Court has gone a good ways on the question of *res gestae*, but this seems to be overstepping the line that has been drawn, but if you can show me anything, you may ask it afterwards.

20 Q. When your husband came in that morning, did you give him any—did you do anything for him yourself? A. I just rubbed him with liniment.

Q. Had he made any complaint of a cold or anything before that morning at all to you? A. Never.

Q. Was he suffering with any cold or did he have any impairment to his health existing before the morning he came in at quarter after four? A. Not to me.

30 Q. Well, you saw him daily? A. Yes.

Q. Did he ever have anything wrong with him immediately preceding this coming in at quarter of four that morning? Did he have anything wrong with him at all? A. Just—

Q. Before that morning? A. No.

Q. Now, Mrs. Maitland, did you remain with your husband most of the time during the nine days? A. Yes, sir.

40 Q. Did he do anything at all during the remaining nine days except stay in bed, and with the ex-

Mary Ellen Koepf, direct.

ception of going to the bath room, as you stated?

A. In the bed.

Q. Nothing else? A. No.

Q. Did he do any work at all? A. No, sir.

Q. Was he out at all? A. No, sir.

Q. In bed all the time? A. Yes, sir.

10

Mr. Weinberger: That is all; take the witness.

Cross examination by Mr. Morrison:

Q. Mrs. Maitland, you spoke about this money you received, three fifty-dollar checks did you say they were? A. Yes, sir.

Q. Where were they paid from, do you know? A. The bank; the national bank.

Q. The national bank, and they were sent by the Borough officials, were they? A. Yes, sir.

20

Q. Do you know whether they were paid out of the pension money or out of the city money? A. Well, I don't know whether—

Q. You don't know? A. Just the same as his ordinary police check.

Q. They were like his regular pay checks? A. Yes.

Q. And signed by the same men as had signed his pay checks? A. Yes, sir.

30

Mr. Morrison: That is all.

MARY ELLEN KOEPF, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Weinberger:

Q. Your full name is what? A. Mary Ellen Koepf; K-o-e-p-f.

40

Mary Ellen Koepf, direct.

Q. And where do you live? A. 56 State Street, Garfield.

* Q. And how long have you lived there? A. Well, I am only living there since the first of July.

Q. Of this year? A. This year.

10 Q. Where did you live before that, in Garfield? A. In Garfield; yes, sir.

Q. How long? A. Well, I am living altogether four years in Garfield.

Q. Did you know Mr. John Maitland? A. Yes, sir.

Q. How long a time did you know him? A. Well, I know him to see on duty, well, anyway a little over three years. I was a little while in Garfield.

20 Q. What kind of a man was he in appearance? A. He was a healthy man.

Q. How were his cheeks? A. He had rosy cheeks just as rosy as mine is now, I guess.

Q. Perhaps rosier? A. (No response.)

Q. Did he have a decidedly ruddy cheek? A. Yes, sir; healthy look, too.

Q. Now, did you see him on the day that he got sick, Mrs.— A. Yes, sir.

30 Q. Where did you see him? A. In his own bed in the house.

Q. Did you attend to him while he was in bed? A. Yes, sir.

Q. For how long a time? A. I was there until he died. I was there until he breathed his last.

Q. You came in on the morning he got sick? A. Yes, sir.

Q. You were there all the time? A. All the time; night and day.

40 Q. What is your vocation? A. I am a practical nurse.

Mary Ellen Koepf, direct.

Q. And have been for how many years? A. Well, for about 15 years.

Q. And will you just state what the condition of the officer was at the time he first came in and then give the Court and jury his general condition down to the time that he died? A. Well, he came in and told his wife that he didn't feel— 10

The Court: No, not what he told his wife.

A. (Continuing)—but she told me, and then I went down to see him. She asked me what I could do.

Q. Were you living in that house? A. Yes, sir.

Q. Upstairs? A. Yes, sir.

Q. And Officer Maitland lived downstairs? A. Yes, sir. 20

Q. You came down, did you? A. I told her she had best have the doctor, because he looked to be a pretty sick man. He had a very high fever, and the doctor came around eleven o'clock.

Q. Had a chill? A. He had a cold chill and she had quite some bed clothes on him to get him warm.

Q. And you immediately had a doctor sent? A. Yes, she sent for the doctor immediately, but the doctor wasn't in and he came around eleven o'clock. 30

Q. Now, were you there all the time? A. All the time.

Q. He went to bed, did he? A. He was in bed; yes, sir.

Q. What kind of a night was this, do you remember? A. The night he came in?

Q. Yes. A. Well, it was a nasty, damp—one of

Mary Ellen Koepf, direct.

those nights that the cold would penetrate through you; those nasty fall damp nights.

Q. Was he in uniform when he came in? A. Yes, sir. Well, not in the house; they always changed their uniforms in the police station, but
10 he came from duty at four o'clock.

Q. What is that? A. They change their uniform in the police station.

Q. Well, I mean when he came into the house, was he in his uniform? A. No, not at four o'clock. That I cannot tell you, because I was home in bed. I cannot tell you that.

Q. Well, he went to bed, did he? A. Yes.

Q. Now, what was his condition from day to day until he died? A. Well, he was getting worse
20 right along.

Q. What was it? A. High fever, and, of course, at times he thought he was getting better, and when I would ask him how he was, he seemed to brace right up, and then in the last three days he broke right down.

Q. Had you seen Officer Maitland daily before the morning in question when he got sick? A. Yes, sir.

Q. And how frequently would you see him? A. Well, he was on night duty, you know. He would
30 be on night duty and day duty, but most all the time when he would be at home I would see him.

Mr. Weinberger: That is all.

The Court: We will take a recess (12.57 P. M.) until 2.00 o'clock.

Mary Ellen Koepf, direct.

AFTER RECESS.

2.00 P. M.

MARY ELLEN KOEPF resumed the stand.

Mr. Morrison: I have no cross examination of this witness, if the Court please.

10

Mr. Weinberger: May I ask a further question, if the Court please?

The Court: Yes, you may.

By Mr. Weinberger:

Q. Did you see him on the evening before the morning that he came home sick? A. I seen him home; yes, sir.

Q. What was his condition of health at that time, do you know? A. Well, like anybody would take sick with an attack of the grippe.

20

Q. I mean the night before that morning. A. Oh, I saw him going out on his duty.

Q. What condition of health was he in then? A. He seemed to be all right; he didn't complain.

Mr. Weinberger: That is all, Mrs. Koepf. Now, if your Honor please, Police Officer Brown was to have been here this morning, and he didn't appear. I sent a machine for him from Passaic and he isn't here yet. I went out of my way to do that. He was to have been here at ten o'clock this morning.

30

The Court: Was he subpoenaed?

Mr. Weinberger: I wouldn't say that to the Court. I don't know. I think I took his word that he would be here, or my office did. I couldn't say that he was subpoenaed; I don't know. With the exception of him, sir, I rest my case. I just want to prove by

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Mary E. Maitland, direct.

the police officer that he saw him on duty, got sick there and brought him home.

The Court: There is one thing you haven't shown to the Court, and that is whether this lady has remarried.

10 Mr. Weinberger: I will offer her for that; will you just take the stand, Mrs. Maitland.

The Court: I notice that is a provision of the act.

MARY E. MAITLAND, resumes the stand.

By Mr. Weinberger:

Q. Mrs. Maitland, have you remarried since the death of your husband? A. No, sir.

20 Q. Are you a widow at the present time? A. Yes, sir.

Q. And have been such since the time of his death? A. Yes, sir.

Q. One further question, now. Did you see your husband on duty that night after he left home? A. Yes; I seen him going out.

Q. Did you see him in his uniform? A. Yes, I did.

30 Q. At what time was that, about, when you saw him? A. Eight o'clock.

Mr. Weinberger: That is all.

Mr. Morrison: No questions.

Mr. Weinberger: Now, we rest our case, if your Honor please. I am offering in evidence—I guess it is not disputed.

Mr. Morrison: Mr. Mackay tells me that the pleadings do not dispute that up to the time of his death—

40 Mr. Weinberger: She testified being paid

Mary E. Maitland, direct.

to the time of the death. There is no dispute as to the fact that the pension fund deducted the amount from his pay under the statutory requirement up to the time of his death.

The Court: That is admitted?

10

Mr. Mackay: Yes, that is admitted.

The Court: Well, there wasn't any obligation to pay it afterwards, was there, by the widow?

Mr. Weinberger: She claims that a dollar was deducted from her pay, \$49.00 each time, in her testimony. That is all, with the exception, if your Honor please, I take it that the letters of administration, in view of the fact that I have sued that way, be offered in evidence.

20

The Court: Oh, you have amended your complaint?

Mr. Weinberger: I thought the amendment was both ways.

The Court: It is either in or out, and you asked to have it struck out, and I have stricken it out.

Mr. Weinberger: We rest.

Mr. Morrison: It would embarrass our case somewhat to go on without having this officer, because our case is rebuttal, and we want to rebut what he may testify to. We have witnesses here in rebuttal of some of these facts, and it would be rather hard to rebut what this man is going to say if we haven't heard him yet.

30

The Court: Can't you go on with what you have and then you may recall any witnesses on any question of rebuttal?

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William A. Burke, direct.

Mr. Morrison: Well, we will be slightly prejudiced by it.

The Court: I don't see how you can.

Mr. Morrison: It gives them the privilege of rebutting our witness.

10

The Court: Don't put your witness on; put somebody else on. If you have any witnesses that you don't desire to put on, I won't force you to put them on until after their case is rested.

WILLIAM A. BURKE, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

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Direct examination by Mr. Morrison:

Mr. Morrison: If the Court please, the case going on in this aspect, may we reserve the right for a motion for a non-suit when their case is finally closed?

The Court: Yes, that may be reserved.

Q. Mr. Burke, where is your home? A. Garfield.

Q. And you hold an official position for the city?

A. Yes.

30

Q. What is that position? A. City Clerk.

Q. How long have you held that position? A. Since November, 1917.

Q. And you knew Mrs. Maitland's husband, Officer Maitland, in his lifetime, I presume? A. Yes, sir; I did.

Q. Do you know from what fund he was paid, or she was paid, rather, three payments of \$50.00 after his death? A. Why, the records show two payments only.

40

Q. And from what fund was that paid? A. General fund.

William A. Burke, cross.

Q. Is that the fund from which the police salaries are paid? A. Yes, sir.

Q. Is the fund from which pensions would be paid, the pension fund, a separate fund from that?

A. What the police officers would be paid from in case of death?

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Q. Yes. A. Yes, sir.

Mr. Morrison: You may take the witness.

Cross examination by Mr. Weinberger:

Q. Is it the same fund that they would pay a pension from in case they didn't die? A. There is no pension given unless there is a death, that I know of.

Q. What is that? A. Every month we give two per cent. toward the pension fund. Any pension is paid from the pension fund. We don't pay pensions, the city itself.

20

Q. You seem to qualify your answer? A. I say in case of death, it is paid from another fund. If any pension is taken from the police pension fund, that is a special committee, special permission.

Q. Do you make the deductions and deliver the money to the pension fund? A. Yes, sir.

Q. You did in Mr. Maitland's case? A. Yes, sir.

Q. Regularly? A. Yes, sir.

30

Q. Each month's pay you deducted the amount that he was entitled to and delivered it to the pension fund? A. Yes, we take off two per cent. and make a check to the pension fund for all of it.

Q. That was done in his case? A. Yes, sir; up until October 30th.

Mr. Weinberger: That is all.

By Mr. Morrison:

Q. And after October 30th when the subsequent

40

William A. Burke, cross.

payments were made to Mrs. Maitland, was the deduction made? A. No, sir.

By Mr. Weinberger:

10 Q. Have you got the checks here? A. No, sir; I have the warrants.

Q. Have you got the checks here that were given to Mrs. Maitland? A. No, sir.

Q. You say those checks were for \$49.00?

The Court: He says he has the warrants.

Q. How much were the warrants for? A. Fifty dollars each.

Q. May I see them? A. There is one (handing paper to Mr. Weinberger).

20 Q. When was that written on (indicating)? A. When was what written on?

Q. John Maitland. A. A long time ago.

Q. Well, this doesn't show— A. There is another one (handing paper to Mr. Weinberger).

30 Q. This isn't a warrant, is it? A. Yes, that is a general warrant. See the numbers on the back? At the time these checks were made out, they had decided at first not to pay them. He died on the first of the month, and on the 15th of the month he was entitled, if he had been working, to \$50.00; so the 15th of November, they didn't pay him anything. Then the Mayor said to pay him then the end of the month the Mayor and Council decided to give him another month's pay.

Q. Now, isn't it a fact that the city invariably and on all the different occasions when it made payments to officers, made out the warrant for \$50.00? A. \$50.00 one-half of the month and \$49.00 the other.

40 Q. Yes, and isn't it a fact that the one dollar

William A. Burke, cross.

was deducted from his pay and the warrant showed \$50.00? A. No. I wouldn't swear to a check being made out wrong. I haven't the check, but that is the warrant, and the check is made accordingly.

Q. Can you tell us whether the check she received for October was not for \$49.00? A. For October? 10

Q. Yes. A. Well, that is the \$50.00, October. Oh, \$49.00, that is the last of October.

Q. I know, but your warrant says \$50.00. A. That is not October.

Q. What is that? A. This is November.

Q. Do you mean to say that in November she got \$50.00? A. Yes, sir.

Q. Is there any means of definitely determining whether she got \$50.00 or \$49.00? A. By getting the checks. 20

Q. You haven't them here? A. Nobody asked me to bring them.

Q. I say, you haven't it here? A. No, sir.

Q. Insofar as your own personal knowledge is concerned, then, you don't know whether she only received \$49.00? A. I am sure, practically sure, on account of the warrants. They are made out similar to the warrants. The warrants are made out first and the checks made out accordingly. 30

Q. My question is, you aren't positive of your own knowledge that she got \$49.00, are you? A. I know she got \$100.00 the month of November.

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

Q. What makes you so sure? A. The warrants call for \$100.00.

Q. Well, might it be that the check is only for \$49.00? A. The entry in the comptroller's book says \$50 also. 40

William A. Burke, cross.

Q. Might it be that the check is \$49.00? A. I don't see any chance of it.

10 Q. Might it be? A. I can't say that it is. When the Comptroller enters it, he takes the stub off the check and he enters in his book from the stub of the check, and I looked in the book last night and it said \$50.00.

Q. Did you look at the check last night? A. No, sir.

Q. Did you ever see the check? A. Certainly; I certainly did.

Q. Can you tell use whether it was \$49.00 or \$50.00? A. Not positively, no.

Mr. Weinberger: That is all.

20 Mr. Morrison: I want to offer in evidence these warrants.

The Court: They may be offered. Being original records, don't mark them.

(Marked Exhibits D-1 and D-2.)

Mr. Morrison: May I read them into the record in the synopsis form?

The Court: Yes, you may read them into the record.

30 Mr. Morrison: These papers that have been offered in evidence, gentlemen of the jury, are, first, a warrant of the Borough of Garfield covering salaries due November 30th, 1917, on which there is a list of names and amounts and among them there is Number 9266, John Maitland, \$50.00. The warrant is marked, "For salaries due November 30th, 1917," and bears the numbers corresponding to those opposite the names, which I presume are the check numbers.

40 The second paper is a warrant of the Bor-

Argument.

ough of Garfield, headed, "Salaries due 15th of December, 1917," and on which there is a list of names and amounts, and among them there is 9321, John Maitland, \$50.00, and that is endorsed, "For salaries due December 15, 1917, General Account," and bears on the outside a list of numbers which I presume are the check numbers. 10

Now, if the court please, our next witness is the one we wished to use in rebuttal. We think we cannot use him until they have closed their case on the question of this man's illness.

The Court: Is that all your case?

Mr. Morrison: That is all our case.

Mr. Weinberger: The case, so far as we are concerned, is closed, with the exception of Officer Brown, who is not in Court. 20

The Court: What do you want to do?

Mr. Weinberger: If your Honor might give me a chance of getting him here, I would prefer to do that.

The Court: Well, when can you get him here?

Mr. Weinberger: Well, I sent a machine from Passaic to Garfield, from my office. They said they would leave at once, and they might have left, and I just rang my office again before I came into Court about seven minutes of two, and they said he had gone a considerable time ago, one of the men of my office said. 30

Mr. Morrison: We would be glad to give Mr. Weinberger time now in which to wait for this man to come. 40

Argument.

10 Mr. Weinberger: I rang up the place and instructed them to have Mr. Brown call this morning, and they said they had nobody to send to his home, and after I had that party on the wire, I then phoned my office and suggested that they immediately get a taxicab and leave for Garfield. It is only a few minutes ride from Passaic, and come right back to Hackensack in the same machine. Now, if I might step out for a minute—

The Court: You may. I want to let you put your whole case in.

20 Mr. Weinberger: I will have to rest my case as it is, if your Honor please. I just got word that the young man had called up the house; he was not at home, and he ran around Garfield looking for him, and he hasn't located him yet. He rang up police headquarters in Garfield but he didn't get him yet.

30 Mr. Morrison: If the Court please, at this time, we move for a non-suit on the ground that the plaintiff has not shown any right to recover against us, in fact the act to which their remarks refer is only effective to the suit in ways specified by the act, and they haven't shown that this act was adopted in that way or was in force in the City of Garfield. There are numerous pension acts, and they didn't specify in their complaint that they were suing under—they haven't shown now which act is applicable to the City of Garfield. We think that we should be entitled to a non suit because he hasn't

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shown that the act to which he casually refers in his remarks here is applicable to the City of Garfield.

Mr. Weinberger: If your Honor please, the only act in force and effect in this State is the Act of 1911; there can be no other act. Then the Long Branch case disposes of that question, and says that where the city does deduct a certain amount, the presumption is that it is complying with the certain law under which it is doing that, and the only act under which we can recover is the Act of 1911 concerning pensions in all municipalities excepting first-class cities, and I don't know of any law which will compel a plaintiff to plead the statute. I understand the law to be that the Court takes judicial notice of the statutory enactments, and the presumption is that the deduction is made under some legal legislation, and in this case it appears that the sum of two per cent. was deducted regularly by the city during the entire time that he was in the employ of the police department, and the evidence discloses the fact that he died in November of 1917, and that these deductions were made by the city. In view of the fact that there is no other law under which we could recover and the only law which authorizes the deduction of two per cent., I submit there can be no question but this is only the law.

The Court: Does the act provide that it is to be adopted by the city?

Mr. Weinberger: No.

Mr. Morrison: If your Honor will look at the last section of the act—

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The Court: My recollection is that that was a fact.

Mr. Weinberger: If your Honor please, there is no dispute as to the fact in the pleadings that there is a police pension, and that they have been acting under that.

The Court: What is their answer?

Mr. Weinberger: The defendant, the Board of Police Commissioners of the City of Garfield, in the County of Bergen and State of New Jersey, answering the plaintiff's complaint says: (1) It has no knowledge sufficient to form a belief as to the matters alleged in paragraph one of the plaintiff's complaint, because the particular act of the Legislature to which the plaintiff refers is not mentioned in said paragraph of plaintiff's complaint, and, therefore, denies the same. (2) Defendant is informed and believes—

Mr. Morrison: That is the only one that applies.

The Court: Go ahead and read the rest of it.

Mr. Weinberger: That the said John Maitland, husband of Mary E. Maitland, was on December 29th, 1908, appointed to the office of patrolman of the Borough of Garfield, now the City of Garfield, but it has no knowledge as to whether or not a certificate was issued by the Borough showing such appointment, and, therefore, denies that part of this paragraph.

(3) It admits that John Maitland continued to act as patrolman for the Borough of Garfield, now the City of Garfield, down

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to November 1st, 1917, but denies that he lost his life in the performance of duty directly as a result of sickness and illness while in the performance of actual duty.

The defendant denies paragraphs four, five, six, seven and eight of plaintiff's complaint. 10

Now, if your Honor please, my point is that the evidence adduced by the defendant itself admits the fact that there is a pension fund and that two per cent. was deducted by Mr. Burke, by the Police Pension Fund, and that has been going on for the length of time that he claims, and the time he was on the police department up to the time, as a matter of fact, that he died, with the exception of time subsequent. Now, I understood Mr. Morrison and Mr. Mackay to admit the fact that these deductions were made and these percentages were paid. If that were put in issue, and as a matter of fact, we would have proceeded with proof on that score; but I don't think it necessary. But I say, as a matter of law, as the case stands now, Mr. Burke, the city treasurer appears on the stand and says there are two distinct funds; we paid him his salary from the one fund, and there is the pension fund, and so characterizes it, from which is paid two per cent., which, in case of death, the moneys are paid to the widow and next of kin from the pension fund. Now, I submit in itself that that shows that the City of Garfield has been acting on it, and as I understand the Long Branch case, they cannot come in and complain after they have deducted a cer- 20 30 40

Argument.

tain amount of money. I submit the fact that the defendant pleads—admits the fact that there is a Board of Commissioners in existence, and even if they were illegally constituted, they would be liable, holding themselves out to the widow and next of kin as a Board of Commissioners. Now, I take it that an answer wherein the defendant comes in and says, the defendant, the Board of Police Commissioners of the City of Garfield in the County of Bergen and State of New Jersey—admits that statement in itself—admits its legal entity and recognizes the fact that it is a body authorized in pursuance of an act, and the only act we can go under is the Act of 1911, and there is no other—and if Mr. Morrison puts me to legal proof of that point, I submit that what he should have done was to plead that there was no such thing as the Police Pension Fund in the City of Garfield; but I take it that under my complaint, “By an act of the Legislature of the State of New Jersey entitled ‘An Act Providing for the Pensioning of Police Officers and Policemen in Certain Municipalities of this State,’ provision was made for the payment to every member of the police department having paid into the fund the amount prescribed in accordance with law and upon his having fully complied with all of the conditions imposed upon by said membership.”

Now, we go further than that. We produce proof here to show that these authorities did deduct, the Commissioners did, they admit that by Mr. Burke, the city treas-

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urer, and that this fund was composed of two per cent. deductions by members of the Police Department, and that, as a matter of fact, a warrant would be issued for the fifty dollars, and subsequently a check at the end of each month deducting the one dollar which went into this fund; and then he goes on to say that in case of death, this money was payable from the Police Pension Fund to the widow, as he phrased it, and the next of kin. I respectfully submit, as the case stands now, there is ample proof to show that the City of Garfield operated under and by virtue of this act, and in view of the fact that there can be no other act under which we could possibly bring this suit excepting Chapter 72 of the laws—an act providing for the pensioning of police officers in certain municipalities of this State—

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20

The Court: Well, how would that apply?

Mr. Weinberger: The act says, in all municipalities of the State other than cities of the first class, any member of the police force thereof who shall have honorably served on such force for a period of twenty years and shall have attained the age of sixty years, may be retired upon half pay or, upon his application, shall be retired on half pay.

30

Then the age and retirement; then the section under which we proceed: "Any member of such police force who shall have lost his life in the performance of his duty shall, so long as such widow remain unmarried and such children remain under the age of sixteen years, receive a pension equal to

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one-half of the amount of the salary of such member of said police force at the time of his death."

Now, I submit —

10 The Court: Read that last section in regard to the referendum.

Mr. Weinberger: The said Police Pension Commission shall have the management and control of said funds and is hereby empowered to make all necessary rules and regulations not inconsistent with this act. All moneys belonging to said police pension fund shall be paid over to the treasurer of such municipality, who shall give bond in such amount from time to time as
20 the common council or other governing body of such municipality shall determine, and all moneys not needed for the immediate payment of such pensions shall be invested by such Police Pension Commission in interest bearing bonds, and so forth.

Paragraph Eight: The Board of Aldermen, Common Council or like governing body of any such municipality of this State may adopt the provisions of this act by an ordinance duly adopted by the Board of
30 Aldermen, Common Council or like governing body of any such municipality.

Now, the fact is, if your Honor please, they have been acting under it. The treasurer comes here and says, "We have deducted regularly from this man's pay this sum of money."

Mr. Morrison: That is part of the defendant's case, and that wasn't in at the time;
40 it was a courtesy to Mr. Weinberger that

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we went on; that wasn't in the case at the time. The motion would have been made were it not for the interruption.

Mr. Weinberger I understood the motion was reserved for only one purpose; that was in case if the evidence disclosed by Mr. Brown would warrant it; but no one prevented Mr. Morrison from making a motion on this proposition at the close of his case.

10

Mr. Burke testified that there was such a thing. Now, I submit, if your Honor please, that we ought not to be put to any further proof on this matter, unless the Court should think it necessary. I personally believe that as a matter of law as the case stands now, the proof seems to be—of course, if it was merely a question of strict technical proof—

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The Court: If counsel of the defendant insist, I will continue this case until tomorrow and let you put that evidence in. I wouldn't grant a non-suit on a technicality of that kind.

Mr. Weinberger: This comes like a surprise to me.

The Court: I am not going to take advantage of it. The theory of the law is, under the new practice act, that cases should be tried on their merits. Still the rule of law is applicable and if you haven't adopted that act, there might be a question whether you could recover.

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Mr. Weinberger: Well, that presents a nice question of law.

The Court: That presents another question, and if the other side insist on that mo-

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John A. Forss, direct.

10 tion, you have got to meet that question. I wouldn't non-suit you; it wouldn't be fair to your clients; it wouldn't be fair to the municipality. The matter ought to be disposed of, and if counsel insist on it, I will suspend the case until you get that.

Mr. Weinberger: I will have it here the first thing in the morning.

Mr. Morrison: I will ask your Honor to hold that motion in abeyance. There is another motion that I will want to make. Perhaps we can dispose of it finally this afternoon.

20 The Court: If it turns on another question, this may not make much difference. Proceed.

JOHN A. FORSS, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. Morrison:

Q. Mr. Forss, where do you live? A. Garfield.

Q. And what is your occupation? A. Chief of Police.

30 Q. Of the City of Garfield? A. Yes, sir.

Q. How long have you held that office? A. It will be ten years January the first.

Q. You were acquainted with Officer Maitland in his lifetime, I presume? A. I was; yes, sir.

Q. Who was on duty at the police headquarters when Officer Maitland went out on his tour on the night that his wife has mentioned? A. The last night he left headquarters?

Q. Yes, sir. A. Sergeant Maitland.

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John A. Forss, direct.

Q. And were you in the headquarters that night? A. I was.

Q. Did you have any conversation with Officer Maitland? A. I did.

Q. Did that conversation concern his health?

A. He did speak about not feeling well. He did speak about it. 10

Mr. Weinberger: I ask that be stricken out, about his not feeling well. The question was whether he had a conversation, and I submit what the witness volunteered wasn't responsive.

The Court: Yes; you may get your responsive answer.

Q. Did that conversation concern Officer Maitland's health? 20

The Court: Did you have a conversation about his health? Answer yes or no.

The Witness: He spoke of it.

Q. Now, what did he say?

Mr. Weinberger: That is objected to on the ground, if your Honor please, that it is a conversation with the deceased, and they shut the door insofar as I was concerned, to testify concerning the statements made by him or conversations had with him, and I understand the rule of law to be that where the legal representatives are debarred from disclosing any conversation with the deceased, that no other person can. If the door is to be opened for all of us generally, I haven't any objection to it going in; but I think as a matter of strict law it is not evidential. 30 40

John A. Forss, cross.

The Court: I will allow that.

Mr. Weinberger: May I have an exception?

The Court: Yes; you may take an exception.

10 Mr. Morrison: Read the question to the witness, please.

(Question read.)

A. Why, I couldn't remember what he said at just that minute; but may I say one thing, your Honor? The Chief most always speaks to the members before going out, and Officer Maitland stepped up to the door, and he spoke about he was not feeling well. His trouble was—may I say what his trouble was?

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The Court: You may say what he said.

The Witness: He said he had trouble, with his bowels; he said he was going to take a dose for it.

Q. Had he, at that time, his uniform on? A. Yes, sir.

Q. Had he as yet gone out on his duty? A. He was leaving for duty. He was standing at the door, going out.

30

Mr. Morrison: You may take the witness.

Cross examination by Mr. Weinberger:

Q. When was that, Chief? A. On the Monday, on a Monday evening, October 22nd.

Q. That was a nasty night, wasn't it? A. No, sir, a good night.

Q. Clear? A. Clear.

Q. Do you remember that? A. Positive.

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John A. Forss, cross.

Q. The night that you speak of was a clear night? A. Positive.

Q. You remember that? A. Yes.

Q. It wasn't foggy? A. Why, maybe it had been foggy during the night, but not in the evening when they went out.

Q. It wasn't foggy at that time, I mean, when you had this conversation with him? A. Oh, no; it was a nice, clear night when he left there. It was during the night—

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Q. You don't remember what month this was?

A. In October.

Q. Do you remember the date? A. Yes; 22nd.

Q. Of October? A. 22nd of October.

Q. Officer Maitland was a very regular police officer insofar as his health was concerned? A. A very good officer.

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Q. And reported daily? A. Reported for duty when his turn came.

Q. When his time was required, he was always on duty? A. Yes.

Q. I believe you say you are Chief of the Police Department? A. Yes, sir.

Q. Are you also any official of the pension fund? A. Yes, sir.

Q. What office do you hold? A. Secretary.

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Q. You are the Secretary? A. Yes, sir.

Q. And how long have you been Secretary of the Pension Fund? A. Since January, 1912.

Q. And who composed the Pension Fund in Garfield? A. Why, it is two—two citizens and two members of the department.

Q. When did Garfield, do you know what date—when it was that Garfield adopted the pension fund commission?

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John A. Forss, cross.

Mr. Morrison: I object to that as improper proof, and improper cross examination. We haven't gone into any such direct examination of this witness.

10 The Court: Yes; it is objectionable as cross examination.

Q. Did he work the day before? A. What day before? Before taken sick?

Q. Before taken sick that evening when he had his uniform on, did he report the day before that? A. He worked at night. He was on night duty the time he was taken sick, sir. He didn't work in the daytime, but he worked the night before that.

20 Q. Oh, he was taken sick at night? A. I don't know. You asked me if he worked days. I said nights.

Q. Well, did he work the night before? A. Yes, sir; that was a Sunday, and he came on Monday.

Q. And he reported to duty on time on the following Monday night? A. Yes.

Q. You remember that? A. Yes.

Q. And dressed himself in his uniform? A. Yes, sir.

30 Q. About what time? A. Why, what time he came in?

Q. Yes. A. I wouldn't know, maybe he came in quarter past seven, maybe quarter to eight.

Q. You don't remember when you spoke to him, do you? A. Yes, it was about five minutes to eight, maybe three minutes to eight; between five and three minutes to eight.

Q. He was on duty that night? A. He was on duty with the rest of the men.

40 Q. Well, he did go out? A. He did.

John A. Forss, cross.

Q. And stayed out that night? A. As far as I know.

Q. He was on duty that night? A. He was.

Q. And in the morning reported sick? A. Not to me, sir.

Q. I mean, you know the fact to be that he reported sick at police headquarters? A. No. 10

Mr. Morrison: If the Court please, we are going outside of the scope of the direct again.

Mr. Weinberger: I am trying to see if the occasion the witness refers to is the case I have in mind; in other words, this witness says—

Mr. Morrison: I withdraw the objection, if the Court please. 20

Mr. Weinberger: Will you read my question, please? (Question read.)

Q. As sick in the morning about four o'clock? A. No, sir.

Q. You don't know that? A. No, sir.

Q. You weren't in charge of the headquarters at that time? A. No, sir.

Q. He never reported to duty after that night, did he? A. He didn't come on duty after that; no. 30

Q. You made it your business to inquire into—from the different police officers as to their condition of health while they were working there, Chief? A. No, sir.

Q. You didn't do that? A. No, sir; I didn't, sir; no, sir.

Q. Didn't you ask the different members how they feel? A. No, sir. I say he came in in a general way—no, sir, I didn't say that. I may speak to a superior officer; I speak to the men 40

Argument.

every night; I don't have to inquire about their health when they are going to go out and work. I suppose they are ready to go to work. If anyone makes a complaint, then I listen to it.

10 Q. He looked all right the night you spoke to him? A. Yes, sir.

Q. And looked perfectly healthy? A. Positive.

Q. Did you see him after that evening? A. Did I see him?

Q. Yes. A. Unfortunately he was dead when I saw him.

Q. Oh, you saw him after he had died? A. Yes, sir.

Mr. Weinberger: That is all, Chief.

20 Mr. Morrison: The defendant rests, if the Court please, and I beg leave to withdraw the motion for a non-suit, and not press that at this time.

The Court: The motion may be withdrawn.

Now, that is the defendant's case. Have you anything further?

Mr. Weinberger: We rest, if your Honor please.

30 Mr. Morrison: We move for the direction of a verdict on the ground that there isn't any evidence in the case to bring the complaints within the statute. The particular words are that this lady and her children might be entitled to a pension if their husband, the officer, had lost his life in the performance of duty. Now, there isn't anything in this case to show that the man lost his life in the performance of his duty; he wasn't killed by a criminal that he was trying to arrest as part of his duty; he wasn't injured by a chance shot or a fall or a blow, or anything in the performance of his duty. There isn't anything in the case to show that his sickness, which was unquestionably

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the cause of his death, was anything more than a sickness that might come to any man. It seems to me that the cases on the Workmen's Compensation Act are right on the interpretation of this particular provision of this statute. I have not been able to find, your Honor, any interpretation of these words in this statute, but, as your Honor knows, the workmen's compensation is something similar to a policeman's pension; in other words, the unfortunate dependents of a man who loses his life in the performance of his work is given compensation; in one case; the policeman's dependents are compensated by a pension, and in the other case the dependents are compensated by payments by the employer. Your Honor is undoubtedly familiar with the cases that have been carried up to our Court of last resort on Workmen's Compensation. What those cases have held perhaps I should say first that the statute is somewhat different in the wording, although the effect is the same, and the workman is entitled to compensation, the dependents are entitled to compensation if his death is caused by an accident which arises out of his employment. Now, this policeman's dependents were entitled to compensation if he lost his life in the performance of his duty. The meaning expressed, but different words to my mind, is the same.

Now, the Courts have held, *Hulley v. Moosbrugger*, 95 Atlantic, that the criterion by which they determine whether a man lost his life in the performance of his duty or in his occupation is this: Did the injury or the death result from some risk which he had to take which ordinary people do not take? One of the cases was one

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Argument.

10 where a bricklayer was building a tall chimney and while he was working there a thunder storm came up and he was struck by lightning. In that case, the contention of the employer was there was no liability because anyone might be struck by lightning. The Court said there, the English Court, that he did take more risk of being struck by lightning because he had to go up on that high chimney to work, and they gave him compensation there. Now, in the *Hulley v. Moosbrugger* case, that is a sky-larking case where some young boys were around an ice-plant. There are two of those cases, very similar. These boys got to sky-larking and one was thrown down and injured or killed, and the Court said there was no compensation there.

20 Now, it seems to me that Mr. Maitland died from a cold which anybody might get. He told the Chief he was constipated; he went out and went to work; caught a cold and developed pneumonia. He might have caught the same cold if he had gone out with his wife that night, or out to see a friend. There is some suggestion there was a foggy night; but there might have been other foggy nights; and their testimony is that he was a good, healthy man and went through rain and fog and never caught cold. It seems to me the case lacks anything to show that he lost his life while in the performance of his duty, and that we are entitled to ask a direction of a verdict for the defendant.

30 The Court: I will hear you.

Mr. Weinberger: I think my friend confuses the doctrine under which our Courts have construed what my learned friend advances as a rea-

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Argument.

son for a direction in this case. In the compensation cases, the test of compensation is an accident; in other words, it must be an injury. The presumption is that unless there is an injury, there can be no recovery, and the whole doctrine underlying workmen's compensation cases is predicated upon the express theory that during the course of the employment, the employe sustained an injury by virtue of which the alleged injury became abrogated, or whatever may have happened. If death eventually comes about, then the primary question involved is, was the injury the cause of the death; and the next question which confronts the Court is, was this injury sustained during the course of the employment. But in this case, if your Honor please, under the statutory enactment which defines what the Legislature intended to have in mind, or did have in mind, when it enacted the legislation, it specifically provides that sickness—your Honor can see the reason for the rule; a man working outdoors for a certain concern may catch a cold, but that is not because of the nature of his employment, there couldn't be any recovery, of course not. If I catch cold going to my employment, that certainly wouldn't be an injury; but if, as a matter of fact, the act provided that during the performance of my duty I was to get sick, and I would show that, as a matter of fact, the person left home in a healthy condition, as we show in this case, perfectly normal and sound, nothing wrong with him, and then in going to his duty he catches a cold or while in the performance of his duty, standing outside on a corner all night, rainy weather, damp out, he contracts a cold, surely that is a sickness contracted

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Argument.

in the course of the employment, and it is very manifest from the interpretation that was given to the clause in question by the Legislature, the phrase "sickness" contemplated the very case in question.

- 10 Now, assume this, if your Honor please: If John Maitland had left home, and while standing on a certain corner, contracted influenza, that would be a sickness which he sustained because of the fact that he was at the time engaged in his performance. The weather was damp, the cold came about, the doctor testified this man was a perfectly normal man; he knew him very well: that on the morning in question the man came
- 20 there and had a cold which he had contracted and developed into pneumonia, and that prior to that time he was a perfectly healthy and normal man. Mrs. Maitland testified that he was healthy and did not complain about anything. Went out, healthy, well; went to duty, the police headquarters, and there went out on duty; the evidence shows that, the Chief says so; stayed out all night until four o'clock in the morning; came home and went to bed, never to get up again, and the reason
- 30 for it, contracting a cold and developing into pneumonia. I submit that the case is so clear concerning what the cause of death was. The only question involved in this case is, was John Maitland a healthy man before he went to duty that night. As a matter of fact, he came home sick that night, and we show it was a cold and prove what the weather was, as a matter of fact, and it is a jury question as to whether or not this man did then and there, by reason of the fact that
- 40 he contradicted the sickness, lose his life, and if he did, I submit we should recover.

Argument.

The Court: I understand the point made by the defendant is that the sickness does not comply with this act because this act provides he shall have lost his life in the performance of his duty.

Mr. Weinberger: Of course, if your Honor please, in the performance of his duty means this: It is a case of cause and effect. In the performance of his duty does not mean that a man must necessarily lose his life while he is just doing the act in question. If, as a matter of fact, I received a bullet wound while I am performing my duty and I do not die for six months, but because of that bullet wound I would be entitled to recover under the act. I submit, likewise, it is a continuing cause. If, as a matter of fact, a man goes to work in a healthy condition, and while in the course of his employment catches cold and as a result of that cold he dies, I submit that the fact that he caught his cold while on duty would entitle the plaintiff in this case to recover.

If I may just refer to the exact sentence, if your Honor please, for a moment. Now, the Legislature, in Section 94, page 2348, C. S. Vol. 2, the words "who shall have lost his life in the performance of duty" as employed in the above entitled act shall be interpreted to mean and construed to apply to the case of any officer or man who has died or shall hereafter die as the direct result of any injury received or sickness or illness contracted or incurred while in the performance of actual duty or the attempted performance of actual duty.

The Court: That doesn't apply to this act.

Mr. Weinberger: But, if your Honor please, the phraseology in this act, "who shall have lost his life in the performance of his duty," is the

Argument.

10 exact phrase that was used in the act which they
are construing in this section—the exact words.
I had occasion to look them over, and the exact
language is used, in the old act, which does not
apply to Garfield, but the language was used and
20 apparently that language was ambiguous and sub-
ject to considerable criticism, and various infer-
ences might be deduced from that sentence. Now,
the Legislature comes along in the Compiled Stat-
utes, Volume 2, at page 2348, enacted this law, and
in the enactment there is a preamble,—Wherever
doubt has arisen as to the true meaning of the
words, “who shall have lost his life in the per-
formance of duty,” as employed in Section 4 of
the above-entitled act, therefore, the words, “who
20 shall have lost his life in the performance of duty”
as employed in the above-entitled act shall be
interpreted to mean and construed to apply to the
case of any officer or man who has died or shall
hereafter die as the direct result of any injury
received or sickness or illness contracted or incur-
red.

30 Now, my point is, if your Honor please, that
for all intent and purposes, the Legislature has
given a definition of what that phrase means. It
has defined it by language which is now subject
to only one construction, and that is that if the
police officer shall become ill while in the per-
formance of his duty or—they go further than
that—or in an attempt to perform his duty he
shall contract an illness, then and under circum-
stances of that character he shall for all intents
and purposes, have complied with the act and
be entitled to get the benefits of the pension fund.

40 Now, I respectfully submit that although this

Argument.

construction is placed on Section 4 of the old act, that the Legislature has once and for all time defined what that phrase means as applied to a pension fund. Some police authorities that would be entitled under the old act are the same character of officers that are involved in this act. The police authorities, the pension fund, and both of them are construed by the Legislature to mean as I have already recited to your Honor, and in accordance with Section 94.

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Now, can there be any question, if your Honor please, in this case, that the plaintiff has established these facts? First, that this man has been a police officer for nine years, has reported daily to the police department, and has been on time whenever required; that on the day in question, on October 22nd, he left his home a healthy man, as testified to both by Mrs. Maitland and by Mrs. Koepf. Both of them saw him; that he was perfectly healthy and normal that night; no complaint of any sickness or ailment of any kind; reported at police headquarters and was in uniform when he told the Chief that he may have been constipated; that subsequently he went on duty and remained on duty until four o'clock in the morning, when he came home; was taken to the police headquarters in a patrol wagon, having been brought there sick, and then eventually got home. The doctor comes, and he is produced here, and he testifies that he found the man suffering with a cold and that it developed into pneumonia. Now, if your Honor please, the presumption of law is that in going from his home to report at police headquarters, he was attempting to perform his duty. He gets into his uniform and goes out on duty and is brought home a sick man.

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Argument.

There is only one conclusion that we can come to, that this man contracted cold that night, and it is for the jury to say whether or not this man did not contract a cold on the night in question, and whether because of that cold he did die.

10 There is a question of fact as to whether or not he died because of the cold he contracted that particular night, and I respectfully submit, if your Honor please, that insofar as workmen's compensation is concerned, there is absolutely no—there is no analogy in the two classes of cases. The one is purely statutory, and the basic principle underlying workmen's compensation is an accident entitling one to compensation, as compared,

20 on the other hand, with the pension fund which is meant for the protection and the relief—the act is intended for the relief of those surviving, the widow and children, and the courts unquestionably, likewise the Legislature too, sought to be liberal in the construction of the words, “in the performance of duty,” and by the enactment of the preamble and the language which it did enact, it is manifest that the Legislature intended to be very liberal, for, after all, the fund is made up

30 of the funds of the police department; each individual is contributing his share of money towards this fund; it is being taken from his pay and placed into a fund to be a protective fund; and now, sir, when we come to court and produce witnesses as we have, showing this man's health, condition of health, condition of affairs on the night he went to work, and give the court the further evidence that at four o'clock next morning while on duty, brought home sick, I respectfully submit that it is a question for the jury to

Argument.

say whether or not the illness—died as the direct result of any injury received or sickness or illness contracted or incurred in actual duty—whether or not that was the case in this particular matter. So I respectfully submit, if your Honor please, that the plaintiff has established a *prima facie* case, that the act in question, because of the interpretation given to it by the Legislature, shows conclusively that an illness which is contracted while one is in the performance of his duty or the attempted performance of his duty, would entitle the plaintiff to recover in this case.

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Mr. Morrison: Mr. Weinberger has mentioned that his client's decedent had been on the police force for nine years. That makes me think he is referring to another section of this statute.

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Mr. Weinberger: No; eight years.

Mr. Morrison: In 1916 the statute was amended and provided that dependents of policemen who had been on the force for nine years and died from other causes than injuries received in his duty, might have a pension. This man was not on the force for nine years. So he doesn't come under that section. The act of 1916 makes clear the interpretation of the words of the original act. If he dies from a cold or sickness, why, then they have to wait until he has been on the force nine years before they are entitled to it.

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The Court: Read that section.

Mr. Morrison: "The widow of every member of such police force in any municipality of this State in which the act to which this is a supplement is applicable, where such member shall have paid or shall hereafter pay into the fund provided by the act to which this act is a supplement, the full amount of the annual assessments or con-

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Argument.

10 tributions, who shall have died or shall hereafter die from causes other than injuries received in the performance of duty"—that is the second clause—"and who shall have served at the time of his death nine years as a member of such police force, shall, so long as she remains unmarried, receive a pension," and so forth.

The Court: Now, what is the first clause? You say that is the second clause.

20 Mr. Morrison: The first clause is the clause in the original statute; men who lose their lives in the performance of duty; men who are shot down by transgressors, and so forth; and, second clause, he must serve nine years. This man had not come into the second clause. That was apparently passed by the Legislature to meet a situation like Mr. Maitland's, but, unfortunately, he had not been on the force quite long enough to get into it.

The Court: Now, let me see that original act, please.

I shall refuse the motion to direct a verdict.

Mr. Morrison: The Court will allow us an exception?

30 The Court: Yes; you may take your exception. I think there is a question of fact to be submitted to the jury.

Mr. Morrison summed up to the jury on behalf of the defendant.

Mr. Weinberger summed up to the jury on behalf of the plaintiff, during which Mr. Morrison entered the following objection:

Mr. Morrison: Is this a proper summary? Is that other act in evidence in this case?

The Court: I think he has a right to argue the case.

40 Mr. Weinberger concluded summing up.

Charge.

CUTLER, J.

Gentlemen of the Jury: This is not an insurance case. The plaintiff is not bringing a suit against any corporation or any body of men for insurance by reason of the death of Mr. Maitland, but this action is brought by his widow under an act of the Legislature entitled,

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"An act providing for the pensioning of police officers and policemen in certain municipalities of this State,"

And the only right that this lady has to recover against the Board of Police Commissioners of the City of Garfield is the right that she recovers under the provisions of this act, and the part of the act which is applicable to this case reads as follows:

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"Section 4: The widow or children of any member of such police force who shall have lost his life in the performance of his duty shall, so long as such widow remains unmarried or so long as such children or any of them remain under the age of sixteen, receive a pension equal to one-half of the amount of the salary of such member on said police force at the time of his death."

It is not disputed in this case, gentlemen, that Mr. Maitland was a member of the police force of the City of Garfield and that he died from pneumonia. It is also admitted that he was receiving twelve hundred dollars a year as an officer, and there is evidence that from his salary was deducted each month, two per cent. under the terms of this act.

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The plaintiff in this case, as in all other cases, must establish to your satisfaction by a fair preponderance of the testimony, that she is entitled

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Charge.

to recover; so this plaintiff, before she can recover in this case, must satisfy you by a fair preponderance of the testimony that John Maitland contracted the disease from which he died while in the performance of his duty.

10 There has been an act passed, a supplement to this act passed afterwards, that provided that any officer who had been in the service nine years and died would be entitled to a pension under the act, whether the death was caused by a disease or any other active cause not incurred while he was in performance of his duty; but that does not apply to this case. This case does not come under the head of that supplement, so you must determine from the evidence, before you can give Mrs. Maitland a verdict, that the disease was contracted by
20 Mr. Maitland while he was in the discharge of his duty.

Now, gentlemen, you have heard the evidence in this case; the plaintiff must establish it by a fair preponderance of the testimony. If you are satisfied that the disease which finally resulted in John Maitland's death was contracted by him while he was in performance of his duty, then Mrs. Maitland is entitled to the sum that she demands at your hands. If, on the other hand, you
30 believe that the disease was contracted at some other time while he was not in the performance of his duty, why, then she is not entitled to it, because he had not served nine years on the police force.

Gentlemen, it is a question entirely for you to decide. It is entirely for you to determine whether Mrs. Maitland has satisfied you by a fair preponderance of the testimony that the disease which
40 caused her husband's death was contracted while

Verdict.

he was in performance of his duty. If she has failed to do that by a fair preponderance of the testimony, then the verdict should be for the defendant. If she has, then the verdict should be for the plaintiff.

Let an officer be sworn.

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(The jury retired at 3:45 P. M.)

Mr. Morrison: If the Court please, the defendant prays an exception to so much of the charge that said the plaintiff must show by a fair preponderance of the evidence that the disease resulted—disease was contracted while he was in the performance of his duty, as not accurately stating the construction of the act which is, lost his life in the performance of his duty.

The Court: Yes; I think you ought to take your exception to that, because that is the real question in the whole case.

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Mr. Morrison: Our exception to this is allowed?

The Court: Oh, yes; certainly.

(The jury returned at 4:00 P. M. with a verdict of \$450.00 for the plaintiff.)

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Judgment.

NEW JERSEY SUPREME COURT.

MARY E. MAITLAND,
Plaintiff-Respondent,

v.

BOARD OF POLICE COMMISSIONERS
OF THE CITY OF GARFIELD,
Defendant-Appellant.

Action at Law
Postea.

It is ordered that judgment be and hereby is
entered in favor of plaintiff and against the de-
fendant for the sum of four hundred fifty dollars
besides costs to be taxed *nisi*.

Entered January 21, 1919

On motion of

WEINBERGER AND WEINBERGER,
Attorneys.

A true copy.

ENOCH L. JOHNSON,
Clerk.

Reasons.

(Filed January 28, 1919.)

NEW JERSEY COURT OF ERRORS AND AP-
PEALS.MARY E. MAITLAND,
Plaintiff-Respondent,

v.

BOARD OF POLICE COMMISSIONERS
OF THE CITY OF GARFIELD,
Defendant-Appellant.On Appeal
Reasons.

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The defendant-appellant states the following as
grounds for appeal:

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1. The Court refused to grant defendant's mo-
tion to non-suit plaintiff at the conclusion of
plaintiff's case.

2. The Court refused to grant defendant's mo-
tion to direct a verdict for defendant at the con-
clusion of the case.

3. The Court charged the jury as follows:

"The plaintiff must show by a fair preponder-
ance of the evidence that the disease resulted—
disease was contracted—while he was in the per-
formance of his duty."

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4. Because the verdict was contrary to the evi-
dence.

MACKAY & MACKAY,
Attorneys of Defendant-Appellant.

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New Jersey Court of Errors and Appeals

MARY E. MAITLAND,

Plaintiff-Respondent,

VS.

BOARD OF POLICE COMMISSION-
ERS OF THE CITY OF GAR-
FIELD,

Defendant-Appellant.

Action-at-Law

BRIEF FOR PLAINTIFF-RESPONDENT.

This is an appeal from a judgment recovered in New Jersey Supreme Court by Mary E. Maitland against the Board of Police Commissioners of the City of Garfield. Mary E. Maitland is the widow of John Maitland, who was a member of the police force of the City of Garfield and who contracted a cold or illness, while in the performance of his duty, which resulted, nine days afterwards, in his death.

The action is based on Section 4 of an act of the Legislature of the State of New Jersey, entitled "An Act providing for the pensioning of police officers and policemen in certain municipalities of this State," (P. L. 1911, page 104).

That Section reads as follows:

"The widow or children of any member of such police force who shall have lost his life in the performance of his duty shall, so long as such widow remains unmarried or so long as such children or any of them remain under the age of sixteen years, receive a pension equal

to one-half of the amount of the salary of such member of said police force at the time of his death."

At the trial, attorney for defendant-appellant moved first for a non-suit and afterwards for a direction of a verdict in favor of the defendant on the theory that a fatal illness contracted while in the performance of his duty did not entitle the widow of the deceased policeman to recover anything under the provisions of said Section of said act.

The court denied both motions, and submitted the case to the jury, and in effect charged the jury that if the disease from which the policeman died was contracted while he was in the performance of his duty, then his widow could recover under said act.

An exception was taken to the charge, as will hereafter appear.

The sharp point in question is whether the words "lost his life in the performance of his duty" embraces a case in which a police officer, contracting an illness while on duty, subsequently dies in consequence thereof.

This question we will consider in our discussion of the defendant-appellant's reasons on appeal.

I.

THE COURT RIGHTFULLY REFUSED TO GRANT A NON-SUIT AND TO DIRECT A VERDICT FOR THE DEFENDANT.

A.

If the trial court's construction is sound that the words "lost his life in the performance of his duty"

embraces a case in which a police officer, contracting an illness while on duty, subsequently dies in consequence thereof, then there is sufficient evidence in the case to make it a jury question, as to whether decedent in this case died from such cause.

Plaintiff testified that she had been married to her husband twenty years (Case, page 13, lines 30-35); that three living children were born of the marriage; that her husband was a police officer of the City of Garfield; that he was forty years old at the time of his death; that during the time they were married, her husband never had a doctor until the sickness whereof he died (Case, Page 14); that her husband was a well built man and a very strong man (Case, page 15; that he was always well; that he worked daily; that he died on November 1, 1917 at his home, after an illness of only nine days; that the last night he went to work was on a Monday night; that the weather was foggy, damp and "blustery" (Case, page 16); that he had been working regularly up to that time, and that "he had his supper home with us that night;" that he left home about a quarter of eight that evening, and came in four o'clock in the morning, complained that he was sick; that he had been on duty that night (Case, page 17); that when he got in at four o'clock, he was sick; that he told her he was awfully sick, and that he took a chill on his beat, and that at that hour of the morning he would not like to get the doctor out; that then he went to bed, and never got up again except to go to the bathroom (Case, page 18); that Dr. Reid was called in right away and attended her husband till he died; that from the time he came home that morning, till the time he died he was very sick; that he was first suffering from a heavy cold; that a nurse, Mrs. Koepf, was called in to attend him, and attended him till the time of his death (Case, page 19); that when her husband came in four o'clock in the morning he went

right to bed (Case, page 22, lines 37 etc.); that she rubbed him with liniment; that he had not made any complaint of a cold or anything before that morning; that he was not suffering from a cold or any impairment of health before he came in that morning; that he had nothing wrong with him immediately preceding his coming in that morning (Case, page 24); that she did not remarry, and is still his widow (Case, page 30).

Erwin W. Reid, the doctor above referred to testified, that he knew Mr. Maitland, the plaintiff's husband; that he examined him (Case, page 20, lines 30, etc.); that he was of robust type; that he was first called in to treat the deceased when he got sick, and treated him until he died, which was on November 1, 1917; that when he first saw decedent seemed to have a bad cold of a grippe condition, and that after about twenty-four hours it developed into an ordinary acute lobar pneumonia, which undoubtedly caused his death; that he had known Mr. Maitland before that time and that he seemed to be in good health (Case, page 21); that he was an active man and seemed to be perfectly healthy.

Mary E. Koepf, the nurse heretofore mentioned, testified that she had lived in Garfield four years and was still living there; that she had seen the deceased on duty for over three years; that he was a healthy man, with rosy cheeks; that she attended him from the morning on which he came home sick until his death; that she is a practical nurse (Case, page 26); that she has been a practical nurse for fifteen years; that at the time of deceased's sickness she was living upstairs in the same house as the Maitlands lived in; that upon the call of Mrs. Maitland, witness went downstairs and looked at decedent; that he looked to be a pretty sick man and had a very high fever; that he had a chill and quite some bed clothes on him

to get warm; that the doctor was sent for immediately; that the night he came in and went to bed sick was a nasty, damp night "one of those nights that the cold would penetrate through you" (Case, page 27); that deceased's condition from day to day grew worse; and that he had a high fever; and that before Officer Maitland became sick she would see him almost daily in the morning (Case, page 28); that she saw him going on duty the night before he came home sick, and that he seemed alright and did not complain (Case, page 29).

Defendant's witness, John A. Forss, Chief of Police of Garfield, testified that the last night the deceased had left headquarters, he said that he was not feeling well. (Case, page 48, lines 13).

B.

The trial Court's construction of the statute, that the words "lost his life in the performance of his duty," used therein, embraces a case in which a police officer, contracting an illness while on duty and subsequently dying in consequence thereof, is sound.

At the time of the enactment of the act of 1911, there was in force a statute entitled "An Act to remove the fire and police departments in the cities of this state from political control," (P. L., 1885, p. 326, Compiled Statutes, Vol. 2., Page 2341). That act dealt (sec. 4) with three classes of persons: First, members of the police force and matrons connected with the police department, who had complied with the pecuniary requirements and had received *permanent disability* from injury or sickness *incurred while in actual service*; secondly, members of the police force and matrons connected with the department, who had met the financial conditions, and *who had attained the age of fifty years and had served in all*

(not necessarily continuously) *for a period of twenty years*; and thirdly, *"the widow of every member of the police force or department of such cities having paid into the fund the full amount of the annual assessments or contributions of at least one per centum of his salary, and who shall have lost his life in the performance of duty."*

The phrase is awkward; yet its meaning is unmistakable so far as a pecuniary condition is thereby imposed; it plainly refers to the widow of such police officer as has made his assessment or contribution, and was in good standing in that sense at the time of his death. *It is free from limitation as to term of service.*

At the time of the enactment of the act of 1911, section 4 of the earlier act above cited had received legislative definition. In P. L. 1907, p. 402 (Compiled Statutes, Vol. 2, Page 2348, 94, the following appears:

Whereas, doubt has arisen as to the true meaning of the words "who shall have lost his life in the performance of duty," as employed in section four of the above entitled act; therefore,

Sec. 1. The words "who shall have lost his life in the performance of duty," as employed in the above entitled act, shall be interpreted to mean and construed *to apply to the case of any officer or man who had died or shall hereafter die as the direct result of any injury received, or sickness or illness contracted or incurred, while in the performance of actual duty or the attempted performance of actual duty.*

In the statute of 1911, now under examination; and upon which rests the case of the plaintiff-respond-

ent, the legislature saw fit to employ in Sec. 4 thereof, which relates to provision for the widow and children of any member of such police department as the act applies to, the identical phrase so sharply defined by it, in an act drawn for that single purpose, only four years before.

4. The widow or children of any member of such police force *who shall have lost his life in the performance of his duty* shall, so long as such widow remains unmarried—receive a pension equal—.”

Those words in section 4 of the act of 1911 should receive the same construction as the identical words in the act of 1885 received by the controlling definition of the legislature of 1917.

“Statutes relating to the same subject matter. Statutes in *pari materia* are those which relate to the same person or thing, or to the same class of persons or things. In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject matter has been changed or modified from time to time. With this purposes in view, therefore, it is proper to consider, not only acts passed at the same session of the legislature, but also passed at prior and subsequent sessions, and even those which have been repealed. *Whenever a legislature has used a word in a statute in one sense, and with one meaning, and subsequently uses the same word in legislating on the same subject matter, it will be understood as using it in the same sense, unless there*

be something in the context or the nature of things to indicate that it intended a different meaning. It must not be overlooked, however, that the rule requiring statutes in *pari materia* to be construed together is only a rule of construction to be applied as an aid in determining the meaning of a doubtful statute, and that it cannot be invoked where the language of a statute is clear and unambiguous. 36 *Cyc.*, Page 1147, etc.

"Statutes constituting a system should be so construed as to make that system consistent in all its parts and uniform in its operation. As said by the Supreme Court of Massachusetts: 'Where statutes are part of a general system relating to the same class of subjects, and rest upon the same reason, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish.'" *Lewis' Sutherland Statutory Construction*, Vol. 2, Page 847 (2nd Ed.)

"A statute must be constructed with reference to the whole system of which it forms a part. And statutes upon cognate subjects may be referred to, though not strictly in *pari materia*." *Idem.*, Page 848.

Moreover, such a construction of the act in question is not only in harmony with the above principles of statutory construction, but is also in accordance with common sense and justice.

Both the act of 1885 and the act of 1911 apply to the same class of persons, viz., those in police departments, and to the same subject matter, viz, pensions; both acts emanate from the same spirit, are aimed at the same beneficial result, provide almost identical means and sources for the creation of such pension fund, and prescribe in a general sense the same regulations in regard to the beneficiaries thereof.

It would seem both unjust and contrary to common sense that the legislature ever intended widows of police officers in some municipalities to have the right to recover from the fund, but widows of police officers in other municipalities, where death was caused by the same reason, to have no right of recovery.

The pension fund, it should be remembered, is not a mere gratuity, but is raised in part, if not altogether, from the class of persons thereby benefitted.

The phrase "who shall have lost his life in the performance of his duty," applied to police officers, may suggest at first thought the hazards to which such persons are exposed by aggressive acts of the criminal or lawless. But upon the slightest reflection, it is plain that their lives are exposed to other hazards. Nature as well as man assaults them. To an extent perhaps unparalleled by any other class of men in civilized society, they are set upon by every sharp inclemency and fitful or extreme change of the weather. Through long hours, they must stand at their unsheltered post or patrol their open beat, regardless of the perils that lurk in the damp, the frost, the storms or the winds.

We submit then, that if the supplement of the legislative session of 1916 (P. L. 1916, Page 298) to this act of 1911 had not been passed, there could be no debatable question here. Let us turn to this supplement, and find with what it really deals. We think that it is misunderstood by counsel for defendant-appellant.

It reads:

"I. The widow of every member of such police force in any municipality of this State in which the act to which this is a supplement is applicable, where such member shall have paid

or shall hereafter pay into the fund provided for the act to which this is a supplement the full amount of the annual assessments or contribution, *who shall have died or shall hereafter die from causes other than injuries received in the performance of duty, and who shall have served at the time of his death nine years as a member of such police force, shall, so long as she remains unmarried, receive a pension, etc.*"

In the case of policemen nine years in the service, and in no other case, this supplement enlarges the field in favor of their widows. It allows them a pension where the officer dies as a result of some cause met with *while off duty*. The act of 1911 required the officer to have met with the cause which eventuated in his death, *while on duty*.

There is, of course, no inconsistency between the act of 1911 and the supplement of 1916, and no overlapping. The latter act, as the trial judge correctly charged the jury, has no application to the case at bar, the police officer in this case not having been nine years in the service. *But if he had been, it would not have been at all applicable to his case, because he died from a cause with which he met while on duty.*

If the object of this supplement (and it could have no other) is to bestow a pension upon widows of police officers who have served for nine years, and who died from a cause met with while off duty, this object has been as well attained by the phrase "who shall have died or shall hereafter die *from causes other than injuries* received in the performance of duty" as by the employment of some dual, fuller or more comprehensive phrase; such as "who shall have died or shall hereafter die *from other than diseases contracted or injuries* received in the performance

of duty." In either case, the object would have been reached and effectuated.

We submit that the amendment of 1907 to the act of 1885, defining the clause "who shall have lost his life in the performance of duty," impressed the same definition upon the act of 1911, when enacted; and that that definition could not be abridged or obliterated, by mere implication, by reason of the terms in the supplement of 1916 to the act of 1911.

Furthermore, aside from the defining effect of the act of 1907, we insist, as we have above pointed out, that the interpretation of the act of 1911 by the trial judge is in agreement with common sense, fairness and justice, and should be sustained.

II.

THE TRIAL JUDGE, IN HIS CHARGE, COMMITTED NO ERROR.

The only exception taken to the charge, by the appellant, is to so much thereof as charges that the plaintiff must show by a fair preponderance of the evidence that the disease was contracted, while he was in the performance of his duty (Case, page 65, lines 10, etc.)

We have covered the subject in our discussion under caption "I."

The case of *Scott vs. Jersey City*, 68 N. J. L., 687, quoted in the brief of counsel for defendant-appellant and founded upon "An Act for the pensioning of firemen," etc., has no bearing here, directly or by analogy. That act expressly, in the plainest terms, restricts pensions to those cases in which the member of a fire department shall be physically hurt in the performance of duty; the phrase used is "shall be

fatally injured while in the performance of or in attempting to discharge his duties."

We respectfully submit that the judgment should be affirmed.

WEINBERGER & WEINBERGER,

Attorneys for Plaintiff-

Respondent.

HARRY H. WEINBERGER,

Of Counsel.

New Jersey Court of Errors and Appeals

MARY E. MAITLAND,
Plaintiff-Respondent,

v.

BOARD OF POLICE COMMISSIONERS
OF THE CITY OF GARFIELD,
Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT.

Statement.

This is an action brought by the plaintiff in the Bergen Circuit of the New Jersey Supreme Court as the widow of John Maitland, to recover the sum of four hundred and fifty dollars (\$450.00) being the amount of certain installment of an alleged pension equal to one-half of the amount of the salary of the said John Maitland, who was a member of the police force of the City of Garfield, County of Bergen.

John Maitland was forty years of age at the time of his death (Case, p. 14, line 30). He was taken sick with a cold which subsequently developed into pneumonia, and died nine days later at his home (Case, p. 16). At the time of his death he had been a member of the police force of the City a little over eight years and not nine years (Case, p. 61). The plaintiff brought her action under Chapter 72 of the Laws of 1911, Section 4, alleging that her husband who had died

of his sickness was entitled to a pension under the said law because he lost his life in the performance of his duty. At the close of the plaintiff's case counsel for the defendant moved for a non-suit, and (Case, p. 38) after considerable argument the motion was not decided until the close of the defendant's case, when a motion was made for the direction of a verdict for the defendant on the grounds that there wasn't any evidence to bring the complaint within the statute, nor to show that John Maitland lost his life in the performance of his duty (Case, p. 52), and after considerable argument by both counsel and the Court the motion for direction was denied (Case, p. 62), the case was submitted to the jury who returned a verdict in favor of the plaintiff for \$450.00.

POINT I.

The Court wrongfully refused to grant a non-suit and direct a verdict for the defendant.

We will take these two reasons together.

The statute upon which the plaintiff based her cause of action is known as the Laws of 1911, page 104. The particular section which, it is argued, applies to the case, is Section 4, and reads as follows:

"The widow or children of any member of such police force who shall have *lost his life in the performance of his duty*, so long as such widow remains unmarried or so long as such children or any of them remain under the age of sixteen years, receive a pension equal to one-half the amount of the salary of such member of said police force at the time of his death; *provided*, however, that if such

police officer leaves a widow and children said pensions shall be paid to the widow so long as she remains unmarried, and in case such member of said police force shall leave children and no widow, then, such pension shall be paid to such of said children who have not attained the age of sixteen years in equal shares."

The title of the act is:

"An act providing for the pensioning of police officers and policemen in certain municipalities of this State. P. L. 911, Chap. 72, p. 104."

The evidence shows that John Maitland was a member of the police force of the City of Garfield for a little over eight years. That on October 22nd, 1917, he spoke to the Chief of Police about his health (Case, p. 448), and told the Chief just before he went on duty that he was not feeling well; to use his words, he said:

"A. Why, I couldn't remember what he said at just that minute; but may I say one thing, your Honor? The Chief most always speaks to the members before going out, and Officer Maitland stepped up to the door, and he spoke about he was not feeling well. His trouble was—may I say what his trouble was?" etc. (Case, p. 48).

He went out and performed his duty and reported back to headquarters at the expiration of his tour at 4 A. M., left the police station and went home and told his wife he was not well (Case, p. 17).

Dr. Reid a practicing physician was called to attend him and describes his condition as follows (Case, p. 21):

"Q. Will you just describe what his condition was when you first came there, and what

it developed into and how he died, the cause of death? A. Why, there seemed to be a bad cold of a grip condition and then after about twenty-four hours it developed into an ordinary acute lobar pneumonia.

"Q. And what was the cause of death? A. monbar pneumonia.

"Q. You say that pneumonia was caused through this cold? A. Undoubtedly was, yes.

"Q. Do you remember when you first came to the house? A. I don't remember the exact date, no."

The only other evidence in the case which we find and which counsel for the plaintiff may try to construe to be sufficient to establish that the decedent having died of a disease contracted while in the performance of his duty is found on page 18 of the case, as follows:

"Q. What was the matter with him? Just tell the Court and jury. A. He told me—he came in, four o'clock, and he called me by my name, and I got up about a quarter after four, and he said, 'I am awful sick,' and I said, 'What happened to you,' and he says, 'At this hour of the morning I wouldn't like to get the Doctor out so early,' and I said, 'What happened to you, John?' He says, 'Oh, I took a chill on my beat.'"

This evidence was objected to and even though counsel said, "I won't press it any further," it should nevertheless have been stricken out by the Court as it was certainly not responsive to the question, and very prejudicial to the defendant's case, and counsel for the plaintiff who was the only one who could move to strike it out as not being responsive should have done so.

Counsel for the defendant did object, but when the Court said, "You didn't object to his going ahead, you don't want me to strike it out now?" Counsel said, "I won't press it any further."

The objection was there and the testimony should have been stricken out.

But even considering this illegal and irresponsible evidence there is nothing to show that decedent lost his life in the performance of his duty, because at the time he complained of being ill to his wife he was not in the performance of his duty. He was at his home, ill for nine days before he died, and all during his illness he was not performing his duty and at no time can it be said that he lost his life in the performance of his duty within the meaning of Section 4 of the Laws of 1911.

The Legislature did not intend nor mean by using those words that a policeman who was taken ill, who contracted a disease, and died as a result thereof that his widow should be entitled to a pension under the act, and this is fully borne out by the fact that in 1916 the Legislature again passed an act which is a supplement to the Act of 1911 and entitled: "A supplement to an act, An Act providing for the pensioning of police officers and policemen in certain municipalities of this State," approved March 30th, 1911. P. L. 1916, page 298, wherein they provided as follows:

"The widow of every member of such police force in any municipality of this State in which the act to which this is a supplement is applicable where such member shall have paid or shall hereafter pay into the fund provided for the act to which this act is a supplement, the full amount of the annual assessments or contributions, who shall have died *or shall hereafter die from causes other than injuries received in the performance of duty*, and who shall have served at the time of his death nine years as a member of such police force shall, so long as she remains unmarried, receive a pension equivalent to one-half of the pay of her deceased husband," etc.

By passing this supplement the Legislature in 1916 intended to cover just such a situation as is presented in this case, namely, a pension for a policeman who dies from causes other than injuries received in the performance of duty, provided the policeman had, at the time of his death, served as a member of the police force for nine years.

The Act of 1911, in our opinion, clearly sets forth the intention of the Legislature when they use the words, "who shall have lost his life in the performance of his duty" as meaning, a policeman losing his life while actively engaged in the performance of his duty at the time of death.

In Black's Law Dictionary we find the word "supplemental" defined as follows:

"Something added to supply defects in the thing to which it is added or in aid of which it is made."

It is undisputed that John Maitland, the decedent, was not a member of the police force of the City of Garfield for nine years at the time of his death, but had served a little over eight years.

POINT II.

The judge charged the jury "that the plaintiff must show by a fair preponderance of the evidence that the disease resulted—the disease was contracted while he was in the performance of his duty," etc.

Counsel for the defendant took an exception to this part of the charge of the Court (Case, p. 65), which was allowed.

In fact all through the charge the Court referred to the fact that the disease was contracted by the

decedent while he was in the discharge of his duty. The wording of the charge was very prejudicial to the defendant's case. It undoubtedly lead the jury to assume that if the decedent was taken ill and his illness subsequently developed into a disease which resulted in his death, that that fact would bring him within the statute and allow his widow to sue for a pension. Nowhere in the Act of 1911 is there any reference to a pension being allowed where a policeman dies of disease.

The Court said in its charge (p. 61) :

"If you are satisfied that the disease which finally resulted in John Maitland's death was contracted by him while he was in performance of his duty then Mrs. Maitland is entitled to the sum that she demands at your hands. If, on the other hand you believe that the disease was contracted at some other time while he was not in the performance of his duty, why then she is not entitled to it because he had not served nine years on the police force."

And just prior to this part of his charge the Court said (commencing at line 10, p. 61) :

"There has been an act passed, a supplement to this act, passed afterwards, that provided that any officer who had been in the service nine years, and died, would be entitled to a pension under the act, whether the death was caused by a disease or any other active cause not incurred while he was in performance of his duty; but that doesn't apply to this case."

This, surely, was misleading, and the evidence being uncontradicted that John Maitland died of a disease and, being instructed that the supplement of 1916 which required a nine-year service, was not applicable, left the jury with only one con-

clusion to draw, namely, that John Maitland having been on the police force and having died of a disease, his widow was entitled to a pension, which they did find. By such a construction it is extending the provisions of the 1911 act beyond what the Legislature intended. This Court, in construing "An Act for the pensioning of firemen in certain cities of this State" Pamphlet Laws of 1897, page 263, which reads as follows:

"If any officer or man permanently employed in any fire department in any such City shall be fatally injured while in the performance of or in attempting to discharge his duties, such municipal board shall allow the widow, if there be any, an annual pension equal to one-half of the salary received by such officer or man at the time of his death, to be paid to such widow during her widowhood."

held, that a fireman who was on his way home for his meals and was knocked off a trolley car and killed, that the decedent was not at the time of his death engaged in the performance of his duty within the meaning of the act, and this Court at page 690 said:

"A number of cases have been called to our attention in the argument which have arisen in the administration of the pension laws, which award pensions to soldiers or their representatives where they have been injured or killed while 'in the line of duty.' And in one of these cases the soldier who had been thus injured while going or coming between the Captain's headquarters in a village and their homes under orders of the Captain was held to have been 'in the line of his duty' within the meaning of the act. (Heacock's case, p. 4, Dec. Dept. Int. Pens., p. 160). But these cases have very slight bearing here where, as we have seen properly interpreted, the duty is

defined as one performed in the active service of extinguishing fires. (*Scott v. Jersey City*, 68 N. J. L., 687 at 690.)”

This is just the point that has arisen in the present case, namely, *did John Maitland lose his life while in the ACTIVE service of the police department—in other words*—was he actively performing his duty at the time he lost his life?

We submit that had the Legislature intended to grant a pension to the widow of every policeman who contracted a cold which subsequently developed into pneumonia and caused his death, they would have said so and there would have been no necessity for enacting the supplement of 1916. What the Legislature intended was, that if any policeman while in the active performance of his duties lost his life while so performing his duties, then his widow and children were to have a pension but not otherwise, unless at the time of his death he had served nine years or more on the force.

For these reasons, we respectfully request that the judgment of the Supreme Court be reversed, with costs.

Respectfully submitted,

MACKAY & MACKAY,
Attorneys for Defendant-Appellant.



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