in other particulars, is that of Pomeroy v. Ætna Ins. Co. [86 Kan. 214, 120 Pac. 344] Ann. Cas. 1913C, 170, 38 L. R. A. (N. S.) 142, and note. At page [218 of 86 Kan., at page 346 of 120 Pac., at page] 145 [of 38 L. R. A. (N. S.) Ann. Cas. 1913C, 170] the court said: 'There was no transfer of the title to the land, nor of the right of possession to either property, to which the contract applied. Occupancy had been exchanged, but it seems apparent that, in case of the failure or inability of either party to comply with the conditions of sale and purchase, the other could have recovered the occupancy of his own property.'

[9] "Where, under a contract which the vendor cannot enforce and with which the vendee is not bound to comply, a loss by fire results, the vendor may recover, although the vendee has possession and has paid as much as $1,200 on a total of $6,000. Phœnix Ins. Co. v. Kerr (U. S. Cir. Ct. of App. 8th Cir.) 129 Fed. 723 [64 C. C. A. 251] 66 L. R. A. 569, digested and cited with approval in Rochester Ins. Co. v. Monumental Sav. Ass'n, 107 Va. 701, 704, 705 [60 S. E. 93].

[10] "Defendant also claims that there was an increase of hazard by reason of the change. The policy permits a change of occupants without an increase of hazard. 'In such a case it is for the jury to determine whether or not the change increased the risk.' 2 Cooley's Briefs on Law of Ins. p. 1726.

"All other similar claims and arguments advanced in support of the motion, and not hereinbefore specifically discussed, seem to be concluded by the verdict of the jury, according to 2 Thompson on Trials (2d Ed.) § 1290, which reads in part as follows: 'It is a familiar rule in the law of fire insurance that any change in the condition of the property insured, which substantially increases the risk, avoids the policy; but whether such a change has taken place is always a question of fact for a jury. Whether the company, in defending an action on a policy, relies upon the falsity of the particular representation, or on the failure to comply with an executory stipulation, it is upon them to prove it; and it is a question of fact in either aspect.'

[11-13] "One other contention made by defendant is: 'The record shows that the plaintiff has no interest in the policy sued on, and does not seek to recover in terms as beneficiary for Ellis M. Kendrick.'

"The law applicable to this case and to this contention is stated in Wood on Fire Ins. (2d Ed.) § 353, vol. 1, p. 736, as follows: 'A mere contract to sell property covered by insurance, even though the insured has bound himself to convey upon the performance of conditions, does not affect the validity of the policy, and, if a loss occurs before the conditions are performed, a recovery may be had by the insured even though the conditions are subsequently performed, and, if it was agreed that the policy should be assigned to the purchaser, the judgment will inure to his benefit.'

"Under section 2860 of the Code, Kendrick could have sued in his own name, but, not having done so, a recovery for his benefit is not thereby barred. It appearing from the record that the suit is in fact for the benefit of Kendrick, the judgment may be so marked and rendered, even after verdict. The indorsement of the fact 'is sometimes not made until after the execution is issued.' Western Union Tel. Co. v. Bank, 116 Va. 1009, 1013 [83 S. E. 424, 425]; Burks' Pl. & Pr. p. 57."

For these reasons, the judgment under review must be affirmed.

Affirmed.

GREGORY et al. v. HUBARD, County Clerk.

(Supreme Court of Appeals of Virginia. Sept. 19, 1918.)

1. MANDAMUS ⟸16(1)—RIGHT TO WRIT—INEFFECTUAL RELIEF.

Where petitioners for mandamus to obtain a certificate of election as members of a town council had already qualified as members, and where, under Code 1904, § 1030, the council was the judge of the election and returns of its members, the object of the petition had been accomplished as to them, and their petition will be refused.

2. ELECTIONS ⟸259—MEETING OF COMMISSIONERS—"PUBLIC PLACE."

Under Code 1904, § 135, requiring that the meeting of election commissioners shall be in public, a meeting in office of county clerk is in a "public place," and none the less so because no one is present except the commissioners, the deputy clerk, and counsel for persons elected.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Place.]

3. ELECTIONS ⟸259—CANVASS OF VOTE—DIRECTORY STATUTE.

Code 1904, § 133, requiring commissioners of election to canvass returns on second day after election, is directory, and failure to comply therewith will not deprive a mayor of the benefit of an election, as the commissioners may thereafter canvass returns, or, if they fail to do so, may be compelled.

4. MANDAMUS ⟸77(2) — COUNTY CLERK—CERTIFICATE OF ELECTION.

Where county clerk, required by Code 1904, § 137, to "immediately make out" a certificate of election as mayor of a town and to deliver it to him on his request, failed to do so without good reason, mandamus will lie to compel him to issue and deliver the certificate.

Application for mandamus by E. D. Gregory, B. H. Barnes, and C. T. Apperson against W. J. Hubard, County Clerk of Buckingham County. Writ refused as to petitioners Barnes and Apperson, and awarded to petitioner Gregory.

Moon & Pitts, of Scottsville, for petitioners.

PER CURIAM. This is an application to compel the county clerk of Buckingham county to issue and deliver to E. D. Gregory a certificate of his election as mayor of the town of Dillwyn, in said county, and to B. H. Barnes and C. T. Apperson certificates of election as members of the council of said town.

[1] It appears that Barnes and Apperson have already qualified as members of the council of said town, and as the council is made the judge of the election, qualification, and returns of its members by section 1030 of the Code, the object of the petition has been accomplished as to them, and the mandamus, so far as it affects them, will be refused.

[2-4] As to E. D. Gregory the writ should be awarded. Section 1022 of the Code provides that the judges of election and the registrar appointed by the county board

"shall also act as commissioners of election." It is not necessary, under section 133 of the Code, that all of the commissioners of election should be present when the vote is canvassed. It is sufficient if three be present, and in this case three were present, and the tie vote for mayor was broken in the manner prescribed by section 135 of the Code. No notice of the time and place of their meeting was required, but they were to meet in public. The meeting was held in the clerk's office, a public place, and it was none the less public because no one was present except the commissioners, the deputy clerk, and counsel for the persons elected. There is no allegation that the election was not fairly held, except the statement of the clerk that one person was allowed to register and vote on the day of election (which might be a ground for contesting the election, but not for the clerk to refuse a certificate), and his further statement as to his refusal to permit the commissioners to canvass the returns, and their subsequent canvass before his deputy while the clerk was sick. These were not good reasons for refusing the certificate, and the clerk could not in this manner annul the election. The statute requiring the commissioners of election to canvass the returns on the second day after the election is only directory as to the time of canvass, and if they let the time elapse without making the canvass, the mayor was not thereby deprived of the benefit of the election. They could thereafter canvass the returns, and, if they failed to do so, could have been compelled to make the canvass. Under section 137 of the Code, it was the plain duty of the clerk to "immediately make out" a certificate of election to the petitioner, E. D. Gregory as mayor of the town of Dillwyn, and deliver the same to him on his request therefor; and, having failed and refused to do so, although thereto requested, the writ of mandamus prayed for by him should be awarded.

CHAPMAN et al. v. RICHARDSON.

(Supreme Court of Appeals of Virginia. Sept. 19, 1918.)

1. HIGHWAYS ⟸58(1) — ESTABLISHMENT — ORDER OF COUNTY BOARD OF SUPERVISORS—APPEAL.

Under Code Supp. 1910, § 944a, subsec. 5, part of the general road law, the finding of the board of commissioners against the establishment of a road and landing and its order dismissing the application is reviewable by the circuit court.

2. STATUTES ⟸167(1) — REVISION — CHANGES IN LAW—PRESUMPTION.

Where there has been a revision of the laws, the presumption is that the old law was not intended to be changed, unless a contrary intention plainly appears in the new law.

Appeal from Circuit Court, New Kent County.

Application by E. C. Chapman and others to the Board of Supervisors of Kent County to establish a public landing on a river and a public road thereto. There was a favorable report of viewers awarding compensation to W. P. Richardson. From an order of the Board of Supervisors rejecting the report and dismissing the application, the applicants appealed; and, from an order of the circuit court sustaining the landowner's motion to dismiss the appeal, the applicants appeal. Order of the circuit court reversed, and case remanded.

Isaac Diggs, of Richmond, for appellants. Henley, Hall, Hall & Peachy, of Williamsburg, and Manly H. Barnes, of Providence Forge, for appellee.

WHITTLE, P. This was an application by E. C. Chapman and other citizens of New Kent county to the board of supervisors for the establishment of a public landing on York river in that county and a public road leading thereto.

The general road law applicable to the case is composed of a compilation of enactments taken from various acts of the General Assembly, and is found, or referred to, in 3 Va. Code Ann. (Supp. 1910) § 944a, which is divided into a number of subsections.

[1] Viewers were appointed as provided by subsection 2, who reported favorably as to the establishment of the road and landing. Their report showed that only the land of W. P. Richardson would be affected, and indicated the quantity of land necessary to be taken and what, in their opinion, would be a just compensation therefor. The board of supervisors rejected the report, and, as required by statute, made an order that the opinion of the board was against establishing the road and landing, and dismissed the application. From that order the applicants took an appeal of right to the circuit court. The board of supervisors were made parties, and the landowner summoned to protect his interest. He thereupon entered a special appearance at the next term of the court and submitted a motion to dismiss the appeal on the grounds that such appeal did not lie "at that stage of the proceedings," and also because "no appeal was provided from the order with respect to the landing." The court sustained the motion on the first ground, and dismissed the appeal with costs; and from that order this appeal was granted. The sole question for our determination, therefore, is: Was the finding and order of the board of supervisors that the road and landing ought not to be established, and dismissing the application, reviewable by the circuit court?

The answer to that question depends upon the correct interpretation of subsection 5, the pertinent parts of which read:

"Upon the return of said process duly executed, defense may be made to the said proceedings by any party, and the board of super-