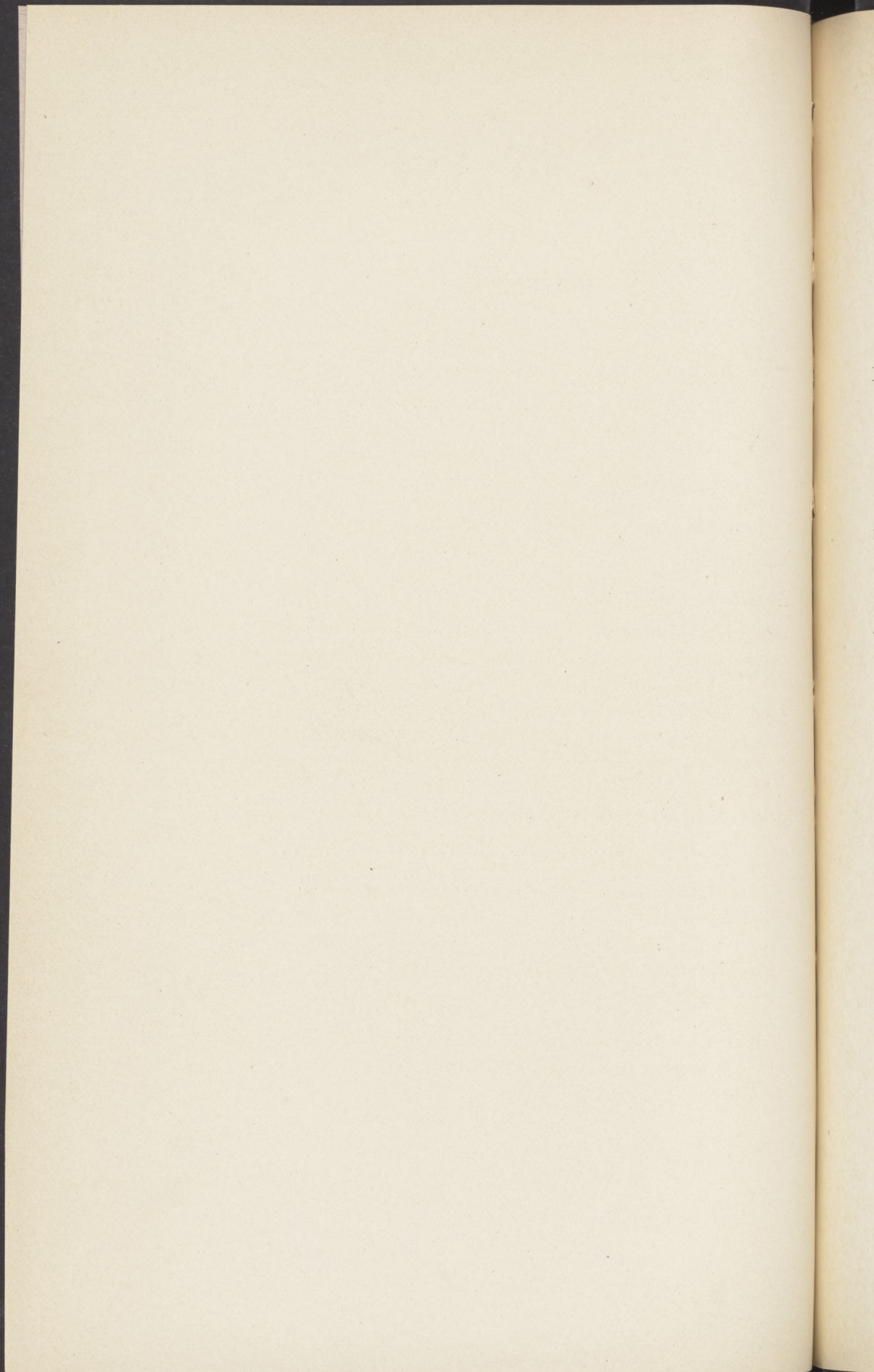


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Writ of Certiorari.

Returnable November 23, 1933.

NEW JERSEY, SS.

(L. S.) THE STATE OF NEW JERSEY TO THE 10
FIRST DISTRICT COURT OF THE CITY
OF JERSEY CITY, GREETING:

We being willing for certain reasons to be certified of a certain judgment of the First District Court of the City of Jersey City, rendered on or about October 10, 1933, in a certain case wherein New Jersey State Board of Optometrists is plaintiff and S. S. Kresge Co., a corporation of the State of Michigan, is defendant (summons issued December 2, 1932), do command you that the said judgment, the decision of the judge of said court whereon said judgment was based, the summons and the complaint therein, the stipulation of the parties and all other proceedings by or before said First District Court of the City of Jersey City concerning the same, as fully and entirely as before you they remain or are in your custody or control, you do certify and send, together with this writ, to our Supreme Court at Trenton on the 23rd day of November, 1933, that we may cause to be done thereupon what of right and according to law ought to be done. 20 30

WITNESS, THOMAS J. BROGAN, Esquire, Chief Justice of our Supreme Court, at Trenton this 4th day of November, 1933.

FRED L. BLOODGOOD, Clerk. JOHN J. GAFFEY, Attorney. 40

Allocatur.

I allow this writ. Let it be sealed.

Dated: November 4th, 1933.

THOMAS J. BROGAN,
J. S. C.

10

Bond

Surety bond in the sum of \$500.00, dated October 30, 1933, approved by T. J. Brogan, C. J., November 4, 1933, and filed that day.

20

Return to Writ.

Certificate of B. Frances Marron, Clerk of the First District Court of Jersey City, that the Summons, Complaint, Stipulation of Facts, Opinion, Transcript of Judgment and Conviction are true copies, dated November 17, 1933.

30

40

Complaint.

Filed November 25, 1932.

STATE OF NEW JERSEY, }
 COUNTY OF HUDSON, } ss.:

LOUIS A. ROCHAT, being duly sworn, on his oath
 says that he is a member of the New Jersey State
 Board of Optometrists, and that he is informed and
 believes that during the month of October, A. D.
 nineteen hundred and thirty-two, at its store lo-
 cated at number three hundred and forty-seven
 Central Avenue, in the City of Jersey City, County
 of Hudson and State of New Jersey, the said de-
 fendant did violate the provisions of section twenty-
 one of an act of the Legislature of the State of New
 Jersey entitled "An act to regulate the practice of
 optometry, to license optometrists and to punish
 persons violating the provisions thereof," approved
 April seventeenth, one thousand nine hundred and
 fourteen, as amended by act approved April sev-
 enth, nineteen hundred and nineteen, in the follow-
 ing respect, to wit: that at the time and place
 aforesaid the said defendant did employ, give aid
 and assist a person not authorized under the pro-
 visions of the above mentioned act to practice
 optometry in this state, to wit, one Elinore Car-
 lock, to practice optometry within the meaning of
 section one of said act, as said section one was
 amended by act approved April eighteenth, nine-
 teen hundred and thirty-two, said Elinore Carlock
 not being then and there the holder of a certificate
 of registration duly issued to her therefor, contrary
 to and in violation of said section twenty-one of
 said act and against the form of said statute.

Deponent therefore says that the said defendant
 has incurred the penalty of two hundred dollars,
 prescribed by the provisions of section twenty-two

Complaint.

of said act, as amended by act approved April eighteenth, nineteen hundred and thirty-two, and prays that the said defendant may be summoned to answer unto the New Jersey State Board of Optometrists and be dealt with according to law.

10

LOUIS A. ROCHAT.

Sworn and subscribed before me
this 25th day of November
A. D. nineteen hundred and
thirty-two.

STEPHEN J. FITZGERALD,
Notary Public of N. J.

20 (Seal)

Summons.

Filed December 2, 1932.

HUDSON COUNTY, SS.

THE STATE OF NEW JERSEY TO ANY
CONSTABLE OF THE COUNTY OF HUD-
SON, GREETING:

30

SUMMON S. S. Kresge Co., a corporation organized and existing under the laws of the State of Michigan, to be and appear before the First District Court of the City of Jersey City, at 20 York Street in said City of Jersey City, in the County of Hudson and State of New Jersey, on Tuesday the 12 day of December A. D. nineteen hundred and thirty-two, at the hour of 9.30 o'clock in the forenoon, to answer unto the New Jersey State

40

Summons.

Board of Optometrists, upon complaint of Louis A. Rochat, for recovery of a penalty of two hundred dollars for violation of section twenty-one of an act of the Legislature of the State of New Jersey entitled "An act to regulate the practice of optometry, to license optometrists and to punish persons violating the provisions thereof," approved April seventeenth, one thousand nine hundred and fourteen, as amended by act approved April seventh, nineteen hundred and nineteen, it being alleged that the said defendant did violate the twenty-first section of said act in the following respect, to wit: that during the month of October, A. D. nineteen hundred and thirty-two, at its store located at number three hundred and forty-seven Central Avenue, in the City of Jersey City, County of Hudson and State of New Jersey, said defendant did employ, give aid and assist a person not authorized under the provisions of the above mentioned act to practice optometry in this state, to wit, one Elinore Carlock, to practice optometry within the meaning of section one of said act, as said section was amended by act approved April eighteenth, nineteen hundred and thirty-two, said Elinore Carlock not being then and there the holder of a certificate of registration duly issued to her therefor, all of which is contrary to and in violation of said section twenty-one of said act and against the form of said statute. Hereof fail not.

WITNESS, AUGUST ZIEGENER, Esquire, Judge of the First District Court of the City of Jersey City, this 2 Day of December A. D. nineteen hundred and thirty-two.

B. FRANCES MARRON,
Clerk.

Stipulation of Facts.

Filed April 12, 1933.

10 The following stipulation of facts is made by the parties hereto solely for the purpose of the trial of the above entitled action, begun by summons issued out of the First District Court of the City of Jersey City on December 2, 1932, reserving to each party the right to object to any facts set forth herein on the ground that they, or some one or more of them, may be irrelevant or incompetent or immaterial and to except thereto in the event of the admission of such facts, or some one or more of them, in evidence over said objection or objections:

20 1. At all the times hereinafter mentioned the plaintiff was and still is the Board duly organized and created pursuant to the provisions of the state statute of New Jersey entitled, "An Act to regulate the practice of optometry, to license optometrists and to punish persons violating the provisions thereof," approved April 17, 1914, as amended and supplemented.

30 2. The defendant, S. S. Kresge Company (named in the summons and complaint as "S. S. Kresge Co."), was and is a corporation organized and existing under the laws of the State of Michigan and duly authorized to transact business in the State of New Jersey.

3. On October 10, 11 and 12, 1932, defendant maintained and operated a certain store for the sale of general merchandise, located at numbers 345-347 Central Avenue, in the City of Jersey City, Hudson County, known as store "No. 263."

40 4. On said dates one Arthur W. Holman was the manager of said store.

Stipulation of Facts.

5. At said time and place defendant employed one Eleanor Carlock (named in the summons and complaint as "Elinore" Carlock) as a saleslady in charge of the notion counter of said store and had so employed said Eleanor Carlock for a period of about six months prior to said date; said Eleanor Carlock was not authorized to practice optometry within the meaning of said statute. 10

6. At said time and place and on said counter there were displayed for sale to the general public various kinds of notions such as needles, pins, spools of thread, pocket books and similar articles; among the articles so displayed for sale were spectacles, which were offered for sale to the general public for twenty-five cents each; said spectacles were not toy glasses or goggles consisting of plano-white or plano-colored lenses or ordinary colored glasses. 20

Plaintiff contends that the spectacles so displayed for sale were sold to aid the human vision. Defendant does not admit that they were sold to aid the human vision but admits that they were made for that purpose.

7. The various articles on said counter were placed in racks or boxes and the price of each article was indicated by a card placed either in the rack or in the box, so that customers might see what these articles were and the price thereof while standing in front of said counter. 30

8. The spectacles so displayed were placed in a rack about six inches wide and about thirty-four inches long, with grooves running crosswise. 40

9. Said spectacles consist of celluloid frames of uniform size and of a pair of lenses; in each pair

Stipulation of Facts.

of spectacles the right lens and the left lens each have the same strength or focus; the lenses vary in power or focus.

10 On each lens of said spectacles there appears a paper tag or paster on which are numbers indicating the focal distance of the lens, said distance being measured both by inches and by diopters.

20 10. Prior to said date of October 10, 1932, defendant had sent instructions to the managers of the stores operated by it in the State of New Jersey, including said store No. 263, that no assistance or advice should be offered or given to any customer in selecting spectacles, and orders in accordance with said instructions were given by the manager of said store to said Eleanor Carlock.

30 11. On October 10, 1932, one Elsie Daubert, employed by the plaintiff for that purpose, entered said store and observed the said counter which, on that date, was attended by the said Eleanor Carlock, and at that time there was displayed for sale on said counter a trayful of spectacles which were offered for sale to the general public at twenty-five cents each, as set forth in paragraphs 6, 7 and 8.

30 12. On October 11, 1932, said Elsie Daubert entered said store and observed said Eleanor Carlock refilling said tray with spectacles, which were offered for sale to the general public at twenty-five cents each, as set forth in paragraphs 6, 7 and 8.

40 13. On October 12, 1932, said Elsie Daubert entered said store and observed said Eleanor Carlock standing at the counter where said spectacles were offered for sale, and apparently in charge of the sale thereof; said Daubert went to said counter

Stipulation of Facts.

where said spectacles were on sale and asked said Carlock if all the glasses were the same, to which said Carlock answered "No; they are all different and go by numbers"; said Daubert thereupon asked said Carlock what number she thought she needed "for general use around the house" to which said Carlock replied, "You will have to try on the glasses yourself, because I cannot help you. I can only sell the glasses to you." 10

Thereupon said Daubert selected a pair of spectacles and said Carlock sold same to her for the sum of twenty-five cents.

On said date of October 12, 1932, said Elsie Daubert was accompanied by Mrs. Burke, also employed by plaintiff; said Burke on said date had a conversation with said Carlock which was substantially the same as above set forth between said Daubert and said Carlock. 20

After said conversation said Burke selected a pair of spectacles and said Carlock sold same to her for the sum of twenty-five cents.

No aid or assistance in selecting said spectacles or either of them was given to said Daubert or to said Burke by said Carlock or by any other person in the employ of defendant. 30

14. The two pairs of spectacles sold on October 12, 1932, were delivered by said Daubert and said Burke to the plaintiff and are now offered in evidence as Plaintiff's Exhibits 1 and 2.

15. At the time of the sale of said spectacles and in connection with the sale thereof the defendant and the said Eleanor Carlock did not employ any means for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof; did not use testing appliances for the pur- 40

Stipulation of Facts.

pose of the measurement of the powers of vision; did not diagnose any ocular deficiency or deformity, visual or muscular anomaly of the eyes of said customers or either of them; did not prescribe lenses, prisms or ocular exercise for the correction
10 or relief thereof; and did not hold themselves out as qualified to practice optometry, or in any way advertise themselves as an optometrist.

16. If the court finds that the facts as herein admitted constitute a violation of the statute, and further finds said statute is constitutional as applied to said facts, then the defendant reserves the right to offer evidence to show that said spectacles are not harmful to the health and welfare of persons using the same, and the plaintiff reserves the
20 right to offer evidence in rebuttal thereof.

17. This stipulation having been made for the purpose of obtaining a prompt decision as to whether the facts herein set forth constitute a violation by the defendant of the statute mentioned in paragraph 1, it is agreed that in the present case the penalty claimed by the state is the sum of \$200.00 and no more.
30

18. On the foregoing facts:

Plaintiff moves for judgment in its favor for the sum of \$200.00 and costs on the ground that the admitted facts show a violation of the statute.

Defendant moves for judgment in its favor on the following grounds:

(a) Said facts do not show any violation of
40 the statute.

Stipulation of Facts.

(b) If said facts are construed to be a violation of the statute, judgment should nevertheless be entered in favor of the defendant for the reason that the statute (as so construed) violates Section 1 of Article I of the Constitution of the State of New Jersey, providing: "All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of * * * acquiring, possessing and protecting property * * *." 10

(c) If said facts are construed to be a violation of the statute, judgment should nevertheless be entered in favor of the defendant for the reason that the statute (as so construed) violates Section 1 of Article XIV of the Amendments to the Constitution of the United States, because, as so construed, said statute is, and any judgment based on said facts would be, an unreasonable exercise of the police power, and deprives the defendant of its property without due process of law. 20

(d) The statute on which the action is based violates the Constitution of the State of New Jersey in the following respects: 30

(1) It interferes with and deprives the defendant of its right to acquire, possess and protect property in violation of Section 1 of Article I of the Constitution of the State of New Jersey, providing: "All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of * * * acquiring, possessing and protecting property, * * *." 40

Stipulation of Facts.

10 (2) The standard of conduct set forth in said statute is so uncertain and indefinite as to amount to a delegation of legislative power, in violation of Paragraph 1 of Section 1 of Article IV of the Constitution of the State of New Jersey, providing: "The legislative power shall be vested in a senate and general assembly."

(e) The statute on which the action is based violates Section 1 of Article XIV of the Amendments to the Constitution of the United States in the following respects:

20 (1) It deprives the defendant of its property without due process of law in that it is an unreasonable exercise of the police power.

(2) It deprives the defendant of its property without due process of law in that it imposes a penalty for the violation of certain acts therein mentioned without setting up any certain standard of conduct and without providing means for the determination of said standard.

30 (3) It deprives the defendant of its property without due process of law in that the penalties imposed thereby are unreasonable and excessive.

Dated: April 11th, 1933.

WM. A. STEVENS,
Attorney for Plaintiff.

GEO. S. HOBART,
Attorney for Defendant.

Opinion.

Filed October 10, 1933.

ZIEGENER, J.:

The cause is submitted to the Court on behalf of the respective parties under a Stipulation as to the facts and upon which the determination of the Court is sought. 10

The stipulation contains a reservation to each party of the right to object to any facts set forth therein on the ground that they, or some one or more of them, may be irrelevant, incompetent or immaterial and to except thereto in the event of the admission of such facts, or some one or more of them, in evidence over said objection or objections. However, no such objections have thus far been made by counsel for either of the parties. 20

The action was instituted by summons issued out of this Court on December 2, 1932, under a complaint filed therein and under which the defendant, a corporation of the State of Michigan, is charged with the practice of optometry during the month of October, 1932, at a store in the City of Jersey City, New Jersey, in violation of the provisions of an act entitled "An Act to regulate the practice of optometry, to license optometrists and to punish persons violating the provisions thereof" approved April 17, 1914, as amended by act approved April 7, 1919, in the following respect, to wit: that at the time and place aforesaid the said defendant did employ, give aid and assist a person not authorized under the provisions of the above mentioned act to practice optometry in this State, to wit: one, Eleanor Carlock, to practice optometry within the meaning of section one of said act, as said section one was amended by act approved April 18, 1932, said Eleanor Carlock not being then and there the 30 40.

Opinion of Ziegener, J.

holder of a certificate of registration duly issued to her therefor, contrary and in violation of said section twenty-one of said act and against the form of said statute.

10 The plaintiff was at all times hereinafter mentioned and still is the Board duly organized and created pursuant to the provisions of the Statute of the State of New Jersey, entitled "An Act to regulate the practice of optometry, to license optometrists and to punish persons violating the provisions thereof" approved April 17, 1914, as amended and supplemented.

20 The defendant, S. S. Kresge Company (named in the summons and complaint as "S. S. Kresge Co."), was and is a corporation organized and existing under the laws of the State of Michigan and duly authorized to transact business in the State of New Jersey.

On October 10, 11 and 12, 1932, defendant maintained and operated a certain store for the sale of general merchandise located at Nos. 345-347 Central Avenue, Jersey City, Hudson County, New Jersey, known as store No. 263, and on said dates one Arthur W. Holman was the manager of said store.

30 At said time and place defendant employed one Eleanor Carlock (named in summons and complaint as "Elinore" Carlock) as a saleslady in charge of the notion counter of said store and had so employed said Eleanor Carlock for a period of about six months prior to said dates. Said Eleanor Carlock was not authorized to practice optometry within the meaning of said Statute.

40 At said time and place and on said counter there were displayed for sale to the general public various kinds of notions such as needles, pins, spools of thread, pocket books and similar articles; among

Opinion of Ziegner, J.

the articles so displayed for sale were spectacles, which were offered for sale to the general public for twenty-five cents each; said spectacles were not toy glasses or goggles consisting of plano-white or plano-colored lenses or ordinary colored glasses.

Plaintiff contends that the spectacles so displayed for sale were sold to aid the human vision. Defendant does not admit that they were sold to aid the human vision but admits that they were made for that purpose. 10

The various articles on said counter were placed in racks or boxes and the price of each article was indicated by a card placed either in the rack or in the box, so that customers might see what these articles were and the prices thereof, while standing in front of said counter. 20

The spectacles so displayed were placed in a rack about six inches wide and about thirty-four inches long, with grooves running crosswise.

Said spectacles consist of celluloid frames of uniform size and a pair of lenses; in each pair of spectacles the right lens and left lens each have the same strength or focus; the lenses vary in power or focus. On each lens of said spectacles there appears a paper tag or paster on which are numbers indicating the focal distance of the lens, said distance being measured both by inches and by diopters. 30

Prior to said date of October 10, 1932, defendant had sent instructions to the managers of the stores operated by it in the State of New Jersey, including said store No. 263, that no assistance or advice should be offered or given to any customer in selecting spectacles, and orders in accordance with said instructions were given by the manager of said store to said Eleanor Carlock. 40

Opinion of Ziegener, J.

On October 10, 1932, one Elsie Daubert, employed by the plaintiff for that purpose, entered said store and observed the said counter which, on said date, was attended by the said Eleanor Carlock, and at that time there was displayed for sale on said counter a trayful of spectacles which were offered for sale to the general public at twenty-five cents each, as hereinbefore set forth.

On October 11, 1932, said Elsie Daubert entered said store and observed said Eleanor Carlock refilling said tray with spectacles which were offered for sale to the general public at twenty-five cents each, as hereinbefore set forth.

On October 12, 1932, said Elsie Daubert entered said store and observed said Eleanor Carlock standing at the counter where said spectacles were offered for sale, and apparently in charge of sale thereof; said Elsie Daubert went to said counter where said spectacles were on sale and asked said Eleanor Carlock if all the glasses were the same, to which said Eleanor Carlock answered "No, they are all different and go by numbers"; said Elsie Daubert thereupon asked said Eleanor Carlock what number she thought she needed "for general use around the house," to which Eleanor Carlock replied "you will have to try on the glasses yourself, because I cannot help you—I can only sell the glasses to you."

Thereupon said Elsie Daubert selected a pair of spectacles and said Eleanor Carlock sold same to her for the sum of twenty-five cents.

On said date of October 12, 1932, said Elsie Daubert was accompanied by Mrs. Burke, also employed by plaintiff; said Mrs. Burke on said date had a conversation with said Eleanor Carlock which was substantially the same as above set forth between said Elsie Daubert and Eleanor Carlock.

Opinion of Ziegner, J.

After said conversation, said Mrs. Burke selected a pair of spectacles and said Eleanor Carlock sold same to her for the sum of twenty-five cents. No aid or assistance in selecting said spectacles or either of them was given to said Daubert or to said Mrs. Burke by said Eleanor Carlock or by any other person in the employ of defendant. 10

The two pairs of spectacles sold on October 12, 1932, were delivered by said Elsie Daubert and said Mrs. Burke to the plaintiff and are now offered as plaintiff's Exhibits 1 and 2.

At the time of the sale of said spectacles and in connection with the sale thereof the defendant and the said Eleanor Carlock did not employ any means for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof; did not use testing appliances for the purpose of the measurement of the powers of vision; did not diagnose any ocular deficiency or deformity, visual or muscular anomaly of the eyes of said customers, or either of them; did not prescribe lenses, prisms or ocular exercise for the correction or relief thereof; and did not hold themselves out as qualified to practice optometry, or in any way advertise themselves as an optometrist. 20

In the stipulation of facts it was also agreed that if the Court determined that the facts therein admitted constituted a violation of the Statute, and further that said Statute was constitutional, as applied to said facts, the defendant reserved the right to offer evidence to show that said spectacles are not harmful to the health and welfare of persons using the same, and the plaintiff reserves the right to offer evidence in rebuttal thereof. 30

Counsel also agreed under said stipulation that in the event that the facts stipulated and herein- 40

Opinion of Ziegner, J.

before set forth did constitute a violation of the statute in question the penalty to be imposed upon the defendant shall be in the sum of \$200.

The plaintiff contends that the admitted facts show a violation of the statute in question.

10 The defendant contends that the admitted facts do not constitute a violation of the Statute; and that if they do, then the Statute itself is unconstitutional.

The Statute in question provides the rules and regulations determining the practice of optometry and that amongst other things that a person shall be deemed to be practicing optometry within the meaning of the act who in any way advertises himself as an optometrist or who shall employ any
20 means for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof * * * The only exceptions made in the Statute is that it shall not be construed to apply to the sale of toy glasses or goggles consisting of plano-white or plano-colored lenses or ordinary colored lenses and that it shall not apply to duly licensed physicians or surgeons.

A reading of the above Statute makes it appear very clearly that it was the intention of the Legis-
30 lature in passing the Act that spectacles for the correction of human vision should not be sold by one not an optometrist, except as therein mentioned.

The defendant sold the spectacles referred to under the circumstances stated in the stipulated facts, but although it is contended that the said Eleanor Carlock did not directly assist the representatives of the plaintiff, yet the fact remains that on each
40 lens of such spectacles that she sold there was a paper tag or paster on which were numbers indi-

Opinion of Ziegner, J.

cating the focal distance of the lens which were measured both by inches and by diopters. A reasonable construction to be placed upon such actions is that the defendant corporation had such tags, pasters and numbers placed on each lens of said spectacles with the intention of evading the provisions of said Statute. 10

All of the lenses were not of like strength—the defendant caused the tags or pasters containing the various numbers to be placed upon the lenses to indicate or advertise to the prospective purchasers thereof that the lenses had been scientifically manufactured to meet standards of distance and strength, to correct or meet with different degrees of defective vision and that each number was for a different degree of defective vision. This would tend to make the purchasers believe or did make them believe that an examination of their eyes was not necessary inasmuch as the defendant was holding out the glasses to correct defective vision and had the glasses numbered and had designations on the glasses as to inches and diopters to indicate that each number was to correct a particular case of defective vision. 20

The statute is a remedial one and as such was intended for public benefit and is to be construed most strongly against those who claim rights or benefits under it and most favorably for the public benefit. 30

In such construction the Court is bound to consider what the mischief was that the Legislature sought to remedy, as well as the remedy intended by the Legislature to cure the mischief. The construction to be placed on remedial statutes such as the one in question should be such as to suppress the mischief and advance the remedy. 40

Opinion of Ziegener, J.

10 The statute in question was designed for the purpose of protecting the health of persons in this State afflicted with or suffering from defective eyes or vision and the Statute should receive such construction as will further the benign purposes which the Legislature had in view in its passage.

20 If the Legislature had intended that spectacles or glasses could be sold in the manner in which they were sold by the defendant it would have so provided in the statute. The statutes of this State in reference to the practice of optometry were passed by the Legislature of New Jersey primarily for the protection of the citizens of the State just as statutes in reference to the practice of medicine, law or other professions have been passed. The purpose of the statute was to prevent anyone not an optometrist, physician or surgeon from selling spectacles for the correction of vision and to prevent any person from purchasing spectacles or glasses for the purpose of correcting his or her vision without first having had an examination of their eyes made by a licensed optometrist, physician or surgeon. The statute is similar to many other statutes of this State passed in an effort to promote and protect the health and welfare of the citizens of the State. It was no doubt passed to do away with the evil of having persons with faulty vision purchase glasses without a proper examination by one licensed to make the same having been first made.

30 The exceptions contained in the Statute as to the sale of toy glasses and goggles and as to the Statute not applying to physicians and surgeons are aids in the determination of the matter, because it indicates certain exceptions thereby making it clear that there were to be no other exceptions such as selling the glasses in the method pursued by the defendant in this case.

40

Opinion of Ziegner, J.

As to the reservation of the defendant to offer evidence to show that the said spectacles were not harmful to the health and welfare of persons using the same, it will avail the defendant nothing to offer such evidence as it is immaterial whether the said spectacles were harmless and even if the defendant could show that they were not harmful it would not alter the situation because it is not incumbent upon the plaintiff to show that a violation of the statute caused any harm nor does it matter whether it caused any harm or not. 10

The defendant has raised the question of the constitutionality of the Statute, but the Court finds that the said statute does not violate the constitution of the State of New Jersey nor does it violate the Federal Constitution. 20

In *S. S. Kresge Co. v. Hamilton Ward* (Roschen v. Ward), 279 U. S. 337, the United States Supreme Court held that a merchant was deprived of no constitutional right by a statutory provision making it unlawful to sell eye glasses or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist is in charge of, and in personal attendance at, place where the glasses or lenses are sold. In *State ex rel. Hallen v. Utah State Examiners*, 108 Pacific 347, and in other cases cited in the case of *Kresge v. Ward, supra*, it was held that the sale of eye glasses and lenses for the correction of vision is a matter so related to public health that regulation of such sales is within the police power. The Court, in speaking of one of the defendants in the Roschen case, *supra*, said "the defendant is undertaking to invade under the guise of private mercantile business, a field rightly sequestered by the Legislature in the interest of public health to those 30 40

Opinion of Ziegener, J.

possessing such skill and training in a specified department of treatment of human ills."

The defendant's motion for a direction of a verdict is denied.

10 Having fully considered the facts submitted and the memoranda submitted by the respective counsel, I have determined and hereby direct that the defendant be adjudged guilty of the violation of the said statute and that the penalty of \$200.00 (the amount stipulated) be imposed, against the defendant.

Judgment is therefore entered in favor of the plaintiff, the New Jersey State Board of Optometrists, and against the defendant, S. S. Kresge Co., in the sum of Two Hundred Dollars and costs.

20

30

40

Judgment.

Entered October 10, 1933.

STATE OF NEW JERSEY, }
 COUNTY OF HUDSON, } ss.:

BE IT REMEMBERED that on this 10th day of October, A. D. nineteen hundred and thirty-two, at the City of Jersey City, in the County of Hudson and State of New Jersey, S. S. Kresge Co., a corporation of the State of Michigan, was convicted of violating the twenty-first section of an act entitled "An act to regulate the practice of optometry, to license optometrists and to punish persons violating the provisions thereof," approved April seventeenth, one thousand nine hundred and fourteen, as amended by act approved April seventh, nineteen hundred and nineteen, in a summary proceeding at the suit of the New Jersey State Board of Optometrists, upon complaint made by Louis A. Rochat, and further that the case was submitted upon facts agreed upon.

10

20

WHEREFORE, the said Court doth hereby give judgment that the plaintiff recover of the defendant two hundred dollars penalty, and three 80/100 dollars, costs of this proceeding.

30

AUGUST ZIEGENER,
*Judge of the First District Court
 of the City of Jersey City.*

40

Docket Record.**FIRST DISTRICT COURT OF JERSEY CITY.**Before AUGUST ZIEGENER, Esquire, *Judge.*

10 STATE OF NEW JERSEY, }
 HUDSON COUNTY, } ss. :
 CITY OF JERSEY CITY, }

No. 214405.

NEW JERSEY STATE BOARD OF
 OPTOMETRISTS,
 Plaintiff,

vs.

20 S. S. KRESGE Co., a corporation
 organized and existing under
 the laws of the State of
 Michigan,
 Defendant.

William A. Stevens,
Pltff's. Atty.George S. Hobart,
Def't's. Atty.

	CITY	AL.
COSTS		
Summons	1.50	
Service		.60
Mileage		
30 Trial Fee	1.50	
Bond	1.00	

A summons was issued tested December 2nd, A. D. 1932, returnable December 12, A. D. 1932, at 10 o'clock in the forenoon at the Court Room of the said Court in the City of Jersey City.

The constable returned the summons as follows:
 40 "I served the within summons December 2nd, 1932,
 on Alfred McCabe, agent in charge of the principal

Docket Record.

office of the defendant Co., by reading the same to him and delivering to him a copy thereof. Thomas Tyrrell, Sergeant-at-arms."

Plaintiff's Complaint filed December 2, A. D. 1932.

The case was submitted to the Court upon a stipulation of facts. 10

October 10, A. D. 1933, the Court found the defendant Guilty of violating section twenty-one of "an Act of the Legislature of the State of New Jersey, entitled an act to regulate the practice of optometry, to license optometrists and to punish persons violating the provisions thereof."

WHEREFORE, it is on this tenth day of October, A. D. nineteen hundred and thirty-three, by this Court considered and adjudged that the New Jersey State Board of Optometrists, plaintiff, recover against said S. S. Kresge Co., a corporation organized and existing under the laws of the State of Michigan, defendant, the sum of Two hundred dollars, penalty and Three dollars and eighty cents, costs. 20

November 4, 1933, Bond filed by defendant.

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Reasons.

Filed December 2, 1933.

The Prosecutor files the following Reasons upon which it will rely for the reversal of the judgment of the First District Court of the City of Jersey City under review herein :

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1. Said judgment is erroneous in that the same was entered in favor of the plaintiff (Defendant-in-Certiorari), New Jersey State Board of Optometrists, and against the defendant (Prosecutor), S. S. Kresge Company, whereas said judgment should have been entered against the Defendant-in-Certiorari and in favor of the Prosecutor, for the reason that the facts as set forth in the stipulation upon which the case was tried in said First District Court of the City of Jersey City do not constitute a violation of the statute upon which the action was based, to-wit ;

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The Act entitled, "An Act to regulate the practice of optometry, to license optometrists, and to punish persons violating the provisions thereof," approved April 17, 1914 (Chapter 222, Laws of 1914),

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As amended by the Act entitled, "An Act to amend an act entitled 'An act to regulate the practice of optometry, to license optometrists, and to punish persons violating the provisions thereof,' " approved April seventeenth, one thousand nine hundred and fourteen, which amendatory act was approved April 7, 1919 (Chapter 59, Laws of 1919),

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And as further amended by the Act entitled, "An Act to amend an act entitled 'An act to regulate the practice of optometry, to license optometrists and to punish persons violating the provisions thereof,' " approved April seventeenth, one thousand nine

Reasons.

hundred fourteen, and the acts amendatory thereof and supplemental thereto," which amendatory act was approved April 18, 1932 (Chapter 75, Laws of 1932).

2. The facts as set forth in said stipulation fail to show that the Prosecutor practiced optometry, as "the practice of optometry" is defined in said Chapter 222, Laws of 1914, as amended by said Chapter 59, Laws of 1919, and as further amended by said Chapter 75, Laws of 1932. 10

3. The facts as set forth in said stipulation fail to show that the Prosecutor employed or gave aid or assisted a person not authorized under the provisions of said Chapter 222, Laws of 1914, as amended by said Chapter 59, Laws of 1919, and as further amended by said Chapter 75, Laws of 1932, "to practice optometry" to-wit, one Elinore Carlock, "to practice optometry" (as alleged in the complaint and the summons herein) within the meaning of section 1 of said Chapter 222, Laws of 1914, as amended by said Chapter 75, Laws of 1932. 20

4. Said statute as construed by the decision of the First District Court of Jersey City and by the judgment of said court rendered on said decision, violates Section 1 of Article I of the Constitution of the State of New Jersey providing: 30

"All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of * * * acquiring, possessing and protecting property, * * *"

5. The statute on which the action is based violates the Constitution of the State of New Jersey 40

Reasons.

in that it interferes with and deprives the prosecutor of its right to acquire, possess and protect property in violation of Section 1 of Article I of the Constitution of the State of New Jersey providing:

10 “All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of * * * acquiring, possessing and protecting property, * * *.”

6. The statute on which the action is based violates the Constitution of the State of New Jersey in that the standard of conduct set forth in said statute is so uncertain and indefinite as to amount to a delegation of legislative power, in violation of
20 Paragraph 1 of Section 1 of Article IV of the Constitution of the State of New Jersey providing:

“The legislative power shall be vested in a senate and general assembly.”

7. The definition of “the practice of optometry” in said statute, to wit, the employment of objective and/or subjective means for the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its powers of
30 vision and adapting lenses and/or prisms for the aid thereof, is so uncertain and indefinite as to amount to a delegation of legislative power, in violation of said Paragraph 1 of Section 1 of Article IV of the Constitution of the State of New Jersey.

8. The provision in said statute that any person shall be deemed to be practicing optometry within the meaning thereof who (among other things), shall “diagnose any ocular deficiency or deformity,
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Reasons.

visual or muscular anomaly of the human eye or prescribe lenses, prisms or ocular exercise for the correction or the relief of same," is so uncertain and indefinite as to amount to a delegation of legislative power, in violation of said Paragraph 1 of Section 1 of Article IV of the Constitution of the State of New Jersey. 10

9. Said statute as construed by the decision of the First District Court of Jersey City and by the judgment of said court rendered on said decision, violates Section 1 of Article XIV of the Amendment to the Constitution of the United States providing:

"Nor shall any State deprive any person of life, liberty or property, without due process of law." 20

Because the statute, as so construed, and the judgment based on such construction, are an unreasonable exercise of the police power and deprive the Prosecutor of its property without due process of law.

10. The statute on which the action is based violates said Section 1 of Article XIV of the Amendments to the Constitution of the United States, because said statute deprives the Prosecutor of its property without due process of law, in that it is an unreasonable exercise of the police power. 30

11. The statute on which the action is based violates said Section 1 of Article XIV of the Amendments to the Constitution of the United States, because said statute deprives the Prosecutor of its property without due process of law, in that it im- 40

Reasons.

poses a penalty for the violation of the acts therein prohibited without setting up any certain standard of conduct and without providing means for the determination of said standard.

- 10 12. The statute on which the action is based, in so far as it defines the practice of optometry to be the employment of objective and/or subjective means for the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its powers of vision and adapting lenses and/or prisms for the aid thereof, violates said Section 1 of Article XIV of the Amendments to the Constitution of the United States, because said part of said statute deprives the Prose-
20 cutor of its property without due process of law, in that it imposes a penalty for the practice of optometry as therein defined without setting up any certain standard of conduct and without providing means for the determination of said standard.

- 30 13. The statute on which the action is based, in so far as it provides that any person shall be deemed to practicing optometry within the meaning thereof who (among other things), shall diagnose any ocular deficiency or deformity, visual or muscular anomaly of the human eye or prescribe lenses, prisms or ocular exercise for the correction or the relief of same, violates said Section 1 of Article XIV of the Amendments to the Constitution of the United States, because said statute deprives the Prosecutor of its property without due process of law, in that it imposes a penalty for the violation of said provision without setting up any certain standard of conduct and without providing means
40 for the determination of said standard.

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14. The statute on which the action is based violates said Section 1 of Article XIV of the Amendments to the Constitution of the United States, because said statute deprives the Prosecutor of its property without due process of law, in that the penalties imposed by said statute for a violation thereof are unreasonable and excessive.

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JOHN J. GAFFEY,
Attorney for Prosecutor.

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Order

NEW JERSEY SUPREME COURT.

10	NEW JERSEY STATE BOARD OF OPTOMETRISTS, <i>Defendant-in-Certiorari,</i>	}	On Writ of Certiorari.
	<i>vs.</i>		
	S. S. KRESGE Co., a corpora- tion of the State of Michigan, <i>Prosecutor.</i>		

20 This cause coming on to be heard at the January Term, 1934, and the court having inspected the transcript and proceedings, returned with the writ of certiorari, and the reasons for reversing the judgment below, and having heard and considered the argument of counsel thereon;

ORDERED that the judgment aforesaid of the First District Court of the City of Jersey City, be and the same is reversed, set aside and for nothing holden, and that the cause be remanded to said First District Court of the City of Jersey City for further proceedings.

30 Rule entered this 21st day of August, 1934, on motion of John J. Gaffey, Attorney for Prosecutor.

A true copy.

FRED L. BLOODGOOD,
Clerk.

Notice of Appeal and Grounds of Appeal

NEW JERSEY SUPREME COURT.

<p>NEW JERSEY STATE BOARD OF OPTOMETRISTS, <i>Defendant-in-Certiorari,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>S. S. KRESGE Co., a corpora- tion of the State of Michigan, <i>Prosecutor.</i></p>	}	<p>10</p> <p>On Certiorari.</p>
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(Filed October 24, 1934)

To JOHN J. GAFFEY, Esq., Attorney for Pros-
ecutor. 20

Sir:

Please Take Notice that the defendant in the
above entitled cause hereby appeals to the New
Jersey Court of Errors and Appeals, the last re-
sort in all causes, from the whole of the judgment
entered in this cause on the following grounds:

1. That the judgment of the Supreme Court is
contrary to law.

2. That the Supreme Court should have found
the defendant (Prosecutor), S. S. Kresge Com- 30
pany guilty of having violated the Optometry Act
of the State of New Jersey.

DAVID T. WILENTZ,
Attorney-General of New Jersey,
Attorney of Defendant-in-Certiorari.

Dated: September 24, 1934.

Service of the within Notice and Grounds of
Appeal is hereby acknowledged this 3rd day of
October, 1934.

JOHN J. GAFFEY, 40
Attorney for Prosecutor.

Opinion

NEW JERSEY SUPREME COURT.
No. 205, January Term, 1934.

10	NEW JERSEY STATE BOARD OF OPTOMETRISTS, <i>Defendant-in-Certiorari,</i>	}	On Certiorari.
	<i>vs.</i>		
	S. S. KRESGE Co., a body corporate, <i>Prosecutor.</i>		

(Filed August 17, 1934)

Submitted January Term, 1934; decided August 17, 1934, on certiorari.

20 Before BROGAN, Chief Justice, and Justices TRENCHARD and HEHER.

For the Prosecutor: GEORGE S. HOBART and JOHN J. GAFFEY.

For the Defendant: WILLIAM A. STEVENS, Attorney-General, and ROBERT PEACOCK, Assistant Attorney-General.

The opinion of the court was delivered by HEHER, J.

30 Prosecutor invokes the jurisdiction of this court to review, by certiorari, a judgment of conviction entered in the First District Court of the City of Jersey City, upon a complaint charging that, in the month of October, 1932, at a retail store maintained by it in the City of Jersey City, in violation of the provisions of an act to regulate the practice of optometry (Pamph. L. 1914, p. 448), as amended by Chapter 59 of the Laws of 1932 (Pamph. L. 1919, p. 105) and Chapter 75 of the Laws of 1932 (Pamph. L. 1932, p. 124), it employed, gave aid and assisted one Carlock, an em-

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ployee who was not possessed of requisite authority, "to practice optometry within the meaning of section one of said act, * * * contrary to and in violation of section twenty-one of said act * * *." The statutory penalty for the first offense was assessed.

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The facts are stipulated. Prosecutor is a foreign corporation engaged in the retail general merchandising business. Carlock was in charge of the notion counter in its Jersey City store. Among the goods displayed for sale on this counter were spectacles which retailed at twenty-five cents each. Concededly, these spectacles were designed to serve as an aid to human vision. They consisted of celluloid frames of uniform size, with a pair of lenses. There was an assortment of spectacles, and the lenses varied in power or focus. There was attached to each a paper tag or paster containing numbers indicating the focal distance of the lens, the distance being measured both by inches and by diopters. The transactions which furnished the basis for the complaint consisted of sales of spectacles by Carlock, who was not authorized to practice optometry in this State, to agents of the defendant board. It is conceded that, in accordance with instructions given by prosecutor to its various store managers, no advice, aid or assistance, in the selection of the spectacles so sold, was given to the purchasers by Carlock, or any other person in the employ of prosecutor. In response to the purchaser's inquiry as to whether "all the glasses were the same", Carlock replied—"No; they are all different and go by numbers," and when the purchaser asked Carlock to indicate "what number she thought she (purchaser) needed for general

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Opinion.

use around the house," Carlock replied, "You will have to try on the glasses yourself, because I cannot help you; I can only sell the glasses to you." It is stipulated that, in respect to these transactions, prosecutor "did not employ any
10 means for the measurement of the powers of vision, or the adaptation of lenses or prisms for the aid thereof; did not use testing appliances for the purpose of the measurement of the powers of vision; did not diagnose any ocular deficiency or deformity, visual or muscular anomaly of the eyes of said customers, or either of them; did not prescribe lenses, prisms or ocular exercise for the correction or relief thereof; and did not hold themselves out as qualified to practice optometry,
20 or in any way advertise themselves as an optometrist."

Prosecutor insists that these transactions did not constitute the unlawful practice of optometry, within the intendment of the statute, and that, therefore, the judgment is without factual support; that if a contrary construction be adopted, the legislation "amounts to an interference with defendant's right of property, and to the taking of defendant's property without due process, in
30 violation of both the State and Federal Constitutions;" and that, in any event, "the statute on its face violates the State and Federal Constitutions," in that (a) the standard of conduct prescribed therein is so indefinite as to amount to a delegation of legislative power, (b) the penalties imposed are unreasonable and excessive, and (c) it unduly interferes with prosecutor's right "to acquire, possess and protect property, and deprives 'it' of its property without due process."

Opinion.

While a determination of the constitutional questions raised may, perhaps, be unnecessary, in view of our conclusion that the statute is inapplicable to the situation here presented, we are of opinion that the public interest requires that this fundamental challenge should not be passed *sub silentio*, and we therefore proceed to consider it. 10

It is said that the statute, if construed to bar "the right to sell" spectacles under the circumstances here presented, would be an unreasonable exercise of the police power. We are unable to subscribe to this view. The right to practice medicine, and kindred professions for the treatment of human ailments, is subject to the paramount power of the State to impose such regulations, within constitutional limits, as may be required to protect the people against ignorance and incapacity, as well as deception and fraud. The State, in the exercise of the police power, has the undoubted right to regulate the practice of such professions for the protection of the lives and health of the people. It may prescribe that only persons possessing the requisite qualifications of learning and skill shall practice these professions. But the laws adopted must be reasonable and appropriate to that end. *Dent v. West Virginia*, 129 U. S. 114, 9 S. Ct. 231, 32 L. Ed. 623; *Lambert v. Yellowley*, 272 U. S. 581, 47 S. Ct. 210, 71 L. Ed. 422; *Graves v. Minnesota*, 272 U. S. 425, 47 S. Ct. 122, 71 L. Ed. 331. 20 30

And a statute prohibiting the sale at retail, in any store or established place of business, of "any spectacles, eyeglasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist * * * be in charge of and in personal attendance at the booth, counter or place, where such articles are sold in such 40

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store or established place of business," is a valid exercise of the police power. *Roschen v. Ward*, 279 U. S. 337, 73 L. Ed. 722. A State may, in the exercise of its police power, confine to registered optometrists, who have demonstrated their qualifications by passing the examination prescribed

10 by the statute, the right to employ means other than drugs to measure the range of human vision, and the accommodative and refractive states of the human eye. *McNaughton v. Johnson*, 242 U. S. 344, 37 S. Ct. 178, 61 L. Ed. 352. See, also, *Commonwealth v. Houtenbrink*, 235 Mass. 320, 126 N. E. 669; *Commonwealth v. S. S. Kresge Co.*, 267 Mass. 145, 166 N. E. 558; *Harris v. State Optical Examiners*, 287 Pa. 531, 135 Atl. 237.

20 That the practice of optometry bears a reasonable relation to the public health and welfare cannot be doubted. There is a known relation between many ailments and impaired eyesight. They disappear when the defects of vision are corrected by suitable glasses. "To properly diagnose and prescribe for the particular defect from which the patient is suffering requires a knowledge of the anatomy of the eye as well as the subject of physical optics, being that branch of the general

30 subject of physics which deals with the action or effect of lenses on light, and how light is directed, reflected and refracted." *Price v. State*, 168 Wis. 603, 171 N. W. 77. Considerations of public policy require that oculists and ophthalmologists, who practice what has been termed "a learned profession," and optometrists, who pursue what has been described as "an occupation or vocation calling for a degree of mechanical skill and experience" (*Saunders v. Swann*, 155 Tenn. 310, 292 S. W. 458), shall demonstrate the skill and experience

40 requisite for practice in their respective fields.

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And the claim that the act unlawfully delegates legislative power is likewise without substance. We find no delegation of this exclusive legislative function. The statute is complete in itself, and there is no attempt to vest in the defendant-board authority that is essentially legislative. It meets, in every respect, the test of validity laid down by Chief Justice Gummere: "the Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact, or state of things, upon which the law makes, or intends to make, its own action depend." *W. J. & S. R. R. Co. v. Public Utility Bd.* 87 N. J. L. 170. The prescribed "standard of conduct" is not, as contended, vague and indefinite. The acts constituting the "practice of optometry" are clearly and definitely stated. The term "optometry" has a technical significance, and there is, as we shall see, little or no departure from the technical meaning in the statutory definition. Those to be guided by this legislation are not left in doubt as to what constitutes the unlawful practice of optometry.

Nor are the penalties provided unreasonable. The act prescribes a penalty of \$200 for the first offense, and \$500 for each subsequent offense. This was clearly not an abuse of the power vested in the Legislature. The penalties so imposed are not so arbitrary and oppressive as to constitute a taking of property without due process of law, in contravention of the Fourteenth Amendment of the Federal Constitution. The proposition that because it is unprofitable, in a pecuniary sense, to do repeatedly that which is forbidden by the Legislature, in the exercise of the police power to promote the public health and welfare, there

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is an unconstitutional deprivation of property is novel indeed.

10 But the transactions in question do not come within the condemnation of the statute. They do not constitute the practice of optometry, as therein defined. Section 22 of the Act of 1914, as amended by Chapter 75 of the Laws of 1932 (Pamph. L. 1932, pp. 124-128), makes subject to the statutory penalty "any person, company or association who shall employ * * * or give aid or assist," any unauthorized person to practice optometry, as therein defined. The statutory definition follows (Pamph. L. 1932, p. 124, section 1):

20 "The practice of optometry is defined to be the employment of objective and/or subjective means for the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its powers of vision and adapting lenses and/or prisms for the aid thereof. Any person shall be deemed to be practicing optometry within the meaning of this act who in any way advertises himself as an optometrist, or who shall employ any means for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof, practice, offer or attempt to practice optometry as herein defined, either on his own behalf or as an employee or student of another, whether under the personal supervision of his employer or preceptor or not, or to use testing appliances for the purpose of the measurement of the power of vision or diagnose any ocular deficiency or deformity, visual or muscular anomaly of the human eye or pre-

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scribe lenses, prisms or ocular exercise for the correction or the relief of same or who holds himself out as qualified to practice optometry.”

While there is no proof as to what constitutes the practice of optometry, the term has a well-established technical significance, of which we may take judicial notice, that is not substantially at variance with the statutory definition. The term “optometry” is defined thus: “1. Measurement of the range of vision, especially by means of the optometer. 2. As defined (with minor variations) in the statutes of various States of the United States: (a) The employment of subjective and objective mechanical means to determine the accommodative and refractive states of the eye and the scope of its functions in general; (b) The employment of any means, other than the use of drugs, for the measurement of the powers of vision and adaptation of lenses for the aid thereof.” *Webster’s New International Dictionary.*

Oculists and ophthalmologists pursue a calling quite distinct from that of optometrists. The first has relation to the practice of medicine and surgery in the treatment of diseases of the eye, and the second to the measurement of the powers of vision, and the adaptation of lenses for the aid thereof. *Saunders v. Swann, supra; Martin v. Baldy, 249 Pa. 253, 94 Atl. 1091; McNaughton v. Johnson, supra; Herzog’s Medical Jurisprudence, sec. 120.* It is the primary function of the optometrist to employ means to determine the need of lenses for the correction of defects of eyesight, and the increase of the power and range of vision. He forms a judgment as to the need, and then provides the corrective lens.

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The practice of optometry, therefore, does not include the mere sale, without more, of spectacles, glasses or lenses, designed to aid human vision. And this is patently the statutory sense of the term. The statutory classification connotes the
10 employment by the practitioner of means, objective or subjective, for the examination of the eye for the purpose of ascertaining its visual power, and the adaptation of lenses or prisms for the correction of discovered defects or deficiencies. The statute was not intended to apply to the sale of spectacles, eyeglasses or lenses as merchandise, or to the mere sale of such to an individual for use in the correction of his defects or deficiencies of vision, or for the alleviation of the consequences
20 thereof. As we have pointed out, this power, to reasonably regulate the sale of lenses designed to correct vision, undubitably resides in the Legislature, but it did not choose to exercise it. If that were its purpose, it would have undoubtedly chosen apt language to express it, as in *Roschen v. State, supra*, and *Commonwealth v. S. S. Kresge Co., supra*. This is a penal statute, and, on familiar principles, it will not be construed to apply, in the absence of a clearly expressed legislative purpose
30 to that effect, to the mere sale of lenses designed to strengthen vision.

Nor are we led to a different result by the concluding provision of the section that it shall not be construed to apply to "the sale of toy glasses or goggles consisting of plano-white or plano-colored lenses or ordinary colored glasses," or to "duly licensed physicians and surgeons authorized to practice medicine under the laws of the State * * *."

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This is, in form, an interpretation clause, but defendant maintains that it is, in substance and effect, a proviso or an exception which, under a familiar rule, is an affirmation of the application of the statute to all other cases not excepted, and thus excludes from the category of permissible transactions the sale, by an unlicensed person, under the circumstances here presented, of lenses designed to aid vision. While there is a technical distinction between a proviso and an exception, there is little or no practical difference between them. The distinction has been stated thus: An exception *exempts*, absolutely, from the operation of an engagement or an enactment; a proviso defeats their operation, *conditionally*. An exception takes out of an engagement or enactment something that would otherwise be part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse. *Plowd.*, 361; 1 *Saund.* 234 a. The law, however, does not attach a fixed and invariable meaning to a proviso. Its function, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview. *Austin v. United States*, 155 U. S. 417, 15 S. Ct. 167, 39 L. Ed. 206; *Lewis' Sutherland Statutory Construction* (2d Ed.), sec. 351. An exception differs from a proviso in that the exception exempts something absolutely from the operation of the statute by express words in the enacting clause, while a proviso follows the enacting clause, and serves to defeat its operation conditionally. *Western Assurance Co. v. J. H. Mohlman Co.*, 83 Fed. 811, 40 L. R. A. 561; *Rowell*

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v. *Janvrin*, 151 N. Y. 60, 45 N. E. 398; 59 C. J. 1092.

10 But the guiding principle, after all, in the interpretation of statutes, is to ascertain and effectuate the legislative intention and purpose. The intent is the essence of the law. Such distinction as there is will be wholly disregarded, if necessary, to give effect to the manifest intention of the Legislature as disclosed by the entire act, and acts in *pari materia*. *Rogers v. Brown*, 20 N. J. L. 119

20 *Lanning v. Administrator of Lanning*, 17 N. J. Eq. 228, 233. All doubt should be resolved in favor of the general provision rather than the proviso or exception. Provisos and exceptions are to be strictly, but reasonably, construed. *Piedmont & N. Ry. Co. v. U. S.* 30 Fed. (2d) 421; *State v. Forney*, 108 Ohio St. 463, 141 N. E. 16. It is not the function of a proviso to enlarge the enacting clause or confer a power. Such a clause in an "act cannot be construed to enlarge it, and extend its terms beyond the clear meaning and accepted signification of the body of the act." *Van Reipen v. Jersey City*, 58 N. J. L. 262, 267; *Lanning v. Administrator of Lanning, supra*; *People v. Continental Beneficial Ass'n.*, 289 Ill. 40, 124

30 N. E. 352. In *Lanning v. Administrator of Lanning*, Chancellor Green held (p. 234) that the "proviso of a statute is generally intended to restrain the enacting clause and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause. It is a limitation of, or exception to, the authority conferred." Its office is "to limit and restrict the operation of the enacting clause." *Patterson v. Winn*, 11 Wheat. 380, 6 L. Ed. 500; *Murray v. Gault*, 179 Ind. 658, 101 N. E. 632; *Com. v. Charity*

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Hospital, 199 Pa. 119, 48 Atl. 906; *Lewis' Sutherland Statutory Construction* (2d Ed.), Sec. 351.

And while it is a generally accepted rule of construction that an exception of a particular thing from the general words demonstrates that, in the opinion of the lawgiver, the thing excepted would be within the general provision had the exception not been made (*Brown v. Maryland*, 25 U. S. 419, 438, 6 L. Ed. 678, 685), it is of necessity subordinate to the cardinal canon of construction that the intention of the lawmakers shall be ascertained and effectuated. Such rules of construction are designed to aid in the discovery of the legislative intent. It has been held that while an exception may properly be considered in ascertaining the true meaning of the statute, "it cannot put into the previous provision something that was not there before." *Batcheller-Durkee v. Batcheller*, 39 R. I. 45, 97 Atl. 378, L. R. A. 1916 E 545.

The duty resting upon the courts is so to construe a statute as to give full effect to all the words in their ordinary sense, if this can be properly done, and thus to preserve the harmony of all its provisions. *Bend v. Hoyt*, 13 Pet. 263, 10 L. Ed. 154. The true principle is that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause and proviso, taken and construed together, is to prevail. *Lewis' Sutherland Statutory Construction* (2d Ed.), Sec. 350. Provisos and exceptions are to be construed with the enacting clause, so as to carry out the intention of the Legislature. "The enacting clause is the principal part of the statute, and is presumed to have embodied the main object of the act * * *." *People v. Andrus*, 299 Ill. 50,

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132 N. E. 225. Provisos are to be given a rational construction in harmony with the ascertainable general purpose and intent of the enactment, considered in its entirety, aided, when possible, by any other legislation in *pari materia*. *Kelley v. Boyne*, 239 Mich. 204, 214 N. W. 316, 53 A. L. R. 273. In this case it was held that the proviso clause “reasonably can and should be construed as intended to exclude possible misinterpretation of the scope of the enactment.”

And here it is evident that the clause in question, considered in the light of the object and policy of the enacting provisions, was introduced, out of an abundance of caution, to avoid possible misinterpretation of the act. If it be construed as indicating a legislative purpose to classify, as the practice of optometry, all such transactions not specifically excepted, traffic in spectacles and lenses of every character and description would necessarily fall within the statutory definition, and this was patently not the legislative purpose.

Concededly, Carlock did nothing more than make sale of lenses designed to aid human vision. She did not examine, or pretend to examine, the eye of the purchaser for the purpose of determining the need of a corrective lens, or make, or presume to make, a diagnosis, or employ testing appliances or other means to measure the power and range of vision. Prosecutor provided an assortment of lenses, varying in power or focus, and the purchaser made his own selection, without the advice, aid or assistance of prosecutor’s agent in charge. True, the focal distance, measured by inches and diopters, was indicated by a number attached to the lens, and thus the refractive power of the lens was conveyed to its patron seeking an

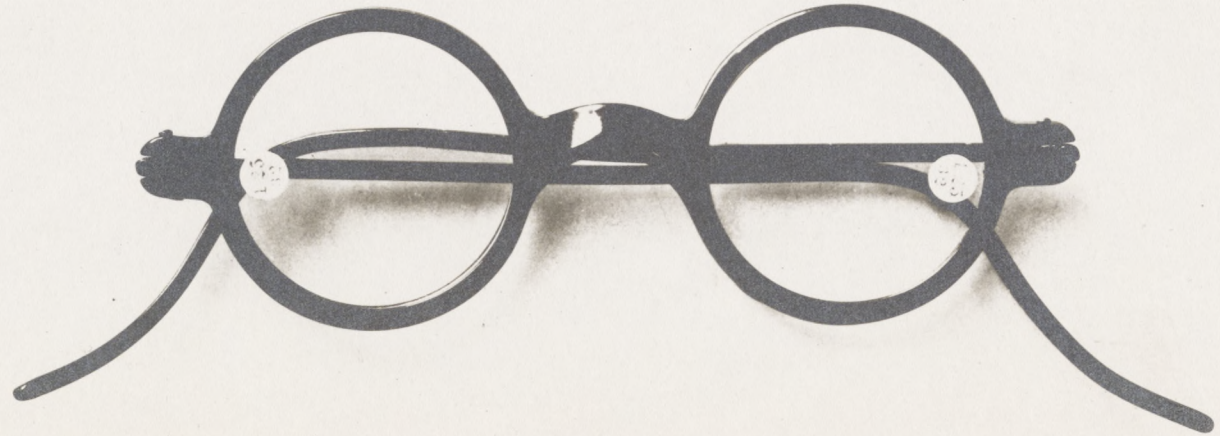
Opinion.

increase in visual power. But this clearly does not constitute the practice of optometry. The participation of the servant, and, by derivation, that of the employer, in the transaction in question, was not essentially different from that of the salesman who makes sale, for the personal use of the purchaser, of an article of wearing apparel containing a number or other symbol indicating its size. He does not thereby represent that it will fit the purchaser—only that it is of the size denoted by the symbol. So the vendor in the instant case did not represent that the lenses would suit the eyes of the purchaser—the representation was merely that they had the refractive power signified by the trade token. The vendor did not thereby employ (in the language of the statute) “means for the measurement of the powers of vision, or the adaptation of lenses or prisms for the aid thereof.” The defendant board acknowledges that these transactions are not embraced within this statutory definition. It is so stipulated. And there is clearly no other statutory provision constituting such acts the practice of optometry. It follows that the conviction must be set aside.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

Exhibits P-1 P-2

Exhibits P-1 P-2



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AGE

45

New Jersey Court of Errors and Appeals

NEW JERSEY STATE BOARD OF
OPTOMETRISTS,

Defendant-Appellant,

vs.

S. S. KRESGE Co., a corporation
of the State of Michigan,
Prosecutor-Appellee.

*On
Certiorari.*

*On Appeal
from
Supreme
Court.*

52
**BRIEF IN BEHALF OF S. S. KRESGE CO.,
Prosecutor-Appellee.**

(1)

Statement of the Case.

53
Writ of certiorari was allowed on November 4,
1933, to review a judgment of the First District
55
Court of the City of Jersey City, rendered Octo-
ber 10, 1933, in an action brought by the New
Jersey State Board of Optometrists as plaintiff
(the defendant on certiorari in the New Jersey
Supreme Court and the appellant herein) against
55
S. S. Kresge Co. as defendant (prosecutor of
the writ of certiorari and appellee herein) to
56
recover a penalty for alleged violation of the
statute regulating the practice of optometry, in
that said company "during" the month of Octo-
ber, 1932, at its store in the City of Jersey City,
56
employed and assisted an unauthorized person
to practice optometry, within the meaning of the
definition of the practice thereof, as set forth in
Section 1 of Chapter 222, Laws of 1914, as
amended by Chapter 59, N. J. Laws of 1919, and
as further amended by Chapter 75, N. J. Laws
of 1932.

57

The State Board will hereinafter be referred to as the "plaintiff" and S. S. Kresge Co. will be referred to as the "defendant."

The facts before the District Court, including the motions for judgment by the parties, are set forth in a stipulation (pp. 6-12).

The Judge of the District Court concluded that there was a violation of the statute and judgment was entered that the plaintiff recover of the defendant a penalty in the sum of \$200.00 and costs (p. 23).

The Reasons on certiorari raised questions as to the construction and the constitutionality of the statute and the application thereof to the facts set forth in the stipulation (pp. 26-31).

The review of the judgment of the District Court is by certiorari, and not by appeal, as the action to recover the penalty is summary. *State Board v. Curtis*, 94 N. J. L. 324; *State Board v. Buettel*, 102 N. J. L. 74.

The case was heard in the Supreme Court before Brogan, C. J. and Justices Trenchard and Heher. The opinion of the court was delivered by Justice Heher; after reviewing the facts and the law he concluded that the conviction must be set aside and the judgment reversed (pp. 34-47); judgment was entered in the Supreme Court accordingly (p. 32).

The opinion is reported in 113 N. J. L. 287; 174 Atl. 353.

The State Board has appealed to this Court.

(2)

Grounds of Appeal.

The plaintiff has appealed from the judgment on the following grounds:

1. That the judgment of the Supreme Court is "contrary to law."

2. That the Supreme Court should have found the defendant "guilty of having violated the Optometry Act of the State of New Jersey" (p. 33).

(3)

Brief of the Argument.**OUTLINE OF ARGUMENT.****I.**

The grounds of appeal are insufficient in that they do not specify the error in the judgment of the Court below.

II.

On the merits, the judgment of the Supreme Court should be affirmed.

Summary of the Facts.

Summary of the Statute.

(a)

The facts do not show a violation of the Statute.

(b)

The Statute as construed by the District Court violates the State and Federal Constitutions.

(c)

The Statute on its face violates the State and Federal Constitutions in the following respects:

1. *The standard of conduct in the Statute is so indefinite as to amount to a delegation of legislative power.*
2. *The penalties imposed are unreasonable and excessive.*
3. *The Statute interferes with the right of the defendant to acquire, possess and protect property and deprives the defendant of its property without due process.*

III.

Discussion of the decisions of the District Court of Jersey City and of the New Jersey Supreme Court.

(a)

The Decision of the District Court.

(b)

The Decision of the Supreme Court.

IV.

Reply to Brief of Appellant.

(a)

There is no proof that the defendant practiced optometry as defined in the Statute.

(b)

The exception in section 1 of the Statute does not justify the conclusion that the mere sale of lenses designed to aid the vision constitutes the practice of optometry.

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(c)

Discussion of Roschen v. Ward.

(d)

If the New Jersey Statute is construed to prohibit the mere sale of glasses, it is an unreasonable exercise of the police power.

(e)

The standard of conduct is indefinite.

(f)

The Supreme Court on certiorari will review questions of fact.

V.

CONCLUSION.

The judgment of the Supreme Court reversing the judgment of the First District Court of Jersey City should be affirmed with instructions to enter judgment in favor of the defendant.

I.

The grounds of appeal are insufficient in that they do not specify the error in the judgment of the court below.

The first ground of appeal is that the judgment is "contrary to law." This does not specify or point out error in the judgment of the Supreme Court. It is so vague that it is meaningless. It may be dismissed from further consideration. *Shaw v. Vermont Marble Co.*, 107 N. J. L. 154, 6; *Eckert v. Nazzaro*, 109 N. J. L. 136; *State Board v. Citarella*, 113 N. J. L. 210, 4.

The second ground is that the *Supreme Court* should have found the company guilty of "having violated the Optometry Act of the State of New Jersey."

There is no authority under the statute for the Supreme Court to act upon the guilt or innocence of a party charged with a violation of the statute; the proceedings to recover the penalty are brought either in the District Court or in the Common Pleas Court.

Moreover, in this case the action was not brought in the Supreme Court, but in the District Court; all that the Supreme Court had to do with the proceeding was to review the judgment of the District Court by means of the writ of certiorari.

Assuming for the purpose of the argument that the second ground might be construed to be equivalent to a statement that the Supreme Court should have affirmed the District Court, it still does not specify or point out the error; thus a general averment such as the (lower) court "erred in giving judgment" to the one party instead of to the other, is not a valid ground for reversal. *Golden Realty Co. v. Grant Building, etc. Association*, 109 N. J. L. 129; *Cohn v. Pasaic National Bank & Trust Company*, 109 N. J. L. 449; *Caspert v. Empire Furniture Co.*, 114 N. J. L. 546.

A ground of appeal that the Supreme Court "should have found" the company "guilty" of violation of the statute is certainly no more specific than the general averment held to be insufficient in the above cases.

The question further arises—of what "should" the Supreme Court have found the company guilty? If it be answered that the ground of appeal says that it should have found the company guilty "of having violated the Optometry Act," the answer is that the Optometry Act consists of not less than twenty-four separate and

distinct sections in the original act and the various amendments and supplements thereto. These are summarized hereinafter under the caption "Summary of the Statute."

In the original act of 1914, with its principal amendments in 1919 and 1932, there is a lengthy list of possible violations, each of which subjects the violator to a penalty.

We submit that if a ground of appeal, such as is set forth as the second ground, is sufficient, the defendant is at least entitled to know what particular act on its part is claimed to constitute a violation of the statute.

II.

On the merits, the judgment of the Supreme Court should be affirmed.

Summary of the Facts.

The facts set forth in the stipulation may be summarized as follows:

On October 10, 11 and 12, 1932, defendant maintained and operated at Jersey City a store for the sale of general merchandise and there employed one Carlock as saleslady in charge of the notion counter, on which there were displayed for sale to the general public various notions, including spectacles which were offered for sale for 25 cents each; said spectacles did not come within any of the exceptions such as toy glasses or goggles, etc., as set forth in the last sentence of Section 1 of the statute (p. 7, par 6 of Stip.).

Prior to October 10, 1932, defendant had instructed its managers and employees that no advice or assistance should be offered or given

to any customer in selecting the spectacles thus offered for sale (p. 8, par. 10).

On October 10, 1932, one Daubert observed that spectacles were displayed for sale on said counter; and on October 11, 1932, the witness observed said Carlock refilling the tray with spectacles, which were offered for sale to the general public for 25 cents each (p. 8, par. 11).

On October 12, 1932, two witnesses, Daubert and Burke, observed said Carlock at the counter and asked her "if all the glasses were the same," to which Carlock answered, "No, they are all different and go by numbers." Plaintiff's witnesses then asked said Carlock what number she (the witness) needed "for general use around the house" to which Carlock replied, "You will have to try on the glasses yourself because I cannot help you. I can only sell the glasses to you." Thereupon the plaintiff's witnesses each selected a pair of spectacles and Carlock sold same for the sum of 25 cents each.

No aid or assistance in selecting said spectacles or either of them was given to Daubert or Burke by Carlock or by any other person in defendant's employ (pp. 8, 9, par. 13).

The spectacles so sold consist of celluloid frames of uniform size and a pair of lenses; in each pair of spectacles the right lens and the left lens each have the same strength or focus; the lenses vary in power or focus. On each lens there appears a paper tag on which are numbers indicating the focal distance of the lens as measured by inches and diopters (pp. 7, 8, par. 9).

Plaintiff contends that the spectacles so displayed for sale were sold "to aid the human vision." Defendant does not admit this, but

does admit that said spectacles were "made" for that purpose (p. 7, par. 6).

It was further admitted that defendant's sales-lady Carlock was not authorized to practice optometry within the meaning of the statute (p. 7, par. 5).

The stipulation further provides:

"15. At the time of the sale of said spectacles and in connection with the sale thereof the defendant and the said Eleanor Carlock did not employ any means for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof; did not use testing appliances for the purpose of the measurement of the powers of vision; did not diagnose any ocular deficiency or deformity, visular or muscular anomaly of the eyes of said customers or either of them; did not prescribe lenses, prisms or ocular exercise for the correction or relief thereof; and did not hold themselves out as qualified to practice optometry, or in any way advertise themselves as an optometrist" (pp. 9, 10).

Plaintiff moved for judgment on the ground that the facts showed a violation of the statute.

Defendant moved for judgment on the ground that said facts did not show a violation of the statute and that if the statute be construed as claimed by the plaintiff, then the statute is unconstitutional for the reasons set forth in the stipulation (pp. 10-12) and hereinafter discussed.

Summary of the Statute.

LAWS OF 1914, CHAPTER 222, PAGE 448—APPROVED
APRIL 17, 1914.

This is entitled, "An Act to regulate the practice of optometry, to license optometrists,

and to punish persons violating the provisions thereof."

This act defines the practice of optometry, creates a board to be known as "The New Jersey State Board of Optometrists," provides for examinations of persons desiring to practice optometry, authorizes the board to issue and to revoke certificates authorizing persons to practice optometry, subject to review by certiorari to the New Jersey Supreme Court, and forbids any person who is not a holder of such a certificate to practice optometry within this State; the violation of the act is made a misdemeanor punishable by fine or imprisonment or both.

This is the first of the several statutes mentioned in the summons and complaint.

LAWS OF 1916, CHAPTER 58, PAGE 103.

This is a supplement to the Act of 1914 and authorizes the collection of an annual registration fee of \$2 from every registered optometrist.

LAWS OF 1917, CHAPTER 269, PAGE 884.

This regulates the appointment of members of the State Board of Optometrists and of the members of various other boards therein named.

LAWS OF 1919, CHAPTER 59, PAGE 105—APPROVED
APRIL 7, 1919.

This amends various sections of the Act of 1914. The most important changes are the following:

Section 1 is amended by enlarging the definition of "Practice of Optometry."

Section 21 of the Act of 1914 is amended in certain respects.

Section 22 imposes a penalty for violation of certain sections of the Act of 1914 (including Sec-

tion 21 of said act) and provides that the penalty shall be sued for and recovered by and in the name of "The New Jersey State Board of Optometrists." Jurisdiction is given to every District Court in any city or judicial district and to any Court of Common Pleas in any county to issue process upon the filing of a verified complaint, stating what provision of the law is alleged to have been violated.

This is the second of the several statutes mentioned in the summons and complaint herein.

LAWS OF 1920, CHAPTER 133, PAGE 270.

Amends the Act of 1916 by increasing the registration fee.

LAWS OF 1921, CHAPTER 237, PAGE 753.

This is a supplement to the Act of 1914 and authorizes licenses to be issued to optometrists of other States.

LAWS OF 1923, CHAPTER 106, PAGE 197.

This amends the Act of 1914 by changing the definition of the "Practice of Optometry" and by amending the provisions as to the examination of applicants for certificates to practice optometry.

LAWS OF 1926, CHAPTER 26, PAGE 49.

Authorizes the secretary of the Board of Optometrists to issue certificates relating to licenses.

LAWS OF 1932, CHAPTER 26, PAGE 40.

This is a supplement to the Act of 1914 and requires the clerk of the Court wherein any person licensed to practice optometry shall be convicted of a crime to make a written report thereof to the Board of Optometrists.

LAWS OF 1932, CHAPTER 75, PAGE 124—APPROVED
APRIL 18, 1932.

Amends the Act of 1914 in certain respects, the most important of which are as follows:

Section 1 is amended by changing the definition of the "Practice of Optometry."

Section 22 is amended by increasing the penalty for violations of the statute.

This statute is also mentioned in the summons and complaint herein.

So far as relates to this action, the important sections of the statute as amended, from time to time, are the following:

Section 1 of the Act of 1914, as amended by the Act of 1932.

Section 21 of the Act of 1914, as amended by the Act of 1919.

Section 22 of the Act of 1914, as amended by the Act of 1932.

LAWS OF 1933, CHAPTER 284, PAGE 761.

This is a supplement to the Act of 1914 and authorizes the issuance of a license to an optometrist who has been a resident of this state for at least thirty years.

LAWS OF 1933, CHAPTER 402, PAGE 1119.

Repeals last mentioned act.

Following is a copy of Sections 1 and 21 of the Act of 1914 as amended, and of such parts of Section 22 as amended, as are important to be considered in the present action:

SECTION 1 OF CHAPTER 222, PAGE 448, LAWS OF 1914,
AS AMENDED BY CHAPTER 75, PAGE 124, LAWS
OF 1932.

"1. The practice of optometry is defined to be the employment of objective and/or

subjective means for the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its powers of vision and adapting lenses and/or prisms for the aid thereof. Any person shall be deemed to be practicing optometry within the meaning of this act who in any way advertises himself as an optometrist, or who shall employ any means for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof, practice offer or attempt to practice optometry as herein defined, either on his own behalf or as an employee or student of another, whether under the personal supervision of his employer or perceptor or not, or to use testing appliances for the purpose of the measurement of the powers of vision or diagnose any ocular deficiency or deformity, visual or muscular anomaly of the human eye or prescribe lenses, prisms or ocular exercise for the correction or the relief of same or who holds himself out as qualified to practice optometry. Nothing in this act shall be construed to apply to the sale of toy glasses or goggles consisting of plano-white or plano-colored lenses or ordinary colored glasses, nor shall it apply to duly licensed physicians and surgeons authorized to practice medicine under the laws of the State of New Jersey."

SECTION 21 OF CHAPTER 222, LAWS OF 1914, AS AMENDED BY CHAPTER 59, LAWS OF 1919, PAGE 105, AT PAGE 108.

"21. No person not a holder of a certificate of registration duly issued to him shall, after January first, one thousand nine hundred and fifteen, practice optometry within this State. No person shall falsely personate a registered optometrist of a like or different name, nor buy, sell or fraudulently obtain a certificate issued to another."

SECTION 22 OF CHAPTER 222, LAWS OF 1914, AS
AMENDED BY CHAPTER 75, PAGE 124, AT PAGE
128, LAWS OF 1932.

"22. Any person violating any of the provisions of this act, and any person who shall obstruct or interfere with any duly authorized agent of the New Jersey State Board of Optometrists in the performance of any duty under this act, and any person, company or association who shall employ for a stated salary or otherwise, or give aid or assist, any person not authorized under this act to practice optometry within the meaning of this act, to practice optometry in this State, shall be subject to a penalty of two hundred dollars for the first offense and shall be subject to a penalty of five hundred dollars for the second offense and a like amount for each subsequent offense, which penalty or penalties shall be sued for and recovered by and in the name of the New Jersey State Board of Optometrists. Every District Court in any city or judicial district in any county, and every Court of Common Pleas in any county is hereby empowered, upon the filing of a complaint in writing, duly verified, which said verification, when made by any member of the said New Jersey State Board of Optometrists or by any member of any incorporated optometrical society of this State or of any county of this State, may be made upon information and belief that any person has violated any provision of this act to issue process at the suit of the New Jersey State Board of Optometrists as plaintiff; such process shall be either in the nature of a summons or warrant, which warrant may issue without any order of the court or judge first being obtained against the person or persons so charged, which process, when in the nature of a warrant shall be returnable forthwith, and when in the nature of a summons shall be returnable in not less than five nor more than fifteen entire days; such process shall state what provision or provi-

sions of the law is alleged to have been violated by the defendant or defendants, and on the return of such process, or at any time to which the trial shall be adjourned, the said court shall proceed summarily without a jury to hear the testimony and to determine and give judgment in the matter without the filing of any pleadings for the plaintiff for the recovery of such penalty, with costs, or for the defendant * * *.”

(a)

The Facts Do Not Show a Violation of the Statute.

The first question is whether the facts show a violation of the statute as alleged in the complaint, to wit, that the defendant employed and assisted an unauthorized person to practice optometry within the meaning of Section 1 of the statute, as amended by the Act of 1932.

Section 21 of the Act of 1914, as amended by the Act of 1919 provides that no person not a holder of a certificate shall “practice optometry within this State.”

The practice of optometry is defined in Section 1 of the statute as amended by said Act of 1932.

The complaint alleges that the defendant violated the statute in that it “did employ, give aid and assist” an unauthorized person, to wit, one Carlock, to practice optometry (p. 3, l. 27).

It is admitted that Carlock was a saleslady employed at the notion counter of defendant’s Jersey City store and that she was not authorized to practice optometry within the meaning of the statute.

In said Section 22, as amended by Laws of 1932, a penalty is imposed for violating “any” of the provisions of the statute; and a penalty is

likewise imposed upon any persons, company or association "who shall employ for a stated salary or otherwise, or give aid or assist, any person not authorized under this act to practice optometry within the meaning of this act, to practice optometry in this State."

The case of the plaintiff, therefore, depends upon a showing of the following facts:

1. That Carlock was not authorized to practice optometry.

This fact is admitted.

2. That defendant employed Carlock.

This is also admitted.

3. That Carlock was employed "to practice optometry."

This is denied.

Plaintiff's case depends upon a showing (so far as the third point is concerned) that the defendant gave aid (to) and assisted Carlock "to practice optometry." Under the facts of this case this is included in the allegation that the defendant "did employ" Carlock to practice optometry, because, obviously, the only connection Carlock had with the defendant or with the sale of spectacles at the notion counter was by virtue of her employment by the defendant as a sales-lady.

In the final analysis the sole question on the admitted facts is whether the defendant employed Carlock "to practice optometry"; and that question in turn depends, first, upon the definition of the practice of optometry as set forth in the statute; and, second, whether what Carlock was employed to do is included within the various acts which are defined as the practice of optometry in Section 1 of the statute.

Turning to Section 1, we find that any person shall be deemed to be practicing optometry who does certain things as set forth in this section as follows:

1. "Who in any way advertises himself as an optometrist * * *."

It is admitted that neither Carlock nor the defendant advertised themselves as optometrists (par. 15 of Stip., p. 10, l. 12).

2. "*Or* who shall employ any means for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof * * *."

It is admitted that the defendant and Carlock did not violate this provision (see first sentence of par. 15, p. 9, l. 35).

3. (Or who shall) "practice offer or attempt to practice optometry as herein defined, either on his own behalf or as an employee or student of another, whether under the personal supervision of his employer or perceptor or not."

This provision might possibly be the basis for a proceeding against Carlock or any other individual employee of the defendant, but it obviously has no application to the corporate defendant.

4. (Or who shall) "use testing appliances for the purpose of the measurement of the powers of vision * * *."

It is admitted that Carlock and the defendant did not use testing appliances for the purpose of the measurement of the powers of vision (par. 15 of Stip., p. 9, l. 41).

5. (Or who shall) "diagnose any ocular deficiency or deformity, visual or muscular anomaly of the human eye."

It is admitted that neither Carlock nor the defendant violated this provision (par. 15 of Stip., p. 10, l. 2).

6. (Or who shall) "prescribe lenses, prisms or ocular exercise for the correction or the relief of same."

It is admitted that Carlock and the defendant did not violate this section (par. 15 of Stip., p. 10, l. 5).

7. "Or who holds himself out as qualified to practice optometry."

It is admitted that neither Carlock nor the defendant violated this provision (par. 15, p. 10, l. 10).

The foregoing quotations from Section 1 cover *all* of the acts therein described as "practicing optometry within the meaning of this act."

The defendant is not shown to have done any of said acts.

In plaintiff's brief the alleged violation is set forth as follows (*italics ours*):

"It is true that the defendant did not examine eyes, but its agents did employ means for measurement of the powers of vision and adapted lenses or prisms for the aid thereof *in that they sold the glasses, which were of different strength and different numbers, to fit the eyes* of persons making the purchase.

* * * The defendant certainly practiced optometry when glasses were *sold to correct the vision*. So this case resolves itself on this point—When the defendant *sold glasses to correct the vision of the human eye or employed means for the measurement of power of vision*, did it practice optometry?" (pp. 3, 4).

But it is admitted in paragraph 15 of the stipulation that the defendant *did not* employ any

means for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof (p. 9, ll. 35-40).

While it is true that the lenses of the various spectacles offered for sale vary in power or focus, it is obvious that there would be no point in buying them unless they did so vary; if the spectacles were all of the same strength, they would be nothing more than "toy" glasses.

The customer, however, *makes his own selection without suggestion or advice from any employee of the defendant.* In this case the saleslady refused to assist the customer, saying: "You will have to try on the glasses yourself because I cannot help you I can only sell the glasses to you" (p. 9, l. 10). Thereupon the customer selected a pair of spectacles and they were sold for 25 cents.

There is nothing to show that the customer made her selection of glasses upon the basis of the focal strength of the lenses; or that the customer even looked at the pasters on the lenses upon which were numbers indicating the focal strength, based upon "the focal distance" (p. 8, ll. 1-10); there is nothing to show that the customer even knew what the numbers on the lenses indicated—or whether she knew that one number indicated the measurement of the focal distance by inches and the other number measured the same distance by diopters—or even that she knew what a "diopter" was. The stipulation sets forth all the facts as to the purchase of the glasses, and there is nothing in the stipulation which shows on what basis or for what reason the customer selected the pair of spectacles that was sold by Carlock. The stipulation states that the customer asked defendant's employee what

number she, Carlock, thought the customer needed "for general use around the house," to which defendant's employee replied, "You will have to try on the glasses yourself, because I cannot help you. I can only sell the glasses to you"; and thereupon *the customer selected the spectacles* (p. 9, ll. 1-15).

Moreover, if the customer did know the significance of the numbers on the pasters, she did not acquire that information from defendant's employee; there is no evidence that defendant's own employee (Carlock) knew the significance of the pasters and the numbers thereon.

The above quotation from plaintiff's brief is not an accurate statement of the point of the case, as it is admitted that the defendant did *not* employ means for the measurement of the powers of vision (p. 9, l. 35). The real question is, was the statute violated by the sale of spectacles with lenses of varying power or focus when the selection was left exclusively to the customer without advice from the defendant?

It is admitted that the spectacles were *made* for the purpose of aiding the human vision (see last sentence of par. 6 of Stip., p. 7, l. 25). Whether the spectacles in question in this action were *sold* to aid the human vision is another question; plaintiff contends that they were so sold but defendant does not admit it.

The spectacles were made for the purpose of *aiding* the human vision—otherwise there would be no reason for buying them.

But the customers themselves selected the spectacles and the defendant's employee directed the customers to try on the glasses for themselves.

In other words, the defendant did nothing more than to expose for sale to its customers spectacles which vary in focal power, leaving to the customers themselves to select their own spectacles without recommendation or advice or even suggestion.

There is nothing to show that the employee of the defendant knew what the numbers on the lenses represented—whether it was merely a price mark or an arbitrary trade number; there is nothing to show that the customers had any knowledge as to the meaning of the numbers on the lenses. Even if they did have such knowledge they did not receive the information from the defendant or its employees; on the contrary, the defendant's employee expressly refrained from giving any information.

We accordingly submit that the mere exposure for sale of spectacles—to be selected and in fact selected by the customers themselves—without advice or recommendation to customers by the defendant's employee, did not constitute the practice of optometry as defined in Section 1 of the statute.

Said section does not include within any of its several subdivisions the sale of spectacles selected by the customers; no testing appliances were used or furnished; no prescription was asked or offered; no means were employed by defendant to measure the powers of vision of the customer; the defendant did nothing except to expose for sale to its customers spectacles with lenses of varying powers; the customers made their own selection, paying the same price for each pair of spectacles, regardless of the power of the lens, and the defendant's employees not only refrained from giving any advice or recom-

mendations to the customers but said, "Try them for yourself."

In *Johnson v. State*, 22 Ala. App. 149, 113 So. 484, it was held that one who takes orders for spectacles which are sent to the customer by mail from the manufacturer, making no examination of the eyes, and the customer selecting his own spectacles from samples, was not engaged in the practice of optometry within the meaning of a statute defining such practice as "the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its functional powers and adopting mechanical means for the aid thereof."

In *Price v. State*, 168 Wis. 603, 171 N. W. 77, the statute exempted from the operation of the law persons who sold spectacles without attempting to test the eyes. The statute defined the practice of optometry as "The employment of any means, other than the use of drugs, for the measurement of the powers of vision and the adaptation of lenses for the aid thereof." (A definition almost identical with that found in Section 1 of the New Jersey statute.)

While the court held that under the facts of that case the defendant had violated the statute because the evidence showed that he tested the eyes of the customer, the court said *arguendo*:

"This was not a case where a customer simply picked out her own glasses by trying on pair after pair until she found a pair which satisfied her * * *. It was also quite plainly the intent of the Legislature to permit persons to sell spectacles so long as they did so without attempting to test the eyes * * *. It was also intended to exempt from the provisions of the law persons who simply sold spectacles over the counter, where the customer makes his own

selection, and there is no attempt on the part of the salesman to test the eyes.”

In *Harris v. State Board*, 287 Pa. 531, 135 Atl. 237, plaintiff sought a mandamus against the Board to compel the Board to issue a license to him to practice optometry; he had been a registered optometrist for many years, but his license had been revoked for violation of the Pennsylvania statute in that he peddled eyeglasses from house to house and practiced optometry outside of his office; these were among the acts forbidden by the statute. It was held that these regulations were reasonable. The court said (*italics ours*):

“Appellant contends that, as any citizen may sell from door to door or from person to person, as an article of merchandise, spectacles, without attempting to adapt or fit them to the eye, and as such sales are not unlawful under the act, the regulation as it affects optometrists is a gross discrimination against them, and a denial of their right to practice optometry as they wish. We do not so regard it. The inhibition prevents one known to have the qualifications of an optometrist, and licensed as such, from doing a thing in the same way as one who is not so known. In the one case, the vendor does not assume, directly or indirectly, *to adapt glasses to the eyes. They are sold as so much merchandise.* In the other case, the very fact of the license clothes his act with an apparent assumption that the glasses are adapted and fitted to the eyes.”

In that statute, optometry was defined as “employment of any means other than the use of drugs for the measurement of the powers of vision, and the adaptation of lenses for the correction and aid of the vision of human beings.”

This definition is practically identical with one of the definitions set forth in section 1 of the New Jersey statute; and it is this part of section

1 which plaintiff claims was violated by the defendant (p. 3 of plaintiff's brief).

The conclusion from this decision is that there was nothing in the Pennsylvania statute which prohibited the sale of glasses as "merchandise" when the vendor did not assume to adapt glasses to the eyes of the purchaser; in this respect the case is precisely like the present case in that the defendant did not assume to adapt glasses to the eyes of customers and did not permit its employees so to do, but merely sold the glasses "as so much merchandise."

In considering the question of the construction of this statute it must be remembered that it is a penal statute, and as such, must be strictly construed. The Supreme Court of the State of Pennsylvania, in discussing a somewhat similar statute, said:

"In the present case it is our conclusion that the plaintiffs and those engaged in the same occupation as themselves, are not covered by the provisions of the statute * * *.

This would be our judgment upon broad and general grounds, but we regard it as more imperatively our duty to adopt the foregoing interpretation of the statutes in question, for the reason that the statutes are penal in character, and therefore to be strictly construed." *Martin v. Baldy*, 249 Pa. 253, 94 Atl. 1091 (cited in the Supreme Court opinion on the question of the definition of "the practice of optometry," p. 41, l. 36).

The reasoning of the New Jersey Supreme Court on this point is persuasive. We quote from the opinion:

"The practice of optometry, therefore, does not include the mere sale, without more, of spectacles, glasses or lenses, designed to aid human vision. And this is patently the

de. statutory sense of the term. The statutory
 here classification connotes the employment by the
 which practitioner of means, objective or subject-
 se" iva, for the examination of the eye for the
 sses purpose of ascertaining its visual power, and
 the the adaptation of lenses or prisms for the
 the correction of discovered defects or deficien-
 the cies. The statute was not intended to apply
 em- to the sale of spectacles, eyeglasses or lenses
 'as as merchandise, or to the mere sale of such
 ion to an individual for use in the correction of
 t is his defects or deficiencies of vision, or for
 etly the alleviation of the consequences thereof.
 of As we have pointed out, this power, to
 lar reasonably regulate the sale of lenses de-
 sion signed to correct vision, undubitably resides
 the in the Legislature, but it did not choose to
 ov- exercise it. If that were its purpose, it
 * would have undoubtedly chosen apt language
 pad to express it, as in *Roschen v. State, supra*,
 as and *Commonwealth v. S. S. Kresge Co.,*
 the *supra*. This is a penal statute, and, on
 in familiar principles, it will not be construed
 are to apply, in the absence of a clearly ex-
 be pressed legislative purpose to that effect,
 49 to the mere sale of lenses designed to
 me strengthen vision."
 in- (p. 42, ll. 1-30.)
 41,

* * * * *

“Concededly, Carlock did nothing more
 than make sale of lenses designed to aid
 human vision. She did not examine, or pre-
 tend to examine, the eye of the purchaser
 for the purpose of determining the need of
 a corrective lens, or make, or presume to
 make, a diagnosis, or employ testing appli-
 ances or other means to measure the power
 and range of vision. Prosecutor provided
 an assortment of lenses, varying in power
 or focus, and the purchaser made his own
 selection, without the advice, aid or assist-
 ance of prosecutor’s agent in charge. True,
 the focal distance, measured by inches and
 diopters, was indicated by a number at-
 tached to the lens, and thus the refractive

power of the lens was conveyed to its patron seeking an increase in visual power. But this clearly does not constitute the practice of optometry. The participation of the servant, and, by derivation, that of the employer, in the transaction in question, was not essentially different from that of the salesman who makes sale, for the personal use of the purchaser, of an article of wearing apparel containing a number or other symbol indicating its size. He does not thereby represent that it will fit the purchaser—only that it is of the size denoted by the symbol. So the vendor in the instant case did not represent that the lenses would suit the eyes of the purchaser—the representation was merely that they had the refractive power signified by the trade token. The vendor did not thereby employ (in the language of the statute) ‘means for the measurement of the powers of vision, or the adaptation of lenses or prisms for the aid thereof.’ The defendant board acknowledges that these transactions are not embraced within this statutory definition. It is so stipulated. And there is clearly no other statutory provision constituting such acts the practice of optometry. It follows that the conviction must be set aside.”

(p. 46, l. 25 to p. 47, l. 28.)

We accordingly submit that the Supreme Court was right in concluding that the facts did not show a violation of the statute.

(b)

The statute as construed by the District Court violates the State and Federal Constitutions.

Section 1 of Article I of the State Constitution reads (in part) as follows:

“All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of

* * * acquiring, possessing and protecting property * * *.”

The defendant is duly authorized to transact business in the State of New Jersey (p. 6, l. 32). It is engaged in the business of selling general merchandise in many cities and towns of the State of New Jersey. In its Jersey City store it sells all kinds of merchandise, including notions such as needles, pins, pocketbooks, etc.; the spectacles in question in this action are displayed for sale on the same counter with other notions.

Its business in New Jersey is property; one of the natural and necessary incidents of “property” is the right to sell or otherwise dispose of it.

We quote from *Barr v. Essex Trades Council*, 53 N. J. Eq. 101 (p. 112):

“A man’s business is property. By the first section of the bill of rights of the constitution of New Jersey, the right of acquiring, possessing and protecting property is classed, as a natural and inalienable right which all men have, with those of enjoying and defending life and liberty, and of pursuing and obtaining safety and happiness. This is an echo of *Magna Charta* repeated in the declaration of independence. Mr. Justice Bradley, in the *Slaughter House Cases*, 16 Wall. 36 (at p. 116), says: ‘For the preservation, exercise and enjoyment of these rights (life, liberty and the pursuit of happiness) the individual citizen, as a necessity, must be left free to adopt such calling, profession or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one’s calling is an essential part of that liberty which it is the object of the government to protect, and a calling, when chosen, is a man’s property and right. Liberty and property are not protected where these rights are arbitrarily assailed.’”

This right of property is subject to the police power but such power must be reasonably exercised.

Ignaciunas v. Risley, 98 N. J. L. 712; aff'd 99 N. J. L. 389;

Falco v. Atlantic City, 99 N. J. L. 19;

New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. Ed. 747;

Southern Ry. Co. v. Virginia, 290 U. S. 190; 78 L. Ed. 260;

Nashville, C. & St. L. R. Co. v. Walters, 79 L. Ed. (Adv.) 458 (decided March 4, 1935).

This rule applies to the claim of the defendant that a judgment against it on the admitted facts would deprive it of its property without due process of law, in violation of the provisions of the Fourteenth Amendment.

We discuss hereinafter the further question whether the provisions of the New Jersey statute are so unreasonable *on their face* as to constitute a violation of that amendment.

It is enough to say so far as the present point is concerned that defendant claims that if the statute be construed to apply to the facts of this case, then it amounts to an interference with defendant's right of property and to the taking of defendant's property without due process, in violation of both the State and the Federal Constitutions.

The rule is that when the question of the constitutionality of a statute is involved, the court will, if possible, give the statute such construction as to sustain rather than to reject it; if, in the present case, the court should conclude that the facts do not show a violation of the statute

then the constitutional questions need no further consideration.

If the court concludes that the facts show a violation of the statute, then we further submit that *as so construed* the statute violates said provisions of the State and of the Federal Constitutions.

Under the admitted facts we submit that there is no reasonable basis for the plaintiff to interfere with the exercise by the defendant of its right to acquire, possess and protect its property, including the right to sell or otherwise dispose of spectacles.

There is no proof that the spectacles sold by the defendant were harmful to the health of the customers who buy and use them. In the absence of such proof, the court is not justified in assuming that the spectacles sold by the defendant are harmful to those using same; *on the contrary it is admitted that they are made to "aid" the human vision* (p. 7, l. 28).

If and when a case should arise where the defendant undertakes to "prescribe" lenses or to use test cards; or, perhaps, even to recommend or advise one pair of spectacles rather than another, then a different question would be presented. But such is not the present case; the defendant does nothing more than sell spectacles to customers *who make their own selection* of glasses that are adapted for their individual cases.

To say that a customer shall not select his own glasses is almost as absurd as to say that one shall not select a pair of shoes or a pair of stockings or a pair of gloves or some other article of attire which happens to be the par-

ticular size adapted to his person. It is as reasonable to say that the public cannot buy shoes without consulting a chiropodist, as to say that the public cannot test spectacles by looking through them.

Photostatic copies of the two pairs of spectacles purchased by the witnesses of the plaintiff (Exs. P. 1, P. 2) are submitted with the state of case (p. 49). On each lens of Exhibit P. 1 appear the figures ".75." "52"

On each lens of Exhibit P. 2 appear the figures "1.25." "32"

It is doubtful if any customer knows the significance of these or other numbers that appear on the lenses; in the present case there is no proof that the customers were informed as to the meaning of these numbers or that they had any knowledge thereof, or that they even looked at them.

These numbers indicate the focal distance of the lens, measured in inches and diopters. A diopter is the refractive power of a lens that has a focal distance of one meter (Gould's Dict., 2nd Ed., p. 418).

For example, in the case of Exhibit P. 2 the inch length is 32; the figures "1.25" are obtained by dividing the metric length, to-wit, 39.37 by 32, giving a result of approximately 1.25.

In *State Board of Medical Examiners v. Uchin*, 9 Misc. 966, 156 Atl. 285, the defendant was charged with practicing chiropody without obtaining a license, in violation of the act to regulate the practice of chiropody. The testimony showed that investigators for the State Board went to the defendant's shoe store and complained of pains in their feet. Defendant sug-

gested that they bathe their feet in hot water and use soap and powder; he also took a picture of their feet with a "pedigraph" and then sold them certain proprietary preparations and a pair of arch supports; defendant did not hold himself out as a doctor of chiropody and did not cut their corns; and charged only the regular price for the remedies.

The statute there in question did not define what was meant by chiropody and the State Board undertook to supply that deficiency by testimony of an expert that in his opinion these acts of the defendant constituted the practice of chiropody. The court refused to accept this view and dismissed the complaint.

When the Legislature has undertaken to define the "practice of optometry," the court is bound by that definition (provided it does not exceed the limitation of reasonable exercise of the police power), and cannot supply any deficiency in the definition by importing into the statute its own idea of what the Legislature should have done.

In the *Uchin* case, the defendant examined the feet and advised in regard to the proper treatment of same; such case is no stronger for the State than the present case where the defendant's employee not only did not prescribe the kind of spectacles to be used, but expressly refused to give assistance and directed the customers to make their own tests, and thereupon the customers themselves selected the spectacles.

There is a decision in the State of Texas where under similar facts it was held that the statute was unconstitutional. In *Bruhl v. State*, 13 S. W. (2d) 93, a merchant who was not a licensed optometrist was prosecuted for selling spectacles to a customer whom he permitted to test his own

eyes with a mechanical device by rotating discs containing the lenses that were on sale at the counter. The statute included in the definition of the practice of optometry any sale of spectacles by a merchant in any other way or by any other means than *by merely exhibiting the same in trays or containers*. The court held that this statute violated the Fourteenth Amendment (and also the Constitution of the State of Texas), in so far as it forbade the giving of aid to the customer by the merchant or the use of any device or literature or printed directions for the purpose of assisting the customer in selecting the spectacles and in so far as it made any sale illegal save that *in which the customer personally went to the container of spectacles alone and without interference or aid, directly or indirectly, from anyone, made his own selection by trying on eyeglasses in the tray one after another until he found the pair that suited him*.

That case goes much further than it is necessary in the present case, because there the court held it illegal to forbid the use of a mechanical device to assist the customer, whereas in the present case there is no claim that any device was used to assist the customer, but he is required to make his own selection by trying the spectacles for himself, without advice or recommendation.

Whether the New Jersey statute is bad on its face is discussed later. All that need be considered under this point is whether *under the admitted facts* the statute is an unreasonable exercise of the police power, if construed to apply to such facts; if it is unreasonable, then it violates both the State and the Federal Constitutions in the respects above mentioned.

Plaintiff's brief admits there is no case in the State of New Jersey on this point, but cites *Roschen v. Ward*, 279 U. S. 337, 73 L. Ed. 722 (pp. 4, 5).

The statute in that case is set forth at length in the decision of the court below (29 Fed (2d) 762). In substance it made it unlawful to sell at retail as merchandise in any store any spectacles, etc., "for the correction of vision," unless a physician or optometrist was in charge of, or in personal attendance at, the counter or place where the articles were sold.

The principal point there under consideration was whether the requirement for the attendance of a physician or optometrist at the counter where the spectacles were sold was a reasonable exercise of the police power. While the statute was sustained, the situation presented in that case is very different from that now before the court. The New Jersey statute has no provision requiring the attendance of a physician or optometrist; and the sole question under this point is whether it is a reasonable exercise of the police power to prohibit the sale of spectacles that are made for the purpose of aiding the human vision when the selection of the glasses is left exclusively to the purchaser without any testing, advice or recommendation on the part of the defendant or of its employee. While we urge that the admitted facts do not show any violation of the statute, we further submit that *if the statute be construed* to apply to such facts, then it is an unreasonable exercise of the police power.

In this connection we call attention to *Commonwealth v. S. S. Kresge Co.*, 267 Mass. 145, 166 N. E. 558, where a statute of Massachu-

setts was sustained which defined the practice of optometry to be "the employment of any method or means other than the use of drugs for the measurement of the powers of vision and the adaptation of lenses for the aid thereof." We mention this case for the purpose of distinguishing it; the opinion shows that the defendant not only displayed eyeglasses for sale in its store, but also placed cards near same for the use of customers which contained various sizes of type, designated by numbers which correspond to the numbers on the eyeglasses; the salesman, at the request of the customer, would then select from the stock in the showcase, eyeglasses of corresponding numbers, as might be indicated by the customer; then the customer would try on the glasses and, if found satisfactory, would purchase same.

The difference between that case and the present is obvious, as here the numbers on the glasses merely indicate the focal distance of the lens, and have no reference to test cards or to numbers thereon; no test cards or any other test appliances are furnished and the employee of the defendant not only did not advise the customers what spectacles to buy, but refused to do so.

(c)

The Statute on its face violates the State and Federal Constitutions in the following respects:

- (1) The standard of conduct in the statute is so indefinite as to amount to a delegation of legislative power.
- (2) The penalties imposed are unreasonable and excessive.

(3) It interferes with the right of the defendant to acquire, possess and protect property and deprives the defendant of its property without due process.

(1)

Standard of Conduct.

Section 1 of the New Jersey statute is quoted above. We submit that its definition of the "practice of optometry" is vague and indefinite. Such practice is defined to be "the employment of objective and/or subjective means for the examination of the human eye for the purpose of ascertaining *any departure from the normal*, measuring its powers of vision, * * * etc." What is meant by "normal" is left to the guess of the court in every case; there is no attempt to define what kind of vision is regarded as normal and what kind is regarded as abnormal.

The further provisions in Section 1 have been heretofore analyzed; they all relate back to the first sentence of the section; hence, in every case where it is alleged that some provision of the statute has been violated it is necessary to go back and ascertain what is meant by "any departure from the *normal*." It would probably be difficult to find any two optometrists who would agree as to what is meant by "normal" vision, and equally difficult to find any two who would agree as to what is meant by "departure" from the normal.

Other provisions in said section are equally vague; for example, what is meant by an "ocular deficiency or deformity?" What is meant by a "visual or muscular anomaly?" It would probably be very difficult to find any individual of full age who does not have some slight degree of

ocular deformity or anomaly. But what departure from the "normal" is to be fixed as the dividing line between the violation and non-violation of the statute.

This point has been considered in *State v. Larson*, 10 Misc. 384, 160 Atl. 556. In that case the State Aviation Act of 1931 was held to be an unconstitutional delegation of legislative power in so far as it authorized the State Commission to establish "uniform field rules for airports." The court pointed out that this did not fix any criterion to be adhered to by the Commission and held that the statute "therefore violates the fundamental concept of our constitutional law as to the separation of the powers. It may well violate also the due process clause of the fourteenth amendment to the federal constitution, since it creates a crime, without setting up any ascertainable standard of conduct for the citizens to conform to."

In the *Uchin case*, 9 Misc. 966, 156 Atl. 285 the court said:

"I am not willing to convict a person for an act, the violation of which does not depend upon any standard established by the Legislature which may be known in advance, but one created by the judiciary, which may be as varying and uncertain as the varying viewpoints of respective judges, and even which variable standards cannot be known until after the infraction of the acts complained of. As was said by Justice Holmes in *Towne v. Eisner*, 245 U. S. 418, 38 S. Ct. 158, 159, 62 L. Ed. 372, L. R. A. 1918D, 254: 'A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.'

It is the duty of the Legislature to enact laws specific enough so that a citizen may be entitled to an unequivocal warning before conduct on his part, which is not malum in se, can be made the occasion of a deprivation of his liberty or property. *Weister v. Hade*, 52 Pa. 478; *Sherwin v. People*, 100 N. Y. 351, 3 N. E. 465."

The following are some of the United States Supreme Court cases that apply the same principle: *American Seeding Machine Co. v. Kentucky*, 236 U. S. 660, 59 L. Ed. 773, holding invalid the Kentucky anti-trust statute on the ground that there was no standard of conduct to determine "real value," which was declared by the statute to be "the market value under fair competition, and under normal market conditions."

United States v. Cohen Grocery Co., 255 U. S. 81, 65 L. Ed. 516, 14 A. L. R. 1045, holding the Lever Act invalid on the ground that the language therein used, to wit, "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," was so vague and uncertain as to render the statute unconstitutional.

Connally v. General Construction Co., 269 U. S. 385, 70 L. Ed. 322, holding a statute of the State of Oklahoma invalid which required a contractor under penalty to pay employees "not less than the current rate of per diem wages in the locality where the work is performed," on the ground that it is so uncertain as to deprive the contractor of property without due process.

Cline v. Frink Dairy Co., 274 U. S. 445, 71 L. Ed. 1146, holding invalid the Anti-trust Law of the State of Colorado on the ground that the proviso thereof that certain acts thereby condemned should not be regarded as unlawful if

the purpose was to obtain "only a reasonable profit" was to compel the defendant to "guess" on the peril of an indictment "whether one or more of the restrictions of the statute will destroy all profit or reduce it below what would be reasonable."

Smith v. Cahoon, 283 U. S. 553, 75 L. Ed. 1264, holding that (Headnote 4):

"A statute setting up a scheme for the regulation of common and private carriers by motor vehicles on highways between fixed termini or over regular routes, without expressly distinguishing the provisions properly applicable to common carriers only, is void for uncertainty."

Panama Refining Company v. Ryan, 293 U. S. 388, 79 L. Ed. (Adv.) 223 (decided January 7, 1935) holding invalid the provision of section 9 (c) of Title 1 of N. I. R. Act of June 16, 1933, whereby the President was authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof. That provision reads:

"(c) The President is authorized to prohibit the transportation of interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State * * *."

The court said:

"Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that §9 (c) goes beyond those limits. As to the transportation

of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.

If §9 (c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function the Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government."

The *Connally* case cited, among others, the case of *United States v. Capital Traction Co.*, 34 App. D. C. 592, where a statute was held invalid which made it an offense for the railway company to run an insufficient number of cars to accommodate passengers "without crowding."

The rule deduced from the several cases is set forth in the *Connally* decision as follows:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ

as to its application violates the first essential of due process of law.”

The *Connally* case and numerous others were cited in *Commonwealth v. Daniel O'Connell's Sons*, 281 Mass 402, 183 N. E. 839 holding invalid a statute which provided that wages paid in construction of public works should “be not less than the customary and prevailing rate of wages for a day's work in the same trade or occupation in the locality where such public works are under construction.”

A striking summary of the legal principle is found in *State ex rel. Crow v. West Side R. Co.*, 146 Mo. 155, 47 S. W. 959, where the court said:

“A mere collection of words cannot constitute a law; otherwise the dictionary can be transformed into a statute by the proper legislative formula. An act to be enforceable must prescribe a rule of action, and such rule must be intelligently expressed.”

In the cited cases the language that was held too vague was: failure under “normal” market conditions—any “unjust or unreasonable” rate or charge—“current” rate of wages—insufficient cars “without crowding”—“customary and prevailing” rate of wages.

So here, the legislature has attempted to penalize any person who attempts to examine the eye to ascertain any departure from the “normal,” or to diagnose any ocular “deficiency.” or visual or muscular “anomaly.”

We submit that this language is so vague as to come within the condemnation of the decisions on this subject.

Excessive Penalties.

Section 22 of the statute imposes a penalty of \$200 for the first offense and a penalty of \$500 for the second offense "and a like amount for each subsequent offense." It further provides that if judgment be rendered for the plaintiff the court may cause any defendant who refuses or neglects to forthwith pay the amount of the judgment and costs to be committed to the county jail in the case of a first offense for any period not less than thirty days and not more than sixty days in the discretion of the court, and in the case of a second or subsequent offense, to be committed to the county jail for any period not less than sixty days and not more than 120 days for *each* of said subsequent offenses in the discretion of the court.

This fine is so absurdly excessive as to amount to a deprivation of property without due process. For example, if the defendant in the course of a week's business should sell to its customers 100 pairs of spectacles for a total purchase price of \$25, it would thereby become liable to penalties aggregating the total sum of \$50,000.

We are not dealing with the possibility of the imposition of such a penalty in the present case, as both parties have agreed that this is to be considered as a "first" offense, the penalty for which is \$200 in case of conviction. But such a statute is unconstitutional on its face, in view of the excessive penalties.

Ex Parte Young, 209 U. S. 123, 52 L. Ed. 714;

Missouri Pacific R. Co. v. Tucker, 230 U. S. 340, 57 L. Ed. 1507;

St. Louis, etc. R. Co. v. Williams, 251 U. S. 63, 64 L. Ed. 139;

Oklahoma Operating Co. v. Love, 252 U. S. 331, 64 L. Ed. 596.

In the *Tucker* case, the penalty imposed was \$500 for every charge made by a common carrier in excess of the rates established by the Legislature for certain shipments. The court said:

“The imposition * * * is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law, and therefore in contravention of the 14th Amendment.”

In the *Love* case the court said:

“But the penalties which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident. The penalty for refusal to obey an order may be \$500; and each day’s continuance of the refusal after service of the order, it is declared, ‘shall be a separate offense.’ * * * Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if otherwise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates” (citing cases).

Many other cases in which the same principle is discussed and applied will be found in a note to the case of *State of Washington v. Crawford*, 46 L. R. A. (N. S.) 1039 (reported in 133 Pac. 590).

See also cases cited in 39 A. L. R. at page 1181.

Violation of Due Process Clause.

The Board relies upon *Roschen v. Ward, supra*, to sustain the constitutionality of the statute, but, as we have heretofore pointed out, the statute there under consideration was different from that in the present case.

The Supreme Court of Illinois in *People v. Griffith*, 280 Ill. 18, 117 N. E. 195, held unconstitutional the statute of that state which defined the practice of optometry to be "the employment of any means other than the use of drugs, medicine or by surgery, for the measuring of the power of vision and the adaptation of lenses for the aid thereof."

This language is strikingly similar to the second sentence of Section 1 of the New Jersey statute. There the defendant tested the eyes of a witness by the use of different lenses to see whether the witness could read letters placed at certain distances. The conviction of the defendant was reversed. In that case the court said:

"The act exempts from examination those who have practiced 3 years, entirely regardless of moral character, temperate habits, age, skill, knowledge, or competency to practice optometry, and prescribes no subjects for examination. What the defendant did was to try different lenses, and when the customer said she could read the letters at a distance she practically decided what glasses would suit her and contracted for them. If changing lenses until the customer was suited, or placing letters at a distance to be read, is measurement of the power of vision and the adaptation of lenses, it is no more than the measurements made by any person who undertakes to fit a person where the person himself decides what answers the

purpose. Such measurements, if they are so called, have no relation to the public health, comfort, safety or welfare, such as to require a course of previous study and an examination and payment of a license fee. No reason is given by counsel how the comfort, health, welfare, or safety of society is to be promoted by requiring a license for such acts as were done by the defendant. A statute which singles out a particular class of persons and imposes burdens upon them from which other similar classes are exempt violates their constitutional rights, and cannot be sustained. We do not say that it is beyond the power of the General Assembly to enact a statute requiring a previous course of study and an examination of applicants to practice the calling or profession of examining the eye to ascertain if there are defects which can be remedied by the use of lenses, the determination of the accommodation and refractive states of the eye, the range and power of vision and abnormal conditions, and the adaptation of lenses to correct defects, or to require a license to practice such calling or profession; but the act now in question, as construed by the parties and counsel, it not within the scope of the powers intrusted to the General Assembly."

This decision is authority for the contention of the defendant that the New Jersey statute on its face is unconstitutional. The facts in the *Illinois* case are much stronger than in the present case, because there the defendant tested the customer's eyes by means of a mechanical appliance by the use of various lenses, whereas nothing of that sort was done by this defendant.

III.

Discussion of the Decisions of the District Court of Jersey City and of the New Jersey Supreme Court.

(1)

The Decision of the District Court.

(a) The District Court said that a reading of the statute "makes it appear" that it was the intention of the Legislature that spectacles for the correction of human vision "should not be sold by one not an optometrist, except as therein mentioned" (p. 18, l. 30). But the statute contains no such provision; it specifically defines what is meant by "the practice of optometry," and then prohibits such "practice" by anyone who is not an optometrist. *Nothing is said in the statute about the sale of spectacles* (except for the proviso that nothing in the act shall be construed to apply to the "sale" of toy glasses), either by an "optometrist" or by anybody else. If the intention of the Legislature was as stated, it could easily have said so. Whether such a restriction would be a reasonable exercise of the police power is another question. But the Legislature has not yet *said* so. Moreover, if the statute is so *construed*, then we submit that it is an unreasonable exercise of the police power for the reasons above stated.

(b) The District Court refers to the pasters on the lens of each spectacle, and from the mere fact that each lens has such pasters thereon, drew two unjustifiable conclusions: First, that the defendant placed the pasters on the lens; there is no such proof. Second, that the defendant did so with the intention of "evading" the provisions of the statute (p. 19, l. 10). There is no proof to sustain that conclusion.

(c) The District Court held that the defendant caused the pasters containing the numbers to be placed upon the lenses "to indicate or advertise to the prospective purchasers thereof that the lenses had been scientifically manufactured to meet standards of distance and strength, to correct or meet with different degrees of defective vision and that each number was for a different degree of defective vision" (p. 19, ll. 12-20). But there is nothing in the stipulation to show that the *defendant* caused the pasters to be placed upon the lens, or that the purpose of so doing was to *advertise* to purchasers that the lenses had been "scientifically manufactured," or that the purchasers had any knowledge of the significance of the numbers on the lenses, or even that these purchasers were suffering from "defective vision." Moreover, the spectacles were not purchased by reference to the numbers—at least, there is no proof of such purchase in the present case—but they were purchased on the basis of an actual test, by the customer putting the glasses on his nose, as one would put a pair of shoes on his feet or a pair of gloves on his hands.

(d) The District Court says that the numbers on the glasses tend to make the purchasers believe, or "did make them believe" that an examination of the eyes was not necessary (p. 19, l. 20); here, again, there is no proof that this was the purpose of the defendant or that the witnesses or other customers did in fact *believe* that an examination of the eyes was not necessary.

(e) The District Court says that the glasses were numbered for the purpose of indicating that each number "was to correct a particular case of defective vision" (p. 19, l. 28). This

conclusion is an inaccurate statement of the meaning of the numbers; while the numbers do indicate the focal strength of the glasses, there is no proof that each number was intended to correct a "particular" case; the fact is that the customer makes his selection by an actual *test* of the glasses and not by looking at numbers whose significance he does not understand; the stipulation is that the customer was directed *to try on the glasses* and thereupon the customer "selected" same without aid or assistance of defendant's employee (p. 9, ll. 10-30).

(f) The District Court says that the statute is remedial and should be construed strongly against those who claim rights or benefits under it (p. 19, l. 32). Here the court overlooked the fact that the statute imposes a penalty (and a very excessive one) for violation. Hence it is not accurate to say that the statute should have a liberal construction; on the contrary, it is to be strictly construed. So held by the Supreme Court (p. 42, l. 28).

(g) The District Court says that the statute was designed to protect the health of persons who suffer from defective vision (p. 20, l. 4). We submit that those persons who suffer from defective vision and who cannot afford to pay the fees of the optometrist will continue to suffer, unless the statute is so construed as to permit them to make their own selection of suitable glasses by their own personal tests of same at a moderate price for the glasses themselves.

(h) The District Court says that if the Legislature had intended that glasses could be sold in the manner in which they were so sold by the defendant, it would have so provided (p. 20, l. 12). The answer to this is that if the Legis-

lature intended that glasses could *not* be sold in that manner, it would have so provided. It did *not* so provide; and, therefore, on the admitted facts the defendant is not liable.

(i) The District Court says that the purpose of the statute was to prevent any person from purchasing glasses for the purpose of correcting his vision without an examination of the eyes by an optometrist or a physician or surgeon; and that it was no doubt passed to do away with the evil of having persons with faulty vision purchase glasses "without a proper examination" (p. 20, l. 33). There is nothing in the statute which refers to any such "evil"; there is no proof that any such "evil" in fact exists; still less is there any proof that no person with faulty vision can safely purchase glasses (tested by himself) without an examination by an optometrist. But, in any event, there is nothing in the statute which undertakes to prevent a person from buying spectacles of his own choice, if he wants to do so, *without* an examination.

(j) The District Court says that the inclusion in the statute of certain exceptions as to toy glasses and goggles makes it clear there were to be no other exceptions, "such as selling the glasses in the method pursued by the defendant" (p. 20, l. 40). The difficulty with this is that there is nothing in the statute which *prohibits* the *sale* of glasses. This point is fully answered in the opinion of the Supreme Court (p. 42, l. 30 to p. 46, l. 25).

(k) The District Court says that the question whether the spectacles were harmless is immaterial because it was not incumbent upon the plaintiff to show that a violation of the statute caused any harm, nor does it matter whether it

caused any harm or not (p. 21, l. 15). This overlooks the basis of the police power. The exercise of that power can be justified only when it appears that it is reasonable and is in the interest of the public health or welfare.

(1) The District Court dismisses the constitutional questions on the authority of *Kresge v. Ward*, 279 U. S. 337. This has been discussed above and the difference between the statute there involved and the present one has been pointed out.

The District Court refers to *Hallen v. Utah*, 108 Pac. 347, as holding that regulation of the sale of eyeglasses for the correction of vision is within the police power (p. 21, l. 30). The opinion in that case shows that it had nothing to do with the *sale* of glasses. It was a proceeding to compel a State Board to issue a license to a person who had been engaged in the practice of optometry prior to the enactment of the statute; it held that the Legislature has the right to prescribe reasonable qualifications for those so engaged—a point which obviously has nothing to do with the present case.

(2)

The Decision of the Supreme Court.

(a) On the fundamental question of the construction of the statute, namely, whether the practice of optometry includes the sale, without more, of glasses, that are designed to aid the human vision, the Supreme Court held that the statute was not intended to apply to the mere sale for use in the correction of defects of vision, or for the alleviation of the consequences thereof (p. 42, ll. 1-20).

The Supreme Court further held that under the facts of this case the defendant's employee did not "practice" optometry (p. 47, ll. 1-30).

If this court agrees with the conclusion of the Supreme Court in these respects, that is the end of the case, and the further questions that have been raised require no further consideration.

(b) The Supreme Court held that the State, in the exercise of the police power, has the right to regulate the practice of medicine and of kindred professions, including optometry; and thus could confine the practice of optometry to those who are registered in accordance with the statute, after passing the prescribed examination (pp. 37-38).

But in this case we are not concerned with the question of the general doctrine as to the exercise of the police power under the optometry statutes of New Jersey; what the defendant claims is that if the statute be construed to apply to the *mere* sale of glasses (without advice or recommendation), then the statute as so construed would be a violation of the constitutional rights of the defendant.

As the Supreme Court has held that the mere sale of glasses does not violate the statute, this question is academic—unless this court should disagree with the Supreme Court in its construction of the statute; if this court should conclude that under the stipulated facts the defendant had violated the statute, then (and only then) would it become necessary to consider the constitutional questions.

(c) The Supreme Court held that the "standard of conduct" as prescribed by the statute, was not "vague and indefinite" (p. 39, ll. 1-20);

and that, therefore, the attack upon the statute because of its alleged failure to define clearly the practice of optometry, must fail.

Here, again, this constitutional question is only of academic interest, if this court agrees with the court below that there was no violation of the statute.

If, however, this court disagrees with the Supreme Court on that conclusion, then the question as to the standard of conduct becomes important. The judgment of the District Court in this case convicted the defendant of violating the twenty-first section of the statute (p. 23). The judgment did not specify the particular act or acts of which the defendant was guilty; neither did the summons and complaint. The complaint was that the defendant employed and aided a person unauthorized to practice optometry, to wit, one Carlock "to practice optometry" (p. 3, l. 30), but did not state what the violation was. The complaint charges the practice of optometry "within the meaning" of Section 1 of said act, as amended (said Carlock not being the holder of a certificate of registration); the summons is in the same form (p. 5, ll. 20-30).

But when we examine Section 1 of the statute we find difficulty in determining what constitutes a violation thereof. We have discussed the meaning of this section above in Point II (a) under the caption "The Facts do not Show a Violation of the Statute"; and further, under Point II (c) 1 under the caption "The Standard of Conduct."

We respectfully submit that under the decisions of the United States Supreme Court the standard fixed by this section is so uncertain and indifferent that it is void on its face.

(d) The Supreme Court held that the penalties were not unreasonable.

The cases cited above under Point II (c) 2 show that the court has a right to consider in any particular case whether the penalties are so excessive as to amount to a violation of due process.

IV.

REPLY TO BRIEF OF APPELLANT.

(Note: References in left-hand margin are to the pages of the brief of appellant.)

(a)

There is no proof that the defendant practiced optometry as defined in the statute.

(pp. 2, 3) The argument of appellant (plaintiff) is that the defendant practiced optometry when it sold glasses to "fit the eyes" of purchasers. The brief then quotes the definition of the practice of optometry as set forth in Chapter 75, P. L. 1932.

But there is nothing in that definition which imposes a penalty upon one who *sells glasses* "to fit the eyes." If the Legislature intended to have the practice apply to such sales it could easily say so. A question might arise as to whether such a statute would be a reasonable exercise of the police power, but however that may be, the Legislature has not included within the definition of the practice of optometry the mere *sale* of glasses for such purpose.

The brief claims that the agents of the defendant employed "means for the measurement of the powers of vision" in that they sold glasses to

fit the eyes of persons who made the purchases, but the stipulation of facts states (*italics ours*):

“The said Eleanor Carlock did *not* employ any means for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof” (p. 9, ll. 35-40).

The only proof of the sale of glasses by the defendant is the sale through its employee, the said Carlock; and if she did not employ means for the measurement of the powers of vision, etc., obviously the defendant did not do so.

Moreover, this argument of the plaintiff overlooks the fact that the purchasers of the glasses in this case *made their own selection of glasses, without suggestion or advice from the defendant or from any of its employees*; the admitted fact is that she refused to give any assistance to the customer, saying, “You will have to try on the glasses yourself because I cannot help you” (p. 9, ll. 10-12).

(b)

The exception in Section 1 of the statute does not justify the conclusion that the mere sale of lenses designed to aid the vision constitutes the practice of optometry.

(p. 4) Appellant argues that if the Legislature intended the statute “not to apply to persons who employed means for measuring powers of vision,” they would have so provided in the statute; and says that the only “exemption” in the statute is that in Section 1 concerning the sale of toy glasses, etc.

It should first be noted that under the stipulation the defendant’s employee did not employ

means for the measurement of the powers of vision (par. 15, p. 9, ll. 35-40).

But assuming that the appellant's argument might be construed to amount to a claim that an exception of certain kinds of glasses is equivalent to an affirmation that the statute applies to all cases not so excepted, the answer to such argument is set forth in the opinion of the Supreme Court (pp. 43-46). We quote from the concluding paragraph of that part of the opinion which deals with this claim (*italics ours*):

“And here it is evident that the clause in question, considered in the light of the object and policy of the enacting provisions, was introduced, out of an abundance of caution, to avoid possible misinterpretation of the act. If it be construed as indicating a legislative purpose to classify, as the practice of optometry, all such transactions not specifically excepted, traffic in spectacles and lenses of every character and description would necessarily fall within the statutory definition, *and this was patently not the legislative purpose*” (p. 46, ll. 15-25).

The same principle of construction was applied in *Cooper v. State Board*, 114 N. J. L. 10, where the Supreme Court said:

“In interpreting statutes the object should be to ascertain and give effect to the intention of the legislature. *Clarkson v. Ley*, 106 N. J. L. 380. Courts, under these circumstances, look to the substance of the statute rather than to the form. *McCarthy v. Walters*, 107 *Id.* 223. It is the intention rather than the letter of the law that should prevail. *Associates of Jersey Co. v. Davison*, 29 *Id.* 415. The statutory construction should be reasonable. *Hart v. Central Railroad*, 9 N. J. Mis. R. 121” (p. 15).

(affirmed May 17, 1935)

(c)

Discussion of Roschen v. Ward.

(pp. 5-8) The plaintiff relies on the case of *Roschen v. Ward*, 279 U. S. 337, 73 L. Ed. 722. We have elsewhere herein pointed out that the constitutionality of the statute there in question was sustained as against an attack that it was unreasonable to require the attendance of a physician or optometrist at the counter where the articles were sold. There is no similar provision in the New Jersey statute. That case did not involve the question of a *sale* of glasses when their selection was left to the purchaser, without test, advice or recommendation on the part of the seller.

Other cases cited in this brief indicate that the sale of glasses under such circumstances is not the practice of optometry—and that it would be an unreasonable exercise of the police power to provide a penalty for the sale of glasses under such circumstances.

(d)

If the New Jersey statute is construed to prohibit the mere sale of glasses, it is an unreasonable exercise of the police power.

(pp. 8-10) Plaintiff cites several cases which define the police power and hold that the regulation of the practice of medicine is a reasonable exercise of such police power. We do not question this general principle, but there is a limitation upon the exercise of the police power, to wit, that it must be reasonable; and it is the province of the court to decide in any particular case whether it is reasonable.

(e)

The standard of conduct is indefinite.

(pp. 8-10) The cases cited in the plaintiff's brief on the question of the police power do not touch the point as to the standard of conduct; we submit that under the cases cited under Point II (e) 1, the standard is so indefinite as to render the statute unconstitutional on its face.

(f)

The Supreme Court on certiorari will review questions of fact.

(p. 10) Plaintiff states that questions of fact have been raised in this case and that the Supreme Court will not review such questions where there is evidence to support the findings of fact by the trial judge, citing *Marten v. Brown*, 80 N. J. L. 143, (aff. 81 N. J. L. 599) and *Goldberg v. Reed*, 97 N. J. L. 170.

Both of these cases were *on appeal* from the District Court. A different situation is presented on certiorari. The remedy of the defendant in this case is by certiorari and not by appeal. *State Board v. Curtis*, 94 N. J. L. 324.

See also *State Board v. Dussinger*, 154 Atl. 325, 9 N. J. Misc. 423, Aff. 109 N. J. L. 346; *State Board v. Citarella*, 157 Atl. 246, 9 N. J. Misc. 1148.

On certiorari the Supreme Court has power to review questions of fact when the writ is allowed to review the proceedings of any "special statutory tribunal" (as well as in certain other cases mentioned in the statute). 1 Comp. Stats. of 1910, p. 405, Sec. 11.

If there was any question of fact in this case the decision of the Supreme Court on such question is final and will not be reviewed by this court. However, there is no occasion to apply this well-settled rule on the present record, as all the facts are stipulated; on those undisputed facts, the Supreme Court has concluded that as a matter of law there was no violation of the statute. See *State Board v. Wooding*, 5 Misc. 143.

V.

CONCLUSION.

The judgment of the Supreme Court reversing the judgment of the First District Court of Jersey City should be affirmed with instructions to enter judgment in favor of the defendant.

JOHN J. GAFFEY,
Attorney of S. S. Kresge Co.,
Prosecutor-Appellee.

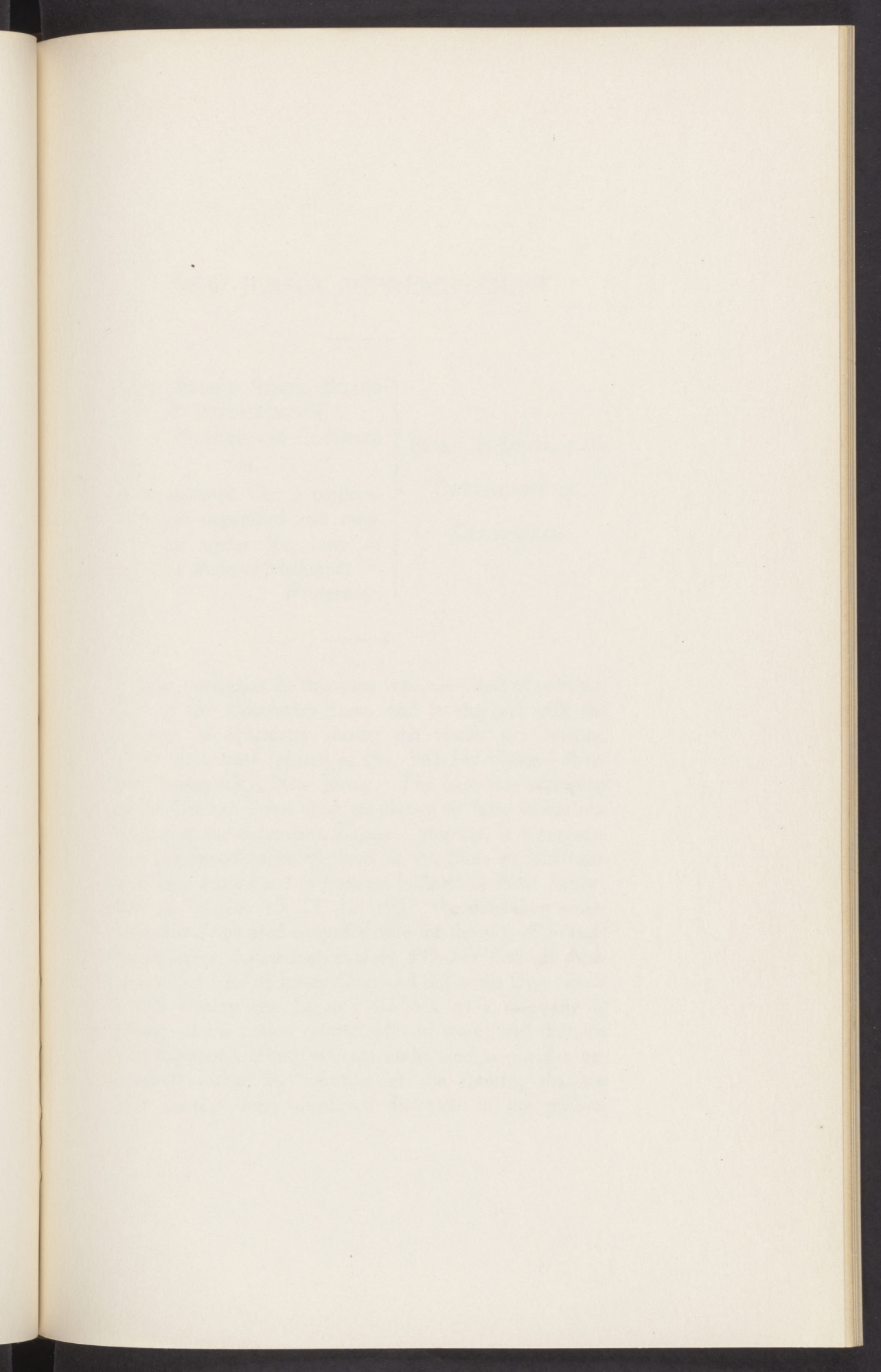
GEORGE S. HOBART,
Of Counsel.

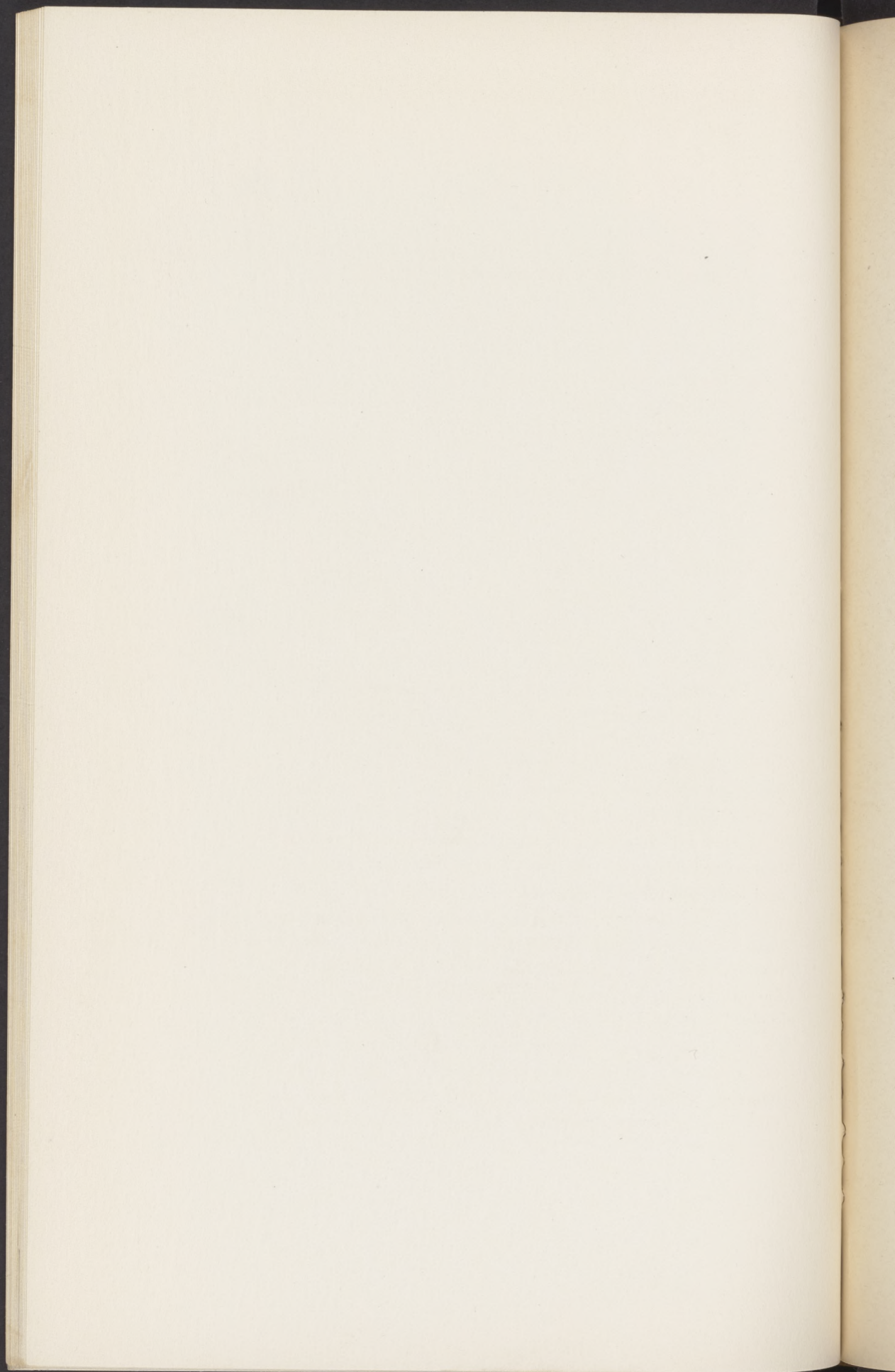
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NEW JERSEY SUPREME COURT

NEW JERSEY STATE BOARD OF OPTOMETRISTS, <i>Defendant in Certiorari,</i>	}	BRIEF IN BEHALF OF
<i>vs.</i>		
S. S. KRESGE CO., a corpora- tion organized and exist- ing under the laws of the State of Michigan, <i>Prosecutor.</i>	}	DEFENDANT IN CERTIORARI

The defendant in this case was convicted of a violation of the Optometry Law, and is charged with the practice of optometry during the month of October, 1932, at a store located at No. 345-347 Central Avenue, Jersey City, New Jersey. The case was submitted to the District Court upon stipulation of facts which sets forth that the defendant, Kresge Company, is a corporation organized under the laws of the State of Michigan and duly authorized to transact business in New Jersey; that on October 10, 11, 12, 1932, the defendant maintained and operated a certain store for the sale of general merchandise, located at number 345-347 Central Avenue, in the City of Jersey City, and did at the times above stated employ one Eleanor Carlock as a saleslady in charge of the notion counter of said store; and that the said Eleanor Carlock was not authorized to practice optometry within the meaning of the statute; that on said counter were displayed for sale to the general

2 *Brief in Behalf of Defendant—On Certiorari*

public various kinds of notions and among the articles so displayed for sale were spectacles, which were offered to the general public for twenty-five cents each; that said spectacles were placed in a rack, that said spectacles consisted of celluloid frames of uniform size and of a pair of lenses; that in each pair of spectacles the right lens and the left lens each have the same strength or focus; that the lenses vary in power or focus and are sold by different numbers; that on October 12, 1932, defendant sold two pair of spectacles at said store for the price of twenty-five cents; that the said spectacles were selected by the customers and no aid or assistance in selecting them was given to said customers by said Eleanor Carlock or by any other person in the employ of said defendant.

It was also stipulated that the said Eleanor Carlock did not employ any means for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof, but that the defendant sold certain glasses by numbers and that the person who bought the glasses picked out the glasses that suited his eyes and for a consideration received the same from the defendant.

The practice of optometry in this State is defined in Section One, Chapter 75, P. L. 1932, as follows:

“The practice of optometry is defined to be the employment of objective and/or subjective means for the examination of the human eye for the purpose of ascertaining any departure from the normal, measuring its powers of vision and adapting lenses and/or prisms for the aid thereof. Any person shall be deemed to be practicing optometry within the meaning of this act who in any way advertises himself as an optometrist, or who shall employ any

means for the measurement of the powers of vision or the adaptation of lenses or prisms for the aid thereof, practice, offer or attempt to practice optometry as herein defined, either on his own behalf or as an employee or student of another, whether under the personal supervision of his employer or preceptor or not, or to use testing appliances for the purpose of the measurement of the powers of vision or diagnose any ocular deficiency or deformity, visual or muscular anomaly of the human eye or prescribe lenses, prisms or ocular exercise for the correction or the relief of same or who holds himself out as qualified to practice optometry. Nothing in this act shall be construed to apply to the sale of toy glasses or goggles consisting of plano-white or plano-colored lenses or ordinary colored glasses, nor shall it apply to duly licensed physicians and surgeons authorized to practice medicine under the laws of the State of New Jersey."

A procedure for the enforcement of said act is set out in section twenty-two, which provides that a complaint may be filed, process in the nature of summons or warrant served upon the defendant, and a hearing had before the court in a summary way without a jury .

It is true that the defendant did not examine eyes, but its agents did employ means for measurement of the powers of vision and adapted lenses or prisms for the aid thereof in that they sold the glasses, which were of different strength and different numbers, to fit the eyes of persons making the purchases. Section one of the act provides that persons practice optometry who advertise themselves as optometrists or employ any means for the measurement of powers of vision or adaptation of lenses or prisms for the aid thereof.

4 *Brief in Behalf of Defendant—On Certiorari*

If the Legislature intended this act not to apply to persons who employed means for measuring powers of vision they would have so provided in the act, but the only exemption contained in the act is in paragraph one concerning the sale of toy glasses, goggles, plano-white lenses or plano-colored lenses or ordinary colored glasses. The defendant certainly practiced optometry when glasses were sold to correct the vision. So this case resolves itself on this point: When the defendant sold glasses to correct the vision of the human eye or employed means for the measurement of power of vision, did it practice optometry?

There is no case in the State of New Jersey on this point, but the case in the United States Supreme Court of *William Roschen v. Attorney General of New York* and *S. S. Kresge Company v. Attorney General of New York* holds, as to the constitutionality of the act, that:

“A merchant is deprived of no constitutional right by a statutory provision making it unlawful to sell at retail, in any store or established place of business, any spectacles, eyeglasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist is in charge of, and in personal attendance, at the place where the articles are sold.”

The complainants in these cases merely sold ordinary spectacles which merely magnified, and which, it is said, can do no harm. The customers made the selection for themselves without being examined and bought the glasses for a relatively small sum. The appeal to the United States Supreme Court was an appeal from the decrees of the District Court of the United States for the Southern

District of New York filed by the Kresge Company and Roschen to enjoin the enforcement of the act and the United States Supreme Court affirmed the decree of the District Court.

One of the complainants in these appeals, the Kresge Company, is the same firm that is now operating in the State of New Jersey.

The opinion of the Court is as follows:

UNITED STATES SUPREME COURT

WILLIAM ROSCHEN, Appt.,

v.

HAMILTON WARD, Attorney General
of the State of New York, Joab H. Ban-
ton, District Attorney of New York
County, New York, and Williston W.
Bissell, et al., etc. (No. 667) (279 U. S. 337)

S. S. KRESGE COMPANY, Appt.,

v.

HAMILTON WARD, Attorney General
of the State of New York, Joab H. Ban-
ton, District Attorney of New York
County, New York, and Williston W.
Bissell, et al., etc. (No. 668)

CONSTITUTIONAL LAW, Sec. 668—forbidding
sale of spectacles—validity.

6 *Brief in Behalf of Defendant—On Certiorari*

A merchant is deprived of no constitutional right by a statutory provision making it unlawful to sell at retail, in any store or established place of business, any spectacles, eyeglasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist is in charge of, and in personal attendance, at, the place where the articles are sold.

Nos. 667 and 668

Argued April 10, 1929, Decided April 22, 1929.

Appeals by complainants from decrees of the District Court of the United States for the Southern District of New York dismissing bills filed to enjoin the enforcement of a statute forbidding the sale of spectacles. Affirmed.

See same case below, 29 F (2d) 762.

The facts are stated in the opinion.

MR. WALTER N. SELIGSBERG, of New York City, for appellants.

The court declined to hear further argument.

Mr. JUSTICE HOLMES delivered the opinion of the court:

These are suits brought by dealers in eyeglasses for an injunction prohibiting the enforcement of Chapter 379 of the New York Laws of 1928, which amends the Education Law by inserting two sections, of which the material portion makes it unlawful to sell at retail in any store or established place of business "any spectacles, eye-

glasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and personal attendance at the booth, counter or place, where such articles are sold in such stores or established place of business." The complainants moved for a preliminary injunction, a statutory court of three judges was convened, and after a hearing the injunction was refused and the bills were dismissed on the ground that no cause of action was shown. 29 F. (2d) 762.

The complainants sell only ordinary spectacles with convex spherical lenses, which merely magnify, and which, it is said, can do no harm. The customers select for themselves without being examined, and buy glasses for a relatively small sum. It is said that the cost of employing an optometrist would make the complainants' business impossible, and that in the common case of eyes only grown weaker by age the requirement is unreasonable. But the argument most pressed is that the statute does not provide for an examination by the optometrist in charge of the counter. This, as it is presented, seems to us a perversion of the act. When the statute requires a physician or optometrist to be in charge of the place of sale and in personal attendance at it, obviously, it means in charge of it by reason of, and in the exercise of, his professional capacity. If we assume that an examination of the eye is not required in every case, it plainly is the duty of the specialist to make up his mind whether one is necessary, and, if he thinks it necessary, to make it. We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in constructing laws as saying what they obviously mean. Moreover, as pointed out below, wherever the requirements of the act stop, there can

be no doubt that the presence and superintendence of the specialist tend to diminish an evil. A statute is not invalid under the Constitution because it might have gone further than it did, or because it may not succeed in bringing about the result that it tends to produce.

Of course, we cannot suppose the act to have been passed for sinister motives. We will assume that there are strong reasons against interference with the business as now done; but it is obvious that much good would be accomplished if eyes were examined in a great many cases where hitherto they have not been, and the balancing of the considerations of advantage and disadvantage is for the legislature, not for the courts. We cannot say, as the complainants would have us say, that the supposed benefits are a cloak for establishing a monopoly and a pretense.

Decree affirmed.

“The power to prescribe regulations demanded by the general welfare for the common protection of all is known as the ‘police power’ and is inherent in every sovereignty. *Cochran v. Proston*, 70 Atl. 113, 114; 103 Md. 220; 23 L. R. A. “N. S.” 6113; 129 Am. St. Rep. 432; 15 Ann. Cas. 1048.

“‘Police power’ is nothing more nor less than the power of government inherent in every sovereignty. While generally speaking the police power of the State is said to extend to the protection of the public health, the public morals, and the public safety, the law does not recognize these as the extent of the power, but it embraces regulations designed to promote public convenience and general prosperity as well, and the rights of a sovereign State to

regulate public service corporations rests on the police power of the State." 200 U. S. 561, 592.

"The 'police power' is one which belongs to State sovereignty, reserved and protected by the Constitution of the United States. *El Paso & S. W. R. Co. v. Foth*, 100 S. W. 171, 45 Tex. Civ. App. 273 (citing *Cooley Const. Lim.* 7th Ed., p. 831)."

"The 'police power' of the State is the power which enables it to promote the health, comfort, safety and welfare of society. *In re Boice*, 75 Pac. 1, 27 Nev. 299 (quoting *People v. Lochner*, 76 N. Y. Supp. 399).

The State, under its power to enact laws for the general welfare may pass laws designed to increase the industries of the State or its resources.

"The police power is an inherent attribute of sovereignty, and may be exercised to conserve and promote the safety, health, morals, and welfare of the public." *Inland Steel Co. v. Yedina*, 87 N. E. 229, 172 Ind. 423, 139 Am. St. Rep. 389.

The defendant argues that his conviction deprives him of certain constitutional rights set out in the reasons.

The regulation of the practice of medicine and surgery is a proper exercise of the police power of the State. *State Medical Board v. Buettel*, 102 N. J. L. 74.

The regulation of the practice of medicine has been held to be the proper exercise of police powers. *State v. Kempkes*, 160 Atl. 827.

Counsel has raised questions of fact in this case and it

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is well settled that the Supreme Court will not review questions of facts where there is evidence in the case to support the finding of facts by the trial Judge.

Martin v. Brown, 80 L. 143.

Goldberg v. Reed, 97 L. 179.

It is respectfully submitted that the judgment of the trial Court should be affirmed.

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