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Notice of Appeal.

Filed May 14, 1913.

New Jersey Supreme Court.

LIZZIE ALIDA SEXTON, on behalf of heirs and the next of kin, *et al.*, *Defendants,* *vs.* NEWARK DISTRICT TELEGRAPH COMPANY, *Prosecutor.*	*On Certiorari.*

TAKE NOTICE that the prosecutor appeals to the Court of Errors and Appeals from the whole of the order or judgment entered in this cause on the seventh day of May, nineteen hundred and thirteen on the following grounds:

First. Because the New Jersey Supreme Court ordered that the proceedings brought up by the Writ of Certiorari, heretofore allowed herein, be affirmed.

Second. Because the New Jersey Supreme Court ordered that the said proceedings brought up by the said Writ of Certiorari be affirmed; whereas the said proceedings should have been set aside for one or more of the reasons assigned by the prosecutor above-named, in support of its said Writ of Certiorari.

Third. Because the New Jersey Supreme Court ordered that the said proceedings brought up by the said Writ of Certiorari be affirmed; whereas the said proceedings should be set aside for one or more of the following reasons:

Notice of Appeal.

1. Because William P. Martin, Esq., one of the Judges of the Essex County Court of Common Pleas, in which court judgment was entered against the prosecutor herein on December 4th, nineteen hundred and eleven in the proceedings brought up by said Writ of Certiorari, had no jurisdiction to hear and determine the cause.

2. Because the facts were not presented in such a way at the hearing as to give the ground for a verdict for the plaintiff in certiorari.

3. Because the points in this case do not show that the plaintiff in certiorari committed any wrong and it was asked that this action be dismissed upon the principle and authority that the legislature cannot impose liability except for the violation of a legal duty.

4. Because this action was brought under an act of the legislature which violates the Fourteenth Amendment of the United States Constitution.

5. Because this action is brought under an act of the legislature which violates Article 1 of Section 17 of the State Constitution, in that it does not permit a trial by jury.

6. Because the act under which this action is brought is repugnant to the Fourteenth Amendment of the Constitution of the United States in that it deprives the plaintiff in certiorari of its liberty and property, without due process of law and denies to it the equal protection of the laws.

7. Because the act of the legislature under which this action is brought took effect on July 4th, nineteen hundred and eleven, while Sexton died about 4 p. m. the same day and it was therefore impossible for the plaintiff in certiorari to give notice to the deceased that the provisions of Section 2 of the Employer's Liability Act were not intended to apply. The law does not require the performance of impossibilities.

8. Because Sexton was killed by an outside cause.

9. Because the act and the supplement is in violation of Article 1, Section 10 of the Constitution of the United States, and Paragraph 3, Section 7, Article 4 of the State Constitution in that it impairs the obligation of a contract.

10. Because the Employer's Liability Act violates the act of a minor in that Section 2, Paragraph 9 of the said act states: "That in the employment of a minor, Section 2 shall be presumed to apply, unless due notice be given either to the parents or guardian of the minor. This presumption would be against the minor, who is under a disability to make a contract. This presumption of contract against a minor is void."

11. Because the Employer's Liability Act cannot be upheld upon the doctrine of the police power of the state, as the said act is not designed to conserve health, safety, comfort, morals, peace and order.

12. Because there was no evidence that the widow and children of Floyd Sexton were his dependents.

13. Because the said judgment, order and proceedings of the Essex County Court of Common Pleas are in diverse other respects illegal, oppressive and unjust to said plaintiff.

McCARTER & ENGLISH,
Attorneys of Appellant-Prosecutor.

To Harry V. Osborne, Esq.,
Attorney of Respondent-Defendants.

Service of the within Notice of Appeal is hereby acknowledged this 13th day of May, 1913.

HARRY V. OSBORNE,
Attorney of Defendants.

Writ of Certiorari.

Returnable, January 16, 1912.

NEW JERSEY, *ss.*

(SEAL) The State of New Jersey to Honorable William P. Martin, one of the judges of the Court of Common Pleas, in and for the County of Essex, and John B. Woolston, Clerk of the Court of Common Pleas of the County of Essex, GREETING:

We, being willing for certain reasons to be certified of a certain determination, judgment, order and proceedings, made and given by William P. Martin, Esq., one of the judges of the Court of Common Pleas, in and for the County of Essex, in a certain action, plaint or proceedings brought against the Newark District Telegraph Company, at the suit of Lizzie Alida Sexton on behalf of herself and Horace C. Sexton and Gordon W. Sexton, infants and next of kin of Floyd Sexton, deceased, to recover compensation under, "An act of the legislature of New Jersey, prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder, approved April 4, 1911, also under the supplement of said act approved May 2, 1911," do command you that you send under your seals, to our justices of our Supreme Court of Judicature, at Trenton, on the sixteenth of January next, the said determination, judgment, order and proceedings made and given by you with all things touching and concerning the same, as fully and entirely as they remain in said Court of Common Pleas, by whatever names the parties may be called

therein, together with this, our writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

WITNESS, William S. Gummere, Esq., Chief Justice of our Supreme Court, at Trenton, aforesaid, this twenty-third day of December, in the year of our Lord, one thousand nine hundred and eleven.

WM. RIKER, JR.,
Clerk.

JOHN J. HUBBELL,
Attorney.

WRIT OF CERTIORARI.

Returnable, January 16th, 1912.

John J. Hubbell, Attorney, No. 717 Essex Building, Newark, N. J.

Allowed December 23, 1911.

SAMUEL KALISCH, *J. S. C.*

Service of a copy of the within writ hereby acknowledged this 12/28/11.

H. V. OSBORNE,
Attorney for Plaintiff.

Petition for Compensation.

Filed, August 17, 1911.

Essex Couuty Court of Common Pleas.

LIZZIE ALIDA SEXTON, on behalf of herself and the next of kin of FLOYD SEXTON, deceased, *et als.*,
Petitioner,

vs.

NEWARK DISTRICT TELEGRAPH COMPANY,
Respondent.

To the Honorable Judges of the Court of Common Pleas for the County of Essex:

The petition of Lizzie Alida Sexton, widow, on behalf of herself and Horace Sexton and Gordon Sexton, infants, next of kin of Floyd Sexton, respectfully shows;

That the petitioner, Lizzie Alida Sexton resides at No. 826 Montgomery avenue, City of Newark, New Jersey; that she is the widow of the said Floyd Sexton, deceased; that Horace aged ten, and Gordon aged eight are the children of petitioner and said Floyd Sexton.

That on the fourth day of July, nineteen hundred and eleven the said Floyd Sexton was employed by the Newark District Telegraph Company, a corporation of New Jersey, in the City of Newark in the capacity of a lineman; that his duties as such lineman was to run, repair and test the wires of the Newark District Telegraph Company.

That while engaged in his duties as such lineman and while being in and about the business of the said

Newark District Telegraph Company at the corner of Mulberry and Green streets, in the City of Newark, the said Floyd Sexton received injuries by burning from coming in contact with certain electric wires which caused the death of the said Floyd Sexton.

That the said Floyd Sexton was in receipt of wages to the amount of seventy dollars ($70) per month at the time of his death.

That notice of the accident which caused the death of the said Floyd Sexton was given to the Newark District Telegraph Company by petitioner on the eleventh day of July, nineteen hundred and eleven.

That the said Newark District Telegraph Company has failed to agree upon the amount of compensation to be paid your petitioner for herself and the said children of the said Floyd Sexton.

Your petitioner therefore prays that an order may be made directing the payment of such sums as may be found to be due under an act entitled, "An act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder." Approved April 4, 1911.

Your petitioner prays for such and other and further relief as may be equitable and just in the premises.

LIZZIE ALIDA SEXTON,
Petitioner.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

Lizzie Alida Sexton, of full age, being duly sworn upon her oath according to law deposes and says that she is the petitioner in the foregoing petition named; that she has read the said petition and knows the contents thereof; that the same is true to the best of her knowledge, information and belief.

LIZZIE ALIDA SEXTON,

Sworn and subscribed to before me
this 16th day of August, A. D.,
1911.

CHARLES ELIN,
Master in Chancery of New Jersey.

Acknowledgment of Service.

Filed, August 18, 1911.

ESSEX COUNTY COURT OF COMMON PLEAS.

LIZZIE ALIDA SEXTON on behalf of herself and the next of kin of FLOYD SEXTON, deceased, *et als.*, *Petitioner*, *vs.* NEWARK DISTRICT TELEGRAPH COMPANY, *Respondent.*	*Acknowledgment of Service of Petition.*

Due and legal service of a copy of the petition filed in this case is hereby acknowledged this eighteenth day of August, nineteen hundred and eleven and statutory service thereof is hereby waived.

JOHN J. HUBBELL,

Attorney for Newark District Telegraph Company.

Answer.

Filed August 25, 1911.

ESSEX COUNTY COURT OF COMMON PLEAS.

NEWARK DISTRICT TELEGRAPH COMPANY, *Respondent.* *ads.* LIZZIE ALIDA SEXTON on behalf of herself and the next of kin of FLOYD SEXTON, deceased, *et als.*, *Petitioner,*	*On Petition for Compensation.*

The answer of the Newark District Telegraph Company, respondent, to the petition of Lizzie Alida Sexton, widow, on behalf of herself and Horace Sexton and Gordon Sexton, infants, next of kin of Floyd Sexton, this respondent answering says:

That it is admitted that respondent is a corporation of New Jersey; it does not admit that the alleged petitioner Lizzie Alida Sexton is the widow of one Floyd Sexton, nor that she has children by the said Floyd Sexton, and leaves these facts to the petitioner to prove.

That the said Floyd Sexton was nominally employed by the respondent, but that he had been ill for a long time with tuberculosis, and while he did not perform all duties, he was nevertheless kept upon the pay roll of the company, that at times he was a very despondent man, and at times his brain was affected, and when employed in his duties for respondent, would neglect all precautions in his work; that on the fourth

day of July last past the said Floyd Sexton was required to perform certain duties at the cable box of the respondent, at the corner of Mulberry and Green streets, in the City of Newark, that the said Sexton during his long course of employment with respondent had the knowledge that on the poles where the respondent's wires were strung there were strung also the highly electrified wires of the Public Service Company for electric lighting purposes, that said Sexton having often performed duties at this same box, and had orders to take with him a belt and rubber gloves, did wilfully neglect to take with him and use the belt and gloves, which the respondent corporation had supplied him with, and that the said Sexton by his own wilful neglect came in contact with the highly charged electric wires of the Public Service Company, and not by any wire belonging to the respondent, as it was afterwards found that the box had not been opened; that said Sexton did not receive his injuries which caused his death by any fault of the respondent, but that the same were self-inflicted.

And respondent further answering says that the act of the legislature approved April 4, 1911, as set forth in the last paragraph of the petition did not go into operation until 12 o'clock on the fourth day of July, 1911, and the alleged accident happened about three hours after the law went into effect, and said fourth of July, being a holiday, respondent denies that it is liable for damages in this action, because there was no time or opportunity after the act went into effect for the respondent to make any agreement with the said Sexton under Section 11, paragraphs 7, 8 and 9 of the said act.

And your respondent further answering says that it denies the constitutionality of the act under which the action is brought, namely: "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of em-

ployment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability, and compensation thereunder," approved April 4, 1911. This act under which this action is brought is unconstitutional, for the following reasons:

1. Because section 1, paragraph 1, "When personal injury is caused to an employe by accident arising out of and in the course of employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate case, he shall receive compensation therefor from his employer, provided the employe was himself not wilfully negligent at the time of receiving such injury, and the question of whether the employe was wilfully negligent shall be one of fact to be submitted to the jury, subject to the usual superintending powers of a court to set aside a verdict rendered contrary to the evidence." And also paragraph 2. "The right to compensation as provided by section 1 of this act shall not be defeated upon the ground that the injury was caused in any degree by the negligence of a fellow employe; or that the injured employe assumed the risks inherent in or incidental to or arising out of his employment or arising from the failure of the employer to provide and maintain safe premises and suitable appliances which said grounds of defence are hereby abolished."

This paragraph deprives the defendant of all the common law defences, such as an injury by the fault of a fellow servant; the employe with certain risks taken with the employment; and contributory negligence, except when such negligence is wilful.

11. Because under section 11, paragraph 18 of said act, "In case of dispute over a failure to agree upon a claim for compensation between employer and employe, &c., the personal representatives of Sexton has submitted the claim both as to questions of fact, the

nature and effect of the injuries, and the amount of compensation therefor according to a schedule to the judges of the Court of Common Pleas of this county and the judges are authorized to hear and determine such disputes in a summary manner, and the decision as to all questions of facts shall be conclusive and binding." This allows the judges to settle the compensation sitting alone without a jury. This section violates the 7th section of the New Jersey Constitution which maintains that the right of trial by jury shall remain inviolate. This respondent denies the jurisdiction of the judges of this court to hear and determine this action.

III. Because by section 2, paragraph 9, "Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of section II of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section II of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section II of this act and have agreed to be bound thereby."

This paragraph is contrary to Article 5th of the Amended Constitution of the United States, which states, "Nor shall any person be deprived of liberty or property without due process of law." Because the scheme set forth in the provision of section II would make the employer liable for compensation for an injury to an employe, which injury was not caused by the employer's negligence. Such scheme can only be binding upon employer by his consent, for otherwise the award of damage in such case would deprive him of his property without due process of law.

Answer.

And this respondent humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

JOHN J. HUBBELL,
Attorney for Respondent.

Attest: J. P. RUNYON, *Acting.*
NEWARK DISTRICT TELEGRAPH COMPANY,
By GEORGE W. HUBBELL,
President. (SEAL)

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

The answer of the respondent, Newark District Telegraph Company, was taken this twenty-fifth day of August in the year nineteen hundred and eleven, before me, under the common seal of the said corporation, as by its seal, thereto affixed, appears.

HENRY H. DAWSON,
Master in Chancery of N. J.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

George W. Hubbell, of full age, being duly sworn on his oath, according to law deposes and says, that he is the President of the Newark District Telegraph Company, the respondent in the foregoing answer named, and that he has read the said answer, and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

GEORGE W. HUBBELL.

Sworn and subscribed to before me
this twenty-fifth day of August,
A. D. nineteen hundred and
eleven, at Newark, N. J.

HENRY H. DAWSON,
Master in Chancery of N. J.

Amendment to Answer.

Filed September 18, 1911.

ESSEX COUNTY COURT OF COMMON PLEAS.

NEWARK DISTRICT TELEGRAPH COMPANY, *Respondent.* *ads.* LIZZIE ALIDA SEXTON on behalf of herself and the next of kin of FLOYD SEXTON, deceased, *et als.*, *Petitioner,*	*On Petition for Compensation.*

The respondent amends its answer filed in the above stated action by inserting in the third section at line 22, page 4 the words "to article 14 of the amended constitution of the United States" so that at lines 22 and 23 in amendment to the answers shall read "This paragraph is contrary to Articles 5th and 14th of the amended constitution of the United States."

JOHN J. HUBBELL,
Attorney for Respondent.

I consent to the amendment to the answer as above set forth.

HARRY V. OSBORNE,
Attorney for Petitioner.

Notice.

Filed November 23, 1911.

ESSEX COUNTY COURT OF COMMON PLEAS.

LIZZIE ALIDA SEXTON on behalf of herself and the next of kin of FLOYD SEXTON, deceased, *et als.*,
Petitioner,

vs.

NEWARK DISTRICT TELEGRAPH COMPANY,
Respondent.

Take notice that I will apply to William P. Martin, Judge of the Common Pleas Court on Thursday, November 23d, nineteen hundred and eleven at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, at the court house in the City of Newark, for an order to open this case and to introduce further testimony relative to letters of administration or testamentary of the estate of the deceased and as to the age of the children of the deceased.

HARRY V. OSBORNE,
Attorney for Petitioner.

TO JOHN J. HUBBELL, ESQ., or
to whom it may concern.

ESSEX COUNTY COURT OF COMMON PLEAS.

December 14, 1911.

LIZZIE ALIDA SEXTON on behalf of herself and HORACE C. SEXTON AND GORDON W. SEXTON, infants and next of kin of FLOYD SEXTON, deceased, *Petitioner,* *vs.* NEWARK DISTRICT TELEGRAPH COMPANY, *Respondent.*	*Summary Proceeding under Workingman's Compensation Act of 1911.*

Hon. Harry V. Osborne for Petitioner.

Sommer, Colby & Whiting, Hon. Frank H. Sommer, of Counsel for Employers' Liability Commission, (J. R. No. 2, L. 1910, p. 608, recognized L. 1911, chap. 241, p. 520) and

Lindabury, Depue & Faulks, Sherrerd Depue, Esq., of Counsel, also for commission.

John J. Hubbell, Esq., for Respondent.

MARTIN, *J.*

This is a proceeding brought by Lizzie Alida Sexton, widow of Floyd Sexton, deceased, petitioner, on behalf of herself and Horace C. Sexton and Gordon W. Sexton, infants and next of kin of said Floyd W. Sexton, deceased, against Newark District Telegraph Company, a corporation, respondent, under the act entitled:

> "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employ-

ment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder."

approved April fourth, 1911 (Chap. 95, p. 134), known as the "Employers' Liability or Workingmen's Compensation Act," and the supplement thereto approved May second, 1911 (Chap. 368, p. 763), in which petitioner prays that the amount due and to be paid the petitioner for herself and her children provided for in the act be ascertained and that judgment be entered therefor. Upon filing the petition a day was duly fixed for hearing and after due serv, ice of process and a copy of the petition upon the respondent, the respondent appeared and answered. At the hearing, in the presence of counsel, witnesses presented by the parties were examined and the matter submitted for decision. Section 20 of the act prescribes that the judge shall file a statement or determination of facts in writing with the clerk and a judgment shall be entered thereon in the same manner as in a cause tried in the court of common pleas.

Stipulation.

New Jersey Supreme Court.

NEWARK DISTRICT TELEGRAPH COMPANY, *Plaintiff,* *vs.* LIZZIE ALIDA SEXTON on behalf of herself and the next of kin of FLOYD SEXTON, deceased, *et als.,* *Defendants.*	*On Certiorari.*

In the statement of facts returned with this writ appear the words "belonging to or under the control of the respondent." These words do not agree with the proof in the suit, and Judge Martin having given his consent these words are stricken out so that the sentence from line 27 should now read "The death of the said Floyd Sexton was caused by a current of electricity received by him in coming in contact with wires highly charged with electricity by an accident arising out of and in the course of his employment without any negligence whatsoever on the part of Floyd Sexton, deceased."

I hereby stipulate and agree to the above changes.

H. V. OSBORNE,
Attorney for Defendant.

On motion of

JOHN J. HUBBELL,
Attorney for Plaintiff.

STATEMENT OF FACTS.

Floyd Sexton, deceased, was, on the fourth day of July, 1911, employed by respondent, Newark District Telegraph Company, as lineman and his duties consisted in running, repairing and testing wires of respondent. The deceased had been employed by respondent in various capacities up to May 16, 1911, when, by mutual agreement, the contract of employment ceased and all relations, contractural, and otherwise, between them were terminated. Thereafter, and on the 23d day of May, 1911, said Floyd Sexton, deceased, was employed again by respondent as such lineman and was paid wages in the sum of $35 on the 1st and 15th of each month up to the first day of July before his death.

On the fourth day of July, 1911, about five o'clock in the afternoon, while engaged in the discharge of his duties as lineman, in the employ of respondent, and by direction of its representative, Floyd Sexton, deceased, ascended a pole on the corner of Mulberry and Green streets, in the City of Newark, which supported certain wires of the Public Service Electric Company, and other telegraph and telephone wires of other companies in addition to the wires of respondent. The wires of the electric company were highly charged with electricity. On the pole were two distributing points or boxes, the topmost of which was owned by respondent. Floyd Sexton, deceased, ascended the pole, and while working about the wires of respondent near its distributing box, suddenly stopped and fell from a point near the top of the pole to the ground. An examination made immediately after the accident showed that Sexton was dead, his hands were burned, a long burn was on his left side under the arm, and his head was badly crushed and his neck broken.

The death of said Floyd Sexton was caused by a current of electricity received by him in coming in con-

tact with wires highly charged with electricity by an accident arising out of and in the course of his said employment without any negligence whatsoever on the part of Floyd Sexton, deceased.

Respondent admits in its answer that Sexton was employed by it, but alleges that he came to his death by injuries which were intentionally self inflicted. This defence entirely failed upon the hearing, there being no evidence to support it.

Floyd Sexton, deceased, was married to the petitioner, Lizzie Alida Sexton, and by her had two children, Horace C. Sexton, born May 16, 1901, now ten years old, and Gordon W. Sexton, born February 9, 1903, now eight years old, and they are now residing, and were at the time of the injuries, in the City of Newark.

Section 12 of the act provides: "In case of death compensation shall be computed, but not distributed on the following basis:

(1) Actual dependents, * * * If widow two children, forty-five per centum of wages, * * *

Compensation in case of death shall be computed on the basis of the foregoing schedule, but shall be distributed according to the laws of this state, providing for the distribution of the personal property of an intestate decedent, unless decedent has in fact left a will. * * *

In computing compensation to orphans or other children, only those under sixteen years of age shall be included, and only during the period in which they are under that age, at which time payment on account of such child shall cease.

The compensation in case of death shall be subject to a maxium compensation of ten dollars per week and a minimum of five dollars per week. * * *

This compensation shall be paid during three hundred weeks."

The deceased did not leave a will.

The wages of deceased were at the rate of $70 a month which, for twelve months, would amount to $840. This divided by 52, the number of weeks in a year, fixes the weekly wage at $16.1538. Forty-five per centum amounts to $7.27, which is directed to be paid weekly to said Lizzie Alida Sexton for herself and her children, Horace C. Sexton and Gordon W. Sexton, beginning July 18, 1911, fourteen days after the accident, until the expiration of the total period of three hundred waaks.

Section 19 of the act prescribes that, where no executor or administrator has qualified, the judge shall, by order, direct payment to be made to such person as would be appointed administrator of the estate of the decedent upon like terms as to bond for the proper application of compensation payments as are required of administrators.

Lizzie Alida Sexton, widow of Floyd Sexton, deceased, would be entitled to be appointed administratrix of the estate of the decedent. Upon the petitioner, Lizzie Alida Sexton, giving bond in the sum of $100, judgment shall be entered for the amount due to date thereof, together with costs to the petitioner and directing payment thereafter in accordance herewith.

Dated Newark, New Jersey, December 4, 1911.

WM. P. MARTIN,
President Judge of Essex County Court of Common Pleas.

Judgment.

Entered, Dec. 4, A. D., 1911.

ESSEX COMMON PLEAS COURT.

LIZZIE ALIDA SEXTON on behalf of herself and the next of kin of FLOYD SEXTON, deceased, *et als.*, *Petitioner,* *vs.* NEWARK DISTRICT TELEGRAPH COMPANY, *Respondent.*	*Upon petition on determination of Court. After hearing amount awarded.*

Judgment upon determination of the court after hearing in the above entitled action was rendered in favor of the petitioner Lizzie Alida Sexton, *et als.*, and assess the damages against the respondent Newark District Telegraph Co., in weekly payments of the sum of seven and 27/100 dollars ($7.27) to be paid to Lizzie Alida Sexton for herself and children, Horace C. Sexton and Gordon W. Sexton, beginning July 18, 1911, for a period of three hundred weeks, with costs of these proceedings.

Judgment entered and signed Dec. 4th, 1911.

WM. P. MARTIN,
Judge.

Affidavit of John A. Kipp.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

JOHN A. KIPP, being duly sworn on his oath according to law, saith that he is a stockholder in the Newark District Telegraph Company, a corporation organized under the laws of the State of New Jersey, against which corporation Lizzie Alida Sexton on behalf of herself and Horace C. Sexton and Gordon W. Sexton, infants and next of kin of Floyd Sexton, deceased, obtained a judgment in the Court of Common Pleas in the County of Essex, before William P. Martin, one of the judges of the said Court of Common Pleas, in and for the said county, for the sum of seven dollars and twenty-seven cents per week, for three hundred weeks, beginning on July eighteenth, nineteen hundred and eleven, that said judgment having been entered in an action for compensation under "an act of the legislature of New Jersey, prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, also under the supplement to said act approved May 2, 1911, and the Newark District Telegraph Company is about to apply for the allowance of a certiorari to remove the said judgment into the Supreme Court of this State; deponent being advised by its counsel, and believing that the proceedings before the said William P. Martin, Esq., Judge of the Court of Common Pleas, and the said judgment were and are erroneous and illegal, that the act of the legislature of New Jersey, under which the action in this case is brought and judgment rendered is unconstitutional and that the said judge of the Court of Common Pleas had no jurisdiction in hearing the said action, and announcing judgment thereon, and deponent prays that a writ of certiorari may be allowed to the

Newark District Telegraph Company to have the said judgment rendered against it set aside and reversed.

JOHN A. KIPP.

Sworn and subscribed before me,
this fourteenth day of December,
nineteen hundred and eleven.

HENRY H. DAWSON,
Master in Chancery of N. J.

Return.

Filed January 15, 1912.

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

In obedience to the command of this writ, to us directed, we, William P. Martin, one of the judges of the Inferior Court of Common Pleas, and John B. Woolston, the clerk of the Court of Common Pleas of the County of Essex, within named, do send under our seals, to you, the Honorable Justices of the Supreme Court of Judicature of New Jersey, the judgment lately made and rendered in the said Court of Common Pleas in an action for compensation, and under "An Act of the legislature of New Jersey prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder, approved April 4, 1911, also under the supplement to said act approved May 2, 1911," wherein Lizzie Alida Sexton on behalf of herself and Horace C. Sexton and Gordon W. Sexton, infants and next of kin of Floyd Sexton, deceased, was petitioner, and the Newark District Telegraph Company was respondent, together with the order, proceedings and testimony, with all things touching and concerning the same, as fully and entirely as they remain before us as appears in the signature hereto annexed, as we are commanded.

In witness whereof we have hereto set our hands and seals in open court this fifteenth day of January, one thousand nine hundred and twelve.

WM. P. MARTIN, (SEAL)
Judge of Court of Common Pleas,
Essex County.

(SEAL)
J. B. WOOLSTON,
Clerk. (SEAL.)

ESSEX COUNTY COURT OF COMMON PLEAS.

Friday, October 6, 1911.

LIZZIE ALIDA SEXTON, for herself and others,
Petitioner,
vs.
NEWARK DISTRICT TELEGRAPH COMPANY,
Respondent.

Petition for Compensation.

Before Hon. William P. Martin, Judge.

For the Petitioner appears Harry V. Osborne, Esq. (Messrs. Sommer, Colby & Whiting) Frank H. Sommer and Borden D. Whiting, and (Lindabury, Depue & Faulks) Sherrerd Depue, Esq., of Counsel with the Petitioner and especially representing the Employers' Liability Commission.

For the Respondent appear John J. Hubbell, Esq., and George W. Hubbell, of Counsel.

Mr. Osborne opens for petitioner.

LIZZIE ALIDA SEXTON, sworn in behalf of petitioners.

Direct examination by Mr. Osborne.

Q Mrs. Sexton, where do you live? A 826 Montgomery avenue.

Q Newark? A Yes, sir.

Q How long have you lived in Newark? A Thirteen years last April.

Q Are you the widow of Floyd Sexton? A I am.

Q When did Floyd Sexton die? 9 The 4th of July.

Q Of this year? A Yes, sir; 1911.

Q Have you any children by Floyd Sexton? A I have two.

Q Boys? A Yes, sir.

Q What are the names and ages of those boys? A Horace C., age ten; Gordon W., age eight.

Q Are those boys sitting in the court room now? A Yes, sir.

Q Do you know what your husband's employment was at the time of his death and by whom he was employed? A By the Newark District Telegraph Company.

Q How long had he been employed by the Newark District Telegraph Company? A Since he was thirteen years old.

Q How old was he at the time of his death? A Thirty-four years and nine months.

Q He was thirty-four when he died? A Yes, sir.

Q That is twenty-one years? A Yes, sir.

Q In what capacity was he employed at the time of his death? A I really couldn't say.

Q You don't know? A No.

Q Do you know what his duties were? A To run wires, climb poles and wire up houses, burglar alarm protection.

Q Do you know whether or not he left the house to go to work on the 4th of July last? A He did.

Q At the usual time? A Yes, sir.

Q Had he been working constantly prior to that? A Yes, sir.

Q When did you see him next after he left the house in the morning to go to work? A At one o'clock, when he came home to dinner.

Q Then did he leave after dinner? A Yes, sir.

Q And then when did you see him? A I didn't see him after that.

Q You saw him after he was killed, didn't you? A Yes, sir.

Q That is what I want to know, when that was. When did you next see him after he left the house? Did he leave the house to go back to work, so far as you know? A He left the house about two o'clock, when he left to go to work.

Q When did you next see his body? A His body wasn't brought home until the next evening, the 5th.

Q Was that the first you saw him? A Yes, sir.

Q Can you describe his condition? Did you look at the body? A Yes, sir.

Q Was there anything about the body unusual? A Well, his head was in a bad state.

Q Of course, a "bad state" doesn't mean anything to us. Tell us what you mean by "a bad state"? A It was awfully bruised, and his hands were burned, but not very badly; that is all I saw unusual.

Q Did you see his body at all? A I didn't see his body.

Q Did you look at it? A No, sir.

Q Do you know what wages your husband was receiving at the time of his death? A Yes, sir; $70 a month.

Q How long had he been receiving $70 a month? A Well, I really couldn't say that, but for some time, a few years.

Mr. Osborne. It is admitted that the notice prescribed by the act was served.

Mr. Hubbell. The action was begun at a time when everybody was away out of town, and we didn't know anything about it until two or three weeks afterwards; so I suppose we can admit that, yes.

Q Has the Newark District Telegraph Company agreed with you or, so far as you know, with anyone on your behalf, as to the amount of compensation to be paid for yourself and your children? A No, sir. I was offered my husband's salary, but I wasn't told for how long I would get it.

Q You were offered his salary? A Yes.

Q No agreement has been made under the—

The Court. I do not want to interfere with your proper and orderly method of presenting the case, but I do not believe under the pleadings that the respondent here could deny that it has refused to agree. It practically sets up that it has refused to agree.

Mr. Hubbell. It is a very peculiar position. This accident happened in July. The president was away, the treasurer was away, and everybody was away except the superintendent, who had no power whatever to act in the matter. He tried to agree with Mrs. Sexton, but he had no power to do it at that time, and we don't know but what we would have, but this suit was brought right away in August, and we didn't have a chance to make any arrangements.

Q As a matter of fact, you haven't reached any agreement, have you? A No, sir.

Q You desire to have the court order such sum to be paid as may be due under the law? A Yes, sir.

Cross examination by Mr. Hubbell.

Q Mrs. Sexton, you testified that your husband had worked constantly for the respondent? A Yes, sir.

Q Where was he in 1909, in the first part of the year? A He was at home. 1910 he went to the sanitarium, and he was gone just three months. In that time he was paid.

Q What was he in the sanitarium for? Why was he sent there, for what purpose? A The doctor claims he had tuberculosis.

Mr. Osborne. I object to this line of examination as being incompetent and immaterial. The issue is a plain one, and it is confined to whether or not this man was employed, in fact, with the

respondent at the time this injury took place, not whether he was engaged there as a casual employee. Now, whether he was in a sanitarium for one month or six months or a year or two before cannot have the slightest effect on this case, and unless they disclose the materiality of it I shall object to their pursuing this line of inquiry further.

The Court. Suppose a man was ill, but was in possession of his senses, but extremely dizzy, would you call that deliberate negligence on his part in going to work that day?

Mr. Osborne. Not at all, not within the meaning of the act.

The Court. There is no jury to be influenced by this testimony, and I think the proper course in this case is to take almost everything that may be offered and reserve decision. I will reserve decision on this and give you an exception.

Mr. Osborne. This whole line is taken subject to my objection?

The Court. Yes.

Petitioner's counsel prays an exception to this ruling of the court.

Exception allowed; let it be sealed, and it is sealed accordingly.

Judge.

Q How long was he at the sanitarium? A He was nine weeks.

Q Did he receive his salary? A Yes, sir.

Q The company paid him a salary all that time? A Yes, sir.

Q When did he return from the sanitarium? A He returned the 28th of March.

Q What year? A 1910.

Q How long did he stay with the company? A

He went to work the 2d of May, 1910, and he has been working ever since.

Q Didn't he resign on May 16, 1911? A He was home just a week, yes.

Q He resigned from the company? A Yes.

The Court. "Resigned" is a conclusion of law.

Q Well, he didn't work for the company and didn't receive his pay? A He didn't receive his pay for that week; he was only home a week.

Q Was he home at other times? A No, sir; only three days, and he had tonsilitis, and one day home with a carbuncle on his neck. After he came from the sanitarium that was the only time he was at home.

Q Did he keep a pistol at home? A One that belonged to the office, which has been returned since.

Q (*By Mr. Osborne.*) What is that? A Belonged down to the office.

The Court. What has that got to do with it?

Mr. Osborne. I suppose my objection covers such immaterial testimony as that.

Mr. Hubbell. It may amount to something.

Mr. Osborne. I object to that, your honor.

The Court. The objection is overruled and the petitioner is granted an exception.

Exception allowed; let it be sealed, and it is sealed accordingly.

Judge.

Q Did he ever have any conversation with you about how he was going to die? A No, sir.

Q After the death of your husband did any of the company come to see you? A Not until the day of the funeral.

Q What happened on that day? What was said by any member of the company to you? A Mr. Kipp said I would receive his pay, and I said, "How long will that last"? and he said, "I couldn't say."

Q Did you refuse— A I didn't refuse; I went down and saw Mr. Osborne, my lawyer.

Q Didn't Mr. Kipp, the manager, who saw you, say that you would receive the same salary as your husband did until the officers returned? A No, he didn't say that. I asked him how long that would last; he said, "I couldn't tell you," he said, "Mr. Hubbell and Mr. Feary are away"—he didn't say "away" —"until they come back." That is the way he spoke.

The Court. You do not really claim that you are ready to pay the amount of compensation apparently required by this act, do you?

Mr. Hubbell. I think Mrs. Sexton would have been in very much better condition if she had stayed with us rather than to bring this suit.

The Court. You do not answer my question.

Mr. Hubbell. No, not now we are not.

The Court. That disposes of that end of the case.

CHARLES QUINN, sworn in behalf of petitioners. *Direct examination* by Mr. Osborne.

Q Mr. Quinn, where do you reside? A 218 Mulberry street.

Q Corner of Green and Mulberry? A Yes, sir.

Q Are you in business there? A Saloonkeeper.

Q Do you remember Mr. Floyd Sexton? A I remember him, yes, sir—that is I remember the day he got killed; I don't think I ever saw the man before.

Q Did you see the accident? A I see him after he fell, after he hit the curbstone.

Q Just describe what you saw. A Well, it was kind of quiet day around there at the time; I think it was around four or half-past, in the neighborhood of that time, and a man comes running in and says, "Telephone for the ambulance"—

Q Never mind that. Who came in? A A man named Tim Breen.

Q Is he in court? A I don't know; I don't think he is; he might be down in the other court where I was for awhile.

Q Did you run out? A I ran right out to the door. Instead of telephoning I wanted to see what the accident was; I thought possibly I might be of some assistance to him; I ran out, got there, saw this man in the gutter where he had fallen off this pole.

By the Court.

Q Where is this pole? A On the corner of Green and Mulberry.

By Mr. Osborne.

Q Which corner was that, as to the points of the compass? A Well, it is on the downtown corner, on the right hand side going down.

By the Court.

Q Are you south of Green street? A Right on the corner of Green street.

Q Are you on the south side of Green street? A Yes, sir; I think it is.

Q It is on the lower side away from Market street? A Yes.

Q And which side of Mulberry street are you on, the east or west? Is it towards the Pennsylvania railroad or west? A Towards the Pennsylvania railroad.

Q That is the southeast corner? A Southeast corner.

Q This pole is right in front, on the corner? A The very corner.

By Mr. Osborne.

Q Just describe what you saw. Describe the man you saw, his physical characteristics, and his condition? A Well, he laid right on his back; his head was all stove in; the blood was oozing out in bad shape; he laid right on his back and his legs was up; I didn't stay there any length of time; I hollered to a

couple of fellows to help lift him in on the sidewalk, and I went back in again.

Q Did you notice any burns on him? A No, I didn't notice anything.

Q Did you notice his hands or his clothing? A They told me afterwards that he was all burned, but I didn't stay there long enough to see it.

The Court. Strike that out.

Q Had you any difficulty with the running of the fans in your place just before the accident? A Yes; about twenty minutes before that the fans all stopped, and a couple of men came along and wanted to know if there was any trouble there; in the meanwhile the fans had started.

Q Where did they come from? A They must have come from the Public Service Company.

Q Did they have any signs on their hats? A No, they were ordinary workmen; they wanted to know if I telephoned up, and I said no, I didn't telephone, that someone in the neighborhood must have.

Q What did they do? Did they climb up the pole? A No, they didn't; I didn't see them after they went out of the saloon.

Q Do you know anything about the condition of the wires on that pole? A No, sir; I do not.

By the Court.

Q When you saw him on the ground he was near the pole, was he? A Yes, sir; his head was right next to the gutter, right next to the pole where he fell.

By Mr. Osborne.

Q Do you know who took him away finally? A Do you mean who lifted him from the street to the sidewalk?

Q Well, yes. A There was four men; two picked him up by the arms and two by the legs.

Q Will you give me their names? A One is Tim Breen, 218 Mulberry street, and John McCourt; I don't know just where he lives; I couldn't just say who

the other two was positive. I don't want to make any assertion that I can't—those are the only two that I can remember.

Q After he was taken out of the gutter and put on the sidewalk then what became of him? A Why, he stayed there for about twenty minutes, and the ambulance came along, and the surgeon of the ambulance said, "This is no case for us"; and he said, "This is a case for the coroner." He didn't even throw a blanket over him.

Q How long after that did he stay there? A Probably twenty more minutes before the wagon came and took him away.

Q Was the wagon from the morgue? A I couldn't say.

Q Somebody came? A Somebody came; I wouldn't say as to that.

JACOB JANOFSKY, sworn in behalf of petitioner.

Direct examination by Mr. Osborne.

Q Mr. Janorsky, where do you live? A 68 Green street.

Q How long have you lived there? A Two years.

Q And what is your business? Tailor shop.

Q Do you remember an accident happening to a man on last 4th of July on the corner of Melberry and Green? A Yes, sir.

Q Will you tell us what you saw of that accident? A Yes, sir.

Q If you please. A I was sitting around in the front of the door and I see the man up the pole, and he doing something, and at the same time he fall off, and that's all I know.

Q You saw a man climb up the pole? A Yes, sir.

Q Well, he was doing something up there? A Yes, sir; he been doing something.

Q Do you know what he was doing? A I don't know what he went—it ain't my business.

The Court. Describe what he did.

Q You saw him doing something. How do you know he was doing anything? A He was doing something about the wire.

Q Did he take hold of the wire with his hands? A Yes, sir; he take hold of the wires.

Q You saw him working about the wire? A Yes, sir.

Q And then you saw him fall off? A Yes, sir.

Q He fell down to the ground? A He fell down to the ground, and he laid there.

Q And then did you see him after that? A Yes, sir; I been the first that run over to him.

Q You were the first one over. Did you pick him up? A I helped pick him up.

Q And what did you do with him? A I called the rest of the people.

Q What did you do with the man after you picked him up? A They take him on the sidewalk, took him up to the sidewalk.

Q What was his condition? What was the condition of his body, his head? A His head was all broke up.

Q Did you notice anything about his body? A No, sir.

Q Did you notice anything about his clothes? A That is all I see.

Q Did you notice whether there were any burns or not? A I didn't look.

Q Did you remain there until he was taken away? A I lived there. I see it.

Q Was the body under your observation? Were you looking at it until it was taken away finally? A Yes, sir.

Q And who took it away? A A man comes with a wagon and took him away.

Q How far up the pole had he gotten when you saw him fall? A About half a yard up the pole.

Q What? A About half a yard of the pole, fall off.

Q Do you understand the question? How high up did he get when he fell down? A He was to the second box. There are two boxes.

Q What do you mean by a box? A There is two boxes on that pole; he went up to the box.

Q You mean a box in which the wires run? A Yes, sir.

Mr. Osborne. I guess it is a transformer, isn't it?

Mr. Hubbell. I don't think so.

By the Court.

Q Are there two boxes? A Yes, sir.

Q One is above the other? A Yes, sir.

Q And he was at the one that was highest up? A Yes, sir.

Cross examination by Mr. Hubbell.

Q You say that he was half a yard up when he fell? A Yes, sir.

Q (*By Mr. Osborne.*) Half a yard from where? A From the pole.

Q (*By Mr. Hubbell.*) From the ground? A (Indicating.) There is the pole, and he was half a yard further.

The Court. When he fell he was half a yard away from the pole on the ground.

Q (*By the Court.*) Where was he before he commenced to fall? A I told you the second box.

Q (*By Mr. Osborne.*) The second box, up near the top of the pole? A Yes, sir.

WILLIAM H. McKENZIE, sworn in behalf of petitioners.

Direct examination by Mr. Osborne.

Q Doctor, you are the county physician? A I am.

Q And do you recall seeing a man by the name of Floyd Sexton last 4th of July? A I do.

Q Who was said to have been injured corner of Mulberry and Green streets? A I do.

Q Where did you first see the body? A At Holley's morgue.

Q Do you know how the body reached Holley's morgue? A Why, I ordered it sent there; I told them to call up the morgue and go and get the body and take it there.

Q Where did you tell them to go and get the body? A Corner Mulberry and Green streets.

Q Did you describe the accident to them? A I told them there was a man that had fallen from a pole; that is all I could tell them.

Q Tell us what condition you found the body in after you examined it. A When I examined him at the morgue I found the man with the left side of his head all crushed; very badly crushed, all the left side of his head, and he was bleeding from his nose and his ears and from the wound on his head. His neck was broken, and he had slight burns on the inner part of his hand, and he had a large burn on the left side of his body, about four inches, under the arm, on the left side, seven inches long and right across in that direction (indicating).

Q Was there anything about the burn to indicate what probably caused it? A Well, with the history that I got it was undoubtedly caused by an electric wire.

Q Contact with an electric wire? A Yes, sir.

By the Court.

Q Where were these burns, on both hands? A Yes.

Q On the palm of both hands? A In the palm of both hands. This was a large one here, on this side (indicating).

Q The other one was on the left side? A Yes, about seven inches long, almost straight across.

By Mr. Osborne.

Q Did you see the clothing? A Well, I don't remember about them.

Q You don't remember whether there was any indication of burns on the clothing or not? A I don't remember about that.

Q Was this a fresh burn? A Yes, it was a fresh burn.

Q By fresh I mean that there was no evidence of his having begun to heal yet; the indication were that it had just taken place? A It looked like a fresh burn.

Q I suppose the man was dead when you saw him? A Oh, yes.

Cross examination by Mr. Hubbell.

Q Doctor, you testified that the left side of the head was badly crushed? A Yes.

Q And that his neck was broken? A Yes.

Q Would that have been sufficient to cause his death? A Yes, surely.

Q Would these burns, in your judgment, have been sufficient to cause death? A Why, yes; I have seen them die with much smaller burns of electricity.

Q Would it kill him instantly? A Yes. I have had them drop very quickly from it.

By the Court.

Q If the burns preceded the broken neck would you say that his death was caused by the burns or by the broken neck? A I might think that the burns probably killed him—that is, they were so extensive—I mean electricity killed him.

Q I mean, the electricity that caused the burns killed him? A Yes, sir.

Q Would you say that the current passed through the body, through the hands to the side, or the other way? A I couldn't say that.

Q You couldn't say which way? A I couldn't say which way.

Q But you can say that it passed one way or the other? A It must have passed one way or the other.

By Mr. Hubbell.

Q You say that these burns killed him. Now, what experience have you had with electricity to know that these burns would have killed him? A Why, I have seen a number of cases where they have died of electricity; I have seen the burns after. I have seen two electrocutions.

Q Now, in your judgment as a physician, in what way did these burns kill him? A An autopsy on a man that is burned by electricity shows very little change in the body. Simply an electric current going through the body kills him, and it has very little effect, if any, on the tissues of the body except at the point of contact and the point where the fluid leaves the body. That is all you can tell about it.

Q He had clothing on? A Yes, sir.

Q That was a conductor to a certain extent, was it not? A There was the burn in the clothing.

Q But you don't know, except merely it is your opinion, that he died of these burns rather than the crushing of the head? A Of course, that is my opinion of it.

Mr. Osborne. I desire to rest, reserving the right to put on the morgue keeper if he comes in before the case closes.

Mr. Hubbell. We will admit that he is dead.

The Court. The question is whether the body which Dr. McKenzie examined was the body of Mr. Sexton.

Mr. Hubbell. We do not dispute that.

The Court. Cannot you enter into a stipulation on that, that the body that Dr. McKenzie examined was the body of Floyd Sexton?

Mr. Hubbell. Yes; we will admit that.

PETITIONER RESTS.

JOHN A. KIPP, sworn in behalf of respondent.

Direct examination by Mr. Hubbell.

Q Where do you live, Mr. Kipp? A 53 Eighth avenue, Newark.

Q Are you now employed by the respondent? A I am.

Q What are your duties? A Manager.

Q Do you know in regard to the duties of Mr. Sexton, who was alleged to have been killed? A Yes, sir.

Q What were his duties? A He was electrician for the Newark District Telegraph Company in the burglar alarm department.

Q Were you there on the 4th of July? A No, sir—with the exception of the morning; I was there from about eleven o'clock until 12.30.

Q As an electrician, when either of the electricians went out, what was their duty in regard to taking with them certain things? A Why, we provide rubber gloves; also provide a belt—anything that they can use in handling the wires.

Q And spurs? A Yes, sir.

Q You weren't there, so you don't know the time when Mr. Sexton went out? A I wasn't there, but I heard—.

Q Never mind what you heard. How long have you known Mr. Sexton? A About twenty-two years, twenty-three years.

Q What had been his physical condition?

Mr. Osborne. I object to that as immaterial, incompetent and irrelevant.

Mr. Hubbell. I think it is competent, because one of the allegations here is that he did intentionally self-inflict the injuries.

The Court. Your idea is that he committed suicide?

Mr. Hubbell. Yes.

The Court. I will take the testimony and give you an exception, Mr. Osborne.

Exception allowed; let it be sealed, and it is sealed accordingly.

Judge.

Q What had been his condition for some time previous to the 4th of July? A Well, he was all right up until about the middle of December, 1909, and then I was told he had a touch of tuberculosis.

The Court. Never mind what you were told. Strike out what he was told.

Q What did he do? A Well, he told us he had to go to a sanitarium.

Q Do you know why he went to a sanitarium? Don't say what he told you; just tell us what he did do. A Well, he went to a sanitarium.

Q And stayed how long? A Well, he was away from the office four months.

Q Under the pay of the company all the time? A Yes, sir.

Q What was his condition when he returned from the sanitarium? A Well, he looked very good to me; he seemed to be much better; he gained in health, was heavier.

Q Then he went back to work again? A Then he came to work, went to work on the first or second day of May.

Q 1910? A Yes, sir.

Q Well, then, along from here to the end of 1910 what appeared to be his physical condition? A Well, he seemed to be first-class for a while, and then after a while he seemed to get—I don't know just what I would say—as if everybody was against him and if we were trying to put all the work on this one man, and he was practically dissatisfied, and that is the reason he resigned from the office there for one week.

Q Was he despondent?

Mr. Osborne. This is all subject to the same objection, that it is all incompetent, irrelevant and immaterial. I don't want to object to every question.

The Court. The principal objection to this testimony is that it is nothing but a conclusion. He says he resigned. I think a resignation is a conclusion of law from certain acts. He says he cannot describe it, but he seems to have been despondent. The state of despondency is a conclusion. He is not stating the facts.

Q You can say he was in his normal condition?

The Court. That is not testimony, either. If he is going to tell us the condition of this man he ought to describe how he acted, what he did and how he conducted himself, and it may be that he might testify as to what he said. I am not so sure about that yet. The answer is stricken out.

Q How did he act from the time he returned from the sanitarium up to the time he was killed? Give us the history? A Well, for a time everything was all right, and after a while he imagined that everybody was putting all the work on him.

Mr. Osborne. I object. State what the man seemed to imagine.

Witness. I am only trying to state his condition.

The Court. The motion is to strike out the answer?

Mr. Hubbell. I am willing.

The Court. Strike it out.

Q Tell us his physical condition, how he looked.

The Court. What he did and how he appeared, your idea of what that amounted to, not whether it was a condition of discouragement or happiness or encouragement—how he acted and what he did.

Witness. When he returned he looked all right.

Q From the time he returned from the sanitarium give us his appearance and what he said about himself up to the time of the accident. A Well, he was a man that would very seldom say anything.

Q How did he appear? A Never told us any of his personal affairs. When he returned he appeared to be improved in health, in good condition.

Q Didn't he ever talk to you about his health at all? A I don't remember as he had. Once or twice he said that—I wouldn't say that—it wasn't told to me.

The Court. Tell us what he said to you and what you observed, not what somebody else told you.

Q His physical condition from the time he returned from the sanitarium—

Mr. Osborne. I submit he has repeated three or four times that his physical condition was good.

Q Tell us what it was along in September, 1910. A I said about seven months after he returned he started to go down, he seemed to be discouraged.

The Court. Strike out "discouraged."

Q (*By Mr. Osborne.*) How do you mean that he went down—went down to what? A He went down in health.

By the Court.

Q What did he do that makes you say what you have. What did he do and what was his appearance? A I will tell you. The trouble was this: Our men have to work there from six to nine every third week; they change the trick; he wanted to be relieved from that trick, and at that time we wasn't able to do so; we told him that as soon as we had another man and had him broken in so that he could handle it we would try to relieve him and make it every fourth week; but we can't get a man on a day's notice, if we want it, and on that account he was discouraged, and it was so bad that he resigned from the office and was away a whole week, and he came back again, and I says, "Have you secured a position anywhere else?" He says, "No." I says, "If you are not working why don't you come back here?" I says, "It will be all right here in a month or so."

The Court. What was that week he was away? (Witness produces paper.)

Mr. Hubbell. That is taken from our books.

Witness. May 16, 1911.

By the Court.

Q Is that the beginning or the end of it? A That is the time he resigned.

Q He was away the week beginning— A May 16th.

The Court. State what he did. You cannot say that he "resigned." Strike out the word "resigned."

Mr. Hubbell. He left the employment.

The Court. That is a conclusion. State what actually happened.

By Mr. Hubbell.

Q What did he say when he went away? A He didn't like the hours, and so forth, and simply quit.

Q Well, then, he came back again, you testified? A Yes, sir.

Q His condition after that, did it improve or deteriorate? A Just the same way. We was very glad to have him come back because we were short of men and we put up with a good deal that we wouldn't have otherwise.

Q After the death of Mr. Sexton you went to see his widow? A I did, yes, sir.

Q What conversation did you have with her?

Mr. Osborne. I object unless they disclose the materiality. The fact that he went there and talked with the widow hasn't anything to do with it.

Cross examination by Mr. Osborne.

Q When he came back after having resigned you re-employed him, did you? A Yes, sir.

Q And he was continuously in the employment of the company up to the time of his death? A Yes, sir.

Q Performing the duties that he had been accustomed to? A Yes, sir.

Q Those duties were to go up on poles and fix burglar alarm wires? A Yes, sir.

Q Were those wires on the same poles as the Public Service Electric Company's wires? A It was in this case.

Q In this case they were? A Yes, sir.

Q On the pole from which it is said Mr. Sexton fell, what wires were on that pole, do you know? A I don't know myself, no, sir.

Q Have you ever examined them? A Our cable runs up this pole and we have a cable box at the top of the pole.

Q And whose pole is that? Is that the Public Service Electric Company's pole? A So I understand.

Q And your cable runs up to a cable box at the top of the pole? A Yes, sir.

Q What is the purpose of that cable box? A That is our distributing point.

Q Distributes from that cable where? A Well, within a radius of three blocks from that centre. We run an aerial wire from there.

Q Your wires are underground, in an underground conduit? A Yes, sir.

Q And then leave the ground and go up to the overhead wire and are distributed from that box? A Yes, sir.

Q Are there two boxes on that pole? A Yes, sir.

Q What is the other one? A I think it is the Public Service Company.

Q And used for the same purpose, for distributing? A Yes, sir.

Q Are there any wires on the poles besides yours and the Public Service? A I guess there are some telephone wires.

Q Any others? A Not that I know of.

Q Do your wires carry any electricity? A Well, a very small current we use. You could put it on your tongue and it wouldn't hurt you.

Q Do you know whether the telephone wires carry any? A Well, they carry current.

Q Not enough to injure anybody? A I don't think so, no, sir.

Q Does the Public Service Electric Company carry current? A Yes, sir.

Q How much do they carry, if you know? A They are charged very heavy sometimes.

Q Enough to injure a person if he came in contact with them? A Yes, sir.

Q Do you know whether those wires are covered or not? A Those wires are covered, but it doesn't do much good; sometimes, if you are perspiring or—

Q No, where the insulation was worn off and gloves weren't much of a protection. A Yes, sir.

Q Do you know of any cases like that? A No, sir.

Q Then what leads you to that conclusion? A I have read of cases; that is all.

Re-direct examination by Mr. Hubbell.

Q You know about this pole, don't you? Do you know where the electric light wire is on that pole? A No, sir; I do not. I have nothing to do with the plant department. Our superintendent does that.

Q (*By the Court.*) What compensation did Mr. Floyd Sexton receive? A $70 a month.

Q How was he paid, weekly or monthly, or how? A Every two weeks.

Q How much? A $35.

Q Paid $35 every two weeks? A We pay on the 15th and the end of the month.

DANIEL J. McNAMARA sworn in behalf of respondent.

Direct examination by Mr. Hubbell.

Q Do you live in Newark? A Yes, sir.

Q Whereabouts? A I now live at 45 Hunterdon street.

Q Are you engaged with the respondent company? A Yes, sir.

Q In what position? A Foreman.

Q Foreman of what? A Of the burglar alarm department.

Q You know Mr. Sexton? A Ever since we have been working together.

Q How long? A About twenty-one years.

Q Did you ever have any conversation with Mr. Sexton about his health? A Only the time he was sent down to the sanitarium for tuberculosis; that is the only time; I visited him at his house before he was sent away several times and corresponded with him two or three times while he was there.

Q And nothing since then? A Nothing since then only until about six months ago, when he com-

menced to complain again; then he commenced to find fault with the way the work was done. On April 15th there was a change made at the office in the line of help, and a new man came on through him wanting to be relieved from night work; every third week we had to take a trick and work until about ten or eleven o'clock at night, and he claimed—

Mr. Osborne. I object to what he claimed.

Witness. Well. he said that the night work was interfering with his health, and he wanted to get off of it, he couldn't stand it any longer.

Mr. Osborne. I ought to object to all this testimony being admitted. To my mind it has no connection whatever with this work. I presume that the court is letting it in so that the matter can be passed upon if it goes up on appeal.

The Court. I do not like to see a case of importance turn on some unimportant technicality that can be prevented here. As no jury is here there is no harm. I will take it subject to the objection and will give you an exception. The objection is overruled.

Petitioner's counsel prays an exception to this ruling of the court.

Exception allowed; let it be sealed, and it is sealed accordingly.

Judge.

Q Then what happened after that? A At the time the change was made in the office I was appointed foreman, and this new man came in; he objected to this new man getting the same amount of wages as he.

Mr. Osborne. I object to this as entirely incompetent.

Q What was the condition of Mr. Sexton's health up to the time of the accident? A Fairly well, as far as I could understand. Of course, I wouldn't say that he was in perfect health.

Q This pole is situated where? A Southeast corner of Mulberry and Green streets.

Q Tell us how the wires are situated there, all of the wires. A Well, I hardly think I could describe just how the wires go.

Q Do you know how the electric wires run? A They take the long arms and buck arm, and I think it has two cross arms running in another direction, and then wired to the top of the pole.

By the Court.

Q What is the buck arm? A It is an arm runs on another angle from the way the wires have the pull.

Q Would the arms run east and west? A Some of them, and some run north and south.

By Mr. Hubbell.

Q How far is the electric light wire from the pole? A An ordinary space for a man to get through.

Q You have been up that pole how many times? A Oh, I dare say two dozen times.

Q Had Mr. Sexton ever been up the pole? A Yes, sir.

Q You know that to be a fact? A Yes, sir; positive of it; he had been up there frequently.

Q In going up that pole is there a way of safety? A I always found a safe way to go up the pole.

Q Tell us how, in ascending that pole, would be the safe way of avoiding any electric light wires? A Well, the way I always climbed the pole and the way he always made a practice of climbing the pole was to go up on the north side of the pole until we got to the electric light arm, and then after we got to the electric light arm we crossed over and went to the east side of the pole and reached our box.

Q And Mr. Sexton, to your knowledge, had been up many times? A Yes, sir.

Q How near, in going up, would that bring you to the electric light wires? A About eighteen inches—

nineteen inches, I should say, right up in between them.

Q Are rubber gloves and belt and spurs provided by the company? A Yes, sir.

Q And the employees are told to use them? A Yes, sir.

Mr. Osborne. I object.

Q Is it a rule of the company? A It has been a rule of the company ever since I have been with them.

The Court. The first objection is sustained. The second question that you ask, do you withdraw that?

Mr. Hubbell. Yes.

The Court. Strike out the answer.

Q What are the orders of the company in regard to their workmen, their linemen? A Well, the orders of the company are for a man to take the best of care of himself that he possibly can. The gloves are furnished to him, and when the gloves were given to us we were given orders to take those gloves whenever we went into any dangerous place and if the gloves showed the least sign of defect we were to be furnished with new gloves.

Q Do you know whether Mr. Sexton took gloves and belt with him? A He did not. I wouldn't say positively as to the belt, but he did not take gloves with him.

Q The wires that carried electricity, do you know who owns them? A Well, the Public Service, the New York Telephone Company, the Newark Telephone Company and the Newark District Telegraph Company. Four companies on that pole.

Q Which wires on that pole carry the dangerous current? A As far as I know the Public Service.

Q Do the wires of the respondent company carry any dangerous current? A We only carry about 18 volts when we leave our switchboard, and by

the time it reaches the subscriber's end it is very much lower then.

Cross examination by Mr. Osborne.

Q How many volts do the telephone wires carry, do you know? A I couldn't tell.

Q Or the telegraph wires? A Which telegraph wires?

Q Didn't you say there were telegraph wires on there? A I said the Newark Telephone and the New York Telephone and—

Q You don't know how much voltage they carry? A I couldn't tell you anything about it.

Q Have you ever had your hands on the wire? A Oh, yes.

Q Not enough to— A Not enough to kill anybody, no, sir.

Q Do you know how much voltage the Public Service wires carry? A Only from hearsay.

Q When were you last up that pole prior to the accident? A I couldn't give you the exact date, but it was the Sunday morning after the heavy thunder and lightning shower that we had.

Q Did you notice the condition of the Public Service wires then as to insulation? A They were just the same then as they are now.

Q You mean to say they were properly, apparently, insulated? A I wouldn't say they were properly insulated.

Q You say they were just the same as they are now. What was their condition then? A Apparently looked all right to me; I went up to them safely.

Q You didn't observe anything wrong about the insulation of those wires? A No, sir; I didn't observe anything wrong myself.

Q What? A Not the time I went up I didn't observe anything wrong, the time I went up there.

Q Three weeks before the accident? A Sunday morning, quarter to six, I went up that pole.

Q You haven't observed anything since about the insulation of those wires? A I haven't had occasion to go up since.

Q I thought you said you had? A No, sir.

Q You were up there two weeks previous? A Yes, sir.

Q And you haven't been up since? A No, sir.

Q Were you with Sexton on the morning of the accident? A I was with him about twenty-five minutes to five, about fifteen minutes before his death.

Q Did you leave the office together? A No, sir.

Q Where did you meet him? A I had left him at the office.

Q Where did you pick him up again? A The next time I saw him was when he laid in the casket in his house.

Q I thought you said you were with him until something after five o'clock on that afternoon? A I says I was with him until about twenty-five minutes to five in the afternoon.

Q Of the afternoon that he was hurt? A Yes, sir.

Q You say you left him at the office? A Left him at the office.

Q After you left him at the office you said you saw him next in his casket. How could you have been with him until five twenty-five that afternoon? A I didn't say I was with him until five twenty-five. I said I was with him until twenty-five minutes to five.

Q Whereabouts? A In the office.

Q Was he in the office all the afternoon? A At intervals, yes, sir. On an afternon like the 4th of July, holidays like any other day, our subscribers are opening up their safes or their stores, and we have to visit those places for identification purposes.

Q I am trying to find out just how you and Sexton were together on the afternoon that he was hurt. Tell us about it. You know what I want. Did you go out with Sexton? Where did you see him? A That afternoon we traveled separately.

Q When did you last see him before the accident? A 4.35 on the afternon of July 4th.

Q Then you left the office? A Yes, sir.

Q Leaving him there? A Yes, sir.

Q So you don't know whether he took any gloves with him or not? A No, sir; I am not positive of it.

Q Why did you say he didn't? A Because the gloves were at the office when I reached the office after I was notified of his death.

Q The gloves were at the office? A Yes, sir.

Q You don't know what appliances he took with him? A As far as I could see—

Q You don't know what safety appliances he took with him? A Not of my own knowledge, no.

Q That is what I want. And you don't know what precautions he took when he was climbing that pole? You didn't see him climb it? A I didn't see him climb it, no.

By the Court.

Q And these orders that you talk about in the form of rules, were they written rules of the company? A What orders are those, Judge?

Q The orders to take rubber gloves and belt. A Well, as far as to my knowledge it was a written rule years ago.

Q Have you ever seen the rules? A No, I haven't seen it personally myself, but I understood that such was the case and it was told to me personally.

By Mr. Osborne.

Q You don't know if Mr. Sexton ever saw them, do you? A But I know of my own knowledge that he was told.

Q Wait a minute. You don't know that Mr. Sexton ever saw—

The Court. He says he knows of his own knowledge that Mr. Sexton was told of this rule.

Q You don't know of your own knowledge that Mr. Sexton ever saw any rules? A Written rules?

Q Yes. A Regarding the use of rubber gloves and the like?

Q Yes. A No, I don't know.

By Mr. Hubbell.

Q Do you know whether he knew of unwritten rules? A Yes, sir; I knew that both of us knew of unwritten rules. We both got our orders when the gloves were handed over to us and told us to use the gloves when the occasion arose.

By the Court.

Q Were you there when he got them? A Yes, sir; both pairs were handed over to us together.

By Mr. Osborne.

Q When was that? A I don't remember the date.

Q How many pairs of gloves were handed to you? A Each one a pair of gloves.

Q That was the only pair you got? A Oh, no; when those wore out we got new gloves.

Q How long ago was that? A I don't know when we got them.

Q How long did those gloves ordinarily last? A That I couldn't say.

Q Which time was it that you heard Mr. Sexton instructed as to the use of the gloves that were handed over to him? A What do you mean by that?

Q When the gloves were handed over to Mr. Sexton you heard him told what to use them for? A When the gloves were given to us.

Q You say there were several pairs to you. What occasion was that? A That first occasion when we

got gloves we were told that when they were worn out they would be renewed.

Q When was it that you first got gloves? A That I don't just remember. I have been doing this work for a great number of years now.

Q So it is a great number of years that you remember Sexton being told about the use of the gloves? A He has only been employed there ten or twelve years.

Q You have been there longer in this department? A Yes, sir.

Q When did you first do this kind of work? A I can't remember how long I am in this department; I didn't keep record of it.

Q Do you know whether it was before Sexton came in or not? A Yes, sir; but I didn't do this kind of work.

Q When did you first do this kind of work? A I don't remember.

Q Was it before Sexton came in? A Yes.

Q So that you were doing this kind of work before Sexton came in this department? A Yes, sir.

Q And you were doing it with rubber gloves? A Yes, sir.

Q And when those gloves were handed out these instructions were given, Sexton wasn't there? A No, sir; he wasn't.

Q So when you said before that he got his instructions when the rubber gloves were first handed out to you you were mistaken, weren't you? A No, sir.

Mr. Hubbell. The gloves were renewed from time to time.

Witness. The gloves were renewed from time to time and both pair of gloves were handed to us together; he was handed a pair of gloves the same time I was handed a pair of gloves, and that was what we were told to do. Of course, I had a pair of rubber gloves before that. I am not saying that I didn't have gloves before that.

Q Did you see Sexton's gloves in the box? A Yes, I see his gloves there.

Q What was the condition of the gloves? A The gloves looked all right to me.

Q No burns on them? A No, sir.

RESPONDENT RESTS.

PETITIONERS REST.

Mr. Hubbell. I would like to make a motion that the proceeding be dismissed, first, that the facts have not been presented in such a way as to give a ground for a verdict for the petitioner.

Second, that the pleadings in this case do not show that the respondent committed any wrong, and we ask this upon the principle and authority that the legislature cannot impose liability except for the violation of a legal duty.

Third, this action should be dismissed upon the ground that it is brought under an act of the legislature which violates the Fourteenth Amendment of the United States Constitution.

Fourth, this action should be dismissed because it violates the State Constitution in that it does not permit the respondent to have his case tried by a jury.

Fifth, this action should be dismissed for the reason that the act on which it is brought deprives the respondent of his property without due process of law.

Sixth, the act took effect July 4, 1911, at twelve noon, while Sexton died about four p. m. of the same day. It was, therefore, impossible for the respondent to give notice to the deceased that the provisions of Section 2 of this act are not intended to apply. The law does not require the performance of impossibilities.

Seventh, that Sexton was killed by an outside cause.

Eighth, that it violates Article 1, Section 10, of the United States Constitution respecting the impairment of the obligation of contract.

Mr. Hubbell sums up for respondent.

Mr. Osborne sums up for petitioners.

RECESS.

Mr. Depue sums up for Employers' Liability Commission.

Adjourned until Monday, October 9, 1911, at ten o'clock in the morning.

ESSEX COUNTY COURT OF COMMON PLEAS.

Thursday, November 23, 1911.

LIZZIE ALIDA SEXTON, for herself and others, *Petitioner,* *vs.* NEWARK DISTRICT TELEGRAPH COMPANY, *Respondent.*	*Petition for Compensation.*

Before Hon. William P. Martin.

Appearance as before stated.

Mr. Osborne. In the case of Sexton against Newark District Telegraph Company, I gave notice that I would apply to your honor this morning to open this case for the purpose of introducing further testimony on two points. While they were touched upon they perhaps were not touched upon as fully as they should have been in detail.

Mr. Hubbell. May it please the court, I would like to enter an objection upon the record, on the ground that at the trial on the 6th of October, the petitioner rested and did not, within a reasonable time, request the court to have the case reopened.

The Court. The situation is this: Upon a careful review of the testimony in this case, and upon consideration of the proposed statement and determination of facts presented by the petitioner to the court, the court reached the conclusion that there was a possibility, if the constitutionality of the act was sustained, that you might be required to pay to Mrs. Sexton something for the account of her eldest son, even

after he arrived at the age of sixteen years, so I notified counsel for the petitioner to let me know if there was any testimony on that subject, and he stated to me that the testimony showed that Horace C., I think it was, was ten years old, but that it did not state the date of his birth, and I presume that counsel for the petitioner has served the notice to get the matter before the court.

Mr. Hubbell. It is one of those matters which sometimes one consents to, but I have consented at other times to different matters that have gone up to the Supreme Court and I have found it is not always well to consent.

The Court. I want you to be informed of the situation. If you object I want you to state the grounds of your objection.

Mr. Hubbell. Under the different decisions of the court, and in the case of *State* vs. *Fox*, 1 Dutch, 566, the rule was that it should be done before the jury had gone out or else they might be recalled at the time of the trial.

The Court. This is not a jury trial.

Mr. Hubbell. I know it is not, but the trial took place, and your honor combines the judge and the jury. It ought to be done within a reasonable time.

The Court. Your chief complaint is that there was no jury trial.

Mr. Hubbell. But your honor is the judge of the facts. I just merely want to enter my objection.

The Court. I will note your objection on the record and the court will take the position that this is a discretionary matter, and, it being a matter of discretion, the court cannot allow you an exception, but the court will give you an exception. That will get you in proper position to protect your rights.

Exception allowed; let it be sealed, and it is signed and sealed accordingly.

WILLIAM P. MARTIN, (SEAL)
Judge.

LIZZIE ALIDA SEXTON, recalled in behalf of petitioner.

Direct examination by Mr. Osborne.

Q Mrs. Sexton, your oldest boy's name is what? A Horace Calvin.

Q When was he born? A May 16, 1901; he was ten years old last May.

Q And the youngest boy's name is what? A Gordon W.

Q And he was born? A He was eight years old the 9th of last February.

Q Those are the only children you have? A Yes, sir.

Q Was there any administration taken out, letters testamentary granted upon your husband's estate? A I have been made administratrix.

Q Have you? A Yes, sir.

Q Since when? A Well, I guess it was about four or five weeks.

Q Were you made the administratrix prior to the beginning of these proceedings? A Yes—no, I wasn't.

Q Which happened first? Was this petition filed by you before you were made administratrix? A Yes, before this was filed.

By the Court.

Q Do you know of any will left by your husband? A No, sir.

Q No last will and testament that you know of? A No, sir.

Cross examination by Mr. Hubbell.

Q You examined your husband's papers and could not find any will? A He didn't have any will.

Q You know that he didn't make any will? A I know that he did not.

Reasons.

Filed, January 18, 1912.

NEW JERSEY SUPREME COURT.

LIZZIE ALIDA SEXTON, *et als*, *Defendants*, *vs.* NEWARK DISTRICT TELEGRAPH COMPANY, *Prosecutor.*	*On Certiorari. Reasons for setting aside Judgment.*

The said plaintiff by John J. Hubbell, its attorney, comes and prays that the judgment made against it in the Inferior Court of Common Pleas in the County of Essex by William P. Martin, Esq., one of the judges of said Court of Common Pleas, in which judgment was rendered in the records of the Court of Common Pleas, on December fourth, nineteen hundred and eleven, may be set aside, reversed and for nothing holden, for the following reasons:

First, because the said judge of the Court of Common Pleas had no jurisdiction to hear and determine the cause.

Second, because the facts were not presented in such a way at the hearing as to give a ground for verdict for the plaintiff in certiorari.

Third, because the pleadings in this case do not show that the plaintiff in certiorari committed any wrong, and it was asked that this action be dismissed upon the principle and authority that the legislature

cannot impose liability except for the violation of a legal duty.

Fourth, because this action was brought under an act of the legislature, which violates the fourteenth amendment of the United States Constitution.

Fifth, because this action is brought under an act of the legislature, which violates article I, section seven of the state constitution in that it does not permit a trial by jury.

Sixth, because the act under which this action is brought is repugnant to the fourteenth amendment to the constitution of the United States, in that it deprives the respondent (the plaintiff in certiorari) of its liberty and property without due process of law, and denies to respondent the equal protection of the laws.

Seventh, because the act of the legislature under which this action is brought took effect on July fourth, nineteen hundred and eleven, while Sexton died about four p. m. of the same day, and it was therefore impossible for respondent (the plaintiff in certiorari) to give notice to the deceased, that the provisions of section two of the employer's liability act were not intended to apply. The law does not require the performance of impossibilities.

Eighth, because Sexton was killed by an outside cause.

Ninth, because the act and the supplement is in violation of article I, section ten of the constitution of the United States, and paragraph three, section seven, article IV, of the state constitution, in that it impairs the obligation of a contract.

Ten, because the employer's liability act violates the act of a minor, in that section two, paragraph nine, of said act states, that in the employment of a minor,

Reasons.

section two shall be presumed to apply, unless the notice be given by or to the parent or guardian of the minor. This presumption would be against the minor, who is under a disability to make a contract. This presumption of contract against a minor is void.

Eleven, because the said judgment, order and proceedings are in divers other respects irregular, illegal, oppressive and unjust to the said plaintiff.

JOHN J. HUBBELL,

Attorney of Plaintiff in Certiorari.

Filed, January 18th, 1912.

Reasons.

Filed, January 25, 1912.

NEW JERSEY SUPREME COURT.

LIZZIE ALIDA SEXTON, on behalf of herself and the next of kin, *et als*, *Defendants*, *vs.* NEWARK DISTRICT TELEGRAPH COMPANY, *Prosecutor.*	*On Certiorari. Additional Reason for setting aside Judgment.*

The said prosecutor by John J. Hubbell its attorney, having filed certain reasons in this court, why the judgment made against it by William P. Martin, Esq., one of the judges of the Court of Common Pleas of Essex County, entered on December fourth, nineteen hundred and eleven, should not be set aside.

The said prosecutor files an additional reason for the setting aside of said judgment, and which reason is found upon the decision filed by the said judge in the above stated cause.

Twelfth. Because the employer's liability act cannot be upheld upon the doctrine of the police power of the state as the said act is not designed to conserve health, safety, comforts, morals, peace, and order.

JOHN J. HUBBELL,
Attorney of Prosecutor.

Filed, January 25th, 1912.

Opinion.

Filed, February 25, 1913.

NEW JERSEY SUPREME COURT.

November Term, 1912.

LIZZIE ALIDA SEXTON, on behalf of herself and the next of kin,
Defendants,
vs.
NEWARK DISTRICT TELEGRAPH COMPANY,
Prosecutor.

Submitted December 6, 1912; decided February 25, 1913.

SYLLABUS.

1. When a judgment of the Court of Common Pleas, awarding compensation in case of death under section II of the Employers' Liability Act of 1911 (p. 134, chap. 95), is removed to the Supreme Court by certiorari, the Supreme Court accepts the findings of the Common Pleas Court upon the facts if there be any legal evidence to warrant them.

2. Section I of the Employers' Liability Act, of April 4, 1911 (p. 134, chap. 95), allows a recovery only in cases where the employee can show that his injuries were caused by an accident "arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause," and "provided the employee was himself not wilfully negligent," and

abolishes the common law defenses of assumption of risk and the fellow servant rule.

Held, that, in modifying or abolishing such defenses to an action for an injury sustained after the act became effective, the section does not violate the "due process of law" and "equal protection of the law" provisions of the Fourteenth Amendment of the Federal Constitution, nor does it impair the obligation of contracts, in violation of the State and Federal Constitutions.

3. Section II of the Employers' Liability Act of April 4, 1911 (p. 134, chap. 95), provides that compensation shall be made "without regard to the negligence of the employer" when the employer and employe shall by agreement, either express or implied, accept the provisions of Section II, and where the personal injury or death for which compensation is sought is the result of an accident arising out of and in the course of the employment, in all cases except when the injury or death is intentionally self inflicted, or when intoxication is the natural and proximate cause of injury. The section further provides that, with respect to contracts of hiring made after the act becomes effective, it shall be presumed that the parties are acting under Section II if one or the other does not then or before the accident expressly elect to operate under Section I.

Held, that such provisions of Section II are not in violation of the "due process of law" provision of the Fourteenth Amendment of the Federal Constitution.

4. The supplement of May 2, 1911 (p. 763, chap. 368), was approved May 2, 1911, and provides that it shall take effect on the fourth day of July next, succeeding its passage and approval. On May 23, 1911, Floyd Sexton was employed by the prosecutor. On July 4th, 1911, at five o'clock in the afternoon, he was killed whilst engaged in that employment. Proceedings were subsequently begun under Section II of the

Employers' Liability Act of April 4, 1911 (p. 134, chap. 95), to recover compensation for his death.

Held (1), that, in view of the supplement of May 2, 1911, which provides that "every contract of hiring * * * now in operation or made or implied prior to the time limited for the act to which this act is a supplement to take effect (July 4, 1911), shall, after this act takes effect, be presumed to continue subject to the provisions of Section two of the act to which this act is a supplement, unless either party shall, prior to accident, in writing, notify the other party to such contract that the provisions of Section two of the act to which this act is a supplement are not intended to apply," there arose a presumption that Sexton's employment when killed was subject to the provisions of Section two, it appearing that there was nothing in the contract to the contrary, and that the notice required by the supplement had not been given;

Held (2), that, under the facts as recited, there was no impairment of the obligation of the contract of employment.

5. In reviewing by certiorari a judgment of the Court of Common Pleas, awarding compensation on account of the death of an employe under Section II of the Employers' Liability Act of 1911 (p. 134, chap. 95), an allegation that the provision of paragraph 9 of the act that "in the employment of minors Section II shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor" is void, will not be considered by the Supreme Court when it appears that decedent was thirty-four years old at the time of his death.

6. Section II of the Employers' Liability Act of 1911 (p. 134, chap. 95), does not violate Art. 1 Sec. 7 of the New Jersey Constitution providing that "the right of a trial by jury shall remain inviolate."

On certiorari.

Before Justices Trenchard, Parker and Minturn.

For the prosecutor, George W. Hubbell.

For the defendant, Harry V. Osborne.

For the Employers' Liability Commission, Frank H. Sommer and Kinsley Twining.

The opinion of the court was delivered by Trenchard, *J.*

This writ brings up for review a judgment of the Essex County Common Pleas Court against the prosecutor in an action under the Employers' Liability Act, approved April 4, 1911 (p. 134, chap. 95), and the supplement thereto approved May 2, 1911 (p. 763, chap. 368).

The act of April 4, 1911 (the main act) is divided into three sections. The first six paragraphs are included within Section I, which is entitled "Compensation by Action at Law."

These paragraphs, so far as they are pertinent to this case, are as follows:

"Section I. Compensation by Action at Law."

"1. When personal injury is caused to an employe by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he shall receive compensation therefor from his employer, provided the employe was himself not wilfully negligent at the time of receiving such injury, and the question of whether the employe was wilfully negligent shall be one of fact to be submitted to the jury subject to the usual superintending powers of a court to set aside a verdict rendered contrary to the evidence."

"2. The right to compensation as provided by section I of this act shall not be defeated upon the ground that the injury was caused in any degree by the neg-

ligence of a fellow employe; or that the injured employe assumed the risks inherent in or incidental to or arising out of his employment or arising from the failure of the employer to provide and maintain safe premises and suitable appliances; which said grounds of defense are hereby abolished." * * *

"4. The provisions of paragraphs one, two and three, shall apply to any claim for the death of an employe arising under an act entitled 'An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default,' approved March third, eighteen hundred and forty-eight, and the amendments thereof and supplements thereto."

"5. In all actions at law brought pursuant to section I of this act, the burden of proof to establish willful negligence in the injured employe shall be upon the defendant." * * *

Paragraphs 7 to 22 inclusive are included within section II, which is entitled "Elective Compensation," and, so far as pertinent, are as follows:

"Section II. Elective Compensation."

"7. When employer and employe shall by agreement, either express or implied, as hereinafter provided, accept the provisions of section II of this act, compensation for personal injuries to or for the death of such employe by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in paragraph eleven, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury, and the burden of proof of such fact shall be upon the employer."

"8. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof

than as provided in section II of this act, and an acceptance of all the provisions of section II of this act, and shall bind the employe himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency."

"9. Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of section II of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section II of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section II of this act and have agreed to be bound thereby. In the employment of minors, section II shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor."

"10. The contract for the operation of the provisions of section II of this act may be terminated by either party upon sixty days' notice in writing, prior to any accident." * * *

(Paragraph 11 sets forth the schedule of compensation for injury. Paragraph 12 provides a basis of compensation in case of death.)

"18. In case of a dispute over, or failure to agree upon, a claim for compensation between employer and employe, or the dependents of the employe, either party may submit the claim, both as to questions of fact, the nature and effect of the injuries, and the amount of compensation therefor according to the schedule herein provided, to the judge of the Court of Common Pleas of such county as would have jurisdiction in a civil case, or where there is more than one judge of said court, then to either or any of said judges

of such court, which judge is hereby authorized to hear and determine such disputes in a summary manner, and his decision as to all questions of fact shall be conclusive and binding." * * *

The remaining paragraphs are included within section III, which is entitled "General Provisions," and, so far as pertinent, are:

"24. In case for any reason any paragraph or any provision of this act shall be questioned in any court and shall be held to be unconstitutional or invalid, the same shall not be held to affect any other paragraph or provision of this act, except that sections I and II are hereby declared to be inseparable, and if either section be declared void or inoperative in an essential part, so that the whole of such section must fall, the other section shall fall with it and not stand alone. Section I of this act shall not apply in cases where section II becomes operative in accordance with the provisions thereof, but shall apply in all other cases, and in such cases shall be in extension of the common law." * * *

"27. This act shall take effect on the fourth day of July next, succeeding its passage and approval."

The act was approved, April 4, 1911.

The supplement of May 2, 1911, is as follows:

"1. Every contract of hiring, verbal, written or implied from circumstances, now in operation or made or implied prior to the time limited for the act to which this act is a supplement to take effect, shall, after this act takes effect, be presumed to continue subject to the provisions of section two of the act to which this act is a supplement, unless either party shall, prior to accident, in writing, notify the other party to such contract that the provisions of section two of the act to which this act is a supplement are not intended to apply."

"2. This act shall take effect on the fourth day of July next, succeeding its passage and approval."

This act was approved May 2, 1911.

In the present case, a dispute arose as to the liability of the prosecutor, the employer of Floyd Sexton, to make compensation for the death of Sexton. A claim, made by his widow on behalf of herself and the next of kin, was presented to the judge of the Court of Common Pleas of the County of Essex, as allowed by paragraph 18 of the act. The claim was based upon the theory that there had been an implied acceptance by the employer of the provisions of section II of the act. A judgment in favor of the claimant, and against the prosecutor, was entered, computed upon the basis allowed by the act, and the employer sued out this writ.

The learned trial judge made certain findings of fact from which it appears that on July 4, 1911, at about five o'clock in the afternoon, Floyd Sexton, the husband of the claimant, while employed by the prosecutor, met his death "by an accident arising out of and in the course of his employment," without any negligence whatsoever on his part.

The first reason assigned for reversal is "because the facts were not presented in such a way at the hearing as to give a ground for verdict for the plaintiff in certiorari."

We assume that this reason is intended to raise the question whether the evidence before the trial judge was sufficient to warrant his findings of fact. As stated above, paragraph 18 of the act made the Common Pleas judge's "decision as to all questions of fact * * * conclusive and binding." Furthermore, paragraph 20 of the act, which relates to procedure in all cases of dispute, expressly provides that after the entry of judgment—"Subsequent proceedings thereon shall only be for the recovery of moneys thereby determined to be due, provided that nothing herein contained shall be construed as limiting the jurisdiction of the

Supreme Court to review questions of law by certiorari."

Hence, when the judgment of the Common Pleas Court is removed by certiorari to the Supreme Court, the function of the writ is that of a writ of error. In such case the Supreme Court accepts the findings of the Common Pleas Court upon the facts if there be any legal evidence to warrant them.

Ryer vs. *Turkel,* 46 Vroom, 677.

In the present case there was ample legal evidence to support such findings.

Other reasons for reversal aver that the main act of April 4, 1911, violates the "due process of law" and "equal protection of the laws" provisions of the Fourteenth Amendment of the Federal Constitution, and that the act impairs the obligation of contracts, in violation of the State and Federal Constitutions.

The proceedings under review are not under section I of the act. But, sections I and II providing two entirely different schemes—one regulative of the common law, and the other purely the creature of statute—are so interwoven and constitute so completely one single plan that it is unlikely that if section I is bad, the legislature intended that section II should stand. Indeed, the contrary is expressly provided in paragraph 24 of the act. It is therefore necessary to consider the objections raised, as they may be applicable to either section. Section I allows a recovery only in cases where the employe can show that his injuries were caused by an accident "arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause," and "provided the employe was himself not wilfully negligent." The section does, however, abolish the common law defenses of assumption of risk and the fellow servant rule.

Cases are numerous and we think uniform in holding that the defenses modified or abolished by section

I of the act may be modified or abolished by the legislative power when they relate, as here, to an injury sustained by an employe after the legislative provision becomes effective. *Missouri Ry. Co.* vs. *Mackey,* 127 U. S., 205; *Minneapolis, etc., Ry. Co.* vs. *Herrick,* 127 U. S., 210; *Tullis* vs. *Lake Erie & Western R. R.,* 175 U. S., 348; *Chicago, Burlington & Quincy R. R. Co.* vs. *McGuire,* 219 U. S., 549; *Kibbe* vs. *Stevenson Iron Min. Co.,* 136 Fed., 147; *Watson* vs. *St. Louis R. R. Co.,* 169 Fed., 942, 946; *Hancock* vs. *N. & W. Ry. Co.,* 124 N. C., 222; *Ind. Union Ry. Co.* vs. *Houlihan,* 157 Ind., 494; *Vindicator Consol, Gold Mining Co.* vs. *Firstbrook,* 36 Colo., 498; *Quackenboss* vs. *Railroad,* 62 Wis., 411; *Railroad* vs. *MacNamara,* 122 S. W., 102 (Ark., 1909).

The last case in the United States Supreme Court with reference to the right to limit or abolish common law defenses is Second Employers' Liability Cases, 223 U. S., p. 1. Mr. Justice Van Devanter, speaking for the court, said on p. 51:

"Of the objection to these changes it is enough to observe:

"First: 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will * * * of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances' (*Munn* vs. *Illinois,* 94 U. S., 113, 134; *Martin* vs. *Pittsburg & Lake Erie R. R. Co.,* 203 U. S., 284, 294; *The Lottawanna,* 21 Wall., 558, 577; *Western Union Telegraph Co.* vs. *Commercial Milling Co.,* 218 U. S., 406, 417.)"

"Second: The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the basis of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employes and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution (*Lottery Case,* 188 U. S., 321, 353, 355; *Atlantic Coast Line R. R. Co.* vs. *Riverside Mills,* 219 U. S., 186, 203)."

As a corollary to the above, the opinion proceeds, on page 52:

"Next in order is the objection that the provision in section 5, declaring void any contract, rule, regulation or device, the purpose or intent of which is to enable a carrier to exempt himself from the liability which the act creates, is repugnant to the Fifth Amendment to the Constitution as an unwarranted interference with the liberty of contract. But of this it suffices to say, in view of our recent decisions in *Chicago, Burlington & Quincy Railroad Co.* vs. *McGuire,* 219 U. S., 549; *Atlantic Coast Line Railroad Co.,* vs. *Riverside Mills,* 219 U. S., 186, and *Baltimore & Ohio Railroad Co.* vs. *Interstate Commerce Commission,* 221 U. S., 612, that if Congress possesses the power to impose that liability, which we here hold that it does, it also possesses the power to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it."

See also Mr. Justice Moody's dissenting opinion in Employers' Liability cases, 207 U. S., 463, at pp. 536-539.

This court has sustained the constitutionality of the 1909 Employers' Liability Act (P. L., 1909, p. 114), which act, as appears from the opinion, regulated the common law defenses of employers (*Quigley* vs. *Lehigh Valley Railroad Company,* 51 Vroom, 486).

Certainly, as against the objections stated, section I of the act is clearly a valid and constitutional enactment.

Section II of the act differs essentially from Section I in that it provides that compensation shall be made "without regard to the negligence of the employer" when the employer and employe shall by agreement, either express or implied, accept the provisions of section II, and where the personal injury or death for which compensation is sought is the result of an accident arising out of and in the course of the employment, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury.

Objection is made to this section upon the ground that it makes the employer liable to pay its employes compensation for injuries which were not due to the negligence of the employer. It is urged that such scheme can only be binding upon the employer with his consent, for otherwise the award of compensation provided by section II deprives him of his property without "due process of law."

This contention as an objection to the constitutionality of the act is wholly without substance and is apparently founded upon an insufficient consideration of the scheme of the statute. Under the act neither the employer nor the employe is bound to accept the provisions of section II unless he chooses to do so. If he does not he certainly is not deprived of property without due process of law. If he does, then he has given the consent which the prosecutor contends he must give in order to be bound by the provisions of the second section.

The authorities above cited are equally controlling here. No coercion was exercised by the legislature upon either party to the contract of hiring. It is left entirely optional with them whether they will stand upon the first or second sections of the act. If both parties to the contract of hiring agree to operate un-

der the second section neither can complain. If they do not agree, then by appropriate proceedings the dissatisfied party may operate under section I of the act.

Perhaps the real complaint of the prosecutor is that the legislature by paragraph 9 has created a presumption that, with respect to contracts of hiring made after the act becomes effective, the parties are acting under the second section, if one or the other does not then or before the accident expressly elect to operate under the first.

It cannot be doubted that under our industrial conditions and in order to avoid much confusion and unproductive litigation, it may well have been considered proper to establish some presumptive rule as to an election between section I and section II of the act.

It can make no practical difference whether the presumption is that the contract of hiring is subject to section I or to section II, or whether both employer and employe are required to enter into some express contract accepting one or the other of the statutory alternatives. The latter course would naturally involve a very great amount of labor and trouble, especially on the part of employes.

The legislature has seen fit to adopt a presumptive rule, leaving the parties to overcome the presumption by their own act, if they desire to do so. It has also seen fit to adopt the presumption in favor of section II, no doubt because it was thought that that offered the fairest basis for both employer and employe.

It would have been quite as competent for the legislature to have adopted either of the other alternatives suggested, but in its wisdom it has not seen fit to do so. Really, the matter comes down to a question of presumption or burden of proof, which it is entirely within the control of the legislature to regulate so long as the parties are left entirely free to make whatever contract they choose, as they are in this case. We are, therefore, of the opinion, that, as against the objection stated, section II is constitutional.

It is further argued (though perhaps the point is not distinctly raised by the reasons), that the supplement (chap. 368), violates the constitution in that it impairs the obligation of a "pre-existing" contract. We think not. We think that, as against the objections of the prosecutor, it was competent for the legislature to enact the supplement; that it deprived the prosecutor of no constitutional rights, and a recovery may be had in this case although Sexton's death occurred at five o'clock in the afternoon of July 4th, 1911.

It is to be remarked that an act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt. *Atty. General* vs. *McGuinness*, 49 Vr., 346.

Any consideration of the constitutional aspects either of the act or of the supplement must be limited to the question whether the proceedings under review violate the constitutional rights of the prosecutor. The question cannot be broader than that raised by the facts. That the act or the supplement may or may not deprive parties to suppositious cases of constitutional rights has no bearing upon the present case, if it appears that the parties before the court are not deprived of constitutional rights by the proceeding under review.

That the scope of the inquiry is so limited is too well settled to admit of dispute. *Cooley's Const. Lim.* (6th Ed.), p. 196; *Lee* vs. *State of New Jersey*, 207 U. S., 67, 70; *Williams* vs. *Walsh*, 222 U. S., 415, 423; *Pittsburg Steel Co.* vs. *Baltimore Equitable Society*, 226 U. S., 455; *State* vs. *DeLorenzo*, 78 Atl., 660, 661.

The situation in the present case is this:

On April 4, 1911, the main act was approved. On May 2, 1911, the supplement was approved, and on May 23, 1911, Sexton's employment began. Under the rule above stated, we are not concerned with the effect of the supplement upon "pre-existing contracts," be-

cause Sexton's contract did not come into existence until May 23, 1911. It is obvious that in the present instance the prosecutor could have inserted in its contract with Sexton, that the provisions of section II were not to apply thereto. If Sexton had been unwilling to enter into such a contract he was free to refuse to do so. The contract in the present case was subject to no legislative interference, nor was there any restraint upon the freedom of both parties to make such contract as they saw fit. This being the case, the prosecutor is driven to the untenable position that even though it had elected that Sexton's contract of hiring should be with reference to section II (since the contract did not provide to the contrary), it cannot be bound by its election because it was not competent for the legislature to require it to elect.

Although the supplement provided that it should take effect on July 4, it made ample provision whereby either Sexton or the prosecutor, in entering into the contract of May 23, 1911, might prevent it from becoming subject to the provisions of section II, either by so providing in the contract itself, or by giving notice to that effect prior to the occurrence of an accident, and that they did not do. All of the intervening time between May 2, 1911, and July 4, 1911, was allowed to both employers and employes to determine their attitude with regard to the law. No doubt during this interval both employers and employes considered the situation, which was given the widest publicity, so that by July 4, 1911, they had had the fullest opportunity to determine what course they should adopt. We think it may be fairly said, that although the supplement did not become effective until July 4, 1911, it had a potential existence from the date of its approval and that for a period of upwards of two months both employers and employes were put on notice of the presumption of the act and what it was necessary for them to do if it was desired that the presumption should not apply.

The following cases are ample authority for that proposition:

Lamb vs. *Powder River Live Stock Co.,* 132 Fed., 434.

Smith vs. *Morrison,* 22 Pick., 430.

Mulvey vs. *Boston,* 197 Mass., 184.

Osborne vs. *Lundstrom* (North Dak.), 81 N. W., 72.

State vs. *Krahmer,* 105 Minn., 422.

State vs. *Dircks,* 211 Mo., 568.

Diamond Glue Co. vs. *U. S. Glue Co.,* 187 U. S., 611.

Pennsylvania vs. *State of Indiana,* 142 Ind., 428.

In *Stuhr* vs. *Hoboken,* 18 Vroom, 148, the Court of Errors and Appeals held that, where, after an ordinance is passed fixing a salary for the next ensuing term, an officer is elected, the ordinance will fix the salary for that term, although it did not, because of the necessity of publishing it, take effect until after the term began.

In support of the point now under discussion, the prosecutor contends that the supplement is invalid because it required the performance of an impossibility. The supplement took effect at the first moment of July 4th. The accident did not occur until five o'clock in the afternoon of that day. Since it is obvious that it was not impossible to give notice either on or before July 4, the claim must rest upon the theory that the supplement required the giving of a sixty-day notice, and the accident ocurring within sixty days after the employment, no such notice could have been given. Since, as a matter of fact, no notice was given by the prosecutor either on July 4th or prior thereto, it apparently acquisced in the provisions of the supplement that the presumption should be binding. The prosecutor should not now be heard to say that it has been deprived of its property, or that its rights have been affected against its assent when it appears that as-

sent had been given. It appeared that Sexton was at the office of the prosecutor several times during the day of July 4th, and was there as late as 4:35 p. m., when he departed to do the work (as the trial judge found, under "the direction of the representative" of the prosecutor), which resulted in his death at 5 o'clock p. m.

We think that the supplement cannot be fairly construed as requiring the giving of a sixty-day notice. It is complete in itself. It applies only to contracts "now" (on May 2, 1911) "in operation or made or implied prior to the time limited for the act to which this act is a supplement to take effect" (July 4, 1911), to which class of contracts the main act did not apply, since it applied only to "every contract of hiring made subsequent to the time provided for this act to take effect" (July 4, 1911). The supplement was not repealed or modified by anything in the main act because it was approved about a month later than the main act. The supplement provides how either party may prevent section II, not then operative, from becoming operative on and after July 4. The main act, paragraph 10, provides for the termination of the provisions of section II, which had already become operative. It expressly provides for the giving of a sixty-day notice in writing prior to any accident. The supplement expressly provides for the giving of a notice "prior to accident" which must mean at any time prior to accident, since if it had been intended that a notice should be given any specified number of days before the accident, that intention would have been expressed, or the supplement would have provided for the giving of the notice "provided for in the act to which this act is a supplement," or "provided for in paragraph 10 of the act to which this act is a supplement," instead of simply providing for the giving of a notice "prior to accident." We find nothing in the supplement to indicate an intention that if notice had been given prior to Sexton's accident a recovery could

have been had under section II, and we think the court would have had no difficulty in finding that if such notice had been given by Sexton or the prosecutor section II would not have applied. We think, therefore, that in so far as the question is raised in these proceedings, which relates to a contract made after the approval of the supplement, it was competent for the legislature to enact the supplement, and that under it the recovery is justified since both Sexton and the prosecutor were free to protect themselves by their contract of hiring or to prevent the application of section II independently of the contract, by giving a proper notice at any time prior to the accident. Neither the act nor the supplement deprived the prosecutor of its right to bring the contract within section I. The most which they did was to require the prosecutor to express its dissent or be bound by its failure to do so. That the contract operated under section II is wholly due to the prosecutor's default.

The fact that Sexton's contract of employment was not in existence upon the date of the approval of the supplement, renders inapplicable the contention that the supplement impaired the obligation arising from the contract of employment. *J. A. Guillotte* vs. *City of New Orleans,* 12 La. An. Rep., p. 432; *Lehigh Water Co.* vs. *Easton,* 121 U. S., 388.

Statutes in principle essentially similar to the statutes under consideration have in other jurisdictions been declared constitutional. See *State* vs. *Clausen* (Wash., 1911), 117 Pac., 1101; *Borgnis* vs. *Falk Co.* (Wis., 1911), 133 N. W., 209; *Cunningham* vs. *Northwestern Improvement Co.* (Mont., 1911), 119 Pac., 554.

These are cases construing recent Workmen's Compensation Laws, the aim of which is to substitute, either by compulsion or by the voluntary act of the employers, for the common law liability for negligence, a definite payment by the employer, irrespective of negligence, which shall reach the workman or his de-

pendents quickly and with small expense. The Washington and Montana cases cited above are cases construing acts where this substitution of the Workmen's Compensation principle is made compulsory. The Wisconsin act, like the New Jersey act, makes this substitution elective. We think no decision can be found which holds such acts unconstitutional where the substitution of the Workmen's Compensation principle has been made elective.

The much discussed decision of *Ives* vs. *South Buffalo Ry. Co.*, 94 N. E., 431 (201 N. Y., 271), which overthrew the compulsory New York act is contrary to the decision in *State* vs. *Clausen, supra,* where the compulsory Washington act was sustained. Even under the Ives case, however, our elective act would still be left constitutional. It was the compulsory feature of the New York act that was held violative of fundamental constitutional provisions. The Court of Appeals said:

"We conclude therefore, that in its basic and vital features the right given to the employe by this statute does not preserve to the employer the 'due process of law' guaranteed by the constitution, for it authorizes the taking of the employer's property without his consent and without his fault."

See also in re-opinion of Justices (Mass., 1911), 96 N. E., 308.

The prosecutor next contends (though why is not clear from its reasons), that the main act is void because of the provision of paragraph 9, that "in the employment of minors section II, shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor."

We lay out of view the fact that this objection is now raised for the first time. It was not suggested in the pleadings nor at the trial.

We think the objection is not entitled to consideration in this case for this reason: The decedent (Sexton) was not a minor—he was thirty-four years old

at the time of his death. This prosecutor is therefore not deprived of any constitutional rights by the judgment in favor of this defendant, even assuming (which we do not admit), that if the deceased had been a minor the judgment would have violated the prosecutor's constitutional rights.

Attack is next made upon section II of the act upon the alleged ground that it violates art. 1, sec. 7 of the New Jersey constitution, providing that "the right of a trial by jury shall remain inviolate."

This contention totally misconceives the proper construction and effect of the constitutional provision in question. The language, with respect to this mode of trial, is that it shall remain inviolate, nor that it shall be unalterable. *Clayton* vs. *Clark*, 26 Vroom, 539; *State* vs. *De Lorenzo*, 79 Atl., 839, 840. It is therefore a privilege which may be waived by either party, and not an absolute right which is not the subject of such a waiver.

The practice of waiving a trial by jury in civil cases or proceedings in this state is of such common occurrence as to attract no attention; and it has never been doubted in this state that such a waiver could be made.

Thus it is stated by Mr. Justice Van Syckel, in *Joy & Seliger Co.* vs. *Blum*, 26 Vroom, 518, at p. 520: "The right of trial by jury may be waived."

No distinction can be perceived between a waiver of this right by the parties after commencement of a suit and as incident to its prosecution and a general waiver as a result of a contract made prior to the commencement of legal proceedings, or, indeed, to the accrual of a possible cause of action.

Nor can any distinction be perceived between a waiver of the right in the form of an express contract between the parties and a waiver which may arise as a result of a legal presumption under legislative authority.

For a number of years we have had upon our statute books in connection with the various District

Court acts, provisions with respect to the right of trial by jury. Some of these provisions require a demand for a trial by jury at least one or two days before the return day of the summons. In some instances, it is expressly provided that if such a demand be not made the right to trial by jury will be deemed to be waived. Other provisions contain no such express authority. In some instances, too, it is required that the party demanding the trial by jury shall with his demand advance the fees for the venire and jurymen. It has been uniformly held that provisions of this sort are entirely constitutional.

Clayton vs. *Clark,* 26 Vroom, 539.
Condon vs. *Royce,* 39 Vroom, 222.
Humphrey vs. *Eakeley,* 43 Vroom, 424.
Haythorn vs. *Van Keuren & Son,* 50 Vroom, 101.

These cases all are on the theory that the right to trial by jury may be waived and that the legislature may prescribe the way in which the waiver may be evidenced. They are all applicable to the present statute. Either party to the contract of hiring may preserve his right to trial by jury by electing to stand upon the provisions of section I of the act. If he chooses, on the contrary, to stand upon the provisions of section II of the act by not giving notice or entering into an express stipulation in accordance with its terms, he has that option, and by exercising it by implication waives his right to a trial by jury.

The judgment will be affirmed, with costs.

Rule on Affirmance.

NEW JERSEY SUPREME COURT.

LIZZIE ALIDA SEXTON, on behalf of herself and the next of kin, *et als*, *Defendants*, *vs.* NEWARK DISTRICT TELEGRAPH COMPANY, *Prosecutor.*	*On Certiorari.*

This cause having been duly argued at the present term of this court and the court having considered the same and finding no error in the record or proceedings of the Essex Common Pleas;

It is thereupon, ordered, and adjudged, that the judgment of the Essex Common Pleas, removed by the Writ of Certiorari in this cause, be affirmed with costs, and that the record be remitted to the Essex Common Pleas to be proceeded with in accordance with this judgment and the practice of said court.

Entered May 7, 1913.

On motion of

HARRY V. OSBORNE,

Attorney of Defendant on Certiorari.

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

LIZZIE ALIDA SEXTON, on behalf of herself and the next of kin of Floyd Sexton, deceased, *et al*, *Defendants*, *vs.* NEWARK DISTRICT TELEGRAPH COMPANY, *Prosecutor-Appellant.*	*On Certiorari. An Appeal from the Supreme Court.*

Brief for Prosecutor-Appellant.

This appeal seeks to review a judgment of the Supreme Court, affirming an order of the Essex County Common Pleas, adjudging that the Telegraph Company should pay a certain sum of money to the widow and next of kin of the deceased, arising from the fact that on the 4th of July, 1911, Floyd Sexton, husband and father of the petitioners, while in the employ of the Telegraph Company, was killed.

The case shows that Sexton, who had formerly been in the employ of the Telegraph Company, on the 23rd of May, 1911, re-entered their employ, and continued therein until the 4th of the following July, when he was killed in the discharge of his duties. Proceedings were taken under the Employer's Liability Act, Chapter 95 of the Laws of 1911, and its supplement, Chapter 368, to have the damages assessed by the Court of Common Pleas under the Second Section of that Act. In order properly to grasp the important point involved in the case, it is necessary to direct the court's attention to certain salient facts in connection with this act and its supplement.

For several years previous to 1911, a wave had spread over the Continent of Europe, Great Britain and several states of the United States, in favor of workmen's compensation acts, and New Jersey had passed a tentative and unsatisfactory law (P. L., 1909, p. 114), along the same lines, which was considered wholly insufficient. On the 24th of March, 1911, the Court of Appeals of the State of New York, in *Ives* vs. *South Buffalo Ry. Company,* 200 N. Y., 271; 94, Northeastern Reporter, page 431, had, while expressing generally its approval of legislation of this character, unanimously decided that the New York Act, passed in the year 1910, which had compelled an employer to pay, and an employe to accept, compensation in the way pointed out by the act was unconstitutional upon the ground among other things; that,

> "It (the statute) does not affect the status of employment at all, but writes into the contract between the employer and the employe, without the consent of the former, a liability on his part which never existed before, and to which he is permitted to interpose practically no defence, for he can only escape liability when the employe is injured through his own wilful misconduct."

The New Jersey Act is framed largely upon the New York Act. It was approved April 4, 1911, and as is well known, in order to avoid the legal difficulties which the New York court found to exist in the New York Act, the legislature of this state devised the plan of an elective compensation, provided in section II of this act, for an agreement between the employer and employe by which the provisions of the second section should be mutually adopted, which agreement would be tantamount to a surrender by the parties of their rights to any other form or amount of compensation. It further provides:

> "That every contract of hiring made subsequent to the time provided for this act to take

effect, shall be presumed to have been made with reference to the provisions of section II of this act, and unless there be as a part of such contract an express statement in writing prior to any accident either in the contract itself, or by written notice from either party to the other, that the provisions of section II of this act are not intended to apply, then it shall be presumed that the parties had accepted the provisions of section II, and have agreed to be bound thereby."

By this scheme of legislation, an injured employe, under section I of the act was, after it became operative, entitled to compensation for an accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, providing the employe was himself not wilfully negligent; and in such an action certain defences, such as the negligence of a fellow employe, etc., were excluded. Under this section it was still however, necessary, in order to permit a recovery, to show actual or lawfully imputed negligence of the employer. The act, while approved April 4, 1911, in its last section expressly provided that it should take effect on the 4th day of July next succeeding its passage and approval. The effect of this was to permit a recovery by an injured employe under section I of the act, for an accident occurring after the 4th of July, 1911, in the manner provided by section I regardless of the consent of either employer or employe. Section II, as we have already seen, set up the so-called elective scheme, by which regardless of negligence, if the parties had elected to come under its provisions, recovery could be had in case of accident, and a rate of compensation had, in accordance with the provisions contained in the act.

The act further sets up and provides that after a given time, parties to all kinds of contracts for employment would be presumed to have assented to be bound by and come in under such act, but in order

to escape the pit-falls of the New York Act as described in the decision of the *Ives case, supra,* the legislature expressly limited this presumption to contracts made subsequent to the time provided for the act to take effect.

The result was that the legislature, by the original act expressly declared that on all contracts of employment made after the 4th of July, 1911, the presumption of assent should apply, and hence every employer and employe had from the 4th of April, 1911, when the act was approved, until the 4th of July in the same year, to study the act and determine whether or not they desired to elect to be bound by the provisions of its second section, and if they desired not to be so bound, they were then required in contracts entered into on or after the 4th of July, 1911, to expressly so state.

We do not, in this suit, question the entire legality and propriety of a legislative scheme of this character. The difficulty with the case at bar is that Sexton's contract with the defendant company was not made after the 4th of July, 1911, but on the 23rd day of May, several weeks after the act was passed and about eight weeks before it became operative.

On the 2nd of May, 1911, Chapter 368, a supplement to the act just referred to was approved. It reads:

> "1. Every contract of hiring which was made prior to the time when the act was to take effect, shall be presumed to continue subject to the provisions of section 2, unless either party shall, prior to the accident, in writing notify the other party to such contract, that the provisions of section 2 of the act to which this act is a supplement, are not intended to apply.
>
> "2. This act shall take effect on the fourth day of July next, succeeding its passage and approval.
>
> "Approved May 2, 1911."

Now, we claim that it is entirely without the power of the legislature to thus alter a contract, or to compel the parties to elect their remedy. The original law, being Chapter 95 of the Laws of 1911, provided that every contract made *after* the law took effect should be presumed to include the elective compensation as provided for in that act, unless the employer or the employe should provide in his contract or by notice thereafter that the elective provision should not apply.

Some enthusiastic legislator, not versed in the law and regardless of the principles reiterated in the *Ives* case, went a step too far in the supplement, and undertook to attach the same presumption to contracts made before the act went into effect, as we have seen was attached by the original act to contracts made after it went into effect.

Whatever may be said concerning the original act (chapter 95), and whatever construction the court in the future may place upon it, it certainly observed the Constitution of the State of New Jersey making it apply only to contracts thereafter made. We do not think it necessary to enter into any extended argument with regard to the constitutionality of chapter 95, either as to its taking away defences or depriving a party of a trial by jury; or whether or not it is an exercise of the police power of the state, but we refer to chapter 95 to show in what way and to what extent the obligation of an existing contract has been impaired, if the supplement is to be sanctioned; and how the parties to this contract have been deprived of a remedy and of defences which existed when the contract was made.

First: The employer is obliged to pay compensation to his employe by accident arising out of and in the course of his employment, without being able to plead that the injury was caused by the negligence of a fellow employe, or that the injured employe assumed

the risks inherent in or incidental to, or arising out of his employment, or arising from the failure of the employer to provide safe premises and suitable appliances.

SECOND: The employer in any such action who enters into a contract with an independent contractor, or employs a sub-contractor, shall still be liable for injury to an employe as such contractor or sub-contractor, for any accident occasioned by any defect in the condition of the ways, works, machinery or plant, if the defect arose or had not been discovered or remedied through the negligence of the employer or someone entrusted by him with the duty of seeing that they were in proper condition, unless it can be shown that the employe himself was wilfully negligent at the time of receiving the injury.

THIRD: The employer is liable for personal injuries or the death of the employe arising out of and in course of his employment without regard to the negligence of the employe, and when the employer is without fault except where death is intentionally self-inflicted, or when intoxication is the cause, and the burden of proof of such fact is placed upon the employer.

FOURTH: The employer agrees to surrender all rights to any other method, form or amount of compensation or determination other than that provided in section 2 of the act.

FIFTH: The remedy for enforcing the obligations of a contract are changed by section 20 of chapter 95 in the particular that in cases of dispute the party shall submit the questions to a single judge of the Court of Common Pleas, who is authorized to hear and determine such disputes in a summary manner and all questions and facts shall be conclusive and binding.

SIXTH: The right of the deceased plaintiff's representatives to bring an action in a regular court of competent jurisdiction and to have his case heard by

judge and jury, and also the right of the prosecutor to have the case regularly tried before a judge and jury under proper pleadings with the liberty to make all defences which existed at the time his contract was made, is thus denied.

SEVENTH: A change of remedy is further shown by the requirement that either party may present a petition to the judge stating the matter in dispute, and the judge of the Court of Common Pleas shall fix a place for the hearing not less than three weeks from the date of filing the petition, and the adverse party shall file an answering petition within seven days.

At the time fixed for hearing, the judge shall hear the witnesses in a summary manner and decide the merits of the controversy.

The determination shall be filed in writing with the clerk of the Common Pleas Court, and judgment shall be entered thereon in the same manner as in causes tried in the Court of Common Pleas and the judgment shall be collected in the usual way, but either party may have his right of certiorari in the Supreme Court to review questions of law.

The employer, although his contract was made before the law took effect, and was still existing at that time, is compelled to adopt the method prescribed in section II, unless he gives notice in writing to the other party to such contract prior to the accident, that the provisions of section II of chapter 95 are not intended to apply.

We maintain that the employer is in our case bound to do no such thing. The contract was a legal and valid one when entered into, and the law cannot impose any duties or change his remedy in any essential respect.

If it were true that the legislature has such power to change a contract, and to change the remedy which existed at the time the contract was made, then there

is practically no stability to any contract made before July 4, 1912, and now existing in the State of New Jersey.

The court is asked to go to the length of saying that any contract now existing, although legal when made, may be changed by the legislature with regard to the obligations of the contract and with regard to the remedies for the enforcement of the contract which existed when the contract was made, unless one of the contracting parties gives notice that it does not intend to abide by the law.

The legislature has no power to place a contracting party in such a positiou. The very requirement that one of the contracting parties shall give notice to the other party of the election of remedies, is in itself a violation of the Constitution of New Jersey. The existing contract contains no such provision, and there was no law in existence which required it, and we maintain it is beyond the power of the legislature to either change the contract or the remedy, or to compel a party to elect whether his contract, which is inviolate, shall be subject to a new law passed subsequent to the making of the contract.

Chapter 95 is a law which was suggested and devised after the passage of the British Compensation Act and of the Workmen's Compensation Act of the State of Wisconsin, which was approved May 3, 1911; of the State of Ohio, which was passed May 31, 1911; of the State of Washington, which passed the House, February 23, 1911, and was also suggested by legislation which had been introduced although not yet acted upon in a number of other states.

It is a recognized fact that optional laws were passed because of the decision in the Court of Appeals of the State of New York in the case of *Ives* vs. *South Buffalo Ry., supra,* for the reason that the mandatory law was unconstitutional. Bradbury's Workmen's Compensation Law, introduction, page 31.

This law of New Jersey, chapter 95 of the Laws of 1911, if it had not been supplemented by chapter 368, would not have permitted the bringing of the action which we are now considering.

The passage of this supplement, chapter 368, was an unfortunate error in legislation, and could not have been drawn or proposed by men experienced in constitutional construction. Chapter 95 exhibits the sentiment which has spread throughout the country with regard to bettering the condition of workmen, and the form of the law and the elective system which it adopts is at present competing with other methods which have been adopted in Germany, England and the State of Ohio, which is to create a State Insurance fund to which both the employer and employe shall contribute, the effect of which will be to render compensation to injured workmen just as the law of New Jersey unsupplemented, endeavored to do. The world's ideas upon this subject have not been crystallized, but are still in the process of forming, and what may ultimately be the final and most meritorious system of compensating employes for their injuries, no one can undertake to say.

At the present time, however, the conclusion is irresistible in reading the history and progress of the sentiments which we have referred to, that laws, of which chapter 95 is a type, have not yet worked out the problem in a satisfactory manner.

We make these remarks in order to emphasize our position, that we are not asking the court in any way to pass upon the constitutionality of chapter 95, but simply to apply itself to the construction of the supplement, and whether or not this case can stand, or whether that particular law can stand under the Constitution of the State of New Jersey.

Among the reasons assigned for the reversal of the judgment of the Court of Common Pleas is (page 64, line 32), the fact that it violates paragraph three, sec-

tion 7 of article IV of the State Constitution, which provides:

> "The legislature shall not place any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts or depriving a party of any remedy for the enforcement of a contract which existed when the contract was made."

This provision is broader than is to be found in the constitutions of most of the states, in that it protects not only contracts but remedies. The following cases have been decided in our courts under and in support of this section of our fundamental law:

> *Scaine* vs. *Inhabitants of Belleville*, 39 N. J. L., page 526.

It appears that the Township of Belleville, was by statute converted into a city, and debts accrued, and subsequently the statute was repealed making no provision for the city's debts. The opinion was rendered by Chief Justice Beasley in 1877, who held that in the State of New Jersey, the legislature cannot destroy either the contract or the remedy of the creditors, and hence the action was sustained.

In the case of *Munday* vs. *Rahway*, 43 N. J., 341, the opinion rendered by Judge Dixon in 1881, held that the constitutional provision which we have above referred to, being article 4, section 7, sub-section 3, applies to remedies against municipal corporations.

In the case of *Rader* vs. *Township of Union*, 44 N. J. L., 259, the court went so far as to say that a contract which was unenforceable at the time it was made by reason of some irregularity, but which was validated by a subsequent law, is protected by the constitutional provision above referred to as if legal at the first instance—and in his opinion, Judge Dixon said, in 1882, this obligation includes remedies which would have been available if the law had been originally valid, Judge Dixon also said:

> "Now in legal parlance the obligation of a contract includes the remedies for its performance.

> Such is the purport of the language already quoted from the opinion of the Federal Supreme Court in Louisiana *vs.* New Orleans, 102 U. S., 203, and such is also the view of this court, plainly expressed in Baldwin *vs.* Flagg, 14 Vroom, 495, where it is said, the effort to draw any definite line of demarkation between a law affecting the obligations of a contract and one relating to the remedy upon it within this constitutional provision is impracticable. The obligation of a contract is synonymous with the ability to enforce its performance."

The case of *Munday* vs. *Rahway* was taken to the Court of Appeals under the title of *Rahway* vs. *Munday,* 44 N. J. L., 395, and the opinion was rendered by Chief Justice Beasley in 1882. In that case, the holder of a defaulted bond, on which he obtained judgment was rendered a writ of mandamus to require the assessors to levy a tax to pay the judgment, notwithstanding the fact that the legislature had passed a law impairing the city's taxing power, and Chief Justice Beasley said that the legislature cannot take away or substantially impair such taxing power, so far as it relates to such contracts, namely municipal bonds issued by the city of Rahway. In the case of *United Companies* vs. *Weldon,* 44 N. J. L., 63, the United Companies held an irrepealable charter which provided that in condemnation proceedings an appeal should be made to the Common Pleas Court, and an act of the legislature of March 9, 1877, changed the right of appeal to the Circuit Court, which possessed and was to possess all the powers of the Court of Common Pleas. This was a hotly contested case, and the opinion was rendered by the eminent Judge Depue. He held that the statute which directed an appeal to the Circuit Court rather than to the Common Pleas Court did not impair the obligation of a contract by limiting or altering the modes of proceeding to enforce

it provided that the remedy be not withheld or embarrassed with conditions which impair the value of the right. The legislature may change the remedy provided no substantial right secured by the contract is impaired.

Comment upon this case is necessary. The court will perceive the narrow line upon which rested the contention—whether an appeal should be made to one court or another having like and equal powers, one court having been substituted for another. It was seriously argued and a long and lengthy opinion rendered by Judge Depue in order to find that the change of the court to which an appeal should be made was not an infraction of the constitution.

If such a contention can engage the attention of the Supreme Court of New Jersey, it seems useless for us to argue any further with regard to the unconstitutionality of chapter 368.

Commissioners of the City of New Brunswick having the power to issue bonds, did issue them and pledged certain assessments to secure their payment.

By subsequent act the office of commissioner was abolished. The court held that neither the validity of the bonds, nor the pledge of assessments were affected by the abolishment of the commisioners and that the bonds were enforceable obligations against the city, and that the assessments were available. A change in the mode in which creditors' rights are to be enforced, which does not affect any substantial right, is no infringement of the constitution; citing *Munday* vs. *Rahway* and *United Companies* vs. *Wood.* The case is *Warner* vs. *Hoagland,* 61 N. J. L., 74. The opinion was rendered by Judge Depue in 1888.

In the case of *Intisco* vs. *Metropolitan Savings & Loan Association,* 68 N. J. L., 580, a contract was entered into by the plaintiff with the defendant which made him a member of the Association, and the contract imposed certain conditions or penalties in case

the member should withdraw from the Association. The legislature subsequently passed a law on March 24th, 1899, Pamphlet Laws, 1899, page 357, compelling the Association to pay to withdrawing members a greater amount than the contract provided for. It was held by the court, the opinion being delivered by Judge Collins in 1902, "that it was not competent for the legislature to impair the obligation of that contract."

Bear in mind that while neither of the acts became effective, or went into operation, until the 4th of July, the accident to Sexton occurred on that day, and the courts below have sustained the claim against the Telegraph Company upon the impossible theory that a presumption can be read into the contract between the company and its employe, because some time prior to the 4th of July and at a time before the law went into effect, it was the duty of the company to have notified Sexton that it would not be bound by the elective feature of the act, in order to overcome the presumption which it is claimed would otherwise apply. To support so revoluntionary an idea as this, the Supreme Court states (page 81, line 34):

> "We think it may be fairly said that although the supplement did not become effective until July 4, 1911, *it had a potential existence from the date of its approval,* and that for a period of upwards of two months, both employer and employe were put on notice of the presumption of the act and what it was necessary for them to do if it was desired that the presumption should not apply."

We submit that neither the cases cited nor any principle of law will support this idea. On the contrary, as laid down in the 26 English & American Encyc. of Law, 2nd Edition, page 565:

> "Before the time a statute is to go into effect no rights may be acquired under it and *no one is*

bound to regulate his conduct according to its terms. It is equivalent to a legislative declaration, that the statute shall have no effect until the designated day."

The following cases support this sensible and careful statement of law:

The Santa Cruz Water Co. vs. *Kross,* 74 Cal., 222.

The Court:

"This is an application for a writ of mandate, commanding the defendants * * * constituting the common council of the City of Santa Cruz, to audit and allow a demand for interest on certain bonds of the city, issued to purchase and pay for 'water works' and to command the mayor * * * to draw his warrant on the city treasurer therefor.

"The bonds in question were issued pursuant to authority conferred by an election, held, or purporting to be held, under an act of the legislature approved March 9, 1885, entitled, 'An act to authorize corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants to obtain public water works' (Stats., 1885, p. 42).

" 'Every statute unless a different time is prescribed therein, takes effect on the sixtieth day after its passage.' (Pol. Code, sec. 323).

"The act of March 9th did not in terms prescribe when it should take effect, and hence did not become a law until the sixtieth day thereafter; viz., May 8, 1885.

"The election was held March 30, 1885. Conceding the act of March 9, 1885, to be applicable to Santa Cruz, the election authorizing the bonds to issue was null and void, because held before the law took effect (Andrews *vs.* St. Louis Tunnel R. R. Co., 16 Md. App., 305; People *vs.* Johnston, 6 Col., 674.)

"It follows that the petition for a writ of mandate must be denied, and the proceedings dismissed."

Larrabee vs. *Talbot,* 5 Gill (Md.), 426-46, Am. Dec., 637, 645. Martin, *J.*:

"The late bankrupt law of the United States was passed on the 19th of August, 1841; but it was expressly provided by the 17th section of the statute, that it should take effect only from and after the 1st day of February, 1842. This is equivalent to declaring that the act should have no effect until that day; and, therefore, there is no foundation for the point made by the counsel for the appellant that the insolvent laws of Maryland were suspended in their operation by the bankrupt act of the United States, at the period when the proceedings of Rogers & Frick under those laws were commended and consummated (August 30, 1841). At that time the bankrupt act was not in force and there could have been no conflict between the national and state legislature upon this subject. In *ex parte* Eames, 2 Story, 325, Mr. Justice Story, said: 'That as soon as the bankrupt act went into operation in February, 1842, it *ipso facto* suspended all action on future cases arising under the state insolvent laws where the insolvent persons were within the purview of the bankrupt act. I say future cases, because very different considerations would or might apply, where proceedings under any state insolvent laws were commenced, and were in progress before the bankrupt act went into operation.'" etc.

State, ex rel, Cook vs. *Dearles* (116 N. C., 582), 21 S. E., 973. Plaintiff was elected by the legislature on March 9th, to fill an office created by an act passed on March 8th, containing the provision that it should be "in force from and after its ratification" and which was not signed by the President of the Senate and

Speaker of the House until March 12th. Held, that the election was void.

Clark, *J. P.* (p. 975):

> "The act itself selects that date (or ratification) as the beginning of the life of the statute. Prior thereto it was to be dead—of no effect; and after that date it was to live, breathe and be effective."

Conley vs. *Calhoun Co.,* 2 W. Va., 416, holding that where by an act of the general assembly a vote was to be taken "after the present war is over" and it was taken on the 4th Thursday of May, 1866, before the proclamation of the President of the United States, declaring that the war was over throughout the whole country (issued August 20, 1866), such vote is a nullity for the act had no validity. See also *Commonwealth* vs. *Fowler,* 10 Mass., 290.

We contend therefore that until the 4th of July, 1911, the Telegraph Company had a right to act under its contract with Sexton exactly as if the acts in question had never been passed and that if the legislature intended chapter 368 to have the presumption attach *instanter* upon its going into effect, such intention is plainly violative of fundamental constitutional principles.

This contention does not contradict the well settled fact that the legislature may control remedies for the enforcement of rights arising either out of contract or tort. Such control, however, must be a reasonable one, and if it is unreasonably exercised, the court can and must set aside the same as unconstitutional. For example, as shown in *Wilson* vs. *Iseminger,* 185 U. S., 55, the period of the statute of limitations may be shortened, provided a reasonable time be given for the commencement of an action. If, however, such abbrevation be unreasonably short, it is unconstitutional, as amounting to a denial of justice. Now, we contend that in as much as the supplement was to

be ignored until it became operative on the 4th of July, it is a plain denial of justice and a violation of the contractual relation existing between the company and Sexton to raise a presumption that the parties had, by failing to give a notice on a legal holiday—being the same day the act became operative, assented to be bound by section II of the act.

The only time during which notice could have been given was on July 4, 1911, before 5 P. M. on that day.

The prosecutor is a corporation and acts through its officers, and the activities of a corporation are usually attended to and comprised within ordinary business hours. Supposing, therefore, that the business day commenced at nine A. M., then there were only eight hours during which the notice could have been given. The day was a national holiday, during which offices generally closed and business generally suspended. The evidence shows that the officers of the prosecutor were out of town on that day. Under these circumstances, will the court say that the prosecutor had a reasonable time and opportunity to give notice? It will be observed that chapter 368 fixes no time within which the notice must be served, but requires the notice to be in writing, and further requires that it must be served between the taking effect of the act and the accident.

Supposing Sexton had been killed at the very instant the law took effect, the court certainly in such a case would say that the act was incapable of observance.

If the death occurred an hour after the law took effect, would the court then allow a recovery because notice had not been given within that hour?

So with the case at bar, will the court say that between the taking effect of the act and the death of Sexton there was time or opportunity to give the notice required by chapter 368? Does the law require the performance of an impossibility?

NOTICE.

Chapter 368, is silent as to time within which the notice must be given. As the notice must be given to the other party, it must be mailed or handed to him, or served upon him and in some way delivered to him. In what manner, therefore, is notice to be given to the other party to the contract? It certainly will not be held to be possible to have given the party notice on the 4th of July, before he had arisen, and it was equally impossible to give him notice during the 4th of July, on account of its being a legal holiday, and Sexton was not obliged to do any work except such emergency work as was made necessary by the peculiar character of the business which the prosecutor carried on.

Whether or not Sexton was at the office of the prosecutor on the morning on the 4th of July, does not appear from the testimony, but it appears from Mrs. Sexton's testimony that he came home to dinner in Montgomery street, which was a long distance from the office of the prosecutor and did not leave home again until two o'clock.

The statutes of New Jersey have provided for giving notice of more than one hundred and fifty different kinds, embracing almost as many subjects and we have not been able to find a single instance where eight hours' notice has been required, especially when notice must be in writing. Is there any legal reason why the notice required by chapter 368 should not be served in the same manner and within the same time that are required of all other notices?

Is it not the duty of the court to say in this case that considering the time when the accident occurred, neither party had a reasonable time within which to serve the notice, and that as notice could not be given to Sexton who died the same day on which the law took effect, no recovery can be had by the plaintiff in this case?

II.

We contend that the judgment not only violates this provision of the State Constitution, but also the Constitution of the United States; and without amplifying the matter, we desire to raise the Federal question that chapter 368 is in violation of the Constitution of the United States, as well as our own Constitution, so that, if necessary, this question can be reviewed by the Supreme Court of the United States.

Bright vs. *Columbus, Hocking Valley, etc. Ry.*, 176 U. S., 481.

Williams vs. *Eggleston,* 170 U. S., 304.

III.

There was no allegation in the petition or proof in the case that the prosecutor or those on whose behalf she sued were dependents. This is fatal to the claim. *Miller* vs. *Public Service Ry. Co.,* 85 Atlantic Rep., 1030. *Blang* vs. *Erie R. R., Id.* The point is covered by the second reason, p. 63.

It is therefore respectfully contended that the judgment must be reversed.

GEORGE W. HUBBELL,
ROBERT H. McCARTER,
Of Counsel with Newark District Telegraph Company.

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

LIZZIE ALIDA SEXTON, on behalf of herself and the next of kin of FLOYD SEXTON, deceased, *et al.*, *Defendants,* *vs.* NEWARK DISTRICT TELEGRAPH COMPANY, *Prosecutor-Appellant.*	*On Certiorari.* *On Appeal from the Supreme Court.*

Brief for Prosecutor-Appellant on Re-Argument.

This appeal seeks to review a judgment of the Supreme Court, affirming an order of the Essex County Common Pleas, adjudging that the Telegraph Company should pay a certain sum of money to the widow and next of kin of the deceased, arising from the fact that on the 4th of July, 1911, Floyd Sexton, husband and father of the petitioners, while in the employ of the Telegraph Company was killed.

The case shows that Sexton, who had formerly been in the employ of the Telegraph Company, on the 23rd of May, 1911, re-entered their employ, and continued therein until the 4th of the following July, when he was killed in the discharge of his duties. Proceeding were taken under the Employers' Liability Act, Chapter 95 of the Laws of 1911, and its supplement, Chapter 368, to have the damages assessed by the Court of Common Pleas under the Second Section of that Act. In order properly to grasp the important point involved in the case, it is necessary to direct the court's attention to certain salient facts in connection with this act and its supplement.

For several years previous to 1911, a wave had spread over the Continent of Europe, Great Britain and several states of the United States, in favor of workmen's compensation acts, and New Jersey had passed a tentative and unsatisfactory law (P. L. 1909, p. 114), along the same lines, which was considered wholly insufficient. On the 24th of March, 1911, the Court of Appeals of the State of New York, in *Ives* vs. *South Buffalo Ry. Company,* 200 N. Y., 271; 94 Northeastern Reporter, page 431, had, while expressing generally its approval of legislation of this character, unanimously decided that the New York Act, passed in the year 1910, which had compelled an employer to pay, and an employe to accept, compensation in the way pointed out by the act was unconstitutional, upon the ground among other things; that,

> "It (the statute) does not affect the status of employment at all, but writes into the contract between the employer and the employe, without the consent of the former, a liability on his part which never existed before, and to which he is permitted to interpose practically no defence, for he can only escape liability when the employe is injured through his own wilful misconduct."

The New Jersey Act is framed largely upon this New York Act. It is Chapter 95 of the Laws of 1911 (P. L. p. 134), and was approved April 4, 1911. Its last section provides:

> "This Act shall take effect on the 4th day of July next succeeding its passage and approval."

As is well known, in order to avoid the legal difficulties which the New York court had found to exist in the New York Act, the legislature of this state devised in this Act the plan of an elective compensation, and provided in Section II of this Act, for an agreement between the employer and employe, by which the provisions of Section II should be mutually

adopted, which agreement would be tantamount to a surrender by the parties of their rights to any other form or amount of compensation. Section 9 of the Act is important; it provides:

> "Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of Section II of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of Section II of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of Section II of this act and have agreed to be bound thereby. In the employment of minors, Section II shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor."

By this scheme of legislation, an injured employe, under Section I of the act was, after it became operative, entitled to compensation for an accident arising out of and in the course of his employment, of which the negligence of the employer is the natural and proximate cause, provided the employe was himself not wilfully negligent; and in such an action certain defences, such as the negligence of a fellow employe, etc., were excluded. Under this section it was still, however, necessary, in order to permit a recovery, to show either actual or lawful imputed negligence of the employer. The effect of this act was to permit a recovery by an injured employe under Section I of the act, for an accident occuring after the 4th of July, 1911, in the manner provided by Section I, regardless of the consent of either employer or employe. Section II, as we have seen, set up the so-called elective scheme, by which, regardless of negligence, if

the parties elected to come under its provisions, recovery could be had in case of accident, and a rate of compensation had in accordance with the provisions of the act.

Section 9, as we have already seen, provides that after a given time parties to all kinds of contracts shall be presumed to have assented to be bound by and come in under such act, but in order to escape the pit-falls of the New York Act as described in the decision of the *Ives case, supra,* the legislature expressly limited this presumption to contracts made subsequent to the time for the act to take effect, *i. e.,* July 4, 1911.

We do not, in this suit, question the entire legality and propriety of a legislative scheme of this character. The difficulty with the case at bar is that Sexton's contract with the defendant company was not made after the 4th of July, 1911, but on the 23d day of May, of that year, several weeks after the act was passed, and about eight weeks before it became effective.

On the second of May, 1911, a supplement to the act just referred to was approved, being Chapter 368 of the laws of that year. It is entitled a supplement to the former act and reads as follows:

> 1. "Every contract of hiring, verbal, written or implied from circumstances, now in operation or made or implied prior to the time limited for the act to which this act is a supplement to take effect, shall, after this act takes effect, be presumed to continue subject to the provisions of section two of the act to which this act is a supplement, unless either party shall, prior to accident, in writing, notify the other party to such contract that the provisions of section two of the act to which this act is a supplement are not intended to apply.

2. This act shall take effect on the fourth day of July next succeeding its passage and approval.

Approved May 2, 1911."

Now, we claim that it is entirely without the power of the legislature to thus alter a contract, or to compel the parties to elect their remedy. The original law, being Chapter 95 of the Laws of 1911, provided that every contract made *after* the law took effect should be presumed to include the elective compensation as provided for in that act, unless the employer or the employe should provide in his contract or by notice thereafter that the elective provision should not apply.

Some enthusiastic legislator, not versed in the law and regardless of the principles reiterated in the *Ives* case, went a step too far in the supplement, and undertook to attach the same presumption to contracts made before the act went into effect, as we have seen was attached by the original act to contracts made after it went into effect.

Whatever may be said concerning the original act (chapter 95), and whatever construction the court in the future may place upon it, it certainly observed the Constitution of the State of New Jersey making it apply only to contracts thereafter made. We do not think it necessary to enter into any extended argument with regard to the constitutionality of chapter 95, either as to its taking away defences or depriving a party of a trial by jury; or whether or not it is an exercise of the police power of the State, but we refer to chapter 95 to show in what way and to what extent the obligation of an existing contract has been impaired, if the supplement is to be sanctioned; and how the parties to this contract have been deprived of a remedy and of defences which existed when the contract was made.

First. The employer is obliged to pay compensation to his employe by accident arising out of and in

the course of his employment, without being able to plead that the injury was caused by the negligence of a fellow employe, or that the injured employe assumed the risks inherent in or incidental to, or arising out of his employment, or arising from the failure of the employer to provide safe premises and suitable appliances.

SECOND: The employer is any such action who enters into a contract with an independent contractor, or employs a sub-contractor, shall still be liable for injury to an employe as such contractor or sub-contractor, for any accident occasioned by any defect in the condition of the ways, works, machinery or plant, if the defect arose or had not been discovered or remedied through the negligence of the employer or someone entrusted by him with the duty of seeing that they were in proper condition, unless it can be shown that the employe himself was wilfully negligent at the time of receiving the injury.

THIRD: The employer is liable for personal injuries or the death of the employe arising out of and in course of his employment without regard to the negligence of the employe, and when the employer is without fault except where death is intentionally self-inflicted, or when intoxication is the cause, and the burden of proof of such fact is placed upon the employer.

FOURTH: The employer agrees to surrender all rights to any other method, form or amount of compensation or determination other than that provided in section two of the act.

FIFTH: The remedy for enforcing the obligations of a contract are changed by section 20 of chapter 95 in the particular that in cases of dispute the party shall submit the questions to a single judge of the Court of Common Pleas, who is authorized to hear and determine such disputes in a summary manner and all questions and facts shall be conclusive and binding.

SIXTH: The right of the deceased plaintiff's representatives to bring an action in a regular court of competent jurisdiction and to have his case heard by judge and jury, and also the right of the prosecutor to have the case regularly tried before a judge and jury under proper pleadings with the liberty to make all defences which existed at the time his contract was made, is thus denied.

SEVENTH: A change of remedy is further shown by the requirement that either party may present a petition to the judge stating the matter in dispute, and the judge of the Court of Common Pleas shall fix a place for the hearing not less than three weeks from the date of filing the petition, and the adverse party shall file an answering petition within seven days.

At the time fixed for hearing, the judge shall hear the witnesses in a summary manner and decide the merits of the controversy.

The determination shall be filed in writing with the clerk of the Common Pleas Court, and judgment shall be entered thereon in the same manner as in causes tried in the Court of Common Pleas and the judgment shall be collected in the usual way, but either party may have his right of *certiorari* in the Supreme Court to review questions of law.

The employer, although his contract was made before the law took effect, and was still existing at that time, is compelled to adopt the method prescribed in Section II, unless he gives notice in writing to the other party to such contract prior to the accident, that the provisions of Section II of chapter 95 are not intended to apply.

We maintain that the employer is in our case bound to do no such thing. The contract was a legal and valid one when entered into, and the law cannot impose any duties or change his remedy in any essential respect.

If it were true that the legislature has such power to change a contract, and to change the remedy which existed at the time the contract was made, then there is practically no stability to any contract made before July 4, 1912, and now existing in the State of New Jersey.

The court is asked to go to the length of saying that any contract now existing, although legal when made, may be changed by the legislature with regard to the obligations of the contract and with regard to the remedies for the enforcement of the contract which existed when the contract was made, unless one of the contracting parties gives notice that it does not intend to abide by the law.

The legislature has no power to place a contracting party in such a position. The very requirement that one of the contracting parties shall give notice to the other party of the election of remedies, is in itself a violation of the Constitution of New Jersey. The existing contract contains no such provision, and there was no law in existence which required it, and we maintain it is beyond the power of the legislature to either change the contract or the remedy, or to compel a party to elect whether his contract, which is inviolate, shall be subject to a new law passed subsequent to the making of the contract.

Chapter 95 is a law which was suggested and devised after the passage of the British Compensation Act and the Workmen's Compensation Act of the State of Wisconsin, which was approved May 3, 1911; of the State of Ohio, which was passed May 31, 1911; of the State of Washington, which passed the House, February 23, 1911, and was also suggested by legislation which had been introduced although not yet acted upon in a number of other states.

It is a recognized fact that optional laws were passed because of the decision in the Court of Appeals of the State of New York in the case of *Ives* vs. *South*

Buffalo Ry., supra, for the reason that the mandatory law was unconstitutional. Bradbury's Workmen's Compensation Law, introduction, page 31.

This law of New Jersey, chapter 95 of the Laws of 1911, if it had not been supplemented by chapter 368, would not have permitted the bringing of the action which we are now considering.

The passage of this supplement, chapter 368, was an unfortunate error in legislation, and could not have been drawn or proposed by men experienced in constitutional construction. Chapter 95 exhibits the sentiment which has spread throughout the country with regard to bettering the condition of workmen, and the form of the law and the elective system which it adopts is at present competing with other methods which have been adopted in Germany, England and the State of Ohio, which is to create a State Insurance fund to which both the employer and employe shall contribute, the effect of which will be to render compensation to the injured workmen just as the law of New Jersey unsupplemented, endeavored to do. The world's ideas upon this subject have not been crystallized, but are still in the process of forming, and what may ultimately be the final and most meritorious system of compensating employes for their injuries, no one can undertake to say.

At the present time, however, the conclusion is irresistible, in reading the history and progress of the sentiments which we have referred to, that laws, of which chapter 95 is a type, have not yet worked out the problem in a satisfactory manner.

We make these remarks in order to emphasize our position, that we are not asking the court in any way to pass upon the constitutionality of chapter 95, but simply to apply itself to the construction of the supplement, and whether or not this case can stand, or whether that particular law can stand under the Constitution of the State of New Jersey.

Among the reasons assigned for the reversal of the judgment of the courts below (p. 64, l. 38, to p. 88) is the fact that the supplement violates paragraph three, section 7 of article IV. of the State Constitution, which provides:

> "The legislature shall not pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts or depriving a party of any remedy for the enforcement of a contract which existed when the contract was made."

This provision is broader than is to be found in the constitutions of most of the states, in that it protects not only contracts but remedies. The following cases have been decided in our courts under and in support of this section of our fundamental law:

Scaine vs. *Inhabitants of Belleville*, 39 N. J. L., p. 526;

Rahway vs. *Munday*, 44 *id.*, 395;

Warner vs. *Hoagland*, 61 *id.*, 74;

Intisco vs. *Metropolitan Savings & Loan Association*, 68 *id.*, 580;

They all conspicuously manifest how tenacious of rights arising from contract, the courts of New Jersey are.

Bear in mind that while neither of the acts became effective, or went into operation, until the 4th of July, the accident to Sexton occurred on that day, and the courts below have sustained the claim against the Telegraph Company upon the impossible theory that a presumption can be read into the contract between the company and its employe, because some time prior to the 4th of July and at a time before the law went into effect, it was the duty of the company to have notified Sexton that it would not be bound by the elective feature of the act, in order to overcome the presumption which it is claimed would otherwise apply. To support

so revolutionary an idea as this, the Supreme Court states (page 81, line 34):

> "We think it may be fairly said that although the supplement did not become effective until July 4, 1911, *it had a potential existence from the date of its approval,* and that for a period of upwards of two months, both employer and employe were put on notice of the presumption of the act and what it was necessary for them to do if it was desired that the presumption should not apply."

We submit that neither the cases cited nor any principle of law will support this idea. On the contrary, as laid down in the 26 English & American Encyc. of Law, 2nd Edition, page 565:

> "Before the time a statute is to go into effect no rights may be acquired under it and *no one is bound to regulate his conduct according to its terms. It is equivalent to a legislative declaration, that the statute shall have no effect until the designated day.*"

The following cases support this sensible and careful statement of law:

The Santa Cruz Water Co. vs. *Kross*, 74 Cal., 222.

The Court:

> "This is an application for a writ of mandate, commanding the defendants * * * constituting the common council of the City of Santa Cruz, to audit and allow a demand for interest on certain bonds of the city, issued to purchase and pay for 'water works' and to command the mayor * * * to draw his warrant on the city treasurer therefor.
>
> "The bonds in question were issued pursuant to authority conferred by an election, held, or purporting to be held, under an act of the legislature approved March 9, 1885, entitled, 'An act to

authorize corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants to obtain public water works' (Stats., 1885, p. 42).

"'Every statute unless a different time is prescribed therein, takes effect on the sixtieth day after its passage.' (Pol. Code, sec, 323).

"The act of March 9th did not in terms prescribe when it should take effect, and hence did not become a law until the sixtieth day thereafter, viz., May 8, 1885.

"The election was held March 30, 1885. Conceding the act of March 9, 1885, to be applicable to Santa Cruz, the election authorizing the bonds to issue was null and void, because held before the law took effect (Andrews *vs.* St. Louis Tunnel R. R. Co., 16 Md. App., 305; People *vs.* Johnston, 6 Col., 674).

"It follows that the petition for a writ of mandate must be denied, and the proceedings dismissed."

Larrabee vs. *Talbot,* 5 Gill (Md.), 426-46, Am. Dec., 637, 645. Martin, *J.:*

"The late bankrupt law of the United States was passed on the 19th of August, 1841; but it was expressly provided by the 17th section of the statute, that it should take effect only from and after the 1st day of February, 1842. This is equivalent to declaring that the act should have no effect until that day; and, therefore, there is no foundation for the point made by the counsel for the appellant that the insolvent laws of Maryland were suspended in their operation by the bankrupt act of the United States, at the period when the proceedings of Rogers & Frick under those laws were commended and consummated (August 30, 1841). At that time the bankrupt act was not in force and there could have been no

> conflict between the national and state legislature upon this subject. In *ex-parte* Eames, 2 Story, 325, Mr. Justice Story, said: 'That as soon as the bankrupt act went into operation in February, 1842, it *ipso facto* suspended all action on future cases arising under the state insolvent laws where the insolvent persons were within the purview of the bankrupt act. I say future cases, because very different considerations would or might apply, where proceedings under any state insolvent laws were commenced, and were in progress before the bankrupt act went into operation.' " etc.

State, ex rel, Cook vs. *Dearles* (116 N. C., 582), 21 S. E., 973. Plaintiff was elected by the legislature on March 9th, to fill an office created by an act passed on March 8th, containing the provision that it should be "in force from and after its ratification" and which was not signed by the President of the Senate and Speaker of the House until March 12th. Held, that the election was void.

Clark, *J. P.* (p. 975):

> "The act itself selects that date (or ratification) as the beginning of the life of the statute. Prior thereto it was to be dead—of no effect; and after that date it was to live, breathe and be effective."

Conley vs. *Calhoun Co.*, 2 W. Va., 416, holding that where by an act of the general assembly a vote was to be taken "after the present war is over" and it was taken on the 4th Thursday of May, 1866, before the proclamation of the President of the United States, declaring that the war was over throughout the whole country (issued August 20, 1866), such vote is a nullity for the act had no validity. See also *Commonwealth* vs. *Fowler*, 10 Mass., 290.

We contend therefore that until the 4th of July, 1911, the Telegraph Company had a right to act under

its contract with Sexton exactly as if the acts in question had never been passed and that if the legislature intended chapter 368 to have the presumption attach *instanter* upon its going into effect, such intention is plainly violative of fundamental constitutional principles.

This contention does not contradict the well-settled fact that the legislature may control remedies for the enforcement of rights arising either out of contract or *tort*. Such control, however, must be a reasonable one, and if it is unreasonably exercised, the court can and must set aside the same as unconstitutional. For example, as shown in *Wilson* vs. *Iseminger*, 185 U. S., 55, the period of the statute of limitations may be shortened, *provided a reasonable time be given for the commencement of an action*. If, however, such abbreviation be unreasonably short, it is unconstitutional, as amounting to a denial of justice. Now, we contend that inasmuch as the supplement was to be ignored until it became operative on the 4th of July, it is a plain denial of justice and a violation of the contractual relation existing between the company and Sexton to raise a presumption that the parties had, by failing to give a notice on a legal holiday—being the same day the act became operative, assented to be bound by section II of the act.

The only time during which notice could have been given was on July 4, 1911, before 5 P. M. on that day.

The prosecutor is a corporation and acts through its officers, and the activities of a corporation are usually attended to and comprised within ordinary business hours. Supposing, therefore, that the business day commenced at nine A. M., then there were only eight hours during which the notice could have been given. The day was a national holiday, during which offices generally closed and business generally suspended. The evidence shows that the officers of the prosecutor were out of town on that day. Under

these circumstances, will the court say that the prosecutor had a reasonable time and opportunity to give notice? It will be observed that chapter 368 fixes no time within which the notice must be served, but requires the notice to be in writing, and further requires that it must be served between the taking effect of the act and the accident.

Supposing Sexton had been killed at the very instant the law took effect, the court certainly in such a case would say that the act was incapable of observance.

If the death occurred an hour after the law took effect, would the court then allow a recovery because notice had not been given within that hour?

So with the case at bar, will the court say that between the taking effect of the act and the death of Sexton there was time or opportunity to give the notice required by chapter 368? Does the law require the performance of an impossibility?

Reliance was had below, and will probably again be placed by the other side, upon the case of *Diamond Glue Co.* vs. *United States Glue Co.*, 187 U. S., 611, where an action was brought for damages from the breach of a written contract. The plaintiff, an Illinois corporation, sued the defendant, a Wisconsin corporation, in the courts of the latter state. The contract was made on June 25th, but prior to its execution a law had been enacted in Wisconsin, requiring foreign corporations to comply with certain requirements as a condition of doing business in Wisconsin. It was admitted that the plaintiff had not complied with these conditions, and reliance was placed upon the statute as a defense to the action. In reply thereto it was argued that the act was unconstitutional as affecting a previously made contract. The statute in question consisted of sections 1770-B, and 4978 of the Laws of Wisconsin. Section 4978 suspended the operation of the statute until a given date after its enactment.

Mr. Justice Holmes, in delivering the opinion of the Supreme Court suspending the constitutionality of the act, said:

> "*The suspension clause of section* 4978 *was of immediate operation,* and therefore was notice to the plaintiff and defendant of itself and of what was suspended and for how long. If with that notice they contracted for the transaction of business within the jurisdiction of the statute and after the statute should have gone into effect, they did so with notice that, if nothing changed, the contemplated business would be unlawful by force merely of present conditions and the lapse of time, unless the plaintiff should comply with the regulation. In such circumstances, at least, it seems to us impossible to say that the obligation of the contract is impaired within the meaning of the Constitution of Wisconsin law."

In other words, the decision is made, and the act sustained as affecting prior contracts, because of the fact that the separate clause in the act suspending its operation until a time after the making of the contract was, nevertheless,

> "of immediate operation, and therefore was notice to the plaintiff and defendant of itself and of what was suspended and for how long."

It is evident that in Wisconsin they had no general provision such as exists in some state constitutions, and in others in statutes postponing the operation of statutes in the absence of particular phraseology, until a given day after their approval, and hence, as shown by Mr. Justice Holmes, the suspension clause became immediately effective, and hence was notice to everyone. Now, in this state, section 13 of our act with regard to statutes, 4 Comp. Stat., p. 4973, provides that:

> "From and after the passage of this act, all public acts which shall be hereafter passed shall not

> go into operation or be enforced until the 4th day of July, next after the passage of any such act, unless otherwise specially provided for in such act."

Had such a provision existed in Wisconsin, it could not have been held that the suspension clause was of "immediate operation."

In passing, it may be well to note the difference in the phraseology between the general statute,

> "shall not go into operation or be enforced until the 4th of July next"

and the particular statute in question and its supplement,

> "shall take effect on the fourth of July next."

This difference cannot be accidental, and if, as the other side contends, it operated to simply suspend the act, which otherwise became operative, then the provisions of the general statute postponed the operation until the same time. There is no room for the view that it was the purpose of the legislature, by the language it used in the act and its supplement in postponing the effectiveness of the act, otherwise to precipitate its immediate operation. In other words, if the last clause of the act and its supplement was simply suspensory, such suspensory clauses by reason of the provision of the general statute did not themselves become operative or effective until July 4th, and hence the situation is different from that disclosed in *Diamond Glue Company* vs. *United States Glue Company, supra.*

We are confirmed in this view by the opinion of JUDGE COOLEY, in *Price* vs. *Hopkins,* 13 Mich., 318, who, after full consideration, held that an act has no force as notice before the date that it became, by its terms, operative. He considered *Smith* vs. *Morrison,* 22 Pickering, 430, and expressly disapproved of it because of the fact that the Michigan constitution (in

analogy to the New Jersey general statutes) provided that:

> "No public act shall take effect or be enforced until the expiration of ninety days from the end of the session at which the same passed, unless the legislature shall otherwise direct."

He adds:

> "The purpose of this provision undoubtedly was to give the people time and opportunity to learn what changes were to be made in the law before these changes should come into operation, and some countenance is therefore afforded to the position of the defendants that the law becomes notice from its passage, notwithstanding it has not yet taken effect. But the idea embodied in this constitutional provision is not that the passage of the law is notice, but that ninety days from the end of the session are required to bring knowledge of the law to the public at large. In other words, as notice of legislation is and must be given by publication in some form, the notice in analogy to other cases of notice by publication, cannot be held complete until the whole period allowed for it has expired. And when the legislature, for reasons satisfactory to them, decide to postpone the period for the statute to come into operation to a later period, it is to be presumed, nothing appearing to the contrary, that in the particular case it was deemed important that more time be allowed for citzens to ascertain the proposed changes, and to become acquainted with their bearings. * * *
>
> To make this act operate as notice from its passage, seems to us to violate the constitutional provision we have quoted. To do that, we must hold that it has at least the effect and force of notice, during a period when the constitution has declared it shall not take effect or be in force, and when the obvious design and intention was, that it should have no force or effect whatever."

The same great judge in his book on "Constitutional Limitations," seventh edition, page 222, under the heading "When Acts are to take Effect," after referring to statutory or constitutional provisions similar to that in our general statutes above quoted, says:

> "These and similar provisions are designed to secure, as far as possible, the public promulgation of the law before parties are bound to take notice of and act under it, and to obviate the injustice of a rule which should compel parties at their peril to know and obey a law of which, in the nature of things, they could not possibly have heard; they give to all parties the full constitutional period in which to become acquainted with the terms of the statutes which are passed, except when the legislature has otherwise directed; *and no one is bound to govern his conduct by the new law until that period has elapsed.* And the fact that, by the terms of the statute, something is to be done under it before the expiration of the constitutional period for it to take effect, will not amount to a legislative direction that the act shall take effect at that time, if the act itself is silent as to the period when it shall go into operation."

Another very important case sustaining our view is *Gilbert* vs. *Ackerman,* 159 N. Y., 118; 53 N. E., 753, where the Court of Appeals upon full consideration adopted fully the views of Judge Cooley in *Price* vs. *Hopkins,* 13 Mich., 318 *supra.* Here the question was whether an amendatory law which became a law on April 16, 1897, but which in its second section provided that it should take effect September 1, 1897, leaving an intervening period of four weeks between its passage and its taking effect, had any effect as notice or otherwise during the intervening period.

The doctrine in *Smith* vs. *Morrison,* 22 Pickering's Reports, 430 and *Stine* vs. *Bennett,* XIII Minnesota Reports, 138, disapproved of in *Price* vs. *Hopkins,*

supra, was repudiated, and it was distinctly held that that intervening period was *dies non;* and that, therefore, the fact that there was such intervening period in no way did away with the unconstitutionality of the act, which, assuming that it only became operative or effective on the date of its being made effective, improperly shortened the period of the statute of limitations. This opinion should be carefully read, and seems to be conclusive of the doctrine for which we are here contending.

Russell vs. *Akeley Lumber Co.* (Minn.), 48 N. W. Rep., p. 3, we find was based upon the fact that:

> "The act was a public law from the date of its enactment, although by its terms it was not to take immediate effect, and all persons were bound from the date of its approval, to take notice of its existence and terms."

This, as we have seen, is not the law of New Jersey. The case of *Pennsylvania Company* vs. *State* (Ind.), 41 N. E. Rep. 937, is based upon the provision of the Constitution of Indiana, that laws shall be enforced from the time of their distribution and the proclamation of the Governor, and hence the court properly held that the suspension clause postponing the effectiveness of the act was, by virtue of this constitutional provision, itself operative, and therefore constituted notice from the time of such proclamation and publication.

NOTICE.

Chapter 368 is silent as to the time within which the notice must be given. As the notice must be given to the other party, it must be mailed or handed to him, or served upon him and in some way delivered to him. In what manner, therefore, is notice to be given to the other party to the contract? It cer-

tainly will not be held to be possible to have given the party notice on the 4th of July, before he had arisen, and it was equally impossible to give him notice during the 4th of July, on account of its being a legal holiday, and Sexton was not obliged to do any work except such emergency work as was made necessary by the peculiar character of the business which the prosecutor carried on.

Whether or not Sexton was at the office of the prosecutor on the morning of the 4th of July, does not appear from the testimony, but appears from Mrs. Sexton's testimony that he came home to dinner in Montgomery street which was a long distance from the office of the prosecutor and did not leave home again until two o'clock.

The statutes of New Jersey have provided for giving notice of more than one hundred and fifty different kinds, embracing almost as many subjects and we have not been able to find a single instance where eight hours notice has been required, especially when notice must be in writing. Is there any legal reason why the notice required by chapter 368 should not be served in the same manner and within the same time that are required of all other notices?

It is not the duty of the court to say in this case that considering the time when the accident occurred, neither party had a reasonable time within which to serve the notice, and that as notice could not be given to Sexton who died the same day on which the law took effect, no recovery can be had by the plaintiff in this case?

II

We contend that the judgment not only violates this provision of the State Constitution, but also the Constitution of the United States; and without amplifying the matter, we desire to raise the Federal

question that chapter 368 is in violation of the Constitution of the United States, as well as our own Constitution, so that, if necessary, this question can be reviewed by the Supreme Court of the United States.

Bright vs. *Columbus, Hocking Valley, etc. Ry.*, 176 U. S., 481.

Williams vs. *Eggleston*, 170 U. S., 304.

III.

There was no allegation in the petition or proof in the case that the prosecutor or those on whose behalf she sued were dependents. This is fatal to the claim. *Miller* vs. *Public Service Ry. Co.*, 85 Atlantic Rep., 1030. *Blang* vs. *Erie R. R., Id.* The point is covered by the second reason, p. 63.

It is therefore respectfully contended that the judgment must be reversed.

GEORGE W. HUBBELL,
ROBERT H. McCARTER,
Of Counsel with Newark District Telegraph Company.

June Term, 1914.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

New Jersey Court of Errors and Appeals.

LIZZIE ALIDA SEXTON, on behalf of herself and next of kin of FLOYD SEXTON, deceased, *et als.*, Defendants-Respondents, vs. NEWARK DISTRICT TELEGRAPH COMPANY, Prosecutor-Appellant.	**On Certiorari. On Appeal from Supreme Court.**

BRIEF FOR DEFENDANTS-RESPONDENTS ON REARGUMENT.

I.

The contract with Sexton was made with notice that on and after July 4th, 1911, it would be subject to the provisions of the Employers' Liability Act of 1911.

As we understand the appellant's brief, which does not comply with the additional rule of this Court, promulgated June Term, 1912, to take effect November Term, 1912, it is predicated upon the proposition that the supplement to the Em-

ployers' Liability Act of 1911 (Chap. 763, P. L., 1911) *had no force or effect whatsoever prior to July 4th of that year.*

In his brief (pp. 13–14), the appellant's counsel says:

> "We contend, therefore, that until the 4th of July, 1911, the Telegraph Company had a right to act under its contract with Sexton exactly as if the acts in question had never been passed * * *".

Briefly stated, the appellant's contention is that the supplement is unconstitutional because, having no force prior to July 4th, it did not give the appellant a reasonable opportunity to take the action which was necessary to relieve it from the provisions of Section II of the Employers' Liability Act, and because on July 4th it imposed other terms upon a pre-existing contract of such nature as to impair its obligation. The soundness of this contention is dependent upon the soundness of the proposition that the supplement had no force or effect whatsoever prior to July 4th. If the Telegraph Company was charged with notice from the date of the supplement's approval that on and after July 4th, its contract with Sexton would be subject to the provisions of the act, then the appellant's argument falls to the ground. No constitutional question can be involved if the Telegraph Company was charged with such notice, since its contract with Sexton was made about three weeks subsequent to the approval of the supplement which was approved about two months before the act went into effect.

A reading of the supplement leaves no room for doubt, that the Legislature intended that all persons should be charged with notice of its contents from and after the date of its approval. It provides as follows:

> "1. Every contract of hiring, verbal, written, or implied from circumstances, now in operation or made or implied prior to the time

limited for the act to which this act is a supplement to take effect, shall, after this act takes effect, be presumed to continue subject to the provisions of section two of the act to which this act is a supplement, unless either party shall, prior to accident, in writing, notify the other party to such contract that the provisions of section two of the act to which this act is a supplement are not intended to apply.

"2. This act shall take effect on the fourth day of July next succeeding its passage and approval.

"Approved May 2, 1911."

(P. L., 1911, p. 763).

The appellant contends that the supplement could be wholly disregarded until the date when it became operative. We concede, of course, that it did not go into effect until July 4th. We deny that it follows that its provisions could be disregarded until that date and submit that from and after May 2, 1911, the appellant was charged with notice of its provisions. The fact that it provides that it shall *become effective* on July 4th, does not militate against the view that it was *notice* prior to that date. The fundamental fallacy in the appellant's argument consists in its failure to discriminate between the effectiveness of the supplement *in its operation* as distinguished from its effectiveness *as notice*. This will be more clearly demonstrated by an examination of the cases cited on pages 11–13 of the appellant's brief, all of which relate solely to the question of the time when the provisions of the particular act went *into operation*.

Thus, in *Santa Cruz Water Co.* v. *Kron*, 74 Cal., 222, 15 Pac., 772, it was held that certain bonds which were issued pursuant to authority conferred at an election held *prior* to May 8th, were void because the act authorizing the election did not become effective *until* May 8th.

In *Larrabee* v. *Talbot*, 5 Gil. (Md.), 426; 46 Amer. Dec., 637, 645, it was held that the insolvent laws

of Maryland were not suspended on August 30, 1841, by the Bankrupt Law of the United States, since the latter did not become effective until February 1, 1842.

In *State, ex rel. Cook* v. *Meares*, 116 N. C., 582, 21 S. E., 973, plaintiff's election on March 9th to fill an office created by an act passed prior to that date, but which did not become effective until March 12th, was held void.

In *Conley* v. *Calhoun*, 2 W. Va., 416, it was held that a vote taken at an election authorized by an act but taken before the act went into effect was a nullity.

The statement in the *Amer. & Eng. Ency. of Law* cited on the appellant's brief, must be read in connection with the cases cited in support of the text before it can be properly understood. When so read it will appear that it relates to the time when acts take effect. It is not intended as a discussion of the question here involved.

The rule applicable to the present case has been discussed in a number of decisions. In *Diamond Glue Co.* v. *U. S. Glue Co.*, 187 U. S., 611, an action was brought upon a written contract alleging breach and claiming damages. The plaintiff was an Illinois corporation; the defendant a Wisconsin corporation. The contract was made on June 25th. Prior to its execution a law had been enacted in Wisconsin, to go into operation on September 1st, requiring foreign corporations to comply with certain requirements as a condition of doing business in Wisconsin. It was admitted that the plaintiff had not complied with these conditions. The defendant set up that the contract was one to do business in Wisconsin after the statute took effect, and that the defendant was justified by the statute in declining to go on. This defense was sustained by the lower court and the plaintiff excepted, contending that the statute did not and could not constitutionally affect its rights under the contract in question. The contract was one by which it was agreed that the plain-

tiff should supervise the plans for a glue factory to be built by the defendant on a site to be selected within sixty days; that it should have charge of the management and operation of the factory for the defendant. The contract was to run for five years from the time when the plant was finished and began work. It was to be constructed in Wisconsin and was actually put in operation about one year after the date of the contract. The Wisconsin statute forbade foreign corporations from transacting business in the State without complying with the requirements thereof, and provided further that every contract made by such corporation should be wholly void on its behalf, but should be enforceable against it. Mr. Justice Holmes said; on pages 614 *et seq.:*

> " The plaintiff contends, however, as we have said, that the statute did not and could not apply to the performance of the contract in suit. It will be remembered that while enacted before the contract was made, it did not go into effect until afterwards, although before the time when the factory was or could have been built in the ordinary course of business. It is said that if the statute is taken to govern the present contract it impairs the obligation of that contract, and encounters the United States Constitution, Article I, Section 10. It is assumed that to allow the statute any operation upon the contract is to give it a retroactive effect, and it is said that for that reason also plaintiff is not barred.
>
> " A prohibition of the doing of business after a statutes goes into effect is not retroactive with regard to that business, even though the business be done in pursuance of an earlier contract. The suggestion needing discussion is whether the statute impairs the obligation of the contract. * * *
>
> " The suspension clause of Sec. 4978 was of immediate operation, and therefore was notice to the plaintiff and defendant of itself and of what was suspended and for how long. If with that notice they contracted for the transaction of business within the jurisdiction

> of the statute and after the statute should have gone into effect, they did so with notice that, if nothing changed, the contemplated business would be unlawful by force merely of present conditions and the lapse of time, unless the plaintiff should comply with the regulation. In such circumstances, at least, it seems to us impossible to say that the obligation of the contract is impaired within the meaning of the Constitution by the Wisconsin law. Statements made with a different intent in some decisions, to the effect that suspended statutes are to be read as if passed on the day when they go into operation, do not apply to a case like this. Such statutes are to be read in that way for the purposes of the operation which is suspended, but not for all. *Stine* v. *Bennett*, 13 Minnesota, 153, 157; *Smith* v. *Morrison*, 22 Pick., 430, 432; *Ford* v. *Chicago Milk Shippers' Association*, 155 Illinois, 166, 181."

The last clause above quoted has, as it seems to us, a direct application to the present case. The supplement under consideration provided:

> " This act shall take effect on the fourth day of July next succeeding its passage and approval."

That clause was, of course, a suspension clause, and, as stated in the *Diamond Glue Co. case*, was of immediate operation and was, therefore, notice to the appellant and Sexton

> " of itself, and of what was suspended and for how long."

The supplement was approved on May 2d, and the contract entered into on May 23d. The contract was therefore entered into with notice that if nothing changed it would become subject to Section II of the act " by force merely of present conditions and the lapse of time " unless the appellant should give the notice provided for in the supplement. The supplement is not one of those statutes which should

be read as if passed on the day when it went into operation. It was evidently the intent of the Legislature that persons who entered into contracts between the date of its approval and July 4th, should be put on notice that on and after July 4th the provisions of Section II of the act would apply unless notice to the contrary was given.

We are not concerned with the effect of the supplement upon pre-existing contracts because the Sexton contract was not in existence on May 2, 1911, the date of the approval of the supplement, and it is settled that Courts will not listen to Constitutional objections raising purely moot questions.

Cooley, Const. Lim. (6th ed.), p. 196.
State v. *De Lorenzo*, 51 Vr., 500, 502.
Williams v. *Walsh*, 222 U. S., 415, 423, 424.
Lee v. *State of New Jersey*, 207 U. S., 67, 70.
Pittsburgh Steel Co. v. *Baltimore Equitable Society*, 226 U. S., 455.

Similar in principle to the *Diamond Glue Co. case* is *McLaughlin* v. *Newark*, 28 Vroom, 298. There the act under consideration provided that it should go into effect on May 14th, but since it was not approved until May 16th, it was contended that it fell within the general statute which declares that public acts shall go into effect on July 4 next after their passage "unless otherwise specially provided for in such act." Justice Dixon said, on page 302:

> "It is indisputable that, on the face of this act, the legislature has declared its intention that the act should be in force at all times after May 14th, and there is not the slightest ground for supposing that this intention, so far as it related to the time subsequent to the passage of the act on May 16th, was dependent on the efficiency of the act prior to its passage. We are therefore bound to hold that the act went into effect on its passage, and was operative on June 25th, when the commissioners were appointed."

The appellant's contention that it was not charged with notice of the contents of the supplement until the date when its provisions became effective is the basis of its claim that the supplement is unreasonable in its operation and unconstitutional. Under the well-settled rule of this Court it is incumbent upon it to adopt such construction of the supplement as will support it if such construction is admissible.

In *Road Commission* v. *Harrington Township*, 26 Vr., 327, this Court said, at page 329:

> "We must presume that the legislature intended to pass a valid law and adopt an admissible construction which supports it."

In *Village of Passaic* v. *State, The D., L. & W. R. R. Co.*, 8 Vr., 538, this Court said, at page 539:

> "Courts will sustain legislative action attacked on the ground of unconstitutionality unless they are fully satisfied of its invalidity, and such a construction will be given to it, if practicable, as will give it effect."

In *Attorney General* v. *McGuinness*, 49 Vr., 346, Mr. Justice Garrison, speaking for this Court, discussed the reasons for the above rule. At page 370, he said:

> "As early, however, as 1811, Chief Justice Tilghman, of Pennsylvania, spoke of the doctrine as not only already established, but also as having a well defined limitation. 'For weighty considerations,' he said, 'it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court and every other court of reputation in the United States that an act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.'"

There can be no doubt that it is at least an "admissible construction" of the supplement that it

was intended thereby to give notice that certain contracts would by mere lapse of time become subject to the act. This notice was not in anywise affected by the suspension clause.

That statutes become notice from the date of their approval, whether containing suspension clauses or not, is established by the weight of authority. The question has usually come before the court upon a consideration of statutes of limitation. It is not now urged that these decisions, in so far as they contain discussions of the constitutionality of statutes of limitation, are applicable except in their discussion of the time when the statutes operate as notice.

In *Wilson* v. *Iseminger*, 185 U. S., 55, 64, the United States Supreme Court recognized the effectiveness of a statute of limitation as notice three years before the statute went into effect.

In the leading case of *Stine* v. *Bennett*, 13 Minn., 138, the Court said, at page 143:

> "This act, upon its passage by the legislature and approval by the governor, had all the constitutional requisites of a law in our State. As a public law, therefore, although by its provisions not to take immediate effect, all persons were required, from its approval, or at least from its publication, to take notice of its existence and terms, and that at the time appointed its provisions would be operative for all purposes. This gave notice to all that a change in the law regulating the remedy upon the causes of action embraced in the act, would take place at the time appointed to determine its suspension and that thereafter the remedy could be enforced only within six years from the time the cause of action accrued. *Smith* v. *Morrison*, 22 Pick., 430; *Hedger* v. *Rennaker*, 3 Metc. (Ky.), 258. See also *Burwell* v. *Tullis*, 12 Minn., 578 (Gil., 486); Sedg. St. & Const. Law, 134–5, and authorities cited in Notes; *Id.*, 691; *Holcombe* v. *Tracy*, 2 Minn., 246 (Gil., 201)."

In *Russell* v. *H. C. Akeley Lumber Co.*, 48 N. W., 3, the Court said, at page 4:

> "This act was passed March 1st and by its terms did not take effect until September 1st. * * * The act was a public law from the date of its enactment, although by its terms it was not to take immediate effect; and all persons were bound from the date of its approval to take notice of its existence and terms."

In *Duncan* v. *Menard*, 21 N. W., 714, the Court said, at page 715:

> "When this act had been passed, approved and published, it became a statute of the state and all persons are to be thereafter presumed to have had notice of its provisions."

To the same effect see:

Smith v. *Morrison*, 22 Pick., 430;
Eaton v. *Supervisors*, 40 Wis., 668;
State v. *Krahmer*, 117 N. W., 780, 785.

In *State* v. *Dircks*, 111 S. W., page 1 (Mo.), the constitutionality of an act relating to sheriffs was under consideration. At page 3 the Court said:

> "That a statute or constitutional provision may have a potential existence but which will not go into actual operation until a future time, is familiar law." (Citing cases.)

This is the view which was followed by the Supreme Court in the present case.

The opinion of that Court is in part as follows:

> "Although the supplement provided that it should take effect on July 4, it made ample provision whereby either Sexton or the prosecutor, in entering into the contract of May 23, 1911, might prevent it from becoming subject to the provisions of Section II either by so providing in the contract itself, or by giving notice to that effect prior to the occurrence of an accident, and that they did not

> do. All of the intervening time between May 2, 1911, and July 4, 1911, was allowed to both employers and employees to determine their attitude with regard to the law. No doubt during this interval both employer and employees considered the situation, which was given the widest publicity, so that by July 4, 1911, they had had the fullest opportunity to determine what course they should adopt We think it may be fairly said, that although the supplement did not become effective until July 4, 1911, it had a potential existence from the date of its approval and that for a period of upwards of two months both employers and employees were put on notice of the presumption of the act and what it was necessary for them to do if it was desired that the presumption should not apply " (Case, p. 81, lines 18–40).

In *Pennsylvania Co.* vs. *State*, 41 N. E., 937 (Ind.), an action was instituted for the recovery of penalties for the violation of an act. The alleged violation consisted in the failure of the railroad company to note upon a blackboard at least twenty minutes before the schedule time of the arrival of passenger trains, the fact as to whether such trains were on schedule time, and if late, how much. The contention was made by the railroad company that it was entitled to at least a reasonable time after the act went into effect to make such arrangements as were necessary to enable it to comply with its terms. This view was not adopted by the Court, which held that the time between the approval of the act and the date when it took effect was intended to be the period during which the railroad company could make such preparations. On pages 938–9, the Court said:

> " The language of the act as to the time when compliance shall begin is: 'Immediately after (the) taking effect of this act.' If there had been an emergency clause, under which penalties would, by the letter of the law, have attached at once upon its passage, manifestly it would have worked great hardship to

> hold that the Legislature meant to inflict heavy penalties for failing to do that which necessarily required time for preparation to do. * * * So we may say with reference to the time when the law went into force (May 10, 1889) if that were the first notice that railway companies were required to take of the law. As we find it, the law was approved March 9, 1889, and was proclaimed in force May 10, 1889—more than 60 days, and, upon the allegations of the answer, an abundant time within which to prepare for compliance with the law and for the avoidance of the prescribed penalties. The law, having passed without an emergency clause, was not in force until May 10, 1889. However, that its passage by the Legislature and the declaration of the Constitution that it should be in force from its distribution and the proclamation of the Governor, were notice to railway companies sufficient to enable them to prepare for its requirements we have no doubt."

The fact that in some of the cases cited the operation was suspended by a general statute and not by a clause in the act itself is immaterial.

> *Mulvey* v. *City of Boston*, 83 N. E., 402, 404.

In *Merchants National Bank* v. *Braithwaite*, 75 N. W , 244 (N. D.), the Court, speaking of the date from which reasonable time within which a statute of limitations might go into effect should be computed, said:

> " that the reasonable time is to be computed from the date when the new law is passed and and not from the time when it takes effect, is well settled " (citing cases).

We have found but two cases to the contrary of the above, to wit:

> *Price* v. *Hopkin*, 13 Mich., 318, and
> *Gilbert* v. *Ackerman*, 159 N. Y., 118, 53 N. E., 753,

both of which are cited and relied upon in the appellant's brief. The *Price* case can be readily distinguished and has been judicially distinguished upon the ground that it is based upon the peculiar provisions of the Michigan Constitution. Both cases were criticized in *Wrightman* v. *Boone County*, 82 Fed., 412, and in *Osborne* v. *Lindstrom*, 81 N. W., 72 (N. D.), where the Court said, at page 74, speaking of the *Braithwaite case:*

> "Since that case was decided, the Court of Appeals of New York, in *Gilbert* v. *Ackerman*, 159 N. Y., 118; 53 N. E., 753; 45 L. R. A., 118, has decided the same question directly opposite. Had that decision been reported prior to our decision of the Braithwaite case, perhaps our profound respect for that Court might have induced us to reach a different conclusion, but we think not. Justice Gray, who speaks for the Court of Appeals, says that the point had not previously been decided in that State; and he cites *Smith* v. *Morrison*, 22 Pick., 430; *Stine* v. *Bennett*, 13 Minn., 153 (Gil., 138); *Duncan* v. *Cobb*, 32 Minn., 460; 21 N. W., 714; *Eaton* v. *Supervisors*, 40 Wis., 668; *Hedger* v. *Rennaker*, 3 (Metc. (Ky.), 255; *Hart* v. *Bostwick*, 14 Fla., 180; *Wrightman* v. *Boone Co.* (C. C.), 82 Fed., 412—which he concedes holds adversely to the views announced in the decision. To these cases we would add *State* v. *Jones*, 21 Md., 432; *Bigelow* v. *Bemis*, 2 Allen, 496; *Korn* v. *Browne*, 64 Pa. St., 55; *Clay* v. *Iseminger*, (Pa. Sup.), 41 Atl., 38; *Holcombe* v. *Tracy*, 2 Minn., 241 (Gil., 201); and *Peirce* v. *Tobey*, 5 Metc. (Mass.), 168—all of which are directly opposed to *Gilbert* v. *Ackerman*. To support that case *Price* v. *Hopkin*, 13 Mich., 318, is cited. But that case was largely controlled by a provision in the Michigan constitution. Practically, the New York case stands alone, and, under this condition of the authorities, we are constrained to adhere to our ruling upon this point as announced in the Braithwaite case."
>
> "* * * The courts say that a party is bound to take notice of an act when it is passed. That proposition is fully conceded in *Gilbert* v. *Ackerman*."

It would seem that each of the learned judges in the *Price* and *Gilbert cases* overlooked the point noticed in the *Diamond Glue Co. case*, that the suspension clause was of immediate operation, "and therefore was notice to the plaintiff and defendant of itself and of what was suspended and for how long."

Of course, it follows that if the statute operated as notice, the obligation of the Sexton contract could not have been impaired.

In *Lehigh Water Co.* v. *Easton*, 121 U. S., 388, the first syllabus is as follows:

> "The provision in the Constitution of the United States that 'no State shall pass any law impairing the obligation of contracts' necessarily refers to the law made after the particular contract in suit."

In *J. A. Guillotte* v. *City of New Orleans*, 12 La. Annual Rep., 432, the last head-note is as follows:

> "The contract spoken of by Article 105 of the Constitution, the obligation of which the Legislature is prohibited from impairing, is a contract in existence at the time of the passage of the law."
>
> See also *Pinney* v. *Nelson*, 183 U. S.. 144, 148.

Since the appellant made no attempt to relieve itself from the provisions of Section II, either by giving notice to Sexton or by inserting a proper clause in the contract of employment, it is difficult to see how it can be fairly urged that its rights are infringed by the provisions of the supplement. That Section II applies is due to the appellant's act, as was pointed out in various portions of the opinion of the Court below:

> "Under the act neither the employer nor the employee is bound to accept the provisions of Section II unless he chooses to do so. If he does not he certainly is not deprived of property without due process of law. If he

does, then he has given the consent which the prosecutor contends he must give in order to be bound by the provisions of the second section" (Case, p. 78, lines 28-35).

"It is obvious that in the present instance the prosecutor could have inserted in its contract with Sexton that the provisions of Section II were not to apply thereto. If Sexton had been unwilling to enter into such a contract he was free to refuse to do so. The contract in the present case was subject to no legislative interference, nor was there any restraint upon the freedom of both parties to make such contract as they saw fit. This being the case, the prosecutor is driven to the untenable position that even though it had elected that Sexton's contract of hiring should be with reference to Section II (since the contract did not provide to the contrary), it cannot be bound by its election, because it was not competent for the Legislature to require it to elect" (Case, p. 81, lines 2-18).

"Since as a matter of fact, no notice was given by the prosecutor either on July 4th or prior thereto, it apparently acquiesced in the provisions of the supplement that the presumption should be binding. The prosecutor should not now be heard to say that it has been deprived of its property, or that its rights have been affected against its assent when it appears that assent had been given" (Case, p. 82, lines 34–40; p. 83, line 1).

"Neither the act nor the supplement deprived the prosecutor of its right to bring the contract within Section I. The most which they did was to require the prosecutor to express its dissent or be bound by its failure to do so. That the contract operated under Section II is wholly due to the prosecutor's default" (Case, p. 84, lines 15-21).

An attempt is made in the appellant's brief to distinguish from the present case the *Diamond Glue Company* case, *supra*. On page 16 of the appellant's brief the following appears:

"It is evident that in Wisconsin they had no general provision such as exists in some state constitutions, and in others in statutes

> postponing the operation of statutes in the absence of particular phraseology, until a given day after their approval, and hence, as shown by Mr. Justice Holmes, the suspension clause became immediately effective, and hence was notice to every one."

Section 13 of the New Jersey "Act relative to statutes" is then quoted and the brief continues (p. 17):

> "Had such a provision existed in Wisconsin, it could not have been held that the suspension clause was of 'immediate operation.'"

There is nothing in the opinion of the United States Supreme Court or of the Federal Circuit Court (103 Fed., 838) to indicate what the provisions of the Wisconsin act relating to statutes generally were, but it appears in the opinion of the Supreme Court that the statutes then in force in Wisconsin were "Wisconsin Stat., 1898" (see p. 612 of the Opinion; see also 103 Fed., p. 839). The sections of those statutes under discussion in the Federal courts were 1770*b* and 4978. Section 1770*b* contains certain provisions requiring foreign corporations to file a copy of their charters with the Secretary of State and to pay a small fee as a condition of doing business in Wisconsin under certain penalties. Section 4978 provides:

> "These statutes shall take effect and go into operation on the first day of September in the year 1898."

The Court will recall that Section 2 of the Supplement to the Employers Liability Act provides:

> "This act shall take effect on the 4th day of July next succeeding its passage and approval."

It appears, therefore, that the suspense clause of the Wisconsin act under consideration by the

Supreme Court was substantially the same as the suspense clause in the Supplement to the Employers' Liability Act. The Wisconsin statute relating to the time when statutes generally should take effect appears at Section 4975 of the "Wisconsin Stat. 1898," and provides:

> "Every statute which does not expressly prescribe the time when it shall go into operation shall take effect throughout the state on the twentieth day next after that on which it shall be approved by the governor or otherwise become a law, according to the provisions of the constitution; but no general law shall be in force until published."

For the purpose of comparison, we quote the Section of the New Jersey Act relating to the same subject, which appears as Section 13 of the "Act relative to statutes" (4 Comp. Stat. of N. J., p. 4973), and provides as follows:

> "That from and after the passage of this act, all public acts which shall be hereafter passed, shall not go into operation or be in force until the fourth day of July next after the passage of any such act, unless otherwise specially provided for in such act."

A consideration of the statutes of the two States conclusively shows, therefore, that the assertions in the appellant's brief with reference to the statutory situation in Wisconsin are wholly unfounded, and that the fact is that the statutory law of the two States covering the subject under consideration is substantially the same. In the *Diamond Glue Company* case, the Supreme Court held that the plaintiff in error was charged with notice of the provisions of Section 1770*b* of the Wisconsin statutes, notwithstanding the fact that Section 4978 of the statutes of that State expressly provided that Section 1770*b* should "take effect and go into operation on the first day of September in the year 1898," which was some months after the time when the

contract under consideration was made. The case is direct authority for the claim that in the present instance the appellant was charged with notice of the provisions of the Supplement. In New Jersey as in Wisconsin it is necessary to examine statutes as soon as they become valid laws, in order to ascertain when they go into operation, since in New Jersey a statute may provide that it shall go into immediate operation, or may provide that it shall go into operation on some date before or after the fourth day of July next succeeding its passage and approval, or may be silent as to when it goes into effect, in which case its operation commences at the time mentioned in the act relating to statutes generally. An examination of the statutes of Wisconsin adds greatly to the weight which should be given to the opinion of the Supreme Court in the *Diamond Glue Company* case. That case, as it seems to us, is high and direct authority for the proposition that the appellant was from the date of the approval of the Supplement charged with notice of the suspension clause and also "of what was suspended and for how long."

II.

The Trial Court's determination of fact contains findings sufficient to warrant the judgment.

Sexton left him surviving a widow and two boys aged respectively eight and ten years at the time of the hearing (Case, p. 21, lines 10–19).

In *Miller* v. *Public Service Ry. Co.*, 85 Atl., 1030, cited in appellant's brief, it does not appear that there was any proof as to the dependency of the petitioner other than that she was widow of the deceased. The discussion was limited to a consideration of the effect of the failure to prove the fact of

the dependency of the deceased's father, brothers and a sister, and it was held that before a recovery could be allowed for *their* benefit it must be shown that *they* were dependents in fact. In the present case the persons for whose benefit compensation was allowed are the widow and the two boys aged eight and ten years respectively. It is submitted that these facts raise a presumption of actual dependency. The children were of such tender age that the Court was warranted in judicially noticing that they would not be able to earn enough to support themselves. There was no evidence that they were entitled to income from any outside source and the fact that their father had been a line-man in the employ of the appellant since he was thirteen years of age (Case, p. 28, lines 19-25) indicates that the family was in humble circumstances.

In *Tompkins* v. *Tompkins' Executors*, 3 C. E. Green, 303, the Chancellor said, page 304:

> "The settled rule with regard to the support of infants is, that if their father is living, and is of sufficient ability, he is bound to support them, notwithstanding they may have estates of their own; even when such estates are given expressly for their maintenance."

In *Stephens* v. *Howard's Executor*, 5 Stewart, 244, the Court said, at page 247:

> "A father is bound to support his infant child, if of sufficient ability, even though it may have an ample estate of its own, but if he is not, or not able to support it according to its station and expectations, then the court may order the application of its own estate to that end."

In *Keeney* v. *Henning*, 13 Dick., 74, Pitney, *V. C.*, said, at page 82:

> "The parental right to the earnings of the infant is burthened with the duty to support, which is not relieved by the fact that the infant has an independent income. It would be

> monstrous to hold that a parent may compel his or her infant child to work for the parent's benefit, and at the same time charge the infant with its support out of its independent estate."
>
> See also *Tomkins* v. *Tomkins*, 3 Stockton, 512–517.

In *Freeman* v. *Robinson*, 9 Vr., 383, the Supreme Court held that the mere moral obligation of a father to provide maintenance for his children was not a sufficient consideration to support a subsequent express promise, but in that case the moral obligation of the parent to support his infant children was fully recognized.

It is submitted that the finding by the trial Judge that the petitioner's children were but eight and ten years old, which leads necessarily to the conclusion that they could not have supported themselves, when coupled with the obligation of their father to support them raised a presumption that the children were in fact dependent upon him. Of course there was no evidence to rebut this presumption.

A similar presumption is raised from the fact that the petitioner was the widow of the deceased and was living with him at the time of his death, there being no evidence that she had any separate estate.

The rule with reference to the husband's common law duty to support his wife, is thus stated in *15 Am. & Eng. Ency. of Law* (2d Edition), p. 814:

> "The marriage contract imposes upon the husband the duty of supporting his wife in a way suitable to her situation and his condition in life, and a failure to perform this duty is a wrong acknowledged at common law, though there was there no personal remedy, because there the wife could not sue the husband."

In *Schouler's Domestic Relations* (4th Edition), p. 70, the author said:

> "The general rule of law is that the husband, the spouse who holds and fills the purse,

> is bound to provide the family support and means of living."

This Court recognized the husband's duty to support his wife in *Freeholders* v. *Ritson*, 39 Vr., 666.

In *Yule* v. *Yule*, 2 Stock., 138, 143, the Chancellor said:

> "The husband is bound to provide a proper maintenance for his wife, but she must share his fortunes under his own roof."

In *Miller* v. *Miller*, Sax., 386, the following language was approved:

> "'It may have been the misfortune of a husband to have connected himself in marriage with a profligate and abandoned woman; but his obligation to maintain her continues until the marriage bonds are legally dissolved, or she voluntarily separates herself from him: 6 Mad., 171, S. C.; 1 Salk., 119; 1 Esp., 441.'"

In *Parker* v. *Parker*, 12 Dick., 557, 581, the Court said:

> "The defendant is shown to have been entirely willing to have such relations with his wife as enabled him to enjoy all the privileges of a husband. He subjected her to the probable dangers which attend upon maternity, but the responsibilities of maintenance of the wife and of his child, which the law casts upon him, and which he was well able to undertake, he declined to assume, and compelled her to depend on her own family."

Furth v. *Furth*, 39 Atl., 128 was an action brought by a wife against her husband for non-support. During the course of the opinion the Court said:

> "Nor do I consider his statement that he is presently unable to earn a sufficient sum to support his wife as a reason for dismissing the bill without relief to the wife. I think he should fully understand that the obliga-

tions of his marriage contract, and the consequent duty that he owes to the woman whom he contracted to support, and to the public, to carry the burden of his wife's maintenance, still rests upon him, and may justly be expected to be fully performed by him. The mere fact that the husband presently has no money does not discharge him of the duty to support his wife, though it may be some excuse for a present failure. His duty to support his wife is continuous, and is not dependent upon his prosperity. There should be a decree for the complainant accordingly."

III.

For the reasons given, it is respectfully submitted that the appeal should be dismissed, with costs.

Respectfully submitted,

KINSLEY TWINING,
Of Counsel with Defendants-Respondents.

June Term, 1914.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

New Jersey Court of Errors and Appeals.

LIZZIE ALIDA SEXTON, on behalf of herself and the next of kin, *et als.*, Defendants-Respondents,	On Certiorari.
v.	On Appeal from Supreme Court.
NEWARK DISTRICT TELEGRAPH COMPANY, Prosecutor-Appellant.	

BRIEF FOR DEFENDANTS-RESPONDENTS.

I.

The contract with Sexton was made with notice that on and after July 4th it would be subject to the provisions of the act.

As we understand the appellant's brief, which does not comply with the additional rule of this court, promulgated June term, 1912, to take effect November term, 1912, it is predicated upon the proposition that *the supplement had no force or effect whatsoever prior to July 4th.*

In his brief (p. 16) the appellant's counsel says:

> "We contend, therefore, that until the 4th of July, 1911, the Telegraph Company had a

right to act under its contract with Sexton exactly as if the acts in question had never been passed * * *."

Briefly stated the appellant's contention is that the supplement is unconstitutional because, having no force prior to July 4th, it did not give the appellant a reasonable opportunity to take the action which was necessary to relieve itself from the provisions of Section II, and because on July 4th it imposed other terms upon a pre-existing contract of such nature as to impair its obligation. The soundness of this contention is dependent upon the soundness of the proposition that the supplement had no force or effect whatsoever prior to July 4th. If the supplement operated as notice from the date of its approval that on and after July 4th the contract would be subject to the provisions of the act, then no constitutional question is involved since the contract was made about three weeks subsequent to the approval of the supplement, which was approved about two months before the act went into effect. The supplement is incorrectly quoted on page 4 of the appellant's brief. Correctly quoted it provides:

"1. Every contract of hiring, verbal, written, or implied from circumstances, now in operation or made or implied prior to the time limited for the act to which this act is a supplement to take effect, shall, after this act takes effect, be presumed to continue subject to the provisions of section two of the act to to which this act is a supplement, unless either party shall, prior to accident, in writing, notify the other party to such contract that the provisions of section two of the act to which this act is a supplement are not intended to apply.

"2. This act shall take effect on the fourth day of July next succeeding its passage and approval.

"Approved May 2, 1911."

(P. L. 1911, p. 763).

It was evidently the intention of the Legislature that the supplement should have the effect of notice prior to July 4th The fact that it provides that it shall *become effective* on July 4th, does not militate against the view that it was *notice* prior to that date. The fallacy of the appellant's argument lies in its failure to distinguish between the effectiveness of the supplement *in its operation* and *as notice*. The cases cited by the appellant on pages 13 *et seq.* of its brief relate solely to the question of the time when particular acts went into operation.

A brief consideration of these cases will disclose that they are not in point.

Thus, in *Santa Cruz Water Co. v. Kron*, 74 Cal., 222, 15 Pac., 772, it was held that certain bonds which were issued pursuant to authority conferred at an election held *prior* to May 8th, were void because the act authorizing the election did not become effective *until* May 8th.

In *Larrabee* v. *Talbot*, 5 Gil. (Md.), 426; 46 Amer. Dec., 637, 645, it was held that the insolvent laws of Maryland were not suspended on August 30, 1841, by the Bankrupt Law of the United States, since the latter did not become effective until February 1, 1842.

In *State, ex rel. Cook* v. *Meares*, 116 N. C., 582, 21 S. E., 973, plaintiff's election on March 9th to fill an office created by an act passed prior to that date, but which did not become effective until March 12th, was held void.

In *Conley* v. *Calhoun*, 2 W. Va., 416, it was held that a vote taken at an election authorized by an act but taken before the act went into effect was a nullity.

The statement in the *Amer. & Eng. Ency. of Law* cited on the appellant's brief, must be read in connection with the cases cited in support of the text before it can be properly understood. When so read it will appear that it relates to the time when acts take effect. It is not intended as a discussion of the question here involved.

The rule applicable to the present case has been discussed in a number of decisions. In *Diamond Glue Co.* v. *U. S. Glue Co.*, 187 U. S., 611, an action was brought upon a written contract alleging breach and claiming damages. The plaintiff was an Illinois corporation; the defendant a Wisconsin corporation. The contract was made on June 25th. Prior to its execution a law had been enacted in Wisconsin, to go into operation on September 1st, requiring foreign corporations to comply with certain requirements as a condition of doing business in Wisconsin. It was admitted that the plaintiff had not complied with these conditions. The defendant set up that the contract was one to do business in Wisconsin after the statute took effect, and that the defendant was justified by the statute in declining to go on. This defense was sustained by the lower court and the plaintiff excepted, contending that the statute did not and could not constitutionally affect its rights under the contract in question. The contract was one by which it was agreed that the plaintiff should supervise the plans for a glue factory to be built by the defendant on a site to be selected within sixty days; that it should have charge of the management and operation of the factory for the defendant. The contract was to run for five years from the time when the plant was finished and began work. It was to be constructed in Wisconsin and was actually put in operation about one year after the date of the contract. The Wisconsin statute forbade foreign corporations from transacting business in the State without complying with the requirements thereof, and provided further that every contract made by such corporation should be wholly void on its behalf, but should be enforceable against it. Mr. Justice Holmes said, on pages 614 *et seq.:*

> "The plaintiff contends, however, as we have said, that the statute did not and could not apply to the performance of the contract in suit. It will be remembered that while

enacted before the contract was made, it did not go into effect until afterwards, although before the time when the factory was or could have been built in the ordinary course of business. It is said that if the statute is taken to govern the present contract it impairs the obligation of that contract, and encounters the United States Constitution, Article I, Section 10. It is assumed that to allow the statute any operation upon the contract is to give it a retroactive effect, and it is said that for that reason also plaintiff is not barred.

"A prohibition of the doing of business after a statute goes into effect is not retroactive with regard to that business, even though the business be done in pursuance of an earlier contract. The suggestion needing discussion is whether the statute impairs the obligation of the contract. * * *

"The suspension clause of Sec. 4978 was of immediate operation, and therefore was notice to the plaintiff and defendant of itself and of what was suspended and for how long. If with that notice they contracted for the transaction of business within the jurisdiction of the statute and after the statute should have gone into effect, they did so with notice that, if nothing changed, the contemplated business would be unlawful by force merely of present conditions and the lapse of time, unless the plaintiff should comply with the regulation. In such circumstances, at least, it seems to us impossible to say that the obligation of the contract is impaired within the meaning of the Constitution by the Wisconsin law. Statements made with a different intent in some decisions, to the effect that suspended statutes are to be read as if passed on the day when they go into operation, do not apply to a case like this. Such statutes are to be read in that way for the purposes of the operation which is suspended, but not for all. *Stine* v. *Bennett*, 13 Minnesota, 153, 157; *Smith* v. *Morrison*, 22 Pick., 430, 432; *Ford* v. *Chicago Milk Shippers' Association*, 155 Illinois, 166, 181."

The last clause above quoted has, as it seems to us, a direct application to the present case. The supplement under consideration provided:

> "This act shall take effect on the fourth day of July next succeeding its passage and approval."

That clause was, of course, a suspension clause, and, as stated in the *Diamond Glue Co. case*, was of immediate operation and was, therefore, notice to the appellant and Sexton

> "of itself, and of what was suspended and for how long."

The supplement was approved on May 2d, and the contract entered into on May 23d. The contract was therefore entered into with notice that if nothing changed it would become subject to Section II of the act "by force merely of present conditions and the lapse of time" unless the appellant should give the notice provided for in the supplement. The supplement is not one of those statutes which should be read as if passed on the day when it went into operation. It was evidently the intent of the Legislature that persons who entered into contracts between the date of its approval and July 4th, should be put on notice that on and after July 4th the provisions of Section II of the act would apply, unless notice to the contrary was given.

We are not concerned with the effect of the supplement upon pre-existing contracts because the Sexton contract was not in existence on May 2, 1911, the date of the approval of the supplement, and it is settled that courts will not listen to constitutional objections raising merely moot questions. *Cooley, Const. Lim.* (6th Ed.), p. 196.

State v. *de Lorenzo*, 51 Vroom, 500, 502.

Williams v. *Walsh*, 222 U. S., 415, 423, 424.

Lee v. *State of New Jersey*, 207 U. S., 67, 70.
Pittsburg Steel Co. v. *Baltimore Equitable Society*, 226 U. S., 455.

Similar in principle to the *Diamond Glue Co. case* is *McLaughlin* v. *Newark*, 28 Vroom, 298. There the act under consideration provided that it should go into effect on May 14th, but since it was not approved until May 16th, it was contended that it fell within the general statute which declares that public acts shall go into effect on July 4 next after their passage "unless otherwise specially provided for in such act." Justice Dixon said on page 302:

> "It is indisputable that, on the face of this act, the legislature has declared its intention that the act should be in force at all times after May 14th, and there is not the slightest ground for supposing that this intention, so far as it related to the time subsequent to the passage of the act on May 16th, was dependent on the efficiency of the act prior to its passage. We are therefore bound to hold that the act went into effect on its passage, and was operative on June 25th, when the commissioners were appointed."

The intent of the supplement being clearly to give notice that certain contracts would by mere lapse of time become subject to the act, that intent should be given effect. The notice is not in any wise affected by the suspension clause.

In *Road Commission* v. *Harrington Township*, 26 Vr., 327, this Court said at page 329:

> "We must presume that the legislature intended to pass a valid law and adopt an admissible construction which supports it."

In *Village of Passaic* v. *State, The D., L. & W. R. R. Co.*, 8 Vr., 538, this Court said, at page 539:

> "Courts will sustain legislative action attacked on the ground of unconstitutionality

> unless they are fully satisfied of its invalidity, and such a construction will be given to it, if practicable, as will give it effect."

In *Attorney General* v. *McGuinness*, 49 Vr., 346, Mr. Justice Garrison, speaking for this Court, discussed the reasons for the above rule. At page 370, he said:

> "As early, however, as 1811, Chief Justice Tilghman, of Pennsylvania, spoke of the doctrine as not only already established, but also as having a well-defined limitation. 'For weighty considerations,' he said, 'it has been assumed as a principle in constitutional construction by the Supreme Court of the United States, by this court and every other court of reputation in the United States that an act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.'"

It is submitted that under the rule above stated the Court will not adopt the view taken by the appellant. That the supplement should operate as notice from the date of its approval is not merely "an admissible construction" of its provisions, but it is clearly the construction which the Legislature intended.

That the main act operated as notice from the date of its approval seems to be conceded on page 4 of the appellant's brief, where the following appears:

> "The result was that the Legislature, by the original act expressly declared that on all contracts of employment made after the 4th of July, 1911, the presumption of assent should apply, and hence every employer and employee had from the 4th of April, 1911, when the act was approved, until the 4th of July in the same year to study the act and determine whether or not they desired to elect to be bound by the provisions of its second section, and if they desired not to be so bound, they were then required in contracts

> entered into on or after the 4th of July, 1911, to expressly so state."

If the main act operated as notice from the date of its approval, it is difficult to see upon what theory it can be successfully claimed that the supplement did not.

That statutes become notice from the date of their approval, whether containing suspension clauses or not, is established by the weight of authority. The question has usually come before the court upon a consideration of statutes of limitation. It is not now urged that these decisions, in so far as they contain discussions of the constitutionality of statutes of limitation, are applicable except in their discussion of the time when the statutes operated as notice.

In *Wilson* v. *Iseminger*, 185 U. S , 55, 64, the United States Supreme Court recognized the effectiveness of a statute of limitation as notice three years before the statute went into effect.

In the leading case of *Stine* v. *Bennett*, 13 Minn., 138, the Court said, at page 143:

> "This act, upon its passage by the legislature and approval by the governor, had all the constitutional requisites of a law in our State. As a public law, therefore, although by its provisions not to take immediate effect, all persons were required, from its approval, or at least from its publication, to take notice of its existence and terms, and that at the time appointed its provisions would be operative for all purposes. This gave notice to all that a change in the law regulating the remedy upon the causes of action embraced in the act, would take place at the time appointed to determine its suspension and that thereafter the remedy could be enforced only within six years from the time the cause of action accrued. *Smith* v. *Morrison*, 22 Pick., 430; *Hedger* v. *Rennaker*, 3 Metc. (Ky.), 258. See also *Burwell* v. *Tullis*, 12 Minn., 578 (Gil., 486); Sedg. St. & Const. Law, 134–5, and authorities cited in Notes; *Id.*, 691; *Holcombe* v. *Tracy*, 2 Minn., 246 (Gil., 201)."

In *Russell* v. *H. C. Akeley Lumber Co.*, 48 N. W., 3, the Court said, at page 4:

> "This act was passed March 1st and by its terms did not take effect until September 1st. * * * The act was a public law from the date of its enactment, although by its terms it was not to take immediate effect; and all persons were bound from the date of its approval to take notice of its existence and terms."

In *Duncan* v. *Menard*, 21 N. W., 714, the Court said, at page 715:

> "When this act had been passed, approved and published, it became a statute of the state and all persons are to be thereafter presumed to have had notice of its provisions."

To the same effect see:

> *Smith* v. *Morrison*, 22 Pick., 430;
> *Eaton* v. *Supervisors*, 40 Wis., 668;
> *State* v. *Krahmer*, 117 N. W., 780, 785.

In *State* v. *Dircks*, 111 S. W., page 1 (Mo.) the constitutionality of an act relating to sheriffs was under consideration. At page 3 the Court said:

> "That a statute or constitutional provision may have a potential existence but which will not go into actual operation until a future time, is familiar law" (Citing cases).

This is the view which was followed by the Supreme Court in the present case.

The opinion of that Court is in part as follows:

> "Although the supplement provided that it should take effect on July 4, it made ample provision whereby either Sexton or the prosecutor, in entering into the contract of May 23, 1911, might prevent it from becoming subject to the provisions of Section II either by so providing in the contract itself, or by giving notice to that effect prior to the occurrence of an accident, and that they did not do. All of the intervening time between May 2, 1911, and July 4, 1911, was allowed to both

> employers and employees to determine their attitude with regard to the law. No doubt during this interval both employer and employees considered the situation, which was given the widest publicity, so that by July 4, 1911, they had had the fullest opportunity to determine what course they should adopt. We think it may be fairly said, that although the supplement did not become effective until July 4, 1911, it had a potential existence from the date of its approval and that for a period of upwards of two months both employers and employees were put on notice of the presumption of the act and what it was necessary for them to do if it was desired that the presumption should not apply " (Case, p. 81, lines 18-40).

In *Pennsylvania Co.* vs. *State*, 41 N. E., 937 (Ind.), an action was instituted for the recovery of penalties for the violation of an act. The alleged violation consisted in the failure of the railroad company to note upon a blackboard at least twenty minutes before the schedule time of the arrival of passenger trains, the fact as to whether such trains were on schedule time, and if late, how much. The contention was made by the railroad company that it was entitled to at least a reasonable time after the act went into effect to make such arrangments as were necessary to enable it to comply with its terms. This view was not adopted by the Court, which held that the time between the approval of the act and the date when it took effect was intended to be the period during which the railroad company could make such preparations. On pages 938-9, the Court said:

> "The language of the act as to the time when compliance shall begin is: 'Immediately after (the) taking effect of this act.' If there had been an emergency clause, under which penalties would, by the letter of the law, have attached at once upon its passage, manifestly it would have worked great hardship to hold that the Legislature meant to inflict heavy penalties for failing to do that which

> necessarily required time for preparation to do. * * * So we may say with reference to the time when the law went into force (May 10, 1889) if that were the first notice that railway companies were required to take of the law. As we find it, the law was approved March 9, 1889, and was proclaimed in force May 10, 1889—more than 60 days, and, upon the allegations of the answer, an abundant time within which to prepare for compliance with the law and for the avoidance of the prescribed penalties. The law, having passed without an emergency clause, was not in force until May 10, 1889. However, that its passage by the Legislature and the declaration of the Constitution that it should be in force from its distribution and the proclamation of the Governor, were notice to railway companies sufficient to enable them to prepare for its requirements we have no doubt."

The fact that in some of the cases cited the operation was suspended by a general statute and not by a clause in the act itself is immaterial.

Mulvey v. *City of Boston*, 83 N. E., 402, 404.

In *Merchants National Bank* v. *Braithwaite*, 75 N. W., 244 (N. D.), the Court, speaking of the date from which reasonable time within which a statute of limitations might go into effect should be computed, said:

> "that the reasonable time is to be computed from the date when the new law is passed and not from the time when it takes effect, is well settled" (citing cases).

We have found but two cases to the contrary of the above, to wit:

Price v. *Hopkin*, 13 Mich., 318, which may be distinguished upon the ground that it was based upon the peculiar provisions of the Michigan Constitution, and

Gilbert v. *Ackerman*, 159 N. Y., 118, 53 N. E., 753.

These cases were criticized in *Wrightman* v. *Boone County*, 82 Fed., 412, and in *Osborne* v. *Lindstrom*, 81 N. W., 72 (N. D.), where the Court said, at page 74, speaking of the *Braithwaite case:*

> "Since that case was decided, the Court of Appeals of New York, in *Gilbert* v. *Ackerman*, 159 N.Y., 118; 53 N. E., 753; 45 L. R. A., 118, has decided the same question directly opposite. Had that decision been reported prior to our decision of the Braithwaite case, perhaps our profound respect for that Court might have induced us to reach a different conclusion, but we think not. Justice Gray, who speaks for the Court of Appeals, says that the point had not previously been decided in that State; and he cites *Smith* v. *Morrison*, 22 Pick., 430; *Stine* v. *Bennett*, 13 Minn., 153 (Gil., 138); *Duncan* v. *Cobb*, 32 Minn., 460; 21 N.W., 714; *Eaton* v. *Supervisors*, 40 Wis., 668; *Hedger* v. *Rennaker*, 3 Metc. (Ky.), 255; *Hart* v. *Bostwick*, 14 Fla., 180; *Wrightman* v. *Boone Co.* (C. C), 82 Fed., 412—which he concedes holds adversely to the views announced in the decision. To these cases we would add *State* v. *Jones*, 21 Md., 432; *Bigelow* v. *Bemis*, 2 Allen, 496; *Korn* v. *Browne*, 64 Pa. St., 55; *Clay* v. *Iseminger* (Pa. Sup.), 41 Atl., 38; *Holcombe* v. *Tracy*, 2 Minn., 241 (Gil., 201); and *Peirce* v. *Tobey*, 5 Metc. (Mass.), 168—all of which are directly opposed to *Gilbert* v. *Ackerman.* To support that case *Price* v. *Hopkin*, 13 Mich., 318, is cited. But that case was largely controlled by a provision in the Michigan constitution. Practically, the New York case stands alone, and, under this condition of the authorities, we are constrained to adhere to our ruling upon this point as announced in the Braithwaite case."
>
> "* * * The courts say that a party is bound to take notice of an act when it is passed. That proposition is fully conceded in *Gilbert* v. *Ackerman.*"

It would seem that each of the learned judges in the *Price* and *Gilbert cases* overlooked the point noticed in the *Diamond Glue Co. case*, that the sus-

pension clause was of immediate operation, "and therefore was notice to the plaintiff and defendant of itself and of what was suspended and for how long."

Of course, it follows that if the statute operated as notice, the obligation of the Sexton contract could not have been impaired.

In *Lehigh Water Co.* v. *Easton*, 121 U. S., 388, the first syllabus is as follows:

> "The provision in the Constitution of the United States that 'no State shall pass any law impairing the obligation of contracts' necessarily refers to the law made after the particular contract in suit."

In *J. A. Guillotte* v. *City of New Orleans*, 12 La. Annual Rep., 432, the last head-note is as follows:

> "The contract spoken of by Article 105 of the Constitution, the obligation of which the Legislature is prohibited from impairing, is a contract in existence at the time of the passage of the law."
>
> See also *Pinney* v. *Nelson*, 183 U. S., 144, 148.

Since the appellant made no attempt to relieve itself from the provisions of Section II, either by giving notice to Sexton or by inserting a proper clause in the contract of employment, it is difficult to see how it can be fairly urged that its rights are infringed by the provisions of the supplement. That Section II applies is due to the appellant's act, as was pointed out in various portions of the opinion of the Court below:

> "Under the act neither the employer nor the employee is bound to accept the provisions of Section II unless he chooses to do so. If he does not he certainly is not deprived of property without due process of law. If he does, then he has given the consent which the prosecutor contends he must give in order to be bound by the provisions of the second section" (Case, p. 78, lines 28–35).

"It is obvious that in the present instance the prosecutor could have inserted in its contract with Sexton that the provisions of Section II were not to apply thereto. If Sexton had been unwilling to enter into such a contract he was free to refuse to do so. The contract in the present case was subject to no legislative interference, nor was there any restraint upon the freedom of both parties to make such contract as they saw fit. This being the case, the prosecutor is driven to the untenable position that even though it had elected that Sexton's contract of hiring should be with reference to Section II (since the contract did not provide to the contrary), it cannot be bound by its election, because it was not competent for the Legislature to require it to elect" (Case, p. 81, lines 2-18).

"Since as a matter of fact, no notice was given by the prosecutor either on July 4th or prior thereto, it apparently acquiesced in the provisions of the supplement that the presumption should be binding. The prosecutor should not now be heard to say that it has been deprived of its property, or that its rights have been affected against its assent when it appears that assent had been given" (Case, p 82, lines 34-40; p. 83, line 1).

"Neither the act nor the supplement deprived the prosecutor of its right to bring the contract within Section I. The most which they did was to require the prosecutor to express its dissent or be bound by its failure to do so. That the contract operated under Section II is wholly due to the prosecutor's default" (Case, p. 84, lines 15-21).

II.

The trial Court's determination of fact contains findings sufficient to warrant the judgment.

Sexton left him surviving a widow and two boys aged respectively eight and ten years at the time of the hearing (Case, p. 21, lines 10-19).

In *Miller* v. *Public Service Ry Co.*, 85 Atl., 1030, cited in appellant's brief, it does not appear that there was any proof as to the dependency of the petitioner other than that she was widow of the deceased. The discussion was limited to a consideration of the effect of the failare to prove the fact of the dependency of the deceased's father, brothers and a sister, and it was held that before a recovery could be allowed for *their* benefit it must be shown that *they* were dependents in fact. In the present case the persons for whose benefit compensation was allowed are the widow and the two boys aged eight and ten years respectively. It is submitted that these facts raise a presumption of actual dependency. The children were of such tender age that the Court was warranted in judicially noticing that they would not be able to earn enough to support themselves. There was no evidence that they were entitled to income from any outside source and the fact that their father had been a line-man in the employ of the appellant since he was thirteen years of age (Case, p. 28, lines 10–25) indicates that the family was in humble circumstances.

In *Tompkins* v. *Tompkins' Executors*, 3 C. E. Green, 303, the Chancellor said, page 304:

> "The settled rule with regard to the support of infants is, that if their father is living, and is of sufficient ability, he is bound to support them, notwithstanding they may have estates of their own; even when such estates are given expressly for their maintenance."

In *Stephens* v. *Howard's Executor*, 5 Stewart, 244, the Court said, at page 247:

> "A father is bound to support his infant child, if of sufficient ability, even though it may have an ample estate of its own, but if he is not, or not able to support it according to its station and expectations, then the court may order the application of its own estate to that end."

In *Keeney* v. *Henning*, 13 Dick., 74, Pitney, *V. C.*, said, at page 82:

> "The parental right to the earnings of the infant is burthened with the duty to support, which is not relieved by the fact that the infant has an independent income. It would be monstrous to hold that a parent may compel his or her infant child to work for the parent's benefit, and at the same time charge the infant with its support out of its independent estate."
>
> See also *Tomkins* v. *Tomkins*, 3 Stockton, 512–517.

In *Freeman* v. *Robinson*, 9 Vr., 383, the Supreme Court held that the mere moral obligation of a father to provide maintenance for his children was not a sufficient consideration to support a subsequent express promise, but in that case the moral obligation of the parent to support his infant children was fully recognized.

It is submitted that the finding by the trial Judge that the petitioner's children were but eight and ten years old, which leads necessarily to the conclusion that they could not have supported themselves, when coupled with the obligation of their father to support them raised a presumption that the children were in fact dependent upon him. Of course there was no evidence to rebut this presumption.

A similar presumption is raised from the fact that the petitioner was the widow of the deceased and was living with him at the time of his death, there being no evidence that she had any separate estate.

The rule with reference to the husband's common law duty to support his wife, is thus stated in *15 Am. & Eng. Ency. of Law* (2d Edition), p. 814:

> "The marriage contract imposes upon the husband the duty of supporting his wife in a way suitable to her situation and his condition in life, and a failure to perform this duty is a wrong acknowledged at common law,

> though there was there no personal remedy, because there the wife could not sue the husband."

In *Schouler's Domestic Relations* (4th Edition), p. 70, the author said:

> "The general rule of law is that the husband, the spouse who holds and fills the purse, is bound to provide the family support and means of living."

This Court recognized the husband's duty to support his wife in *Freeholders* v. *Ritson*, 39 Vr., 666.

In *Yule* v. *Yule*, 2 Stock., 138, 143, the Chancellor said:

> "The husband is bound to provide a proper maintenance for his wife, but she must share his fortunes under his own roof."

In *Miller* v. *Miller*, Sax., 386, the following language was approved:

> "'It may have been the misfortune of a hnsband to have connected himself in marriage with a profligate and abandoned woman; but his obligation to maintain her continues until the marriage bonds are legally dissolved, or she voluntarily separates herself from him: 6 Mad., 171, S. C.; 1 Salk., 119; 1 Esp., 441.'"

In *Parker* v. *Parker*, 12 Dick., 577, 581, the Court said:

> "The defendant is shown to have been entirely willing to have such relations with his wife as enabled him to enjoy all the privileges of a husband. He subjected her to the probable dangers which attend upon maternity, but the responsibilities of maintenance of the wife and of his child, which the law casts upon him, and which he was well able to undertake, he declined to assume, and compelled her to depend on her own family."

Furth v. *Furth*, 39 Atl., 128, was an action brought by a wife against her husband for non-support. During the course of the opinion the Court said:

> " Nor do I consider his statement that he is presently unable to earn a sufficient sum to support his wife as a reason for dismissing the bill without relief to the wife. I think he should fully understand that the obligations of his marriage contract, and the consequent duty that he owes to the woman whom he contracted to support, and to the public, to carry the burden of his wife's maintenance, still rests upon him, and may justly be expected to be fully performed by him. The mere fact that the husband presently has no money does not discharge him of the duty to support his wife, though it may be some excuse for a present failure. His duty to support his wife is continuous, and is not dependent upon his prosperity. There should be a decree for the complainant accordingly."

III.

For the reasons given, it is respectfully submitted that the appeal should be dismissed, with costs.

Respectfully submitted,

KINSLEY TWINING,
Of Counsel with Defendants-Respondents.

November Term, 1913.