THE

DAUPHIN COUNTY REPORTS,

CONTAINING

THE DECISIONS OF THE JUDGES OF THE 12TH JUDICIAL DISTRICT AND THE DECISIONS OF THE HEADS OF DEPARTMENT OF THE STATE GOVERNMENT.

EDITED BY

GEORGE R. BARNETT,

Of the Dauphin County Bar.

VOL. XI.

HARRISBURG, PA.
WARREN O. FOSTER.
1908.

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THE

DAUPHIN COUNTY REPORTS

CONTAINING THE CASES DECIDED BY

Judges of the Twelfth Judicial District of Pennsylvania

AND THE

Decisions of the Departments of the State Government.

In re Estate of Cyrus Gingrich, Deceased.

Wills—Construction—Charge on land—Act of February 24, 1834.

By the second item of his will testator gave to his wife the use and occupation of a house, with the garden and outbuildings appurtenant thereto, so long as she should remain his widow. The widow complained that the owner of the farm on which the house was located had interfered with her enjoyment of the house and appurtenances, and claimed damages on account of loss of rent, due to such interference. *Held,* That the interest given to the widow was not a charge on the farm on which the house was located, within the Act of February 24, 1834, P. L. 84.

The eighth item of the will provided as follows: "The owners of the farms herein designated as tract Nos. one and two are yearly to put in the stable on the premises occupied by my wife, so long as she remains my widow, as much hay as she may need to feed one horse and two cows, without charge, and my said wife, during said period, shall have the right to take from the orchards on said farms as many apples as she may desire for her use, without charge."

In re Estate of Cyrus Gingrich, Deceased.

Held, That the paragraph quoted created a charge on the farms enforceable under the Act of February 24, 1834. That the fact that the widow did not reside in the house to which the stable was appurtenant, did not relieve the owners of the farm from the charge created by the will.

Citation to enforce charge in deed. Orphan's Court Dauphin County.

J. C. Nissley and *I. B. Swartz,* for petitioner.

John E. Snyder and *E. M. Hershey* for respondent.

KUNKEL, P. J., Nov. 27, 1907.

The claim which the petitioner seeks to enforce in this proceeding is two-fold, and arises out of item second, and the latter part of item eight, of her deceased husband's will. Item second reads as follows: "I give and bequeath to my beloved wife Malinda Gingrich, her heirs and assigns forever, one horse, two cows, all my household goods and furniture my Hummelstown bank stock, and my Meyerstown bank stock I also give and bequeath to her, my said wife, the use and occupation of the house we now occupy, as well as the garden and outbuildings belonging thereto, as long as she remains my widow." That part of item eight, which is involved in this dispute, reads as follows: "The owners of the farms herein designated as tract Nos. one and two are yearly to put in the stable on the premises occupied by my wife, so long as she remains my widow, as much hay as she may need to feed one horse and two cows, without charge, and my said wife, during said period, shall have the right to take from the orchards on said farms as many apples as she may desire for her use, without charge."

The petitioner complains that the respondent, who is the owner of one of the farms designated in the will, the one upon which the house, out-buildings, and garden mentioned in item second are located, has interfered with her enjoyment of the interest given to her in that item, and has failed to comply with the direction contained in item eight. The first part of the claim is for the loss of the rent of the premises devised to her during the period of the alleged interference. It is unnecessary to pass upon the question of fact raised by the petition and answer with respect to this part of the claim, for, in our opinion, the petitioner has mistaken her remedy,

and is in the wrong court. If it be true, as she alleges, that the respondent has interfered with her use of the house and buildings, and has prevented her from renting them, her remedy is not by this proceeding, nor in this court. The provision for her in item second is a devise to her of an estate in the house, out-buildings, and garden, during widowhood. It is not an easement, nor is it a legacy, but the devise of a freehold estate in the premises. By the gift of the "use and occupation" she took all that could have been given her, had the devise been in terms of the thing itself; Wusthoff vs. Dracourt, 3 Watts, 240; Hamilton vs. Overseers of Whitely, 12 Pa., 147; Ringrose vs. Ringrose, 170 Pa., 593. It may be remarked, in passing, that a similar estate in the same premises is given to the daughter of the testator by the ninth item of the will.

But whatever the petitioner's interest under item second may be called, it is not a charge on the farm of which it is part. Rather, it is first carved out of the farm, separately devised to her, after which the farm is disposed of. For there is nothing in the will to indicate that the testator intended to make it a charge on the farm. The devise of the farm, reserving out of it the interest in favor of the widow, or subjecting the farm to the interest given her, would show such intention. But this is not done. The interest is given without reference to the farm at all. Indeed, the contrary intention appears from the evident desire of the testator to treat his two sons equally by giving to each a farm at the same rate per acre. This latter intention is wholly inconsistent with the thought that he intended to make this provision for the widow a charge on one of the farms, which would destroy that equality by placing upon one a burden, from which the other would be free. We are satisfied it is not such a charge on land as is enforceable under the Act of February 24, 1834, and the wrongs touching it, of which the petitioner complains, must be redressed in another forum.

The second part of the claim, however, may be enforced in this proceeding. We think it is a charge upon the land of the respondent, and is due to the petitioner, notwithstanding she does not reside on the premises devised. The intention of the testator to secure her interests, under item eight, upon the farms, is evinced by the provisions in the first part of the item, that the legacies there given to her shall be charged on the farms. The direction in the following part of the item is

to the owners of the farms, not to the sons as individuals, who, under items third and fourth of the will, are given the privilege of taking the farms at a fixed rate per acre, nor to those persons as individuals who, if the sons refuse to take, may purchase, under items sixth and seventh of the will, but to the owners of the farms, whether they be the sons or other purchasers, indicating that the hay is to come from them as such as owners of the farms, or in other words, from the farms. This view is strengthened by the language which immediately follows in the same item: "And my said wife * * * shall have the right to take from the orchards on said farms as many apples as she may desire for her use * * *." The apples are here expressly directed to be taken from the farms, making it quite plain that the hay was to come from the same source. This makes the bequest a charge upon the farms; Gibson's App., 25 Pa., 191; Walter's Estate, 197 Pa., 555

But it is contended by the respondent that because the petitioner did not reside in the house, she is not entitled to the hay; that the obligation to furnish the hay is dependent upon her actual residence there. We can find nothing in the terms of the will that limits or prescribes the rights of the petitioner under this item. The owners of the farms are directed "yearly to put in the stable * * * as much hay as she may need to feed one horse and two cows." There is no limitation that they shall do this so long as, or while, she resides upon or occupies the premises. The direction is absolute. It would hardly be contended that if she kept neither horse nor cows, although residing on the premises, the owners of the farms would be relieved from complying with the terms of the will, and yet there would be more reason for holding them absolved in that case than in the present instance. The term "as much hay as she may need to feed one horse and two cows" is used, evidently, to define the quantity to be furnished, and not as a limitation upon her right. It is plain, therefore, that the owners are charged by the will with the obligation of putting the hay in the stable without the condition that she shall reside upon, or occupy, the premises; Craven vs. Bleaking, 9 Watts, 19; Steele's App., 47 Pa., 437; Ringrose vs. Ringrose, 170 Pa., 593; McCalla's Est., 16 Sup. Ct. 202.

The respondent owns one of the farms and is liable for the value of one-half of the hay, which he failed to furnish to

the petitioner during his ownership; Mohler's App., 8 Pa., 26; Wingett vs. Bell, 14 Sup. Ct., 558. That there was no demand upon him makes no difference. The burden was upon him to discharge the obligation imposed upon the land, and to furnish or tender performance to her. "The charge was in the nature of a debt which the debtor, in order to discharge himself of, must seek the creditor, and perform, or offer to perform, his obligation," Steele's App., 47 Pa., 437.

The evidence shows that he became the owner of the farm on April 1, 1905, and has not complied with the direction in the will as to the delivery of the hay. It also shows that the value of hay during the period from April 1, 1905, to the time of filing this petition, May, 1906, was $14.00 per ton, and that the quantity necessary to feed one horse and two cows for a year is eight tons. The petitioner, therefore, would be entitled to receive the value of the hay during the time it was not delivered, which would be $129.88. The respondent's farm is chargeable with one-half of that sum, and he is liable for the same to the petitioner. It is, therefore, ordered and decreed that he pay to the petitioner the sum of $64.94, and the costs of this proceeding.

Paxtang Electric Company vs. Herman Astrich.

Contracts—Mutuality.

To show mutuality, the obligation may be implied as well as expressed. Although, on its face and by its express terms, the contract is obligatory on one party only, yet if the intention of the parties and the consideration upon which the obligation is assumed is that there should be a correlative obligation on the other side, the law will imply it.

Plaintiff and defendant entered into an agreement in the form of a written offer and acceptance, by which the defendant agreed "to use electric current supplied by the plaintiff" for a designated term of years, and to pay for the same at a designated rate. This agreement contained the following stipulations:

"This contract shall continue in force after the expiration of the term above mentioned, until terminated by thirty (30) days' notice in writing from either party."

Paxtang Electric Company vs. Herman Astrich.

"It is further understood and agreed that said company shall not be held liable for any damage or loss, if for any reason it is unable to supply current."

"The company reserves to itself the right, at any time, to cut off the light, if it shall deem it necessary to protect itself from fraud and abuse."

After using the current for a time, defendant ceased using it and secured his supply from another company. Action was brought against him for breach of the contract and verdict rendered for plaintiff. On motion for judgment *non obstante veredicto*, defendant contended that the contract imposed no obligation upon plaintiff to furnish current, and that it was void for want of mutuality. *Held*, That the obligation of the contract was mutual. Motion overruled.

Motion for judgment *non obstante veredicto*. C. P. Dauphin County, No. 486. January Term, 1906.

Wm. M. Hain and *C. H. Backenstoe* for plaintiff.

Snodgrass and Snodgrass for defendant.

KUNKEL, P. J., December 14, 1907.

This is a motion by the defendant for judgment *non obstante veredicto* on the ground that the contract upon which the action is brought is void for want of mutuality. The parties entered into an agreement in the form of a written offer and acceptance, by which the defendant agreed "to use electric current supplied by the plaintiff" for a designated term of years, and to pay for the same at a designated rate. For the purpose of supplying the current, the plaintiff connected the defendant's equipment in his store with its main. After using the current for a time, the defendant disconnected the equipment and received his supply from another company. Thereupon, this action was brought against him for a breach of the contract.

It was contended on the trial, and is contended now by the defendant, that the obligation to use the electric current is not binding upon him, because there is no corresponding obligation upon the plaintiff to furnish it. It may be conceded that the defendant would not be bound, if it were the fact that there was no binding promise to furnish, and the promise to use had no other consideration to support it. But, aside from that consideration, it may well be said the obligation to use the current is supported by the consideration of the cost and

expense which the plaintiff, relying upon the offer to use, incurred by connecting the defendant's equipment with its main. Be that as it may, we cannot agree with the defendant that the plaintiff is not bound by the terms of the contract. It is true, there is no express or direct stipulation on its part to furnish the current for the term and at the rate mentioned, but it may be implied. "To show mutuality, the obligation may be implied as well as expressed. Although, on its face and by its express terms, the contract is obligatory on one party only, yet if the intention of the parties and the consideration upon which the obligation is assumed is that there should be a correlative obligation on the other side, the law will imply it;" Cyc., volume 9, 333. It is manifest from the stipulations in the contract in question that it was the intention of the parties that both should be bound, the one to furnish, and the other to use, the electric current. This appears from the direct agreement of the defendant "to use electric current *supplied* by the plaintiff,' which can mean nothing else than the current *to be supplied* by the plaintiff; in other words, that the plaintiff is to supply it. Another stipulation is that "this contract shall continue in force after the expiration of the term above mentioned, until terminated by thirty (30) days' notice in writing from either party." Why should there be a provision for notice from the plaintiff if it was not understood that it was bound by the contract, and, if bound, bound to do what, if not to furnish electric current, in accordance with its terms? The conditions of the contract, which read as follows,

> "It is further understood and agreed that said Company shall not be held liable for any damage or loss, if for any reason it is unable to supply current; and
>
> "The Company reserves to itself the right, at any time, to cut off the Light, if it shall deem it necessary to protect itself from fraud and abuse,"

also evince the understanding of the parties to have been that the plaintiff was bound to furnish the current, for they expressly provide the contingencies, upon the happening of which it shall be relieved from responsibility in damages for failure to carry out its agreement. If the plaintiff was not to be bound to furnish the current, why stipulate for relief in certain contingencies?

But the defendant contends that the effect of the stipulations, just quoted, is to relieve the plaintiff from supplying electric current under the contract whenever it sees fit to do so. We are not able to adopt this view. These stipulations must be construed in consonance with the general intent to bind the plaintiff. We can not, therefore, construe them as authorizing the plaintiff arbitrarily to refuse to supply electric current to the defendant's store, but to refuse only when it shall be necessary to protect itself from fraud or abuse, and as relieving it from liability to the defendant for loss or damage only when it shall be unable to furnish the supply. They are reasonable precautions which we do not think admit of the construction placed upon them by the defendant. On the contrary, in order to be relieved from liability for loss or damage for failure to supply electric current, we think that, in an action against it for a breach on that account, the plaintiff would be compelled to show such facts and circumstances as, in the one case, would amount to fraud and abuse, and, in the other, to inability from some reasonable or unavoidable cause. Unless it could do this, it would be liable for such breach. Under this construction, the obligation of the plaintiff, under the contract is plain. It would be answerable in damages for the failure, or refusal, to supply electric current, not due to inability, or not necessary to protection against fraud or abuse; that is to say, it would be liable for a wilful and arbitrary breach of the contract, the very kind of a breach for which it seeks, in this action, to make the defendant respond in damage. We are of the opinion that the contract is valid, and that a recovery upon it should be sustained. The motion for judgment *non obstante veredicto* is, therefore, overruled, and judgment is directed to be entered on the verdict upon payment of the jury fee.

COMMONWEALTH *vs.* STATE BANK OF PITTSBURG.

Banks—Depositors—Distribution of assets in case of insolvency—Act of May 13, 1876.

Exceptants to the report of an auditor, claimed the right to participate in the distribution of the funds of an insolvent bank, as depositors, upon the following certificate:

"PITTSBURG, Pa., July 8, 1903.

"This is to certify that the State Bank of Pittsburg holds in escrow ten thousand dollars ($10,000), to be distributed according to the terms of contract and prospectus of W. R. Heckert, Colvin & Robinson, C. E. Smith, and D. Paul Hughes, of even date; said contract and prospectus made a part of this consideration.

"LOUIS KLEIN, *Cashier.*"

The auditor found that, as a matter of fact, no deposit was made in the bank, either by cash, or by the discount of a note, and that the certificate was false.

Held, overruling exceptions to auditor's report, that exceptants were not entitled to participate in the distribution, as depositors. That under the Act of May 13, 1876, P. L. 161, the fund for distribution must first be applied to the claims of depositors, and being insufficient to pay all claims in full, exceptants were not entitled to participate, even though they had suffered loss by reason of the misrepresentations of the cashier.

Exceptions to report of Auditor. C. P. Dauphin County, No. 23. Commonwealth Docket, 1904.

Lowrie C. Barton for exceptions.

Marron and McGirr contra.

KUNKEL, P. J., December 18, 1907.

The exceptants, Colborn & Robinson, claimed to share in the distribution as depositors. They offered, in support of their claim, the following certificate, which was delivered to them by the cashier of the State Bank:

PITTSBURG, PA., July 8, 1903.

"This is to certify that the State Bank of Pittsburg holds in escrow ten thousand dollars ($10,000), to be distributed according to the terms of contract and prospectus of W. R. Heckert, Colvin & Robinson, C. E. Smith, and D. Paul Hughes, of even date; said

contract and prospectus made a part of this consideration.

"LOUIS KLEIN,
Cashier."

They also offered in evidence the written contract mentioned in the certificate, by the terms of which the ten thousand dollar deposit was to be forfeited to Colborn & Robinson and C. E. Smith, if D. Paul Hughes, who was to make the deposit, should fail to comply with the terms and conditions of the contract. Claiming that the forfeiture had taken place, the exceptants demanded payment of the certificate out of the fund for distribution.

The auditor has found that, as a matter of fact, no deposit was made in the bank, either by cash, or by the discount of a note, and that the certificate was false. The books of the bank failed to show that any deposit of cash was made, or that any note was discounted by the bank in connection with the transaction, save that in the minutes, kept by Klein, the cashier, of the meeting of the directors, held July 7, 1903, the day before the date of the certificate, there was the minute:

"Following notes were discounted:

"Wm. H. Whitfield, End. John Heppel, 200—4 mo.

"Heilman Bros., J. H. Elder & R. J. Kingman, 1475—2 mo.

"J. C. Fulton, D. Hartbauer, 75—90 da.

"W. A. Scott, Jr., 40 shares Mfgrs. L. & B. Co., 1000—4 mo.

"W. C. Connelly, Jr., D. Paul Hughes & W. A. Merritt, 10,000 to be held in escrow."

The directors present at the meeting, however, testified that no such note as that last stated was passed upon by them, and both W. A. Merritt and W. C. Connelly, Jr., also testified that they did not sign such a note. Klein, the cashier, did not appear before the auditor, and D. Paul Hughes was dead. Under all the evidence, we think that the learned auditor was fully warranted in his finding.

But it is contended by the exceptants that even if there was no deposit, in fact, made, yet they are entitled to recover from the bank, because they were deceived and misled to their loss by the misrepresentation of the cashier. They have not, however, made any proof of the amount of their loss, but claim the whole amount represented to have been deposited.

Conceding that they would be entitled to recover for the loss which they suffered by reason of the misrepresentation of the cashier, who was the agent of the bank, upon the principle that where one of two innocent parties must suffer by the act of a third person, the one who held that person out as worthy of trust and confidence, and as having authority in the matter, should sustain the loss, yet it does not follow that they may claim as depositors, or the amount of the alleged deposit. Upon this theory, their claim would not arise out of the fact that deposit was made, for it was not made, but out of the misrepresentation of the bank's agent, and recovery would be limited to their actual loss. They, therefore, would not be entitled to receive, necessarily, the amount of the certificate, or a dividend upon that amount. Nor would they be entitled to be paid out of the fund which is now being distributed. The fund is not sufficient to pay in full all the claims of the depositors, and, by the direction of section twenty-eight of the act of May 13, 1876, P. L. 161, it must be first applied to them. The claim, we think, was properly disallowed. The exceptions to the auditor's report are, therefore, overruled, the report is confirmed, and distribution is directed to be made in accordance therewith.

EMPLOYMENT OF LOCAL COUNSEL IN PROSECUTIONS OF VIOLATIONS OF GAME LAWS.

Game laws—Employment of local counsel in prosecutions for violations of game laws.

The secretary of the Game Commission may, in his discretion, employ local counsel to assist in the prosecution of flagrant violations of the game laws.

Attorney General's Department. Opinion to Joseph Kalbfus, Secretary of Game Commission.

FLEITZ, Deputy Attorney General, January 16, 1908.

I am in receipt of your letter of recent date, addressed to the attorney general, relative to the right of your department to employ counsel in the prosecution of violators of the game laws, and to defend your deputy game protectors in actions arising out of the discharge of their official duties. You state that prior to the meeting of the legislature of 1907 under the laws in force at that time you were possessed of a contingent fund arising from the collection of fines and penalties against violators of the game laws, which, under an opinion of this department, you were accorded the right to use in such manner as you saw fit, for the betterment of game conditions, and that out of this fund you were in the habit of paying counsel fees for the purposes above mentioned, and that in no year did the amount so expended exceed $1,000.00.

The legislature of 1907 in its wisdom saw fit to pass laws generally abolishing the retention of fees and penalties by the various departments and requiring that the same be paid into the State Treasury and making specific appropriations for the payment of the expenses of the various departments of the state government. The wisdom of this change is obvious, and the only question involved in your inquiry is whether this language used by the legislature in making the appropriation to your department is broad enough to include the item of counsel fees for the purposes named.

> "For the payment of traveling and other necessary expenses of these ten game protectors, and for the payment of services rendered, or expenses

incurred by either deputy game protector, or a special deputy game protector, under the specific and written order of the chief game protector, and incidental office expenses, two years, the sum of twenty-four thousand dollars ($24,000.00)."

If authority exists anywhere for the employment and payment of counsel in connection with the work of your department, it must be found in the language above quoted, and in the fact that before the appropriation can be paid there must be the "presentation of duly certified vouchers of the expenditure of money previously drawn, and the satisfactory proof to the auditor general that the expenditure is necessary for the enforcement of the laws of the commonwealth relative to the protection of game, of song and of insectiverous birds."

On account of the antagonistic public sentiment in certain remote sections of the state against the enforcement of the laws on this subject, it is no doubt necessary from time to time for your department to employ local counsel in extraordinary cases where otherwise there would occur a miscarriage of justice.

It may also be necessary, if the work of your department is to be uninterrupted, that the game protectors shall themselves be protected against malicious and unjust prosecutions. For this reason I am of the opinion and advise you that you have the authority, in cases which appeal to your judgment and discretion, to employ local counsel to protect your game protectors and assist in the prosecution of flagrant violations of the law; but this should be done in a conservative, economical and careful manner, and satisfactory proof presented to the auditor general with the vouchers to satisfy that official that the expenditure was necessary for the enforcement of the laws relative to the protection of game, of song and of insectiverous birds.

STOCK AND POULTRY FOODS.

Patented proprietary or trade marked stock foods—Act of May 28, 1907.

A commodity known, advertised and sold as "The International Stock Food," is within the terms and is subject to the restrictions imposed by the Act of May 28th, 1907, P. L. 273.

Attorney General's Department. Opinion to M. B. Critchfield, Secretary of Agriculture.

FLEITZ, Deputy Attorney General, January 16, 1908.

Your letter of January 9th is before me, in which you ask to be advised whether or not a certain commodity manufactured by The International Stock Food Company, of Minneapolis, Minn., and sold under the name of "The International Stock Food," comes within the terms and is subject to the restrictions imposed by the Act of May 28th, 1907, P. L. 273, entitled:

> "An act regulating the sale of wheat, rye, corn and buckwheat, bran and middlings, or any mixture thereof; also of condimental stock and poultry-food and patented, proprietary, or trade-marked stock and poultry-food, possessing nutritive value combined with medicinal properties, and mixed feeds, including mixtures bearing distinctive names, used for feeding poultry and other domestic animals; and also of concentrated commercial feeding-stuffs defining concentrated commercial feeding-stuffs; prohibiting their adulteration; providing for the collection of samples, and analysis thereof, by the department of agriculture, and the publication of information concerinng the same; providing also for the expenses of the enforcement of the law, and fixing penalties for its violation."

This act is so general in its terms and sweeping in its character that it must be held to apply to all patented, proprietary or trade-marked stock and poultry foods. This is apparent from an inspection of the language of the first and second sections, which read as follows:

> "That every lot or parcel of corn- or buckwheat-bran or middlings or any mixture of two

or more of these articles, used for feeding domestic animals, sold, offered, or exposed for sale within this State, at any other place than at the mill where manufactured; and that every lot or parcel of concentrated commercial feeding-stuff, as defined in section two of this act, used for feeding domestic animals, including condimental stock and poultry-food, and patented, proprietary or trade-marked stock and poultry-food, possessing nutritive value combined with medicinal properties; and every lot or parcel of mixed feed, including mixtures bearing distinctive names, used for feeding poultry and other domestic animals, sold, offered or exposed for sale within this state, shall have affixed thereto, in a conspicuous place on the outside thereof, a legible and plainly-printed statement, clearly and truly certifying the number of net pounds of feeding stuff contained therein, the name, brand or trade-mark under which the article is sold; the name and address of the manufacturer or importer, and a statement of the minimum percentage of crude protein and crude fat and the maximum percentage of crude fiber which it contains; these constituents to be determined by the methods adopted by the association of official agricultural chemists of the United States; and shall also have affixed thereto, in a conspicuous place on the outside thereof, a plainly-printed statement, truly certifying the names of the several ingredients of which the article is composed. Wheat-bran or wheat-middlings, rye-bran or rye middlings, or any mixture of wheat-bran and wheat-middlings, or rye-bran or rye-middlings, used for feeding domestic animals, sold, offered, or exposed for sale within this state, at any other place than at the mill where manufactured, shall have a tag or printed statement attached to each package containing the same, guaranteeing the contents of the package to be pure and unadulterated wheat-bran or wheat-middlings, or rye-bran or rye-middlings, or a mixture of two or more of such articles; and also stating the number or net pounds contained therein,

the name and address of the manufacturer or importer, and the names of the several ingredients of which the contents of the package are composed. Whenever any wheat-, rye-, corn-, or buckwheat-bran or middlings, or any mixture of two or more of these articles, is kept for sale in bulk, at any other place in this state than at the mill where manufactured, or whenever any concentrated commercial feeding-stuff is kept for sale in bulk, stored in bins or otherwise, the dealer or dealers keeping the same for sale shall keep on hand cards of proper size upon which the foregoing statement or statements is or are plainly printed, and if the feeding stuff is sold at retail, in bulk, or if it is put up in packages belonging to the purchaser, the dealer or dealers shall, upon request of the purchaser, furnish him with one of said cards upon which is or are printed the statement or statements described in this section: Provided, That when any manufacturer or purchaser, located within the state of Pennsylvania, of any bran or middlings, or mixture thereof, or of any concentrated commercial feeding-stuff, as defined in section two of this act, shall send samples of the same to the secretary of agriculture for analysis, the chemist of the department shall furnish such analysis, showing the percentage of crude protein, fat and fibre which it contains, and shall charge a fee of one dollar for each such sample, which analysis shall be made within ten days after the sample is received by the chemist, and all moneys so received shall, from time to time, be covered into the state treasury."

"The term 'concentrated commercial feed-stuff, as used in this act, shall include cottonseed meals, cottonseed feeds, linseed meals, gluten meals, gluten feeds, pea meals, bean meals, peanut meals, cocoanut meals, maize feeds, starch feeds, sugar feeds, dried distillers' grains, dried brewers' grains, malt sprouts, hominy feeds, cerealine feeds, rice meals, dried beet refuse, oat feeds, corn and oat feeds, ground beef or fish scraps, and other animal and vegetable by-products, mixed feeds, other than

Stock and Poultry Foods.

mixtures of wheat-bran and wheat-middlings and rye-bran and rye-middlings, including mixtures bearing distinctive names, and all other materials of a similar nature used for feeding domestic animals, including poultry, also condimental stock and poultry foods, and patented, proprietary, or trademarked stock and poultry foods, possessing nutritive value combined with medicinal properties; but shall not include wheat-bran or wheat-middlings, rye-bran or rye-middlings, or any mixture of two or more of these articles; hays, straws and corn stover, pure grains ground together; nor the unmixed meals made directly from the entire grains of wheat, rye, barley, oats, Indian corn, buckwheat, broom-corn, flaxseed, sugar-cane and sorghum, when all the different parts of such grains remain together and have not been separated, after grinding, by bolt, sieve, or otherwise."

The manufacturer of this particular commodity insists that this law does not apply to his product by reasons of facts set forth in his letter, accompanying yours, and which are summed up in the following sentence: "These facts show conclusively that International Stock Food is simply a 'trade name' for a high class tonic, purifier and aid to digestion and assimilation." In another sentence he uses the following sentence: "I go as far as I can, but I cannot qualify as a 'feed' when International Stock Food is absolutely medicinal and nothing else." If the compound referred to were advertised and sold as a medicine, it would not come under the terms of the act and would not have to comply with its requirements, but to permit it to be sold without thus complying with the act under its present name would be to concur and acquiesce in a fraud upon the purchasing public, as the proprietor himself advertises it as the "International Stock Food," and the analysis which he furnishes to your department in support of his claim that it is a medicine shows that it is in fact a condimental stock food. This, in addition to the name under which it is sold, fixes its status, and places it beyond your power to exempt it from the provisions of the statute.

I am therefore of opinion and advise you that, under the statement of facts furnished by the manufacturer him-

self, you are without discretion in the matter and must insist that he comply with the law, and a failure to do so will render him liable to the penalties prescribed in such cases.

CITY OF HARRISBURG *vs.* OTTO J. STAHL, TRADING AS ECLIPSE SUPPLY COMPANY.

Cities—License tax on methods of doing business—Combination of two or more methods separately taxed.

When a city has, by ordinance, classified different methods of doing business, and has imposed a separate license tax upon each of the methods included in the classification, a person who combines two or more of the methods, so classified and separately taxed, is liable for the tax imposed upon each.

D. S. Seitz, City Solicitor, for plaintiff.

Hargest & Hargest for defendant.

JACOBS, J., December 21, 1903.

This is a case stated to determine the liability of the defendant to pay license taxes under an ordinance of the city of Harrisburg. The parties have agreed upon the following statement of facts for the judgment of the court:

"First: The defendant has a permanent place of business at No. 1561 Walnut street, in the city of Harrisburg, and has paid to the city treasurer the sum of twenty-five dollars for the privilege of selling or leasing goods upon payments by instalments under the 34th clause of section 2, of the ordinance hereinafter referred to.

"Second: He sells and leases household articles such as clocks, wringers, rugs, lace curtains and other household specialties.

"Third: The business at Harrisburg is carried on as a branch business; his main place of business being at No. 64 S. Sixth Street, Reading, Pa. He also has branch establishments like the one at Harrisburg, at Coatesville and Allentown, Pa.

"Fourth: He makes uniform contracts of bailment with his customers on blank forms, signed in duplicate, one of which is hereto attached as part of this statement of facts. The

instalments are credited as they are paid, on the back of the copy held by the bailee.

"Fifth: He employs a one-horse wagon and three men and solicits business by application to residents of the city by going from house to house, taking orders, making contracts and delivering goods.

"Sixth: His wares are shipped direct from the manufactories and taken from the cars to the bailees as his contracts require, and the remainder to his place of business.

"Seventh: His stock in trade is kept stored at his place of business and at the railroad station, the latter for temporary convenience only.

"Eighth: The ordinance of March 27, 1893, is hereby made part of this statement as if hereto attached."

The ordinance referred to is entitled, "An ordinance providing for the levy and collection of license taxes in the city of Harrisburg." In its first section it provides, "that there shall be levied, collected and paid within the city of Harrisburg for general revenue purposes a license tax; and every person .....shall.....apply to the city treasurer for a license..... and the city treasurer shall issue such license upon the payment to him of the respective sums for the same, as provided in this ordinance." The second section, in thirty-seven clauses, classifies the subjects of such taxation and fixes the several amounts of the license taxes to be paid upon the various classes and kinds of business, etc. We have to do with but two clauses, which are as follows:

"Clause IV. Sample merchants or persons soliciting orders from others not merchants or dealers in this city shall pay annually the sum of $100.00. .....

"Clause XXXIV. For each and every permanent establishment, selling or leasing goods upon instalments, annually the sum of $25.00."

Upon the agreed facts of the case there can be no doubt that the defendant is taxable under Clause XXXIV. This is practically admitted by both sides, and the defendant has paid his tax and obtained a license under this clause. Is he taxable under Clause IV? This is affirmed by the plaintiff and denied by the defendant, who moreover contends that Clause IV is invalid for reasons presently to be stated.

We find no difficulty in holding that the defendant falls within the terms of the clause in question. He both "sells and leases household articles such" as are described. "He.....

solicits business by application to residents of the city by going from house to house, taking orders, making contracts and delivering goods."

It is true, as is pointed out by counsel for the defendant, that the case stated does not set forth "that none of the houses which he visited were those of merchants or dealers," and we agree with counsel in understanding the language, above quoted from the case stated, to mean that the defendant makes a house to house canvass, taking orders indiscriminately wherever he can get them, whether from merchants or dealers or others; and this we think clearly brings him within the terms of the clause. We do not agree with counsel that, "if the sample merchant solicits orders from a dealer or dealers,—no matter of what description,—or from merchants of whatever kind or whatever extent as to the volume of their business, he is exempt," nor that "if he solicits orders from individuals and also from merchants, he is exempt." Our view is the reverse of this. No doubt the language of the clause is not as apt to express the legislative thought as it might be, but, as we construe it, if the sample merchant or other solicitor confines his business to obtaining orders from merchants or dealers, he is exempt, but, if he solicits orders from persons "not merchants or dealers," he is liable. In other words his liability depends upon his dealing with "others," who do not belong to the excepted class, and he is not exempt merely because he also solicits from merchants or dealers. The manifest intention of the draftsman of Clause IV was to distinguish between wholesale and retail sample merchants,—that is to say: between those who take orders for sales to persons whose business it is to sell again and those who take orders for sales to persons for immediate consumption or use. It is not intended to tax drummers or agents of wholesale houses, but it is intended to tax dealers who, by themselves or their agents, make house to house canvasses and solicit orders from persons constituting the general mass of the community. The latter is what the defendant in this case does, and it makes no difference that in the course of his business thus conducted he may also take orders from merchants or dealers.

But it is contended that the clause in question is invalid because, (1) it is a regulation in restraint of trade, and (2) is not universal in its application, inasmuch as it distinguishes between persons soliciting orders from merchants or dealers and those soliciting from other persons. We do not consider

either of those objections well founded. But, even if we did, we should feel ourselves concluded by the decision of the Superior Court in Newcastle vs. Cutler, 15 Super. Ct., 612, the facts of which closely resemble those of the case before us. The court there held valid the following section of an ordinance relating to license taxes, which, while differing in terms from the clause before us, was, as we interpret the latter, in legal effect the same. "Sec. 13. .....All persons soliciting orders for goods, wares, merchandise, works of art or any other kind of article for sale shall pay $20.00, provided however, that this shall not apply to traveling salesmen selling to dealers."

In the opinion of the court, W. D. Porter, J., said (p. 625), "The ordinance in question was a legitimate exercise of the taxing power as applied to domestic commerce. The exemption of traveling salesmen selling to dealers from the tax imposed by the 13th section of the ordinance is clearly sustainable as a classification, founded upon the difference between those who sell at retail, delivering directly to the consumer, and the representatives of wholesale houses established in some other city or state, who sell only to traders."

An allocatur was refused by the Supreme Coure (See 16 Super. Ct., p. 27), and, while other authorities might be cited, so far as this court is concerned, this decision settles the principle, that a city may lawfully impose a license tax upon "sample merchants or persons soliciting orders from others not merchants or dealers."

It is further urged that a proper construction of the ordinance does not allow an accumulation of license taxes upon the same individual. This is no doubt true as a general statement, but we do not think it applicable to the present case. In our opinion the construction of the clause under discussion in this case is not difficult, and it is not aided or in any manner affected by the fact that the defendant has seen fit to combine two methods of doing business, each of which is taxable under the ordinance. If he pursues but one method, he must pay a license tax for it alone. If he chooses to combine several, we see no reason why we should not hold him taxable for both or all.

In our opinion the business of the defendant falls within both the fourth and the thirty-fourth clauses of section 2 of the ordinance and he is liable to pay the sum of $100 in addition to

the license tax already paid. In accordance with the terms of the case stated we therefore direct that judgment be entered for the plaintiff and against the defendant for $100 and costs.

COMMONWEALTH OF PENNSYLVANIA *vs.* WHITE HAVEN WATER CO.

Taxation—Tax on corporate loans—Exemption from taxation —Act of July 15, 1897.

Corporate indebtedness, evidenced by a note or notes held and owned by a savings bank, incorporated under the laws of Pennsylvania, which has paid the tax on its shares of stock, imposed by the first section of the Act of July 15, 1897, P. L. 292, is not taxable, under the Act of June 8, 1891, P. L. 229.

The exemption from taxation, contained in the proviso to the Act of June 15, 1897, P. L. 293, embraces state as well as local taxes and extends to corporate as well as to individual loans.

Whether the notes were regularly discounted by the bank, or the interest on them was paid when they fell due, can make no difference as to their taxability.

Appeal from settlement for tax on corporate indebtedness. C. P. Dauphin County, Nos. 182 and 182½ Commonwealth Docket, 1905, and No. 398 Commonwealth Docket, 1906.

Hampton L. Carson, Attorney General, for Commonwealth.

Olmsted & Stamm for defendant.

KUNKEL, P. J., January 4, 1908.

These are appeals by the corporation defendant from the settlement made against it by the auditor general and state treasurer for tax on corporate loans for the years 1903, 1904 and 1905. By agreement, they were consolidated and tried as one case by the court without a jury under the Act of April 22, 1874.

The facts are not in dispute, and we find them to be as follows:

FINDINGS OF FACT.

1. The White Haven Water Company, defendant, is a corporation of the state of Pennsylvania, and had an indebted-

ness in the year 1903 of $13,000, in the year 1904 of $12,700, and in the year 1905 of $11,500.

2. This indebtedness was evidenced by a note, or notes, held and owned by the White Haven Savings Bank, a corporation incorporated under the laws of Pennsylvania, which paid the tax in 1903, 1904 and 1905, on its shares of stock imposed by the first section of the Act of July 15, 1897 (P. L. 292).

3. It does not clearly appear whether the notes were discounted by the bank, or the payment of the interest on them was postponed until they became due.

DISCUSSION.

The tax of four mills on its indebtedness, which is here sought to be collected from the defendant, is not a tax upon the defendant, but upon the holder of the indebtedness, and is imposed by the Act of June 8, 1891, section 2 (P. L. 229). The Act of June 4, 1885, section 4 (P. L. 193), however, imposes upon the defendant the duty of assessing the tax and deducting it from the interest payable on its indebtedness. Thus, the defendant is made the collector of the tax; Commonwealth vs. Delaware Division Canal Company, 123 Pa., 594. If, therefore, the holder of the indebtedness was not liable for the tax, the defendant is not liable for failure to collect it.

The White Haven Savings Bank was the holder of the notes which evidence the indebtedness. It paid the tax on its shares of stock imposed by the first section of the Act of July 15, 1897 (P. L. 293), and was, therefore, entitled to the exemption given in the proviso to that section, which is as follows:

> "And provided further, That in case any bank or savings institution having capital stock, incorporated under the law of this state or of the United States, shall collect, annually, from the shareholders thereof said tax of four mills on the dollar upon the actual value of all the shares of stock of said bank or savings institution according to the rule hereinbefore stated that have been subscribed for or issued, and pay the same into the state treasury on or before the first day of March in each year, the shares and so much of the capital and profits of such bank or savings institution as shall not be invested in real estate, shall be exempt from local taxation under the laws of this commonwealth; and such bank or savings institution shall not be required to make any report to the

local assessor or county commissioners of its personal property owned by it in its own right for purposes of taxation, and shall not be required to pay any tax thereon. Except, however, that any bank or savings institution incorporated as aforesaid, in lieu of the method hereinbefore set out for ascertaining the actual value of the shares of capital stock thereof, may elect to collect annually from the stockholders thereof a tax of ten mills on the dollar upon the par value of all shares of said bank that have been subscribed for or issued, and pay the same into the state treasury on or before the first day of March in each year; and the shares of such bank or savings institution as shall not be invested in real estate shall be exempted from local taxation under the laws of this commonwealth."

The construction of this proviso is hardly now open to question. The exemption has been held to embrace state as well as local taxes and to extend to corporate as well as to individual loans in Savings Bank vs. Monongahela River Consolidated Coal and Coke Company, 29 Sup. Ct. Rep., 153, and we have already had occasion to follow that case in Commonwealth vs. Clairton Steel Company, No. 12, Commonwealth Docket, 1906. Whether the notes were regularly discounted by the bank, or the interest on them was paid when they fell due, can make no difference as to their taxability. The conclusion must be the same in either event. If the former was the case, they were expressly excepted by the proviso of section one of the Act of June 8, 1891, out of the subjects of taxation enumerated in that section. If the latter, they fell within the exemption of the Act of July 15, 1897.

CONCLUSIONS OF LAW.

We, therefore, conclude

1. That the indebtedness of the corporation defendant, held and owned by the White Haven Savings Bank, is not subject to the four mills tax imposed by the Act of June 8, 1891.

2. That the corporation defendant is not liable for the tax on its indebtedness held and owned by the White Haven Savings Bank.

Judgment is, therefore, directed to be entered in favor of the defendant, if exceptions be not filed within the time limited by law.

COMMONWEALTH OF PENNSYLVANIA *vs.* CLAIRTON STEEL COMPANY.

Taxation—Tax on corporate loans—Exemption from tax when residences of owners of evidences of indebtedness are unknown—Act of July 15, 1897.

A corporation will be relieved from the payment of tax on such portion of its indebtedness as is held by persons whose residences are unknown, upon sufficient proof of diligent and unsuccessful effort to ascertain the residences of the holders thereof.

State banks and savings institutions which have paid the tax on the shares of their capital stock imposed by the first section of the Act of July 15, 1897, P. L. 292, are exempt from taxation upon bonds of a corporation owned by them.

The exemption from taxation, contained in the proviso to the Act of July 15, 1897, P. L. 292, includes both state and local taxes.

Appeal from settlement for tax on corporate indebtedness. C. P. Dauphin County, No. 12 Commonwealth Docket, 1906.

Hampton L. Carson, Attorney General, for Commonwealth.

Olmsted & Stamm for defendant.

KUNKEL, P. J., January 4, 1908.

This is an appeal by the defendant corporation from the settlement of an account against it by the auditor general and state treasurer for tax on loans for the year 1904, and was tried by the court without a jury, agreeably to the provision of the Act of April 22, 1874. The facts are not in dispute, and we find them to be as contained in the defendant's request for findings of fact, which we now affirm. They are as follows:

FINDINGS OF FACT.

1. The Clairton Steel Company, defendant, is a corporation of the state of Pennsylvania. For the year 1904, its treasurer made report to the auditor general of Pennsylvania, showing the amount of its indebtedness, original or assumed, to be $11,004,798.67. The report showed the location and residence of the holders of all the bonds save $3,967,000, of which it reported after "careful search and inquiry" the company had been "unable to ascertain the residence of the persons who

held" the said bonds. The report showed, *inter alia*, $346,749.92 of bonds held by individual residents of Pennsylvania, and $1,044,000.00 of bonds held by state banks and savings institutions chartered under the laws of Pennsylvania, and paying the four mills tax upon the shares of their capital stock, under the provisions of the act entitled "An act to provide revenue by taxation," approved July 15, 1897 (P. L. 292.)

2. Upon the ninth day of November, 1905, the auditor general settled and entered and the state treasurer approved an account against the defendant company in which the tax of four mills was charged upon $3,376,249 of bonds, which included the following items, viz: Bonds held by Pennsylvania state banks and savings institutions, which pay the tax imposed by the first section of the Act of July 15, 1897, $1,004,000.00 and $1,983,500, being one-half of the item of $3,967,000 returned by defendant's treasurer as held by persons of unknown residence. From this amount defendant duly appealed to this court.

3. As part of defendant's report to the auditor general for the year in question there was attached a schedule setting out with elaboration how much of the loans and indebtedness of defendant was held, owned or possessed by corporations of Pennnsylvania, and whether in their own right or as trustee, agent or attorney in fact, or in any other fiduciary capacity; how much by individual residents; how much by state banks and savings institutions; how much by non-residents, and how much by persons whose residences could not be ascertained, with other details concerning each of three different series of bonds and three different set of mortgages. This report was the result of careful, painstaking and diligent inquiry made by defendant's officers in order to ascertain the facts contained therein, and these officers discharged their full duty to the commonwealth and ascertained as nearly as lay in their power the facts concerning the owners of the company's bonds, and particularly the fact concerning the residence of such owners. The bonds are coupon bonds. The coupons were payable at two different trust companies as trustees under the mortgages securing them. The coupons were frequently presented for payment by runners or messengers of banks and other collection agencies, who did not even know the names of the owners of the bonds from which the coupons had been originally cut, and the difficulty in this case was enhanced by the fact that two series of the bonds and two sets of mortgages had originally

been issued, not by this defendant, but by other corporations and secured upon property of which this defendant became subsequently possessed. It now pays the interest upon these bonds and mortgages, as well as upon those issued by itself, and has shown due diligence in ascertaining the residences of the holders of all of its original and assumed indebtedness. No evidence was offered to show that defendant's officers could have ascertained by any means within their power the residences of any of the holders of any of the bonds which were returned as held by persons of unknown residence. No evidence has been offered tending to show that any of the said bonds were in 1904 held or owned in Pennsylvania, either by individuals or corporations, or in any other manner, and no presumption of fact arises from the evidence before the court that the residence of any bondholder which was returned as unknown was actually within the state of Pennsylvania in the year 1904.

4. Before appealing defendant paid into the state treasury $1,333.33, as tax on loans for the year 1904.

Discussion.

The question presented by this appeal is whether the defendant is liable for the tax of four mills on its loans held and owned by Pennsylvania state banks and savings institutions which pay the tax on their shares of stock imposed by the first section of the Act of July 15, 1897 (P. L. 292). The present settlement is for the tax of four mills on $3,376,249.00 of the bonds of the defendant company, which include its bonds held by individual residents of Pennsylvania, its bonds held by Pennsylvania state banks and savings institutions which pay the tax imposed by the first section of the Act of July 15, 1897, and its bonds held by persons whose residence the defendant had been unable to ascertain. The tax on the bonds held by residents of Pennsylvania, less the commission allowed to the company's treasurer, amounting to $1,333.33, has been paid into the state treasury. The claim for the tax on the bonds held by persons whose residence is unknown was practically abandoned by the comonwealth when the proof which the defendant submitted as to its effort to discover the holders thereof was heard. And it is conceded in the commonwealth's brief that the proof is sufficient to absolve the defendant from liability for that claim. The only item of the settlement, therefore, unpaid and insisted upon here is the claim for the tax

upon the bonds of the defendant held by Pennsylvania state banks and savings institutions which pay the tax on their shares of stock imposed by the first section of the Act of July 15, 1897. The defendant contends that by the provision of that act, state banks and savings institutions which have paid the tax on their shares of stock are exempt from tax on the loans held by them, and that it may not assess the latter tax and deduct it from the interest payable on such loans.

The defendant is made, by the fourth section of the Act of June 30, 1885 (P. L. 193), the collector of taxes imposed by section one of that act, and by the Act of June 1, 1889 (P. L. 420), and increased from three to four mills by the Act of June 8, 1891 (P. L. 229), which tax the commonwealth seeks to recover in this suit. The tax is not imposed upon the defendant, but upon the holders of its bonds, the duty being imposed upon the defendant to assess the tax and deduct it from the interest due the holders of the bonds and pay it into the state treasury; Commonwealth vs. Delaware Division Canal Company, 123 Pa., 584. It is manifest, therefore, that if the holders of the bonds are not liable for the tax the defendant is not liable for failure to collect it. The holders' exemption from the tax is this case is found in the proviso of the Act of July 15, 1897 (P. L. 292), which reads as follows:

"And provided further, That in case any bank or savings institution having capital stock, incorporated under the laws of this state or of the United States, shall collect, annually, from the shareholders thereof said tax of four mills on the dollar upon the actual value of all the shares of stock of said bank or savings institution according to the rule hereinbefore stated, that have been subscribed for or issued, and pay the same into the state treasury on or before the first day of March in each year, the shares and so much of the capital and profits of such bank or savings institution as shall not be invested in real estate, shall be exempt from local taxation under the laws of this commonwealth; and such bank or savings institution shall not be required to make any report to the local assessor or county commissioners of its personal property owned by it in its own right for purposes of taxation, and shall not be required to pay any tax thereon. Except however that any bank or savings institution incorporated as aforesaid, in lieu of the method hereinbefore set out for ascertaining the actual value of the shares of capital stock thereof, may elect to collect annually from the stockholders thereof a tax of ten mills

on the dollar upon the par value of all shares of said bank that have been subscribed for or issued, and pay the same into the state treasury on or before the first day of March in each year; and the shares of such bank or savings institution, and so much of the capital and profits of such bank or savings institution, as shall not be invested in real estate shall be exempted from local taxation under the laws of this commonwealth."

The language of the proviso is that the bank shall not be required to pay any tax on its personal property owned by it in its own right.

The commonwealth, however, contends that the exemption thus given is only from local taxation, as is evinced by the context, and not from state taxes. Unfortunately for the commonwealth's contention, judicial construction has already been given to the proviso in question. In Savings Bank vs. Monongahela River Consolidated Coal and Coke Company, 29 Sup. Ct., 153, this proviso was under consideration, and it was there held that it relieved the bank from taxation, state as well as local, upon its personal property owned by it in its own right, and that the affidavit of defense in that case, which averred that the bonds were subject to the four mills state tax and that it was the duty of the corporation to retain and pay into the state treasury the amount of the tax out of the sum due on the coupons was insufficient to prevent judgment in an action on the coupons. We feel bound to follow this construction of the appellate court.

It may be observed that substantially the same exemption as is now given by the Act of 1897 to Pennsylvania banks and savings institutions was formerly given to them by the third section of the Act of June 30, 1885 (P. L. 193), but subsequently by the twenty-fifth section of the Act of June 1, 1889 (P. L. 420), the exemption was limited to local taxation. It is not at all unlikely that the legislature, by the proviso in section one of the Act of July 15, 1897, intended to restore the general exemption previously enjoyed under the Act of 1885. If it had intended to restrict the exemption to local taxation, there was no necessity for the phrase abrogating the requirement of the report to the local assessors and the commissioners, or for declaring that the institutions should not pay any tax on their personal property owned by them in their own right, for in the same proviso provision is made for the relief from local taxation upon the payment of four mills on the actual value of the shares of the capital stock, or, if the institutions

choose to exercise the option, for like relief upon the payment of ten mills on the par value of the shares. This exempting phrase must be given some effect, and to do so, in view of the exemption from local taxation which is already given, it must be held to relate to taxes other than local. Necessarily, therefore, it must refer to state taxes, and to the state tax of four mills. But it may be said that even if it be construed to relate to state taxes as well as local taxes, the provision that removes the requirement to report to the local assessors, or county commissioners, shows that the exemption was intended to embrace such property only as is required to be reported to the local assessors, and not that which is directed to be excluded from the report by the proviso of the sixth section of the Act of Assembly of June 30, 1885 (P. L. 193), and the proviso of the second section of the Act of June 1, 1889 (P. L. 420). This argument, although persuasive, is not convincing. By the use of the general words "its personal property owned by it in its own right," it seems that the legislature did not intend to limit the property which should be exempt from the state tax of four mills, but to embrace all owned by it in its own right. Otherwise it would have specified the property to be exempt. But it declares it shall not be required to pay tax on "its personal property owned by it in its own right" generally. Manifestly the property meant is that which is subject to the state tax of four mills. If it had intended to distinguish between individual and corporate loans, it could have readily expressed its intention by qualifying the word property. It did not do so, but used the word without limitation or qualification. We are not at liberty to qualify it by construction. Concededly the word property embraces individual bonds and mortgages. It cannot, therefore, consistently be held not to include the obligations of public or private corporations.

Conclusions of Law.

We, therefore, conclude

1. That state banks and savings institutions which have paid the tax on the shares of their capital stock imposed by the first section of the Act of July 15, 1897, P. L. 292, are exempt from taxation upon bonds of a corporation owned by them.

2. That the defendant is not liable for the tax of four mills on its bonds held and owned by Pennsylvania state banks

and savings institutions which have paid the tax on the shares of their capital stock.

Wherefore, judgment is directed to be entered in favor of the defendant, if exceptions be not filed within the time limited by law.

COMMONWEALTH OF PENNSYLVANIA EX REL. HAMPTON L. CARSON, ATTORNEY GENERAL VS. IRON CITY TRUST COMPANY.

Corporations—Insolvency—Appointment of receivers—Jurisdiction—Act of February 11, 1895.

There is no Pennsylvania statute giving simple contract creditors of banking corporations or trust companies the right to proceed in equity against such corporations or companies for the appointment of receivers.

The Pennsylvania statute of February 11, 1895, P. L. 4, was enacted for the purpose of placing all such corporations and companies under the control of a separate department of the state government, and subjecting them to the supervision of the banking commissioner of the commonwealth. This statute was intended to provide a complete system of supervision and control of such corporations and companies and, in the interest of the public welfare, should be held to be as exclusive as is the control of national banks by the federal government.

A trust company that is not in condition to meet and pay its obligations to depositors as they are demanded, is insolvent in the technical and legal sense of that word and within the meaning of the Act of February 11, 1895.

Creditors, residing in the state of Ohio, filed a bill in equity in the Circuit Court of the United States for the western district of Pennsylvania alleging that their debtor, a trust company incorporated under the laws of Pennsylvania, although having assets largely in excess of its liabilities, was unable to convert them into cash in time to meet its liabilities as they matured and asked for the appointment of a receiver. In its answer, the trust company admitted all of the allegations of the bill and joined in the prayer for the appointment of a receiver and a receiver was appointed. Afterwards the Attorney General of Pennsylvania filed a petition in the court of common pleas of Dauphin County, Pennsylvania, alleging the insolvency of the trust company and asking for the appointment of a receiver. In its answer to this petition, the trust company denied its insolvency and alleged the ap-

pointment of a receiver by the United States Circuit Court. *Held*, That the appointment of the receiver by the United States Circuit Court was not the result of a controversy between the complainants in the bill, as citizens of Ohio, and the Pennsylvania corporation. That the purpose of the Act of February 11, 1895, was to preserve to the state, through its banking department, the exclusive jurisdiction and control of banks and trust companies. Decree declaring the trust company insolvent and appointing a receiver.

Bill in equity for the appointment of a receiver. C. P. Dauphin County, No. 430, Commonwealth Docket, 1907.

M. Hampton Todd, Attorney General, and *J. E. B. Cunningham, Deputy Attorney General,* for Commonwealth.

W. F. McCook and *W. C. Farnsworth* for defendant.

McCARRELL, J., February 20, 1908.

OPINION.

This is an application, made November 20, 1907, upon the relation of the attorney general of the state acting in pursuance of information submitted to him by the banking commissioner of the commonwealth for the appointment of a receiver and the winding up of the business of the Iron City Trust Company of Pittsburg, Pennsylvania, upon the allegation that said defendant company is in an unsound and unsafe condition and is insolvent.

The application is made under the provisions of the Act of February 11, 1895, P. L. 4, and the proceeding is instituted under the 9th section of said act.

From the testimony taken at the hearing upon the rule to show cause, on December 19, 1907, we find the following:

STATEMENT OF FACTS.

On October 23, 1907, W. D. McKeefrey, N. J. McKeefrey and W. D. McKeefrey, partners, doing business under the name of McKeefrey & Company, alleging that they were citizens and residents of Leetonia, Ohio, presented their bill of complaint in equity to the circuit court of the United States for the western district of Pennsylvania, the said bill being filed in said court on said day to No. 30, November Term, 1907.

The bill alleges that the complainants are creditors of the defendant, the defendant being indebted to W. D. McKeefrey in the sum of $3,151.52, and to the firm of Mc-

Keefrey & Company in the sum of $32,049.59, and averring that these sums are respectively due and owing by the said defendant to the complainants, respectively.

The bill of complaint further alleges, as follows:

"That the defendant, the Iron City Trust Company, is a corporation organized and existing under the laws of Pennsylvania, having its office and place of business in the city of Pittsburg, Pa., and is engaged in receiving and holding moneys on deposit and in trust, and doing a general banking and trust company business, in accordance with the laws of Pennsylvania in said cases made and provided."

The bill further alleges that "plaintiffs' claims exceed the sum of two thousand dollars over and above interest and costs, and the assets of the defendant consist of about $175,000.00 in cash and other assets exceeding $4,000,000.00, which assets are largely in excess of its liabilities, but cannot be converted into cash in time to meet the liabilities as they mature."

The bill further avers that "upon the defendant's failure to meet its obligations, it will, unless its assets are properly protected by an officer of this court, be subjected to vexatious and costly litigation, its assets will be subject to attachment and execution, and in the event of a forced sale will bring very much less than their fair and reasonable value, all of which will be to the great prejudice of your orators and to all other creditors and the stockholders of the defendant, and your orators verily believe that unless the court will take defendant's property into its custody and deal with it as a single trust, such property will be sacrificed and then stockholders and creditors and all other parties in interest will suffer irreparable damage and loss."

The bill then prays for the appointment of W. L. Abbott and H. S. A. Stewart as receivers of the property of the defendant and an order requiring defendant's officers to forthwith transfer, convey and turn over and deliver to the receivers all of the real and personal property, business, assets and effects of whatsoever kind and nature belonging to defendant.

Upon the same day, October 23, 1907, and apparently at the same time when the bill of complaint was presented, the corporation defendant, presented and filed its answer to the said bill. This answer "admits as true all the statement of facts in said bill of complaint, and it admits that although

having assets very largely exceeding all its liabilities, it is not able to convert said assets into cash as rapidly as said liabilities will mature, and it therefore joins in the prayers of the bill and prays that your honorable court will appoint receivers as therein asked for, to the end that all of the creditors of your respondent may be paid in full without loss and sacrifice of its assets and so as to preserve the same for its stockholders as well."

It thus appears that the appointment of receivers by the circuit court of the United States for the western district of Pennsylvania was not the result of any controversy between the complainants in said bill as citizens and residents of the state of Ohio, but that the said receivers were appointed in pursuance of the concerted action of the complainants and the defendant company, and that the appointment of said receivers was practically the result of an agreement between the complainants and the defendant.

At the hearing the commonwealth offered in evidence certified copies of the bill of complaint, above referred to, and the answer thereto of the defendant and the order of the circuit court made upon the said bill and answer.

To the petition and application of the attorney general, filed in this court, November 20, 1907, the defendant company made answer on December 2, 1907, admitting that it is a corporation of Pennsylvania with its office in the city of Pittsburg, Pennsylvania, denying that it "is in an unsound and unsafe condition, and denying that it is insolvent," and averring that its assets, exclusive of furniture, equipment and supplies, on October 22, 1907, were of the value of $4,740,-449.59, that its liabilities to depositors were $1,545,814.27, that its other debts, exclusive of capital were $263,000.00, and that it therefore had an excess of assets over creditors' claims of $2,931,635.32.

The answer further avers that because of the failure of the Westinghouse companies and the Security Investment Company on October 23, 1907, and the financial stringency then existing, it was unable "to secure currency to meet the demands of its depositors," and it was then "deemed prudent and advisable to discontinue deposits and payments on that date."

The answer further avers that in consequence of this condition receivers were appointed by the circuit court of the United States for the western district of Pennsylvania on Oc-

tober 23, 1907, and that said receivers had taken possession of all the properties and assets of the defendant company and "are duly administering the same and converting them into cash, and within one month of their appointment they have reported $391,000.00 for distribution, and under all normal conditions all depositors will be paid in full within six months."

The answer further avers that the defendant company "is not engaged and does not intend to engage in business beyond the liquidating its assets and liabilities," and claim "that there is no justification or need for receivers to be appointed by this court."

At the hearing December 19, 1907, before this court, the defendant company called H. S. A. Stewart, one of the receivers, who testified that he considered the defendant was solvent on October 24, 1907, when he took possession as receiver, and that the difficulty which resulted in the appointment of receivers by the circuit court was simply that the defendant had not the currency to meet demands of depositors and could not get cash for its own deposits in New York banks.

He further stated (page 12) that he did not consider the defendant either unsafe or unsound,, and that upon examination he found its financial condition on October 23, 1907, to be as follows, to-wit:

Assets,	$4,395,259 00
Liabilities to creditors,	1,549,086 42
Leaving an excess of assets over creditor's claims of,	$2,846,172 58

Mr. Stewart also testified (pages 13 and 14) that the plaintiffs in the bill of complaint, filed in the U. S. court, while then depositors of the defendant company, were liable upon promissory notes held by the defendant company for amounts larger than their respective deposits.

The defendant also called as a witness Joseph A. Knox, assistant treasurer of the Fidelity Title & Trust Company of Pittsburg, who testified (page 18), that from an examination made by him of the assets and liabilities of the defendant company, he believed the defendant on October 23, 1907, "to be perfectly solvent, having assets very considerably in excess of its liabilities."

On page 20, he testifies, as a result of his examination, that the financial condition of the defendant company on October 23, 1907 was as follows, to-wit:

Assets,	$4,161,467 81
Liability to creditors,	1,586,712 54
Leaving an excess of assets over liabilities to creditors of,	$2,574,755 27

He further testified that his estimate of assets and liabilities was a very conservative one.

On page 21, he says that he regards the defendant company as safe and sound, and that it could do business if it chose to do so.

He further states that the stock of the defendant company, after payment of all liabilities to creditors, is worth, in his opinion, $128.75 per share, the par value of each share being $100.00.

Upon these proofs the defendant company contends that it is not insolvent; that it is not in an unsafe or unsound condition, and that no receivers can properly be appointed by this court.

The commonwealth contends that the defendant company is insolvent within the meaning of the Act of February 11, 1895, and that the fact that the defendant company ceased to do business on October 23, 1907, and secured the appointment of receivers who are closing up its business, is sufficient proof that the defendant company is not in that safe and sound condition which justifies its continuing in business.

The commonwealth further contends that the appointment of receivers by the circuit court of the United States in the manner and under the circumstances hereinbefore mentioned, was an appointment not within the jurisdiction of the court making said appointment, and that the control and management of the winding up of the business of the corporation defendant is under the Act of February 11, 1895, solely within the jurisdiction of this court, and that receivers should now be appointed for the purpose of receiving the assets and closing the business of the corporation defendant, and that a decree should now be entered dissolving the said corporation defendant and appoint receivers to wind up its business.

It is manifest from all the testimony submitted that on October 23, 1907, the defendant company was not in condition to meet and pay its obligations to depositors as they were demanded, and the conclusion seems to be inevitable that at that time the corporation defendant was insolvent in the technical and legal sense of that word and within the meaning of the Act of February 11, 1895. The admitted fact that the corporation defendant, practically voluntarily ceased to do business on October 23, 1907, warrants the conclusion that the defendant did not then regard itself as in a safe and sound condition to continue business, and that it actually was not then in a safe and sound condition to do or continue business.

If it were not for the appointment of receivers by the circuit court of the United States for the western district of Pennsylvania on October 23, 1907, and the placing of the property of the defendant company in the hands and under the control of said receivers, to be administered and applied by said receivers, under the direction of said circuit court, the right of the commonwealth to now ask for the dissolution of the defendant company and the appointment of receivers by this court to wind up its business would apparently become a question.

The important question therefore to be considered and decided is whether the action of the circuit court of the United States for the western district of Pennsylvania, as hereinbefore mentioned, is of such character as to deprive the commonwealth of the decree which is now asked.

The commonwealth contends that the said circuit court, under all the circumstances connected with this case, had no lawful jurisdiction to entertain the bill of complaint or appoint receivers thereunder.

The lawful jurisdiction of said circuit court as limited and defined by the Act of Congress, approved September 24, 1789 (1st Statutes at Large 79), has been modified by the Act of Congress, approved March 3, 1875 (18th Statutes at Large 470), entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from state courts and for other purposes."

This act was further amended by the Act of Congress, approved March 3, 1887, and was further changed by Act of

Congress, approved August 13, 1888, so that at present it reads as follows:

"That the circuit courts of the United States shall have original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs the sum or value of $2,000.00, and arising under the constitution or laws of the United States or treaties made, or which shall be made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." 4th Federal Statutes Annotated, 265.

The general object of the Act of March 3, 1875 and its supplements, as appears upon its face and as has been often declared by the courts, is the contract not to enlarge the jurisdiction of the circuit courts of the United States.

In discussing the Act of March 3, 1875 (18th Statutes 470 and its supplements) Chief Justice Fuller, in Mexican National Railroad vs. Davidson, 157 U. S. Reports, page 208, says:

"This change was made in accordance with that intention to restrict the jurisdiction of the circuit courts, which has been so often recognized by this court. Smith vs. Lyon 133 U. S. 315-319; In re Pennsylvania Company 137 U. S. 451; Hanrich vs. Hanrich 153 U. S. 122. In Hanford vs. Davies 163 U. S. 279, Mr. Justice Harlan uses the following language: 'It is well settled that as the jurisdiction of a circuit court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears; and that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleading, but the averments should be positive. These principles have been applied in cases where the jurisdiction of the circuit court was invoked upon the ground of diverse citizenship. But they are equally applicable where its original jurisdiction of a suit between citizens of the same state is invoked upon the ground that the suit is one arising under the constitution or laws of the United States."

The plaintiffs in the proceeding instituted by them in

the circuit court of the United States for the western district of Pennsylvania came into that court and filed their bill in equity, alleging that they were simple contract creditors of the corporation defendant. The testimony before us clearly indicates that while they were nominal creditors as depositors, they were actually and really indebted at the time of the filing of their bill to the corporation defendant upon unmatured notes in an amount exceeding their deposits, and that in reality they were not creditors, but debtors.

Their right as simple contract creditors, even if it be conceded that they were such, to institute and maintain this proceeding in equity in the United States circuit court is apparently questionable.

In Hollins vs. Brianfield Coal & Iron Co. 150 U. S. 378 Mr. Justice Brewer uses the following language, to-wit:

"The plaintiffs were simple contract creditors of the company. Their claims had not been reduced to judgments, and they had no express lien by mortgage, trust deed, or otherwise. It is the settled law of this court that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor and its application to the satisfaction of their claim; and this, notwithstanding a statute of the state, may authorize such a proceeding in the courts of the state. The line of demarkation between equitable and legal remedy in the federal courts cannot be obliterated by state legislation.

This decision has been uniformly followed in the federal courts.

In Jacobs et. al. vs. Mexican Sugar Co., 130 Federal Reporter, 589, it was clearly held by Judge Archbald that "A simple contract creditor, having no lien by way of pledge or otherwise on the property of the defendant company, and his claim not having been reduced to judgment, has no standin this court to prosecute the present bill, the state to the contrary notwithstanding.

In Canton Roll & Machine Company vs. Rolling Mill Company of America, 155 Federal Reporter 321, it was held by Judge Dayton that the judiciary act of March 3, 1875 "Does not enlarge the right of an individual to sue and confers no right upon a simple contract creditor to maintain a creditor's suit in a federal court to set aside an alleged fraudulent conveyance of property by the debtor, nor does the fact that complainant has an alleged mechanic's lien upon the prop-

erty afford basis for such a general creditor's suit, since such lien, if valid, may be enforced in rem against the property regardless of conveyances whether prior or subsequent."

In each of the two cases last cited, there is a full and able discussion of the right of a simple contract creditor without any specific lien to institute proceedings in equity in the courts of the United States, and the conclusion announced in each of these cases is supported by numerous federal authorities.

There is no Pennsylvania statute giving simple contract creditors of banking corporations or trust companies the right to proceed in equity against such corporations or companies for the appointment of receivers.

The Pennsylvania statute of February 11, 1895, P. L. 4, was enacted for the purpose of placing all such corporations and companies under the control of a separate department of the state government, and subjecting them to the supervision of the banking commissioner of the commonwealth. This statute was intended to provide a complete system of supervision and control of such corporations and companies and, in the interest of public welfare, should be held to be as exclusive as is the control of national banks by the federal government. It is important to the public that this system of supervision and control should be exercised without hindrance by the department of the state government to which the legislature has committed this work. The public interests can be more fully protected by holding, as we do, that this statute was intended to preserve to the state through its banking department and its banking commissioner the exclusive supervision and control of these corporations and companies.

While the policy of the law and the comity properly existing between courts of concurrent jurisdiction preclude us from deciding whether under all the circumstances of this case the circuit court of the United States for the western district of Pennsylvania had lawful jurisdiction to entertain and pass upon the bill in equity filed in that court against the corporation defendant, we feel constrained, in order that the purpose of our state statute may be followed and carried out, to grant the application made by the commonwealth of Pennsylvania, through her attorney general, in the present case.

We cannot, of course, confer upon the receiver whom we may appoint, authority to take possession of the property and

assets of the defendant corporation now in the possession of the receivers as officers of the circuit court of the United States for the western district of Pennsylvania, but the receiver appointed by us will be by virtue of the appointment in position in a proper and orderly way to invite the attention of the circuit court to all the circumstances attending the proceeding commenced therein on October 23, 1907, against this defendant, and we have no doubt but that said circuit court will then reach such conclusion and enter such judgment as under all the circumstances of this case may be right and proper.

From the testimony submitted to us, we find that the Iron City Trust Company of Pittsburg, Pa., the defendant herein, was on October 23, 1907, according to its own admissions and acts, not in a safe and sound condition to do business, and was then, in contemplation of law, insolvent, and that this condition still continues.

We therefore, now order and decree that the Iron City Trust Company of Pittsburg, Pa., the defendant herein, be and is hereby dissolved and its corporate existence ended, and that Mr. J. Denny Lyon of Pittsburg, Pa., is hereby appointed receiver of all its property and assets of whatsoever nature and kind, and direct that he institute such proceeding in the circuit court of the United States for the western district of Pennsylvania as may be proper to procure the revocation of its decree appointing receivers for said defendant corporation, and upon its revocation to take possession of the property and assets of said defendant corporation, close its business and dispose of its property and assets in such manner as the law may require. Bond with approved security to be given by said receiver in the sum of five hundred thousand dollars.

IN THE MATTER OF THE APPLICATION OF JOSEPH J. ARMENTO FOR RETAIL LIQUOR LICENSE.

Hotel license—Remonstrance—Evidence.

When no question as to the necessity of a hotel license is raised by a remonstrance, the court will not refuse a license when the evidence offered by the remonstrant has already been presented to a grand jury in support of a bill of indictment which was ignored, and the manner of the remonstrant and his witnesses is such as to discredit their testimony.

Remonstrance against granting hotel license. Quarter Sessions Dauphin County, No. 13, License Docket, 1908.

Snodgrass & Snodgrass, E. E. Beidleman, for applicant.

Scott S. Leiby, for remonstrant.

MCCARRELL, J., Feb., 1908.

There is no objection raised by the remonstrance in this case affecting the necessity of the State Capital Hotel, at which the retail liquor license applied for in the above caption is asked.

The remonstrance rests solely upon the allegation that Joseph J. Armento is an unfit person to be entrusted with said license, because within the last year he had sold and furnished by himself and bar-keeper, intoxicating liquors at said hotel to Earl Rhoads, Albert Mendinghall and Emma Ebersole, who are minors about or under the age of nineteen years.

The testimony submitted before us to support this allegation had, as was stated at the hearing, been previously submitted to a grand jury of this county, which, after considering the same, did not regard it as of sufficient weight to warrant them in finding an indictment against the present applicant.

In addition to the testimony heard by the grand jury, we have heard the testimony of the applicant relative to the occurrences testified to by the witnesses called for the remonstrant. He denies emphatically the selling of any intoxicating beverages to any of the persons named in the remonstrance either by himself or by any bar-keeper.

The testimony submitted by him further shows that he had instructed his bar-keepers not to sell to minors at any time, and further indicates that the hotel for which this license

is now asked has been conducted in accordance with the requirements of law.

A grand jury having ignored a bill resting upon the same testimony which was presented to us, and the conduct and manner of the remonstrant and his witnesses tending to discredit their evidence, and the applicant having positively denied before us the allegations of the witnesses called by the remonstrant, and he, the applicant, being corroborated by other testimony offered in his behalf, we are not satisfied that upon the evidence which has been submitted we should conclude that the defendant has wilfully or negligently violated the law as alleged in the remonstrance.

If the allegations of the remonstrance had been sustained by proof establishing beyond doubt the facts therein alleged, we would not hesitate to refuse to grant a renewal of the license.

For the reasons hereinbefore suggested, however, we do not feel warranted in reaching the conclusion necessary to be reached before we can properly refuse the application upon the ground alleged. We shall, therefore, make an order granting the application.

CHARLES F. HARMAN, ET AL., *vs.* J. A. ROMBERGER, ET AL.

Wills—Gifts for religious uses—Trusts—Act of July 7, 1885.

The Act of July 7, 1885, P. L. 259, can not become operative after the disposition of property by will has once become effective, and an estate has vested and passed into the possession of beneficairies or trustees, in accordance with the terms of a testamentary disposition.

The Act of July 7, 1885, P. L. 259, was not intended to work a divestiture of an estate which has once become vested. Its purpose is to vest title in "the heirs at law and next of kin," if, at the death of a testator, the specific provisions of a testamentary paper cannot then be effective for any of the reasons named in the statute.

Testatrix devised certain real estate to trustees, their successors and assigns forever, in trust for the uses and purposes of a designated church congregation. The trustees entered into possession of the real estate by virtue of the devise in the will. About six years after the death of testatrix her heirs instituted an action of ejectment against the trustees and upon the trial of the cause offered to prove that the designated congregation had disbanded about three years prior to the bringing of the action, that no services had been held since that time, that there was no congregation in existence answering the description in the will, and contended that, under the Act of July 7, 1885, the propp- passed to the heirs at law. The trial judge excluded the evidence offered and directed verdict for defendants. *Held,* on motion for a new trial, that the evidence was properly excluded. That the Act of July 7, 1885, could not operate to divest an estate that had once vested under the provisions of the will.

Motion for new trial. C. P. Dauphin County, 145 January Term, 1906.

John C. Nissley and *Wm. M. Hargest,* for plaintiffs.

M. E. Stroup, for defendants.

McCARRELL, J., March 25, 1908.

OPINION.

The pending motion for a new trial has been fully and ably discussed and is now before us for decision.

From the record we gather the following:

STATEMENT OF FACTS.

The action was commenced October 25, 1905, to recover possession of a lot of ground on Moore Street in the borough

of Millersburg, Dauphin county, Pennsylvania, particularly described by metes and bounds and containing three thousand four hundred and ten (3,410) square feet of land.

The brief of title filed at the time the suit was instituted shows that Mary Knouff died seized in fee of the premises in dispute. The plaintiffs claim that they are entitled to possession as her heirs and legal representatives. She died April 10, 1900, having first made her last will and testament, dated May 11, 1897, and duly proven April 19, 1900.

By the second paragraph of her said will she gives, devises and bequeaths the premises described in this action to "J. A. Romberger, A. M. Romberger and G. W. Lenker, trustees, in trust for the uses and purposes of the Millersburg congregation of the Evangelical Association of North America and to their successors and assigns forever, and in like manner I hereby devise and bequeath all and every other real estate of which I may die seized and possessed to the same trustees in trust and their successors and assigns forever."

On November 15, 1906, the defendants filed an affidavit of defense, together with an abstract setting out the title under which they claim possession of the premises in dispute.

This abstract shows that defendants claimed title and possession under the last will and testament of Mary Knouff, deceased, and the record shows that they are in possession as devisees under said will.

At the trial the learned and lamented trial judge excluded, under exception, testimony offered to show that the Millersburg congregation had disbanded in 1904; that no services had been held by said congregation since that time and that there is no congregation known as the Millersburg congregation to use the premises in dispute in any way whatsoever. The learned judge then instructed the jury, as follows, to-wit:

"It is admitted that shortly after the death of Mary Knouff, the defendants under and by virtue of the devise in this will, went into possession of this house and lot of ground as trustees of the Millersburg congregation, and that the trustees were in possession of this property under this provision in the will at the time of the institution of this suit and are in possession at this time. The plaintiffs claim that since this date, to-wit, about 1904, this congregation had disbanded, and therefore under and by virtue of the Act of 7th July, 1885, this property had reverted to the heirs and legal representatives of Mary Knouff. The Legislature of Pennsylvania has

specifically directed that the doctrine of Cy Pres shall be established and remain in Pennsylvania. The subject of the testator's bounty is clearly defined. The trustees are named and we do not believe and do not agree with the counsel for plaintiffs that the Act of 1885 was intended or did in fact affect the powers of the courts with reference to the enforcement of this doctrine, and as in our opinion under the terms of this will and under the law as it now exists in Pennsylvania, there is no reversionery interest in the plaintiffs notwithstanding the fact that this congregation may have since that time disbanded, we are obliged to instruct you to render a verdict for the plaintiffs. Exception to the plaintiffs."

Under all the reasons assigned for a new trial the sole question for our consideration is, was this instruction of the learned trial judge correct?

DISCUSSION.

It is and must be admitted that under the will of Mary Knouff no express provision whatever is made for the reversion of the premises in question under any circumstances or at any time whatsoever. The testatrix had apparently no thought or intention that her heirs should ever own or possess the property in question. If the heirs are permitted to recover possession, it must, therefore, be upon the basis of some title acquired or existing quite independently of the last will and testament of Mary Knouff. It is suggested that the Act of July 7, 1885, P. L. 259 vests such title in the plaintiffs. This act is entitled, "An act relating to the disposition of property of decedents, on failure of testamentary devises," and the text of the act is as follows, to-wit:

"That in the disposition of any property by will made or to be made for any religious, charitable, literary, educational or scientific use or purpose, if the same shall be void for uncertainty or the subject of the trust be not ascertainable, or has ceased to exist or be an unlawful perpetuity, such property shall go to the heirs at law or next of kin, of the decedent as in the case of persons who have died or may be intestate."

It is not contended that the will of testatrix in this case attempts to create "an unlawful perpetuity;" neither is it suggested that any uncertainty exists in the terms of the devise, which would render it void, nor that the object of the trust was not and is not ascertainable. The contention is that "the

object of the trust has ceased to exist," and that the testimony offered and excluded establishes the fact that the object of the trust ceased to exist in 1904, thus making the Act of July 7, 1885 (P. L. 259), effective to vest title in the plaintiff as heirs at law of the testatrix.

If, as matter of fact, the Millersburg congregation of the Evangelical Association of North America had ceased to exist prior to the death of the testatrix, the position of the plaintiffs would have been much stronger and perhaps unassailable. It has never been judicially decided that the Act of July 7, 1885, P. L. 259, can become operative after the disposition of property by will has once become effective, and an estate has vested and passed into the possession of beneficiaries or trustees, in accordance with the terms of the testamentary disposition. From its language the act does not appear to have been intended to work a divestiture of an estate which has once become vested. Its purpose apparently is to vest title in "the heirs at law and next of kin," if at the death of a testator the specific provisions of a testamentary paper cannot then be effective for any of the reasons named in the statute. The language is "if the will shall be void," not shall become void, for any of the statutory reasons.

In the present case it is conceded that none of these statutory reasons existed at the time of the death of the testatrix, and that the premises here in question then became immediately vested in the trustees named in her will. By the terms of the will they are to hold in trust by themselves, their successors and assigns forever "for the uses and purposes of the Millersburg congregation of the Evangelical Association of North America."

By the first paragraph of her will the testatrix gives to the same trustees all of her personal estate after the payment of debts and certain expenses "in trust for the Evangelical Association of North America to be used and expended for such purposes as the ministry and membership of the congregation at Millersburg aforesaid may deem advisable and proper."

No restriction is placed in either clause of the will upon the uses and purposes to which the Millersburg congregation may either directly or indirectly apply the property bequeathed and devised to the trustees.

No provision exists in the will for the control or ownership of the whole or any part of the estate of the testatrix

at any time, or under any circumstances by her heirs at law or next of kin. No estate either in reversion or remainder is created thereby.

Counsel for plaintiffs have referred us to the case of Henderson vs. Hunter, 59 Pa. 335, as in some measure supporting their present contention. In that case Mr. Justice Agnew delivering the opinion of the court at pages 339-340 and 341, uses the following language, to-wit:

"This was an action of trespass by church trustees under a deed of trust made by Thomas Pillow in 1836, for taking down and removing the materials of a church building in 1867. The case turns on the limitation in the deed. The legal estate of the trustees clearly has no duration beyond the use it was intended to protect. The word "successors" is used to perpetuate the estate, but as the trustees are an unincorporated body having no legal succession, their is nothing in the terms of the grant to carry the trust beyond its appropriate use. This brings us to the limitation of the use itself.

It is for the erection of "a house or place of worship for the use of the members of the Methodist Episcopal Church of the United States of America (so long as they use it for that purpose, and no longer, and then to return back to the original owner), according to the rules and discipline which, from time to time, may be agreed upon and adopted by the ministers and preachers of the said church at their general conference in the United States of America.' This is the main purpose of the trust, the other portion of the deed relating to the use being ancillary only to this principal object. The interjected words, 'so long as they use it for that purpose and no longer, and then to return back to the original owner,' are terms of undoubted limitation, and not of condition. They accompany the creation of the estate, qualify it, and prescribe the bounds beyond which it shall not endure."

"The effect of the limitation in this case was that the estate of the trustees terminated the moment the house ceased to be used as a place of worship according to the rules and discipline of the church, by the members to whose use in that manner it had been granted; and the reversion ipso facto returned to Thomas Pillow, the grantor. The abandonment of the house as a place of worship, therefore, became a chief question in the cause, because the title of the trustees to the property, and consequently their right to maintain this action hinged upon this event."

In the present case, however, there is no limitation upon the estate granted to the trustees and no condition annexed which would work a termination of the estate, and we are of opinion, therefore, that this authority does not support the contention of the plaintiffs here.

The case of Slegel vs. Lauer, 148 Pa. 236, is also referred to by the learned counsel for the plaintiffs as sustaining their position that the will of Mary Knouff vests a base or qualified fee in and to the premises in the trustees, who are the defendants here. That case, however, is materially different in its essential facts. That was a bill in equity for the cancellation of a deed upon the ground that the purpose for which it was specifically made no longer existed and that the deed was being improperly used to prevent the sale of the property at an adequate price, and that it was a cloud upon the title. The deed in question had been made December 1, 1772, by George Fleisher to the commissioners of Berks County, Pa., for a strip of land eight feet in width by two hundred and thirty feet in depth, adjoining the prison lot and wall in Reading, Penna., with a reservation to the grantor, his successors and assigns forever of the free liberty and use of the strip and every part thereof for an open yard or grass plot. In the habendum the purpose of the conveyance was specifically stated as follows, to-wit:

"To and for the use, intent and purposes following: that is to say, to be and remain forever hereafter unbuilt on in order to prevent any prisoner or prisoners making their escape over the said prison wall by reason or means of any building to be erected contiguous to the same wall."

A new prison having been erected more than a mile distant, the old prison was abandoned and the commissioners of Berks county on April 2, 1849, conveyed the old prison lot with its appurtenances to William Rhodes in fee. The plaintiff in the bill had acquired the title to the Fleisher lot and the defendant to the old prison lot.

The court below in an able opinion by Judge Endlich, which was affirmed by the Supreme Court, held that the purpose stated in the habendum explained the nature of the estate granted by the conveyance and made it a "base or qualified fee."

In the present case no such conclusion can properly be reached from a consideration of the devise in question.

Houston's Estate, 12th District Reports, 121, is also re-

ferred to by the learned counsel for plaintiffs as sustaining their position here.

In that case, Ashman, J., says:

"The testator created no trust; he simply made a gift outright to a designated society. His purpose was to serve the interests of that society, and through it, to aid in the abolition of slavery. But the single end of the society was ultimately attained; slavery was abolished, and thereupon the society, having outlived its function, disbanded. Without going into a labored analysis of the cases in Pennsylvania, illustrating the law as it stood at the date of the testator's death, it is sufficient to say that the cy pres doctrine seems to have been adopted only where a discretion was lodged somewhere in the disposition of the charitable gift, or where the object itself of the gift was permanent."

This language of the learned judge marks the distinction between that case and the present one. Here a trust has undoubtedly been created by the testatrix, and her devise is to trustees, and that devise took effect and became vested upon her decease, and as we have already stated, there is no provision in her will for any remainder, reversion or residue of her estate under any circumstances whatsoever.

We have carefully examined all the cases cited by the learned counsel for plaintiffs and have reached the conclusion that they do not sustain their contention in the present case.

The learned counsel for the defendants has referred us to numerous cases in support of the position taken by the trustees, who are the defendants here.

Upon the authority of these cases, including Pepper's Estate, 154 Pa. 397; Fisher's Appeal, 162 Pa. 238; Funk's Estate 16 Superior Court 434; Nauman vs. Wideman 182 Pa. 263, we are of opinion that the learned and lamented trial judge properly excluded the evidence tendered at the trial and correctly instructed the jury to render a verdict in favor of the defendants as the devisees of the testatrix.

We therefore overrule the motion for a new trial in the present case and direct that judgment be entered upon the verdict upon payment of the jury fee.

COMMONWEALTH OF PENNSYLVANIA, EX REL. ATTORNEY GENERAL *vs.* TEXTILE MUTUAL FIRE INSURANCE COMPANY.

Corporations—Receivers—Credits—Compensation.

On October 24, 1901, the court having jurisdiction of a receiver made an order staying the collection of assessments. On December 10, 1902, it made absolute a rule to file an account and resign. On April 8, 1905, a successor in the receivership was appointed. *Held,* on exceptions to report of auditor appointed to pass upon exceptions to the receiver's account, that, notwithstanding the orders of October 24, 1901, and December 10, 1902, the receiver remained charged with the duties of the receivership until the appointment of his successor. That he was entitled to credit for disbursements actually and necessarily made in the performance of his duties, between the dates of the orders and the appointment of his successor.

A receiver of an insolvent corporation is entitled to compensation for his services in resisting the efforts of the officers of the corporation to prevent him from obtaining custody of its books and papers for the purpose of performing his duties as receiver.

A receiver will not be refused compensation for his services, on accounts of mismanagement or delay in closing up the affairs of the corporation committed to his care, where no actual loss has resulted from such mismanagement or delay and bad faith on the part of the receiver has not been clearly shown.

A receiver and his attorney divided between them the attorney's commissions on certain collections made by the attorney acting for the receiver. The auditor appointed to pass upon exceptions to the receiver's account surcharged the receiver with the amount of the fees thus received and disallowed his claim for services. *Held,* that while the division of fees between the receiver and his attorney merited the condemnation of the court, the surcharge made by the auditor was sufficient censure for his conduct in this particular and that a reasonable compensation for his services should be allowed.

Exceptions to auditor's report. C. P. Dauphin County, Nos. 21, 22 and 23, Commonwealth Docket, 1899.

E. Hunn and *Robert Snodgrass* for George W. Shoemaker.

J. W. Bayard and *Olmsted & Stamm* for Thomas S. Pierce.

MCCARRELL, J., March 25, 1908.

The three corporations mentioned in the foregoing caption were proceeded against severally at the instance of the attorney general and decrees were entered in each case dissolving the respective corporations and appointing George F. Shoemaker as the receiver of each.

The corporations had been under the management of the same officers and the business thereof, while conducted separately so far as keeping accounts was concerned, was practically managed as that of a single corporation.

The original reports of the auditor were filed February 27, 1905, and upon application of the receiver, who was surcharged by said reports, the court, after the confirmation thereof, opened the decree of confirmation and referred the whole matter to the same auditor for further consideration.

We have now before us the three supplemental reports of the auditor, who has submitted a separate report with respect to each corporation, and the exceptions to these reports are now to be considered.

The exceptions which the auditor was originally appointed to pass upon were exceptions to the accounts of George W. Shoemaker, the receiver of the several corporations named in the above caption.

These exceptions all relate to charges on the credit side of his respective accounts for commissions, services and various expenses in connection with his receivership.

These exceptions have all been disposed of by the auditor in his supplemental reports by allowing to the receiver compensation for services down to certain dates and disallowing compensation after those dates, and also by allowing for expenses incurred between certain dates and disallowing claims for certain expenses beyond those dates.

Exceptions have been filed to these supplemental reports both on account of George W. Shoemaker, the receiver, and on behalf of creditors of the corporations.

We have carefully considered these respective reports, the several exceptions thereto which were dismissed by the auditor, the arguments submitted by counsel in regard to these exceptions, and all the evidence relating thereto.

The learned auditor upon the theory that after the order of October 24, 1901, staying the collection of assessments pending the rule to show cause, the receiver was practically relieved and discharged from all duties of the receivership, has disallowed certain expenses incurred and paid by the re-

ceiver for clerk hire, travelling and other incidental expenses after that date.

He has also, upon the theory that after December 10, 1902, the receiver was relieved and discharged from all duties of the receivership and could lawfully do nothing else than file his account and statement, as directed by the court, disallowed certain disbursements made by the receiver for office rent, storage of books, etc., after that date.

Notwithstanding the orders of October 24, 1901, and of December 10, 1902, George W. Shoemaker continued to be the receiver of each of the corporations named in the foregoing caption, and was charged with performing all the duties incident to his receivership, and he continued as such receiver, and thus charged with the performance of all the duties of the receivership until April 8, 1905, when this court appointed Thomas S. Pierce as his successor. We are therefore of opinion that the receiver is properly entitled to credit for the disbursements actually and necessarily made by him in the performance of the duties of his receivership and is entitled to credit for the sums actually and necessarily paid by him for clerical assistance, postage, stationery, office rent and storage of books, and we accordingly modify the supplemental reports of the learned auditor by allowing George W. Shoemaker, the receiver, credit for the disbursements made by him for these purposes, at the same rates as have been approved by the learned auditor, as is hereinafter shown in our modification of the several supplemental reports.

The learned auditor has allowed to George W. Shoemaker, receiver, the sum of four hundred and fifty ($450.00) dollars for his services in resisting the efforts of the officers of the corporations to prevent the receiver from obtaining the custody of the books and papers of the respective corporations, in order to enable him to perform the duties imposed upon him by this court when it appointed him as the receiver, and in this allowance we fully concur.

The learned auditor, however, has disallowed any further claim of Mr. Shoemaker for services or commissions upon the ground of mismanagement or mistaken management of the estates, and unnecessary delay in closing up the business of the corporations committed to his care.

It does not appear that any asset of the estates has been lost by reason of mismanagement or mistaken management or by delay, and the auditor does not distinctly find that the

receiver was guilty of bad faith or lack of integrity, however dilatory he may have appeared to be in the conduct of the business of the receivership, and we are unable to find in the testimony that indubitable proof necessary to warrant such a finding.

The only suggestions contained in the supplemental reports of the learned auditor indicating bad faith or lack of integrity relate to the moneys collected by the receiver from the Belnap Mill Company, and the division of fees with Mr. Satterthwaite, the attorney for the receiver, in his claim against the Wilson estate at Trenton, New Jersey.

The money collected from the Belnap Mill Company does not appear to have been received until after the accounts of the receiver had been filed in this court, and we are unable to find beyond doubt that the receiver has shown bad faith or lack of integrity in this particular. As the learned auditor well says, every presumption is in his favor, not only in regard to this, but as to all other matters relating to the receivership.

While we cannot but unsparingly condemn the division of fees made between Mr. Satterthwaite and the receiver, yet we feel that the surcharge of six hundred dollars and eighty-four cents ($600.84) made against him in connection with the Wilson estate and his arrangement with Mr. Satterthwaite, is a sufficient censure for the receiver's conduct in this particular.

We are therefore of opinion, after carefully considering all the circumstances connected with this case, that George W. Shoemaker has not forfeited all right to compensation for his services as receiver, and have concluded to allow him the further sum of four hundred and fifty ($450.00) dollars, to cover his services and commissions after the date when he obtained possession of the books and papers of the respective corporations.

If it were not for the delay which has existed and the large amounts disbursed for clerical assistance, counsel fees, and other expenses connected with the receivership, we would have allowed him a larger sum.

In discussing the receiver's claim for compensation, as also his respective claims for clerical assistance and other expenses, the learned auditor seems to have measured the receiver's rights by a consideration of results accomplished by him.

While a consideration of results may have been proper, yet we are of opinion that results accomplished should not have controlling influence in reaching our conclusion, particularly in the light of all the circumstances connected with this receivership, which clearly show that the officers of these corporations, some of whom are exceptants here, instead of aiding the receiver in a prompt and proper settlement of the affairs of the respective corporations, have apparently done much to hinder the receiver in his work and to cause delay in the final settlement of the affairs of the receivership. The course adopted by these officers appears to us to be not entirely commendable.

The learned auditor has concluded that under all the circumstances George W. Shoemaker, the former receiver, should be charged with all the expenses of the audit, except the sum of three hundred ($300.00) dollars, for which he allows him credit upon the theory that the work done in connection with the preparation of these supplemental reports will in the future inure to the benefit of the respective corporations and save expense in the final distribution of the estates.

In our opinion the theory upon which the learned auditor allows credit to the former receiver for the sum of three hundred ($300.00) dollars is rather remote, problematical and uncertain.

Under all the circumstances of the case, however, we have concluded that it is proper to charge George W. Shoemaker with all the expenses of the audit, excepting the sum of three hundred ($300.00) dollars, the division of the costs of the audit in this proportion being in our opinion just and equitable under all the circumstances of the case.

We therefore modify the several supplemental reports of the auditor in the manner following, to-wit:

The supplemental report of the auditor upon the account of the receiver for the Textile Mutual Fire Insurance Company, No. 21, Commonwealth Docket, 1899, is now modified, as follows, to-wit:

The auditor finds, page, 94, that there is a balance due by the receiver of, ...	$310 44
We now allow to the receiver the following credits in addition to those given him by the auditor:	

1.	For clerk hire,	$167 25	
2.	For office rent,	72 00	
3.	For travelling expenses,	15 18	
4.	For postage,	32 63	
5.	For stationery,	7 11	
6.	For storage of books,	30 67	
7.	For services,	150 00	
			$474 84

This modification of the supplemental report of the auditor results in a balance due to George W. Shoemaker, the former receiver, of, ... $164 41 which amount we now find is justly due and owing to said receiver.

The supplemental report of the auditor upon the account of the receiver for the Automatic Mutual Fire Insurance Company, No. 22, Commonwealth Docket, 1899, is now modified, as follows, to-wit:

The auditor finds, page 104, that there is a balance due by the receiver of, ... $352 83

We now allow to the receiver the following credits in addition to those given him by the auditor:

1.	For clerk hire,	$162 00	
2.	For office rent,	72 00	
3.	For travelling expenses,	14 72	
4.	For postage,	32 63	
5.	For stationery,	6 88	
6.	For storage of books,	30 67	
7.	For services,	150 00	
			$468 90

This modification of the supplemental report of the auditor results in a balance due to George W. Shoemaker, the former receiver, of, ... $116 07 which amount we now find is justly due and owing to said receiver.

The supplemental report of the auditor upon the account of the receiver for the Protective Mutual Fire Insurance Company, No. 23, Commonwealth Docket, 1899, is now modified, as follows, to-wit:

The auditor finds, page 106, that there is a balance due by the receiver of, ... $363 28

We now allow to the receiver the following credits in addition to those given him by the auditors:

1.	For clerk hire, ...	$154 00	
2.	For office rent, ...	72 00	
3.	For travelling expenses, ...	15 18	
4.	For postage, ...	32 63	
5.	For stationery, ...	11 17	
6.	For storage of books, ...	30 67	
7.	For services, ...	150 00	
			$465 65

This modification of the supplemental report of the auditor results in a balance due to George W. Shoemaker, the former receiver, of, ... $102 37 which amount we now find is justly due and owing to said receiver.

The supplemental reports of the auditor in the cases mentioned in the foregoing caption as hereinbefore modified, are now confirmed absolutely and it is ordered that payment be made in each case in accordance therewith. The foregoing conclusions are the result of conference and consideration by and with the president judge, who concurs in this opinion.

IN RE ESTATE OF JACOB BUCK, INSOLVENT.

Insolvents—Preferences—Farmers—Act of June 4, 1901.

The Act of June 4, 1901, P. L. 404, is essentially a bankrupt law. It differs in some of its features from the Federal law on the same general subject, but it is in entire correspondence with it in its objects and purposes, and not materially different in its methods.

The purpose of the act is to secure an equal distribution of the property of an insolvent to and among creditors, without preference to any, and, in order that this purpose may be secured, the court has full power and authority to make such orders and decrees as will produce this result.

A farmer is not amenable to the Federal bankrupt law; and, upon insolvency, his estate is administered under the Act of June 4, 1901.

When creditors, having knowledge of their debtor's insolvency, secure a transfer of personal property with intent to obtain a preference over other creditors, the court having jurisdiction will order a surrender of the property thus transferred to the receiver of the insolvent's estate, appointed under the Act of June 4, 1901.

Such order will be made without prejudice to the right of the creditors affected by it to present their claim for expenses incurred in the keeping of such property while in their possession.

Rule to show cause why property should not be surrendered to receiver. C. P. Dauphin County, No. 706, January Term, 1908.

Wm. H. Earnest, for rule.

E. E. Beidleman, contra.

McCARRELL, J., March 31, 1908.

On January 11, 1908, upon petition of creditors of Jacob Buck, filed in this court under section 7 of the Act of June 4, 1901, P. L. 408, the court granted a rule to show cause why a receiver should not be appointed for the estate of the alleged insolvent, Jacob Buck, and why all legal proceedings there against, if any, vacated and set aside.

Notice of this rule was given to Jacob Buck, the alleged insolvent, and to his various creditors, including W. H. Rapp and Levi Miller.

In pursuance of this rule, testimony was taken at the bar of the court in regard to the various matters alleged in

the petition of creditors, and at this hearing W. H. Rapp and Levi Miller were present in court and gave their testimony.

After carefully considering the testimony thus taken and the arguments submitted thereon, the court on February 25, 1908, made an order finding that the said Jacob Buck is an insolvent within the contemplation of the Act of June 4, 1901, P. L. 404, entitled "An act relating to insolvency; embracing, among other matters, voluntary assignments for the benefit of creditors, and adverse proceedings in insolvency by creditors; forbidding, also, certain preferences; providing for the distribution of the insolvent's estate, and in certain contingencies relieving him, and others liable with him, from further liability for his or their debts."

The court further found that the said insolvent, Jacob Buck, during the last four months preceding the filing of the petition against him, with a view to giving a preference to W. H. Rapp and Levi Miller, two of his creditors then having claims against him, did assign, transfer or pledge for a debt then existing to the said W. H. Rapp and Levi Miller, certain articles of personal property, more specifically appearing in a schedule attached to said order and made a part thereof and marked "Exhibit A," and the court thereupon, in accordance with the provision of the said Act of Assembly appointed David H. Reigle as receiver of the estate of the said insolvent, and directed that he be clothed with all the powers vested in such receiver by the said Act of Assembly.

This receiver has since duly qualified and has given bond, approved by the court, and as required by the act, has filed a schedule of property alleged to belong to the said insolvent.

On February 26, 1908, the said receiver presented to this court his petition, alleging that W. H. Rapp and Levi Miller, two of the creditors of said insolvent, had in their possession certain personal property, particularly described in Schedule "A" attached to his said petition, and being the said property referred to in the schedule attached to the aforesaid order of court, and asking the court for an order directing the said W. H. Rapp and Levi Miller to turn over to him, as such receiver, the said articles of personal property.

Upon this petition the court granted a rule upon W. H. Rapp and Levi Miller to show cause why a peremptory order should not issue, commanding them to turn over the said property to David H. Reigle, the receiver, and directing that pending the determination of said rule the said W. H. Rapp

and Levi Miller should not dispose of the said personal property.

An answer to this rule was filed by the said W. H. Rapp and Levi Miller on March 7, 1908.

In this answer W. H. Rapp and Levi Miller admit that they have in their possession the personal property mentioned in said schedule, and allege that the same belongs to them, and claiming that they are entitled to hold the same until the question of their right has been passed upon by a jury.

In their answer they do not show by what title they claim this property, nor under what circumstances they acquired it. They practically admit that it was previous to its coming into their possession, the property of Jacob Buck, who has been found to be an insolvent. We assume, therefore, that they acquired possession of the property from Jacob Buck under the circumstances shown by the testimony taken at the hearing upon the original rule granted in this case. That testimony clearly indicated that at the time of the transfer of said property by Jacob Buck to W. H. Rapp and Levi Miller, the said Jacob Buck was insolvent within the contemplation of the Act of Assembly aforesaid, and also clearly indicated that they, the said W. H. Rapp and Levi Miller had knowledge of the financial condition of the said Jacob Buck, and obtained the transfer to them of the said property with intent to secure for themselves a preference over other creditors of the said Jacob Buck.

Upon the testimony thus submitted, we find the facts to be that Jacob Buck was then insolvent; that the said W. H. Rapp and Levi Miller had knowledge of his financial condition, and secured and obtained the transfer of the personal property in question with intent to secure for themselves, as creditors of the said Jacob Buck, a preference over his other creditors.

This is in violation of the aforesaid act of assembly, and the question now to be determined under the pending rule, is whether or not the court has authority to direct the surrender of the said property to the receiver of the said Jacob Buck.

Our Act of Assembly of June 4, 1901, is essentially a bankrupt law. It differs in some of its features from the Federal law in the same general subject, but it is in entire correspondence with it in its objects and purposes, and not materially different in its methods.

In the present case Jacob Buck being a farmer is not

amenable to the Federal bankrupt law; and therefore no question arises here as to whether the existence of the Federal Bankrupt Law suspends the operation of our Act of June 4, 1901.

Our act intended that the estate of an insolvent should be administered and distribution made by a receiver as the officer of the court and acting under the direction of the court.

The seventh section of the act, under which this proceeding was commenced, expressly authorizes the court to make such order or decree as the facts found will justify, and to enforce such orders and decrees by attachment of the person or sequestration of the property of the person in default.

We are of opinion that under the facts found, as hereinbefore stated, relating to the transfer of the property in question to W. H. Rapp and Levi Miller, the said property should be delivered to the receiver for administration by him, in accordance with the provisions of said act.

The act seems to empower the court to find the facts from the testimony submitted to it, and to make such orders and decrees based upon the facts thus found, as may be necessary to secure the administration and distribution of the estate of the insolvent in accordance with the provisions of the law.

Under the act, which provides a complete system for the administration and distribution of the estate of an insolvent, it is provided in Section 19 that executions may be stayed by the court in order to enable the property of the insolvent levied upon to be sold by the assignee.

This Act of Assembly was considered by Mr. Justice Stewart, while president judge of the Franklin district, in the estate of John S. Hull, reported in 25th County Court Reports, page 353. At page 358, the learned president of the Franklin district uses the following language, to-wit:

"Having regard to the act as a whole, establishing, as it does, a complete scheme or system of rules for the settlement of assigned and insolvent estate, we are of the opinion that it contemplates an entire transfer of the property into the custody of the assignee, for the purpose of conversion and distribution, unembarrassed by adverse legal process, whenever it is possible or practicable for this to be accomplished, through the intervention of the court. It does not seem to be a question for the court, in any case, whether such interven-

tion will promote, or prejudice, the interests of any concerned. We find no suggestion of such an idea in any part of the act. Notwithstanding the language is that the court may restrain, we are of opinion, from the general purpose of the act, and the absence of all reference to the legal considerations which could operate upon a discretionary power, that this provision in the act is mandatory, and requires the court, whenever the occasion arises, to exercise the power conferred."

He accordingly held that inasmuch as the express purpose of the act is to enable the property to be sold by the assignee, he was bound to set aside a Fi. Fa. which had been levied upon personal property prior to the making of the deed of assignment, and accordingly made such order.

The purpose of the act undoubtedly is to secure an equal distribution of the property of an insolvent to and among creditors, without preference to any, and, in order that this purpose may be secured, the court apparently has full power and authority to make such orders and decrees as will produce this result.

After full consideration of all the testimony submitted and of all the circumstances connected with the proceedings in this case, it is now ordered and decreed that W. H. Rapp and Levi Miller, the respondents in the pending rule to show cause, shall deliver to David H. Reigle, receiver of Jacob Buck, within five days from the receipt by them of a certified copy of this order, the personal property referred to in the receiver's petition, filed February 26, 1908, and particularly described in "Schedule A," attached to the said petition, so that the said receiver may dispose of the same and make disposition of the proceeds thereof as required by law.

This order is made without prejudice to the rights of the said W. H. Rapp and Levi Miller, if any such rights they have, to present to the said receiver and this court their claim for expenses which may have been incurred by them in the keeping and maintenance of the live stock mentioned in said schedule and in the storage of the other articles of personal property referred to and in said schedule, such claim when and if presented to be considered by the said receiver and determined by this court in such manner as to right and justice may appear to appertain upon the hearing of such claim.

In re Sewage System of Easton.

Discharge of sewage into waters of Commonwealth—Act of April 22, 1905.

Under the Act of April 22, 1905, P. L. 260, it is the duty of the commissioner of health to assume charge of cases in which cities that were discharging sewage into the waters of the commonwealth, prior to the passage of the act, continue such discharge without having filed the report which the sixth section of the act requires.

Attorney General's Department. Opinion to Dr. Samuel G. Dixon, Commissioner of Health.

Fleitz, Deputy Attorney General, March 25, 1908.

Your letter of the 23d inst. is before me. In it you state that the city of Easton is discharging sewage into the waters of the state, which waters are subsequently used by several large municipalities of the commonwealth for drinking purposes, and that within a few months there has been an excessively high rate of typhoid fever in some of the municipalities, attributable to the pollution of the Delaware river by the sewage of Easton; and you ask to be advised as to the proper action for you to take in the premises.

It is your duty to assume charge of cases of this kind under the authority of the Act of 22d of April, 1905, P. L. 260, entitled:

> "An act to preserve the purity of the waters of the state, for the protection of the public health."
> Section 4 of said act reads as follows:
>
> "No person, corporation, or municipality shall place, or permit to be placed, or discharge, or permit to flow into any of the waters of the State, any sewage, except as hereinafter provided. But this act shall not apply to waters pumped or flowing from coal mines or tanneries, nor prevent the discharge of sewage from any public sewer system, owned and maintained by a municipality, provided such sewer system was in operation and was discharging sewage into any of the waters of the State at the time of the passage of this act. But this exception shall not permit the

discharge of sewage from a sewer system which shall be extended subsequent to the passage of this act.

"For the purpose of this act, sewage shall be defined as any substance that contains any of the waste products, or excrementitious or other discharges from the bodies of human beings or animals."

From the facts contained in your letter it appears that the city of Easton has been derelict in its duty in this matter. In 1906, the governor, attorney general and commissioner of health, under authority of section 5 of the act in question, approved plans for sewer extensions in that city, providing for the discontinuance of the discharge of sewage into the waters of the Commonwealth within three years, which plans were not, however, adopted by the local authorities. Neither did they avail themselves of the provisions of section 6 of said act, which reads as follows:

"It shall be the duty of the public authorities, having by law charge of the sewer system, of every municipality in the state, from which sewage was being discharged into any of the waters of the state at the time of the passage of this act, to file with the commissioner of health, within four months after the passage of this act, a report of such sewer system, which shall comprise such facts and information as the commissioner of health may require. No sewer system shall be exempt from the provisions of this act, against the discharge of sewage into the waters of the state, for which a satisfactory report shall not be filed with the commissioner of health, in accordance with this section."

I also understand that a proposition to bond the city in a sum sufficient to pay for the construction of an intercepting system and sewage disposal works was recently overwhelmingly defeated by the voters of that municipality.

This condition cannot be permitted to continue, and it is your duty, and you have the authority under the laws of the commonwealth, to get into communication with the authorities of the city of Easton at the earliest possible moment with a view of devising some plan whereby the evil complained of may be corrected, and I advise that course before proceeding with the more radical remedies provided by the act itself.

Reserve Fund of Banking Institutions.

Banks—Reserve fund—Act of May 8, 1907.

In computing the aggregate of all the immediate demand liabilities of banking institutions subject to the provisions of the Act of 8th May, 1907, P. L. 189, notes payable on demand, given by such institutions for borrowed money, should be included.

A liability given for borrowed money, payable on demand, is an item in the nature of a claim payable on demand, and is a liability that requires the protection of the reserve as fully as such protection is required for deposits subject to check or payable on demand.

Attorney General's Department. Opinion to Hon. J. A. Berkey, Commissioner of Banking.

Todd, Attorney General, April 2, 1908.

I am in receipt of your letter of April 1, 1908, inquiring substantially whether, in computing the aggregate of all the immediate demand liabilities of banking institutions subject to the provisions of the Act of 8th May, 1907, P. L. 189, entitled:

> "An act to provide for the creation and maintenance of a reserve fund in all banks, banking companies, savings banks, savings institutions, companies authorize to execute trusts of any description and to receive deposits of money, which are now or may hereafter be incorporated under the laws of this commonwealth, and in all trust companies or other companies receiving deposits of money, which may have been heretofore or which may hereafter be incorporated under section twenty-nine of the act approved April twenty-ninth, one thousand eight hundred and seventy-four, entitled 'An act for the creation and regulation of corporations', and the supplements thereto",

upon which aggregate a reserve fund of at least fifteen per centum is required by section 2 of said act, your department should include paper payable on demand given by such institutions for borrowed money.

Your inquiry requests a construction of certain provi-

sions of the act in question. By section 2 of the act it is provided as follows:

> "Every such corporation, receiving deposits of money subject to check or payable on demand, shall, at all times, have on hand a reserve fund of at least fifteen per centum of the aggregate of all its immediate demand liabilities."

In the absence of legislative definition, there might be room for some discussion as to the meaning of the phrase "immediate demand liabilities" as used in the paragraph of section 2 above quoted, but in section 4 of the act the legislature has defined the phrase as follows:

> " 'Immediate demand liabilities' shall include all deposits payable on demand, and all items in the nature of claims payable on demand."

It is clear that one of the purposes of the act is to provide for a reserve equal to fifteen per cent. of the immediate demand liabilities of the institutions subject to its provision, and I am of the opinion that a liability given for borrowed money payable on demand is an item in the nature of a claim payable on demand, and is a liability that requires the protection of the reserve as fully as such protection is required for deposits subject to check or payable on demand.

IN RE SALARY OF HON. ISAAC JOHNSON, JUDGE OF THE THIRTY-SECOND JUDICIAL DISTRICT.

Judges—Salary in districts having a population in excess of 90,000—Act of April 14, 1903.

Under the Act of April 14, 1903, P. L. 175, in judicial districts having a population greater than 90,000, and less than 500,000, the annual salary of the judge, while the work is all performed by a single judge, is $7,000. If an additional judge is provided for such district, the annual salary of each judge is $6,000.

The additional compensation allowed in judicial districts having a population greater than 90,000, in which the work is all performed by a single judge, ceases when the reason of its payment is removed by the appointment of an additional judge.

Attorney General's Department. Opinion to Robert K. Young, Auditor General.

TODD, Attorney General, April 3, 1908.

Your predecessor in office, under date of April 9, 1907, wrote to me, enclosing letter of William I. Schaffer, Esq., of April 4, 1907, as attorney for Hon. Isaac Johnson, president judge of the Thirty-second judicial district, wherein he contends that Judge Johnson is entitled to be compensated, under the Act of April 14, 1903, at the annual salary of $7,000.00, and asking for the opinion of this department as to the correctness of that contention.

Under date of May 2, 1907, I wrote to Auditor General Snyder, acknowledging receipt of his letter of April 9, 1907, and stated therein that I understand that he had settled the salary of Judge Johnson at the rate of $6,000.00 a year after his colleague, the Hon. William B. Broomal, was appointed associate law judge of that district, and I advised him that, in my opinion, his contruction of the law was correct, and I promised to write an opinion, confirmatory of this, to be handed to you. Recently I have received a letter from Mr. Schaffer, under date of March 28, 1908, requesting me to write you a more formal opinion.

The facts in connection with the above inquiry are that the Hon. Isaac Johnson was commissioned as president judge of the Thirty-second judicial district of the commonwealth on the 3d day of December, 1900. The said district has a population of more than 90,000 and less than 300,000. Under the pro-

visions of the act approved the 28th of February, 1907, P. L. 4, entitled "An act to provide for an additional law judge of the several courts of the Thirty-second judicial district," Hon. William B. Broomall was commissioned, on the 7th day of March, 1907, such additional law judge, to serve until the first Monday of January, 1908. He took the oath of office on the 16th of March, 1907. He has since been duly elected by the qualified voters of the district, and has been commissioned as such additional law judge for the period of ten years from the first Monday of January, 1908.

The auditor general settled the salaries of the president and additional law judge of said district on the basis of $7,000.00 a year to Judge Johnson from March 1 to March 16th, 1907, and since that date on the basis of $6,000.00 a year. The Act of 28th of February, 1907, *supra,* provides that such additional law judge shall receive the compensation provided by law for judges learned in the law as if said office had been established at the time of and subject to the provisions of an act, entitled "An act to fix the salaries of judges of the supreme court, the judges of the superior court, the judges of the courts of common pleas, and judges of the orphans' court", approved the 14th of April, 1903, P. L. 175.

This act provides, in section 4, as follows:

> "That from and after the first day of January, one thousand nine hundred and four (1904), the judges of the court of common pleas, learned in the law, in all the judicial districts of this commonwealth, except as hereinbefore provided, shall receive the following compensation:
>
> "In judicial districts having a population of 90,000 and less than 500,000, the annual salary of the judges of the court of common pleas, learned in the law, shall be six thousand dollars ($6,000); and in said judicial districts having a population of 90,000 and less than 500,000, *where there is only one judge,* he shall receive $1,000 additional; and in other judicial districts, having less than 90,000, the annual salary of the judges of the court of common pleas, learned in the law, shall be five thousand ($5,000); but the judges, learned in the law, of the court of common pleas of Dauphin county, shall each receive fifteen

hundred dollars ($1,500) additional for trying the commonwealth's civil cases."

Counsel for Hon. Isaac Johnson contends, first, that the salary of a member of the judiciary cannot be diminished during his term of office, and, second, that the action of the auditor general in making the settlement above referred to is in effect a diminution of the salary of his client during his term of office.

In the recent case of Commonwealth ex rel. *vs.* Mathues, 210 P. S. 372, it was decided that the above mentioned salary act of 1903 applies to all judges in commission at the time of the approval of the act and not merely to those thereafter to be commissioned. It also decided that the provision of article III, section 13, of the constitution, that "No law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment," has no application to the judiciary and cannot be read into the judiciary article, which refers to a separate and co-ordinate branch of the government.

Having passed upon the question then before it, as to whether or not salaries of judges then in commission could be increased by deciding that the constitutional provision relative to increasing or diminishing salaries of officers after their election or appointment had no application to the judiciary, the supreme court expressed no opinion on the converse of the proposition, viz: whether or not salaries could be diminished during the term of office of a member of the judiciary. That question was not before the court. In the opinion of the court below, however, the following language is found:

> "It is not essential to the question before the court to decide as to the right of the legislature to diminish the salary of a judge during the term for which he may have been elected, and we do not make any decision on that point at this time, but we state most emphatically that it is our belief that the legislature have no right to diminish the salary of a judge during the term for which he may have been elected, and that this protection to the judiciary is not, in any sense, dependent upon section 13 of article III of the present constitution of the state. The case of Commonwealth *vs.* Mann, 5 W. & S. 403, estab-

lishes this point to our mind, beyond a doubt. It is perfectly true that that case was decided under the old constitution of 1838, which contained in the judiciary section the words 'an adequate compensation to be fixed by law, which shall not be diminished during their continuance in office,' and that the phrase 'shall not be diminished during their continuance in office' was stricken from the present constitution and is not to be found therein, but nevertheless any one who reads that case carefully will see that Judge Rogers did not found his decision exclusively upon that phrase in the old constitution, but founded it on fundamental constitutional principles, underlying the entire structure of our constitutional government."

The question to be determined, therefore, is whether the settlement made by the auditor general is in reality a diminishing of the salary of Judge Johnson. He is a judge in a judicial district having more than 90,000 population and less than 500,000. When he was commissioned in 1900 the salary act of 1883 was in force. That act provided that, except in the counties of Philadelphia and Allegheny, the judges of the courts of common pleas should receive $4,000 each, except the president judge of the Twelfth judicial district, who should receive $1,000 additional for trying the commonwealth's civil cases, and provided that in all districts having a population of over 90,000, and having but one judge, the salary should be $5,000 per annum. Under the Act of 1903, *supra,* Judge Johnson's salary was increased to $6,000, and when in such a district there is only one judge, such judge is to receive $1,000 additional, and it was under this clause that Judge Johnson was paid $7,000 so long as he remained the sole judge of the Thirty-second judicial district.

While there is a difference in the language used in these salary acts, yet they mean substantially the same thing, viz: that in a judicial district having a population of between 90,000 and 500,000, the salaries of judges of the court of common pleas, learned in the law, shall, under the Act of 1883, be $4,000, and under the Act of 1903, $6,000, provided, however, that where there is but one judge in such districts he shall receive $1,000 additional as a compensation for the performance of the additional labor entailed upon him by reason of the fact that he is the sole judge in a large county.

The provision for the additional compensation is in effect a proviso.

> "A proviso is something ingrafted upon a preceding enactment, and is legitimately used for the purpose of taking special cases out of the general enactments and providing specially for them."
>
> "A proviso in a statute is a clause which defeats its operation conditionally, and differs from an exception, which exempts something absolutely from the operation of the statute by express words in the enacting clause."
>
> "An exception takes out of the statute something that otherwise would be part of the subject matter of it. A proviso avoids them by way of defeasance or excuse."
>
> "An exception is frequently put in the form of a proviso, and not infrequently what is in form a proviso is in addition an enacting clause and enlarges what precedes."
>
> Words and Phrases Judicially Defined, Vol. 6, page 5756 *et seq.*

While it has been held that the acceptance of a commission by a judge does not create a contract on the part of the judge to serve for the full term of his commission at the salary fixed by law at the date of his commission, yet in this particular case it is not to be overlooked that when Judge Johnson, as the only judge of the Thirty-second judicial district, accepted his commission in December, 1900, he knew, or is presumed to have known, that the salaries then fixed under the Act of 1883 for each of the judges of the courts of common pleas throughout the commonwealth of Pennsylvania, except in the counties of Philadelphia, Allegheny and Dauphin, was $4,000 per annum, with the proviso that in a district having a population exceeding 90,000 the judge of such district, if there is but one thereof, should receive additional compensation to the extent of $1,000. After the Act of 1903 went into effect, and he accepted the increased salary provided by that act, he did so knowing that the compensation fixed by the legislature for common pleas judges in a judicial district having a population of between 90,000 and 500,000 was $6,000, subject to the condition that if

there is but one judge to do all of the work in a judicial district of this size, he should receive an additional compensation of $1,000 for additional work.

The additional compensation provided for under these acts of assembly, in my opinion, is payable only so long as the conditions upon which its payment is based exist. Since the reason for the payment of additional compensation ceases by reason of the creation of the office of additional law judge in such district, the payment of the additional compensation also ceases. The reason for the payment no longer existing, the payment itself ceases.

But waiving all questions of the acceptance of the commission with the condition impliedly attached thereto, to the effect that the additional compensation should be paid only so long as Judge Johnson remained the sole judge in his district, I am of opinion that the fundamental legislative enactment relative to judicial salaries in districts such as the one in question, is that the salaries of the judges therein shall be $6,000 per annum. This is the amount fixed by the legislature in obedience to the mandate of the constitution that judges shall "receive for their services an adequate compensation which shall be fixed by law and paid by the state."

Recognizing the fact that in certain districts such as the county of Dauphin, and in districts having between 90,000 and 500,000 population, where but one judge is provided for, such judges have extra work, the legislature had provided additional compensation for such extra work. Up until the creation of the office of additional law judge in his district, Judge Johnson was entitled to additional compensation for extra work. It follows, then, that, as soon as the extra work ceases by the creation of the office of additional law judge, the additional compensation ceases with it.

The settlement made by the auditor general does not diminish Judge Johnson's salary during his term of office. His salary is $6,000 per annum, and it is provided that if he does extra work he shall receive an additional $1,000 for the performance of the same. He no longer performs the extra work for which the additional compensation was provided, and he is, therefore, entitled to receive but the salary of $6,000 from the date Judge Broomall took the oath of office, viz: March 16, 1907.

This disposition of the matter is in harmony with the de-

cision in Commonwealth ex rel. *vs.* Mathues, *supra,* to the effect that an act of assembly relating to the salaries of judges will not be construed so as to give judges upon the same bench, and engaged in the performance of exactly the same judicial functions, different compensation.

I therefore advise you that settlement of the salaries of both Judge Johnson, as president judge, and Judge Broomall, as associate law judge, of the Thirty-second judicial district, should be made on the basis of $6,000 per annum.

Child Labor.

School law—Compulsory attendance—Children of aliens—Child labor—Employment certificates.

The children of aliens are subject to the laws relating to compulsory school attendance to the same extent and in the same manner as the children of American citizens.

It is unlawful to issue an employment affidavit or certificate to a child unable to read and write the English language. Whether the child is able to read and write a foreign language is entirely immaterial.

Attorney General's Department. Opinion to Hon. J. C. Delaney, Chief Factory Inspector.

Cunningham, Assistant Deputy Attorney General, April 8, 1908.

Your inquiry of January 16, 1908, was duly received by this department. In this inquiry you submit two questions, stated as follows:

> 1st. Are children of aliens subject to the law of compulsory school attendance?
>
> 2d. Is a foreign-born child fourteen years of age debarred from legal employment because of inability to read and write the English language, even though able to read and write a foreign language?

In reply to the first inquiry you are advised that the compulsory school attendance legislation makes no distinction whatever between the children of aliens and the children of American citizens, except that the assessors, in making up the enrollment provided for by section 4 of the Act of 11th

July, 1901, P. L. 658, are required to set out in such enrollment the nationality of the children enrolled, as well as the full name, date of birth, age, sex and residence of such children. The children of aliens are subject to the laws relating to compulsory school attendance to the same extent and in the same manner as the children of American citizens.

Replying to your second inquiry, your attention is respectfully called to an opinion rendered by this department to your department, under date of July 30, 1907, relative to the proper form of employment affidavits for children. In that opinion the Act of May 29, 1901, P. L. 322, and the Act of May 2, 1905, P. L. 352, both of which acts, among other things, regulate the employment of children in this Commonwealth, were construed, and you were advised that the Act of 1901 is now in force as modified by the constitutional provisions of the Act of 1905. You were also advised in that opinion that fourteen years is now the age limit under which no child can be employed in any establishment, and that section 4 of the Act of 1901 is in full force except as to the age limit. Section 4 of the said Act of 1901 provides as follows:

> "All persons authorized to administer oaths must examine all children as to their ability to read and write the English language. After a careful examination, if a child is found unable to read and write the English language, or has not attended school as required by law, or is under thirteen years of age, it will be unlawful to issue a certificate; and in no case shall the officer who executes certificates charge more than twenty-five cents for administering the oath and issuing the certificate."

You were further advised in said opinion that if a child is found unable to read and write the English language after a careful examination, or has not attended school as required by law, it is just as unlawful to issue an employment affidavit or certificate for such child as it would be to issue the same if the child were under fourteen years of age.

The law expressly states that it shall be unlawful to issue an employment affidavit or certificate to a child unable to read and write the *English* language. Whether the child is able to read and write a foreign language is entirely immaterial.

ELIZA SPEAKS AND KATIE SPEAKS *vs.* MORRIS YOFFE AND TOBIAS YOFFE.

Deeds—Covenant to convey clear of encumbrances—Judgments—Opening—Satisfaction.

Plaintiff, by deed with covenant against encumbrances, conveyed certain real estate to defendants, receiving part of the purchase money in cash and entering judgments for the remainder. Afterwards it was found that there were liens against the property prior to the conveyance, in excess of the amount of the judgments for the balance of the purchase money. The liens were paid by defendants at the request of plaintiffs. Upon petition of defendants, the judgments were opened and upon hearing by the court without a jury, they were ordered to be satisfied.

Rule to open judgment. C. P. Dauphin County, Nos. 134 and 135 March Term, 1907.

E. M. Hershey, for plaintiff.

Charles C. Stroh for defendant.

MCCARRELL, J., April 8, 1908.

On February 3d, 1908, upon petitions duly presented by the defendants in the above stated judgments, rules were granted upon the plaintiffs to show cause why the judgment should not be opened, the defendants let into a defense, and why the judgments should not respectively be marked satisfied upon the record.

The rules were duly served upon the plaintiffs, and afterwards upon hearing the judgments were respectively opened to permit the defendants to make defense thereto, and the parties having filed their agreements in writing, waiving trial by jury and submitting the question raised by the rules granted as aforesaid, the court, on March 9th, 1908, heard the testimony offered by the parties.

From this testimony it appears that on October 24th, 1898, Eliza Speaks and Katie Speaks (the husband of Eliza joining therein) executed their deed to the defendants for a certain messuage and lot of ground situate on Walnut street, in the Eighth ward of the city of Harrisburg, which deed is duly recorded in Deed Book "E," Vol. 10, page 217, and is a deed of general warranty.

The consideration named in the deed is $1,300.00, $800.00

of which was paid in cash, and the notes upon which the above stated judgments have been entered were given for the remainder of the purchase money.

Some time after the execution and delivery of the deed and after the payment of the cash portion of the purchase money and the giving of the notes, as above stated, it was discovered by the grantees in the deed that the property conveyed thereby was subject to certain liens for city taxes, for paving and for a judgment in favor of John E. Fox, all of which liens had been created prior to the execution and delivery of said deed.

About May 14th, 1900, the city of Harrisburg began proceedings to enforce the collection of the tax and paving liens. The grantors in the deed were notified of the existence of these liens and the parties interested met in the city of Harrisburg for the purpose of having the matters in dispute between them adjusted.

It was there ascertained that the liens for city tax amounted to $130.59, that the paving lien amounted to $480.00, and that the amount due upon the judgment of John E. Fox was $103. In addition to these sums there was due for costs upon the city liens the sum of $6.82. These several sums, aggregating $720.41, were then paid by the grantees in the deed, and the defendants in the judgments, at the request of the grantors in the deed, and the plaintiffs in the judgments, and it was then agreed that the notes given for the purchase money of the property should be returned by the holders thereof to the grantees in the deed, and the defendants in the judgments.

The plaintiffs in these judgments failed to return these notes as they were required to do by the terms of their agreement, as also by the terms of the deed already referred to, which it was admitted was intended to convey a title to the defendants in the judgment in fee simple, clear of all encumbrances.

The plaintiffs afterwards entered these judgment notes of record to Nos. 134 and 135 of March Term, 1907, and thereupon the plaintiffs in the judgments being about to issue execution process upon them, the defendants applied for the rules to show cause hereinbefore referred to.

Under this state of facts, we are satisfied that the plaintiffs in these judgments have no valid claim thereon against

the defendants therein for any sum of money whatsoever, and that they are not entitled to enforce said judgments or either of them against the defendants, and that the said judgment notes were entered of record in violation of the agreement of the plaintiffs.

Under these circumstances we are of opinion that the said judgments should be marked satisfied, and we accordingly order and direct the prothonotary, unless exceptions be filed to this opinion and finding within the time required by law, to mark each of the said judgments satisfied upon the record, and do further order and direct that the plaintiffs in the said judgments, Eliza Speaks and Katie Speaks, pay all the costs accrued upon the said judgments, including this proceeding, to obtain satisfaction thereof.

J. R. Matter *vs.* James Dougherty.

New trial—Verdict—Weight of evidence.

A new trial will be granted, when it has been admitted by counsel for plaintiff that defendant is entitled to some deduction from plaintiff's claim and the jury renders a verdict for the full amount set forth in plaintiff's statement.

Plaintiff sued for the balance of the contract price for the erection of certain houses. Defendant submitted testimony showing that the houses had not been constructed in accordance with contract and that he had been compelled to expend $585.50 to remedy the defects in their construction. Counsel for plaintiff admitted that defendant was entitled to some deduction by reason of faulty construction. The jury rendered a verdict for plaintiff for the full amount of his claim. *Held*, on motion for a new trial, that the fact that the jury had failed to allow any deduction whatever, indicated that they had not carefully considered the evidence. New trial granted.

Motion for a new trial. C. P. Dauphin County, No. 402, June Term, 1907.

Oscar G. Wickersham and *John C. Nissley* for plaintiff.

Frank B. Wickersham and *E. E. Beidleman* for defendant.

McCarrell, J., April 8, 1908.

On November 29th, 1907, the jury in the above stated

case rendered a verdict in favor of the plaintiff for the sum of thirteen hundred and twenty-five ($1,325.00) dollars, with interest from April 5th, 1907, being the full amount of the plaintiff's claim.

The plaintiff's claim was for balance due for the removal of five old houses and the construction therefrom of six new houses from the material contained in the old houses and such new material to be furnished by the plaintiff as might be necessary to construct the six new houses in a good and workmanlike manner. The total contract price was twenty-six hundred and fifty ($2,650.00) dollars, one-half of which had already been paid before the bringing of the suit.

The defendant pleaded non assumpsit and set-off, his contention being that the houses were not constructed in a good and workmanlike manner, as required by the contract, and that he was entitled to a deduction, not only on account of the failure to construct and finish the six houses in question in a good and workmanlike manner, but was also entitled to a deduction because of the plaintiff's failure to construct certain other houses under a previous contract between the parties.

At the time of the settlement for the houses previously constructed, the plaintiff signed and delivered to the defendant a paper agreeing to remedy all defects in the houses previously constructed, and under this agreement the defendant claimed the right in the present case to a deduction from the balance claimed by the plaintiff in this suit, because of the defects existing in the construction of the houses previously erected.

The defendant submitted testimony, indicating defective construction in both sets of houses. He called as witnesses a number of the tenants, who had occupied the houses constructed under both contracts, and who testified to defects in the roofs, in the water-closets and in the steps, which were put up to provide entrances to the houses. He also called a number of witnesses, who testified to defects in the plastering, in the roofing, in the painting of the houses, and in the construction of the water closets. There was testimony showing that some of the cellar walls had been defectively constructed, and that the foundation walls for one house were smaller than the frame of the house placed thereon. He also offered testimony, showing that cornices and brackets had

not been placed upon the houses in accordance with contracts, and that the cornice upon one house projected beyond defendant's line, so as to make it necessary to remove a portion thereof.

Among other witnesses called to establish defective construction was Albert B. Smith, a contractor, who testified that he had examined both sets of houses, ascertained what was necessary to be done in order to complete the houses in a good and workmanlike manner, that he had done the work necessary to remedy these defects, and had been paid therefor by the defendant the sum of $585.50.

That the defendant had actually expended this money upon the houses was not denied, but it was contended by the plaintiff that the work done by Smith covered items not included in his contract with the defendant.

The evidence submitted by the defendant clearly indicated that the greater part of the work done by Smith, if not all of it, had been done merely to complete the houses in the good and workmanlike manner in which the plaintiff, by his contract was bound to complete the same, and this testimony should have been carefully considered by the jury, and in our opinion was sufficient not only to warrant, but to require a very considerable deduction from the amount of the plaintiff's claim in the present suit. That the defendant was entitled to some deduction was practically admitted by plaintiff's counsel at the trial. The jury, however, made no deduction of any sum whatever, thus clearly indicating that they failed to properly consider the evidence upon this subject.

After carefully considering the whole case and all the reasons submitted in support of the motion for a new trial, we are satisfied that the verdict is clearly against the weight of the evidence, and that there should have been a very material deduction from the amount of the plaintiff's claim, because of his failure to complete the houses in the good and workmanlike manner stipulated for in the contract.

Believing that the verdict is against the weight of the evidence and is manifestly unjust to the defendant, a new trial is now awarded upon the defendant's motion.

A. J. BATES COMPANY *vs.* W. F. PAUL.

Sales of personal property—Delivery to common carrier—Notice to common carrier—Affidavits of defense—Sufficiency.

When goods are delivered to a common carrier, to be shipped to the purchaser at the city in which his business is carried on, the title of the consignor passes with delivery to the common carrier, and the sale is complete at the point of shipment.

The fact that the consignor of goods may have the right of stoppage in transitu will not prevent the vesting of title in the consignee, by the delivery to a common carrier, when there was no stoppage and the transit was complete and the goods delivered to the consignee by the carrier.

When the sale of goods is complete at the point of shipment, notice, by the purchaser, to the common carrier at the point of delivery, that the goods had been shipped without his knowledge or consent, and in violation of his express direction, is not notice to the consignor.

The defendant, doing business in Harrisburg, Pennsylvania, ordered certain goods from plaintiff, having its factories and home office in Webster, Massachusetts. To an action for the price of the goods, defendant filed an affidavit of defense, alleging that the goods were not to be delivered earlier than March 1, 1907. That they had been delivered January 4, 1907, and placed in the cellar of his store, by the common carrier, without his knowledge or consent. That he had immediately notified the common carrier to remove the goods and hold them subject to the orders of the plaintiff. Upon receipt of a bill for the goods, in January, defendant made no objection to the plaintiff, either as to the price or the delivery of the goods. Afterwards the goods were destroyed by fire. *Held,* that by retaining the goods without notice to the plaintiff, defendant had acquiesced in the delivery of the goods. That the affidavit was insufficient to prevent judgment.

Motion for judgment for want of sufficient affidavit of defense. C. P. Dauphin County, No. 453, Sept. Term, 1907.

C. H. Backenstoe for plaintiff.

M. W. Jacobs for defendant.

MCCARRELL, J., April 8, 1908.

This suit was brought August 29th, 1907, to recover the

price of goods alleged to have been sold by the plaintiff to the defendant.

The plaintiff, by its claim, filed on the day the suit was brought, claims for goods sold and delivered the sum of five hundred and fifty-nine and 20-100 ($559.20) dollars, and attaches to its statement a copy of the account, verified by affidavit.

It claims interest from April 1, 1907, upon $405.60, and from June 1st, 1907, upon $153.60, these dates being the dates of the alleged maturity of the respective bills.

The statement further avers that the goods for which plaintiff claims were sold by it to the defendant and were delivered to the defendant on or about January 1st, 1907.

The affidavit of defense, filed October 2d, 1907, admits the ordering of the goods, upon which the plaintiff's claim is based, but claims that they were not to be delivered earlier than March 1st, 1907, and while admitting that the goods were unloaded by the Pennsylvania Railroad Company at defendant's store about January 4th, 1907, alleges they were placed in the cellar of defendant's store without his knowledge, authority or consent.

The affidavit further avers that some time in the month of January, 1907, and after January 4th, the defendant received from plaintiff a bill for the goods and alleges that the receipt of this bill was the first notice he had that the goods had already been delivered and placed in the cellar of his store.

The affidavit of defense then alleges that immediately thereafter, and on the same day that he received the bill, he notified the common carrier, to wit, the Pennsylvania Railroad Company, that the goods had been delivered without his knowledge, authority or consent, and in violation of his express direction, and requested the said railroad company to call for the said goods and return them to its warehouse to await further orders of the plaintiff, and alleges that the railroad company failed to comply with this notice and request.

From the book account attached to plaintiff's statement it appears that the plaintiff has its factories and home office at Webster, Massachusetts, and from the statement and affidavit of defense it appears that the goods were shipped by a common carrier about January 1st, 1907, to the defendant at Harrisburg, and that the goods were delivered by the common

carrier about January 4th, 1907, at the defendant's place of business and placed in the cellar of his store.

The sale was certainly completed when the plaintiff delivered the goods to the common carrier at Webster, Massachusetts, and the title thereto became then vested in the defendant. Bacharach & Co. *vs.* Chester Freight Line, 133 Pa. 414.

The fact that the plaintiff may have had the right of stoppage "in transitu" cannot affect the present case, because there was no stoppage; the transit was completed and the goods delivered by the carrier to the defendant.

The notice to the common carrier, as alleged in the affidavit of defense, was no notice to the plaintiff. The common carrier was the agent of the defendant rather than of the plaintiff, and the notice to the common carrier, which does not appear ever to have been given to the plaintiff, did not impose upon the plaintiff any duty whatever with respect to the goods. Blakeslee Mfg. Co. *vs.* Hilton 5 Superior Court, 184.

The defendant had it in his power, when he discovered that the goods were in his possession, to remove them and place them in the custody of the common carrier for return to the plaintiff. This he did not do. He retained the goods in his own possession, without any notice whatever to the plaintiff.

Upon receipt of the bill for the price of the goods in January, 1907, he made no objection whatever to the plaintiff either in regard to the price or the delivery of the goods. He retained the bill and the goods, for the price of which the bill was rendered, without any notice whatever to the plaintiff, and must be held to have acquiesced in the delivery and in the correctness of the price named upon the bill, for he does not allege that he ever made complaint or objected to the plaintiff in regard to either.

It is unfortunate for the defendant that the fire of February 1st, 1907, destroyed the goods in question. According to the averments of the affidavit of defense, the defendant had it in his power, if he had so desired, to return the goods to the plaintiff long before the fire occurred. He did not choose to do so, nor did he give plaintiff any notice that he complained in regard to the delivery of the goods before the time which he alleges was fixed for such delivery. The goods

thus became legally the property of the defendant, and he had an undoubted right to include their value in any claim which he may have made, in case he had insurance upon his stock, at the time of the fire.

The allegation of plaintiff's statement that twenty-three pairs of shoes were taken from the consignment of goods shipped January 1st, 1907, and returned to it, which allegation is denied in the affidavit of defense, we do not regard as being material in disposing of the present motion. The plaintiff does not claim for the price of these twenty-three pairs of shoes, and it is in our opinion immaterial whether they reached the defendant by the shipment of January 1st, 1907, or by an earlier shipment. The price of these shoes is not in controversy in this action.

From the record it clearly appears that the goods in question were delivered to the defendant, or to some one having apparent authority to act for him in the receipt and storage of the goods. He permitted them to remain in his possession after the time when he admits he actually had notice of their presence in the cellar of his store. He retained them without any objection whatever made to the plaintiff, and in our opinion he is legally bound for the payment of the price.

The allegation of the affidavit of defense that the defendant does not know whether the bill is correct or not is, in our opinion, insufficient to prevent a judgment against him. He admits that he received a bill for these goods, and he does not allege that he ever made any complaint to the plaintiff that the bill was incorrect in amount. The affidavit to plaintiff's statement distinctly avers that the bill is correct, and the amount thereof justly due and owing by the defendant to the plaintiff, and these averments are not directly denied in the affidavit of defense.

Under all the circumstances of this case, as disclosed by the record, we are of opinion that the defendant has shown no legal defense to the payment of the plaintiff's claim, and we accordingly adjudge the affidavit of defense to be insufficient and direct that the plaintiff may enter judgment for the amount appearing to be due according to statement of its claim for want of a sufficient affidavit of defense.

IN RE APPLICATION OF ARTHUR P. O'NEILL FOR REGISTRATION OF DENTAL LICENSE.

Dental Licenses—Registration of—Act of May 7, 1907.

The holder of a license to practice dentistry, granted by the State Dental Council, August 5, 1907, is entitled to have the same registered in the office of the prothonotary of the proper county, although more than six months intervene between the passage of the Act of May 7, 1907, and the date at which the license is presented for registry.

Attorney General's Department. Opinion to Hon. N. C. Schaeffer, President of the Dental Council of Pennsylvania.

CUNNINGHAM, Assistant Deputy Attorney General, April 8, 1908.

I am in receipt of your inquiry referred to this department by the Dental Council of Pennsylvania, relative to the registration by the prothonotary of Philadelphia county, of the dental license of Arthur P. O'Neill, of 1737 Park avenue, Philadelphia.

I understand the facts to be as follows:

Arthur P. O'Neill was granted a license to practice dentistry in the state of Pennsylvania by the Dental Council on August 5, 1907. On or about November 18, 1907, the said Arthur P. O'Neill exhibited his said license and made application to the prothonotary of Philadelphia County to be duly registered by the registration of his said dental license. The prothonotary of said county declined to register said license, on the ground that such license could not be registered, under existing legislation, after the 7th day of November, 1907, and suggested that the matter be referred to this department for an opinion. The question for disposition under the above facts is whether the said Arthur P. O'Neill is now entitled to have his said dental license registered by the prothonotary of the court of common pleas of Philadelphia county, that being the county in which he desires to practice dentistry. The disposition of this inquiry requires consideration of the acts of assembly of July 9, 1897, P. L. 206, entitled:

> "An act to establish a Dental Council and a State Board of Dental Examiners, to define the powers and duties of said Dental Council and said State Board of

> Dental Examiners, to provide for the examination and licensing of practitioners of dentistry, and to further regulate the practice of dentistry,"

and the Act of May 7, 1907, P. L. 161, entitled:

> "An act regulating and defining the powers and duties of the Dental Council and the State Board of Dental Examiners; providing for appointment of examiners; defining qualifications of applicants for examination; condition of granting licenses; regulating and limiting the practice of dentistry; prohibiting practice by, or employment of, unlicensed persons, and providing punishment therefor; and disposition of fees and fines, and fixing the appropriation to the Dental Council."

The said Act of 1897, after reciting in its preamble, *inter alia*, that it is expedient to assimilate the laws regulating the practicing of dentistry with those now pertaining to the practice of medicine and surgery in this commonwealth, provides that from and after the first day of October, one thousand eight hundred and ninety-seven, it shall not be lawful for any person in the state of Pennsylvania to enter upon the practice of dentistry unless he or she has complied with the provisions of the said act and has exhibited to the prothonotary of the court of common pleas of the county in which he desires to practice dentistry, a license duly granted to him or her, as provided for in the act, whereupon he or she shall be entitled, upon the payment of one dollar, to be duly registered in the office of the prothonotary of the court of common pleas in the said county.

It is further provided that any person violating the provisions of the act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as provided therein. Under this act it was provided that the dental council of Pennsylvania should consist of three members, viz: the superintendent of public instruction, the president of the state board of health and vital statistics, and the president of the Pennsylvania Dental Society. It was also provided by said act that from and after the first day of September, 1897, there should be and continue to be a board of dental examiners for the state of Pennsylvania, consisting of six members. Under said act it became the duty of the dental council to supervise the

examinations conducted by the state board of dental examiners of all applicants for license to practice dentistry in this commonwealth, and to issue to applicants returned by the board of examiners as having successfully passed the prescribed examination, a license to practice dentistry in the state of Pennsylvania.

Without going into unnecessary detail, it is sufficient to say that the thing prohibited by the said Act of 1897 was entering upon the practice of dentistry after October 1, 1897, without having obtained a license so to do from the dental council of the commonwealth, which license the holder thereof was required to exhibit to the prothonotary of the county in which he or she desired to practice, to the end that the person holding the same might be duly registered in the office of such prothonotary. Applicants for a license from the dental council not theretofore authorized to practice dentistry but desiring to enter upon such practice, were required to make proof that they possessed certain qualifications with reference to age and character, and that they had received a diploma conferring the degree of doctor of dental surgery, or other recognized dental degree from a reputable institution.

Upon making satisfactory proof as above stated, the applicant received an order for examination before the state board of dental examiners, and upon successfully passing the examination was entitled to receive from the dental council the said license to practice. In the case of applicants examined and licensed by the state board of dental examiners, or state board of health, of other states, a license could be issued without examination, provided the dental council of Pennsylvania was satisfied that the standard of requirements adopted by the board of dental examiners or state board of health of the other states in question was substantially the same as the standard specified in Pennsylvania. It was further provided in this act that nothing therein contained should be construed to prohibit the practice of dentistry within this commonwealth by any practitioner already duly registered in accordance with the laws of this commonwealth existing prior to the passage of the act, and that one such registry under the act should be sufficient warrant to practice dentistry in any county in the commonwealth.

By the sixteenth section of the act in question, the Acts of April 17, 1876, June 20, 1883, and June 10, 1893, regulat-

ing the practice of dentistry in this state, were specifically repealed. It was held in Commonwealth *vs.* Gibson, 21 Pa. C. C. 232, that the said Act of 1897, by reason of the fact that it related only to persons who "enter upon the practice of dentistry" did not apply to persons in established practice at the date of the act.

Thus stood the law until the approval of the said Act of May 7, 1907, P. L. 161. This Act of 1907 is not drawn as an amendment to the said Act of 1897, but an examination of its terms shows that it refers to the same subject matter as the said Act of 1897, and that the scope and aim of both acts are practically the same. These two statutes being therefore in *pari materia* are to be construed together, as though they constituted one act, and the legislative intent is to be gathered from a consideration of both acts.

The Act of 1907 increases the membership of the dental council from three members to five, by adding thereto the secretary of internal affairs and the secretary of the state board of dental examiners. In the Act of 1907 the president of the state board of health is, of course, described as the commissioner of health. Under the Act of 1907 licenses may be granted by the dental council to three classes of persons:

First, persons over twenty-one years of age, of good moral character, holding a diploma conferring upon such person the degree of doctor of dental surgery or other established dental degree from a reputable educational institution maintaining a three years' course in dentistry, and who have successfully passed the examination of the state board of dental examiners.

Second, upon the recommendation of the board of dental examiners the dental council may issue a license to any person furnishing proof that he or she has a license to practice dentistry granted by the dental council or other lawfully constituted authority of any other state or country, and,

Third, the dental council may also license any applicant who has been in the actual lawful practice of dentistry for not less than ten years upon the recommendation of the board of dental examiners. It is provided that any license issued otherwise than as a result of a written examination shall state the grounds upon which it is granted.

Certain provisions are contained in the said Act of 1907 as to the time and place of the meetings of the board of

dental examiners. Both of the acts in question deal primarily with the granting of licenses to practice dentistry in this commonwealth by the dental council thereof, and with the registration of such licenses. By both acts it is provided that licenses so granted "shall be recorded in a book to be kept in the office of the dental council, and the number of the book and page therein containing said record shall be noted upon said license."

The question now raised, arises under section 5 of the Act of 1907, which section reads as follows:

> "It shall be the duty of every person practicing dentistry within this commonwealth to display, or cause to be displayed, his or her name, posted in a conspicuous place at or near the entrance to the office or place where he or she is practicing dentistry. Any person practicing dentistry within this commonwealth, within six months from the passage of this act, shall cause his or her license to be registered in the office of the prothonotary of the court of common pleas of the county in which such person shall practice dentistry, unless the same has already been registered in said county. Any person who shall neglect to cause his or her license to be registered as herein provided shall be construed to be practicing dentistry without a license: Provided, this act shall not affect the right of any person to practice dentistry, who is entitled to do so under the provisions of an act of assembly in force, or who shall have conducted the actual, lawful practice of dentistry in this commonwealth for five years continuously preceding the passage of this act."

This section should be read in connection with section 8 of the act, which provides as follows:

> "Any person who shall practice dentistry without being duly licensed or lawfully registered, or who shall practice dentistry or induce any person to practice dentistry in violation of any of the provisions of this act, shall be guilty of a misdemeanor," etc.

The prothonotary of Philadelphia county seems to take the position that the right to register is limited to six months

after the passage of the act, and that registration, therefore, cannot be made after November 7, 1907, or, in other words, that only those persons who enter upon the practice of dentistry within six months from the passage of the act, are entitled to have their licenses registered in the prothonotary's office of the county in which they desire to practice. Upon this ground he declines, until further advised, to register the license of the said Arthur P. O'Neill, which, as I understand the facts, was not exhibited until subsequent to the 7th day of November, 1907, although granted Aug. 5, 1907.

In my opinion this is not a correct construction of the existing legislation upon this subject. As above stated, the Act of 1907 is in *pari materia* with the Act of 1897 and repeals only such parts of the Act of 1897 as are inconsistent with the provisions of the Act of 1907.

With reference to the practice of dentistry in the commonwealth of Pennsylvania, the Act of 1907 seems to divide persons legally entitled to engage in such practice into two classes:

First, those having a license issued by the dental council, and,

Second, persons entitled to practice under the provisions of an act of assembly in force, or who shall have conducted the actual lawful practice of dentistry in this commonwealth for five years continuously preceding the passage of this act.

It is provided in the said Act of 1907 that the right of the second class of persons above mentioned to practice dentistry shall not be affected by its provisions.

Dealing, then, with the first class of persons, the act provides, in section 8, that "any person who shall practice dentistry without being licensed or lawfully registered," etc., shall be guilty of a misdemeanor. Not only is practicing without license prohibited, but practicing without lawful registration is also prohibited. There seems to be a clear legislative intent manifested in the Act of 1907 to prohibit the practice of dentistry by any person in the commonwealth (except such persons as are within the second class of practitioners above mentioned and therefore not affected by the act), unless such person has been duly licensed by the dental council and lawfully registered by the prothonotary of the proper county. It is a misdemeanor for any person, except those practitioners included in the class of practitioners not affected by the act,

to practice dentistry without being both licensed and registered, for it is specifically provided in section 5 that any person who shall neglect to cause his or her license to be *registered* as herein provided, shall be construed to be practicing dentistry *without* a *license*.

Bearing in mind this apparent legislative intent, it is not difficult to construe that portion of section 5 which reads as follows:

> "Any person practicing dentistry within this commonwealth, within six months from the passage of this act, shall cause his or her license to be registered in the office of the prothonotary of the court of common pleas of the county in which such person shall practice dentistry, unless the same has already been registered in said county."

Clearly the phrase "within six months from the passage of this act" is not to be construed as modifying "practicing dentistry", so as to provide that only those persons entering upon the practice of dentistry within six months after the passage of the act, are entitled to regisration, as suggested by the prothonotary of Philadelphia county; but is to be construed as modifying "cause his or her license to be registered". A more accurate expression of the legislative intent would be as follows: "Any person practicing dentistry within this commonwealth shall, within six months after the passage of this act, cause his or her license to be registered," etc. By this construction the purpose of the act is fully carried out. Persons engaged in the practice of dentistry at the date of its passage, under a license from the dental council, who had neglected to register such license with the prothonotary of the proper county, were given six months from the passage of the act within which to register, and any persons who may have neglected to cause his or her license to be registered within that period are to be regarded as practicing without a license. This provision was doubtless intended for the protection of regularly licensed practitioners who had neglected to exhibit their licenses to the prothonotary and register, as expressly required by the Act of 1897, and were therefore practicing without having placed upon record the best evidence of their right to so practice, upon condition that they furnish such evidence with reasonable promptitude.

Bearing in mind that one of the main purposes of the legislation upon this subject is to protect the public from incompetent and unskilled practitioners, and that this end is attained largely by requiring duly qualified practitioners to be registered as such in a public register, under the express terms of the the Act of 1897, which provision for registration is not inconsistent with anything found in the Act of 1907, and construing the Acts of 1897 and 1907 as statutes constituting one harmonious piece of legislation, it seems clear that the prothonotary of Philadelphia county should register the license of the said Arthur P. O'Neill, upon payment of the proper fee, and that neither the said Arthur P. O'Neill, nor any other person licensed by the dental council, is legally entitled to enter upon the practice of dentistry until such registration has been made.

COMMONWEALTH OF PENNSYLVANIA *vs.* AMERICAN STEEL HOOP COMPANY.

Foreign corporations—Bonus on capital stock—Act of May 8, 1901.

The Act of May 8, 1901, P. L. 150, does not embrace foreign corporations which, prior to its passage, employed their capital within the state. Such corporations are not liable for a bonus of one-third of one per cent. upon the amount of their capital thus employed, whether it was employed before or after the passage of the act.

Appeals from Settlements for bonus on capital stock. C. P. Dauphin County, Nos. 529 and 530, Commonwealth Docket, 1906.

Hampton L. Carson, Attorney General, for plaintiff.

Olmsted and Stamm, for defendant.

KUNKEL, P. J., May 14, 1908.

These are the appeals by the defendant corporation from the settlements made by the auditor general and state treasurer against it for bonus on its capital employed in the state of Pennsylvania. By agreement of the parties the cases were consolidated and tried by the court as one case without a jury, conformably to the provisions of the act of assembly of April 22, 1874, P. L. 109.

The facts are not in dispute, and we find them to be as contained in the defendant's request for findings of facts, which are hereby affirmed. They are as follows:

FACTS.

1. The American Steel Hoop Company, defendant (since merged into Carnegie Steel Company), was in the year 1901 and in the year 1902, and prior thereto, a corporation of the state of New Jersey, chartered under the laws of said state for the manufacture of steel hoops and other forms of iron and steel, having its principal office at 525 Main street, in the city of East Orange, in the state of New Jersey.

2. On or about May 2, 1899, the American Steel Hoop Company, defendant, complied with the requirements of the Pennsylvania statute of April 22, 1874, P. L. 108, entitled "An act to prohibit foreign corporations from doing business in

Pennsylvania without having known places of business and authorized agents," and obtained from the secretary of the commonwealth the necessary certificate or certificates, required by that act and preserved the same for public inspection in its office in Pennsylvania.

3. Prior to May 8, 1901, defendant invested $2,820,424.34 in certain manufacturing plants in Allegheny county, Blair county, Mercer county, and Westmoreland county, Pennsylvania, and in some or all of said plants was actively engaged in manufacturing steel hoops and other forms of iron and steel upon an extensive scale at the time of the pasage of the Act of May 8, 1901.

4. For the year ending November 30, 1901, defendant reported to the auditor general that its capital stock paid in was $33,000,000, all invested or employed elsewhere however, except $3,471,927.30, reported as employed in the state of Pennsylvania. The amount thus returned as invested or employed in Pennsylvania in November, 1901, was $651,502.96 more than the amount which the company had invested in Pennsylvania at the time of the passage of the Act of May 8, 1901. In 1902, defendant invested, or expended, in Pennsylvania, the further sum of $944,575.62.

5. The manufacturing plants, or one of the manufacturing plants, which the defendant had prior to May 8, 1901, acquired in Pennsylvania, proved not to be an up to date modern plant and because of the necessities of defendant's business, in which prior to May 8, 1901, it had engaged in Pennsylvania, it became imperative that in order to successfully conduct the said business and protect and render useful the investment of capital defendant had already made in Pennsylvania it should remodel and practically reconstruct the said plant. This remodeling and reconstruction was commenced prior to May 8, 1901, but was not completed until some time in 1902, so that in addition to $2,820,424.34, which up to May 8, 1901, defendant had invested in Pennsylvania it was for the reasons above stated compelled to and did in such remodeling and reconstruction of its plant expend between May 8, 1901, and November, 1901, the further sum of $651,502.96, and in 1902, the further sum of $944,575.62, so that the total amount of its capital expended in Pennsylvania amounted to $4,416,502.92.

6. On May 8, 1906, the auditor general settled and entered and on the 10th of May, 1906, the state treasurer ap-

proved an account which was certified May 15, 1906, wherein defendant was charged with a bonus calculated at the rate of one-third of one per centum upon the $3,471,927.30 of capital invested in Pennsylvania, said claim being based upon the Act of May 8, 1901, P. L. 150, entitled "An act providing for the raising of revenue for state purposes, by imposing upon certain foreign corporations, limited partnerships and joint-stock associations a bonus of one-third of one per centum upon the capital actually employed in Pennsylvania, and requiring the filing of certain reports in the office of the auditor general." On the same date there was certified a separate account against defendant for bonus of one-third of one per cent. upon the $944,575.62 invested or expended by the company in completing the remodeling and reconstruction of its plant in 1902.

7. Defendant's investment of $2,820,424.34 in certain manufacturing plants in Pennsylvania prior to May 8, 1901, and its investment of $651,502.96 in 1901 made after May 8, 1901, and its further investment of $944,575.62 in completing the reconstruction and improvement of one of said plants, which necessary reconstruction and improvement had been commenced prior to May 8, 1901, were made in pursuance and acceptance of authority contained in the Act of June 9, 1881, P. L. 89, entitled "An act authorizing companies, incorporated under the laws of any other state of the United States for the manufacturing of any form of iron, steel or glass, to erect and maintain buildings and manufacturing establishments, and to take, have and hold real estate necessary and proper for manufacturing purposes," and the supplements of April 28, 1887, P. L. 76, April 30, 1891, P. L. 39, June 8, 1893, P. L. 389, and June 16, 1893, P. L. 466, which said act, as amended by the last named act reads as follows:

> "That it shall and may be lawful for any company incorporated under the laws of any other state for the manufacture of any form of iron, steel or glass or for the quarrying of slate, granite, stone or rocks of any kind, or for dressing, polishing or manufacturing the same, or any form of them, or for any mineral springs company incorporated for the purpose of bottling and selling natural mineral springs water, to erect and maintain buildings and manufacturing establishments within this commonwealth, and to take, have and hold real estate not exceed-

ing one hundred acres necessary and proper for corporate purposes: *Provided,* That nothing herein contained shall be deemed to prevent or relieve real estate taken and held by any such company under the provisions of this statute from being taxed in like manner with other real estate within this commonwealth: *And provided further,* That no foreign corporation shall be entitled to employ any greater amount of capital in such business in this state than the same kind of corporations organized under the laws of this state are entitled to employ: *And provided further,* That every such foreign corporation, doing business as aforesaid in this commonwealth, shall be liable to taxation to an amount not exceeding that imposed on corporations organized for similar purposes under the laws of this state, and every such foreign corporation taking the benefit of this act shall make the same returns to the auditor general that are now required by laws of the corporation of this state."

The said act of June 8, 1881, does not, nor does any of its supplements, contain any requirement for the payment of any bonus upon capital invested or employed in Pennsylvania by a foreign corporation in pursuance of authority contained therein.

8. The real estate, buildings, etc., constituting defendant's manufacturing plants representing its only investment of capital in Pennsylvania, are such only as are necessary and proper for its corporate purposes in the conduct of its business of manufacturing steel goods and other forms of iron and steel. It pays upon such real estate the same taxes as are imposed under the laws of Pennsylvania upon other real estate within the commonwealth. The amount of defendant's capital employed in Pennsylvania is not greater than the amount which the same kind of corporations organized under the laws of Pennsylvania are entitled to employ, and defendant pays annually upon its capital stock the same tax as is imposed on corporations organized for similar purposes under the laws of Pennsylvania. It had prior to May 8, 1901, registered in the office of the auditor general and makes annually to that official the same returns as are required by law of corporations of Pennsylvania.

9. Defendant did not after May 8, 1901, invest or employ any additional capital in Pennsylvania in the acquisition of any new property or plant, or for any other purpose so far as the evidence discloses, except in the remodeling and reconstruction of part of its already existing plant, which remodeling and reconstruction it had commenced prior to May 8, 1901, and in the remodeling and reconstruction of which it had at that date already invested $2,820,424.34. The completion of its work of remodeling and reconstruction which necessitated the increased expenditures in 1901 and 1902 was necessary in order to enable the company to successfully conduct its manufacturing business and for the protection of the heavy investment which prior to May 8, 1901, it had made in Pennsylvania.

DISCUSSION.

The question presented by these appeals is whether the defendant corporation is liable for the bonus of one-third of one per cent. on its capital employed in the state, which is imposed upon certain foreign corporations by the Act of May 8, 1901, P. L. 150. The act reads as follows:

> "That from and after the passage of this act all corporations, limited partnerships or joint-stock associations, except foreign insurance companies, chartered by or created by under the laws of any other state, or of the United States, or of any foreign country whose principal office or chief place of business, is located in this commonwealth, or which has any part of their capital actually employed wholly within this state, in addition to complying with the laws now in force as to such corporations, limited partnership or joint-stock associations, shall pay to the state treasurer, for the use of the commonwealth, a bonus of one-third of one per centum upon the amount of their capital actually employed or to be employed wholly within the state of Pennsylvania, and a like bonus upon each subsequent increase of capital so employed.
>
> "Section 2. That in addition to the duty of complying with the other laws now in force, no corporation, limited partnership or joint-stock association liable to pay bonus under this act shall go into operation or transact any business in this commonwealth with-

out having first made a report under oath to the auditor general stating, specifically:

"First. The state or country in which incorporated or created.

"Second. The date of incorporation or organization.

"Third. The location of its chief office in this state.

"Fourth. The name and address of its president and treasurer.

"Fifth. The amount of its bonded indebtedness.

"Sixth. The amount of its authorized capital stock.

"Seventh. The amount of capital paid in.

"Eighth. The amount of capital employed wholly in the state of Pennsylvania.

"And each of said corporations, limited partnerships or joint-stock associations, shall make a similar report annually thereafter, not later than the thirtieth day of November of each year.

"Section 3. The auditor general and state treasurer are hereby authorized to settle, in the usual manner and have collected, an account against any corporation, limited partnership or joint-stock association violating the provisions of this act, with a penalty of fifty per centum for failure to make report and pay the said bonus."

By these settlements, the state claims from the defendant a bonus of one-third of one per cent. on $4,416,502.92, the whole of its capital employed in the state. It is quite certain that this entire claim cannot prevail, for of this amount $2,820,424.34 was employed in the state prior to the passage of the Act of May 8, 1901, and under the ruling in Commonwealth vs. Bessemer Co., 207 Pa., 303, that part of its capital at least is not subject to the bonus. This, we understand, is conceded.

A distinction, however, is sought to be made by the commonwealth, as respects the liability of the defendant for the bonus, between that part of the defendant's capital employed in the state priar to the passage of the act and the part employed thereafter, its contention being that, on the latter part, the defendant is liable for the payment of the bonus, even if

not on the former. We can find no such distinction in the act itself, nor in the construction placed upon it in the case of Commonwealth vs. Bessemer Co., 207 Pa., 302. It is true that in that case it was said the appellee, the defendant, brought no part of its capital into the state after the passage of the act, and that the capital which it had previously brought and employed wholly within the state was exempt from the bonus which the commonwealth attempted to compel it to pay, from which statement the commonwealth would have us draw the inference that the court meant that the capital brought into the state and actually employed therein after the passage of the act by a foreign corporation, which theretofore was doing business in the state, was not exempt from the bonus. But such inference is totally at variance with the whole logic of the opinion in that case, and the express conclusion there reached, which is stated to be "that the foreign corporations in the mind of the legislature at the time this act was passed were such only as thereafter should go into operation, or transact any business in this state." In various parts of the opinion, the same thought is expressed. Particularly, when referring to the transposition of the clause "from and after the passage of this act" it is said "the legislative intent becomes manifest that the act is to affect only those foreign corporations which, after its passage, locate their chief place of business, or actually employ any part of their capital, wholly within the state." The clauses of the act "whose principal office, or chief place of business, is located in this commonwealth, or which have any part of their capital actually employed wholly within this state," indicate the manner in which a foreign corporation may do business, or go into operation in the state, and are descriptive of the foreign corporations which the act was intended to embrace, thereby meaning that all foreign corporations which shall, from and after the passage of the act, go into operation, or do business, in the state, either by locating their principal offices, or chief places of business, in the state, or by actually employing capital wholly within the state, in addition to complying with the other laws of the state governing them, shall pay the bonus therein provided for. The act fixes the time after which foreign corporations, which shall go into operation in the state, shall pay the bonus, and makes them a distinct class from those which, before its passage, were engaged in doing business in the state. There is nothing in the act to indi-

cate that the legislature intended to impose the bonus upon all foreign corporations, those which were doing business in the state before its passage and those which began operations and did business thereafter, nor is there anything in it to warrant the conclusion that, without regard to the fact whether the corporation was one which did business in the state before the act, or after its passage, the part of its capital thereafter employed in the state is subject to the bonus. There is no distinction made in the act, as we have said, as to the time when the capital is employed upon which the bonus is to be paid. The statute acts upon the corporations, not upon the capital employed, nor upon the time when it is employed. The capital employed is merely a measure for the computation of the bonus to be paid. The only distinction made is that between those corporations which went into operation before, or were doing business in the state at the time of its passage, and those which should thereafter do business, or employ their capital therein. The act embraces only the latter class, as is clearly pointed out in Commonwealth vs. Bessemer Co., 207 Pa., 302. The defendant corporation belongs to the former class. It is, therefore, not liable to pay the bonus imposed by the act, either upon its capital employed before, or upon its capital employed after the passage of the act.

The view we have expressed practically disposes of the right of the commonwealth to recover, but, lest we have misconceived the effect of the case of Commonwealth vs. Bessemer, we proceed to pass upon the other objection raised by the defendant to the claim, so that it also may be before the appellate court on review.

The defendant contends that the Act of May 8, 1901, if it is construed to apply to it, is in violation of section 10, article 1, of the constitution of the United States, which declares that no state shall pass * * * any law * * impairing the obligation of contract, and is void.

Prior to the passage of the Act of May 8, 1901, under which the claim for bonus is made, the defendant brought its capital into the state and invested it here in the purchase of real estate and in the erection of its plant under and by virtue of the authority granted by the Act of June 9, 1881, P. L. 89, entitled "An act authorizing companies incorporated under the laws of any other state of the United States for the manufacture of any form of iron, steel or glass, to erect and main-

tain buildings and manufacturing establishments, and to take, have and hold real estate necessary and proper for manufacturing purposes," and its amendments of April 28, 1887, P. L. 76, April 30, 1891, P. L. 39, June 8, 1893, P. L. 389, and June 16, 1893, P. L. 466. The provisions of the last amendment are as follows:

> "That it shall and may be lawful for any company incorporated under the laws of any other state for the manufacture of any form of iron, steel or glass or for the quarrying of slate, granite, stone or rocks of any kind, or for dressing, polishing, or manufacturing the same, or any of them, or for any mineral springs company incorporated for the purpose of bottling and selling natural mineral spring water, to erect and maintain buildings and manufacturing establishments within this commonwealth, and to take, have and hold real estate not exceeding one hundred acres necessary and proper for corporate purposes: *Provided,* That nothing herein contained shall be deemed to prevent or relieve real estate taken and held by any such company under the provisions of this statute from being taxed in like manner with other real estate within this commonwealth: *And provided further,* That no foreign corporation shall be entitled to employ any greater amount of capital in any such business in this state when the same kind of corporation organized under the laws of this state are entitled to employ: *And provided further,* That every such foreign corporation, doing business as aforesaid in this commonwealth, shall be liable to taxation to an ness in this state than the same kind of corporations organized for similar purposes under the laws of this state, and every such foreign corporation taking the benefit of this act shall make the same returns to the auditor general that are now required by the laws of corporations of this state."

It will be observed that by this legislation the defendant was authorized to erect and maintain buildings and manufacturing establishments within this commonwealth, and to take and hold real estate for its corporate purposes with certain limitations upon the quantity of real estate to be held and upon

the amount of the capital to be employed in its business in this state, and with liability to taxation like that of similar domestic corporations. Having complied with and made itself subject to all the provisions of the law, is it in the power of the commonwealth to compel it to pay a bonus upon the capital which it originally employed, or which it subsequently finds necessary to employ in remodeling and improving its plant and in the successful prosecution of its business? This power is denied by the defendant, and we are of the opinion that the position is sound. The legislation above referred to, under which the defendant came into the state and invested its capital, amounts to a grant which having been accepted may not be revoked, or is a contract between the commonwealth and the defendant, the terms of which may not be changed or enlarged; Dartmouth College Case, 4 Wheaton, 518; New Jersey vs. Wilson, 7 Cranch., 164; Green vs. Biddle, 8 Wheaton, 2; Fletcher ys. Peck, 6 Cranch., 87. The consideration therefor was the benefit which flowed to the state from the investment of the defendant's capital and the transaction of business within its limits, the employment of its citizens, and the affording of a market to its iron and coal mines. But, aside from this, the acceptance by the defendant of the commonwealth's invitation to do business in the state, and the expenditure of its capital here in the erection and establishment of its plant, upon the faith of terms and conditions in which there was no hint that any price would be asked for the privilege, is consideration sufficient to support the contract. If it were a contract between individuals, any law which would attempt to change or alter it would be in violation of the federal constitution. The constitutional protection is afforded equally to a contract between the state and a corporation; Green vs. Biddle, 8 Wheaton, 2; Provident Bank vs. Billings, 4 Peters, 514; Wolff vs. New Orleans, 103 U. S., 358. The question which is here raised, we think, is ruled against the commonwealth in Commonwealth vs. Erie & Western Transportation Co., 107 Pa., 112; New York, Lake Erie & Western R. R. Co. vs. Penna., 153 U. S., 628; Delaware & Hudson Canal Co. vs. Penna, 156 U. S., 200; and in Com. of Kentucky vs. Mobile & Ohio Railway Co., 54 L. R. A., 916, 64 S. W., 451, where the subject is ably and exhaustively discussed.

It is suggested however, in the commonwealth's brief, that the case of the Commonwealth vs. Erie & Western Transporta-

tion Co., 107 Pa., 112, is not in point, because there "the defendant had the express right, under legislation, to increase its capital stock, and that having given to the defendant that right the commonwealth could not, by subsequent legislation, compel it to pay a bonus upon an increase." The attempt to distinguish that case from the present one overlooks the second proviso in the Act of June 16, 1893, P. L. 466, which declares "that no foreign corporation shall be entitled to employ any greater amount of capital in such business in this state than the same kind of corporations organized under the laws of this state are entitled to employ." This, as we understand it, is in effect a grant to the defendant of the right to employ its capital in the state to an amount equal to that which a similar domestic corporation is entitled to employ. And it is one of the admitted facts in the case that the total capital which the defendant employs in the state and on part of which at least the commonwealh seeks to collect a bonus does not exceed the limitation. It would, therefore, seem that the distinction suggested does not exist, but that in the present, as in that case, the attempt is made to collect a bonus on previously authorized capital.

In view of the foregoing considerations we conclude

1. That the act of May 8, 1901, does not embrace foreign corporations which, prior to its passage, employed their capital within the state, and that such corporations are not liable for the bonus of one-third of one per cent. upon the amount of their capital thus employed, whether it was employed before or after the passage of the act.

2. That the defendant company is not liable for the bonus required of foreign corporations by that act either upon its capital employed in the state before the act was passed or upon that employed in the state thereafter.

Judgment is, therefore, directed to be entered in favor of the defandant, if exceptions be not filed within the time limited by law.

IN RE PETITION OF JERSEY SHORE AND ANTES FORT RAILROAD COMPANY, FOR PERMISSION TO LAY ITS TRACKS ON BRIDGE OVER WEST BRANCH OF SUSQUEHANNA RIVER.

Board of Public Grounds and Buildings—Bridges—Authority to authorize railroad company to lay track on bridge in course of construction at expense of state.

The Board of Public Grounds and Buildings has authority to grant to a railroad company permission to lay its tracks upon a bridge in course of construction at the expense of the state, upon due proof that the company had acquired the right to maintain its tracks upon the bridge which the new structure replaces.

Attorney General's Department. Opinion to H. D. Jones, Secretary, Board of Commissioners of Public Grounds and Buildings.

FLEITZ, Deputy Attorney General, April 22, 1908.

I have your letter of yesterday stating that the Board of Commissioners of Public Grounds and Buildings desire an opinion on their legal right or authority to grant permission to the Jersey Shore and Antes Fort Railroad Company to arrange with the York Bridge Company, contractors for the erection of a bridge across the West Branch of the Susquehanna river, near Jersey Shore, which bridge is being built at the expense of the state, for the laying of the tracks of the said railroad company across the said bridge at the same time the floor is laid thereon.

Accompanying your letter is a petition of the Jersey Shore and Antes Fort Railroad Company, setting forth the fact that the corporation had acquired the right from the county of Lycoming to lay its tracks and run its cars over the bridge which was destroyed by the spring flood of 1907, and which the new structure is to replace.

The petition also sets forth that the said company has obtained the consent of the county commissioners of Lycoming county to lay its tracks and run its cars over the new bridge in the same manner and to the same extent heretofore existing under the former contract with the county. It is further urged, on behalf of the railroad company, that if the said company be allowed to cause its tracks to be laid over and upon said bridge at the same time the roadway is being constructed, a great amount of expense will be saved to the company, and

the necessity for tearing up the roadway after the said bridge is completed and turned over to the county—thereby causing great inconvenience to the traveling public—will be obviated.

All of these averments of fact are sworn to by the manager of the railroad company and the county commissioners of Lycoming county. In addition thereto, there is a letter from the Hon. Oscar E. Thompson, the superintendent, on behalf of the state, in the construction of the bridge, in which he recommends that this permission be granted, providing the railroad company pay the additional expense, if any, made necessary by their work.

In view of all the circumstances surrounding this case, I am of the opinion and advise the board of commissioners of public grounds and buildings that they have the legal right and authority to grant this permission, and that such action on their part will best serve the interests of all concerned.

SCHOOL LAWS.

School law—Election of county superintendents.

The presumption of law is that a public officer elected by the people is entitled to all the privileges of the office held by him during his continuance therein, and that presumption must prevail in the absence of any legislation limiting those powers under particular circumstances.

School directors, regularly elected or appointed, who have taken the oath of office and organized in districts established since the first Monday of June, 1907, have the right to vote at the election of county superintendents on the first Tuesday of May, 1908.

School directors in a district which has been consolidated with a city or borough having a separate superintendent, since the first Monday of June, 1907, and whose term of office expire June 1, 1908, have the right to vote for county superintendent on the first Tuesday of May, 1908.

Attorney General's Department. Opinion to Dr. Nathan C. Schaeffer, Superintendent of Public Instruction.

FLEITZ, Deputy Attorney General, April 22, 1908.

I am receipt of your letter of to-day, in which you submit two questions, and ask for an official opinion thereon:

First. Have school directors in school districts established

since the first Monday of June, 1907, the right to vote at the election of county superintendent, on the first Tuesday of May, 1908?

Second. In case a school district is merged into a city or borough having a borough superintendent, by consolidation, since the first Monday of June, 1907, have the school directors merged and whose term of office expire at the expiration of the school year ending June, 1908, the right to vote for county superintendent on the first Tuesday of May, 1908?

I have examined these questions carefully and have been unable to find any decisions of the courts covering either of them, and I am, therefore, obliged to decide them under the terms of the acts creating the office of school director and defining its duties.

The presumption of law is that a public officer elected by the people is entitled to all the privileges of the office held by him during his continuance therein, and that presumption must prevail in the absence of any legislation limiting those powers under particular circumstances.

One of the duties imposed upon a person holding the office of school director is that every three years he is to meet with his fellow directors of the county and proceed to elect a county superintendent to serve for the next three years. If, for any reason, his right to vote in such an election is questioned, the proper place for the determination of that matter is in the courts, and any candidate for county superintendent or other interested person who feels that school directors not entitled to vote have exercised that function, has a full and adequate remedy at law.

For these reasons I have the honor to submit the following answers to your questions:

First. School directors, regularly elected or appointed, who have taken the oath of office and organized in districts established since the first Monday of June, 1907, have the right to vote at the election of county superintendents on the first Tuesday of May, 1908.

Second. School directors in a school district merged into a city or borough having a borough superintendent by consolidation since the first Monday of June, 1907, and whose terms expire at the end of the school year ending June, 1908, have the right to vote for county superintendent on the first Tuesday of May, 1908.

PRIMARY ELECTIONS.

Primary elections—Accounts of candidates—Act of March 8, 1906.

Every candidate for nomination at any primary election, caucus or convention shall, within fifteen days after the same is held, if the amount received or expended by him exceeds the sum of fifty dollars, file with the proper officers a full, true and detailed account, subscribed and sworn to by him, setting forth each and every sum of money contributed, received or disbursed by him for election expenses.

The Act of March 8, 1906, P. L. 79, in no wise recognizes committees in primary election matters, they being recognized only in general elections.

Moneys furnished by a candidate to a committee or the treasurer of a committee, to be disbursed in the interest of the candidate, are moneys disbursed by such candidate, and as such must be included in his account.

Attorney General's Department. Opinion to Robert McAfee, Secretary of the Commonwealth.

TODD, Attorney General, April 22, 1908.

I have before me your letter of to-day, stating that you have received numerous inquiries as to the proper interpretation of the corrupt practice act, as applying to primary elections, and submitting the following questions for my official decision:

1. Must each candidate for nomination at any primary election, caucus or convention, whether nominated or not, file with the proper officers a full, true and detailed account of all moneys contributed, received or disbursed by him for election expenses within fifteen days?

2. Can any candidate for nomination at a primary election appoint a committee, which can in turn choose a treasurer, through whom all expenses and disbursements can be made, and the filing of whose account within thirty days will relieve the candidate himself from filing such an account?

The language of sections 5 and 6 of the Act of March 8th, 1906, P. L. 79, covers both these questions so clearly that there can be no mistaking their terms, and I have the honor to answer your questions as follows:

1. Every candidate for nomination at any primary election, caucus or convention shall, within fifteen days after the

same is held, if the amount received or expended by him exceeds the sum of fifty dollars, file with the proper officers a full, true and detailed account, subscribed and sworn to by him, setting forth each and every sum of money contributed, received or disbursed by him for election expenses.

2. The act under discussion in no wise recognizes committees or treasurers of committees in primary election matters, they being recognized only in general elections. There is, therefore, no warrant or authority of law for the disbursement of money through a committee or by its treasurer so far as primary elections are concerned, but each candidate must be responsible for all disbursements made in his behalf and include them in his account. Moneys furnished by the candidate to a committee or the treasurer of a committee, to be disbursed in the interest of the candidate, are moneys disbursed by such candidate, and as such must be included in his account.

Witness Fees of Mine Inspectors.

Mine inspectors—Witness fees and mileage.

When mine inspectors are subpoenaed as witnesses, they are entitled to the same fees and mileage as other witnesses, but as they are salaried officers of the state, their fees and mileage should be turned in to the chief of the department of mines and by him transmitted to the state treasury.

Attorney General's Department. Opinion to James E. Roderick, Chief of the Department of Mines.

Fleitz, Deputy Attorney General, April 22, 1908.

Your letter of recent date to this department, asking for an opinion as to the right of mine inspectors to collect fees and mileage in attending court when they are regularly subpoenaed as witnesses, received.

I advise you that such fees and mileage can be collected by the mine inspectors for such service in amounts equal to that allowed by law for other witnesses for similar services, but, inasmuch as they are salaried officers of the state, such costs cannot be used by these officials for their own use, but must be turned in by them to you, and by you transmitted to the state treasury.

CONSTRUCTION OF STATE HIGHWAYS.

Construction of state highways—Power of county commissioners to withdraw agreement to pay county's share of cost.

After the commissioners of a county have signed an agreement to pay the county's proportionate share of the cost of a state highway, and the contract for the work has been executed, the commissioners can not withdraw their agreement and compel the cancellation of the contract, on the ground that the construction of the highway is a scheme to benefit private individuals who have a railway franchise.

Before county commissioners petition the state for the improvement of certain highways in their county, and sign agreements to pay their proportionate share of the expense, it is their duty to investigate the subject sufficiently to know the facts in each case, and a failure to perform this plain duty at the proper time affords no legal grounds for coming in after a contract is let and pleading their own negligence as a reason for its cancellation.

Attorney General's Department. Opinion to Joseph W. Hunter, State Highway Commissioner.

FLEITZ, Deputy Attorney General, April 25, 1908.

I have your letter of to-day in which you ask for an official opinion upon a peculiar situation which has arisen in connection with the construction of a new state highway in Westmoreland county.

It appears from the papers you enclose that on the 3d day of April, 1908, acting in your official capacity for the commonwealth of Pennsylvania, you entered into a contract with the Pitt Construction Company for the improvement of a certain section of highway in Westmoreland county, township of North Huntingdon, being about 21,538 feet long, and extending from the borough line of Irwin to land of A. L. McFarland, thence to Allegheny county line.

The contract is in due form, according to the requirements of law, and properly executed by the parties thereto. The preliminary proceedings provided by law were all duly taken prior to the execution of this contract, and this included an agreement between yourself, representing the commonwealth of Pennsylvania, and D. W. Shupe, W. D. Reamer, and B. C. Shaffer, county commissioners of Westmoreland county, and A. M. White, H. J. Gongawar and Wm. M. Lauffer, supervisors of North Huntingdon township, that the said county of

Westmoreland and the said township of North Huntingdon "jointly and severally agree to pay each one-eighth of the total expenses of such improvement, to the commonwealth."

I understand also that the contractor is now upon the ground and beginning the work under this contract. On April 17, 1908, you received a letter from Wm. T. Dom, Jr., county solicitor of Westmoreland county, in which he states that he has been instructed by the county commissioners of that county to notify you that they have "passed a resolution annulling the contract let by them for the construction of a state highway * * * in North Huntingdon township, this county * * * the reason for this action exists in the fact that they have discovered unmistakable proof that back of this proposed road exists only a scheme to benefit some private individuals who have a street railway franchise. * * * You will, therefore, at once cancel said contract, or, if the same has been formally awarded, you will please notify the contractor not to enter on said work."

The only contract which exists between the state of Pennsylvania and the county commissioners of Westmoreland county is their signed agreement to pay their legal proportion of the expense made necessary by this work. The contract for the performance of the work is between the commonwealth of Pennsylvania and the Pitt Construction Company, and with this contract the county commissioners of Westmoreland county have absolutely nothing to do. Before county commissioners petition the state for the improvement of certain highways in their county, and sign agreements to pay their proportionate share of the expense, it is their duty to investigate the subject sufficiently to know the facts in each case, and a failure to perform this plain duty at the proper time affords no legal grounds for coming in after a contract is let and pleading their own negligence as a reason for its cancellation.

Under all the circumstances, I am of opinion and advise you that you would not be justified in attempting to cancel this contract, and it is quite beyond the power of the board of county commissioners of Westmoreland county, at this time, and for the reasons stated, to annul the agreement with the state to pay their part of the expense made necessary by this improvement.

IN THE MATTER OF THE APPLICATION OF JAMES J. LYNCH FOR RETAIL LIQUOR LICENSE AND TRANSFER THEREOF TO JOHN C. ALDINGER AND MARTIN L. FEASER.

Liquor law—Hotel licenses—Granting of license for the purpose of transfer.

When, upon the hearing of a remonstrance to the granting of a hotel license, the personal unfitness of the applicant is shown, and it is also shown that the hotel is a public necessity, and that the interests of creditors have intervened since the hotel was first licensed, the license will be granted for the sole purpose of permitting it to be transferred to persons whose fitness to hold it is conceded.

Q. S. Dauphin County. No. 34, License Docket, 1908.

Wm. M. Hain and *C. H. Backenstoe,* for application.

Scott S. Leiby, contra.

McCARRELL, J., May 15, 1908.

This is an application for license at Hotel Lynch, Nos. 325-327 Verbeke street, Harrisburg, Pa. The building was erected about five years ago and has been a licensed house since February, 1904. It is of modern construction, with fifty-nine bedrooms and eighty beds, according to the application, and is well located and adapted for the entertainment of strangers and travelers. Its necessity is not questioned by the remonstrance and is admitted by counsel for the remonstrant. The objection is that Lynch, the applicant, has made sales to minors and others illegally and the testimony sustains the objection.

We are asked to grant the license not for the purpose of permitting the applicant, who has violated the law, to continue the business, but solely in order that transfer thereof may be made to John C. Aldinger and Martin L. Feaser, who are conceded by counsel for remonstrant to be men of temperate habits and good moral character. Their application for transfer has been duly made and advertised, and the applicants for transfer have been in the actual occupancy of the hotel as lessees for several months. If they were original applicants for the license there could be no possible objection to the granting of the application.

If James J. Lynch was the only person interested, we would not hesitate to refuse the application. Since the hotel was first licensed the rights of mortgagees and judgment cred-

itors to the extent of at least $14,500.00, as we are informed by the briefs submitted at the argument, have intervened, and these interests ought not to be prejudiced by conduct for which they are in no way responsible.

The public necessity for the hotel as a place of entertainment for strangers and travelers is admitted. The qualification of the proposed transferrees is conceded. The hotel in its construction and equipment is apparently fully equal to, if not better, thany any other in that portion of the city. Proper accommodation for the traveling public is an important consideration.

We have, therefore, concluded, after careful consideration of all the circumstances, to follow in this instance the precedents established in other counties as also in this. Among these precedents are the cases of Quirk; Kelly; Burchhill; Kearney; Gearhart and Boylon Licenses, 17th County Court Reports, 327, etc., and Hedrick's License, 7th Dauphin County Reporter, 168, and the Forbes and Ulrich Licenses therein referred to.

We accordingly grant the application of James J. Lynch as of February 19th, 1908, solely for the purpose of permitting a transfer of the license to the applicants and lessees, Aldinger and Feaser, and do now approve their bond and authorize the transfer of said license to them.

JOSEPH BALL *vs.* EDWARD BOYER.

Easements—Surrender—Statute of Frauds—Costs.

An agreement for the extinguishment of an easement is within the Statute of Frauds and should be in writing.

There must be a consideration and its payment or performance to support a parol agreement for the extinguishment of an easement.

The abandonment, by the owner of a servient tenement, of his purpose to erect a row of houses and the selling of a part of his lot at a sacrifice do not constitute a sufficient consideration to support a parol agreemnet for the extinguishment of an easement.

A mistake as to the law cannot relieve a defendant of his responsibility for costs arising in litigation caused by his unauthorized act.

Injunction. C. P., Dauphin County, No. 416 Equity Docket.

Wm. H. Earnest, for plaintiff.

E. E. Beidleman, for defendant.

MCCARRELL, J., May 22, 1908.

The plaintiff filed his bill November 6th, 1907, praying for an injunction, preliminary until hearing, and perpetual thereafter, restraining the defendant, Edward Boyer, from obstructing an easement or alley-way four feet in width, appurtenant to plaintiff's premises over and across defendant's lands to Court avenue, in the city of Harrisburg.

The bill alleges in substances that the defendant and the plaintiff own the three houses, Nos. 213, No. 215 and No. 217 Pine street, in the city of Harrisburg, the defendant being the owner of house No. 213, at the corner of Pine street and Court avenue.

The bill alleges that these houses are located upon lot No. 92 in the general plan of the borough, now city, of Harrisburg, and that the plaintiff has the right to the use, in common with the defendant, of an alley four feet in width, beginning on Court avenue, about sixty feet distant from Pine street, and running across lot No. 92 of the general plan aforesaid from Court avenue to the property of plaintiff, known as 217 Pine street, the plaintiff being also the owner of No. 215 Pine street.

The bill complains that the defendant has partly closed

said four feet alley and threatens to close it entirely and open a new alley at another portion of lot No. 92.

On the presentation of the bill, accompanied by injuction affidavit and the filing of a bond, a preliminary injunction was awarded November 6th, 1907.

On November 11th, 1907, the defendant filed his answer, admitting the existence of the right of way and easement claimed by the plaintiff across defendant's lot, but alleging that on October 11th, 1907, by agreement between himself and plaintiff, this right of way and easement was abandoned and extinguished, and further alleging that on said day it was distinctly agreed between the plaintiff and the defendant that in lieu of the aforesaid right of way or easement, the defendant should create and open a right of way across his lot, beginning on Court avenue at a point one hundred and five feet distant from Pine street, which said new right of way should be four feet in width and run from Court avenue, a distance of seventeen feet six inches to the adjoining property of the plaintiff. The defendant in his answer then alleges that in pursuance of said agreement of October 11th, 1907, he proceeded to open said last-mentioned right of way, and relying on said agreement abandoned the construction of two certain houses for which he had prepared plans, and sold at a considerable financial loss all the portion of his property lying south of the said last-mentioned right of way, and has fully consummated the sale of the said portion of his lot.

The defendant admits that he has closed the alley four feet in width, to the use of which the plaintiff was originally entitled, and has proceeded to open the new right of way in accordance with the alleged agreement of October 11th, 1907, and that he has done so solely under said agreement.

The answer having been thus filed, the case was heard November 14th, 1907, and testimony was taken as on final hearing.

At the hearing it was admitted that the right of way claimed by the plaintiff was originally created by deed duly recorded. and the existence of the original right of way being admitted by the answer and at the hearing, testimony was heard as to the alleged agreement of October 11th, 1907, by which the defendant claimed that this original right of way was extinguished.

The defendant testified (page 3) substantially as follows:

"I own lot 213 Pine street, lot being 17 feet 6 inches on

Pine street by 147 feet on Court avenue. I bought the lot October 4th, 1907. Joseph Ball was the owner of 215 and 217 Pine street. I knew of the existence of the alley four feet wide running across the rear of my lot, sixty feet from Pine street, and running across the three properties. I saw Ball October 11th, 1907, at the Burns Building, Harrisburg, about 10 a. m., and said to him, I wish to arrange for the present alley to be removed back eight feet for the purpose of putting up a kitchen. He studied a little, and he said, 'Well, I don't want it there.' I said 'why' and he said, 'for the reason it would interfere with my water-closet there.' I said I thought not, and I was pretty sure that it would not. 'Well,' he says, 'I don't want it there any way, I want you to put that alley down 105 feet.' I said now let me understand what you mean by 105 feet, do you mean to the center of the alley, or do you mean to the end of your lot? He says, 'I mean to the end of my lot and the alley outside of that; there is where it ought to be. I said that is cutting my ground badly and leaving me a little neck of land there that I don't think I can dispose of to very good advantage. I said I must look that up. He says, 'Oh, you will have no trouble selling that, you go to see Mr. Baker, you can sell him that, as he owns the alley property in the rear of that.' I says, very well, I will try that; I will put the alley back just as you say, 105 feet and make a four feet alley and it shan't cost you a penny. I will do all the fencing; I will lay the pavement and put it in good shape and I left him at that."

It is worthy of note that the defendant does not say in his testimony that the plaintiff then assented to this arrangement as stated, or directed him to proceed and change the location of the alley.

The defendant then testified that on the same day he saw Dr. Swartz and Mr. Baker, and on that day concluded a sale of the rear portion of his lot beyond the 105 feet to Dr. Swartz, and that on the next day, October 12th, 1907, he called upon Ball, the plaintiff, to get him to sign a written agreement in accordance with the verbal arrangement of the previous day; that Ball then said, "I have changed my mind over this thing; I don't want that alley put down; I have been there for these years with this alley above as it is and I will just leave it that way." To this the defendant says he replied, "I don't believe you will."

At this conversation, October 12th, 1907, the defendant's

son, George Boyer, was present and corroborates the statements made by his father as to what occurred at this interview. (p. 14.)

The defendant also called in his behalf as a witness, Daniel Rhoads, who testified (p. 17) that he heard a conversation between Boyer, the defendant, and Ball, the plaintiff, after October 11th, 1907, and states what was then said, as follows:

"I just happened to be there one morning and Mr. Ball came up the alley and him and Mr. Boyer got talking, and I heard Mr. Boyer tell Mr. Ball to leave them to get together without any trouble. Mr. Boyer said 'I am just doing as you agreed to do,' and Mr. Ball said 'I don't care a damn about that, that alley is not going to be closed.' "

Joseph Ball, the plaintiff, testified (p. 18) that Boyer came to see him on October 11th, 1907, and wanted him to move the alley back eight feet, and that he, Ball, positively refused to do it. He says, "I said if that alley ever was moved ,it ought to go back 105 feet. I never entered into any agreement with him whatever about moving it. He objected to moving the alley back 105 feet, because it would spoil his plans for a row of buildings, and we came to no agreement at all."

Mr. Ball further testified that he talked with Boyer as to what the property would have been worth if the alley was not there, but asserted positively that he never agreed to change its location.

The defendant having admitted the existence of the original right of way by his answer, has assumed the burden of establishing a valid agreement by which it has been abandoned and extinguished and another alley opened in its place.

The testimony as to the making of the agreement of abandonment has been substantially quoted above.

No one was present at the conversation which occurred between the parties on October 11th, 1907. The defendant asserts that at that time a distinct oral agreement was made and entered into between himself and the plaintiff, by which the original easement was extinglished and a new easement created at another point.

The plaintiff positively denies that any such oral agreement was entered into.

In corroboration of the defendant's testimony, we have the evidence of George Boyer, the defendant's son, who corroborates his father as to what was said at the interview be-

tween the defendant and plaintiff on October 12th, 1907. At this interview, it appears from the testimony of the defendant and his son, George, that the plaintiff then said, after being asked to sign a written agreement for the change in the location of the alley, "I have changed my mind upon this thing; I don't want that alley put down; I have been there for these years with the alley above as it is, and I will just leave it that way."

In further corroboration of the testimony of defendant as to what occurred on October 11th, 1907, we have the testimony of Daniel Rhoads as to the conversation between the defendant and the plaintiff some time after October 11th, 1907, in which conversation, as Rhoads testifies, Boyer said "I am just doing as you agreed to do," and the plaintiff, Ball, said "I don't care a damn about that, that alley is not going to be closed."

It thus appears that the defendant's statement as to the oral agreement of October 11th, 1907, between himself and the plaintiff is to a certain extent corroborated by the testimony of George Boyer and by the testimony of Daniel Rhoads, but the making of such agreement is positively denied by the plaintiff.

From a careful consideration of all the testimony in this case, we find the following,

STATEMENT OF FACTS.

1st. The easement and right of way claimed by the plaintiff in his bill was created by deed duly recorded, and had been used and enjoyed by the plaintiff and his predecessors in title continuously until October 11th, 1907.

2d. That on October 11th, 1907, the defendant alleges an oral agreement was made between himself and the defendant by which the location of the easement was to be changed from its original location, beginning at a point on Court avenue about sixty feet from the corner of said avenue and Pine street, to a point on said avenue about 105 feet distant from the corner of said avenue and said street, but the making of such oral agreement is explicitly denied by the plaintiff.

3d. That on October 12th, 1907, the defendant requested the plaintiff to reduce the alleged oral agreement with respect to said easement to writing, and the plaintiff then declined so to do.

4th. That prior to the interview between the plaintiff and defendant on October 12th, 1907, nothing had been done by

either party in the way of making a change in the location of the easement in pursuance of the alleged oral agreement of October 11th, 1907.

5th. That after the making of the alleged oral agreement between plaintiff and defendant on October 11th, 1907, and before the interview of the defendant with the plaintiff on October 12th, 1907, the defendant had sold to Dr. Swartz that portion of his lot of ground lying south of the proposed new location of the easement or alley.

6th. That the acts of the defendant in the obstruction of the easement, as complained of in plaintiff's bill, were done and committed by the defendant after the date of the alleged oral agreement for change in location of the easement made October 11th, 1907.

The question which we are now called upon to decide is, has there been a valid arrangement entered into between the plaintiff and defendant for the change in the location of the alley or easement in dispute, which arrangement can now be enforced so as to permit the defendant to obstruct or close the alley-way and easement referred to in plaintiff's bill? This appears to us to be the only question for our decision.

Discussion.

It is claimed by the defendant that the alleged agreement of October 11th, 1907, is a valid contract between himself and the plaintiff, by which the easement or alley-way claimed by the plaintiff across the defendant's property has been abandoned and extinguished. The said alleged agreement was an oral one and upon the next day after it was made the plaintiff refused to reduce it to writing. The easement in question was created by deed, and the plaintiff contends that even if said oral agreement was entered into by the plaintiff, it is void and of no effect, because it is not in writing.

In Erb *vs.* Brown, 69 Pa. 216, Mr. Justice Williams, in discussing the question raised here, uses the following laguage, at page 218:

"The servitude imposed on the plaintiff's land for the benefit of the defendant's estate was created by deed, and under the Statute of Frauds could not be assigned, granted or surrendered unless by deed or note in writing, or by act and operation of law. It could not be extinguished or renounced by a parol agreement between the owners of the dominant and the servient tenement."

In Dyer *vs.* Sanford, 9 Metcalf, 395, Chief Justice Shaw, at page 402, uses the following language:

"By the rules of law an easement is an interest in land to be acquired and released only by deed as between the parties, respectively. When it is contended that the owner of the dominant tenement has voluntarily abandoned his right so as *de facto* to withdraw the incumbrances from the servient tenement without a release to its owner, the proof must go to this extent; first, that the acts relied on were volunarily done by the owner of the dominant tenement or by his express authority; secondly, that such party was the owner of the inheritance and had authority to bind the estate by his grant or release; and, thirdly, that the acts are of such decisive and conclusive a character as to indicate and prove his intent to abandon the easement."

In Pope *vs.* Devereaux, 5th Gray, 412, it is held that an unexecuted parol agreement to give up an easement is not valid.

In the present case the alleged oral or parol agreement, relative to the change in the location of the easement or alley was not carried into effect with the consent of the parties.

The plaintiff on October 12th, 1907, gave distinct notice to the defendant that he would not carry it into effect, and when the defendant on or about November 6th, 1907, undertook to carry it into effect by obstructing and closing the old easement or alley-way and opening the new easement or alley-way, the plaintiff promptly applied for a preliminary injunction, which was granted.

The alleged parol agreement in this case has not been executed. The defendant contends that it has been so far executed as to render it inequitable to rescind it or interfere in any way to prevent its full execution. He alleges that the abandonment of his plan to erect buildings along Court avenue and his sale of the portion of his lot lying south of the proposed new location of the easement or alley is such execution of the parol agreement as entitles him to have it enforced against the plaintiff.

The abandonment of the plan to erect houses on the alley and the sale of the portion of his lot, south of the proposed new location, were acts of the defendant entirely independent of the terms of the alleged agreement relative to the change in the location of the alley. They may have been done because of the agreement, but as between the plaintiff and the defendant, it cannot be successfully contended that they were

done in execution of the alleged agreement and for the purpose of carrying it into full effect.

If the alleged agreement of October 11th, 1907, had required that these acts be done and performed by the defendant, his performance of them would place him in a position where he would have much stronger reason to contend that the agreement must be fully carried out. They were, so far as this case is concerned, his own voluntary acts which the agreement in question did not require him to perform for the benefit of the plaintiff. He did these acts presumably for his own advantage. The performance of these acts was no part of the consideration for the alleged agreement of October 11th, 1907. Indeed, no express consideration is mentioned in said agreement.

It is contended by the defendant that an easement may be extinguished by a parol agreement, and in support of this contention we are referred to the case of Hudson *vs.* Watson, 2 Superior Court, 422. In that case Judge Beaver, delivering the opinion of the court, at page 425, uses the following language:

"If the evidence had gone no further than the offer, it was clearly incompetent; but inasmuch as the testimony shows that, in pursuance of the agreement, Watson, the owner of the servient tenement, refrained from making any objection to the public road referred to and the evidence further showing that the public road actually was opened over the land of the appellee, these facts would have constituted a defense, if the jury believed that the agreement as testified to by Hudson had been actually made. Whilst it is true that an easement is a liberty, privilege or advantage in land, without profit and existing distinct from the ownership of the soil, it is nevertheless such an interest in land as is included in the statute of frauds and must be founded upon or acquired, so far as the evidence in this case is concerned, by grant or prescriptions; and whilst it is also true as claimed by the appellant that an abandonment of an easement such as was claimed in this case, once created must be in writing or by cesser, yet, inasmuch as a parol grant executed will be upheld and sustained under the same circumstances and on the same principles that a parol contract for the sale of land would be sustained, it follows that a parol agreement for the abandonment of an easement will be sustained, when such an agreement has been so far executed as to make it inequitable to rescind the same."

In that case, Watson, the owner of the servient tenement, made an agreement with Hudson, the owner of the dominant tenement, by which Hudson, the owner of the dominant tenement or easement, agreed to surrender the easement, if Watson did not object to the opening of a public road through Watson's own premises. Watson made no objection to the opening of the public road through his premises and the road was actually opened, and it was consequently held that "it would be manifestly inequitable to allow Hudson to repudiate the agreement because it was not in writing."

That case was afterwards considered in 5th Superior Court, 456, and 11th Superior Court, 256, but the conclusion herein referred to was not in any way modified.

That case shows the importance of a consideration and its payment or performance to support a parol agreement for the extinguishment of an easement, and the presence of the consideration for the extinguishment of the easement in that case and its performance by the owner of the servient tenement, induced the learned court to make the declaration hereinbefore quoted.

We are therefore constrained to conclude that the alleged parol agreement of October 11th, 1907, even if made, is of no effect because of the statute of frauds requiring such agreements to be in writing.

We are therefore of the opinion that the plaintiff is entitled to have the preliminary injunction in this case made perpetual.

The only question remaining for consideration is that of costs. The acts of the defendant in the obstruction of the easement as complained of by the plaintiff, were done after the date of the alleged agreement of October 11th, 1907, and very probably because the defendant believed that that alleged agreement amounted in law to an extinguishment of the easement. Under the decisions, however, as to the disposition of costs, this mistake as to the law cannot relieve the defendant of his responsibility for costs arising in litigation caused by his unauthorized act. We are, therefore, of opinion that the defendant should pay the costs of this proceeding. Let a decree in proper form be prepared in accordance with the conclusions hereinbefore stated and presented for our signature, as required by the equity rules.

GEORGE W. REED *vs.* WILLIAM L. FEHR AND O. H. WAGNER, NOW OR FORMERLY TRADING AS FEHR & WAGNER, AND WILLIAM L. FEHR AND A. H. CARL, NOW OR FORMERLY TRADING AS FEHR & CARL.

Public lands—Warrants—Trespass for cutting and removing timber—Double and treble damages—Act of March 29, 1824.

A warrant under which there has been no acceptance of survey and no patent issued, will be postponed to a junior warrant under which there has been a return and acceptance and a patent issued.

In an action of trespass for cutting timber, plaintiff showed title under warrant issued in 1811, returned January 20, 1812, and a patent issued July 31, 1815. Defendant attempted to show an interference with one of plaintiff's lines under a warrant issued in 1795, returned August 13, 1827, but with no evidence of acceptance of the return or of the issuing of a patent. *Held*, that even if the jury found that there was an interference, it would not prevent the holder of the title under the warrant of 1811 from claiming the land covered by it.

When defendants, in an action for cutting and removing timber, make no attempt to show title in themselves to the land on which the timber was cut, and made no inquiry as to the title until shortly before the commencement of the trial, the court will treble the damages found by the jury for timber cut and removed and double the damages found by the jury for timber cut and left upon the land.

Trespass. C. P. Dauphin County, No. 469, September Term, 1907.

J. C. Nissley and *C. H. Backenstoe* for plaintiff.

E. E. Beidleman and *John E. Fox* for defendants.

MCCARRELL, J., May 22, 1908.

This case is now before us upon a motion for a new trial, made by the defendants, and also upon a rule to show cause why double and treble damages should not be allowed, granted upon the petition of the plaintiff.

The action was brought under the Act of March 29th, 1824, 8th Smith's Laws, 223, for the purpose of recovering damages for timber cut down and felled upon the premises of the plaintiff, and for timber cut down, felled and removed from plaintiff's premises.

On January 30th, 1908, the jury, after a trial lasting more than a week, rendered a verdict in favor of the plaintiff, finding therein in single damages that the actual value of the timber cut and removed from the land was one hundred and fifty ($150.00) dollars, and the actual value of the timber cut and left upon the premises was three hundred and thirty-five and 90-100 ($335.90) dollars.

On February 3d, 1908, the defendants filed their motion for a new trial, together with the reasons therefor, and on March 2d, 1908, by permission of the court, filed an additional reason for a new trial.

The reasons filed February 3d, 1908, allege that the verdict of the jury was against the weight of the evidence and was excessive in its amount. None of the original reasons for a new trial were seriously pressed at the argument.

The reason filed March 2d, 1908, alleges that the court erred in its charge to the jury with respect to plaintiff's title to the lands upon which the timber was cut down and felled and from which the timber was removed by the defendants.

At the trial the plaintiff for the purpose of showing his title to the premises in question, offered in evidence a warrant issued to Martin Geistwhite in 1811, under which warrant a survey was made and returned, and accepted by the land department of Pennsylvania January 20th, 1812, and a patent duly issued thereon for the land covered by the survey on July 31st, 1815. The plaintiff showed by documentary evidence a regular chain of title from Geistwhite to himself for the lands included in said survey.

The defendants at the trial did not undertake to show any title whatever in themselves to the premises upon which the timber had been cut down and felled. They attempted to show that the cutting and felling of timber was not within the limits of the Geistwhite survey, and for that purpose offered in evidence, *inter alia,* a certified copy of a warrant issued to Samuel Weir in 1795.

By the endorsement upon this certified copy, it appeared that the survey thereunder was not returned to the land department of the state of Pennsylvania until August 13th, 1827, a period of about thirty-two years.

The instruction of the court upon the subject of title in regard to which the defendants now complain, is as follows:

"The warrant to Weir was issued in 1795, but as appears

from the survey, or a copy of it offered in evidence, the return of that warrant was not made to the land department of the state until the 13th day of August, 1827. You will find that the warrant to Geistwhite, while issued in 1811, was returned to the land department of Pennsylvania, and the survey made under that warrant, was accepted by the land department January 20, 1812, and a patent was issued for the land covered by that survey on July 31, 1815, and a regular chain of title under that warrant and under that patent, has been shown by the documentary evidence submitted by Mr. Reed, the plaintiff.

The Weir warrant, which it is alleged interferes with the Geistwhite survey, so far as the evidence before us shows, has not been accepted even yet by the land department of the state, and it does not appear so far as the evidence submitted here is concerned that any patent has even yet been issued under the Samuel Weir warrant. We say to you as matter of law that under these circumstances the title to the Geistwhite lands, the lands included by the lines of the Geistwhite survey, is apparently the better title, because of the fact that the commonwealth accepted the return of the survey and issued a patent; and if when you come to examine the testimony you find that there is any interference between the Geistwhite and Weir warrants, at the eastern end of the Weir tract, then we say to you as matter of law that the title under the Geistwhite warrant is the better title, because of the fact that the survey under the warrant was returned and accepted prior to any return of survey made under the Weir warrant. Martin Geistwhite, who took out the warrant of 1811, followed up the warrant which he procured by having a survey made, by having that survey returned to and accepted by the state, and by obtaining from the state, on July 31, 1815, a patent for the land; so that if you find that there is an interference as testified to by Messrs. McCaffrey and Geary, that interference would not prevent the holder of the title under the Geistwhite warrant from claiming the lands which were covered by the Geistwhite survey thus returned and accepted and upon which a patent was issued. You will consider all this testimony, gentlemen, in regard to the title carefully. You will examine the deed, you will examine these blocks which have been submitted in evidence, you will satisfy yourselves as to whether or not by the weight of the evidence it has been shown that the northern line of this survey was correctly located by Messrs. Cooper and Hoffer."

Was this erroneous? We have not been referred to any authority to sustain the contention of the defendants upon this point.

In McGowan *vs.* Ahl, 53 Pa. 84, a similar question was raised and decided. That was an action of trespass *quare clausum fregit* for cutting timber trees. The plaintiff's title originated in a warrant issued in the name of William B. Goldthwait, February 24th, 1794, and a survey in pursuance thereof made January 1st, 1795, and returned May 11th, 1795, calling for an adjoining survey in the name of John Love.

The defendants claimed under warrant to John Love, dated January 4th, 1794, surveyed October 7th, 1794, but not returned until July 25th, 1814.

The plaintiff in his first point asked the court to say that under the above-named dates of the warrants, surveys and returns, the Goldthwait title is the elder and superior one to all the land embraced within its lines, and postpones the title of the Love warrant and survey thereto.

The court below answered this point as follows:

"We answer this in the affirmative, if the purchase money was not paid on the Love warrant. But in the view we take of this case it is not material which survey was the oldest. It is not the case of an interference or overlapping of surveys, for both call for the same line; but the question is where the division line called for by both surveys was located by the Love and Goldthwait surveys of 1794 and 1795."

This answer was assigned for error, and in delivering the opinion of the supreme court, Chief Justice Woodward, at page 89, uses the following language:

"The doctrine of the above point is unquestionable law. Although the Love warrant was descriptive to a common intent, was the oldest and was first surveyed, yet it lost priority by delay for nearly twenty years of the return of survey. Descriptive warrants, if followed up with legal diligence, confer title from their date; but it is as much the duty of the holder of such a warrant to pay the surveying fees, and have his warrant returned to the surveyor general's office, within a reasonable time, as it is the duty of the holder of an indescriptive warrant. A descriptive warrant may be abandoned or shifted or more land be included than is called for; and in order that the commonwealth may have precise knowledge of the land that has been actually appropriated to it, and be paid for any surplus that has been surveyed into it, the survey

as in other cases must be returned within a period that has been fixed, not to exceed seven years: Chambers *vs.* Mifflin, 1 Pa. Reps. 78; Star *vs.* Bradford, 2 Id., 384; Stauch *vs.* Shoemaker, 1 W. & S. 166; Wilhelm *vs.* Shoop, 6 Barr, 21."

"Nor is it material, as was argued, that the right of the younger claimant originated before and not after the limitation had closed against the elder, because the postponement of the elder on account of laches is from respect to the convenience and rights of the commonwealth rather than to the rights of the adverse claimant. By taking the warrant, a duty to the commonwealth is assumed which can be discharged only by making a survey and return within reasonable time, and if it be not performed within the period that limits the commonwealth's indulgence, the right is postponed to any intervening right that has been duly pursued. And the intervening right is none the worse for being an old and not a recent one. The last becomes first by the postponement of the first as the penalty of neglect."

"Then so far as concerns the doctrine of this point, the plaintiff was entitled to an unqualified affirmance."

Because the point was not unqualifiedly affirmed the judgment was reversed.

In the light of this decision, it cannot be contended that our instruction to the jury upon this point, as above quoted, was erroneous.

We have carefully considered all the reasons which have been submitted in support of the motion for a new trial, and are unable to find merit in any of them. The motion for a new trial is therefore overruled.

We come now to consider the rule granted upon plaintiff's petition to show cause why judgment should not be entered for three times the amount of the value of the timber cut and carried away from plaintiff's premises, and for double the value of the timber cut down and felled and allowed to remain upon the ground, these items of value having been separately found and returned by the jury.

The Act of March 29th, 1824, under which this suit was brought, provides as follows:

"That in all cases where any person, after the said first day of September, shall cut down or fell, or employ any person or persons to cut down or fell, any timber tree or trees, growing upon the lands of another, without the consent of the owner thereof, he, she or they, so offending, shall be liable

to pay such owner, double the value of such tree or trees, so cut down or felled; or in case of the conversion thereof to the use of such offender or offenders, treble the value thereof, to be recovered with costs of suit, by action of trespess or trover, as the case may be."

The act was intended to protect growing timber and to penalize the cutting of timber without the consent of the owner of the land upon which it was standing or growing.

The defendants in this case did not pretend to show any title to themselves in the premises upon which the timber was cut, or from which the timber was removed. So far as the evidence submitted at the trial indicated, they had apparently made no inquiry as to the title until shortly before the commencement of the trial. At the trial they offered in evidence a certified copy of a warrant issued to Samuel Weir in 1795 for the surveying of lands in Middle Paxton Township. They did not follow this proof with evidence that a patent had been issued for the land covered by the survey, which was returned as having been made under this warrant, on August 13th, 1827. They did not attempt to show that they had acquired title to any portion of the lands included in the Weir survey. The only use made of this warrant, so far as the testimony at the trial disclosed, was made by Messrs. McCaffrey and Geary in the surveying which they did only a few days before the commencement of the trial, for the purpose of enabling them to testify that Messrs. Cooper and Hoffer had not, in their opinion, correctly located the northern line of the Geistwhite survey.

No reason is apparent in this case why the defendants should not be required to pay the statutory amount of damages.

The jury has found in single damages that the actual value of the timber cut and carried away was one hundred and fifty dollars, and the plaintiff being entitled under the law to the statutory damages, we now treble the amount of single damages found by the jury on that item and decide that the plaintiff is entitled under the verdict to have for timber cut and carried away from his premises the sum of four hundred and fifty dollars.

The jury has found in single damages that the value of the timber cut and left upon the premises was three hundred and thirty-five and 90-100 dollars. Under the statute the plaintiff is entitled to recover double this value, and we accordingly now decide that the plaintiff is entitled to recover from the defendants for the timber cut and left upon the ground the

sum of six hundred seventy-one and eighty-one hundredths dollars ($671.80).

We therefore authorize and direct that upon payment of the jury fee, judgment be entered upon the verdict in favor of the plaintiff and against the defendants for the sum of eleven hundred twenty-one and 80-100 ($1,121.80) dollars, bearing interest from January 30th, 1908, the date when the verdict of the jury was returned to this court.

IN RE MERGER AND CONSOLIDATION OF THE OXFORD, WEST GROVE AND AVONDALE STREET RAILWAY COMPANY INTO THE WEST CHESTER, KENNETT AND WILMINGTON ELECTRIC RAILWAY COMPANY.

Street railways—Merger—Acts of March 24, 1865, and May 29, 1901.

The consolidation of street railway companies is not controlled or authorized by the terms of the Act of May 29, 1901, P. L. 349; that act is limited in its operation to corporations for profit, incorporated under the provisions of the Act of 29th of April, 1874, which does not provide for the incorporation of either railroads or street railways.

The consolidation and merger of street railway companies whose lines are partly within and partly without the state of Pennsylvania is provided for and governed by the requirements of the Act of Assembly of March 24, 1865, P. L. 49.

There is nothing in the Act of March 24, 1865, which requires the filing of a certificate from the auditor general of reports having been filed and all taxes having been paid, nor for the approval by the governor of such consolidation, or the issuance of letters patent thereon.

Upon the presentation of the agreement of merger, of a certified copy thereof, which shall show on its face compliance with the provisions of said act of assembly in reference to merger, it is the duty of the secretary of the commonwealth to file the same of record.

Attorney General's Department. Opinion to Robert McAfee, Secretary of the Commonwealth.

TODD, Attorney General, May 24, 1908.

The Oxford, West Grove and Avondale Street Railway Company is a corporation with lines entirely in Pennsylvania.

In re Merger of Oxford, West Grove and Avondale St. Railway Co.

The West Chester, Kennett and Wilmington Electric Railway Company is a corporation with lines partly in Pennsylvania and partly in Delaware. The Act of May 16, 1861 (P. L. 702), provides for the consolidation and merger of railroad companies having their lines wholly within the state of Pennsylvania, and the Act of 24th of March, 1865, P. L. 49, supplementary to the act regulating railway companies, approved the 19th of February, 1849, provides for the merger and consolidation of railroads whose lines are either wholly within or partly within and partly without the State, and these acts were held to apply to street railways in the case of Hestonville, etc., R. R. Cy. *vs.* Philadelphia, 89 Pa. St. 210. The Act of May 29, 1901, P. L. 349, entitled "An act supplementary to an act, entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved the twenty-ninth day of April, one thousand eight hundred and seventy-four, providing for the merger and consolidation of certain corporations," requires a certificate from the Auditor General of reports having been filed and all taxes having been paid, and that, on the filing of such certificate, letters patent shall issue thereon as a prerequisite to such consolidation and merger.

Counsel for the above entitled merging companies contend that the supplementary Act of 1901 does not provide for the consolidation and merger of street railways, but must be restricted in its operation to the consolidation and merger of corporations which are created under the provisions of the Act of 29th of April, 1874; and they further contend that, inasmuch as neither the Act of May 16, 1861, nor the Act of March 24, 1865, *supra,* requires applications for merger to be accompanied by a certificate from the auditor general of reports having been filed and all taxes having been paid, or the issuance of letters patent, or the approval by the governor, therefore all that is required to be done in connection with such merger to render the same operative, is the filing of the agreement, or a copy thereof, in the office of the secretary of the commonwealth.

I am of opinion that the consolidation of the street railway companies in this case is not controlled or authorized by the terms of the Act of May 29, 1901, above cited; that that act is limited in its operation to corporations for profit, incorporated under the provisions of the Act of 29th of April, 1874, which does not provide for the incorporation of either

railroads or street railways. They are incorporated under a separate series of acts of assembly.

I am further of opinion that the consolidation and merger in this case is provided for and governed by the requirements of the Act of Assembly of March 24, 1865, which provides, in section 2, among other things as follows:

> "And the agreement so adopted, or a certified copy thereof, shall be filed in the office of the secretary of the commonwealth, and shall from thence be deemed and taken to be the agreement and act of consolidation of the said companies. * * * * * *
>
> "Section 3. Upon the making and perfecting the agreement and act of consolidation, as provided in the preceding section, and filing the same, or a copy, with the secretary of the commonwealth, as aforesaid, the several corporations, parties thereto, shall be deemed and taken to be one corporation, by the name provided in said agreement and act, possessing within this commonwealth all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of each of said corporations, so consolidated."

There is nothing in the above-quoted language, or in any other provision of the act of assembly which requires the filing of the certificate from the auditor general of reports having been filed and all taxes having been paid, nor for the approval by the governor of said consolidation, or the issuance of letters patent thereon.

I am, therefore, of opinion that, upon the presentation to you of the agreement of merger, or a certified copy thereof, which shall show on its face compliance with the provisions of said act of assembly in reference to merger, it is your duty to file the same of record.

I, therefore, advise you in this case to file of record the agreement of merger, as it is presented, without the approval of the governor, and that you are not required to issue letters patent thereon.

DORA FISHMAN *vs.* GEORGE A. OYLER.

Executions—Proceedings to determine title to property—Statement—Judgment of non pros—Act of May 26, 1897.

In a proceeding, under the Act of May 26, 1897, P. L. 95, to determine the title to goods levied on by the sheriff, claimant failed to file statement of title within two weeks after the rule for issue was made absolute. The plaintiff in the execution obtained a rule to show cause why judgment of non pros should not be entered for failure to file statement. Claimant filed statement before the return day of the rule. Held, that the statement was in time and motion to make absolute the rule for judgment of non pros, overruled.

Rule for judgment of non pros for failure to file statement. C. P. Dauphin County, No. 496 January Term, 1906.

Harvey E. Knupp, for rule.

E. E. Beidleman, contra.

KUNKEL, P. J., April 30, 1908.

According to the allegation in the petition, the rule for the issue was made absolute on February 16, 1906. No statement was filed by the claimant within two weeks after that time, as required by the eleventh section of the Act of Assembly of May 26, 1897, P. L. 95. On October 29, 1906, the plaintiff in the execution, now the defendant in the issue, obtained a rule on the claimant to show cause why judgment of *non pros* should not be entered for the failure to file a statement. The rule was made returnable within ten days, and was served November 2, 1906. On November 8, 1906, the claimant filed her statement. The defendant in the issue now asks that the rule for judgment be made absolute. Under the facts stated we do not think he is entitled to judgment. In Ritter *vs.* Leonard, 2 Pars. 255, it was held, as to the right to judgment for want of an affidavit of defence, that though the plaintiff might have been entitled to judgment on motion, yet if he take a rule the defendant may file an affidavit of defense at any time before the return day of the rule, the ground of the decision being "that the plaintiff entering such a rule had signified his willingness even at that late hour to accept a sufficient affidavit of defense, and from analogy to various decisions to be found in our books, a party

might, by his own acts, waive an advantage he had attained." That case was quoted with approval in Barndollar *vs.* Fogarty, 203 Pa. 617. Here the plaintiff, instead of asking for judgment of *non pros* by motion, took a rule, and before the return day of the rule the statement was filed. The case is within the principle laid down and approved in the cases cited. The rule for judgment is, therefor, discharged. Under this view it is unnecessary to consider the subsequent rule to show cause why the statement should not be allowed to be filed *nunc pro tunc*. Because of the long pendency of this controversy it is proper that the title to the property in question should be speedily decided. It is, therefore, ordered that the petitioner, the defendant in the issue, file his affidavit within two days, and that the issue be placed upon the trial list of the special court of common pleas, commencing Monday, May 11, 1908.

Pilots on Delaware River and Bay.

Board of Port Wardens—Commissioners of Navigation—Pilots on Delaware River and Bay—Act of March 29, 1803, May 11, 1889, and June 8, 1907.

The board of commissioners of navigation is not required to record the indenture of an apprentice who shall be decided by the board to be unfit, either morally, intellectually or physically, to become a pilot.

Under the Act of March 29, 1803, the board of port wardens passed the following resolution:

"All matters in relation to apprentices, as to their number, age and qualification, shall be regulated by the board of port wardens, and no pilot shall take an apprentice without having first obtained the written permission of the board."

Held, that under the above quoted legislation, the board of port wardens were authorized to adopt the resolution, and that the same remains in force under their successors in office, the board of commissioners of navigation, modified, however, by the provisions of the Act of Assembly, approved May 11, 1899, which limits the number of apprentices at any one time to five.

Pilots on Delaware River and Bay.

Attorney General's Department. Opinion to George F. Sproul, Secretary Board of Commissioners of Navigation.

tion.

TODD, Attorney General, June 4, 1908.

In further reply to your letters of the 22d ult., and of the 2d inst., in which you ask for my opinion as to the right of the commissioners of navigation, under the Act of Assembly approved June 8, 1907, P. L. 469, to decline to record any indentures of apprentices who should be decided by the board to be either morally, intellectually or physically unfit to become pilots. I understand that there are no apprentices now serving to become pilots in the Delaware bay and river, and that you have five applications for boys to have their indentures, as such apprentices, recorded, and whose names have been suggested by duly licensed pilots.

In the sixth section of the Act of Assembly approved May 11, 1889, P. L. 188, it is enacted:

> "No other person shall receive a license as a first-class pilot till the number of first-class pilots be reduced to less than forty, so that the whole number of first-class, licensed pilots, shall not exceed forty. The whole number of second-class, licensed pilots, shall not exceed ten at any one time, and the number of apprentices at any one time shall not exceed five."

Section 3 of the Act of Assembly approved June 8, 1907, P. L. 469, amends section 18 of the Act of March 29, 1803, P. L. 542, so that the same reads as follows:

> "No license shall be granted to any person to act as a pilot in the bay and river Delaware, unless he has served a regular apprenticeship of six years on board a pilot-boat, and unless he has reached the age of twenty-one. All indentures of apprentices to pilots shall be recorded in the office of the president of the board of commissioners of navigation aforesaid; nor shall any license be granted until the person applying shall have given bond, with one sufficient surety, to the said president, in any sum not exceeding five hundred dollars, nor less than three hundred dollars, conditioned for the true and faithful performance of the duties and services required

by this act, and that they will not be aiding or assisting in defrauding the revenue of the United States, and that they will deliver up the license to them granted when required by the board of commissioners of navigation in pursuance of the provisions of this act."

Section 4 of the Act of March 29, 1803, P. L. 542, is amended by the Act of 1907, *supra*, to read as follows:

"The board of commissioners of navigation for the river Delaware and its navigable tributaries shall have full power and authority, under the limitations hereinafter prescribed, to grant licenses to persons to act as pilots in the bay and river Delaware and to make rules for their government while employed in that service * * * * and to make, ordain and publish such rules and regulations, and with such penalties for the breach thereof, in respect to the matters aforesaid, as they shall deem fitting and proper."

This language is also found in section 4 of the Act of March 29, 1803, as aforesaid.

You further advise me that the board of port wardens, acting under the authority of the Act of 1803, on May 26th, 1882, passed a resolution as follows:

"All matters in relation to apprentices, as to their number, age and qualification, shall be regulated by the board of port wardens, and no pilot shall take an apprentice without having first obtained the written permission of the Board."

I am of opinion:

1. That, under the above quoted legislation, the board of port wardens were authorized to adopt the resolution above set forth, and that the same remains in force under their successors in office, the board of commissioners of navigation, modified, however, by the provisions of the Act of Assembly, approved May 11, 1889, *supra*, which limits the number of apprentices at any one time to five.

2. That you are not required to record the indenture of any apprentice who shall be decided by the board to be unfit, either morally, intellectually or physically, to become a pilot, and that no pilot can take an apprentice without having first obtained the written permission of the board, as provided for in the above quoted resolution.

WILLIAM H. NEUMEYER *vs.* A. MAYERS.

Sale of merchandise in bulk—Act of March 28, 1905.

Where goods have been sold in bulk, without compliance with the provisions of the Act of March 28, 1905, P. L. 62, an action in assumpsit before an alderman, brought by a creditor of the seller against the seller and purchaser, is not a proceeding to invalidate the sale within the meaning of the act.

Feigned Issue. C. P. Dauphin County, 312 January Term, 1908

W. K. Meyers, for plaintiff.

S. H. Zimmerman, for defendant.

MCCARRELL, J., June 6, 1908.

This case is a feigned issue to try the title to certain personal property, being the stock of merchandise levied upon under a writ of fieri facias, issued to No. 5, September Term, 1907, upon a judgment obtained by A. Mayers *vs.* Clayton L. Neumeyer. The verdict upon which this judgment was entered was obtained May 16, 1907, and the writ of fi. fa. was issued June 13, 1907. The levy was made shortly thereafter, and William H. Neumeyer, the present plaintiff, claimed title to the property levied upon.

On July 3, 1907, the Sheriff obtained a rule upon the claimant, William H. Neumeyer, and the plaintiff in the execution, A. Mayers, to interplead and the issue was duly framed and made up November 11, 1907. This issue came on for trial January 21, 1908, and is now before us on a motion made by A. Mayers for a new trial, the reason therefor being the alleged error of the court in giving binding instructions to the jury to find a verdict in favor of William H. Neumeyer, the plaintiff in the issue and the claimant of the goods.

At the trial it was shown by the testimony of William H. Neumeyer, that on September 14, 1906, he purchased from his brother, Clayton L. Neumeyer, the stock of goods and fixtures in the grocery store, No. 2006 North Fourth street, Harrisburg, Pa., after making an inventory of the stock and placing a value upon the fixtures. The consideration was paid and William H. Neumeyer took possession of the property purchased. He continued the business, having exclusive possession of the property purchased, and added to the stock from

time to time as necessity required, by making purchases from wholesale dealers in Harrisburg and elsewhere. He was in possession of the property at the time of the levy, June 18, 1907.

He admitted in his testimony that at the time of the purchase he did not ask his brother about his creditors, and that although he knew Mayers was a creditor he gave no notice to him or to any other creditor of the purchase of the stock.

At the close of the plaintiff's testimony the defendant moved for a compulsory non-suit, which motion was overruled.

The defendant then offered to show by A. Mayers that he was a creditor of Clayton L. Neumeyer on September 14, 1906, when the stock of goods was purchased by William H. Neumeyer, the plaintiff, and offered further to prove that shortly after September 14, 1906, A. Mayers brought suit in assumpsit before an alderman against Clayton L. Neumeyer, William H. Neumeyer and Kate Neumeyer for the debt due by Clayton L. Neumeyer at the time of the sale; that on September 24, 1906, the Alderman gave judgment against the three defendants just named for $120.00 and costs.

From this judgment the defendants appealed, and upon the trial of the case in our Court of Common Pleas on May 16, 1907, a judgment was recovered against Clayton L. Neumeyer alone, the proof showing that he was the sole debtor for the amount of the plaintiff's claim.

This testimony was offered for the purpose of showing that A. Mayers had within ninety days from the consummation of the sale by Clayton L. Neumeyer to W. H. Neumeyer, proceeded at law to invalidate the said sale, and had thus complied with the proviso of the Act of March 28, 1905, P. L. 62, which declares that sales in bulk shall be deemed fraudulent and voidable unless the provisions thereof are complied with.

It had already been admitted that A. Mayers was a creditor of Clayton L. Neumeyer at the time of sale on September 14, 1906, and that William H. Neumeyer knew that he was such creditor.

The remainder of the offer was excluded because in the opinion of the court it did not show or tend to show such proceedings either at law or in equity to invalidate the said sale as would bring the defendant in this issue within the proviso of the Act of March 28, 1905, and this offer being thus excluded, the court gave the jury binding instructions to

find in favor of William H. Neumeyer, the plaintiff in this issue.

The sole question raised by the motion for a new trial is whether or not these binding instructions were properly given.

The defendant, A. Mayers, insists that the commencement of his suit in assumpsit before an alderman in the city of Harrisburg prior to September 24, 1906, for the purpose of recovering a personal judgment against William H. Neumeyer jointly with Clayton L. Neumeyer and Kate Neumeyer, for the debt due to A. Meyers at the time of the sale in question, was a proceeding at law to invalidate the said sale.

The first section of the Act of March 28, 1905, provides:

"That the sale in bulk, of a whole, or a large part, of a stock of merchandise and fixtures, or merchandise, or fixtures, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be deemed fraudulent, and voidable as against the creditors of the seller, unless the purchaser shall, in good faith, and for the purpose of giving the notice herein required, make inquiry of the seller, and receive from him a list in writing of the names and places of residence or business of each and all of his creditors, and unless the purchaser shall, at least five days before the consummation of the sale, give personal notice of said proposed sale, to each of the creditors of the sellers as appearing on said list, or use reasonable diligence to cause personal notice to be given to them. . . . . "Provided, however, that no proceedings at law or equity shall be brought against the purchaser to invalidate any such sale after the expiration of ninety days from the consummation thereof."

Was the proceeding by action in assumpsit, brought by A. Mayers against the purchaser and Clayton L. Neumeyer and Kate Neumeyer, such a proceeding at law or in equity as is contemplated by the statute?

This proceeding had no reference whatever to the sale. It sought to charge W. H. Neumeyer with personal liability for the goods sold and delivered by A. Mayers to Clayton L. Neumeyer prior to the sale. It necessarily assumed that William H. Neumeyer had in some way or other, not here specified, made himself liable personally for the debt of Clayton L. Neumeyer to A. Mayers.

When the case came up for trial in our Court of Common Pleas on May 16, 1907, no evidence was offered to show the

personal liability of William H. Neumeyer for the debt alleged to be due by Clayton L. Neumeyer to A. Mayers, and therefore the verdict and judgment were against Clayton L. Neumeyer alone, no personal liability for the debt having been shown against either William H Neumeyer or Kate Neumeyer.

There was nothing upon the record of that action before the alderman to indicate a purpose on the part of A. Mayers, the plaintiff therein, to inquire into the validity of the sale of the stock of goods made September 14, 1906, by Clayton L. Neumeyer to William H. Neumeyer. It was purely a personal action against the three defendants named upon the record of the suit thus commenced before the alderman.

If the plaintiff, A. Meyers, had contented himself with bringing suit against Clayton L. Neumeyer alone for the debt, the probability is that no appeal would have been taken, and the plaintiff would then have been in a position to issue an execution upon that judgment against Clayton L. Neumeyer and levy upon the stock of goods sold to William H. Neumeyer within the limit of the ninety days mentioned in the proviso to the statute. He choose, however, to attempt to procure a personal judgment against William H. Neumeyer for the debt, and continued in this attempt until by the verdict of May 16, 1907, it was decided that no personal liability whatever for this debt attached to William H. Neumeyer.

Before the final decision in this suit, which sought to fix a personal liability upon the debt of William H. Newmeyer, the limit of ninety days had expired, and when, in pursuance of the judgment obtained against Clayton L. Neumeyer, the Sheriff made his levy upon the stock of goods in the possesion of William H. Neumeyer, which included a part of the stock purchased from Clayton L. Neumeyer on September 14, 1906, much more than ninety days had elapsed.

The defendant at the trial made no offer to prove that the sale of September 14, 1906, was fraudulent in fact, or that the consideration had not been fully paid and possession of the property taken as testified to by William H. Neumeyer. He chose to rely entirely upon the theory that the sale of September 14, 1906, had been made in violation of the provisions of the Act of March 28, 1905, and that he was at liberty to levy upon the property at any time without regard to the limitation of time contained in the proviso to the first section of that act.

We were of opinion at the trial that the defendant was mistaken in his theory as to the construction of this statute, and accordingly gave the binding instructions to find for William H. Neumeyer, the plaintiff.

A careful examination of the whole case, as also of all the authorities to which we have been referred satisfies us that we have committed no error in giving these instructions.

In Swanson Grocery Company *vs.* Terwilliger, 17th District Reports, page 11; 34 C. C. 49, this question was considered by Bouton, P. J.

In that case a creditor alleged that a sale of stock had been made in violation of the provisions of the Act of March 28, 1905, by the making of a sale in bulk on February 23, 1907. On February 28, 1907, the creditor issued an attachment under the Fraudulent Debtors Act of 1869, and while the attachment did not name R. G. Terry, the purchaser, as being in possession of the goods alleged to have been disposd of, in violation of the Act of March 28, 1905, the sheriff finding the goods in the possession of Terry, made return that he had read the writ to Terry and summoned him as garnishee.

On May 16, 1907, the creditor took judgment against Terwilliger, his debtor, and on June 3, 1907, issued a writ of fieri facias thereon against him.

On June 10, 1907, the sheriff presented his petition to the court, setting forth, *inter alia*, that he had levied upon the property and that the same was claimed by R. G. Terry, and asked for an issue to determine the ownership. A rule was granted to show cause why the issue should not be framed for this purpose. The learned president judge discharged the rule, and in his opinion uses the following language:

"This writ was certainly no notice to Terry that the plaintiff claimed the right to attach the goods because of a fraudulent sale made by Terwilliger to him. The Sheriff when he found the goods in the possession of Terry, claimed by him to have been purchased of the defendant, could have applied to the court for an issue to determine the ownership. Had he done so within the period of ninety days from the consummation of the sale and had a rule to show cause why an issue should not be framed been served upon the claimant within said ninety days, we are of opinion that that would have been a commencement of proceedings against the claimant to determine the ownership. Or had he obtained judgment, issued execution, and had a levy by the sherif been

made upon said goods, and petition then made by the sheriff for an issue, and rule to show cause granted and served on the claimant within the period of ninety days from the consummation of the sale, then action against the claimant would have been commenced to determine the ownership within the statutory period. There is no doubt in our mind that proceeding by fraudulent debtor attachment is a proper prooceeding; but until such time as such process is issued in which the claimant is made a party and in which he is notified, or by reason of the nature of the proceedings would be bound to take notice, that the sale to him is attacked, there is no proceeding brought against him to invalidate the sale. The sale was good as against the seller and as against all the world, except creditors, and can only be avoided by them upon compliance with provisions of the statute; if they fail to commence proceedings against the purchaser to invalidate the sale within the statutory period of ninety days, they cannot afterwards be heard to question its validitiy. In this case such proceedings were not commenced against the purchaser within the time limited by the statute."

In the case of Albert Ochse Co. *vs.* Drda, *et. al.* 16 D. R. 409, the question of the proper procedure to invalidate a sale made in violation of the provisions of the Act of March 28, 1905, was considered by Judge Von Moschzisker, and at page 411 he uses the following language:

"In our view the effect of the Act of 1905 upon the Act of 1869 is as though it had been judicially determined that the condition of affairs that will make one a fraudulent debtor within the Act of 1905, will without further proof constitute a fraudulent debtor under the Act of 1869, with the limitation that if one is going to depend alone upon the stamp of fraud placed upon such a state of facts by the Act of 1905, he must be prompt to proceed within the limitation of ninety days therein fixed. By thus treating the Act of 1869, and its supplement of May 24, 1887, P. L. 197, in connection with the Act of 1905, we have a complete system for carrying the laws into execution wherein with the seller, the purchaser and the creditors all as parties to the action, the questions in controversy are taken into the custody of the law and relief worked out in a most expeditious and inexpensive manner."

The proper procedure to invalidate a sale made in violation of the provisions of March 28, 1905, were considered by the Superior Court in the case of Wilson *vs.* Edwards, 32

Superior 295 and Feingold *vs.* Steinberg 33 Superior 35.

From these cases it apppears that appropriate proceedings at law to invalidate the sale of September 14, 1906, would have been by attachment under the Fraudulent Debtor's Act of 1869, or the issuing of a *fi. fa.* against Clayton L. Neumeyer and the seizure of the goods transferred by the sale of September 14, 1906. As neither of these methods of procedure was adopted in this case until long after the expiration of the ninety day limit fixed by the proviso to the Act of March 28, 1905, we are clearly of the opinion that the sale of September 14, 1906, must, so far as the present issue is concerned, be held to be entirely valid.

We are confirmed in our opinion that the instructions given at the trial were correct, and we now accordingly overrule the motion for a new trial and direct that upon payment of the jury fee, judgment be entered upon the verdict in favor of the plaintiff in the issue and against the defendant.

COMMONWEALTH *vs.* JOSEPH D. LAWRENCE.

Evidence—Testimony of accomplice—Corroboration.

The person upon whom sodomy has been committed is not an accomplice in the act, unless he wickedly permitted the act to be done.

The testimony of the person upon whom sodomy has been committed, when corroborated by the testimony of others that he was with the defendant at the time and place laid in the indictment, and by the fact that as soon as relieved of the presence of the defendant he made known the fact to an officer of the law, is sufficient to sustain a verdict of guilty.

Motion for a new trial. Quarter Session of Dauphin County, No. 48, January Sessions, 1908.

M. E. Stroup, for commonwealth.

W. Justin Carter, for defendant.

MCCARRELL, J., June 6, 1908.

The defendant, Joseph D. Lawrence, was indicted and convicted of the crime of sodomy, committed upon and with Edward Manahan, a lad of about fifteen years of age.

The evidence of the commonwealth consisted in large part of the testimony of Edward Manahan upon and with whom the offense was alleged to have been committed.

It was contended for the defendant that the testimony of Manahan was that of a selfconfessed accomplice, and that the jury ought not be permitted to convict upon this testimony, unless is was corroborated.

The jury was instructed that unless they were satisfied that Edward Manahan wickedly permitted the act alleged to have been done by the defendant upon and with him, he was not in law an accomplice, and that if they did not thus find him to be an accomplice, his testimony was to be considered as that of any other witness, and that if they had any reasonable doubt as to the truthfulness of his story, it was their duty to acquit the defendant.

In calling attention to the testimony of Manahan, the court referred to his youth and the fact that the legislature by an Act of Assembly had declared that a female under the age of sixteen years was legally incapacitated to give consent to sexual intercourse with her. This reference was made solely for the purpose of enabling the jury to determine whether Manahan had wilfully permitted the act of the defendant to be committed upon and with him, and the court gave the jury no instructions which in any way bound them to find that because of Manahan's age he was incapable of permitting the act complained of to be committed. His wilful participation in the act and his consent thereto were left for the consideration and determination of the jury, and they have perhaps found that he did not wilfully consent. Even if the jury had been satisfied that he had wilfully consented and was therefore in law an accomplice, the jury would have been fully warranted in acting upon his testimony and in rendering the verdict which was rendered, because the testimony of Manahan was corroborated. That he was with the defendant at the time and place when and where the offense was alleged to have been committed, was proven by others, and the fact that as soon as he was relieved of the presence of the defendant he at once communicated what had been done to an officer of the law, who immediately took the defendant into custody.

The manner in which the lad Manahan gave his testimony doubtless impressed the jury with its truthfulness, and his corroboration by other witnesses and his immediate complaint to the officer as to what had been done doubtless satisfied the

jury that there was no reason to doubt but that his story was correct.

We are of the opinion that the case was fairly submitted to the jury with proper instructions, and that their verdict is fully warranted. We therefore overrule the motion for a new trial and the District Attorney is at liberty to ask for the entry of judgment upon the record.

Distribution of Fund for Maintenance of Highways.

Distribution of fund for maintenance of highways—Act of June 8, 1907.

When the fund available for the maintenance of highways, constructed under the supervision of the commissioner of highways, is insufficient to pay all townships in which such highways have been constructed, it is the duty of the commissioner of highways to apportion the fund equitably and fairly on that basis of per centage which will enable all of the townships to receive a portion, rather than to attempt to pay a part of them the three-fourths of the sworn annual costs of maintenance, and compel others to do without any state aid in this important matter.

Attorney General's Department. Opinion to Joseph W. Hunter, Commissioner of Highways.

Fleitz, Deputy Attorney General, June 22, 1908.

I am in receipt of your letter of recent date asking for an official opinion upon the following question:

Upon what basis shall the maintenance fund provided by law be distributed among the various townships of the State, in which are located highways, improved under the provisions of the law creating your office?

The Act of May 1, 1905 (P. L. 318) establishing a State Highway Department, in Section 22 provides as follows:

> "Ten percentum of the amount available for highway purposes, under the provisions of this act, shall be set aside for the purpose of maintenance of highways as hereinafter provided; and shall be apportioned by the State Highway Commissioner among the townships or counties, applying for the same, in proportion to the mileage of improved highways made

under the provisions of this act, or which have already been made or may hereafter be made at the expense of such townships or counties, and which are of the standard prescribed by the State Highway Department for improved highways."

The Act of June 8, 1907 (P. L. 505), amending the Act of 1905, does not amend or in any way change Section 22 above quoted, so that the proportion of the entire amount appropriated for highway purposes available for maintenance, remains the same.

Section 23, Paragraph 3 of the Act of 1903 provides:

"The State Highway Commissioner, if in his judgment the conditions warrant the co-operation of the State in maintaining said highways, shall apportion to said township or county its proportion of the total amount available for the maintenance of improved highways, as hereinbefore provided; and the said amount shall be paid to the said supervisors or commissioners by warrant of the State Highway Department; but in no case shall the amount thus given by the State for maintenance be more than one-half the amount which, in the judgment and experience of the State Highway Commissioner, the annual cost of maintaining improved highways of the standard of construction prevailing in such township or county should be, no more than one-half the sworn, average annual cost of maintenance, as set forth in the petition of the supervisors or commissioners of said township or county."

This was amended and superseded by Section 23, Paragraph 3 of the Act of 1907, which reads as follows:

"The State Highway Commissioner, if in his judgment the conditions warrant the co-operation of the State in maintaining said highways, shall apportion to said township or county its proportion of the total amount available for the maintenance of improved highways, as hereinbefore provided; and the *same* amount shall be paid to the said supervisors or commissioners by warrant of the State Highway Department; but in no case shall the amount thus given by the State for maintenance be more than *three-fourths* the amount which, in the judgment and experience of the State Highway Commissioner, the

Distribution of Funds for Maintenance of Highways.

annual cost of maintaining improved highways of the standard of construction prevailing in such township or county should be, nor more than *three fourths* the sworn average annual cost of maintenance, as set forth in the petition of the supervisors or commissioners of said township or county."

An inspection of these two sections demonstrates the fact that the maximum proportion that the State may bear of the expense of maintenance is changed from one half to three fourths by the Act of 1907, but you state in your letter that the maintenance fund available for distribution this year amounts to only $150,000 and that to distribute it fairly and equitably among the various townships of the Commonwealth, for the purpose of repairing the improved roads already built under the supervision of your department, will not permit of a larger amount than 50 per cent of the estimated cost of improvement. If the distribution is made according to the maximum fixed by the Act of 1907, many of the townships will not receive any money at all, and this would be unfair and would result in the deterioration of the roads which need repairs in such townships.

Giving the language used by the legislature its full force and effect, I am of the opinion that the distribution of this fund is largely left to your own judgment and that the maximum fixed is not mandatory; that is does not necessarily mean that this amount must be given to the townships by the State, but only fixes the limit beyond which the State cannot go. It is far more important to carry out the spirit of the law and make a distribution which will be equitable and fair to every township in the State entitled to assistance, than to adhere to a strict construction and thereby work injustice to many of the townships.

For these reasons I am of the opinion and advise you that it is your duty to apportion this available fund of $150,000 equitably and fairly on that basis of per centage which will enable all of the townships to receive their portion, rather than to attempt to pay a part of them the three-fourths of the sworn annual costs of maintenance, and compel others to do without any state aid in this important matter.

State Highways.

Improvement of highways—Act of May 1, 1905.

The state highway commissioner has no authority to award a contract for the improvement of a public road, 1,400 feet in length, connecting a paved street of a city of the third class with an improved street of a borough.

It is expressly provided in section 10 of the Act of May 1st, 1905, P. L. 317, that "no section of highway improved under this act shall be less than one-half mile in length nor shall the improved portion thereof be less than twelve feet in width."

Attorney General's Department. Opinion to R. D. Beman, Deputy State Highway Commissioner.

Cunningham, Assistant Deputy Attorney General, July 1, 1908.

I am in receipt of your inquiry of June 25th, 1908, asking whether the state highway commissioner has authority to reconstruct as a "state highway" 1,400 feet of a certain highway lying in the township of Swatara, Dauphin County, between the city line of the city of Harrisburg and the borough line of the borough of Steelton.

I understand the facts in connection with your inquiry to be that the section of highway above referred to is a portion of a highway beginning at the termination of Cameron street, in the city of Harrisburg, and extending thence to and through the borough of Steelton; that the city of Harrisburg is now paving said Cameron street to the city line, and that the borough of Steelton has improved the section of said highway lying within the limits of said borough, so that when the paving of Cameron street to the city line of Harrisburg has been completed there will be 1,400 feet of highway between the city line of Harrisburg and the borough of Steelton remaining unimproved. No portion of the highway in question, either within or without the limits of the borough of Steelton has been reconstructed under contract with the state highway department, so that under the facts in this case the 1,400 feet of highway in question could not be considered as an extension of previous work done by the State Highway Department. It is expressly provided in section 10 of the Act of May 1st, 1905, P. L. 317, that "no section of highway improved under this act shall be less than one-half mile in length

nor shall the improved portion thereof be less than twelve feet in width."

The proposition now before your department is to award a contract for a section of highway less than one-half mile in length.

I am of the opinion that, by reason of the express provisions of the above cited Act of Assembly, the state highway commissioner has no authority to award a contract for the improvement of the above-mentioned section of highway.

IN THE MATTER OF THE PROCEEDINGS AGAINST JOHN STEINRUCK, INSOLVENT.

Insolvency—Constitutional law—Act of June 4, 1901.

A person owning personal property of the value of $2,500 and no real estate, with debts to the amount of $3,300, who permits an execution to issue upon a judgment for $1,200, is insolvent, within the meaning of the Act of June 4, 1901.

The Act of June 4, 1901, P. L. 408, was intended to procure the distribution of an insolvent's estate proportionately among all his creditors, without preference to any, either by means of a voluntary assignment or through the medium of a receiver appointed upon the application of creditors by the proper court.

Farmers are expressly exempted from the operation of the Federal Bankruptcy Act of July 1, 1898; as to them the Act of June 4, 1901, is in force.

An allegation of the insolvency of a debtor and his failure to make an assignment for the benefit of creditors, contained in a creditor's petition, is all that is necessary to give jurisdiction to the court of common pleas of the county in which the debtor resides or carries on business, and, upon the admission or proof of these jurisdictional facts, it is the duty of the court to forthwith appoint a receiver of the estate of the insolvent debtor.

To give effect to the manifest legislative intent, the word "and" connecting the first paragraph of section seven of the Act of June 4, 1901, with the numbered paragraphs following, should be read "or."

The sixteenth section of the Act of June 4, 1901, seems to contemplate that the question of voidable preferences shall be determined upon the settlement of the account of the assignee or receiver.

The Act of June 4, 1901, does not violate section 6 of article 1 of the Constitution of Pennsylvania, which provides that "trial by jury shall be as heretofore and the right thereof remain inviolate."

Steinruck's Estate.

Rule for the appointment of receiver. C. P. Dauphin County, No. 179 September Term, 1908.

Swartz, Umberger & Swartz and *John R. Geyer,* for rule.

Wolfe & Bailey, contra.

McCarrell, J., July 14, 1908.

On June 15, 1908, the Citizens' National Bank of Middletown and the Farmers' Bank of Middletown, by their respective presidents, filed their petition in this court under the Act of June 4, 1901, P. L. 408, alleging that John Steinruck, the respondent, is a tenant farmer upon lands owned by Christian L. Briner in this county, and that the said John Steinruck is insolvent and has not made an assignment for the benefit of his creditors.

The petition further alleges in support of the averment of insolvency of respondent, that on June 9, 1908, a judgment for $1,200.00 was entered by confession to No. 44 September Term, 1908, for the sum of $1,200.00 in favor of Christian L. Brinser, who immediately issued execution thereon to No. 4, September Term, 1908, under which execution the sheriff has levied upon the general farm stock, cattle and farming implements belonging to the said John Steinruck and also upon his interest in the crops in the ground.

The petition further alleges that in pursuance of the said levy, the sheriff had advertised the property levied upon for sale on June 18, 1908, and that John Steinruck, the respondent, permitted the said judgment to be entered and the said levy to be made, and had made no application for the stay of said execution, with a view to give preference to the said Christian L. Brinser as a creditor of the said Steinruck without the consent of his other creditors.

Upon the presentation of this petition a rule was granted upon John Steinruck, the respondent, and Christian L. Brinser, the creditor, to show cause why a receiver should not be appointed for the estate of the said John Steinruck, and all proceedings against his property under the aforesaid judgment be vacated and set aside, and pending the said rule the court stayed the aforesaid execution and all proceedings thereon.

On June 25, 1908, John Steinruck, the respondent, and Christian L. Brinser, the creditor, filed their respective answers to the aforesaid petition.

The answer of Steinruck alleges and claims that the petition and the several matters alleged therein are insufficient in law to support the prayer of petitioners, because no facts are alleged, showing that the respondent has committed any of the acts of insolvency enumerated and set forth in the seventh section of the Act of June 4, 1901, P. L. 408.

He further denies that he is insolvent within the meaning and intent of the Act of June 4, 1901, or has committed any of the acts of insolvency enumerated and set forth in the seventh section thereof.

He further denies that the judgment confessed in favor of Brinser was given while he was insolvent or in contemplation of insolvency, or with intent to prefer any creditor, and alleges that the said judgment was given to secure the said Brinser for his endorsement upon a note of the same amount as the said judgment, for the purpose of enabling Steinruck, the respondent, to pay for and purchase the stock and farming implements needed by him, and claimed that the execution issued thereon was not procured, suffered or permitted by him with intent to give preference to any person or persons, and that the issuing of said execution was solely the act of Christian L. Brinser, the plaintiff therein.

In his answer he further claims that the Act of June 4, 1901, is inoperative because of the existence of the Act of Congress, approved July 1, 1898, and generally known as the Bankrupt Law, alleging that the true intent and meaning of said act is that farmers shall be subjected to proceedings thereunder only where they voluntarily apply therefor, and that farmers cannot be proceeded against involuntarily under said act or under the state statute of June 4, 1901.

By an amendment of his answer, filed by permission, on June 30, 1908, he further claims that the said Act of June 4, 1901, is in violation of Article 1, Section 6 of the Constitution of Pennsylvania, which provides that "trial by jury shall be as heretofore and the right thereof remain inviolate," because the said act provides that all of the respondent's property may be taken from him and distributed among alleged creditors, without there being given to him at any time the right to trial by jury either as to his alleged insolvency or as to the validity of the alleged debts or claims against him.

Christian L. Brinser, the creditor of Steinruck, the respondent, by his answer makes substantially the same objections to the petition of the creditors as are contained in the

answer of Steinruck, alleges that he has no knowledge that the petitioners are creditors of Steinruck and prays that proof thereof be made.

He further alleges that the note upon which judgment was entered in his favor against Steinruck on June 9, 1908, was given to him on October 5, 1906, at a time when Steinruck was not then indebted to him, and that the same was given to secure his, Brinser's, indorsement of a note of the same amount to procure funds necessary to purchase and pay for the stock and farming implements needed by Steinruck in farming the lands of Brinser.

He further claims that at the time said note was given, Steinruck was not insolvent or in contemplation of insolvency, and that the giving of said note was not intended to prefer the said Brinser or delay, hinder or defraud other creditors of said Steinruck, but was given solely for the purpose of securing Brinser for his endorsement of Steinruck's note, intended to raise money for the purpose aforesaid, and further claims that the issuing of execution upon said note was not the result of any collusion or connivance between himself and the said Steinruck.

The rules granted as aforesaid having been served upon the respective parties and answers having been filed, as above stated, the matter was heard by the court on June 25, 1908.

From the testimony taken at this hearing, it appears that Steinruck owns no real estate, that all his personal property had been levied upon by the sheriff under the execution hereinbefore mentioned, and that the fair market value thereof was about $2,500.00.

It further appears from the said testimony that Steinruck was indebted in the sum of about $3,300.00, and that the petitioners were actually creditors of the said Steinruck at the time they filed their petition.

It further appears from the testimony that Christian L. Brinser, the execution creditor, entered his judgment on June 9, 1908, upon the judgment note, dated October 5, 1906, for $1,200.00, and issued execution thereon upon the same day without any conference with the said Steinruck, the execution creditor being moved to take these proceedings because he had heard that Steinruck was involved in the financial affairs of H. K. Alwine.

The petition in this case is presented under the provisions of the act approved June 4, 1901, P. L. 404-424, entitled "An

act relating to insolvency; embracing, among other matters, voluntary assignments for the benefit of creditors, and adverse proceedings in insolvency by creditors; forbidding, also, certain preferences; providing for the distribution of the insolvent's estate, and in certain contingencies relieving him, and others liable with him, from further liability for his or their debts."

That this act was intended to procure the distribution of an insolvent's estate proportionately among all his creditors, without preference to any, either by means of a voluntary assignment or through the medium of a receiver appointed upon the application of creditors by the proper court, cannot be doubted. That the petitioners are creditors of John Steinruck is satisfactorily proven. They allege his insolvency and that he has not made a general assignment for the benefit of his creditors, and as a specification under this general averment, state that he has suffered and permitted the judgment to be entered against him, as above stated, and the execution thereon to remain unstayed after the sheriff had levied upon all his personal property with a view to prefer Christian L. Brinser, the execution credtior.

The 41st section of the Act of June 4, 1901, P. L. 422, provides that "A person shall be deemed insolvent, within the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

That John Steinruck is and was insolvent at the time of the filing of the petition in this case within the terms of the section just quoted, cannot be doubted, for it appears that all his property is not worth more than $2,500.00, while his indebtedness is about $3,300.00.

The 8th section of the said Act of June 4, 1901, P. L. 409, referring to proceedings instituted against debtors under the act provides, as follows, to-wit:

"In such proceedings, as soon as the fact of insolvency be made to appear, the court shall forthwith appoint a disinterested person as receiver, unless the insolvent has made an assignment for the benefit of his creditors or has given security to pay petitioner's debt. Property of a perishable nature or likely to deteriorate in value may be sold by leave of

the court, the proceeds thereof to be substituted in lieu thereof."

We are unable to agree with the contention of counsel for Steinruck and Brinser that our Act of June 4, 1901, is inoperative because of the existence of the Federal Bankruptcy Act of July 1, 1898. Steinruck is a farmer and therefore expressly exempt from the operation of that act. The insolvency of John Steinruck and the fact that he has not made an assignment for benefit of his creditors, being clearly established it is apparently the duty of the court to appoint a disinterested person as receiver of his property, so that the same may be administered in accordance with the provisions of our statute, unless the objections to the averments of the petition are well taken or the unconstitutionality of the act established beyond doubt.

The objections to the sufficiency of the petition are that it does not contain any of the averments mentioned in section 7 of the Act of June 4, 1901.

Section 7 of the said act, is as follows:

"Any creditor of an alleged insolvent may, in the court of common pleas of the county where the alleged insolvent resides or his principal place of business is situate, by petition, under oath, aver that such person, persons, firm, limited partnership, joint stock company, or corporation is insolvent, has not made an assignment for the benefit of his, their or its creditors, is resident or is carrying on business in said county, and—

(1). Has called a meeting of his creditors for the purpose of compounding with them, or has exhibited a statement showing his inability to meet his liabilities, or has otherwise acknowledged his insolvency; or

(2). Has absconded or is about to abscond, with intent to defraud any creditor, or to defeat or delay the remedy of any creditor, or to avoid being arrested or served with legal process, or conceals himself within or remains out of the commonwealth, with like intent; or

(3). Secretes or is about to secrete any part of his estate or effects, with intent to defraud his creditors, or to defeat or delay their demands, or any of them; or

(4). Has assigned, removed or disposed of, or is about to assign, remove or dispose of, any part of his property, with intent to defraud, defeat or delay his creditors or any of them; or

(5). Has been actually imprisoned for more than thirty days, in a civil action, or, being arrested therefor, has escaped from custody, or,

(6). Has refused or neglected to comply with any order, judgment or decree for the payment of money, and an execution therefor has been returned unsatisfied; or,

(7). Has suffered or permitted any attachment or sequestration to remain against any of his property, without attempting to dissolve, by rule taken for that purpose, or upon entering security for a period of thirty days, or having taken a rule to dissolve which has been discharged by the court, has not entered security within twenty days thereafter; or,

(8). Has made any pledge, assignment, transfer, conveyance or incumbrance of the whole or a large part of his stock in trade or property, without being able to meet his liabilities and without the consent of his creditors, either in payment of or as security for a debt then existing, and with the intent to prefer one creditor to another, or out of his usual course of business, or for the benefit of himself or family.

Whereupon, the court shall grant a rule to show cause why a receiver should not be appointed for the estate of such alleged insolvent, and all legal proceedings there against, if any, vacated and set aside. Notice of said rule shall be given to the alleged insolvent and all other persons interested. If the facts averred are not denied, under oath, the court shall make such order as the facts averred or shown may require. If they are denied, testimony shall be taken at the bar of the court or by a law judge thereof, and the court shall make such order or decree as the facts found will justify, and may enforce the same by attachment of the person or sequestration of the property of the party in default. Any person, without foundation, maliciously invoking the action of the court under this section, shall be liable for a sum equal to double the injury actually sustained by the alleged insolvent."

The petition in this case avers the insolvency of Steinruck and asserts that he has not made an assignment for the benefit of his creditors. It contains in substance the averment that Steinruck has suffered and permitted the entry of judgment against him by Brinser, the issuing of an execution thereon, and has not taken any steps to stay the said execution, with a view to give Brinser preference as a creditor and with intent to hinder, defeat or delay his other creditors. It does not contain in exact terms an averment of either of the eight

matters specified in the eight paragraphs of section seven, above quoted, and it is contended that therefore the petition is defective and that the court has no jurisdiction to entertain it or proceed thereon.

The purpose of the Act of June 4, 1901, is manifestly, as already stated, to secure a proportionate distribution of the property of an insolvent to and among all his creditors, without any of the avoidable preferences designated in the act.

The 7th section gives to any creditor of an alleged insolvent the right to present his petition to the court of common pleas of the county where the insolvent resides, or carries on business, alleging the insolvency, and that an assignment for benefit of creditors has not been made. On presentation of the petition the court shall grant a rule to show cause, and if upon its return the facts are not denied or are established by testimony, the court shall make such order and decree as the facts will justify.

The 8th section declares that as soon as the facts of insolvency is made to appear, the court shall forthwith appoint a disinterested person as receiver, unless an assignment has been made for benefit of creditors, or security given for payment of petitioner's debt.

We are of opinion that an allegation of the insolvency of a debtor and his failure to make an assignment for the benefit of creditors, contained in a creditor's petition, is all that is necessary to give the court of common pleas of the county in which the debtor resides or carries on business, jurisdiction and, upon the admission or proof of these jurisdictional facts, it is the duty of the court to forthwith appoint a receiver of the estate of the insolvent debtor. Such we believe is the manifest legislative intent.

We are unable to agree with the contention that in addition to these allegations the petition must aver one or other of the eight acts mentioned in the separate paragraphs of section seven. Some of these acts, if committed, would not per se amount to insolvency of the debtor, and the legislature presumably intended that even if a debtor were not actually insolvent he could be proceeded against by a creditor if he had committed any of the acts specified in these separate paragraphs, because of the fraudulent purpose thereby indicated.

To give effect to what we regard as the manifest legislative intent, it is only necessary to presume that the word "and," which connects the beginning of the seventh section with the

first paragraph designating a prohibited act was intended to be read "or." That this construction may properly be placed upon the act in question and is necessary to give effect to the plain legislative intent seems clear to us from an examination of this statute and from a consideration of cases in which a like construction has been given to the word "and" in other statutes.

Endlich on Interpretation of Statutes, sections 303-304 and 305 and cases there cited.

We do not deem it necessary at present to make any decision in regard to the validity of the preference claimed by Christian L. Brinser under the pending execution. Whether or not that is a voidable preference can properly be determined hereafter.

The sixteenth section of the act seems to contemplate that the question of voidable preferences shall be determined upon the settlement of the account of the assignee or receiver. Its language upon this subject, is, as follows:

"The assignee or receiver shall pay, out of so much of the insolvent's estate as was attached, sequestered or levied upon, or was received from the court or sheriff, the legal cost of such vacated proceedings, as a preferred claim if the creditor's claim is afterwards allowed in the distribution of the insolvent's estate; and the creditor's claim shall also be paid thereout, if it shall be decided that, notwithstanding the provisions of this act, he was entitled to a preference."

When the proper time arises the question as to whether the claim of Christian L. Brinser, the execution creditor, shall be paid in full from the estate will be considered and decided.

This leaves for present consideration the single question as to the constitutionality of the Act of June 4, 1901, the contention of Steinruck, the debtor, being that the act is unconstitutional because it deprives him of the right to a trial by jury of the question of his insolvency and the validity of claims presented against him.

Our constitution of 1873 in article 1, section 6, provides that "trial by jury shall be as heretofore and the right thereof remain inviolate."

In our constitution of 1776 it was provided in chapter 1, section 11, "that in controversies respecting property and in suits between man and man the parties have a right to trial by jury, which ought to be held sacred."

Chapter 2, section 25, of the same constitution declares that "trial shall be by jury as heretofore and it is recommended for the legislature of the state to provide by law against every corruption or partiality in the choice, return or appointment of jurors."

Our constitution of 1790, and all subsequent constitutions contain substantially the same provision as exists in our present constitution. The meaning and extent of this constitutional provision have been judicially considered in many cases.

In Van Swartow vs. the Commonwealth, 24 Pa. 131, it was held that the Act of April 14, 1851, prohibiting the sale of spirituous, vinous or malt liquors on the Sabbath day in Allegheny County, except for medicinal purposes, under a penalty of $50.00, and authorizing a conviction before an alderman or justice of the peace, is not unconstitutional by reason of not providing for a trial by jury. A proceeding under such act is not a suit at common law, but a criminal proceeding under the statute.

In deciding this case, Chief Justice Black, at page 134, uses the following language:

"There is nothing to forbid the legislature from creating a new offence and prescribing what mode they please of ascertaining the guilt of those who are charged with it. Many tribunals, unknown to the framers of the constitution, and not at all resembling a jury, have been erected and charged with the determination of grave and weighty matters; for instance, commissioners, viewers, and appraisers of damages, county and township auditors, and those officers of the state government whose duty it is to settle the public accounts. * * * * * The purpose of the constitution undoubtedly was to preserve the jury trial wherever the common law gave it, and in all other cases to let the legislature and the people do as their wisdom and experience might dictate."

In Byers vs. the Commonwealth, 42 Pa. 89, it was decided that "the constitutional provision relative to trial by jury was intended to preserve that right as it existed at the formation of our state government, and not to increase or extend it, and must be construed with reference to the statutes that were in force in England, and in the Province of Pennsylvania, at the adoption of the first constitution of the state."

In Rhines vs. Clark, 51 Pa. 96, Chief Justice Woodward at page 101, uses the following language:

"Doubtless the legislature may withhold trial by jury

from new offences created by statute, and unknown to the common law, as in the instance of the Sunday Law, and of numerous enactments in the nature of police regulations for preservation of the public peace. So may trial by jury be withheld from new jurisdictions created by statute and clothed with no common law powers, as in the instance of the Justices' Hundred Dollar Law, and of the authorities that enforce the liability of counties for property destroyed by mobs; and also from proceedings which, though in common law courts, are out of the course of the common law, as in motions for summary relief against judgments and in equity suits. The proceedings in our orphans' court, and many of those in our quarter sessions, are examples of this nature. In all these instances it is no invasion of the rights of the citizen to withhold trial by jury, and provide some other mode for trying contested facts because heretofore that is, at the common law which antedated our constitutions, trial by jury did not exist in such cases."

In Powel's Estate, 209 Pa., Chief Justice Mitchell uses the following language at page 78:

"The proceeding is in rem on the distribution of a fund in court, and the court proceeds summarily under forms analogous to proceedings in equity. There is no right to a jury trial even in a common law suit, except on the main issue joined between the parties. If a jury could be demanded on every minor and collateral issue which the parties might try to raise the proceedings would become interminable. In Pennsylvania the right to a jury trial on collateral issues raised before an auditor in the distribution of a fund in court, depends entirely on statute, and is allowed only in certain specified cases, of which the present is not one."

This subject is fully discussed and numerous authorities are cited in White on the constitution of Pennsylvania, pages 66 to 81.

In O'Neill vs. Glover, 5th Gray 144-161, the insolvent acts of the state of Massachusetts passed in 1838 and 1844, were before the court for consideration, and it was there contended that they were unconstitutional because they did not secure the debtor a trial by jury before the issuing of a warrant against him. In overruling this contention, the court says at page 161:

"The obvious answer, we think, is that the proceeding, however important, is in its nature preliminary. It does not

finally determine the question of indebtedness. It does not deprive the debtor of his property or estate. It is in form and in substance but a taking of the property of the debtor into the custody of the law for the security of his creditors. The objection would apply with equal force to a writ of replevin or to a taking on mesne process or by foreign attachment.

In England proceedings against bankrupts and insolvents were never according to the course of the common law, but were entirely created and regulated by statutes.

The first English statute in regard to bankruptcy was that of 34 Henry VIII, chapter 4. This statute was enacted for the purpose of relieving a debtor from the rigor of the common law, and the reason for its enactment as given in Second Blackstone's Commentaries, page 472, is as follows:

"The laws of bankruptcy are considered as laws calculated for the benefit of trade and founded on the principles of humanity as well as justice, and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment; on the debtor, by exempting him from the rigor of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt; whereas the law of bankrupts, taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition that they surrender up their whole estate to be divided among their creditors."

The course of procedure originally in England under the various statutes relating to bankruptcy was by petition of one or more of the creditors of the alleged bankrupt to the Lord Chancellor, who was thereupon authorized to grant a commission "to some discreet persons as to him shall seem good," who were first to secure proof of the person being a trader and having committed some act of bankruptcy, and then to declare him a bankrupt, if so proven and give notice thereof in the "Gazette" and appoint meetings of creditors to elect assignees of the estate, in which assignees the estate of the bankrupt was vested for the benefit of the creditors; 2d Blackstone, 480-483.

It will be observed that no provision is made for the trial by a jury of the question of the commission of an act of

bankruptcy. This is to be decided by the commissioners appointed by the Lord Chancellor, who certify to him their findings.

In Pennsylvania as early as 1818 a statute was adopted, regulating procedure in the case of assignments for the benefit of creditors and avoiding preferences in such assignments. Various statutes were subsequently passed upon this subject, and on June 4, 1901, the act under which this proceeding was instituted was approved by the governor and became the law of the commonwealth. In its 42d section it refers to and repeals all earlier acts upon the subject of insolvency assignments for benefit of creditors, and the administration of the estates of insolvents, and provides a complete system therefor. It establishes a complete scheme or system of rules for the settlement of assigned or insolvent estates, and contemplates an entire transfer of the property into the custody of the assignee or the receiver for purposes of conversion and distribution, unembarrassed by adverse legal process, whenever it is possible or practicable for this to be accomplished, through the intervention of the court. It clearly defines the circumstances under which the property of a debtor shall be taken into the custody of the law for the benefit of his creditors, or in other words, declares when a trust arises with respect to his property, for the benefit of his creditors. It carefully provides for the administration of this trust under the direction of the proper court.

The subject is one of very great importance to creditors and to debtors, and that it was not proper for legislative consideration and action cannot be successfully contended. It clearly falls within the line of legislative authority, and the action of the legislature must not be declared unconstitutional by the courts unless the legislative authority has been manifestly transcended.

We have carefully considered the able argument of the learned counsel for the respondent and have examined the numerous cases referred to in their behalf, and we are by no means satisfied that there is any sufficient reason for holding the Act of June 4, 1901, unconstitutional for the reason alleged by them.

In Hull's Estate, 25th County Court Reports, 353-359, this act was carefully considered by the learned president judge of the Franklin County Common Pleas, and after such consideration, he says at page 355:

"The Act of June 4, 1901, is essentially a bankrupt law. Differing in some of its features from the Federal law on the same general subject, it is in entire correspondence with it in its objects and purposes, and not materially different in its methods. This act is not violative of any constitutional rule or principle, and is operative as existing law."

We are of opinion that the objection here made to the constitutionality of this act has not been sustained, and being satisfied that John Steinruck, the respondent, is and was at the time of the presentation of the petition in this case insolvent within the definition given in the 41st section of the act in question, and that he has not made an assignment for the benefit of his creditors, we deem it our duty to appoint a receiver for his estate, so that the same may be administered in accordance with the provisions of said act. Accordingly we do now appoint William H. Ulrich as receiver of the estate of John Steinruck, the respondent, and direct that he give bond, with security, as provided in the aforesaid act, in the sum of five thousand dollars, for the performance of his duties. The order staying the execution of Christian L. Brinser is continued. When the receiver now appointed shall make application for the vacating and setting aside of the said execution, proper action will be taken thereon.

IN THE MATTER OF THE FORT HUNTER ROAD COMMISSION.

Constitutional law—Acts of March 15, 1872, and June 1, 1907.

The Act of March 15, 1872, P. L. 491, creating the Fort Hunter Road Commission, and the acts supplementary thereto, are constitutional.

The Act of June 1, 1907, authorizing courts of common pleas to decree the dissolution of corporations and commissions, not for profit, is constitutional.

The State Highway Department can only co-operate with counties, townships and boroughs in the improvement of the public highways, and the maintenance and improvement of public highways. It is not permitted by the terms of the act under which it is created, to co-operate with corporations or commissions created for like purposes with that of the Fort Hunter Road Commission.

In view of the present condition of the highway now in the control of the Fort Hunter Road Commission and the volume and character of the traffic thereon, the public interest requires that the commission should now be relieved from the duty of repairing, maintaining and operating the said road, and the public interest further requires that said road should now be declared a free public highway, to be controlled and maintained by the supervisors of Susquehanna township, Dauphin county, Pa., through which it runs, as the other highways in said township are controlled and maintained by them.

Petition under Act of June 1, 1907. C. P. Dauphin County, No. 79, June Term, 1908.

John E. Patterson, for petitioner.

Hargest & Hargest and *Robert Snodgrass* for creditors.

Harry C. Fox and *J. J. Conklin,* for respondent.

McCARRELL, J., July 21, 1908.

On March 26, 1908, the president and members of the Fort Hunter Road Commission, a corporation created by the Act of March 15, 1872, P. L. 491, presented their petition to the court under the Act of June 1, 1907, P. L. 375, and thereupon a rule to show cause was granted, returnable April 10, 1908.

The petition avers that the said Fort Hunter Road Commission, a corporation not for profit, was created by the incorporating act aforesaid, for the purpose of repairing, maintain-

ing and operating that portion of the public road lately belonging to the Harrisburg and Millerstown Turnpike Road Company, extending from Maclay Street in the city of Harrisburg to Fort Hunter in Susquehanna Township, Dauphin County, Penna., and running along the eastern side of the Susquehanna river, the length thereof being about five miles.

The petition further avers that in the opinion of the commissioners, constituting said corporation, they should be relieved of the duty of repairing, maintaining and operating the said road because by reason of the enormous increase in its use and the amount of heavy hauling done upon it, it was unusually difficult to maintain it in good condition; that the said road is the only thoroughfare connecting the city of Harrisburg with the upper end of the county of Dauphin and that the public interest required that the control thereof should be surrendered by the said commission and the same declared to be a free public highway, controlled and maintained by the township of Susquehanna, through which it runs. The petition is accompanied, as required by the act under which it is presented, with a full statement of the indebtedness of the corporation or commission and the manner in which and by what authority the said indebtedness was created.

A rule to show cause having been granted, as above stated, answers thereto were filed respectively, on April 8, 1908, by William H. Moody, A. C. Smith and John J. Hargest, to each of whom the said commission is alleged to be indebted for damages; on April 9, 1908, by the Harrisburg Trust Company, the holder of bonded indebtedness of the corporation to the amount of nine thousand dollars, and on April 10, 1908, by the road supervisors of Susquehanna township, who oppose the granting of the prayer of the petitions for reasons which will be hereafter considered.

Upon this petition and these answers testimony was taken before the court on May 18, and 25, 1908, and argument thereon was heard on June 19, 1908.

The questions to be determined are:

(1) Is the present condition of the road in question in view of the amount of traffic thereon and the ability of the commission to provide funds for its repair and maintenance such as to require that the said commission should now be relieved of the duty of repairing, maintaining and operating the said road?

(2) Are existing conditions with respect to the said road

and its use such as will require and warrant the court to declare the same to be a free public highway, to be controlled and maintained as other highways in Susquehanna township by the supervisors thereof?

(3) In case the said road should now be declared to be a free public highway under the control of said supervisors, how much road tax under the law regulating the said commission shall be collected annually and during how many years for the payment of the indebtedness of the said commission or corporation?

It will be observed that the answers of Moody, Smith and Hargest and the Harrisburg Trust Company contain no denial as to the existence of the conditions set out in the petition filed by the commission.

The answer of the supervisors of Susquehanna township practically admits all the essential averments of the petition. It denies that it is to the interest of the tax-payers of Susquehanna township that the road in question should be declared to be a free public highway and placed under the control of the supervisors, but it contains no denial that the interests of the public require that the said road should now be declared to be a free public highway and placed under the control of the supervisors of the township.

The creditors of the commission or corporation in their answers express their entire willingness that the commission shall be relieved and the road declared to be a free public highway, if provisions are made, in accordance with the Act of June 1, 1907, for the payment of the indebtedness.

The contention of the supervisors of the township is that the several acts of assembly creating and regulating the said commission or corporation are unconstitutional because they are a delegation of the taxing power not warranted by the constitution.

The answer of the supervisors practically admits the necessity for relieving the commission and placing the road under the control of the supervisors of the township, provided the supervisors can be authorized to collect a road tax from all the property in the township, and are not required to levy a road tax only upon the property outside the district placed under the control of the commission or corporation.

The testimony taken at the hearing clearly indicates that since the creation of the commission or corporation, the traffic over the road in question has in the last few years changed

from light to heavy traffic and that the volume of traffic has greatly increased; that the natural foundation of the highway is insufficient for the heavy hauling done upon it and that a strong artificial foundation is necessary to sustain the increased weight and volume of traffic over this important road.

All the money raised by the commission or corporation for assessments upon property and from loans procured in pursuance of the authority conferred has been expended in the construction and maintenance of the highway, and its present condition is better than that of any other highway in the township, with perhaps the single exception of the Jonestown road, which is now being reconstructed under the direction of the state highway commission.

Under these circumstances we can see no reason to apprehend that the maintenance and repair of this road so as to keep it in safe and passable condition for public use would impose any undue burden upon the tax-payers of the township, even if the collection of taxes therefor should be limited to the property outside the district under the control of the commission or corporation. Whether or not the supervisors are by law limited to the collection of a road tax from the property outside the district under the control of the commission is not now properly before us for adjudication.

No tax-payer, as such, has filed any answer in this proceeding, although notice was given by advertisement, as required by our order, to all persons interested in the question to appear and answer the rule to show cause. The only answers filed are those already referred to, and as already stated, none of these answers contain a specific denial of the essential averments of the petition. These averments have, in our opinion, been sufficiently established by the testimony taken.

The important question, however, as to the constitutionality of the legislation creating the commission and defining its powers must be determined.

The incorporating Act of March 15, 1872, P. L. 491, declares in its preamble that the portion of the Millerstown and Harrisburg Turnpike Road between Maclay street and Fort Hunter in Susquehanna township "has been abandoned and neglected by the company formerly owning the same for twelve years and more, and in consequence thereof the said piece of road has become a charge upon the citizens of said county," and that the supervisors because of the absence of the necessary material within convenient distance and "the extraor-

dinary expense that would necessarily be incurred in properly repairing and keeping up said piece of road, have neglected and still neglect to keep the same in that good condition required by public necessity."

While the preamble is not part of the act in question, it clearly sets forth the conditions which induced legislative action.

That the legislature had authority to consider this condition with respect to this highway and provide a remedy therefor cannot be successfully denied. The legislature in its wisdom thought it proper to provide the remedy contained in the act in question. It created thereby the corporation known as the Fort Hunter Road Commission, charged it with the duty of improving, repairing and maintaining the highway in question and gave it authority "to lay a rate of assessment not exceeding six mills on the dollar annually upon the assessed value of all real estate, farms, houses and lots, pieces or parcels of land lying along and abutting on said piece of road, and all personal property, offices, trades and occupations carried on along the line thereof." * * * * * * "as fully as the township supervisors are now by law empowered to do, and to collect the same in like manner and with like powers, * * * * * * , "which assessment when so made and collected shall be deemed and taken as a road tax, and shall exempt the property, trades and occupations thus assessed from the payment of any and all further taxation for road purposes."

The act also provides that the commission shall permit the assessments made by it from time to time to be worked out, if desired, as ordinary road taxes are permitted to be worked out.

Apparently realizing that under the powers conferred by this incorporating act a proper highway could not be immediately constructed by the commission, and deeming it of public importance that such a highway should be promptly procured for public use, the supplement of April 3, 1872, P. L. 855, was passed and approved. This supplemental act authorizes the commission to borrow upon its bonds not exceeding fifteen thousand dollars in amount, running for not exceeding thirty years and at not exceeding eight per cent. interest, the proceeds of said bonds to be applied "to the making of a turnpike or macadam road."

This supplemental act further requires that the assessment authorized to be laid by the commission under the fore-

going act shall "be pledged in said bonds for the payment of interest thereon until due and the creation of a sinking fund to pay the same at maturity, except so much of said tax as may be required to keep the roadway in repair. The legislative intent was clearly to provide for the immediate construction of a substantial and durable highway, which would accommodate the public and require but little expenditure for repairs.

On March 25, 1873, P. L. 406, another supplemental act relating to this commission or corporation was approved. It authorizes the commission to erect such number of toll gates as they may deem necessary and establish such rates of toll as they may elect to do, "provided that the owners and residents of land abutting on said road and holders of the bonds issued by said commission shall be exempt from the payment of any toll."

Speaking of these acts Judge McPherson says in Boas vs. Fort Hunter Road Commission, 1st Dauphin 49: "As the result of this legislation the commission is in charge of an independent road district and is bound to maintain a turnpike, but not for its own profit. This is an unusual obligation and is accompanied by the unusual powers specified in the acts."

Had the legislature the authority to create this independent road district and clothe the commission with the powers conferred? We have not been referred to any provision in the constitution of 1838, which was the fundamental law at the time, prohibiting such legislative action. The road originally constructed by a corporation for profit, which had abandoned it and the township authorities being unwilling or unable to properly construct or maintain it, was, because of its importance to the public, a proper subject for legislative consideration. The legislature in its wisdom thought proper to create the Fort Hunter Road Commission as an agency of the state to reconstruct, repair and maintain this particular highway. It clothed this agency with nothing beyond the ordinary powers of road supervisors, except the power to erect toll gates and collect tolls to be used exclusively in the maintenance of the highway, from all persons using the same, save the property owners along the road and the bondholders, who, through assessments paid or money loaned, had made their contribution toward its construction and maintenance.

That this was within the limits of legislative authority seems to have been settled as early as 1802 in the case of McClenahan vs. Curwin, 3 Yeates, 363.

In that case a suit for trespass had been brought against the superintendent of the Philadelphia and Lancaster Turnpike Company by a land owner, who contended that the legislature by the act of incorporation of the company had no right to permit an entry upon his premises for the purpose of constructing the road. The authority of the legislature was fully considered and Chief Justice Shippen, 3 Yeates, 373, uses the following language, to-wit:

"If then as to these inferior kinds of road the legislature has sanctioned the original idea, can it be doubted, that with regard to the great provincial roads, being of so much more general utility, they should be exempted from a proportionable contribution? We cannot therefore consider the legislature's applying a certain portion of every man's land for the purposes of laying out public roads and highways, without compensation, as any infringement of the constitution; such compensation having been originally made in each purchaser's particular grant. But it is objected, that even if the legislature might do this themselvess, yet they could not grant the right of doing it to individuals or a corporate body for their own emolument, so as to deprive the inhabitants or travellers, of the free use of the road, by imposing tolls, or other restrictions in the use of it. To this it may be answered, that such an artificial road, being deemed by the legislature a matter of general and public utility, and considering that it was not to be effected but at a considerable expense, and that the expense could not be defrayed, nor expected to be defrayed in the ordinary way by the inhabitants of the several townships through which the road was to run, they devised this mode of accommodating the public with such a road at the expense of private individuals, who from a prospect of deriving some small profit to themselves, might be induced to do it; it was immaterial to the public whether it was done by a general tax to be laid on the people at once, or by the gradual payment of certain specified sums by way of toll on those who used the road only, the latter being considered as the most equal mode of defraying the charge of making and keeping such road in repair. For although every man has a right to the free use of a public road, yet every member of the community may be taxed for making that road in any manner that the legislature may think reasonable and just."

The correctness of this decision has never been questioned and the legislature in passing various acts already re-

ferred to with respect to the Fort Hunter Road Commission has acted within the limits of the authority therein declared to exist.

In Commonwealth, ex rel. Dysart vs. McWilliams, 11 Pa. 61, the constitutionality of an act authorizing township supervisors to subscribe for stock in the Spruce Creek and Water Street Turnpike Road and levy a tax to pay the same was denied and the constitutionality of the act was sustained by the taxes, mediately or immediately, for every purpose deemed by them legitimate. Among these purposes, the construction and maintenance of roads and highways, to meet the necessities and to facilitate the commerce of the people, have ever been deemed of the first importance. Without these, a commercial community could scarcely exist. Indeed, they are so essential to the progress of civilization and the cultivation of the arts of life, that the degree of refinement attained by a people may, in some sort, be measured by their extent and condition. With us, accordingly, much attention has been bestowed upon them, and liberal powers for raising money by taxation, vested in the officers charged with their superintendence. No one has yet dreamed of doubting the validity of that power, when applied in maintenance of the ordinary roads of the country. And yet it is difficult to distinguish between these and a public turnpike road, so far as the advantage of the community is involved."

In Sharpless et. al. vs. Philadelphia, 21 Pa. 147, the constitutionality of an act authorizing a municipal subscription to the stocks of certain railroad companies was questioned and the acts were sustained. Chief Justice Black at page 161 uses the following language:

"There lies a vast field of power, granted to the legislature by the general words of the constitution, and not reserved, prohibited, or given away to others. Of this field the general assembly is entitled to the full and uncontrolled possession. Their use of it can be limited only by their discretion. The reservation of some powers does not imply a restriction on the exercises of others which are not reserved. On the contrary, it is a universal rule of construction, founded in the clearest reason, that general words in any instrument or statute are strengthened by exceptions, and weakened by enumeration. To me, it is as plain that the general assembly may exercise all powers which are properly legislative, and which are not taken away by our own, or by Federal constitution, as it is that

the people have all the rights which are expressly reserved." * * * * * * * * "The constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument, we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the legislature possibly could."

We have carefully considered the argument and brief submitted by the learned counsel for the supervisors. No constitutional prohibition has been pointed out which deprives the legislature from creating the Fort Hunter Road Commission as an agency for constructing and maintaining this important public highway, and conferring upon it the powers deemed necessary to carry out the purpose of its creation. We therefore cannot do otherwise than hold that the original act creating the Fort Hunter Road Commission and acts supplementary thereto are valid and binding.

It is also urged by counsel for the supervisors that the Act of June 1, 1907, P. L. 375, is unconstitutional and cannot be enforced.

If, as we have already determined, the legislature had authority to create the Fort Hunter Road Commission, it must necessarily follow that it had authority to provide by law for the discontinuance of its business and the ending of its corporate existence.

Exercising the same legislative discretion under which it passed the several acts intended to secure for the public a suitable highway from Maclay street to Fort Hunter, the legislature passed an act, approved April 15, 1903, P. L. 188, "Providing for the establishment of a State Highway Department, by the appointment of a State Highway Commissioner and staff of assistants, and defining the powers and duties thereof; authorizing the State Highway Department to cooperate with the several counties and townships, and with boroughs in certain instances, in the improvement of the public highways and the maintenance of improved highways; providing for the application of counties and townships for state aid in highway improvement and maintenance; providing for the payment of the cost of highway improvement, made under the provisions of this act, by the state, the counties and the townships, and making an appropriation for this purpose."

The act contains an appropriation of $6,500,000.00 for the purpose of carrying it into effect.

In pursuance of its provisions a State Highway Depart-

ment was promptly organized and has been giving energetic attention to the business for which it was created.

It can only co-operate with counties, townships and boroughs in the improvement of the public highways, and the maintenance and improvement of public highways. It is not permitted by the terms of the act under which it is created, to co-operate with corporations or commissions created for like purposes with that of the Fort Hunter Road Commission. This fact presumably led to the adoption of the Act of June 1, 1907, P. L. 375, under which the proceeding in this case was commenced and is pending.

It is most unfortunate that the co-operation of the State Highway Department in the improvement of the public highway in question here has not long since been procured.

It appears from the testimony submitted to us at the hearing that a proposition from the State Highway Department to the supervisors of Susquehanna township was duly submitted, under which proposition the state would have undertaken to pay one-half of the expense of improving the highway, the county of Dauphin one-fourth of the expense, leaving but one-fourth to be provided for by the township of Susquehanna. It also appears from the testimony that certain gentlemen responsible financially and interested in the Harrisburg Motor Club offered the supervisors of the township to pay one-half of the township's one-fourth of the expense of improving this highway, while the commissioners constituting the Fort Hunter Road Commission, offered individually to bear the expense of the maintenance of the highway in question during such time as the commission might be required to collect an assessment from property owners to pay the indebtedness of the commission.

While this testimony was not directly relevant to the question raised upon this record, it was submitted at the hearing, and we can only express our regret that the supervisors did not see their way clear to accept this most favorable offer.

That the public interest requires that the highway in question should be improved and put in proper condition speedily, cannot be doubted.

Believing that this case is one of great public importance and should be promptly disposed of, we have, after carefully considering the petition, the testimony submitted and the arguments of counsel, reached the following

Fort Hunter Road Commission.

CONCLUSIONS:

(1) In view of the present condition of the highway now in the control of the Fort Hunter Road Commission and the volume and character of the traffic thereon, the public interest requires that the commission should now be relieved from the duty of repairing, maintaining and operating the said road, and the public interest further requires that said road should now be declared a free public highway, to be controlled and maintained by the supervisors of Susquehanna township, Dauphin county, Pa., through which it runs, as the other highways in said township are controlled and maintained by them.

(2) The indebtedness of the said Fort Hunter Road Commission is as follows, to-wit:

To Harrisburg Trust Co., principal on bond,	$8,000 00	
Int. accrued to July 20, 1908,	529 83	
		$8,529 83
To John W. Riley for stone and hauling,		1,900 00
To W. H. Moody, A. C. Smith and John J. Hargest for damage claims in suit and now compromised at,		1,050 00
Total indebtedness,		$11,479 83

which indebtedness must be provided for and paid by a continuance and collection of the assessment of the road tax authorized to be laid and collected by said commission.

(3) The total valuation of real estate and all other taxable property in the district, controlled by the commission is, as shown by the testimony and certificate of Roy C. Danner, the township clerk, as follows, to-wit:

Real estate in township,	$506,940 00	
Real estate in 10th Ward, Harrisburg,	497,360 00	
		$1,004,300 00
Horses and cattle in township,	$9,560 00	
Horses and cattle in 10th Ward,	1,200 00	
		$10,760 00
Occupations in township,	$19,340 00	
Occupations in 10th Ward,	3,800 00	
		$23,140 00
Total valuation of Fort Hunter Road Commission district,		$1,038,200 00

The levy of an assessment of eleven and one-half mills upon this valuation will be required to pay the indebtedness of the commission.

In accordance with the foregoing conclusions it is hereby ordered, adjudged and decreed, as follows, to-wit:

First: That the Fort Hunter Road Commission be and is hereby relieved from the duty of repairing, operating and maintaining the highway mentioned and described in the petition filed in this case.

Second: That the highway mentioned and described in said petition be and is hereby declared to be a free public highway, to be henceforth controlled and maintained by the supervisors of Susquehanna township, in this county, in the same manner as the other highways of said township are required by law to be controlled and maintained by them.

Third: That for the purpose of paying the indebtedness of the Fort Hunter Road Commission, the said commission is hereby required to levy and collect an assessment or road tax upon and from all properties and taxables in the district under control of said commission, as follows, to-wit:

An assessment of three mills for the year, A. D. 1908.

An assessment of three mills for the year, A. D. 1909.

An assessment of three mills for the year, A. D. 1910.

An assessment of three mills for the year, A. D. 1911.

The assessment for the year, A. D. 1908, shall be payable not later than October 1st, A. D. 1908, and the assessments for the remaining years shall respectively be made payable at the time when the usual annual road taxes are by law payable.

If, when the assessment for the year, A. D. 1911, is about to be levied by said commission, it shall appear that the three mill assessment, hereinbefore required to be laid for that year, is for any reason either less or greater than the amount necessary to pay the balance of indebtedness then remaining unpaid, the said commission is hereby directed to make application to this court for such modification of the rate hereby fixed as may then appear to be proper for the discharge of said remaining indebtedness.

Fourth: That the Fort Hunter Road Commission is hereby directed to make an annual report to this court at the June Term thereof in each succeeding year of the amount of assessments or taxes collected, the amount of indebtedness liquidated, the amount of interest paid thereon, and the amount of principal and interest remaining unpaid, together with a

statement of all expenditures incurred in the collection and disbursement of said assessments or taxes.

Fifth: That the Fort Hunter Road Commission is hereby directed to pay the costs of this proceeding.

Sixth: That this, so far as it relieves the Fort Hunter Road Commission from the duty of controlling and maintaining the highway in question here and imposes said duty upon the supervisors of Susquehanna township shall go into effect at the beginning of Saturday, July 25, 1908, from and after which time the said road shall be a free public highway.

We earnestly recommend that the supervisors take immediate steps to secure the aid and co-operation of the State Highway Department in the improvement of this important public thoroughfare.

ESTATE OF ELIZA J. EWING, DECEASED.

Decedent's estates—Note payable at death—Wills—Collateral inheritance.

A note under seal, promising to pay a sum certain at the death of the maker, is not a testamentary paper, and can not be revoked by a subsequent will.

Legacies given in consideration of services rendered are entitled to preference over general legacies.

The expenses of an audit should be deducted from the amount of an estate before computing the collateral inheritance tax.

Testatrix executed and delivered a note under seal, in the sum of $500, payable at her death to the consistory of a Reformed church. Afterwards she executed a will directing her executors to refuse to pay said note and giving the church mentioned in the note the sum of $20. From the evidence produced before an auditor appointed to distribute the balance in the hands of the executors it appeared that testatrix was asked to make a contribution toward the payment of the indebtedness incurred in the erection of the church, that she expressed her willingness to contribute $500, but on account of her inability to make immediate payment, executed the note. That at the dedication of the church her contribution was stated and others were thereby induced to contribute. *Held,* that the note was a valid obligation of testatrix, and payable out of her estate with interest from the date of her death until the date of the filing of the account by her executors.

Exceptions to auditor's report. Orphans' Court of Dauphin County.

Estate of Eliza J. Ewing, Deceased.

John C. Nissley, for accountants.

Paul A. Kunkel, for consistory of St. Andrew's Reformed Church.

McCarrell, J., August 7, 1908.

This estate is now before us upon exceptions to the report of Oscar G. Wickersham, Esq., auditor, making distribution of the fund in the hands of the executors of the decedent.

On October 27, 1894, the testatrix executed and delivered to the payee named therein a paper of which the following is a copy to-wit:

"I, Eliza Ewing, promise to pay to the consistory of St. Andrews Reformed Church of Penbrook, Dauphin County, Pa., or in the event of my death within thirty days, to F. L. Kerr, the sum of five hundred dollars ($500.00), payable at my death by my executors, heirs or assigns, without interest.

Witness my hand and seal this 27th day of October, 1894, at Progress, Dauphin County, Pa.

(Signed) Eliza Ewing (Seal.)"

Witness:

D. H. Schrebley,

Rufus W. Miller.

On October 24, 1896, the testatrix executed her last will and testament, containing, *inter alia,* the following provision:

"I, Eliza J. Ewing, of Progress, Dauphin County and State of Pennsylvania, being of sound mind, memory and understanding, do make and publish this my last will and testament, hereby revoking all former wills by me at any time heretofore made, and especially do I direct my executors, hereinafter named, to refuse to pay to St. Andrews Reformed Church of Penbrook, Dauphin County, the sum of five hundred ($500.00) dollars, named in a paper signed by me on the 16th day of November, 1894, the said paper having been signed by me without any consideration and it being in the nature of a bequest, I do hereby revoke and make the same void and of no effect, and in lieu thereof I hereby give, devise and bequeath unto the said St. Andrews Reformed Church of Penbrook, Dauphin County, aforesaid, the sum of twenty ($20.00) dollars, the same when paid to be in full satisfaction of the sum of five hundred ($500.00) dollars promised or bequeathed in the paper referred to, bearing date November 16, 1894."

Estate of Eliza J. Ewing, Deceased.

The testatrix died, as appears from the affidavit filed with the register of wills, on April 28, 1906, and her will was duly proven May 1, 1906. The account of the executors was filed December 19, 1906.

At the hearing before the auditor, the consistory of St. Andrews Reformed Church of Penbrook, presented the aforesaid paper, which promises to pay to said consistory the sum of five hundred ($500.00) dollars at the death of the testatrix, and claimed payment from the fund of this amount.

The legatees contended that this paper was testamentary in its character, and that it was expressly revoked by the last will and testament of the testatrix, dated October 24, 1896, and insisted that the only amount to which the said consistory was entitled was the bequest of twenty dollars contained in said will.

The paper of October 27, 1894, is under seal, and contains an express promise to pay at the death of Eliza Ewing the sum of five hundred dollars to the consistory of St. Andrews Reformed Church of Penbrook, Dauphin County, Penna.

The seal imports a consideration, and at the hearing before the auditor it was proven that at the time the paper was signed, sealed and delivered, the church at Penbrook was about being dedicated; that Eliza Ewing was interested in the congregation and the church; that she was asked to make a contribution toward the payment of the indebtedness created in the erection of the church; that she expressed her willingness to make a contribution of five hundred dollars for that purpose, but because of her inability to make immediate payment of that sum she executed and delivered the paper in question for the purpose of securing the payment of her contribution of that amount at her decease, and that at the time of the dedication of the church the fact that she had made her contribution of five hundred dollars toward the payment of the indebtedness was stated and that many others were induced thereby to make contributions more or less liberal for the same purpose.

The testimony as to what occurred at the time of the execution and delivery of the paper and at the time of the dedication of the church was uncontradicted.

The learned auditor concluded that the paper dated October 27, 1894, was a valid obligation of Eliza Ewing; that it created an indebtedness against her estate, which by its terms became due and payable upon the day of her decease; that

being under seal the consideration therefor was legally presumed and the fact of a consideration being also established by the testimony as to what occurred at the time of the execution and delivery of the paper and at the time of the dedication of the church there was a valid indebtedness of the estate of the testatrix to the consistory of St. Andrews Reformed Church of five hundred dollars, and accordingly awarded payment of that sum to the said consistory.

We have carefully examined the report of the learned auditor and the authorities cited by him in support of this conclusion. He has intelligently considered and applied the various authorities submitted to him in behalf of the legatees under the will of the testatrix, and we are unable to see any valid reason why his conclusion upon that subject should now be disturbed.

In Megary's Estate, 206 Pa. 260, being one of the cases relied upon by the exceptants, it was decided that a paper there submitted was testamentary in its character, and it appears from the language of Mr. Justice Mestrezat in delivering the opinion of the court at page 263, that the reason the paper there considered was determined to be testamentary in character, was because it contained no promise to pay and indicated no purpose to assume a personal liability. He says "There is no acknowledgment of a liability, nor a promise to pay any sum * * * * * It expresses no intention to assume a personal liability."

In the present case the paper contains an express promise to pay at the death of the testatrix the sum of five hundred dollars, and clearly indicates the intention of the party to make herself and her estate responsible for the payment of that sum. We have no doubt whatever but that the learned auditor properly concluded that this paper created a valid debt and obligation payable from the estate of the testatrix, and we have no hesitation in affirming his conclusion upon that subject.

Exceptions were filed with the auditor for his failure to allow interest upon this indebtedness to St. Andrews Reformed Church. We are of opinion that interest should have been computed upon this indebtedness from the date of the death of testatrix, at which date the money became due and payable, until the date of the filing of the account of her executors. As already stated, testatrix died April 28, 1906, and the account of the executors was filed December 19, 1906.

Estate of Eliza J. Ewing, Deceased.

We are of opinion that the interest accrued of right and as matter of law not only upon this indebtedness to St. Andrews Reformed Church, but upon the other item of indebtedness allowed by the auditor to Dr. W. C. Baker. We shall, therefore, modify the auditor's report so as to allow interest upon both those claims between the dates above mentioned.

Exception was also filed with the auditor for his refusal to allow to St. Andrews Reformed Church the amount due for attendance and mileage of witnesses, which we find from the exception amounted to $14.88.

In our opinion the attendance and mileage of witnesses should have been allowed and a distribution will be hereinafter made allowing the same.

We are of opinion that the learned auditor correctly concluded that the legacies to Sarah Seibert and Elizabeth Yoke are entitled to preference over the other legacies mentioned in the will, because given in consideration of services rendered.

In our opinion the learned auditor has made an unintentional mistake in ascertaining the amount of the collateral inheritance tax due from the estate to the commonwealth of Pennsylvania. In making the computation he allowed the collateral tax upon the sum of $2,207.73. The expenses of the audit being a valid charge and claim against the estate, should have been deducted before computing the collateral tax, as the tax is payable only upon the clear value of the estate actually passing to collaterals or strangers.

There are also in the auditor's report of distribution certain slight and inaccurate mathematical computations which must necessarily be corrected in order to properly distribute the estate. We have concluded that it is best to rectify these unintentional errors and mistakes without referring the report back to the learned auditor for the purpose of having them corrected, and we have accordingly made the following:

SCHEDULE OF DISTRIBUTION.

Balance in the hands of the accountants, ...	$3,011 73
Deduct expenses of audit, as per itemized statement in auditor's report, ...	308 00
	$2,703 73

Estate of Eliza J. Ewing, Deceased.

DEBTS AND EXPENSES.

Dr. W. C. Baker, medical bill,..	$304 00		
Interest, April 28, 1906, to Dec. 19, 1906, ...	11 70		
		$315 70	
St. Andrew's Reformed Church, debt on note, ...	$500 00		
Interest, April 28, 1906, to Dec. 19, 1906, ...	18 25		
Witness fees and mileage, ...	14 88		
		533 13	
			$848 83
Balance for legatees, ...			1,854 90
Deduct collateral tax due commonwealth of Pennsylvania, ...			92 74
Net balance for legatees, ...			$1,762 16
Sarah Seibert legacy, ...$1,000 00			
Elizabeth Yoke legacy, ...	50 00		
			1,050 00
Balance for legacies payable pro rata, ...			$712 16

This amount being distributed among these legacies, which amount to $925,00, at the proportionate rate of .7698 per cent., gives the remaining legatees the following sums, to wit:

Evangelical Church at Shoop's Church, ..	$115 50	
Zion Evangelical Church at Penbrook, ..	115 50	
Emma Lineweaver, ...	19 60	
Trustees of Paul S. Brinser, ...	461 56	
		$712 16

We therefore amend the report of the learned auditor, as hereinbefore indicated, and as thus amended the said report is now confirmed absolutely, and we direct that the accountants pay out the fund in their hands in accordance with the foregoing schedule of distribution.

A. MAYERS *vs.* JOHN D. LEATHERY.

Negligence—Jurisdiction.

Damages occasioned by the negligence of an employee, in the absence of his employer, are recoverable in an action of trespass on the case, of which an alderman has no jurisdiction.

Certiorari. C. P. Dauphin County, No. 413 January Term, 1908.

S. H. Zimmerman for plaintiff.

Fred C. Miller for defendant.

KUNKEL, P. J., August 7, 1908.

The exceptions filed to this proceeding go to the jurisdiction of the alderman. The record shows "a claim against the defendant for damages done by defendant's team to the plaintiff's carriage (breaking wheel), amounting to three and thirty one-hundredths dollars." The defendant failed to appear, and judgment was entered against him for that sum. It is agreed between counsel that at the time the injury was done, the defendant's team was in charge of and was being driven by his employee, defendant himself not being present, and that this proceeding was brought to recover for the negligence of the employee in colliding with the plaintiff's carriage. The remedy in such case is by an action of trespass on the case; Phila., Germantown & Norristown R. R. Co. vs. Wilt, 4 Whar., 143; Strohl vs. Levan, 39 Pa., 177; Yerger vs. Warren, 31 Pa., 319; Drew vs. Peer, 93 Pa., 234, and the alderman had no jurisdiction; Gingrich vs. Shaeffer, 16 Sup. Ct., 299.

The judgment is accordingly reversed and the proceeding set aside.

Estate of Catharine Loudermilch.

Married women—Evidence—Acts of June 3, 1887, and May 27, 1887.

Since the Act of June 3, 1887, P. L. 332, a married woman's note or obligation is no longer *prima facie* void. It is only voidable upon affirmative proof of facts showing that it is such obligation as the act does not permit her to give.

After the death of the payee of a note and a married woman who was one of its joint makers, the surviving maker is not competent to prove that he was the principal debtor and that his co-obligor was a mere accommodation maker or surety for his debt.

Exceptions to Auditor's Report. Orphans' Court of Dauphin County.

John E. Fox for exceptions.

William H. Middleton and *F. J. Schaffner* contra.

McCarrell, J., August 13, 1908.

The exceptants are attaching creditors of Elizabeth Withers, a daughter of the testatrix. By her will, the testatrix gives to her said daughter a legacy of one thousand dollars and an equal portion of the residue of her estate with her other children or their representatives, directing in the residuary clause that there be deducted from the shares of her several children, "Such sum as may be due and owing to me by any of my said children or granddaughters, so that the distribution may be equitable."

On April 2, 1900, in the lifetime of the testatrix, Elizabeth Withers (signing her name as Lizzie Withers), gave her notes to her mother jointly with Samuel G. Withers, for $800.00 and $200.00, respectively, each note bearing three per cent. interest. The note for $800.00 is payable one year after date and the note for $200.00 designates no date for payment, and was therefore demandable at the pleasure of the payee at any time within six years from the date.

At the hearing before the auditor the representative of the testatrix's estate and the distributees under her will claimed that these notes and the interest accrued thereon must be deduced from the distribuive share or portion of Elizabeth Withers. Her creditors, who had issued attachments in execution upon their judgments against her, claimed that these

notes were not valid obligations because given by a married woman and because they were signed by her as surety for her husband, Samuel G. Withers, the notes are joint and not joint and several, and each expresses upon its face a valid joint obligation to pay the amount named therein to the testatrix.

The attaching creditors called Samuel G. Withers, one of the joint obligors, to prove that he was the principal debtor, and that Lizzie Withers was merely a joint accommodation maker or surety for his debt and that therefore the notes were not valid obligations against her or her estate, she being a married woman at the time the notes were signed.

Since the Act of 1887 a married woman's note or obligation is no longer *prima facie* void. It is only voidable upon affirmative proof of facts showing that it is such obligation as the act does not permit her to give.

Adams vs. Gray, 154 Pa. 258.

McNeal vs. McNeal, 161 Pa. 169.

Was Samuel G. Withers, the joint maker of the notes in question, a competent witness to prove that he was the principal debtor after the death of his co-obligor and after the death of the payee, whose estate was being distributed?

This is practically the sole question raised by the exceptions now before us.

The Act of May 23, 1887, P. L. 158, in section 5, clause "E" provides as follows, to-wit:

"Nor where any party to a thing or contract in action is dead or has been adjudged a lunatic and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record, who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased or lunatic party, be a competent witness to any matter occurring before the death of said party or the adjudication of his lunacy."

The contracts in question here are the notes above referred to. The party to whom the notes were given is dead. The act expressly provides that no surviving or remaining party to such contracts shall be a competent witness in regard to any matter occurring before the death of the party with whom the contract was made.

The auditor decided that under the terms of this act,

Samuel G. Withers was not a competent witness to testify as to what occurred between him and the other parties to the notes at the time the same were given, and he accordingly disregarded his testimony and treated the notes as valid obligations of Elizabeth Withers, and finding that her share of the estate under the will of the testatrix was less than the amount due upon these obligations, he has made distribution of the funds in the hands of the testatrix's representative among the other parties designated in her will as the recipients of her estate.

We have carefully considered all the authorities to which we have been referred by the learned counsel for exceptants and are satisfied that the auditor has committed no error in holding that Samuel G. Withers was not a competent witness and in making the distribution reported by him.

We accordingly overrule all the exceptions to the auditor's report, confirm the said report absolutely, and direct that distribution of the estate of the testatrix be now made in accordance with said report.

JOSEPH SCHMIDT *vs.* JOHN R. HAYES, PIERCE W. STOAK AND ANNIE P. STOAK.

Deeds—Building restrictions—Dwelling house.

No matter what the form, size or location of a structure may be, if from the time of its erection it has been occupied as a dwelling house, it must be regarded as a dwelling house in contemplation of law.

A deed contained the following restriction: "That no barn, stable, coop or other outbuilding shall be erected nearer to the avenue or street front than sixty feet. That no dwelling nor building for business purposes costing less than five hundred dollars shall be built upon said premises before the first day of January, A. D. 1915." Defendant erected a structure costing less than one hundred dollars, one hundred and five feet from the street line, and occupied it continuously as a dwelling. *Held,* that the structure was in violation of the restriction in the deed.

Bills in equity to enforce restrictions in deed. Nos. 410 and 411, Equity Docket.

Schmidt vs. Hays.

Geo. R. Barnett and *E. E. Beidleman* for plaintiff.

D. L. Kauffman for defendant.

McCARRELL, J., August 13, 1908.

These bills were filed for the purpose of compelling compliance with the conditions of a certain conveyance of building lots in a location designated as "Edgemont" in this county.

The bills aver that the plaintiff being the owner of a tract of land in Susquehanna township, Dauphin county, divided a large part thereof into building lots, calling the location "Edgemont," and recorded plans thereof in the office of the recorder of deeds.

Plan No. 2, in Plan Book "D," page 28, covers two hundred and four of these building lots, one hundred and seventy-three of which had been sold at the time of the filing of these bills.

On September 21, 1906, by deed recorded in Book "X," Vol. 12, page 228, the plaintiff conveyed eight of these lots, numbered 160, 161, 162, 163, 164, 165, 134 and 135, to Michael J. Shaffer. This deed is in fee simple, but contains the following restrictive stipulation or condition, to-wit:

"No house or other structure shall be erected within twenty feet of the line of the street or avenue upon which said lot fronts, as shown by the original plot. The said party of the second part, his heirs and assigns, shall not at any time before the first day of January, A. D. 1915, erect or build, or cause or permit to be erected or built upon the lots of ground hereby granted, or any part thereof, any tavern, drinking saloon, blacksmith, currier or machine shop, piggery, tannery, slaughter house, glue, soap, candle or starch manufactory, or other building for offensive purpose or occupation, nor shall any building thereon erected be converted, before said first day of January, A. D. 1915, into a tavern, drinking saloon, blacksmith, currier or machine shop, piggery, tannery, slaughter house, glue, soap, candle or starch manufactory, or used for any offensive purpose or occupation. That no barn, stable, coop or other outbuilding shall be erected nearer to the avenue or street front than sixty feet. That no dwelling nor building for business purposes costing less than five hundred dollars shall be built upon said premises before the first day of January, A. D. 1915."

The bill filed to No. 410 Equity Docket, avers that

Michael J. Shaffer, the grantee in the aforesaid deed, has contracted to sell and convey to John R. Hayes, the defendant, lot No. 134 in said Plan No. 2; that said defendant has entered into possession of said lot and has erected thereon a shanty costing not more than fifty dollars and is using the same as a dwelling house.

The bill filed to No. 411 Equity Docket and subsequently amended so as to make Annie P. Stoak a co-defendant with her husband, Pierce W. Stoak, avers that Shaffer, the grantee in the aforesaid deed, has contracted to sell and convey lot No. 160 in said Plan No. 2, to Annie P. Stoak, wife of Pierce W. Stoak; that she has entered into possession and has erected thereon a shanty costing not more than sixty dollars, and is using the same as a dwelling house.

The bills allege and claim that these structures on lots No. 134 and No. 160, respectively, being used as dwelling houses, are erected and used in violation of that portion of the restrictive stipulation or condition in the aforesaid deed from plaintiff to Shaffer, which declares that "no dwelling nor building for business purposes costing less than five hundred dollars shall be built upon said premises before the first day of January, A. D. 1915."

The answers filed admit the allegations of the bills so far as they relate to plaintiff's title, the laying out of the building lots, and the conveyance to Michael J. Shaffer, with the restrictive stipulation or condition hereinbefore stated.

The answer of John R. Hayes, filed to No. 410 Equity Docket, denies that he has erected any building on lot No. 134, but admits that Pierce W. Stoak erected the building complained of for storing the household goods of his mother, and avers that it was so erected with the consent of plaintiff's agent, Arthur Young, and was not intended for a dwelling.

The answer of Pierce W. Stoak, for himself and Annie P. Stoak, his wife, filed to No. 411 Equity Docket, admits that he has erected a stable costing about one hundred dollars on lot No. 160, located one hundred and five feet from the street line and is using the same for the storage of household goods, pending the erection of a dwelling house, and that plaintiff's agent, Arthur Young, consented to the erection and agreed that the same might be used as a dwelling until a house was completed.

Replications have been filed, the cases were heard together and a large amount of testimony was taken. The two

cases will, therefore, be considered and decided in a single opinion.

The restrictive stipulations or conditions in the deed from the plaintiff to Shaffer is entirely lawful and its purpose is commendable. It prohibits the erection of any structure within twenty feet of the street line so as to leave yards or lawns in front of the buildings. It designates buildings for certain purposes regarded as objectionable and declares that buildings for these purposes shall not be erected or used for such purposes before January, 1915. It provides that barns, stables and coops and other outbuildings shall not be erected within sixty feet of the street line. It further declares that no dwelling house or building for business purposes costing less than five hundred dollars shall be erected prior to January 1, 1915. The manifest design was to make the location a desirable one for residences and business purposes by controlling the location and character of the structures to be erected thereon.

The bills allege a violation by the defendants in each case of that part of the restrictive stipulation or condition, which prohibits the erection of a dwelling costing less than five hundred dollars, and claims that thereby the remaining lots owned by plaintiff are depreciated in value and the plaintiff is hindered and embarrassed in making collections of purchase money from those who have purchased lots.

While the bills do not in express words assert that the plaintiff will thereby suffer irreparable loss, the character of the injury alleged is manifestly of such kind as renders the resulting loss difficult, if not impossible, of accurate ascertainment, and therefore by necessary implication the bills assert irreparable injury in each case.

The sole inquiry in these cases is, have the defendants respectively in these bills violated the restrictive stipulation or condition of the deed in question as alleged?

We have carefully read and considered all the testimony submitted, and find therefrom the following:

STATEMENT OF FACTS.

1. John R. Hayes, the defendant in No. 410 Equity Docket, has permitted Pierce W. Stoak to erect on lot No. 134 of the lots conveyed by plaintiff to Michael J. Shaffer, a structure costing less than one hundred dollars, and has permitted said structure to be used as a dwelling by the mother of said Stoak.

2. Although John R. Hayes, by his answer filed October 18, 1907, declared that the said structure permitted by him to be erected by Pierce W. Stoak would be removed within thirty days from that date, he permitted the same to remain and be occupied as a dwelling down to the hearing of the testimony on December 30, 1907, and still permits the same to remain and be so occupied so far as is shown by any evidence submitted.

3. Pierce W. Stoak and Annie P. Stoak, his wife, the defendants in No. 411 Equity Docket, erected on lot No. 160 of the lots conveyed by plaintiff to Michael J. Shaffer, a structure costing less than one hundred dollars, and occupied the same as a dwelling for themselves down to the taking of testimony in these cases on December 30, 1907, and still continues to occupy the same as a dwelling so far as is shown by any evidence submitted.

4. John R. Hayes and Pierce W. Stoak and Annie P. Stoak took possession of lots 134 and 160 respectively, under contracts to purchase from Michael J. Shaffer, the plaintiff's grantee, under deed of September 21, 1906, containing the restrictive stipulation or condition hereinbefore at length referred to, which deed was recorded January 31, 1907, prior to the making of said contracts to purchase from said grantee.

5. The erection and occupancy of the aforesaid structures as dwellings have in each instance interfered with the sale of other lots by the plaintiff and have in each instance hindered and embarrassed the plaintiff in the collection of purchase money for lots sold previous to said erection and occupancy.

6. No consent was ever given by the plaintiff to the occupancy of the aforesaid structures as dwellings in the manner in which they have been so occupied; and although the defendants were severally notified to discontinue such occupancy prior to the filing of the bills against them, respectively, they severally failed and refused so to do.

Discussion and Conclusion.

The deed from plaintiff to Michael J. Shaffer, under whom the defendants are severally in possession of lots No. 134 and No. 160, contain, *inter alia*, the following express condition: "That no dwelling nor building for business purposes costing less than five hundred dollars shall be built upon said premises prior to January 1, A. D. 1915."

It is admitted that neither of the structures erected upon the lots in question cost five hundred dollars, and we have already found as a fact that neither structure cost one hundred dollars.

It is contended by the defendants that neither of these structures was erected as a dwelling, but that each was built as a stable, store house or outbuilding, and that being upon the portion of the lots respectively within which such buildings are permitted, they are not in violation of the restrictive stipulation or condition of the deed.

No matter what the form, size or location of these structures may be, or by what particular name they may be properly designated, the fact remains that they have severally from the time of their erection been occupied as dwellings and must be regarded as dwellings in contemplation of the law.

We are of the opinion that the manifest purpose, intent and meaning of the portion of the restrictive stipulation in question here is that no building upon the premises costing less than five hundred dollars should be occupied as a dwelling before January 1, 1915. The general purpose of this particular clause as to cost of dwellings undoubtedly was to compel the erection of such dwellings upon the lots as would make the location a desirable one for residences. To permit a shanty, stable or store house of small dimensions, of unsightly appearance, and of trifling cost to be used and occupied as a dwelling would certainly defeat the intended purpose.

We are therefore of the opinion that the occupancy of the structures erected upon these lots as dwellings renders them as matter of law, dwellings within the meaning of the restrictive stipulation or condition contained in plaintiff's conveyance, and that such occupancy is a violation of said stipulation or condition.

We accordingly conclude that the plaintiff is entitled to have the occupancy of said structures as dwellings discontinued and their future occupancy as such perpetually enjoined.

We further conclude that the defendants, respectively, should pay the costs of the proceedings severally instituted against them.

Let a decree be prepared in each case in accordance with these conclusions.

Practice of Undertaking.

Practice of undertaking—Unlicensed persons advertising themselves as engaged in the practice of undertaking—Application for license—Practical experience.

When a firm, neither of whose members are licensed undertakers, but who have in their employ a licensed undertaker, advertise themselves as engaged in the business of undertaking, the State Board of Undertakers should cause an information to be made in the proper county, under the Act of June 7, 1895, in order that their right to so advertise may be judicially determined.

The State Board of Undertakers must exercise a sound discretion in passing upon each application for license, taking into consideration the facts in each individual case, but it cannot require, as an unqualified condition precedent to issuing a license, that the practical experience required of the applicant shall have been obtained during the two years immediately preceding the application.

Attorney General's Department. Opinion to Charles W. Naulty, Secretary State Board of Undertakers.

Cunningham, Assistant Deputy Attorney General, September 3, 1908.

I am in receipt of your communications of August 28th and August 31, 1908, respectively, in which you ask this department to advise the state board of undertakers as to the proper action to be taken by that board upon the following matters:

1st, with reference to the complaint lodged with the state board of undertakers against T. J. Huffman & Son, in which it is alleged that Mr. Huffman and his son are engaged in the business of undertaking without having been duly licensed and registered; and

2d, with reference to the application of James R. Foltz, of Dunbar, Pa., for examination before your board.

Concerning your first inquiry, I understand the facts to be as follows:

T. J. Huffman & Son were formerly members of a corporation under the name of the Waynesburg Furniture and Undertaking Company, the business of which said corporation has been purchased by the said T. J. Huffman & Son, who are now conducting the same as a co-partnership. Mr. Huffman and his son advertise themselves as being engaged in the

"furniture and undertaking" business. Neither member of the firm has been licensed nor registered by your board. Neither Mr. Huffman nor his son actually prepare bodies for burial, but have in their employe a salaried employe, one A. Furman Hoge, who is a licensed undertaker.

You ask whether under these facts Mr. Huffman and his son are violating the Act of June 7, 1895, P. L. 167, as amended by the Act of 24th April, 1905, P. L. 299.

The Act of 1895 is entitled,

> "An act to provide for the beter protection of life and health by diminishing the danger from infectious and contagious diseases through the creation of a state board of undertakers in the cities of the first, second and third classes, with systematic examinations, registration and licenses for all entering the business of burying the dead, and penalties for violation of the provisions thereof."

Sections 5 and 6 of the Act of 1895 have been amended by the said Act of 1905. By section 6, as amended, it is provided, inter alia, that

> "Before any person, persons or corporation shall hereafter engage in the business of undertaking or the care, preparation, disposition and the burial of the bodies of deceased persons, in their own name and on their own account, *in this commonwealth,* * * * * such person or persons * * * * * shall apply to said board for a license to practice the same."

By section 7 of the Act of 1895 it is provided that

> "Any person, persons, corporation or member thereof who shall practice or hold himself, herself, themselves or itself out as practicing the business of undertaking or the care, preparation, disposition and burial of the bodies of deceased persons without having complied with the provisions of sections five and six of this act, shall be guilty of a misdemeanor * * * * Provided that nothing contained in this act shall be construed to apply to *bona fide* employees of a duly licensed or registered undertaker, or to persons engaged simply as layers out or shrouders of the dead, or to the employees of any cemetery whose duties or business extends no further."

Your present inquiry does not involve any question rela-

tive to the manner in which corporations can be licensed to engage in the undertaking business, as, under the facts stated, the business referred to is now being conducted by T. J. Huffman & Son as a co-partnership. The legislature, in passing and amending the act in question seems to have had in mind two classes of persons whose occupations would bring them under the jurisdiction of the state board of undertakers, viz:

1st, all persons who "engage in the business of undertaking or the care, preparation, disposition and burial of the bodies of deceased persons, in their own name and on their own account;" and

2d, the "*bona fide* employees of a duly licensed or registered undertaker."

It was evidently the legislative intent that all persons engaging in the business of undertaking, or the care, preparation, disposition and burial of the bodies of deceased persons, in their own name and on their own account, and who practice or hold themselves out as practicing the business of undertaking, should be required to obtain a license so to do from the state board of undertakers, and should be duly registered with said board. These are the persons charged with the responsibility of conducting the business of undertaking in a manner that will best protect the public health, and these are the persons whom the public has a right to hold to a strict accountability. As such persons are responsible for the acts of their employees performed within the scope of their employment, and as no one can obtain a license until he or she has had practical eperience the *bona fide* employees of a licensed undertaker are not required to be licensed or registered.

As I understand the facts upon which your inquiry is based, Mr. Huffman and his son are advertising to the public that they are engaged in the business of undertaking in their own name and on their own account. Prima facie this would seem to be a violation of the law. I am not prepared to say that it would be a good defense for Mr. Huffman and his son to show that they have in their employ a licensed undertaker. The question, however, is one for judicial determination in the court of quarter sessions of Green county, by a trial upon a charge of misdemeanor, at which trial all the facts can be determined and the law judicially construed. It is the province of this department, however, to advise your board as to its action, and under the facts stated in your communica-

tion I am of the opinion that your board should cause an information to be made before a magistrate of the proper county, charging both members of said firm, under the seventh section of the said Act of 1895, with a misdemeanor, to the end that the important question arising under the said complaint may be determined in the proper tribunal.

With reference to your second inquiry, I understand the facts to be as follows:

James R. Foltz, of Dunbar, Pa., is an applicant for examination before your board. Prior to the year 1903 he was in the employ of his father for two years, his father being at that time engaged in the business of undertaking. Some time during the year 1903 Mr. Foltz, Sr., disposed of his business; the applicant, James R. Foltz, sought other employment and has not been employed in the undertaking business since the said year 1903.

You state that your board construes the sixth section of the said Act of 1895, as amended by the Act of 1905, to mean that an applicant for license must have had continuous practical experience in the business of undertaking for at least two years immediately preceding his application for license. Under the second section of the said Act of 1895 your board is authorized to "adopt such regulations for the transaction of the board and the management of its affairs as they may deem expedient," but this provision, of course, does not authorize the board to make rules in violation of the provisions of the act.

Under the sixth section of the act as originally passed, the applicant was required to show upon examination that he or she is of good moral character, possessed of skill and knowledge of the business of undertaking and has a reasonable knowledge of sanitation, preservation of the dead, disinfecting the bodies of deceased persons, and the apartment, clothing and body in case of death from infectious or contagious diseases.

By the Act of 1905 the applicant is required to satisfy the board of all these things and in addition thereto that he or she "has had practical experience in the business of undertaking, for two years continuously, with an undertaker or undertakers."

The original act required only certain skill and knowledge. The act as amended requires not only certain skill and knowledge but a certain amount of practical experience. The act

does not provide that this practical experience must have been acquired during the two years immediately preceding the application for examination. The only thing specifically required by the act is that the practical experience shall have been an uninterrupted experience of two years.

I am of the opinion that an applicant is not necessarily disqualified for examination simply because the practical experience of the applicant has not been obtained during the two years immediately preceding the application for examination. The essential thing is that the applicant shall have had the requisite amount of continuous practical experience. The time during which the experience has been acquired may be a material factor to be taken into consideration by your board in determining whether a license should be issued to the applicant. The more remote the time at which the experience was acquired the less valuable that experience will be, in view of the rapid progress being made in matters of this kind. Your board is vested with certain judicial functions in determining whether a license shall be issued to any applicant, and has a right to take into consideration the length of time which may have elapsed since the practical experience of the applicant has been acquired. It would seem unjust to refuse a license to an applicant otherwise duly qualified merely because the applicant has not been employed in the undertaking business for a period of six months preceding the application. On the other hand, if the applicant has not been engaged in the undertaking business for a period of five or six years, his practical experience could hardly be said to be said to be the kind contemplated by the Act of Assembly.

I am of the opinion, therefore, that your board must exercise a sound discretion in passing upon each application for license, taking into consideration the facts in each individual case, but that you cannot require as an unqualified condition precedent to issuing a license that the practical experience required of the applicant shall have been obtained during the two years immediately preceding the application.

ROAD TAX.

Road Taxes—Act of April 12, 1905.

The tax of one dollar, which the Act of April 12, 1905, P. L. 142, provides shall be assessed by the road supervisors upon every taxable, in addition to the millage tax mentioned in the act, is a tax to be assessed against persons, and the supervisors of any given township of the second class can assess this tax only against residents of their township.

Attorney General's Department. Opinion to R. D. Beman, Deputy State Highway Commissioner.

CUNNINGHAM, Assistant Deputy Attorney General, September 9, 1908.

This department is in receipt of your communication of July 13, 1908, in which you ask to be advised whether, in the opinion of this department, that portion of the second section of the Act of April 12, 1905, P. L. 142, which provides "that upon every taxable the road supervisors of each township shall assess the sum of one dollar in addition to the millage tax above mentioned," authorizes the supervisors of any given township of the second class in this commonwealth to assess said tax of one dollar against a person who owns property within the township in question, but is a non-resident thereof.

The disposition of your inquiry depends upon the character of the tax, the assessment of which is authorized by the language above quoted. If the tax therein provided for is a poll or capitation tax of a specific sum to be assessed against an individual, such tax cannot be assessed by the supervisors of a township against a non-resident thereof, for a personal tax can be levied only at the place of the individual's residence and the right to levy a poll tax depends upon residence. A poll tax is not a tax on property, but is a specific sum levied upon individuals.

It is suggested in your communication, however, that the word "taxable," as used in the act under consideration should be construed to include anything capable of being taxed, property as well as persons. The word taxable is defined in the Century Dictionary both as an adjective and a noun. As an adjective it means, "Subject or liable to taxation," and as a noun it means, "A person or thing subject to taxation; especially a person subject to a poll tax." Standing alone the

word "taxable" may mean either a person or a thing subject to taxation, but in order to ascertain the meaning which the Legislature intended should be given to the word as here used we must examine the context.

The said Act of 1905, *inter alia,* authorizes supervisors of townships of the second class to levy and collect road taxes. It is provided in the said second section of this act that the supervisors "shall proceed immediately to levy a road tax which shall not exceed ten mills on each dollar of valuation; this valuation shall be the last adjusted valuation for county purposes, and which shall be furnished to said road supervisors by the commissioners of the proper county. * * * * And provided further than upon every taxable the road supervisors of every township shall assess the sum of one dollar in addition to the millage tax above mentioned." The language above quoted clearly indicates a legislative intent to authorize the assessment of taxes by supervisors against two separate and distinct objects of taxation—first, property, against which a millage tax is to be assessed, and, secondly, taxable individuals, against whom a specific tax of one dollar each is to be assessed.

I am, therefore, of the opinion that the dollar tax above mentioned is not a tax on property but is a tax to be assessed against persons, and that the supervisors of any given township of the second class can assess this tax only against residents of their township. In arriving at this conclusion this department is in accord with the opinion of Judge Walling, in the case of Mill Creek Township vs. Willis, 16 D. R. 312; the opinion of Judge Wanner in the case of Township of Warrington vs. Belt, and the opinion of Judge Taylor in the case of Independence Township vs. Dodd, 17 D. R. 416.

PRACTICE OF PHARMACY.

State Pharmaceutical Examining Board—Certificates—Hospital Pharmacists.

The State Pharmaceutical Examining Board has no authority to issue a certificate declaring the holder to be a hospital pharmacist and authorizing him to have charge of a hospital dispensary.

There is no legislative authority for issuing any kind of a certificate to persons who propose to act as hospital pharmacists, and do not propose to engage in the retail drug business either as proprietors or managers, or qualified assistants.

Attorney General's Department. Opinion to Charles T. George, Secretary of State Pharmaceutical Examining Board of Pennsylvania.

CUNNINGHAM, Assistant Deputy Attorney General, September 11, 1908.

This department is in receipt of your inquiry of September 3, 1908, in which you ask to be advised whether the state pharmaceutical examining board has authority under existing legislation to issue certificates in the following form:

"This is to certify that ....., of ..... county of ....., state of Pennsylvania, having had four years' practical experience in compounding and dispensing medicines and compounding physicians' prescriptions in a hospital and having passed a satisfactory examination before this board, is hereby declared a

HOSPITAL PHARMACIST

and granted this certificate, which entitles the holder to have charge of a hospital dispensary. This certificate does not permit the holder to conduct or carry on the retail drug and apothecary business either as proprietor or manager thereof, or to act as a qualified assistant."

In reply, permit me to say that an examination of the Act of 24th May, 1887, P. L. 189, being the act establishing the "state pharmaceutical examining board," and regulating the practice of pharmacy in this commonwealth, and of the various amendments thereto, shows that the scope of this legislation in so far as it relates to the present inquiry is to provide for the registration of two classes of persons engaged in the practice of pharmacy, viz: those who conduct and carry

on the retail drug or apothecary business, and those who act as qualified assistants in the carrying on of said business, and to provide for the issuing, after due examination, of appropriate certificates to the said two classes of persons, denominating the certificates issued to the first-mentioned class of persons as proprietor's or manager's certificates, and those issued to the second mentioned class of persons as qualified assistants' certificates.

The fifth section of the said Act of 1887, as amended by the Act of March 24th, 1905, P. L. 53, provides, *inter alia,* that all persons applying for examination for certificates entitling the holders thereof to conduct and carry on the retail drug or apothecary business must produce satisfactory evidence of having had not less than four years' practical experience in the business of retailing, compounding or dispensing of drugs, chemicals or poisons, and of compounding physicians' prescriptions, and of being a graduate of some reputable and properly chartered college of pharmacy; and those applying for examination for certificates as qualified assistants therein must produce evidence of having had not less than two years' experience in said business.

Under this legislation the applicant for a certificate to conduct and carry on the retail drug business, either as a proprietor or a manager thereof, must have at least two qualifications. Such applicant must have had not less than four years' practical experience in the business of retailing, compounding or dispensing drugs, etc., and of compounding physicians' prescriptions, and must be a graduate of some reputable and properly chartered college of pharmacy. The applicant for a qualified assistant's certificate need not be a graduate of a college of pharmacy, but must have had not less than two years' experience "in said business." Under a fair construction of the language of this section the business herein referred to is the business of retailing, compounding or dispensing drugs, etc., and compounding of physicians' prescriptions in a retail drug store, and not the business of compounding and dispensing medicines and compounding physicians' prescriptions in a hospital.

It is expressly stated in the form of certificate submitted with your inquiry, and above quoted, that this certificate will neither authorize the holder to conduct or carry on the retail drug and apothecary business as proprietor or manager thereof, nor to act as a qualified assistant in the carrying on of such

business. The only purpose the proposed certificate could serve would be to authorize the holder thereof to compound and dispense medicines and compound physicians' prescriptions in a hospital, and have charge of a hospital dispensary. I am of the opinion that the state pharmaceutical examining board has no authority, under the law, to issue a certificate of this kind. The board can issue but two kinds of certificates, namely—certificates authorizing their holders to conduct and carry on the retail drug business as a proprietor or manager thereof, and certificates authorizing the holders thereof to act as qualified assistants in the carrying on of such retail drug business. Neither of these certificates can be issued to a person who has not had practical experience in said retail drug business, but the language of the certificate in question would indicate that it is proposed to issue the same to persons who have had no practical experience in the retail drug business. Although not a controlling element in the disposition of your inquiry, it is to be observed that it is proposed to issue the certificate in question to applicants who are not graduates of a college of pharmacy, such graduation being one of the qualifications required of applicants for a proprietor's or manager's certificate.

Aside from the question of whether the practical experience contemplated by the said Act of 1887, as amended, must be acquired in the retail drug business, as distinguished from practical experience in compounding and dispensing medicines and compounding physicians' prescriptions in a hospital, and aside from the matter of graduation from a college of pharmacy, I am of the opinion that the certificate cannot be legally issued by your board, because there is no legislative authority for issuing any kind of a certificate to persons who propose to act as hospital pharmacists, and do not propose to engage in the retail drug business either as proprietors or managers, or qualified assistants. Such persons are not within either of the two classes of persons to whom the state pharmaceutical examining board is authorized to issue certificates.

COMMONWEALTH *vs.* JOHN H. SANDERSON ET AL.

Criminal law—Conspiracy—Evidence—Contracts — Construction—Province of the court and jury.

Item 25 of a contract provided that designed sofas, seatings, etc., either upholstered wood, metal or stone should be furnished at the price of $12.90 per foot. Item 27 provided that designed special desks, and tables should be furnished at the price of $10.80 per foot. Item 22 provided that furniture, fittings and furnishings of wood work, stone, marble, bronze mosaic glass and upholstery, etc., should be furnished at the price of $18.40 per foot. *Held,* that sofas and tables were not embraced under the terms, furniture, fittings and furnishings used in item 22, but were chargeable only at the prices specifically agreed upon in items 25 and 27. That item 22 embraced only those supplies under the designation of furniture, fittings and furnishings not specifically contracted for in the other items.

Where the terms of a contract are ambiguous and evidence dehors the instrument is necessary to explain them, the interpretation of the contract becomes a question for the jury under all the evidence.

Where a contractor, indicted with others for conspiracy to defraud by rendering fraudulent bills under certain items of a contract, defends on the ground that he had not charged as much as he was entitled to charge under the contract, evidence of the market value of the goods furnished is admissible, as to him, to enable the jury to determine the question of construction and his honesty.

Where the meaning of a particular term used in a contract is in dispute, the interpretation put upon it in a prior contract, between the same parties and touching the same subject matter, is admissible.

Under an indictment for conspiracy, charging that one of the defendants, whose duty it was to certify to the correctness of bills, falsely and fraudulently certified, evidence is admissible to show that the measurements and item numbers were taken from the bills and inserted in the certificate at the instance of one of the other defendants, and that the person whose duty it was to certify, knew nothing as to the correctness of the bill certified.

In an indictment charging conspiracy to defraud by rendering false bills under a contract, evidence of the circumstances attending the awarding of the contract is admissible.

Where fraud is alleged, the inquiry is always given a wide latitude and every circumstance that may throw light upon it is proper for the consideration of the jury.

To support a charge of conspiracy it is sufficient if it be shown

that at the time the offense is charged to have been committed or when the overt act was done, there existed an understanding regarding it between the parties charged; it is not incumbent upon the commonwealth to show the exact point of time the conspiracy was entered into.

If it be shown that two or more persons are acting in concert to do an unlawful act, each one contributing to the common object, the circumstances may justify the inference that there then exists an understanding between them to do the unlawful act.

In the trial of an indictment for conspiracy, it is not necessary that the court should place upon the record its opinion as to the sufficiency of the evidence and its reason therefor.

Inferences from evidence are to be drawn by the jury, not by the court.

Motion for new trial. Q. S. Dauphin County, No. 239, September Term, 1907.

M. Hampton Todd, Attorney General, *J. E. B. Cunningham,* Assistant Attorney General, *John Fox Weiss,* District Attorney, *James Scarlet* and *John E. Fox* for commonwealth.

Lyman D. Gilbert, Charles H. Bergner, Percy Allen Rose, P. Fred Rothermel, Jr., W. U. Hensel, W. I. Schaffer, and *Albert S. Miller,* for defendants.

KUNKEL, P. J., December 11, 1908.

To sustain this motion, 112 reasons have been assigned in behalf of the defendant Sanderson, 51 in behalf of the defendant Shumaker, 58 in behalf of the defendant Snyder, and 54 in behalf of the defendant Mathues. Many of the reasons are alike. Some allege error in the charge of the court, others error in the admission of evidence, and others in the submission of the case to the jury at all. Although we have considered all the reasons, it is impracticable in this opinion to refer to them all. We shall, therefore, discuss those only which were urged upon us by counsel at the hearing of the motion and in the written briefs submitted to us.

1. It is claimed that the court erred in its construction of the contract touching the prices chargeable under it for the articles furnished to the state. The schedule and the award show that the defendant Sanderson, who was contractor, agreed in terms to furnish the state at the price of $12.90 per foot designed sofas and at the price of $10.80 per foot

designed tables (item 25 providing for "designed sofas, seating, etc., either upholstered wood, metal, or stone," and item 27 providing for "designed special desks and tables.") He also agreed to furnish at the price of $18.40 per foot "furniture, fittings and furnishings, of wood work, stone, marble, bronze mosaic, glass and upholstery," etc., in item 22. It was contended by defendants that sofas and tables were included in the term "furniture, fittings and furnishings of wood work" used in item 22, and that, therefore, these articles could be properly charged for at $18.40 per foot. This contention raised the question of the construction of the contract. On the trial we instructed the jury that sofas and tables were not embraced under the terms "furniture, fittings and furnishings" as used in item 22, but were chargeable only at the prices specifically agreed upon in items 25 and 27. The contract we then thought hardly open to construction and we think so now. It is plain and unambiguous. The prices of sofas and tables are fixed and agreed upon in items 25 and 27, respectively, and it would be an interpretation not warranted by any canon of construction of which we are advised that would place them under the general term furniture in item 22 at a different price. If it had been intended that they should be paid for under item 22 and at the price of $18.40 per foot, there was no reason for agreeing upon a price for them by name, or making any contract respecting them at all. But the parties did agree upon a price for them by name, and to hold now that they are to be charged under another item at another price would be to eliminate the specific stipulation regarding them from the contract. This cannot be done, but effect must be given to this, as well as to all the terms of the contract. This object is accomplished by declaring, what was the manifest intent of the parties, that item 22 embraces all those supplies falling under the designation of furniture, fittings and furnishings not specifically and by name contracted for in the other items.

Furthermore, we have grave doubts, even if sofas and tables were not specifically mentioned in the schedule, that the clause "furniture, fittings and furnishings of wood work, stone, marble, bronze, mosaic, glass and upholstery," in item 22, was intended to embrace single pieces of furniture, or articles of furniture, such as sofas, tables, and the like. Rather it would seem that it was intended to embrace wood decorations, wainscoting, or panelling, or mantles, just as it evi-

dently embraced marble, mosaic, glass and bronze decorations, or furniture or furnishings in the sense of decorations. It could hardly be said to contemplate a marble, mosaic, bronze or glass sofa or table. The whole character of the item indicates that it was intended to cover something other than single articles or single pieces of furniture. However, be that as it may, the contract leaves no doubt as to the prices which the parties agreed upon for sofas and tables, for they took them out of the general term furniture in item 22 and contracted specifically for them in items 25 and 27.

The contention of the defendants that item 22 is an average item, and the price of $18.40 an average price for the several articles contained therein, does not reach the question which is raised. We may assume all that to be true, yet it does not follow that sofas and tables were intended to be embraced by item 22. That item may be an average item as to the articles and supplies to be furnished under it. The question, if there be a question, however, still remains, does it embrace sofas and tables? There is no doubt the parties could have agreed that sofas and tables should be covered by item 22 by declining to contract with respect to items 25 and 27, but the difficulty about the defendants' contention is they did not do so. It is clear, therefore, that item 22, even if it be an average item, does not embrace sofas and tables, but manifestly was intended, as we have said, to be a collective item covering those articles which were not specifically mentioned in the schedule, or otherwise contracted for.

We may here observe that the illustration used by counsel, that of a contract in which corn, oats and wheat are embraced by one item, and corn and oats each by separate items, is not apposite to the present case. In the illustration used, corn and oats are specifically named in the general or average item, and there is no question but that they are covered by the average item. In the present case, whether the specific articles named are covered by the average item is the very question in dispute. A more exact illustration would be the case of a contract with an average item calling for grain and cereals at one price, and with two specific items, the one calling for corn, the other for oats at lower prices. In such case, could it be seriously contended that oats and corn were to be charged for at a higher price under the item calling for grain and cereals? Surely not, for it would be evident that the average item of grain and cereals was intended to cover only such

grain and cereals as were not mentioned in the specific items.

For the reasons thus briefly stated, as well as for those given in the charge, we are satisfied that the construction which we placed upon the contract as to prices was the correct one.

2. It is further urged in support of this motion that the court erred in submitting to the jury the construction of the contract as to the meaning of the term "per foot" used in connection with the measurement of the articles of furniture contained in the bill which was the subject of the indictment. It is quite manifest that this was not a question the court could deside. The term per foot was ambiguous. It might have meant either lineal, square, or cubic foot, and there was nothing in the contract itself to aid in ascertaining its meaning with certainty. The commonwealth contended it meant lineal foot, the defendants that it meant square foot. Evidence dehors the contract was, therefore, heard to throw light upon the meaning of the term, and thus its interpretation became a question for the jury under all the evidence. The suggestion that the court should have construed it as square foot as to sofas and tables because that kind of foot is the only kind applicable to all the articles mentioned under item 22, could not have been adopted, for sofas and tables are not embraced by that item, as we have already said. The learned counsel's whole argument on this point is founded wholly on the assumption that sofas and tables fall under the so-called average item 22. With this premise removed, the entire superstructure of his reasoning falls.

In this connection we may refer to the admission of the evidence of the market value of the articles supplied by the defendant, Sanderson. The evidence was admitted only as to him, he being a contractor and, presumably, familiar with market value. He had put in the defence that he had not charged as much as he had the right to charge under the contract. He had not as a matter of fact charged by the square foot. The evidence submitted by him showed that if he had measured by the square foot his bills would have been a great deal larger, even if charged at the prices fixed by items 25 and 27. As affecting his construction of the contract that per foot meant square foot, and for the purpose of testing the honesty of his belief that square foot was meant, and also the integrity of his defence, the evidence of market value was admitted. The jury was thus enabled to see the difference

between the amounts he claimed he had the right to charge and the fair market value, and from a comparison to determine the question of construction and his honesty. If the comparison made the charge by the square foot unconscionable or exorbitant, such fact was for the jury to aid them in determining whether the parties intended a measurement and whether Sanderson himself believed they intended a measurement which would bring about so unfair a result.

The suggestion that if the charge by the lineal foot of some of the articles covered by item *22* was compared with their market value, it would show that the charge would be so much below the fair market value as to make them unconscionable as to Sanderson and that, therefore, the jury should have been directed to this phase of the matter as evidence that lineal foot was not meant, is without force. To this suggestion it may be said that the meaning of the term per foot as used in the so-called average item *22* was not the question before the jury. The question was that of its meaning as used in items *25* and *27*. The market value of articles embraced by item *22* was, therefore, not relevant. But if its meaning in item *22* had been the subject of inquiry, its meaning, so far as shown by market value, could not have been submitted to the jury in the absence of any evidence of the market value of the various supplies named therein. The contention that sofas and tables fell under item *22* was the contention of the defendant, and if a comparison of market values of these supplies with charges for them by the lineal foot was to be made and was necessary to the defence it was incumbent upon the defendant, not upon the commonwealth, to give evidence of the market value of such supplies, without which there could be nothing for the jury to consider.

3. The schedule of 1898-99, together with the bill rendered under it to the state by the defendant, Sanderson, we think, was properly admitted in evidence. It contained the same term "per foot" for the measurement of furniture as was contained in the schedule and contract before us at the trial, the meaning of which was the subject of inquiry. What better evidence as to the meaning of the term could be offered than that which the state and the defendant, Sanderson, had given to it in a former contract relating to the same subject? The objection that the evidence was not admissible because it was not accompanied by the plans and specifications to which

the schedule referred is not tenable. Even if it be admitted, as was suggested, that lineal foot might have been provided for in the plans and specifications, which is not at all likely, that could not affect the admissibility of the evidence. The point of the offer was the fact that in a former contract touching a similar subject matter between the state and the defendant, the term per foot was understood to mean lineal foot. Whether it meant lineal foot by express agreement, or by the mutual interpretation of the parties could make no difference. The fact remained that the parties gave a meaning to the term; and when the same term was used in a subsequent contract, that meaning, we think, was proper for the consideration of the jury, both on the question of the true interpretation of the term used therein and the honesty of the belief of the defendant, Sanderson, that it there meant square foot. The weight to be given to the evidence, of course, was for the jury.

4. The contention, that the admission of the evidence of Lewis that Huston did not certify to the correctness of the bill was error, cannot be sustained. It is true, as stated, that the commonwealth averred in the indictment that it was Huston's *duty* to certify to the correctness of bills, but we fail to understand how Lewis' evidence that the measurement and item numbers were taken from the bill and put in Huston's certificate at the suggestion of the defendant, Snyder, contradicts this averment, as urged upon us by the counsel for the defendants. This evidence was to the effect that Snyder having, as Lewis testified, suggested that the item numbers and measurements be taken from the bills and inserted in the certificate, knew that the certificate was false, or, in other words, knew that Huston did not, as a matter of fact, certify to the correctness of the bill. It also showed that Huston, whose conduct, although he was not on trial, was proper for the consideration of the jury, certified the bill, of the correctness of which he knew nothing. This evidence was strictly in accordance with the averments in the indictment and not contrary to them. The indictment averred that it was Huston's duty to certify to the correctness of the bill, but that he falsely and fraudulently certified. The evidence referred to was not offered to deny, nor did it tend to deny, that it was Huston's duty to certify to the bill, but supported the averment in the indictment that he did not honestly certify, but fraudulently certified. It was consistent with what the com-

monwealth charged—that, although it was his duty to honestly certify to the correctness of the bill, he falsely certified it. The contention of the counsel arises out of a confounding of the duty of Huston with respect to the bill and what he did as a matter of fact respecting it. This is what the court understood and meant when it said Lewis disclaimed any responsibility for measurements, not disclaimed the duty of certifying to measurements, but disclaimed responsibility as a matter of fact for measurement. And in the charge of the court, referring to the same subject, it was said: "Lewis testified that neither Huston nor he * * * had anything to do with or were responsible for the measurements or for item numbers in the bill." The context of the charge distinctly shows that reference was made by this language, not to Huston's duty to certify to the correctness of the bill, but to the evidence that, as a matter of fact, he had not certified. So far as we are able to see, there was no contradiction of or attempt to deny the averment of Huston's duty as set forth in the indictment, but the evidence complained of went directly in the support of the averment in the indictment that he had falsely and fraudulently certified, a material fact necessary for the commonwealth to establish by proof. It also, as we have said, went to show that the defendant, Snyder, did not rely upon the correctness of Huston's certificates.

The complaint that the defendants relied upon the correctness of Huston's certificate and that they were injured by the admission of evidence showing its falsity, is without merit. They had notice by the indictment that it was Huston's duty to certify to the correctness of the bill and they also, at the same time, had notice that he falsely certified. The defence that they relied upon the correctness of Huston's certificate was available to them, even in the face of the proof that his certificate was false. Their guilt depended, not upon the falsity of the certificate, but upon their knowledge of its falsity. That they depended upon and relied on the honesty of Huston and the correctness of his certificate rested solely on the assertion of counsel, except in the case of the defendant, Snyder, who substantially testified to that effect, although he was contradicted by the witness, Lewis.

5. The submission by the court to the jury of evidence of the circumstances attending the awarding of the contract is complained of as error in this form—"the court erred in instructing the jury that they might take into consideration

fraud and collusion in awarding the contract." What we said to the jury was this: "There has been considerable evidence submitted to you as to the character of the schedule, the circumstances attending the adoption of the schedule, and the awarding of the contract, out of which this particular bill comes, and under which this particular bill was rendered. The resolution of January 10, 1905, and all those matters have been submitted to you in confirmation of the claim made by the commonwealth that the acts of all these parties charged in this indictment contributing to the presentation and the payment of the false and fraudulent bill justify the inference that they had agreed to commit the fraud charged in the indictment upon the commonwealth, and all the other evidence you will take into consideration so far as it may show that these acts were done pursuant to a common design and to carry out the purpose of cheating and defrauding the commonwealth; so far as it appears from them that the presentation, passage and payment of the bill in question was part of the system, part of the series of acts theretofore done by these defendants and the result of an unlawful combination between them." This submission, we think, was fully warranted by the law as laid down in Commonwealth vs. Bartildon, 85 Pa. 482, wherein it is said: "Acts and declarations of the parties prior to the statutory period may be given in evidence provided they tend to show a conspiracy existing at the time charged in the indictment. It is true they would not be admissible for the purpose of proving a distinct crime barred by the statute. But where in conspiracy an overt act is done within two years and said act is but one of a series of acts committed by the parties evidently in pursuance of a common design and to carry out a common purpose, such acts would be evidence, provided they tend to show that the last act was a part of the series and the result of an unlawful combination, and such evidence may satisfy a jury of the existence of a conspiracy at the later period." And it must not be overlooked that an important question in the present case for the jury to determine was one of fraud, the inquiry into which is always given wide latitude, and every circumstance that may throw light upon it is proper for the consideration of the jury; Glessner vs. Patterson, 164 Pa. 224; White vs. Rosenthal, 173 Pa. 175. The defendant, Shumaker, prepared the schedule and the defendants, Snyder and Mathues, took part in awarding the contract under which the bill and invoice in the in-

dictment purported to be rendered, and under which the other false bills were rendered. It would be strange, indeed, if in an inquiry as to the defendants' guilt of fraud in approving the bill, the character of the schedule, and the part they took in the award of the contract under which it was possible to render fraudulent bills and the attending circumstances, were not to be considered for the purpose of ascertaining their guilt and of determining the further question whether they were acting upon the particular bill pursuant to a combination to defraud. We do not think in this particular the defendants have any just ground of complaint.

6. It is also suggested that the charge of the court was calculated to leave the jury under the impression that the mere fact that the defendants who certified the bill acted together in certifying it, was sufficient to constitute conspiracy when in the performance of their duties they were bound to act together in relation to the bill. This suggestion is made particularly in behalf of the defendants who are state officials. We do not think the jury was left under such impression. Defendants' point for charge numbered 20 and answer thereto are as follows: "That the overpayment by the defendants, Snyder and Mathues, of the invoice on which the indictment in the case is founded is not enough in itself to constitute them parties to a conspiracy. This we affirmed." In answer to the defendant's point for charge numbered 28, we expressly said to the jury: "The mere fact that the defendant, Snyder, as auditor general, drew his warrant for the payment of the invoice set forth in the indictment is not sufficient to found a verdict of guilty upon, but the commonwealth must, in addition, show that in so doing he acted with one or more of the other defendants, knowing the invoice to be false and with the intent to cheat and defraud the state as a result of an agreement or combination between them for that purpose." And to defendants' point for charge numbered 35 we made a similar answer. Besides, we said to the jury in the general charge that they were bound to find, before they could convict any of the defendants, that he knew the bill was false and passed it with intent to defraud, and the jury certainly understood from what we said, that it was not the mere fact of acting together on the bill, or simply the joint act of causing it to be passed, which was evidence of conspiracy, but the acting upon it and together causing it to be passed knowing it to be false and fraudulent. The jury was distinctly told and, we have

no doubt, clearly understood, that acting together honestly in passing the bill was not evidence of conspiracy, but acting upon it together and passing it *dishonestly,* was evidence of the offence. This was emphasized in the charge, and the attention of the jury was fully called to the question of the defendants' honesty in their relation to the bill and was told that if they were not acting dishonestly there could be no conviction.

7. The complaint that there was no sufficient evidence submitted to support the charge of conspiracy is not well founded. It is said there was no evidence to show when the conspiracy began and that this is necessary before a conviction can be sustained. We do not so understand the law. It is sufficient, we think, if it be shown that at the time the offense is charged to have been committed or when the overt act was done, there existed an understanding regarding it between the parties charged, and it is not incumbent upon the commonwealth to show the exact point of time the conspiracy was entered into. As was said in Commonwealth vs. Bartildon, 85 Pa. 482: "But if the overt act charged in the indictment, or proved to have been done within two years, is sufficient to satisfy the jury of the existence of a conspiracy at that time, it is wholly immaterial when the parties thereto first formed the unlawful combination in their minds, or gave effect to it by concert of action."

If it be shown that two or more persons are acting in concert to do an unlawful act, each one contributing to the common object, the circumstances may justify the inference that there then exists an understanding between them to do the unlawful act. To illustrate, three persons are charged with burglary, and it is shown that one was caught in the house in the night time with the owner's property in his possession, and the other two were assisting him, the one by watching at the front door of the house and the other by watching at the back door. Would it be unreasonable to infer that they were acting together pursuant to an understanding to do just what they did, or that there then existed an understanding or agreement between them to steal from the house? Unquestionably they would be guilty of conspiracy, and the inability to show the exact point of time they conspired could not avail them. Many instances of this kind might be cited to show that when two or more persons act together in the commission of crime, the fact of their acting in concert to do the unlawful act is

sufficient to warrant the inference of an agreement and understanding between them. Of course, it seldom happens that they are charged with or tried for conspiracy, for usually they are prosecuted for the felony or the greater offense, or, in other words, for the overt act which they have done.

Upon this question we have carefully considered the case of Ballantine vs. Cummings, 220 Pa. 621, to which our attention has been called, and in which the quality of the evidence necessary to make out a case of conspiracy is defined. There it was said that the evidence must be full, clear and satisfactory. In that case the attempt was made to prove a conspiracy by evidence of circumstances that occurred subsequently to the alleged conspiracy. Here the case is entirely different. The evidence relates to circumstances present at the very time the conspiracy is alleged to have existed and prior thereto. The case presents no question of the sufficiency of the evidence relating to subsequent acts, and we think the evidence reached the standard declared in that case to be necessary.

It is also suggested in one of the briefs that the court should have placed on the record its opinion of the sufficiency of the evidence, and its reasons therefor, to establish the conspiracy. If we had done what is suggested we have no doubt it would have been complained of as error. We indicated without giving the reason that, in our opinion, the evidence was sufficient by submitting the case to the jury. As the sufficiency of the evidence is now questioned and we are called upon to state the reasons for our opinions, we briefly say:

Directing attention to the schedule and contract and the bills rendered by the defendant, Sanderson, under it, and the connection of the several defendants with them, we have these salient and practically undisputed facts. The schedule was prepared by the defendant, Shumaker, the maximum prices therein being suggested by the defendant, Huston. Sanderson put in his bid under the schedule. The adoption of the schedule and the award of the contract at the bids of the defendant, Sanderson, were participated in by Snyder and Mathues, all of which showed a familiarity on the part of all the defendants with the maximum prices in the schedule and the prices at which the contract was awarded. It was, therefore, known to them that $12.90 per foot was the contract price of designed sofas, $10.80 the contract price of designed tables. It was also known to them that $15.00 was the maximum price of designed sofas and that $12.00 was the maximum

price of designed tables, more than which the defendant, Huston, advised should not be paid, and the defendants, Shumaker, Snyder and Mathues, declared in the schedule should not be paid. When we examine the bill which is the subject of the indictment we find that instead of $12.90 per foot being charged and paid for sofas $18.40 per foot was charged and paid; instead of $10.80 per foot being charged and paid for tables, $18.40 per foot was charged and paid; and that the prices paid were not only more than the prices agreed upon for the articles, but were in excess of the maximum prices, more than those which the defendant, Huston, had advised should be paid, and more than those which the defendants, Shumaker, Snyder and Mathues, had declared they would pay. These overcharges and overpayments occurred, not only in respect to the bills set forth in the indictment, but in many other instances to the amount of thousands of dollars.

What inference was to be drawn from these facts? Was it for the court to say that no inference of guilt was to be drawn when the articles had been billed repeatedly by the defendant, Sanderson, and the bills repeatedly approved and caused to be paid by the other defendants at a greater price than the price fixed by the contract, and even at a greater price than the schedule shows it was originally proposed to pay? These facts may be explained in behalf of the defendants, Shumaker, Snyder and Mathues, on the theory, for there was no direct evidence on the subject except in the case of the defendant, Snyder, and he was contradicted by the witness, Lewis, that they depended for the correctness of the price on the certificate of Huston and the affidavit of Sanderson, and yet the mere inspection of the bill would have shown them that the price charged was not that contracted for. It is difficult, we say, to conceive, therefore, that the presentation, approval and payment of the bill were due to mistake or misunderstanding, or were acts of inadvertence, and, if not, the inference of intent to commit fraud follows almost as a matter of course, unless the facts be explained in behalf of the defendants, Shumaker, Snyder and Mathues, as we have indicated, and this was for the jury. And if the bill was presented, approved and caused to be paid by the defendants, knowing it to be false and with intent to overcharge the state, it is equally difficult to conceive that they were acting with such intent independently of one another; that their acting fraudulently together was purely a coincidence. The unavoidable inference

seems to be that they were acting pursuant to an existing understanding. If some only were acting wilfully and fraudulently, it is also difficult to understand why the others did not discover the overcharge and serve as a check upon those who were engaged in defrauding the state.

Whether the defendants knew the bill to be false with respect alone to the price charged and passed it with intent to cheat and defraud pursuant to an agreement so to do then existing between them were questions upon which we think sufficient evidence was given for the consideration of the jury. The inferences from the facts we have briefly stated, aside from the other evidence in the case, were not to be drawn by the court but by the jury. In what we have said we have not overlooked the claim of the defendants that there could have been no intention to defraud, because the state was not in fact overcharged, seeing that the charge for the articles in the bill if calculated by the square foot rule and at the price of $12.90 for sofas and $10.80 for tables would have amounted to $129,000, while the actual charge was only $45,550.60. But the question as to the kind of measurement intended in the contract, as we have already said, and the credit to be given to this defence was solely for the jury.

8. The reasons we have considered thus far are those which were pressed upon us at the argument and in the briefs submitted to us by counsel. To these was added a brief purporting to set out what are called inadequacies in the charge, to some of which only we shall briefly refer.

Complaint is made that the court, when instructing the jury that the charge for sofas and tables was improperly made under item 22, and on the question of the meaning of the term per foot, and of the application of the evidence of market value, failed to refer to the contention of the defendant, Sanderson, that his contract was an average contract, and that while furniture under item 22 might show a big profit, the other articles furnished under it would show a very small profit, or, perhaps, none at all. The answer to this complaint is obvious. The construction of the contract as to item numbers or prices was, as we have said, a question for the court, so that there was no need to call the jury's attention to the position of the defendant, Sanderson, on this question, for the jury had nothing to do with it. Besides, the contention of the defendant, Sanderson, depended upon the market value of the other articles in item 22, of which there was no evidence, and, there-

fore, could not be properly considered by the jury. It is manifest such evidence was not demandable of the commonwealth. The contention being the defendant's, it was his duty to support it by the necessary evidence.

The further complaint that in referring in the charge to the Abbey contract and the Huston letter relative to the measurement of wainscoting the court did not refer to the Huston letter and especially to the statement therein that "being familiar with the per foot rule for measurement of wainscoting, etc., the schedule of 1904 and 1905 and the items for specially designed furniture were framed to extend that principle to tables, chairs, desks, and other articles of furniture." The answer to this is equally obvious. The Huston letter referred to was written by Huston to the attorney general long after the crime set out in the indictment was alleged to have been committed. It was offered in evidence for the sole purpose of contradicting the witness, Lewis, who was in part author of the letter and so far as it contradicted his testimony given on the trial was evidence proper to be considered by the jury. It was the declaration of the witness, Lewis, and also of Huston, one of the defendants. It was a self-serving declaration of Huston and was not admissible in his behalf for that reason, nor in behalf of any of the other defendants because as to them it was mere hearsay. It was not competent proof of the statements it contained. To prove those matters, the defendant, Huston, should have been called himself. The statements in the letter were, therefore, to be considered by the jury only as affecting Lewis' credibility. This being so, the letter could not have been properly submitted to the jury in connection with the question of the meaning of the per foot measurement.

It is made a ground of complaint that the court did not call the jury's attention, when referring to the question of the honesty of defendant Sanderson's belief that sofas were properly billed under item 22, to the evidence of the defendant, Snyder, that he had spoken to Huston and he had told him there were two grades of sofas, grade A, under item 22, and grade B, under item 25. It is quite manifest that to have done so would have been unjust to the commonwealth. There was no evidence in the case that such information ever came to the defendant, Sanderson, and unless he had such information it could not have affected his belief. However, at the close of the charge, when counsel was asked whether they had anything to suggest which the court had omitted and which

they thought necessary to be brought to the jury's attention, and the court was referred to this evidence as throwing light on the honesty of the defendant's, Sanderson's, belief that the charges in the bill in question were under the proper item, it was specifically referred to the consideration of the jury.

In charging the jury there was no attempt on the part of the court to refer to all the evidence; but only to parts of it necessary to illustrate to the jury its proper use and application. The evidence had been fully and elaborately discussed by counsel, three and one-fifth days each of five hours' length having been occupied by the commonwealth and four and one-half days of the same length by the defence in addressing the jury, and there was no necessity for the court to call the jury's attention to the evidence in detail. It was fresh in their minds, and the contentions as to its weight, effect and the fair inference to be drawn from it were plainly before them. Nor are we convinced that the jury was not able to discriminate between the defendants and to distinguish between the evidence that affected one and that which affected the others. At times during the trial, at request of counsel for the defendants, when evidence was admitted to affect one or some and not all the defendants, the court then and there instructed the jury as against whom the particular evidence was admitted, so that the jury was kept advised as the trial proceeded. Moreover, the charge was so framed that the jury could not possibly err in this regard. After they were instructed that the bill was false in respect to item numbers and prices, and the construction of the term per foot was left to their determination, they were told to consider whether the defendant, Sanderson, knew that the bill was false, and then whether the defendant, Huston, knew that the bill was false, and then in order the question of the guilty knowledge of each of the other defendants was directed to their attention, so that in applying the evidence upon the question of guilty knowledge and fraudulent intent they could not possibly have failed to distinguish the evidence which applied specifically to each, especially as they were also told that "each defendant was to be judged by his own acts, and that the acts of one cannot be taken to affect the other, but each must be judged by his own acts as they appear before you in the evidence." This was said on the question of guilty knowledge and fraudulent intent which was the primary question to be considered. When it came to the ultimate question of conspiracy they were instructed to determine

whether the defendants were acting in concert and pursuant to an agreement or understanding between them. This, of course, depended, as they were told, upon their finding on the question of guilty knowledge and intent. If found in favor of the defendants, that was the end of the case; if against them, or, at least, two of them, then they were to consider the question of conspiracy in the light of their fraudulent conduct and all the other evidence in the case; so that it will be seen that the jury could by no possible mistake have been influenced against one by evidence which did not apply to him.

After a careful review of the whole case and a full consideration of the oral and written arguments of counsel, we can find no substantial reason to warrant us in setting the verdict aside. The motion in arrest of judgment and for a new trial is, therefore, overruled, and the defendants are ordered to present themselves for sentence on Friday, December 18th, 1908, at 10 o'clock a. m.

COMMONWEALTH *vs.* JACOB STEHMAN.

Criminal law—Murder—Closing address to the jury when defense is insanity.

A defendant in an indictment for murder, who alleges insanity as a defense, is not entitled to the closing address to the jury.

John Fox Weiss, District Attorney, for Commonwealth.

B. Frank Nead and *John R. Geyer,* for defendant.

Motion for New Trial. O. & T. Dauphin County, No. 118, January Term, 1907.

KUNKEL, P. J., June 6, 1907.

A careful consideration of this motion fails to disclose to us any sufficient reason why a new trial should be granted. The case was submitted to the jury with full instructions as to the distinction between the several grades of the offence, and the effect of intoxication upon the question of the defendant's guilt, and we can find no just ground for complaint, either in the general charge, or in the answers to the points. The claim of intoxication at the time of the killing depended solely upon the testimony of the defendant himself, while it was contradicted by the evidence of his conduct and of his

statements immediately following the killing and afterwards in the prison. The verdict which was rendered was amply warranted by the evidence. Indeed, we do not see how, under the evidence, the jury could have reached any other conclusion. The contention that the defendant was entitled to the last address to the jury, because he had put in the defense of insanity, and the burden of establishing insanity by a fair preponderance of the evidence was upon him, is untenable. Under the plea of not guilty, the burden was upon the commonwealth to satisfy the jury beyond a reasonable doubt of the defendant's guilt, and it had the corresponding right to close the case. The evidence of insanity was so meagre that it scarcely deserved the name, and we went to great lengths when we submitted it to the jury without, in addition, permitting the usual order of trial to be changed.

The motion in arrest of judgment and for a new trial is overruled, and the district attorney is permitted to move for judgment upon the verdict.

IN THE MATTER OF THE OBJECTIONS TO THE NOMINATION PAPER OF M. L. WEAVER, CANDIDATE FOR STATE SENATOR IN THIRTY-FIFTH SENATORIAL DISTRICT, REPRESENTING THE RIGHTEOUS GOVERNMENT PARTY.

Nomination of candidates—Nomination papers—Amendment—Act of July 9, 1897.

Under the Act of July 9, 1897, P. L. 223, the only objection for which the court is authorized to decree a nomination certificate or paper void is that which goes to the right of the party to file the same.

A nomination paper without competent vouchers for the signatures and qualifications of the signers, is defective and may be amended.

Objections to Nomination Paper. C. P. Dauphin County, No. 73, January Term, 1909.

John E. Fox, John R. Geyer and *W. H. Storry* for objections.

James A. Stranahan, contra.

KUNKEL, P. J., October 12, 1908.

Of the several objections which have been filed to this nomination paper, only one was urged upon us for considera-

tion at the hearing. In that objection it is averred that the affiants to the paper were not acquainted with the signatures or qualifications of the signers for which they purport to vouch. The truth of this averment is admitted. The paper is thus left without competent vouchers for the signatures and qualifications of the signers, except, of course, for the signatures and qualifications of the affiants themselves, who are also signers. It is, therefore, insufficiently vouched for and is in that respect defective. It is contended, however, that the paper is not merely defective, but void, and should be so declared. The question is not a new one, but has been heretofore decided by this court adversely to the objector's contention. In Challenger's Nomination, 8 Dauph. Co. Rep., p. 23, we said: "Upon this question the language of the Act of 1897, in its sixth section, is as follows: 'If the court decide that the certificate or paper objected to was not filed by parties entitled under this act to file the same, it shall be wholly void; but if it be adjudged defective only, the court shall indicate the matters as to which it requires amendment, and the time within which such amendment must be made.' The provisions of the act are plain. The only objection for which the court is authorized to decree the certificate or paper void is that which goes to the right of the party to file the same. No other is mentioned in the act, and we are not at liberty to add to it. But when objection is made because the paper lacks or is deficient in something that the act requires, the court is directed to indicate the amendment and to give time to amend. This, we think, is the proper interpretation of the act and is the view held in Butler's Nomination, 4 Dist. Rep. 187. If there is any doubt on the subject, the doubt ought to be resolved in favor of the elector: Independence Party Nomination, 208 Pa. 108." This interpretation of the act was followed in Bailey's Nomination, Dewalt's Nomination, Hartzell's Nomination, Alricks' Nomination, Lindner's Nomination, and Myers' and Gingrich's Nomination, all found in 9 Dauph. Co. Rep., pp. 301 to 317.

We, therefore, conclude that the nomination paper before us is defective only and may be amended. Accordingly we adjudge it to be defective, and grant leave to amend it to meet the objection within ten days.

COMMONWEALTH OF PENNSYLVANIA *vs.* CHARLES MCCLURE.

Records—Amendment of—Effect upon liability of surety.

In a proceeding for maintenance the court ordered defendant to pay four dollars per week for the support of his wife and child. The order was erroneously entered that defendant pay four dollars, and security was entered for compliance with the order. *Held,* on motion to amend the record, that the record could be amended in so far as it affected the defendant, but that the amendment could not enlarge the obligation of the surety.

Rule to Amend Record. Q. S. Dauphin County, No. 272, June Term, 1904.

W. Justin Carter for rule, *John R. Geyer* contra.

KUNKEL, P. J., October 12, 1908.

This is a rule to amend the record of an order of maintenance in the quarter sessions. It is apparent that the order made in the case was erroneously entered. The defendant was ordered to pay for the support of his wife and child the sum of four dollars a week, but the order was entered of record that he should pay the sum of four dollars. Through some inadvertence the period of payment per week was omitted. We are satisfied that the record should be amended in accordance with the actual order made, and that this may be done so far as the defendant is concerned; but the amendment cannot be made so as to affect the surety. He became bound several days after the order was entered. At that time the record showed that the defendant was directed to pay four dollars for the support of his wife and child, and for his compliance with such order the surety became bound. There is no allegation or proof that the surety knew what the true order was, or that it was other than that which was entered of record. We have no power to enlarge his obligation now by amending the record and changing the order; Crutcher v. Commonwealth, 6 Whar. 340.

We accordingly direct that the order be amended as prayed, the allowance of the amendment, however, in no wise to affect the liability of the respondent and surety, John F. Sides. A formal order may be prepared in accordance with the views herein expressed.

PENN PLANING MILL COMPANY *vs.* WEAVER & SON.

Contract—Construction — Affidavits of defense—Sufficiency.

When nothing is alleged to have been omitted by fraud, accident or mistake, a written contract must be enforced in accordance with its terms.

An affidavit of defense that alleges failure to furnish certain building materials in accordance with contract, but that does not specify the loss that resulted therefrom, is not sufficiently specific to prevent judgment.

An affidavit of defense that avers failure to deliver building materials in accordance with specifications, and avers also the loss incident to such failure, is sufficient to prevent judgment for the amount of the loss thus averred.

Motion for Judgment for want of a sufficient affidavit of defense. C. P. Dauphin County, No. 572, June Term, 1908.

Wolfe & Bailey, for plaintiff.

John R. Geyer and *W. Justin Carter,* for defendants.

MCCARRELL, J., October 22, 1908.

This case is before us on plaintiff's motion for judgment for want of a sufficient affidavit of defense.

The plaintiff's demand is for amount alleged to be due on book account, $201.17, and balance of $491.66, due on contract for the furnishing of certain mill work according to plans and specifications for the home of Mr. Stromenger at Camp Hill, Pa.

Neither the original nor supplemental affidavit of defense discloses any objection to the book account, which constitutes a part of plaintiff's claim, and for that amount the plaintiff is clearly entitled to judgment.

The supplemental affidavit of defense alleges that on or about "March 15th, 1907, or a few weeks prior thereto," the defendants exhibited to plaintiff the drawings and specification of material for the Stromenger building and informed plaintiff that the building must be completed by July 15th, 1907, and that the plaintiff thereupon "agreed and bargained" to furnish the material so that the building could be completed within the time limit.

Unfortunately for defendants, their letter of March 15th,

1907 (Plaintiff's Statement, Exhibit B), inviting plaintiff to bid for the furnishing of this material, makes no mention whatever of the time limit for the completion of the building referred to and the plaintiff's proposal of March 25th, 1907 (Plaintiff's Statement, Exhibit C) makes no reference to the time of delivery. The defendants in writing on March 27th, 1907 (Plaintiff's Statement, Exhibit D) accepted this proposal without any modification, and the proposal and acceptance must therefore be taken as the entire contract between the parties.

What occurred "on or about March 15th, 1907, or a few weeks prior thereto," cannot by reason of anything suggested in the affidavits of defense be incorporated into or made part of the arrangement between the parties. The contract is in writing. Nothing is alleged to have been omitted from it by fraud, accident or mistake. The written arrangement must be enforced.

Hand vs. Russell, 1 Superior 165.

Hatfield vs. Thomas Iron Co., 208 Pa. 478.

The defendants, therefore, can make no defense based upon the ground that the material was not furnished within a designated time limit.

The supplemental affidavit of defense contains certain averments as to failure to furnish quartered oak, birch doors, and chair railing for bath-room, but does not specify the amount of loss alleged to have resulted therefrom to the defendants, and these allegations are not sufficiently specific to prevent judgment.

The supplemental affidavit of defense, however, alleges specific failures to comply with the specifications under which the mill work was furnished for the Stromenger house, and states the amount of loss alleged to have resulted from each specific failure. It alleges that although the specifications required it, the plaintiff failed to furnish 166 feet of cornice for porch, and that this failure cost the defendants $100. It also alleges failure on the part of the plaintiff to furnish one step for the porch resulting in a loss of $15.00, a failure to furnish a console which resulted in a loss of $30(and also a failure to furnish stair balusters, which it is alleged resulted in a loss of $150.00 to the defendant. The total amount thus specifically claimed does not exceed $295.00, and to this extent the supplemental affidavit of defense discloses matters which may upon the trial give to the defendants the right to have such deductions as they may be able to establish by evidence submitted.

As to all other matters referred to in the supplemental affidavit of defense, the allegations are not specifically sufficient,, and both the original and supplemental affidavits of defense are now adjudged insufficient, excepting only as to the four items hereinbefore mentioned, under which an aggregate claim is made by the defendants for the sum of $295.00.

The plaintiff is entitled to judgment for the whole amount of its claim, with interest, less a deduction of $295.00, and the prothonotary is directed to liquidate the amount of the judgment accordingly.

As to the items aggregating $295.00, the defendants are apparently entitled to a trial by jury, and if they can establish the allegation that the several items omitted were in fact included in the specifications and were not furnished by the plaintiff, they will be entitled to such deduction as the evidence submitted may establish.

UTECH'S NOMINATION.

Nomination of Candidates—Vacancies—Act of February 17, 1906.

If a political party, entitled to nominate candidates by certificate of nomination, fails to nominate a candidate for the office of representative in the general assembly, under the Act of February 17, 1906, it cannot thereafter nominate such candidate by a nomination paper; and the secretary of the commonwealth has no authority to receive the nomination paper of such candidate, or certify his name to the county commissioners as a duly nominated candidate at the ensuing election.

Failure to nominate a candidate, in accordance with the provisions of the Act of February 17, 1906, does not cause a vacancy to happen or exist, after the date of the primary election, within the meaning of the act.

Attorney General's Department. Opinion to Robert McAfee, Secretary of the Commonwealth.

CUNNINGHAM, Assistant Deputy Attorney General, September 30, 1908.

This department is in receipt of your communication of September 28, 1908, stating that you are in receipt of a certain nomination paper, purporting to nominate Jacob D.

Utech's Nomination.

Utech as a candidate of the Prohibition party for representative in the general assembly, for the sixth legislative district of the county of Allegheny, to be voted for at the ensuing election in November, which is in proper form, bears the requisite number of signatures, is properly verified, and has been received within the limit of time allowed for filing nomination papers for said election.

You further state, in said communication, that an examination of the election returns of the last general election disclose that the Prohibition party then polled in said legislative district a sufficient number of votes to entitle it to nominate candidates as a political party at the primary election held in April of this year.

You further state that the regular primary election was held in said district on April 11, 1908, but that the said Prohibition party did not then nominate a candidate for the office of representative in the general assembly.

It is also stated in your communication that all of the provisions of the Uniform Primaries Act of 17th February, 1906, P. L. 36, with regard to notices, advertisements, etc., were complied with by your department and by the county commissioners of Allegheny county prior to the holding of said primary election.

Under these facts you ask to be advised whether, by reason of the failure or neglect of the said Prohibition party to nominate a candidate for said office at said primary election, such a vacancy now exists in said office of representative in the general assembly as may be filled under section 12 of said Uniform Primaries Act, which provides that

> "Vacancies happening or existing after the date of the primary may be filled in accordance with the party rules, as is now or hereafter may be provided by law,"

(the provisions of law now existing for filling vacancies being found in section 11 of the Act of 10th June, 1893, P. L. 419, providing for the filling of vacancies in case of the death or withdrawal of a regularly nominated candidate); and also whether your department is authorized to accept for filing the said nomination paper of the said Jacob D. Utech, and to certify his name to the county commissioners of Allegheny county, to the end that the same may be printed upon the official ballots for the fall election.

Your inquiry involves a consideration of existing legisla-

tive provisions relative to the nomination of candidates to the office of representation in the general assembly. Prior to the passage of the said Uniform Primaries Act nominations to office were made by nomination certificates and nomination papers. Any combination of electors with sufficient coherence and organization to have acted together for a common purpose, and sufficient strength to have polled two per centum a political party, and had the right to put nominations on the ballot by nomination certificates (Independence Party Nominations, 208 Pa. 108), and a combination which is less than of the highest vote at the next preceding election, constituted a party could secure a place for its nominees on the official ballot only by filing nomination papers (Citizens' Party Nominations, 2 Dauphin, page 328).

The Uniform Primaries Act, however, is an enactment to systematize, regulate and put under control of positive law party nominations for public office. Its first requirement is uniformity throughout the state, Commonwealth ex rel. vs. Blankenburg, 218 Pa. 339.

With reference to the nomination of candidates for the office of representative, the material provisions of the act are as follows: In section 2 it is provided that candidates for all offices to be filled at the general election, with the exception of those nominated by national or state conventions, shall be nominated at the spring primaries, and that no candidates for the public offices specified in said act shall be nominated in any other manner than as set forth therein, "Provided that nothing herein contained shall prevent the nomination of candidates for borough or township offices, or other offices not herein specifically enumerated in the manner provided by existing laws, or any association of electors not constituting a party from nominating candidates by nomination papers as is provided by existing laws."

The office of representative is specifically enumerated in section 5 of said act, under the appellation of "member of the state house of representatives," and, as already stated, the Prohibition party is not within the proviso above quoted. The office in question is a state office and is so designated in section 3 of the Act of 9th July, 1897, P. L. 223.

By the third section of the Uniform Primaries Act it is made the duty of the secretary of the commonwealth to send to the county commissioners in each county a written notice on or before the 9th Saturday preceding the spring primaries,

setting forth, *inter alia,* the number of officers of the commonwealth, not nominated by state conventions, to be elected at the next succeeding general election, and by the same section it is made the duty of the said commissioners to publish the names of all offices for which nominations are to be made within the county at the ensuing primaries at least once each week for three successive weeks in two newspapers.

By section 5 of said Uniform Primaries Act it is provided in substance, *inter alia,* that the names of candidates for the office of representative shall be printed upon the official ballot of a designated party upon the filing of a petition with the secretary of the commonwealth at least four weeks prior to the primary, signed by fifty qualified electors of the district.

Section 6 provides that the secretary of the commonwealth, immediately after the filing of said petition, shall forward the name of such candidate to the county commissioners of the proper county, who are charged with the preparation and distribution of official ballots for the primary election, and with the computation and canvassing of the returns thereof.

By section 11 of said act the county commissioners are required to make a proper certification of the votes cast for state offices to the secretary of the commonwealth.

Section 12 provides that the candidates who receive a plurality of votes of any party at a primary shall be the candidates of the party, and that their names shall be printed by the proper officers upon the official ballots to be used at the ensuing eelction; and by section 1 of the Act of 29th April, 1903, P. L. 338, it is provided that the secretary of the commonwealth at least fourteen days previous to the day of any election of state officers shall transmit to the county commissioners and the sheriff in each county in which such election is to be held, duplicate official lists, stating the names, etc., of all candidates duly nominated for such election.

The above is an outline of the method by which the Prohibition party in the district in question was required to nominate its candidate for the said office, but it neglected and failed to make such nomination, and no effort whatever seems to have been made to comply with the Uniform Primaries Act.

You state in your communication that the persons interested in the filing of the nomination papers referred to evidently rely for their right so to do upon the provisions con-

tained in the last paragraph of the 12th section of the Uniform Primaries Act, reading as follows:

> "Vacancies happening or existing after the date of the primary may be filled in accordance with the party rules, as is now or hereafter may be provided by law."

Clearly no vacancy has *happened* after the date of the primary, but it is contended that there is a vacancy "existing after the date of the primary." The logical result of holding that under the above facts a vacancy exists, within the meaning of section 12, in the Prohibition party for the office of representative would be the abrogation of the entire Uniform Primaries Act; for if no nominations were made under the act by any political party, the same kind of vacancies would exist in each political party for all the offices to which the nominations should have been made at a specified primary.

The words "vacancies existing after the date of the primary" may be given a reasonable construction and a definite meaning which will be in harmony with the purpose of the act. For instance, it appeared in the case of Commonwealth ex rel. v. Blankenburg, *supra*, that in the year 1907 the spring primary was held on June 1st, and that the ninth Saturday preceding was March 30th. Prior to the latter date the secretary of the commonwealth notified the county commissioners of Philadelphia, *inter alia,* that two judges of the court of common pleas No. 1 were to be nominated at the ensuing primary. Subsequently an additional vacancy occurred in said court by reason of the resignation of one of the judges thereof. Upon this state of facts the supreme court held that the third vacancy occurred too late for the nomination to be made under the provisions of the Uniform Primaries Act, and that this vacancy necessarily fell under the alternative provisions of section 12. This is an illustration of a vacancy that *existed* but did not *happen,* after the date of the primary.

Under the former system of making nominations, it was held (Commonwealth v. Reeder, 3 Dauphin, 51) that the secretary of the commonwealth must receive and file every certificate of nomination and every nomination paper which is regular on its face, leaving the persons alleging any defect in the same to their remedy by filing objections in the proper court.

I am of the opinion, however, that there is now no authority in law authorizing you to receive the nomination paper

of the said Jacob D. Utech, or to certify his name to the county commissioners and sheriff as a candidate duly nominated for the ensuing election.

IN RE PHILADELPHIA COMPANY FOR GUARANTEEING MORTGAGES.

Corporations—Indebtedness—Acts of April 29, 1874, and February 9, 1901.

The guarantee contracts issued by the Philadelphia Company for Guaranteeing Mortgages, are not debts of that corporation within the meaning of the Act of April 29, 1874, P. L. 73; and the issuing of such contracts is not such an increase of the indebtedness of said corporation as to require compliance by it with the provisions of the Act of February 9, 1901, P. L. 3, providing a method for increasing the indebtedness of corporations.

Attorney General's Department. Opinion to Lewis E. Beitler, Deputy Secretary of the Commonwealth.

CUNNINGHAM, Assistant Deputy Attorney General, Oct. 1, 1908.

This department is in receipt of your communication of July 1st, 1908, asking to be advised whether, in the opinion of this department, the guarantees, issued by the Philadelphia Company for Guaranteeing Mortgages, are debts which said company owes, within the meaning of clause 6 of section 39 of the Act of 29th April, 1874, P. L. 73, and whether the issuing of said guarantees from time to time constitutes such an increase of the indebtedness of said company as to require proceedings under the Act of February 9, 1901, P. L. 3, in order that the same may be legally effected. I also acknowledge receipt of a copy of the form of guarantee issued by the company in question.

The Philadelphia Company for Guaranteeing Mortgages was incorporated in May, 1907, under the Act of July 9, 1901, P. L. 624, a supplement to the General Corporation Act of 1874. The company was incorporated to engage in the business of "buying, selling, collecting and guaranteeing payment of ground rents, mortgages and other real estate securities."

In pursuance of the purpose of its incorporation the company, among other things, issues guarantees in the following form:

In re Philadelphia Company for Guaranteeing Mortgages.

PHILADELPHIA COMPANY FOR GUARANTEEING MORTGAGES.

Land Title Building, Philadelphia.

Guarantee No. ....

THE PHILADELPHIA COMPANY FOR GUARANTEEING MORTGAGES (herein designated as "this company") in consideration of the premium and terms of the guarantee named below, guarantees to .... and assigns. Address: ..... and all subsequent owners and holders of the bond and mortgage described in Schedule A, assignees of this guarantee, who shall give this company written notice and proof of ownership (each and every person and corporation to whom under this clause this guarantee runs, being hereinafter included in the designation "the insured").

First: Payment of interest at the rate of ..... per cent. per annum, from ....., on the bond and mortgage described in Schedule A. The first payment of interest to be made on the ..... day of ....., and thereafter within five days of the time of payment of interest in said bond and mortgage provided.

Second: Payment of the principal, and of every instalment thereof, as soon as collected, but in any event within twelve months after the same shall have become due under the terms of the said bond and mortgage, or if, with the written consent of the guarantor, payment be not demanded when due, then within twelve months after it shall have been demanded by the insured, with regular payment meantime of interest at the rate guaranteed.

Premium and Terms of Guarantee.

By the acceptance of this guarantee this company is made irrevocably the agent of the insured, with the exclusive right, but at its own expense, to sue for and receive the proceeds of any policy of title insurance or fire insurance covering the mortgaged premises in favor of the insured, also to collect the principal and to collect the interest as it falls due on the bond and mortgage hereby guaranteed, until the bond and mortgage are paid. All interest which shall be collected by this company in excess of the guaranteed interest payments,

this company is authorized to retain as its premium for this guarantee.

This guarantee is subject to the conditions annexed hereto. *In witness whereof,* the Philadelphia Company for Guaranteeing Mortgages, has affixed its common seal, attested by two of its officers, this ..... day of ..... 19..

....., *President.*

....., *Secretary.*

SCHEDULE A.

The bond covered by this guarantee was made by ..... to ....., dated ....., and is marked for identification with the number of this guarantee and the signature of one of the officers of this company. It was given for the payment of ..... on the ..... day of ....., with interest at the rate of ..... per cent. per annum, payable on the ..... day of ....., and ..... in each year. The mortgage given to secure said bond is similarly identified and was made by ..... to ..... date, ...and is recorded in the office of the recorder of deeds at ....., in mortgage book No. ...., page ...., etc.

This company holds as collateral to said bond and mortgage fire insurance in the sum of $....., covering real property described in said mortgage.

The real property covered by this guarantee is described as follows:

The questions arising under your inquiry are whether the contract of guarantee entered into by the corporation in question is a debt, within the meaning of clause 6 of section 39 of the Act of 29th April, 1874, P. L. 73, which provides that

> "The whole amount of the debts which any such company owes shall not exceed the amount of its capital stock actually paid in, unless such debt be for unpaid purchase money for lands, etc.,"

and whether the issuing of these guarantees from time to

time constitutes, upon the execution of such contract, such an increase of the indebtedness of said corporation as is within the prohibition of section 7 of article XVI of the constitution, which provides that

> "The stock and indebtedness of corporations shall not be increased except in pursuance of general law nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting to be held after sixty days' notice given in pursuance of law."

The general law now in force relative to increasing the capital stock or indebtedness of corporations is the said Act of February 9, 1901, P. L. 3, entitled

> "An act to provide for increasing the capital stock and indebtedness of corporations."

A method is prescribed in this act of assembly for obtaining the consent of stockholders at regular annual meetings or special meetings to an increase of capital stock or indebtedness, and provision is made for filing in the office of the secretary of the commonwealth certain certificates with relation to said increase of stock or indebtedness and for the concurrent payment to the state treasurer of the bonus on the actual increase made in pursuance of the consent given by said stockholders.

You ask to be advised whether the Philadelphia Company for Guaranteeing Mortgages can legally execute contracts, or guarantees, in the above form without complying with the terms of the said Act of 1901 and filing in your office the certificate therein provided for.

Ordinarily, a corporation has no power to enter into a contract of suretyship or guaranty, or otherwise lend its credit to another, unless the power is expressly conferred by its charter, or unless such a contract is reasonably necessary or is usual in the conduct of its business. The corporation in question was chartered for the purpose, among other things, of "guaranteeing the payment of ground rents, mortgages and other real estate securities." As a necessary incident to the purpose of its incorporation, it has the power to make such contracts as are appropriate and necessary to carry into effect the purpose of its incorporation.

It is not necessary, in the disposition of your inquiry, to

determine whether the contract in the form above stated is a contract of suretyship, by which the corporation assumes to perform the mortgage contract if the mortgagor does not, or whether it is strictly speaking a contract of guaranty by which the corporation undertakes that the mortgagor is able to perform the mortgage contract. No matter whether the Philadelphia Company for Guaranteeing Mortgages, by the terms of its contract, assumes a direct liability to the insured for the payment of a mortgage by the mortgagor, or merely assumes liability for the mortgagor's ability to pay, the undertaking of the said company is a conditional, uncertain and contingent liability. Every liability assumed by a corporation is not within the prohibition of the constitution. For instance, it has been held that the provisions of the constitution do not apply to mortgages executed to creditors in exchange for other securitiesc, or to raise funds for the purpose of paying off incumbrances in order to protect a debt due to the corporation, or to secure debts incurred in the purchase or improvement of the property or in carrying on the ordinary business of the corporation. (Pepper & Lewis' Digest of Decisions, Vol. III, page 4,909.) The question, therefore, narrows itself to the inquiry whether or not the guarantee contract issued by the corporation in question creates a debt due from the corporation within the legal acceptation of that term.

In the Appeal of the City of Erie, 91 P. S. 398, we find the following definition of the term "debt."

> "A debt means a fixed and certain obligation to pay money or some other valuable thing or things either in the present or in the future."

In "Words and Phrases Judicially Defined," Vol. II, page 1, 864, the term "debt" is variously defined as follows:

"The word 'debt' includes any sort of obligation to pay money."

"A debt is a legal liability to pay a specific sum of money."

"A debt is a certain sum that is owing from one person to another."

Again, a debt, as defined by the Century Dictionary is that which is due from one person to another, whether money, goods or services.

In "Words and Phrases Judicially Defined," *supra,* at page 1,868, the following definitions are cited:

In re Philadelphia Company for Guaranteeing Mortgages.

"A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, dependent upon a condition precedent, which may never be performed and which cannot ripen into a debt until performed."

"To constitute a debt within the attachment laws, the sum must be certainly and at all events payable, but whenever it is uncertain whether anything will ever be demandable by virtue of the contract, it cannot be called a debt."

"Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing and of the latter that it is a debt due. In other words, debts are of two kinds: *solvendum in praesenti* and *solvendum in futuro*. Whether a claim or demand is a debt or not is in no respect determined by reference to the time of payment. A sum of money which is in all events payable is a debt without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt or does not become a debt until the contingency has happened."

Applying these principles to the contracts issued by the Philadelphia Company for Guaranteeing Mortgages, it seems clear that these contracts provide for the payment of a sum of money by the corporation only upon the contingency of the failure of another person to pay a debt primarily owing from such third person. Until the happening of such contingency the obligation of the corporation is not a debt within the legal meaning of that term.

I am therefore of opinion that the guarantee contracts issued by the Philadelphia Company for Guaranteeing Mortgages are not debts of that corporation within the meaning of said Act of 1874, and that the issuing of such contracts is not such an increase of the indebtedness of said corporation as to require compliance by it with the provisions of the said Act of 1901, providing a method for increasing the indebtedness of corporations.

PRACTICE OF PHARMACY.

Practice of pharmacy—Act of April 24, 1872.

A certificate granted under the Act of April 4, 1872, P. L. 905, does not authorize the holder thereof to act as manager of a pharmacy outside the limits of Philadelphia. The holder of a certificate under the Act of 1872 is not authorized to conduct the business of a retail apothecary in this commonwealth, either within or without the city of Philadelphia, unless he has also complied with the provisions of the general Act of May 24, 1887, P. L. 189.

Attorney General's Department. Opinion to W. L. Cliffe, Secretary State Pharmaceutical Examining Board.

CUNNINGHAM, Assistant Deputy Attorney General, Oct. 2, 1908.

In the matter of your communications, asking to be advised by this department whether a pharmacist, who is the holder of a certificate granted under the Act of April 4th, 1872, P. L. 905, entitled "An act to regulate the practice of pharmacy and sale of poisons, and to prevent adulteration in drugs and medicinal preparations *in the city of Philadelphia,*" and is at present the proprietor and manager of a pharmacy in the city of Philadelphia, but who has not been registered under the provisions of the Act of May 24, 1887, P. L. 189, entitled "An act to regulate the practice of pharmacy and the sale of poisons, and to prevent adulteration in drugs and medicinal preparations *in the state of Pennsylvania,*" and the supplemental Act of May 4, 1889, P. L. 80, extending the time for such registration, is at present conducting his pharmacy business according to law, and whether, under the above facts, such person is entitled to act as manager of a pharmacy outside the limits of Philadelphia, I reply as follows:

In the opinion of this department, the holder of a certificate under the said Act of 1872, which was confined in its operation to the city of Philadelphia, must, notwithstanding the fact that he holds such certificate, comply with the said Act of 1887, supplemented by the said Act of 1889, by being registered thereunder. It was evidently the intention of the legislature, in passing the said Act of 1887, to compel all persons then conducting the business of retail apothecaries to register as such apothecaries. There is no indication that the holders of certificates in the ctiy of Philadelphia, granted

under the Act of 1872, were to be exempt from the provisions of the said Act of 1887. It is clear that the certificate granted under the Act of 1872 does not authorize the holder thereof to act as manager of a pharmacy outside the limits of Philadelphia, and in the opinion of this department the holder of a certificate granted under the said Act of 1872 is not authorized to conduct the business of a retail apothecary in this commonwealth, either within or without the city of Philadelphia, unless he has also complied with the provisions of the said general Act of 1887.

Automobile Licenses.

Automobile licenses—Authority of State Highway Commissioner to issue state licenses, in blank, to automobile clubs.

The State Highway Commissioner has no authority to issue state automobile licenses, in blank, to various automobile organizations which desire to pay for them and issue them to persons entitled to receive them from time to time, filling in the names of persons to whom they are issued.

Attorney General's Department. Opinion to Hon. Joseph W. Hunter, State Highway Commissioner, Harrisburg.

Fleitz, Deputy Attorney General, October 20, 1908.

I am in receipt of your letter of recent date, in which you desire an official opinion on the question of your legal authority to issue state automobile licenses in blank to various automobile organizations who desire to pay for them and issue them to persons entitled to receive them from time to time, filling in the names of persons to whom they are issued.

Inasmuch as the act of assembly covering this question imposes certain restrictions upon the issue of these licenses, and the duty of issuing them to individual applicants is reposed by law in you, I am clear that you would not be justified in delegating this authority to any one else. For this reason I am of the opinion and advise you that you cannot legally comply with the requests of these various automobile clubs and associations.

MILEAGE OF MEMBERS OF THE STATE RAILROAD COMMISSION.

State Railroad Commission—Mileage of members—Act of May 31, 1907.

While the members of the State Railroad Commission, their officers, agents and experts, are entitled to receive from the state reimbursement for all money expended by them in the discharge of their official duties, this does not cover the item of expense incurred by them in their travel from their homes to Harrisburg and return, nor that incurred while in Harrisburg.

Attorney General's Department. Opinion to Harry S. Calvert, Secretary State Railroad Commission.

TODD, Attorney General, Oct. 21, 1908.

I have before me your letter of recent date, in which you ask for an official opinion upon the right of an officer of the state railroad commission to include in his official expense to be paid by the state, the item of mileage from his home to Harrisburg and from Harrisburg to his home.

That portion of the 23d section of the Act of 31st May, 1907, P. L. 337, creating your commisssion, and defining its powers and duties, which bears upon this matter, reads as follows:

> "In the discharge of their official duties the commissioners shall have reimbursed to them the necessary actual traveling expenses and disbursements of themselves, their officers, clerks and experts,"

so that the question resolves itself into whether or not the travel above mentioned is "in the discharge of official duties." Practically the same question was passed upon by Deputy Attorney General Fleitz, in an opinion to the auditor general dated April 8, 1902, in which he held that a judge was not entitled to mileage for traveling from his place of residence to the county seat to perform his duties. Later it was held, in an opinion given by Attorney General Carson to the auditor general, under date of July 20, 1906, that "expenses actually and necessarily incurred in the discharge of his official duties," did not include hotel expenses in the city of Harrisburg. Attorney General Carson states the principle as follows:

> "The law does not furnish a residence in Harrisburg or anywhere else to the officer. His accept-

ance of the position implies his presence at the state capitol at his own expense, and the only expense which can fairly be considered chargeable is that incurred by him when absent from the capitol in the discharge of official duty."

You will observe that the phraseology in the law creating your commission and the one last above cited is substantially the same, and there appears no good reason for reversing these decisions in the present case.

I am therefore of the opinion and advise you that while the members of the commission, their officers, agents and experts are entitled to receive from the state reimbursement for all money expended by them in the discharge of their official duties, that this does not cover the item of expense incurred by them in their travel from their homes to Harrisburg and return, nor that incurred while here.

IN THE MATTER OF THE APPLICATION OF THE TRUSTEES OF THE PENNSYLVANIA STATE LUNATIC HOSPITAL FOR THE APPOINTMENT OF VIEWERS TO VIEW AND ASSESS DAMAGES SUSTAINED BY REASON OF THE TAKING OF THE LANDS OF N. K. OYSTER.

Life estates—Value of.

The correct method of ascertaining the share of the life tenant in a fund is to ascertain the present worth of an annuity equal in amount to the annual interest on the fund and running during the period covered by the expectation of life of the life-tenant.

The rule that a life estate equals one-third of the fee, applied in Dennison's Appeal, 1 Pa. 201, Shippen's Appeal, 80 Pa. 391, and Datesman's Appeal, 127 Pa. 348, discussed.

C. P. Dauphin County. No. 85, January Term, 1892.

B. F. Etter, for life tenant.

The report of the auditor, M. W. Jacobs, Esq., appointed to determine the interests of the life tenant and remaindermen, was as follows:

The undersigned, appointed by your honorable court auditor to determine the respective interests of the life-tenant

and remaindermen and to make distribution accordingly of the fund paid into court in the above-stated case, respectfully reports that, in pursuance of an agreement of the parties in interest, he sat for the purposes of his appointment at his office, No. 222 Market street, Harrisburg, Pa., on Thursday, January 7th, 1892, at 10 o'clock a. m.

B. F. Etter, Esq., appeared for Napoleon K. Oyster, who was also present, and Charles F. Etter, trustee for the remaindermen, appeared in person.

The fund in court is, with a small amount of interest accrued, the amount of damages awarded by viewers for the taking and appropriation by the trustees of the hospital aforesaid, under the Act of 6th May, 1891, for the uses and purposes of said hospital, of 38.8 acres of land lying partly in the Seventh ward of the city of Harrisburg and partly in Susquehanna township. The auditor finds that the land taken was part of a larger tract, of which Simon Oyster died seized in 1867 and which, by his will duly proven, etc., he devised as follows:

> "4. I give and bequeath to my son Napoleon Kiever Oyster my Mount Airy farm, containing, etc., in Susquehanna township, adjoining the city of Harrisburg, etc., for his support, and if he should be spared to have family, I desire the above estate to go to the use of his children."

Said farm was in the possession and occupancy of Napoleon K. Oyster from the death of his father, Simon Oyster, down to the time of the taking and appropriation for hospital purposes of the land for which these damages were awarded.

Viewers having been appointed by the court to assess the damages sustained by the owners of said land in consequence of its taking and appropriation as aforesaid, on the 13th of November, 1891, they filed their report, in which they estimated and determined "that all said owners and parties in interest had sustained damage * * * to the aggregate amount of $10,670, and that said sum should be paid by the said Pennsylvania State Lunatic Hospital;" but they further reported that it was "disputed whether said Napoleon K. Oyster holds the land so taken and appropriated in fee, or has only a life estate therein with remainder in fee to his children;" by reason of which dispute they were "unable to determine or report to whom said damages should be paid." On November 16th, 1891, the court confirmed the report of the view-

ers and directed judgment to be entered thereon, and on December 23d, 1891, upon leave granted, the trustees of the hospital paid into court the amount of the award with interest, in all $10,741.13, and this is the amount for distribution.

With respect, however, to the title to the land taken and appropriated there is no longer any controversy or dispute. That question was definitely settled and determined by the supreme court in Oyster v. Knull, 137 Pa. 448, where it was decided that under the will of his father, Simon Oyster, Napoleon K. Oyster took but a life estate in this (Mount Airy) farm, and it is so set forth in the petition of the latter for the appointment of this auditor. On December 21st, 1891, Charles F. Etter was appointed by the court trustee of the estate and interest of the remaindermen, and it is the duty of your auditor under his appointment, as he understands it, to settle and determine the several shares which Napoleon K. Oyster and said trustee shall take out of said fund. Under the act referred to the fee simple vested in the trustees of the hospital. The land has been converted out and out into money, and it is for the auditor to determine what portion of the money belongs to the life-tenant and what portion to the remaindermen.

It was admitted before the auditor, and he so finds, that Napoleon K. Oyster is 34 years old, in good health and of good habits.

Had the viewers not been in doubt about the title it would have been their duty, no doubt, as in the analogous case of land taken and appropriated by railroads (See R. R. Co. v. Boyer, 13 Pa. 497; R. R. Co. v. Bentley, 88 *id.* 178; Passmore v. R. R. Co., 9 Phila. 579; Getz v. R. R. Co., 105 Pa. 547, and Harrisburg v. Crangle, 3 W. & S. 460) to award to each of the parties to the title separate damages according to his estate and the extent to which it was damaged. This, however, was not done and the auditor not having before him the facts upon which the viewers proceeded, it is his duty to apportion the fund upon equitable principles according to the rights and interests of the parties in the land, Dyer v. Wightman, 66 Pa. 425.

The first question, therefore, to be determined is: What, under the law of Pennsylvania, is the correct method of distribution between a life-tenant and the remaindermen upon these given facts? or, in other words, what, upon these facts, is the correct method of valuing the life-estate? For it seems

plain that the first step is to estimate the value of the life-estate and then, having deducted it from the amount for distribution, to award the remainder to the remaindermen.

According to the old English law the life-estate was estimated at one-third of the fee. This rule was applied usually for the purpose of determining the proportion which life-tenants should contribute to the relief of estates from mortgages and other charges, to fines on renewals of leases and for other similar purposes. How or exactly when it originated, or upon what precise grounds it was based, do not appear now to be definitely known. The first case in which it was applied, so far as the auditor is aware, was Rowel v. Walley, 1 Ch. Rep. 116, decided in 1661 by Lord Chancellor Hyde, the question being how much the life-tenant should be decreed to contribute to redeem lands from mortgage. The case was somewhat peculiar and it is fair to infer from the facts reported that the life-tenant was considerably advanced in years. In 1671, in Cornish v. Mew, 1 Ch. Cas. 271, S. C. Rep. *temp.* Finch 220, the same question arose and was decided the same way. In 1675, in Hayes v. Hayes, Rep. *temp.* Finch, 231, tenant for life was decreed to pay one-third of a charge for a marriage portion and in 1677, in Peachy v. Colt, *ibid.* 304, remainderman was decreed to pay two-thirds of certain legacies charged upon the land, and in 1682, in Brent v. Best, 1 Vern. 69, the converse was presented, i. e. in what proportion a fund arising from the redemption of a mortgage should be distributed, the mortgaged lands having been devised by the mortgagee to one for life with remainder in fee. The same principle was applied, "and the ordinary rule of the court was said to be, that one-third of the money should be paid to the tenant for life and two-thirds residue to the remainderman."

It thus appears that the rule was considered as settled prior to 1690, and this is important in view of the fact that the first English tables for the ascertainment of the probable duration of human life,—those of Dr. Halley,—appeared about that year, Sir Isaac Newton's "Observations on Chronology" appearing soon afterwards. Dr. Halley's tables were, however, imperfect and based upon insufficient data, and it required the labors of succeeding mathematicians to place the calculus of probabilities of human life upon an adequate footing. It is to be noted also that the "Society for the Equitable Assurance of Lives and Survivorships,"—the pioneer

of modern life assurance companies,—did not commence business until 1762, just about 100 years after the decision of the earliest reported English case estimating the value of the life-estate at one-third of the fee. Hence, "previous to Halley's time, and apparently for many years subsequently, all dealings with life annuities"—upon which the present estimation of the value of life-estates is grounded,—"were based on mere conjectural estimates." Accordingly we find the English court of chancery, during the remainder of the seventeenth and the first half of the eighteenth century, applying the rule in many cases, one of the latest being Verney v. Verney, 1 Ves. Sr. 428 (1750), where Lord Hardwicke applied it, although admitting its unfairness, to the case of a fine on the renewal of a lease.

But its manifest unfairness in particular cases was so great that the application of the rule did not pass without comment and dissent. In Rives v. Rives, Prec. in Cha., 21 (1690), in apportioning a charge of £1,500, it was decreed that the life estate should bear £700 and the remainderman £800. In James v. Hailes, Prec. in Cha. 44; S. C. 2 Vern. 267 (1692), it was held that the tenant for life must bear two-thirds of the principal and interest of a mortgage and the remainderman three-fifths. These cases were for the time sporadic and the old rule was returned to in all its strictness in 1696 in Ballet v. Sprainger, Prec. in Cha. 62, and Flud v. Flud, Freem. Ch. 210, in the latter of which it was said: "and that hath been the proportion usual in this court, to charge the estate for life with a third; but it seems hard, because now an estate for life is worth nine or ten years purchase, whereas formerly it was worth but seven." In an anonymous case in 1720, 1 P. Wms. M. 647, the reporter says that he "mentioned to the court that a life-estate might be valued at two-fifths, which had been done in some cases; yet the court said how equitable soever this might be, it was not the practice, etc." Other instances might be given, particularly Verney v. Verney, *supra,* where Lord Hardwicke said: "and that computation of tenant for life bearing one-third, the court has said, particularly Lord Macclesfield, to be a wrong rule, as being too low."

It is said by Chancellor Bland in Williams Case, 3 Bland Ch. 186, 240, that Chesterfield v. Janssen, 2 Ves. Sr. 127 (1751) "appears to have been the first case in which any allusion was made in the courts of Westminster Hall, to the

mode adopted by mathematicians for ascertaining the present value of a life interest of any kind." In Nichols v. Gould, 2 Ves. Sr. 423 (1752), Lord Hardwicke refers to Demoivre's rule for the calculation of annuities as furnishing a basis for the valuation of life-estates, but declines to apply it, as in that particular case it was, indeed, inapplicable. And, without burdening this report with citations, it may be said that henceforth we find annuity and life-expectation table referred to and used by the English courts in numerous cases. In White v. White, 4 Ves. Jr. 24, Lord Alvanley, M.R., declares the old rule as applied to fines on renewal of leases to be exploded, and in the same case on appeal, 9 Ves. Jr. 554, Lord Eldon approves this declaration and adds: "as it is undoubtedly as to mortgages." The former says: "It was a most unreasonable and absurd rule for it being admitted that every person is to contribute according to his interest, a man of the age of eighty-four, with perhaps not a year to live, must be said to have as much interest as one of twenty-one;" and the latter quotes Lord Thurlow as saying: "is a tenant for life, at the age of 99, whose title accrued in possession when he was 98 to pay one-third; a great deal more than any possible enjoyment? According to that rule, a man of the age of 99, who has the enjoyment only 10 days, pays as much as a man of 25." The auditor has not found any recent cases in England in which the old rule has been applied and believes it to have entirely ceased there.

In this country there appears to be scarcely a trace of the application of the rule, except in South Carolina, in a somewhat modified form (See Wright v. Jennings, 1 Bailey 277), and in several cases in Pennsylvania, hereafter to be noticed. In the other states, so far as the auditor is aware, the rule has been adopted and consistently followed of estimating the value of a life-estate according to the expectation of life of the *cestui que vie*. It has been applied in a large number of cases and for a variety of purposes, the most usual having been for settling contribution between life-tenants and remaindermen to the extinguishment of incumbrances, and the ascertainment of dower interests, particularly in those states in which the widow is required or allowed to take a gross sum in lieu of dower or where it is necessary to value dower interests for the purpose of distribution of the proceeds of the sale of lands.

The attention of the Maryland court of chancery was early called to the subject and in 1803 and again in 1804 it

was fully considered by Chancellor Hanson, who constructed for the future guidance of the court a table of dower interests based upon the expectation of life at different ages. This table was approved by the supreme court (Dorsey v. Smith, 7 Har. & J. 345), and has since been applied not only to the specific purpose for which it was drawn up, but for the estimation of the values of life-estates generally. The whole subject of the estimation of the present values of life-estates was elaborately discussed and most of the learning upon it up to that time collected in Williams' Case, 3 Bland Ch. 186, by Chancellor Bland in 1829.

In 1813, in Estabrook v. Hapgood, 10 Mass. 313,—an action for breach of covenant of warranty,—"the chief justice, referring to the assessment of damages in this case, observed that the value of the dowager's life estate was to be calculated from the late Dr. Wigglesworth's table. * * * which he said had been adopted by this court, as a rule in estimating the value of life estates, since its publication." (1775.) In Gibson v. Crehore, 5 Pic. 146 (1827), the court allowed a widow "to redeem her dower or life-estate in a third part of mortgaged lands by paying her proportionable part of the mortgage debt, the proportion to be ascertained by the relative value of the shares of the parties in the estate," and the value of the widow's share was directed to be "estimated by the same rules which are adopted for estimating the value of life annuities." The same court in 1832 (Houghton v. Hapgood, 13 Pick. 154), in a distribution of the proceeds of a sale of lands, held that a tenant by the curtesy should receive the present value of the interest on his deceased wife's share of the fund which would accrue during his life, to be ascertained by a mortality or annuity table.

In New York the question came before Chancellor Kent in 1821 in the leading case of Swaine v. Perine, 5 Johns. Ch. 482, on a bill by a widow against the heir for assignment of dower in land which had been redeemed by the heir by paying off a mortgage. It was held that she was first bound to contribute ratably to the redemption of the mortgage, and the mode in which she was to contribute was thus pointed out by the chancellor: "The more accurate rule would appear to be, that she should 'keep down' one-third of the interest of the mortgage debt, by paying, during her life, to the defendant, the interest of one-third part of the aggregate amount of the principal and interest of the mortgage debt paid by the de-

fendant, to be computed from the date of such payment. But as it would be inconvenient and embarrassing to charge her with such an annuity, then let the value of such annuity from the plaintiff (her age and health considered), be ascertained by one of the masters of the court, etc." The rule for ascertaining the amount of her contribution is accurately pointed out in the decree, viz: "that the master ascertain the amount of principal and interest, due upon the mortgage and paid by the defendant, upon the redemption thereof, and the time when it was paid, and the amount of a year's interest on the aggregate sum of such principal and interest so paid by the defendant; and what would the value in a gross sum, upon the calculation of life annuities, and duly considering the age and health of the plaintiff, of such yearly interest, payable yearly, from the time of such payment, during the life of the plaintiff." In the very next case in the same book, Everts v. Tappen, p. 497, the same distinguished chancellor applied the same rule under similar circumstances. Without giving the details of the case, the following language of the chancellor may be quoted: "To ascertain the amount of her contribution as doweress, we must, according to the doctrine or rule in the case of Swaine v. Perine, recently decided, take one-third of a moiety,"—her husband having been a half owner of the land,—"of the principal and interest due on that mortgage when paid, and charge her with the value of an annuity, payable yearly, for her life, of the interest upon one-third of that moiety, and that value to be computed upon the same principle, that the value of her dower, in the money arising from sales of real estate, is to be computed."

In 1828 the same doctrine was applied by the supreme court of New York in Wager v. Schuyler, 1 Wend. 553,—an action at law for breach of covenant of quiet enjoyment, the plaintiff having been evicted from one-third of the premises conveyed by a recovery in ejectment against him by a tenant in dower, and the only question in the case being the measure of damages. The court said: "Upon the principle of the preceding cases, the rule of damages in this case is this: The fee of the one-third recovered by the tenant in dower must be considered as equivalent in value to one-third of the consideration money received by the defendant, that is $583,33; and as the tenant in dower has only a life estate in the premises recovered, and as at her decease the fee will vest in the plaintiff, he is entitled to recover in this action, the present

value of an annuity equal to the interest on one-third of the consideration money received by the defendant, for the time that the tenant in dower has a probable expectation of life. She, on the 1st May, 1824, was 50 years of age, healthy and of good habits; her expectation of life, according to an approved table of life annuities, is seventeen years;" and then proceeded to calculate the value of the life-estate on that basis. In 1843, in Bell v. Mayor of New York, 10 Paige 49,—a case of contribution by a widow to the payment of a mortgage on land in which she claimed dower, Chancellor Walworth applied the same rule. He directed the master to compute a "gross sum, which will be equal to the then"—(date of extinguishment),—"value of an annuity of the amount of one year's interest for the probable continuance of the (widow's) life, upon the principles of computing life annuities."

In Jackson v. Edwards, 7 Paige 386 (1839), the same chancellor applied similar doctrine, and other New York cases might be cited. Swaine v. Perine and Bell v. Mayor of New York have been frequently cited and have been approved and followed in many cases in other states, and the former, although not the first, may be looked upon as the leading case in this country on the subject of the estimation of the value of life estates.

Without stopping to examine the cases in other states approving and applying the same doctrine, it may be said that they are numerous, and the following may be cited: Maine, Carll v. Butman, 7 Greenl. 102; New Hampshire, Cass v. Martin, 6 N. H. 25; Vermont, Mills v. Catlin, 22 Vt. 98; Danforth v. Smith, 23 id. 247; New Jersey, Mulford v. Hiers, 13 N. J. Eq. 13, 17; Chiswell v. Morris, 14 id. 101; McLaughlin v. McLaughlin, 20 id. 190; Cronkright v. Haulenbeck, 25 id. 513, affirming Same, 23 id. 407; Ohio, McArthur v. Franklin, 16 Ohio St. 190; Unger v. Leiter, 32 id. 210; Indiana, Hazelrig v. Hutson, 18 Ind. 481; Illinois, McHenry v. Yokum, 27 Ill. 160; Michigan, Brown v. Bronson, 35 Mich. 415; North Carolina, Jones v. Sherrard, 2 Dev. & B. Eq. 179; Kentucky, O'Donnel v. O'Donnel's Ex'r, 3 Bush. 216; Alexander's Ex'x v. Bradley, id. 667; Alabama, Gordon v. Tweedy, 71 Ala. 282; Same v. Same, 74 Ala. 232; S. C. Am. Rep. 813.

One more case, decided by Judge Story on the circuit,—Foster v. Hilliard, 1 Story R. 77 (1840),—remains to be noticed, both because of the high authority of the judge deciding it and because it was, as the case in hand, a case of

distribution of proceeds of the sale of land. The facts briefly were that a tenant for life joined with the remaindermen in selling land and died before distribution of the purchase money. The Court said: "as to the rule of apportionment, I think it must be according to the value of the life of the life-tenant at the time of the sale, calculated according to the common tables. If I am right in the opinion already stated, that the rights of the parties were absolutely fixed at the very time of the sale, then it follows, as a necessary consequence, that they are entitled to their share in the proceeds according to the relative values of their respective interests in the estate at the time of the sale." The case is a striking one, as the life tenant died about four years after the time of the sale, yet the court held that his interest must be estimated according to his expectation of life at the time of the sale,—which was very much greater. The same principle, however, is held in other cases.

This discussion would be entirely useless and it would be sufficient to cite a few of the leading authorities but for the fact that the supreme court of Pennsylvania has applied the old English chancery rule in three cases, one of which was decided less than three years ago. It is well, therefore, to examine those cases in order to see whether they prevent the auditor from applying the rule so overwhelmingly established by the decisions of at least fourteen states of the Union, and having the sanction of such eminent equity judges as Story, Kent and Walworth.

The first case was Dennison's Appeal, 1 Pa. St. 201. The facts briefly were: that A purchased from B a life estate in an undivided one-tenth part of certain lands, at the same time confessing a judgment to B for the purchase money. Subsequently A purchased from C the fee simple estate in one-half of the same undivided one-tenth, and some months afterwards confessed a judgment to C, which, it appears from the admission of counsel, was also for purchase money. A's interest in the land was sold upon a subsequent judgment and the fund brought into court for distribution. Both B and C claimed the entire proceeds of the undivided one-twentieth and the court below awarded it to the former, holding that upon the purchase of the fee the lien of B's judgment opened to let in the fee. On the other hand, it was contended that the life estate was merged in the fee and the lien of C's judgment, therefore, bound the entire fee, including the life-

estate. Both sides were clearly wrong, and the supreme court took the middle ground and held that the fund should be apportioned between the judgments of B and C, according to their respective interests or estates covered by the liens of those judgments respectively;" and proceeded to make distribution. Kennedy, J., said (p. 207): "The rule generally adopted in England, by which this question is determined, is to estimate the life-estate at one-third of the price or value of the fee-simple estate, including the life-estate. We see no objection to adopting this rule in the present case." No authorities were cited to the court with respect to the rule for estimating the value of the life-estate, neither party asking to have it valued, and the only reference to the subject by counsel being the argument, *inter alia,* that B must take the whole fund, *because* his life-estate *could not be valued,* there being no rule for that purpose which would operate justly. Moreover, it must be noted that so far as appears from the case as reported, the court had before it no facts upon which the life-estate could have been valued, neither the age, the health nor the habits of the *cestui que vie* being given, and the smallness of the fund might have influenced the court, even if otherwise disposed to apply a different rule, to make the distribution as it did, without reference to an auditor to ascertain the necessary facts.

The next case was Shippen's Appeal, 80 Pa. 391 (1876), where the facts were that a wife (her husband joining) had mortgage her land partly to pay off a prior mortgage and partly for money which her husband received and spent. Subsequently the husband made an assignment for the benefit of creditors, and after the death of the wife the land was sold on the mortgage and the surplus, after payment of the mortgage, brought into court for distribution. The assignees of the husband claimed out of the fund an amount proportioned to his expectation of life at the date of sale, according to the Carlisle tables. From the fragment of the opinion contained in the report it is difficult to understand exactly upon what ground the court below proceeded, but the supreme court, in a *per curim* opinion, intimating that it was a question whether the husband's curtesy had not been wholly extinguished by the mortgage and the sale under it and holding that he had already received out of the mortgage money more than the value of his curtesy, according to the old English rule, affirmed the decree of the court below, awarding the whole

fund to the son and devisee of the wife, from whom also the land had originally come; but whether by purchase or gift does not appear. In this case the age of the husband was given, but the court seems to have had nothing before it with respect to his health and habits. The court said (p. 396): "An individual case depends on its own circumstances, and the relative rights of the life tenant and remainderman are to be ascertained accordingly. A consumptive or diseased man does not stand on the same plane as one of the same age in vigorous health. Their expectations of life differ in point of fact. A court, therefore, must ascertain the actual probable expectation of life of the party as he is, or must adopt some recognized approximate standard as its legal measure, in order to capitalize the interest he is entitled to for life. In this case the Carlisle tables, it is said, would give the value of the life estate or capitalized interest at $6,534.60, leaving the fee simple worth but $5,202.00. The disproportion is quite manifest. We are, therefore, disposed to take the old common-law rule of one-third of the whole sum, as the present value of the accumulated interest for the life of Clayton T. Platt. This gives a sum several hundred dollars less than that received by him out of his wife's mortgage-money."

In Datesman's Appeal, 127 Pa. 348 (1889), the facts were somewhat similar to those of Shippen's Appeal. The life-tenant and the remaindermen joined in a mortgage on the land for the debt of the life-tenant,—the remaindermen joining as sureties and receiving none of the proceeds,—and on this mortgage the land was sold. The life-tenant claimed that the whole of the surplus, after payment of the mortgage, should be set aside and interest thereon be paid to him for life. The remaindermen, contending that the life-estate was not extinguished by the sale, claimed the entire fund. Apportionment was, therefore, not asked by either of the parties and the court does not seem to have had before it any evidence with respect to the age, health or habits of the life-tenant. The court, however, held that the life-estate passed by the sale and, adopting the old English rule, apportioned the fund between the parties in proportion of one-third to the life-tenant and two-thirds to the remaindermen, deducting, however, from the share of the former the amount applied to the mortgage, together with the costs of all the proceedings. The supreme court affirmed the decree, and Paxson, C. J., delivering the opinion of the court, used this language: "The court adopt-

ed the 'principle of dividing the fund between the life-tenant and remaindermen instead of ordering it to be invested,' and followed the old common law rule in force in England, and recognized in this state in Dennison's App. 1 Pa. 201, and in Shippen's App., 80 Pa. 391, that one-third of the capital sum is the measure of the life interest. The court therefore awarded $67.66, which was all that was left of his interest, to the life-tenant, and the balance was equally divided between the two remaindermen. We see no error in this. The life-estate in the land was destroyed by the act and default of the life-tenant; the fund realized by the sale represented the entire title to the property; the interest of the life-tenant therein had been exhausted within a few dollars, and no good reason is apparent why the remaindermen should not have their money." In this case, as in Shippen's Appeal, the court may well have felt inclined to cut down the share of the life-tenant to the minimum, in view of the fact that through his default, or partial default, the estate of the remaindermen was taken from them and the land converted into money at a forced sale, with all its usual consequences.

The auditor should not omit to mention a case in this court, decided by the late learned president judge in 1878 (Matter of Hoffman's Estate, 2 Pears. 317), in which Dennison's Appeal was followed under precisely similar circumstances, and the rule of one-third to the life-estate and two-thirds to the remainder applied. Here, again, however, the court does not appear to have had before it the necessary facts upon which to apply a different rule.

But, in the opinion of the auditor, the supreme court has not, in all or any of these cases manifested a disposition to adopt the old English rule of one-third as a hard and fast rule for the estimation of the value of life estates. In each case we must have "the party as he is,"—not his age merely, without his health and habits, nor his health and habits without his age,—but where all these necessary facts are given, in the absence of any contrary decision by the supreme court, there seems to be no good reason for not following the rule countenanced and adopted by the high authorities referred to in the earlier part of this report. The key to the whole problem seems to lie in the language of the supreme court in Shippen's Appeal, quoted above. In a certain sense, it cannot be said that a person, as an individual, has any expectation of life whatever, but as a member of a class composed of individuals

of the same age and similar health and habits, he may be said to have the average expectation of life of the members of the class to which he belongs—an expectation which will, indeed, in few cases be precisely realized, and yet, as the chances of his living beyond the period assigned are equal to the chances of his dying within it, the fairest rule for estimating the probable duration of human life ever devised. Here we have "the actual probable expectation of the party as he is." His age—34 years—and his health and habits—good—are given, and his probable expectation of life is the average expectation of the class to which he belongs. In the very latest case in the supreme court, in which the question of the ascertainment of the probable duration of the life of an individual was involved (Steinbrunner v. Rwy. Co., 1 Leg. Int. Adv. R. 68, decided Jan. 4th, 1892), the chief justice, referring to Shippen's Appeal and quoting from it the language quoted above in this report, says: "We can understand, that in a contest between a life tenant and the remainderman the Carlisle tables would not serve as an authoritative guide. In each instance the question must be decided upon its own facts." The case being an action for damages for negligent killing, the court however held that the Carlisle tables were evidence competent to be considered by the jury in fixing the damages, the earning power of the deceased having been shown; with the caution however that the attention of the jury should be "pointedly called to the other questions which affect" the probable duration of life.

There are perhaps special reasons why the rule of Shippen's and Datesman's Appeals should not be applied to a case like this. Here the land has not been put to a forced sale through the default of the life-tenant. It has been taken under the right of eminent domain, at a price,—not determined by the limited competition usually attending sheriff's sales, but fairly fixed by viewers appointed by the court, and confirmed by the court without opposition from any one. Moreover, although the supreme court, declaring that the question was not free from doubt, arrived at the conclusion that Napoleon K. Oyster took only a life-estate under his father's will, yet it is plain that he was the immediate and special object of the testator's bounty, and he is, therefore, entitled to as large a share of the fund standing in lieu of the land devised "for his support" as the most favorable rule of dis-

tribution, due regard being had for the rights of the contingent remaindermen, can give him.

Some light further is thrown on the question by the language of the court in Rwy. Co. v. Bently, 88 Pa. 178: "We cannot say that the net annual value of the premises multiplied by the years (of) the life-tenant's expectancy of life, and reduced by calculation to a present cash value, is an incorrect mode of determining the value of the life estate as compared with the value of the remainder in fee." Whether, and if so, how this is reconcileable with Shippen's Appeal and the very recent case of Datesman's Appeal the auditor will not stop to inquire. Had the viewers not been in doubt about the title, it would have furnished them a rule for estimating the damage suffered by the life-tenant in this case,—at least in the absence of special circumstances. The auditor has before him no evidence of the net annual value of the land, which might be greater or less, in particular cases, in proportion to the value of the fee. (See Passmore v. R. R. Co., 9 Phila. 579, where the damages to the life-estate were out of all proportion to the damages to the fee, on any expectation of life.) He is therefore thrown back upon the principle of treating the interest on the fund for distribution as the annual value of the land, which brings him precisely to the rule laid down in Swaine v. Perine and the other cases cited. The auditor is, therefore, of the opinion that the correct method of ascertaining the share of the life tenant in the fund is, to ascertain the present worth of an annuity equal in amount to the annual interest on the fund and running during the period covered by the expectation of life of the life-tenant.

But as to the rate of interest, due regard must be had for the rights of the remaindermen, and such amount should be assigned to their trustee as, improved at compound interest, will, at the expiration of the life-tenant's life-expectation, equal the amount now for distribution. Theoretically, by deducting from the fund the life tenant's share, calculated by the above method at the legal rate of interest—6 per cent.—the remainder improved at compound interest at the same rate must, at the period mentioned, equal the amount now for distribution. But practically this is impossible, as such result requires investment at the legal rate, which can not always be done, and the prompt collection of interest and its immediate reinvestment in exact amount. The auditor, therefore, deems it fair to make the calculation at one per cent. below the

legal rate, i. e., at 5 per cent. This was done by Lord Thurlow, in Nightingale v. Lawson, 1 Bro. C. C. 440, by Lord Cottenham in Turner v. Newport, 2 Phil. 14, and in Bradford v. Longjohn, L. R. 3 Ch. 711; Cox v. Cox, L. R. 8 Eq. 343; Roosevelt v. Roosevelt, 5 Redf. (N. Y. Surr.) 264, and see remarks of Bland, Ch., in Williams' Case, 3 Bland 186.

As to the expectation of life of the life-tenant: Various tables have been used and approved by the courts in the cases cited in this report, viz: the Northampton, the Carlisle, Wigglesworth's (based upon the mortality statistics of the New England States), and others. As is shown by the present chief justice in Steinbrunner v. Rwy. Co., *supra,* the Carlisle tables are based upon general population and not upon selected, i. e. insurable lives, and the same is true of the Northampton and Wigglesworth tables. From his health and habits,—good, as the auditor has found them to be,—it is fair to assume that Napoleon K. Oyster's life is an insurable one, and, therefore, it would be unfair to estimate its probable duration by the tables referred to, made up from the mortality statistics of the healthy and unhealthy alike. On the contrary, it should be estimated according to tables made up from the lives of the class to which he belongs, i. e., insurable or selected lives. Such a table is the "American Experience Table of Mortality," which is offered to the auditor as the basis of his calculation,—made up by insurance companies from their own experience with the lives of their assured. It has been adopted, for the valuation of life policies, in many of the states, e. g., New York, Rev. Sts., 6th Ed., Vol. 2, Chap. XVII, sec. 107, p. 667; Michigan, Compiled Laws, 1871, Vol. I, secs. 2952-3, and in our own state by Act 4th April, 1873, sec. 5, and has been applied to the valuation of life-estates by the courts, see Brown v. Bronson, 35 Mich. 415, and Gordon v. Tweedy, 74 Ala. 232; S. C. 49 Am. R. 813. It is true that the Act of 9th May, 1889, has substituted for it the "Actuaries or Combined Experience Table," but the auditor is informed by excellent authority that the change was made because of a difference of interest calculation and not because of any differences with respect to expectation of life. The auditor, therefore, adopts the "American Experience Table," and he finds by it that the expectation of life of Napoleon K. Oyster is 32.5 years. The auditor has not found any annuity table based upon this mortality table, but the necessary formula is given in the Encyclopedia Britannica—("a very high authority," Paxson, C.

J., in Steinbrunner v. Rwy. Co., *supra*), Vol. 2, Art. Annuities, and it is easily demonstrated to be correct. Understanding 1 to be any unit of value, e. g., $1, i the rate of interest, n the number of years and a the annuity or annual interest on the fund, the formula is as follows: Present val $= \frac{1-\frac{1}{(1+i)^n}}{i} \times a$ or otherwise stated for this case; $v = \frac{1-\frac{1}{(1.05)^{32.5}}}{.05} \times a$ The remainder fund is ascertained by deducting the amount so found from the amount for distribution, or it may be found on the usual principle of compound interest by the following formula, understanding f to represent the fund for distribution; Rem. $\frac{f}{(1+i)^n}$; or otherwise $\frac{f}{(1.05)^{32.5}}$

One other matter remains to be noticed. The auditor is asked to allow out of the fund a reasonable compensation to B. F. Etter, Esq., for legal services rendered on behalf of the owners of the land in the proceedings by which the fund was raised. Mr. Etter appears to have been acting as counsel in the case down to the appointment of the auditor, and, while he appears to have been specially representing the life-tenant, yet, as the services of counsel were necessary and the remaindermen were unrepresented by counsel, there seems to be no good reason why the life-tenant should bear the whole expense. One hundred and fifty dollars has been suggested to the auditor as a proper allowance and he finds it to be a reasonable fee. He is therefore of opinion that the amount should be allowed, upon the general equitable principle that the expense of producing a fund should be first paid out of it before distributing it, Freeman v. Shreve, 86 Pa. 136; McKelvy's App. 108 id. 615; Warrell v. R. R. Co., 130 id. 600, 611; Dundas App. 12 Atl. Rep. 485; Trustees v. Greenough, 105 U. S. 527.

DISTRIBUTION.

Amount in court for distribution, ...		$10,741 13
Deduct prothonotary's costs, Poundage,	$112 41	
Deduct prothonotary's costs, Ulrich, .	1 75	
Deduct prothonatary's costs, Melick, ..	2 50	
Auditor's fee, ...	150 00	
Total costs, ...		266 66

Balance of fund after deducting costs, ...	$10,474 47
Deduct allowance for counsel fees to B. F. Etter, Esq., ...	150 00
Net amount for apportionment between life-tenand and remaindermen, ...	$10,324 47

Which is apportioned as follows:

Napoleon K. Oyster, ...	$8,209 94	
Charles F. Etter, trustee, ...	2,114 53	
		$10,324 47

SIMONTON, P. J., February 1, 1892.

Report presented and confirmed absolutely in accordance with agreement of parties in interest and money ordered to be paid out by the prothonotary in accordance with the distribution of the auditor.

GETTYSBURG BATTLEFIELD MEMORIAL.

Gettysburg Battlefield Memorial—Act of June 13, 1907.

The commission created by the Act of June 13, 1907, P. L. 635, has no power to select a site for a memorial structure on the battlefield of Gettysburg, to which it cannot acquire title.

Attorney General's Department. Opinion to George P. Morgan, Secretary Gettysburg Battlefield Memorial Commission.

TODD, Attorney General, October 22, 1908.

I have your letter of the 18th inst., in which you state that you would like my opinion on the following proposition:

> "We find that the memorial to the Pennsylvania soldiers, if erected on the battlefield of Gettysburg, would have to be erected on ground owned by the national government, and, after the monument is finished and in place, it will not only be on ground owned and controlled by the United States government, but will pass into the possession of the same. There is no ground purchasable which we could secure for the state of Pennsylvania upon which any fighting took place, and we desire to know whether be would be justified in erecting the memorial on property belonging to the United States govern-

ment, knowing that the control and keep of the memorial will pass from our own state to the national government."

The commission was created by Act of Assembly approved the 13th of June, 1907, P. L. 635, and in the first section thereof it is provided as follows:

> "They shall select a suitable site on the Gettysburg battlefield for the erection of a monument, or such other memorial structure as the commission shall determine, to commemorate the services of the soldiers of Pennsylvania in that battle. They shall have authority to select and decide upon the design for the said monument or memorial structure, and the material out of which it shall be constructed, and shall have full power to make contracts for its construction."

The question you ask requires the determination of what is meant by the words "select a suitable site." If you could select a suitable site and acquire title to it, such selection and acquisition would be well within your powers, but I understand from your letter that this cannot be done because the only suitable sites are upon land that belongs to the national government.

There is no language in the Act of Assembly that would authorize you to make a donation of the memorial to the United States government, and an erection of it on lands owned by the national government would result in making such a donation. I therefore advise you that you do not have power, under the act as worded, to select a site for the memorial on land to which you cannot acquire title.

STATE HIGHWAYS.

Improvement of state highways—Disposition of money collected from counties, boroughs and townships—Act of May 1, 1905.

Under the Act of May 1, 1905, P. L. 318, all amounts collected by the state treasurer from counties, boroughs and townships for highway improvements should be placed to the credit of the general construction fund of the state highway department and be made available for the payment of warrants drawn against it by the state highway commissioner.

Attorney General's Department. Opinion to John O. Sheatz, State Treasurer.

FLEITZ, Deputy Attorney General, Nov. 23, 1908.

I am in receipt of your letter of yesterday asking for an official opinion upon a question which has been raised by the state highway commissioner, with your department.

The 18th section of the Act of Assembly of the first day of May, A. D. 1905, P. L. 318, provides that "the total expense of the highway improvement or maintenance, under the provisions of this act, shall be paid by the state treasurer." It further provides that twelve and one-half per cent. of the cost shall be paid by the proper county, and that twelve and one-half per cent. shall be paid by the township or borough wherein the said improvement is made, to the state treasurer. If the county and township or borough, both or either, fail to pay their proportionate share of such improvement, to the state treasurer, within thirty days after the state highway commissioner has certified the account to that official, he is authorized by law to charge the respective amounts against any funds of the said county which may be in, or which may thereafter come into the state treasury.

You state in your letter that a large amount of money has been collected by you and your predecessor in office under the authority above recited, and you desire to be advised whether or not this amount can be properly and legally paid out in the further construction of highways in the different counties of the commonwealth. Upon that precise question the 18th section of the Act of May 1st, 1905, contains the following language:

State Highways.

"The amounts paid under this act to the state treasurer by counties, townships and boroughs, shall be placed by him to the credit of the fund for road construction."

Prior to the passage of the Act of 1905 the improvements made by the state highway department were paid for as provided by law in a different manner. The state, county, township or borough each paid its proportionate share directly to the contractors; this plan was found, however, to work very badly. It often happened that after the applications for road improvements had been received and contracts entered into by the state, that new local officials would be elected who were not in harmony with the policy of their predecessors, and who would refuse to pay the amount agreed upon. This involved the highway department in much confusion, and the legislature, in order to overcome this difficulty passed the Act of May 1, 1905, which provides in the section above discussed, that the entire amount shall be first paid by the state treasurer, upon the warrant of the state highway commissioner, and that then the local authorities shall pay their respective proportions directly to the state treasurer, and their failure to do so, within thirty days after the account had been certified to the state treasurer, gives that official the legal right and power to charge the amount so withheld against any funds of the county which might at that time be, or that might thereafter come into his hands.

It is clear that this twenty-five per cent. of the cost is ultimately to be paid by the county and township, and should be considered merely an advance payment by the state treasurer, and when this amount is collected and returned to the treasury, it must be credited by him to the general fund available for highway improvement throughout the commonwealth.

I am therefore of the opinion and advise you that all amounts so collected as shown by the books in your office, should be placed to the credit of the general construction fund of the state highway department and be made available for the payment of warrants drawn against it by the state highway commissioner.

DISPOSITION OF PENALTIES COLLECTED FOR FAILURE TO REPORT INFECTIOUS OR CONTAGIOUS DISEASES.

Public health—Infectious and contagious diseases—Disposition of fine for failure to report—Acts of June 18, 1895, and April 22, 1903.

Townships are municipalities, within the meaning of the Act of June 18, 1895, P. L. 203, as amended by the Act of April 22, 1903, P. L. 244.

A fine collected under the Act of June 18, 1895, as amended by the Act of April 22, 1903, by a justice of the peace of a township of the second class should be paid by the magistrate to the treasurer appointed by the supervisors of the township in which the offense was committed.

Attorney General's Department. Opinion to Samuel G. Dixon, Commissioner of Health.

CUNNINGHAM, Assistant Deputy Attorney General, November 25, 1908.

Referring to your inquiry submitted to this Department as to the proper disposition to be made of the fine of $5.00 imposed against and paid by Dr. C. C. Conway to J. C. Morris, a justice of the peace of one of the townships of Greene county, Pennsylvania, after due proceedings against the said Dr. C. C. Conway for a violation of the Act of June 18, 1895, P. L. 203, I reply as follows:

As I understand the facts upon which your inquiry is based, the fine in question was imposed after a summary conviction under section 21 of the said Act of June 18, 1895, P. L. 203, as amended by the Act of April 22, 1903, P. L. 244. The act is entitled:

> "An act to provide for the more effectual protection of the public health in the several municipalities of this commonwealth."

Among other things, it is provided in this act that every physician located or practicing in any of the municipalities of the commonwealth shall report infectious or contagious diseases to the proper health authorities. Failure, neglect or refusal to comply with any of the provisions of the act subjects the person so offending, upon conviction thereof before any mayor, burgess, alderman, police magistrate "or justice of the peace of the municipality in which said offence was com-

Failure to Report Infectious or Contagious Diseases.

mitted," to the imposition of a fine of not less than $5.00 nor more than $100.00, which said fine "shall be paid into the treasury of said municipality."

The said defendant, having been convicted, under said Act of Assembly, paid the fine of $5.00 imposed to the said magistrate, who is a justice of the peace in a township of the second class in which there is no township treasurer.

You ask to be advised as to the proper disposition of the fine now in the hands of said magistrate, which inquiry raises the question of whether a township is a municipality within the meaning of the said Act of 1895, and, if so, what is meant by the "treasury" thereof. The act in question, by its express provisions, applies to all the municipalities of the commonwealth. Townships are civil divisions of the state incorporated by general laws to aid in the administration of government. By law certain powers are conferred upon them; certain duties are prescribed and certain liabilities imposed; and they are therefore frequently term "quasi corporations." The constitution of our state classifies both townships and school districts as municipalities, and our supreme court often characterizes townships as municipalities. Sprague vs. Baldwin et al., 18 Pa. C. C. 568. Many acts of assembly might be cited referring to townships as municipal corporations. There is nothing in the above mentioned Act of 1895 to indicate that its operation is to be limited in any way to cities and boroughs, and it may be safely concluded that townships are included in the term "municipality" as used therein.

Except in townships of the first class and in those of certain counties, there is no such office as that of township treasurer, which fact gives rise to some difficulty in construing the provision of the act directing that the fine shall be paid into the treasury of the municipality in which the offence was committed. A treasury may be properly defined as "a department of government which has control over the collection, management and expenditure of the public revenue." The corporate powers of a township are vested in and exercised by the supervisors thereof, and I am therefore of the opinion that, under a fair construction of the act in question, and following what seems to be the general legislative intent expressed therein, the fine to which you refer should be paid by the magistrate to the treasurer appointed by the supervisors of the township in which the offence was committed.

MUTUAL LIFE INSURANCE COMPANIES.

Mutual life insurance companies—Power to issue endowment policies.

A life insurance company incorporated for the purpose of making contracts of insurance upon the lives of individuals, on the mutual plan, by assessments upon surviving members, has no power or authority, under the laws of this commonwealth, to issue contracts of endowment insurance.

A statement upon a policy of a mutual life insurance company, that this company is not required by law to maintain a reserve fund under its by-laws is a substantial compliance with the last proviso to section 37 of the Act of May 1, 1876, P. L. 53.

Attorney General's Department. Opinion to David Martin, Insurance Commissioner.

TODD, Attorney General, December 8, 1908.

I am in receipt of your communication enclosing the form of policy now being issued by the Abraham Lincoln Mutual Life Insurance Company of Philadelphia, the communication to you from its counsel, and the typewritten provisions for a proposed endowment policy.

You ask to be advised, first, whether this mutual life insurance company, or any mutual life insurance company incorporated under the laws of this commonwealth has power to issue an endowment policy of insurance, and also whether the language used in clause C of section 8 in said policy constitutes a substantial compliance with the requirements of section 37 of the Insurance Act of May 1st, 1876 (P. L. 53).

As I understand the facts in connection with your first inquiry, the Abraham Lincoln Mutual Life Insurance Company was incorporated under the said Act of 1876 for the purpose of making contracts of "insurance upon the lives of individuals on the mutual plan by assessments upon surviving members."

The general objects for which the company was incorporated are:

> "To make insurance upon the mutual principle upon the lives of individuals and every insurance appertaining thereto or connected therewith, and to grant and purchase annuities."

Having been incorporated under the said Act of 1876 for the above purposes and objects, said Abraham Lincoln Mutual Life Insurance Company now proposes to issue a policy containing the following provision:

> "*Provided, however,* That should ...., the insured hereunder, be living on the ..... day of ....., 190.., and should this contract be then in full force and effect, (he or she) shall receive in cash the amount of this policy less any indebtedness hereunder to the company, subject to all the conditions and privileges set forth at length on the following pages, which are hereby accepted by the insurer and made part hereof, as fully as if they were recited at length over the signatures hereto attached."

Your inquiry to be advised whether you, as insurance commissioner, can approve the issuing of a policy by the said company containing the above provision, raises the question whether a mutual life insurance company can be permitted under the insurance laws of this commonwealth, to issue an endowment policy. It is essential to define the distinction between mutual and endowment insurance.

> "A mutual insurance company is one in which the members contribute either cash or assesable premium notes, or both, as the plan of transacting business may provide, to a common fund out of which each is entitled to indemnity in case of loss."
>
> Words and Phrases Judicially Defined, Vol. 5, page 4650.

Or again:

> "A mutual insurance company is simply a company whose fund for the payment of losses consists not of capital subscribed or furnished by outside parties, but of premiums mutually contributed by the parties insured."
>
> Idem.

Or again:

> "A mutual insurance company is one in which the life of every member is insured by reason of his membership and compliance with the requirements of its constitution and by-laws, which establish a benefit fund by means of payments made by parties joining the

order before being received into membership, and assessments levied upon them upon death of a member, should the fund at the time be insufficient to pay the death benefit; from which, on the satisfactory evidence of the death of a beneficial member of the order who has complied with all its lawful requirements, a sum is paid, not exceeding a certain amount, to the family, orphans or dependents, as the member directs; thus insuring the life of each member immediately upon his entering the order and making him one of the insurers of the lives of his fellow-members to the amount required to be paid by him under the provisions of the by-laws."

Idem.

On the other hand:

"An endowment policy of life insurance is one payable at a certain time, at all events, or sooner, if the party should die sooner; and the premiums on which are all to be paid within a certain limited time."

Carr vs. Hamilton, 129 U. S. 252.

"A form of insurance known as endowment insurance is a contract to pay a certain sum to the insured if he lives a certain length of time, or if he dies before that time, to some other person indicated."

Words and Phrases Judicially Defined, Vol. 3, page 2390.

"An endowment policy is an insurance into which enters the elemnt of life. In one respect it is a contract payable in the event of the continuance of life; in another, in the event of death before the period specified."

Idem.

In Cook on Insurance, section 107, it is said:

"Sometimes the contract to pay on the death of the insured is conjoined with a contract to pay on the expiration of a fixed period should he live so long. Such a contract is called a contract of endowment insurance, though so far as concerns the contract to pay on the expiration of a fixed period it is not, strictly speaking, a contract of life insurance at all."

Having indicated the distinctions between mutual and endowment insurance, reference must next be made to the said insurance act of 1876, for the purpose of ascertaining whether this legislation contemplates the issuing of endowment policies by mutual life insurance companies. By paragraph 2 of section 1 of the said act it is provided that an insurance company may be incorporated "to make insurance, either upon the stock or mutual principle, upon the lives of individuals, and every insurance appertaining thereto or connected therewith, and to grant and purchase annuities." As above pointed out, the company in question was incorporated to make insurance upon the mutual principle, as distinguished from the stock principle, upon the lives of individuals.

By section 34 of this act it is provided that:

> "Companies incorporated under this act must be organized upon the joint stock or the mutual plan, and the power to insure upon both plans shall not exist in the same corporation, except temporarily, as provided in the preceding section of this act."

This section received judicial construction in the case of Schimpf & Son vs. Lehigh Valley Mutual Life Insurance Co., 86 Pa. 373. In the course of the opinion of the supreme court in this case the distinction between a stock policy and a mutual policy is pointed out. With reference to this distinction it is said by the supreme court:

> "They are essentially different. The payment of a cash premium does not decide the character of the the policy as to whether it is mutual or stock. A mutual company may insure for either note or cash, so may a stock company. The distinction between them rests upon different principles. A stock policy is issued solely upon the credit of the capital stock of the company to one who may be an entire stranger to the corporation, who acquires no right of membership by reason of his policy; no right to participate in its profits and who subjects himself to no liability by reason of its losses. In such case it can make no difference whether the premium is paid in cash or by note; that is a private matter between the insurer and the insured, which concerns no one but the parties to the contract. Mutual companies, on the other hand, are somewhat of the nature of a part-

nership; the insured becomes a member of the corporation by virtue of his policy; is entitled to a share of the profits and is responsible for the losses to the extent of his premium paid or agreed to be paid. * * * * * The true principle of mutual insurance is the payment by each of the insured of a certain sum of money towards a common fund, which fund is to be held for the protection of each person so contributing."

Having now pointed out the distinction between mutual and endowment insurance and the distinction between the stock or joint stock plan of insurance, as contrasted with the mutual plan, it remains to examine the provisions of the said Act of 1876 governing the organization and operation of companies incorporated to make insurance upon the lives of individuals upon the mutual principle. Section 37 of the said Act of 1876 provides in part as follows:

"Companies insuring lives on the plan of assessments upon surviving members may be organized in the same manner as provided in this act for the organization of mutual fire insurance companies, and the provisions of the act to which this is a supplement shall not apply to said companies heretofore organized if their business is transacted in accordance with the provisions of their respective charters, whether with or without capital stock, guarantee capital, or accumulated reserve in lieu of capital stock. * * * Provided also, that no part of such assessment upon surviving members shall be applied to any other purpose than the payment of death losses, unless the amount intended for other purposes is specially stated in the notice for such assessment, and the object or objects for which it is intended."

The company in question was organized for the purpose of insuring lives on the plan of assessments upon surviving members, and is therefore clearly within the provisions of section 37 of said Act of 1876. Can such companies enter into contracts to pay the insured a fixed and certain sum of money if he lives a certain length of time, or if he dies before that time to pay the said sum to some other person indicated? There is, of course, no difficulty about such companies issuing a contract to pay a certain sum to the indicated

beneficiary upon the death of the insured. The difficulty arises with reference to the power to enter into a contract to pay a fixed sum to the insured, provided he lives a certain length of time. In the case of Wagner vs. The Keystone Mutual Benefit Association, 8 Pa. Dist. Rep., page 231, a mutual insurance company, incorporated for the purpose of insuring the lives of persons on the plan of assessments upon surviving members, issued policies of endowment insurance. In an action upon a policy of this kind the defence was set up by the company that it had no power to issue policies of endowment insurance. Judge Audenried, before whom the case was tried, held that the company was estopped by the receipt of premiums and assessments from denying its power to make the contract on which it was sued. In the course of the opinion, Judge Audenried stated that he entertained no doubt as to the power of the defendant company to issue policies of endowment insurance. This portion of the opinion, however, is dictum, as the real question before the court was not the power of the defendant company to issue policies of endowment insurance, but whether, having issued such policies and collected premiums and assessments thereon, it could be permitted to defend in an action upon an endowment policy upon the ground that it had no power to make the contract.

In Walker vs. Giddings, 103 Michigan, 344, under an act authorizing not less than five persons to incorporate to secure to the family or heirs of a member on his death a certain sum of money by assessment on the members, or to secure in the same manner a certain sum weekly or monthly to a member, disabled by sickness or otherwise, it was held that a fraternal beneficial association organized under such act was not authorized to conduct endowment insurance business.

Aside from the question of payment of accident or sick benefits, it is essential to inquire whether our said Insurance Act of 1876 authorizes "companies insuring lives on the plan of assessments upon surviving members" to make contracts to pay the insured a certain sum of money provided he live a certain length of time.

Under section 37 the two classes of persons contemplated are the *insured* and the *surviving* members of the company in which he is a member or practically a partner. The only time when it can be properly said that there are *sur-*

viving members of the company is at the time of the death of the insured. The act, therefore, contemplates the death of the insured and not his living a certain number of years as the event, upon the happening of which payment is to be made. If a member live the specified period of years, thereby becoming entitled to receive the sum of money fixed by his policy, how could that sum be raised by assessments upon *surviving members?* As to him, there are no surviving members until his death.

It is also provided, that no part of the assessment upon surviving members shall be applied to any other purpose than the payment of death losses, unless special notice be given. Here again assessment is to be made upon surviving members and primarily for the purpose of paying death losses.

I am therefore of opinion that the said Abraham Lincoln Mutual Life Insurance Company, incorporated for the purpose of making contracts of insurance upon the lives of individuals, on the mutual plan, by assessments upon surviving members, has no power or authority, under the laws of this commonwealth, to issue contracts of endowment insurance.

With reference to your second inquiry, the language of clause C is as follows: "This company is not required by law to maintain a reserve fund under its by-laws." The last proviso of section 37 of said Act of 1876 is as follows:

> "Provided further, That all policies or certificates issued by said companies, shall state that the company issuing the same is not required by law to maintain the reserve which other life insurance companies are required by the act to which this is a supplement."

In my opinion, the said company, by the use of the language of clause C above quoted, has substantially complied with the proviso referred to.

In re Salary of Hon. George A. Vare.

Members of senate—Salary of absent members.

When a warrant for the payment of the salary of a member of the senate is presented to the state treasurer, with notice endorsed thereon that the payee therein named had not been in attendance at any meeting of the senate during the session for which the salary is claimed, the state treasurer should refuse to pay this warrant, leaving the parties contending for the payment thereof to their remedy to compel such payment by mandamus or such other proceedings as they may select, in the course of which proceeding the facts and law applicable thereto can be judicially determined and the rights of the commonwealth and of all parties interested can be properly ascertained and protected.

Attorney General's Department. Opinion to John O. Sheatz, State Treasurer.

Todd, Attorney General, December 9, 1908.

This Department is in receipt of your communication of December 1st, 1908, stating that a salary warrant has been presented to you for payment, which said warrant is drawn to the order of Hon. George A. Vare, formerly a member of the senate of Pennsylvania, but which warrant contains the following endorsement immediately preceding the signature of the president pro tempore of the senate:

> "This warrant is signed by the president pro tempore of the senate with notice to the state treasurer that the payee named therein, Hon. George A. Vare, was not in attendance at any meeting of the senate at the legislative session of 1907."

You now ask to be advised by this department as to the proper action to be taken by you in connection with this warrant.

Under the Constitution of 1776, the remuneration of members of the general assembly is described as "wages;" under the Constitutions of 1790 and 1838, it is described as "compensation," and under the present constitution as "salary." In so far as your inquiry is concerned, there is practically no distinction in the meaning of these words. They all mean a sum of money periodically paid for services rendered. If there is any distinction in their popular sense it is to be found only in the application of them to what may be

popularly considered more or less honorable services. The present constitution provides that:

> "The members of the general assembly shall receive such salary and mileage for regular and special sessions as shall be fixed by law,"

and by the Act of May 11, 1874, P. L., 129, it is provided:

> "That the compensation of members of the general assembly shall be one thousand dollars for each regular and each adjourned annual session not exceeding one hundred days, and ten dollars per diem for time necessarily spent after the expiration of the one hundred days. * * * Provided, that when any member shall absent himself without leave he shall not be entitled to any compensation during such absence."

This Act of 1874 was amended by the Act of July 7, 1885, P. L. 264, by which latter act it is provided:

> "That the compensation of members of the general assembly shall be fifteen hundred dollars for each regular biennial session, and mileage to and from their homes, at the rate of twenty cents per mile, to be computed by the ordinary mail route, between their homes and the capital of the state, and five hundred dollars and mileage as aforesaid, for each special or extraordinary session."

It is to be noted that the amendment omits the above quoted proviso to the effect that when any member absents himself without leave he shall not be entitled to compensation during such absence.

The terms of the notice to you from the president pro tempore of the senate would seem to indicate, however, that the absence referred to was not temporary, but continued during the entire session. It is not stated, however, whether the absence of the senator in question was with or without leave.

Ordinarily, when a salary warrant for a member of the general assembly is presented to you for payment, duly certified and signed, you would be justified in assuming that the person therein named is an officer, not only *de facto* but also *de jure,* that he had rendered the services incumbent upon him, and is therefore entitled to the remuneration fixed by law. In the present case, however, this presumption is re-

butted, in so far as the rendition of services is concerned, by the endorsement placed upon the warrant.

Keeping in mind the fact that the term "public office" embraces the ideas of tenure, duration, emoluments and duties, which ideas or elements cannot be separated and each considered abstractly; that a public office is intended for the public good and not for the particular gain of the incumbent, and that the relation between a public officer and the government itself does not rest upon the theory of contract, but arises from the rendition of services, it becomes apparent that a serious question is raised in this instance as to whether you can legally honor and pay this warrant. The endorsement placed thereon raises questions both of fact and of law. Neither your department nor this department has any means for the proper investigation and disposition of questions of fact.

In a controversy of this kind the parties interested should be afforded an opportunity to be heard on the facts in a proper tribunal. It may also be a serious legal question whether the remedy for non-attendance of members of the general assembly is not rather by proceedings to compel attendance than by declining to pay members who have absented themselves from the sessions of the legislature.

It is the duty of this department, however, to advise you as to the departmental action you should take.

I am therefore of opinion that, under the circumstances of this case, you should refuse to pay this warrant, leaving the parties contending for the payment thereof to their remedy to compel such payment by mandamus or such other proceedings as they may select, in the course of which proceeding the facts and law applicable thereto can be judicially determined and the rights of the commonwealth and of all parties interested can be properly ascertained and protected.

TAXATION OF BONDS OF SCHOOL DISTRICTS.

Taxation of bonds of school districts—Acts of April 29, 1844, and April 30, 1864.

Under the Acts of April 29, 1844, P. L. 486, and April 30, 1864, P. L. 219, the treasurers of the various school districts should make return of the bonds issued by them direct to the auditor general, together with such other information as that official may require; such bonds should no longer be returned by the individual owners to the local assessors for taxation.

Attorney General's Department. Opinion to T. A. Crichton, Deputy Auditor General.

FLEITZ, Deputy Attorney General, December 17, 1908.

I have before me your letter of recent date enclosing certain correspondence and memoranda, and asking for an official opinion as to the proper method for the return for taxation of bonds issued by the school districts of the commonwealth.

It appears, from your letter, that it has been the practice of the auditor general's department to require the individual holders of school district bonds to return such securities to the local assessors for taxation and in cases where the payment of the tax is assumed by the district the practice has been to require the district officers to return the amount of bonds owned by residents of Pennsylvania to the local assessors for such taxation, and to pay the tax due thereon. The question is now raised whether, under the Act of the 29th of April, A. D. 1844, P. L. 486, and the Act of 30th of April, 1864, P. L. 219, these bonds should not be returned by the treasurers of the various school districts issuing them directly to the Auditor General, and the tax deducted and paid into the state treasury, in the same manner as county and other municipal bonds are now returned for taxation, and you desire an official opinion from this department upon this point.

Section 32 of the Act of 1844 provides that "all public loans * * * except those issued by the comomnwealth" * * * "shall be valued and assessed and subject to taxation." This language is applicable in this connection only as showing that under this law all public loans were considered together as a specific class for taxation. The language of sec-

tion 4 of the Act of 1864, above referred to, however, is specifically in point "that the treasurer of each county and city, the burgess or other chief officer of each incorporated district or borough of this commonwealth, within ninety days after the passage of this act shall make return under oath or affirmation to the auditor general, of the amount of scrip, bonds or certificates of indebtedness outstanding by said county, city, district, borough or incorporation * * * as the same existed on the first day of January one thousand eight hundred and sixty-four, and of each succeeding year thereafter, together with the rates of interest thereon for each of those periods," in order that taxes might be assessed and collected for state purposes on such indebtedness.

The question is whether or not this language is broad enough to include school districts; if it is, then clearly the bonds of such districts must be returned to the auditor general and not to the local assessors, and the tax must be deducted and paid to the state treasurer by the school districts instead of being assessed against the individual holders of the bonds. For the settlement of this question it is not necessary to analyze or define the legal status of the various civil sub-divisions of the commonwealth, nor is it necessary to discuss and determine whether or not a school district is technically a municipality.

The several school districts within this commonwealth were created bodies corporate by the 18th section of the Act of 8th of May, 1854, P. L. 620, which defines their corporate duties and powers, and the 22d section of the same act confers upon said school districts the corporate power to issue bonds. It is, therefore, only reasonable for us to assume that the legislature of 1864, ten years after the creation of these districts, took cognizance of their existence and indebtedness, and that the word "district" used in the above-quoted language of the 4th section of the Act of 1864 was meant to apply to school districts.

This conclusion is logical and is warranted by the fair interpretation of the Acts of Assembly, and if put into practice will harmonize and make more perfect the system for the assessment and collection of taxes. Under the present method the auditor general has no knowledge of the amount of bonds issued by the various school districts of the state now outstanding and owned by residents of the commonwealth and

many of them may thus escape from bearing their proper burden of taxation.

I am, therefore, of opinion and advise you that the present method should no longer be followed, but that your department should issue directions to the treasurers of the various school districts to make return of the bonds issued by them direct to the auditor general, together with such other information as that official may require, and that such bonds shall no longer be returned by the individual owners to the local assessors for taxation.

IN THE MATTER OF THE OBJECTIONS TO THE NOMINATION PAPER OF M. L. WEAVER, CANDIDATE FOR STATE SENATOR IN THIRTY-FIFTH SENATORIAL DISTRICT, REPRESENTING THE RIGHTEOUS GOVERNMENT PARTY.

Nomination of candidates—Amendment to nomination papers.

Where, for purposes of identification, original signers have inserted their names in amending affidavits, it is not indispensable that their residence and occupation should also be stated therein.

If an objection to affidavits to an amendment to a nomination paper raises a question of fact and is not supported by proof, the affidavits will prevail.

Objections to Amendment of Nomination Papers. C. P. Dauphin County, No. 73, January Term, 1909.

John E Fox, John R Geyer and *H. W. Story* for objections.

James A. Stranahan contra.

KUNKEL, P. J. October 23, 1908.

By the amendment made to this nomination paper, pursuant to our order of October 12th, 1908, the signatures and qualifications of the requisite number of signers have been vouched for by twelve competent affiants.

The objections to the form of the affidavit amending the nomination paper cannot be sustained. Lincoln Party Nomination, 8 Dauphin County Reporter, 208; DeWalt's Nomination and Hartzel's Nomination, 9 Dauphin County Reporter, 314-317.

For purposes of identification original signers have inserted their names in the amending affidavits. It was not

indispensable that their residence and occupation should also be stated therein, and the objection based upon this omission is not sustained.

The objection that persons whose names appear in the amending affidavits and vouched for there are not the same persons who signed the nomination paper raises a question of fact. This objection is not supported by proof, and counsel declined to say that they expected to be able to prove the fact alleged. Under these circumstances the amending affidavits must prevail. None of the objections is sustained.

The nomination paper as amended is adjudged to be valid and the prothonotary is directed to certify this judgment to the secretary of the commonwealth, returning herewith the nomination paper and the amending affidavits.

ESTATE OF WILLIAM F. GEIBE, DECEASED.

Decedents estate—Widow's exemption.

If a widow elects to take part of her exemption in cash, and before the filing and confirmation of the appraisement sufficient cash is realized from the sale of personal property of decedent to cover the amount set apart to the widow, the confirmation of the appraisement is an adjudication of that amount to her.

Exceptions to Auditors report. Orphans' Court of Dauphin County.

P. S. Keiser and *F. J. Schaffner* for exceptions.

KUNKEL, P. J. Oct. 28, 1908.

The claim of the exceptant that there was no cash on hand at the time the widow elected to take in cash the balance of her exemption is not borne out by the fact. The auditor has found, and states that it was admitted, that the grain and milk were sold and the proceeds of the sale were realized, and sufficient thereof set apart to the widow before the completion and filing of the appraisement and its approval by the court. Thus the foundation is removed upon which rests the contention that the widow, who was also the accountant, had no right to apply the proceeds of the sale to the payment of her exemption. The present case differs from Finney's App., 113 Pa., 11. In that case there was no present cash or money

upon which the adjudication or the approval of the appraisement could take effect. Here, however, were the cash proceeds of sale which were set apart to the widow by the appraisement, and adjudged to her by the confirmation. If there existed any good reason why she was not entitled to take the money derived from the sale, objection should have been made to the confirmation of the appraisement. That judgment cannot be questioned in this proceeding. It follows that the widow was entitled to take credit in her account as executrix for the money derived from the sale and awarded to her by the appraisement. The exceptions to the auditor's report are overruled. The report is confirmed and distribution directed in accordance therewith.

CHARLES S. WEAKLEY, TRADING AS C. S. WEAKLEY & CO., *vs.* RUTH DIFFENDERFER, B. H. DIFFENDERFER.

Bailments—Waiver of default.

Where a lessee of personal property is in default at the end of the term, and the lessor does not enforce the stipulations of the lease relative to the surrender of the property, but contniues to receive rent, he waives the right to the return of the property as provided in the lease in case of default.

Motion for judgment for want of sufficient affidavit of defense. C. P. Dauphin Co., No. 383, January Term, 1908.

George R. Barnett for plaintiff,

Scott S. Leiby and *E. E. Beidleman* for defendants.

KUNKLE, P. J. November 4, 1908.

This is a motion for judgment in an action of replevin for want of a sufficient affidvait of defense. The property which is the subject of the litigation was delivered by the plaintiff to the defendants under two contracts or leases in writing numbered in the statement 557 and 597. No defense is made to the recovery of the part of the property which is covered by lease numbered 597, and for that property the plaintiff is entitled to judgment.

The real controversy is over the right to the property mentioned in lease numbered 557. By that lease, which is dated October 10, 1905, the property was leased by the plaintiff

to the defendant "for the term of twelve months for the sum of $370.05, payable weekly (monthly) in advance at the rate of $25 for each and every month," with the agreement that at the expiration of the lease, if the defendants had fully and punctually complied with all the terms thereof, and had paid all rental, the plaintiff would, upon request, sell and convey the property to them by bill of sale for the consideration of one dollar. It was stipulated in the lease that the defendant should not remove the property from the premises designated therein, and that " at the expiration or sooner determining of the term," they would surrender it to the plaintiff. It was further provided that if there should be default in the payment of any installment of rental, or if the property should be removed, or be permitted to be out of the possession of the defendants without the written consent of the plaintiff, then, in either event, the whole sum of money, or rental, should become due and payable at once, and the plaintiff might repossess himself of the property and enjoy the same as though the agreement had not been made.

It is averred in the statement that the defendants were in default in the payment of rental, and had violated the agreement by removing the property from the premises mentioned therein; and, further, that the defendants had agreed that the property covered by lease numbered 557 should be held as additional security for the payments to be made under lease numbered 597. The defendants deny that the property was removed without the plaintiff's consent. They also deny that they agreed to hold the property contained in lease 557 as security for that contained in lease 597. They admit, however, that they defaulted in the payments of rental as set out in the statement, but aver that every default was waived by the plaintiff; and that on the twelfth day of July, 1907, the day the last payment was made, they owed a balance of $17, which they tendered to the plaintiff at his office each month from that day, and that he refused to accept it. The plaintiff's statement shows that the rental was paid monthly, with but a few exceptions, and in varying sums, during the period beginning October 13, 1905, to July 12, 1907, to the amount of $353.05, $17 short of the total rental agreed to be paid. Of this amount, $253 was paid before October 13, 1906, the date of the expiration of the term, and $100 thereafter.

It thus appears that the whole amount of rental has been paid, except $17, which, when it was tendered, was refused.

The plaintiff now seeks to recover the property, and requests that judgment therefor be entered against the defendants. This we must decline to do. In the brief which the plaintiff has filed with us, he does not contend that he has the right at this late day to rescind the contract and repossess himself of the property because of the admitted defaults in the payment of rentals. Indeed, such contention could not be sustained, for the reason that each default was waived by each subsequent acceptaance of rental. But he insists that he has the right to enforce the agreement on the part of the defendants to return the property at the end of the term; and upon this stipulation in the lease he rests his claim to recover. We do not think he is in any better position to enforce the contract according to its strict letter than he is in to rescind it. He had the right at the end of the term, the total rentals not then having been paid, to demand the surrender of the property in accordance with the stipulation in the lease. But he did not do so. Instead he accepted installments of rental during a period of nine months after the term had expired, and thus he received the whole sum to which he was entitled, save $17, which he refused to accept. Having failed to assert his right when it accrued, and having permitted the defendants to pay him the rental thereafter, which he would have had no right to demand if the property had been returned, he is in no position now to enforce it. To permit him to do so would be against equity and good conscience. He is estopped by his conduct, and must be held to have waived his right. He was bound to accept the last payment and then he would have had all to which he was entitled under the contract and his dealings with the defendants.

Apparently the plaintiff's claim to recover is based upon the theory that he was entitled, at the end of the term, not only to the return of the property, but also to the unpaid rental. We do not so construe the lease. It must be construed in the light of the purpose for which it was given. It is manifest that it was made in contemplation of the future sale of the property to the defendants, the substantial consideration for which was not the nominal sum of one dollar mentioned in the lease, but the aggregate of rentals agreed to be paid. We fail, therefore, to find anything in it to warrant the inference that it was intended that the plaintiff, when he had received the full price, should have the property also. The intention is clearly the contrary. We are satisfied that on the pleadings

the plaintiff is not entitled to judgment for the property covered by the lease numbered 557. As to that property the motion for judgment is overruled. For the property, however, replevined and covered by the lease numbered 597, judgment is directed to be entered in favor of the plaintiff and against the defendants.

COMMONWEALTH *ex rel.* HAMPTON L. CARSON, ATTORNEY GENERAL *vs.* PENNSYLVANIA GUARANTY COMPANY.

Corporations—Insolvency—Distribution of Assets.

Upon the insolvency of a corporation organized for the purpose of issuing and selling bonds, debentures, and certificates of indebtedness of said company, to be paid by the purchasers thereof in periodical installments, the contract between the company and the holders of the bonds should be treated as rescinded and the parties put in the ordinary relation of debtor and creditor.

Exceptions to Auditors report. C. P. Dauphin County, No, 400, Commonwealth Docket 1905.

Thomas Stephen Brown and *Paul A. Kunkel* for exceptions.

Guy H. Davies contra.

KUNKEL, P. J. November 25, 1908.

The Pennsylvania Guaranty Company was incorporated, on April 28, 1903, under the laws of this commonwealth, for the purpose of issuing and selling bonds, debentures, and certificates of indebtedness of said company, to be paid by the purchasers thereof in periodical installments. On November 29, 1906, in a proceedig brought against it in this court by the attorney general, under the act of February 11, 1895, it was adjudged insolvent and dissolved, and a receiver appointed to wind up its business. In due course of time the receiver filed his account, which was confirmed; and an auditor was appointed to make distribution of the funds in his hands. The principal claimants to the fund were certain persons to whom the company had issued its bonds, in which it was stipulated that, in consideration of the payment of a designated premium at designated periods, the company guaranteed to pay to the order of the holder a fixed sum in gold ten years after date

with semi-annual dividends as per coupons attached. To each bond was attached twenty coupons, in which the company agreed to pay semi-annually to the order of the registered owner of the bond a sum amounting to four per cent. on the premiums paid in. The privilege of surrendering the bond at the end of three years for a certain sum in cash, or for another bond of a fixed value, was given by the contract to the holder. However, none of the bonds had reached the time at which this privilege could be exercised. There was no provision in the bond which gave to the corporation the right to terminate the contract. The auditor allowed the claimants, who were in good standing at the dissolution of the company, to participate in the distribution, and awarded to them a dividend on the aggregate amount each had paid as premiums, or periodical payments. To this disposition of the claims, exceptions were filed, and the correctness of the auditor's ruling is now before us.

The substance of this contract between the claimant and the company as shown by the bond was that, if the claimant would make certain payments at stated times during the period of ten years from the date of the instrument, the company would pay him semi-annually, during that time, interest on the payments so made and at the expiration of the time a certain sum of money. The claimants kept their part of the contract and made their periodic payments up to the time of the dissolution of the company. It is quite manifest, however, that after that time the company was not capable of performing its part of the contract. It was dissolved. It was no longer in existence. Its business was directed to be wound up. It was in no position either to receive further payments or to continue its contracts with the claimants. The contract was at an end, but through no fault of theirs. They, however, had paid their money upon the faith of the promise made by the company. We think, therefore, the contract should be treated as rescinded, and the claimants restored as far as possible to the position they were in before it was made. This course was taken in State Saving & Loan Association vs. Carroll, 15 C. C. R., 522, decided by this court, where the association, from which the defendant borrowed money upon his shares of stock, became insolvent and made an assignment for the benefit of creditors, and the weekly payments during a period of years contracted for having become impossible, the contract was treated as rescinded and the parties

put in the ordinary relation of debtor and creditor. That object is accomplished in the present case by giving the bondholders the right to the return of the money which they paid. This is the conclusion the learned auditor reached and he accordingly treated the company as the debtor of the claimants for the amount they paid in, and awarded to them a dividend on such amounts. In this we think he was right. We can add nothing of profit to that which he has said in support of his conclusion.

Several other exceptions were filed to the allowance of certain individual claims, but they were not pressed at the argument. For the reasons given by the auditor they cannot be sustained. All the exceptions are overruled, the auditor's report is confirmed and distribution is directed to be made in accordance therewith.

COMMONWEALTH *vs* HARRY SHERK.

COMMONWEALTH *vs.* J. GALBRAITH.

Horse thieves—Reward for capture of—Act March 15, 1821.

A person who pursues and apprehends two persons who had stolen a horse is, upon the separate trial and conviction of the persons apprehended, entitled to the reward provided by the Act of March 15, 1821, for each person convicted.

Larceny of a horse. Q. S. Dauphin County, No. 31 September Sessions, 1908.

Petition for order for payment of reward for arrest and conviction of horse thieves. Q. S. Dauphin County, Nos. 207 June Sessions, 1908 and 31 September Sessions, 1908.

B. Frank Nead for petition.

MCCARREL, J. December 9, 1908.

We have before us in each of the above-stated cases the petition of Joseph P. Thompson, a legally licensed detective of the city of Harrisburg, asking that an order be made for the payment to him of the reward of twenty dollars, provided by the Act of March 15, 1821, 7th Smith's Laws, 388, for the apprehension and conviction of each of the above

named defendants. Notice of his intention to apply for the said reward appears to have been duly given by advertisement, and no other person has appeared to claim the reward in either of the above-stated cases.

The defendants have been severally convicted, upon their respective pleas of guilty, of the larceny of a horse belonging to Joseph D. Snyder, on July 22d, 1908. Both of the defendants above named committed the larceny, and the offense charged in the two cases is a single one perpetrated by both the defendants acting together.

On July 25th, 1908, Joseph D. Snyder, the owner of the horse, made information before Alderman Hoverter, of the city of Harrisburg, charging Harry Sherk with the commission of the offense. Sherk was arrested by Joseph P. Thompson, the petitioner, and after hearing was committed in default of bail to the Dauphin county prison. On August 17th, 1908, Sherk entered the plea of guilty before bill found, and was sentenced to pay costs, a fine of five dollars, and to six months' imprisonment in the Dauphin county jail.

On July 30th, 1908, Joseph P. Thompson, the petitioner, having ascertained at the hearing of Harry Sherk that J. Galbraith had acted with the said Sherk in committing the larceny of Mr. Snyder's horse, made an information against Galbraith, charging him with the offense, alleging in the information that it was committed "with one Harry Sherk." On this information a warrant was issued, Galbraith was arrested, and after hearing was committed to the Dauphin county jail to answer. On September 28th, 1908, before bill found, Gailbraith entered the plea of guilty to the offense charged and was sentenced by the court to pay costs, a fine of five dollars and be imprisoned in the Dauphin county jail for six months.

The petitioner claims the reward of twenty dollars for the apprehension and conviction of each of the above-named defendants, who, as already stated, were separately proceeded against for the commission of the offense.

The question to be determined is whether the reward of twenty dollars provided for by the Act of March 15th, 1821, is a single reward for each particular offense of the character designated in the statute, or whether this reward is payable for the apprehension and conviction of each of the persons who have committed the offense. The act is entitled "An act to encourage the apprehension of persons who shall have committed the crime of horse stealing."

The language of the first section of the act is as follows:

> "That whosoever after the passing of this act shall pursue and apprehend any person who shall have stolen any mare, horse or gelding within any county of this commonwealth, on the conviction of the person so apprehended, shall be entitled to the reward of twenty dollars for apprehending the person who shall have been convicted of stealing any mare, horse or gelding as aforesaid, and six cents for every mile necessarily traveled in pursuit of the offender."

The petitioner in this case has pursued, apprehended and secured the conviction of two persons who committed the larceny of Mr. Snyder's horse, and claims that he is entitled to the reward of twenty dollars for the apprehension and conviction of each, or to forty dollars for the apprehension and conviction of the two offenders. They were proceeded against separately and not jointly, and each was separately arrested, convicted and sentenced. The act, as indicated by its title, was passed to encourage the apprehension of persons who shall have committed the crime of horse stealing, and expressly provides that "whosoever after the passing of this act, shall pursue and apprehend any person who shall have stolen any mare, horse or gelding within any county of this commonwealth on the conviction of the person so apprehended, shall be entitled to the reward of twenty dollars for apprehending the person who shall have been convicted."

If the petitioner had ceased his activity when Sherk was apprehended and admitted the larceny, Galbraith, who was equally guilty, would perhaps have escaped punishment, and been ready to commit another like offense. The declared purpose of the act is to encourage the apprehension and punishment of such offenders. The statute must be so construed as to effectuate its purpose. *County of Butler vs. Leibold*, 107 Pa. 407.

The petitioner has pursued, apprehended and secured the conviction of two persons who committed the offense of horse stealing.

We are therefore of opinion that he is entitled to the statutory reward for the apprehension and conviction of each, and we therefore hereby certify that the petitioner, Joseph P. Thompson, is entitled to the sum of forty dollars for the appre-

hension and conviction of the defendants above named, and direct the clerk of the court of quarter sessions to certify this finding to the commissioners of Dauphin county.

BAUSCHER BROS. *vs.* CHRISTIAN W. HERSHEY.

Affidavits of defense—sufficiency.

In an action to recover the purchase price of certain goods manufactured by the plaintiff and sold and delivered to the defendant, an affidavit of defense which avers that goods of the same kind, previously delivered by the plaintiff, had not been finished in a workmanlike and durable manner, is sufficient.

Motion for judgment for want of a sufficient affidavit of defence. C. P. Dauphin Co., No. 526, January Term, 1908.

Paul A. Kunkel for plaintiff.

Chas. H. Bergner for defendant.

MCCARREL, J. December 11, 1908.

This case is before us upon plaintiffs' motion for judgment for want of a sufficient affidavit of defence.

From the statement filed by plaintiffs, it appears that they are or were manufacturers of dishes and other like articles for hotel and domestic use, and that on or about October 15th, 1906, they took the defendant's order for the manufacture and delivery of the dishes and tableware particularly described in the statement.

The order shows that the dishes were to be decorated with two lines of blue and lustre and with a crest of the Dauphin of France done in blue and lustre. The plaintiffs being manufacturers of the articles ordered, must be held in law to have contracted for the decoration of the articles sold in a workmanlike and durable manner.

The affidavit of defense alleges that the defendant has a true, just and complete defense to the whole of the plaintiffs' claim, the nature and character of which is that certain dishes ordered at the same time as were the dishes referred to in plaintiffs' present claim, and directed to be decorated in the same way, proved after delivery not to have been decorated in a workmanlike and durable manner, but in such way that after short use the decorations faded and washed off, making

the dishes unsightly and less valuable than plain, unornamented dishes would have been. For this reason the defendant alleges that he declined to receive or pay for the dishes, which are made the subject of the present claim. The affidavit of defense asserts that plaintiffs' agent at the time the order was given, stated that the decorations would stand all kinds of wear, and guaranteed they would remain plain and undimmed so long as the dishes were in use.

We do not regard this statements as to the representations of plaintiffs' agent to be an offer to contradict the written order or contract between the parties, but rather to confirm it.

We are of opinion, therefore, that the affidavit discloses a valid ground of defense and the motion for judgment for want of a sufficient affidavit of defense is accordingly overruled, and the cause is directed to be placed at issue.

Estate of Martin Good, deceased.

Orphans' Court—conclusive effect of decree from which no appeal has been taken—Intestate laws—adopted children.

A decree of the Orphans' Court, from which no appeal has been taken, confirming an auditor's report awarding a sum absolutely to a claimant, is conclusive of the rights of the parties to said sum.

The intestate laws of Pennsylvania do not extend to adopted children the right of inheritance as collaterals under the statutes regulating the descent of either real or personal property.

John E. Fox, John R. Geyer and *I. B. Swartz* for exceptions.

John C. Nissley and *J. Warren Light,* contra.

McCarrel, J. Dec 21, 1908.

We have before us the reports of the auditor distributing separately the proceeds of the real estate and of the personal estate of Martin Good, deceased.

Two exceptions have been filed to each of the said reports. The first exception is by Cyrus S. Gingrich, executor of Christian Peffley, late of Lebanon county, Penn'a, deceased, and by the grandchildren of the said testator, and complains that the auditor failed to allow them out of the estate of Martin Good, deceased, $1,278.15, with interest from October 16,

1894, and $720.71, with interest from January 29, 1896, these sums having been received, as alleged by exceptants, by Mary A. Good, nee Peffley, out of the estate of Christian Peffley, deceased, and by her turned over into the possession of her husband, Martin Good, the intestate, whose estate is now being distributed.

The claim thus made is upon the theory that Mary A. Good had only a life estate in these sums under her father's will, and that by the terms of said will —if Mary A. Good should die without having any children born and alive the money should be recovered back from her estate and be paid unto the grandchildren of the said Christian Peffley, share and share alike.

The $1,278.15 was paid to Mary A. Good in pursuance of the decree of the Orphans Court of Lebanon county, Penn'a., entered by Judge McPherson, December 27, 1886, confirming the auditor's report distributing the balance in the hands of Cyrus S. Gingrich, executor of Christian Peffley, deceased, which report awarded this money to Mary A. Good absolutely. This decree was never appealed from, and under the authorities cited by the learned auditor is conclusive of the rights of the parties as to this sum.

The remainder of the exceptants' claim is for $720.71, and is made up of $538.50, paid to Mary A. Good about January 29, 1896, (See release auditor's report pp. 8 to 10), and the sum of $182.21, for which Mary A. Good gave her release January 29, 1896, to Martin G. Gingrich, (See release auditor's report pp. 10 to 13). The aggregate amount named in these two releases, $720.71, was paid by the judgment note of Cyrus S. Gingrich, dated January 29, 1896, entered in Dauphin county common pleas to No. 204 March term, 1896, in favor of Martin Good. A portion of this judgment was paid to Martin Good in his lifetime, and the remainder thereof was paid to his administrator after his decease.

The release first mentioned shows that the $538.50 paid to Mary A. Good was for her one-fourth of the sum of $2,000.00 and accrued interest charged upon certain lands in Lebanon county, Penn'a., conveyed by Christian Peffley and wife, April 11, 1874, to Cyrus S. Gingrich, as per deed recorded at Lebanon in deed book "Y" page 410.

By this deed the charge of the $2,000.00 upon the lands is in the following language, to wit:

"It is further understood and reserved by the said Christian Peffley that the sum of $2,000.00 shall remain in the property hereby conveyed and be a lien on the same until paid as follows; that the said Cyrus S. Gingrich, his heirs and assigns, shall pay the interest of the $2,000.00 yearly unto the said Christian Peffley, and upon his death to his widow, Rachel Peffley, during her natural lifetime, and upon her death the sum of $2,000.00, as above described, shall be paid to the legal heirs and representatives of the said Christian Peffley."

While this $2,000.00 is referred to in the will of Christian Peffley, deceased, the testator does not therein undertake to make any other or different disposition thereof than that established by the deed charging the money upon the lands, and it would have been beyond his power to make any change therein. It is clear, therefore, that this sum of $538.50 was properly paid to Mary A. Good and that she had the right thereto absolutely.

The second release shows that the $182.21 was paid to Mary A. Good for her one-fourth of $678.76 and accrued interest charged upon certain other lands, by deed of Cyrus S. Gingrich, executor of Christian Peffley, to Kate Gingrich, dated December 16, 1886, and recorded in Lebanon county, Penn'a., in deed book "N" Vol. 2, page 642.

This money is charged in the deed in the following language, to wit:

"The premises hereby granted being under and subject to the payment of six per cent interest on the first $676.76, to Rachel Peffley, widow and relict of the said Christian Peffley, deceased, during her natural lifetime, or as long as she remains widow of the said Christian Peffley, deceased, and at and immediately after her decease or second marriage, in either case, to the payment of said principal sum of $676.76, which shall then be equally divided, share and share alike, among all the children of the said Christian Peffley, deceased, pursuant to the directions of the last will and testament of the said Christian Peffley, deceased."

This sum of $182.21 is the only sum with respect to which

the exceptants are in position to raise any question upon this distribution.

The charge in the deed declares that it shall "be equally divided, share and share alike, among all the children of the said Christian Peffley, deceased, pursuant to the directions of his last will and testament."

The learned auditor has with great care examined and construed the will of Christian Peffley, deceased, and has most carefully considered and intelligently applied the numerous decisions of our appellate courts relating to the construction of this will. His conclusions meet with our entire approval and we are of opinion that under the will of Christian Peffley, Mary A. Good, his daughter, acquired an absolute estate in the property of her father, devised and bequeathed by his will. This is the conclusion reached by the Orphans' Court of Lebanon county in the original distribution of his estate, which conclusion was not appealed from by the present exceptants or by any other party. We therefore overrule the exceptions hereinbefore referred to.

Another exception has been filed to the auditor's distribution in behalf of Minnie Myrtle Good (now Miller) and Rottie Good, two adopted children of John D. Good, who was a brother of Martin Good, the present intestate.

These persons were duly adopted by John D. Good as his own children under the laws of the state of Minnesota, and doubtless acquired by these adoption proceedings the rights of children of the said John D. Good, so far as his own property is concerned. Our intestate laws, however, do not extend to such adopted children the right of inheritance as collaterals under the statutes of Pennsylvania, regulating the descent of either real or personal property.

The learned auditor, upon the authority of Burnett's Estate, 219 Pa., 599, disallowed their claim to participate in the present distribution, and this conclusion we entirely approve.

Martin Good, the present intestate, left neither widow nor lineal heirs, and his estate must necessarily be distributed among the collateral heirs. They were many in number, and we commend the care with which the learned auditor has ascertained the names and determined the rights of the respective claimants. In our opinion his conclusions upon all the subjects submitted to him or raised before him are en-

tirely correct, and we therefore overrule all exceptions to his reports, confirm the same absolutely, and direct that distribution be made in accordance therewith.

IN THE MATTER OF THE ESTATE OF CHRISTIAN FARVER, LATE OF CONEWAGO TOWNSHIP, DAUPHIN COUNTY, PENNA.

Decedents estate—Contracts of decedents.

A promissory note was made payable to the order of A and B. After the death of A, B claimed that he had advanced all of the money represented by the note, and that A had paid him only one-half of it in his lifetime. The remainder he claimed from the executors of A. Held, that to enable B to recover, he must, by a preponderance of evidence, establish a contract on the part of A to make such payment. That expressions of intentions to pay B, or to see that he got the money out of the maker's interest in an estate, were not sufficient to establish such contract.

Exceptions to auditor's report. O. C. Dauphin County.

John E. Fox and *John R Geyer* for exceptions.

Wm. M. Hain contra.

MCCARREL, J. December 21, 1908.

Christian Farver died January 13th, 1907, having first made his last will and testament, dated October 26th, 1906, and since his decease duly proven.

His executors settled their account, which was referred to I. B. Swartz, Esq., as auditor to make distribution. His report is now before us with a single exception thereto, which complains of the disallowance of the claim of Jacob N. Shenk for two hundred and fifty dollars, with interest from November 26th, 1904.

This claim was presented to the auditor as "a common loan made by Jacob N. Shenk to Christian Farver during his lifetime, and this money was by Christian Farver loaned to Edwin, his son, and that the claim is made on that transaction evidenced further by fact that he assumed an unqualified obligation during his lifetime."

The only loaning of money to testator's son, Edwin, as shown by the testimony, took place May 26th, 1904, and for

that loan a note was given by Mrs. E. S. Farver, wife of Edwin, and E. S. Farver. The following is a copy of the note:

"May 26, 1904.

"Six months after date, we promise to pay to the order of Christian Farver and Jacob N. Shenk, the sum of five hundred dollars, without defalcation, for value received. And it is further expressly understood that the woman is a married woman and this money is to be used in her business and for her own separate use and collectible out of and from her own property.

"Witness our hands and seals this 26th day of May, A. D. 1904.

(Signed.) MRS. E. S. FARVER. (Seal.)
(Signed.) E. S. FARVER. (Seal.)

The testimony of Jacob S. Farver (pp. 48 and 49) is to the effect that shortly after his father's death Jacob N. Shenk told him that the two hundred and fifty dollars claimed by him is one-half of the five hundred dollar note.

It appears that on May 16th, 1904, Christian Farver and Jacob N. Shenk entered into an agreeent (Auditor's report, p. 5) with Edwin S. Farver, by which Christian Farver and Jacob N. Shenk constituted Edwin S. Farver, their agent, to conduct the live stock business, they to furnish the capital and deposit it in bank, subject to check of E. S. Farver, Agent. The agent to have authority to deal in other merchandise and chattels, and present an account as agent on the last day of each month. The agent was to have a percentage of the profits for his services. The theory of Mr. Shenk's present claim is that he furnished the money, $500.00, which was loaned May 26th, 1904; that Christian Farver paid him two hundred and fifty dollars on account, and that his estate owes him the balance. The note itself is an obligation to pay the $500.00 to Christian Farver and Jacob N. Shenk and is therefore not in harmony with this theory. If Shenk actually furnished the whole sum the note would naturally have been payable to Shenk alone. If Shenk at the time intended to make Farver his debtor for this sum, he would naturally have taken his obligation therefor.

It appears from the testimony that the obligation of May 26th, 1904, was in the possession of Jacob N. Shenk until

Christian Farver had paid him $250.00, when the note was given to Christian Farver, who had it in his possession at the time of his death, along with the agreement of May 16th, 1904. (See testimony pp. 38-39.)

This agreement of May 16th, 1904, required Jacob N. Shenk and Christian Farver to furnish capital to enable E. S. Farver to engage in the live stock business "by depositing their money in bank, subject to check of E. S. Farver, Agent, to be used and applied," in the conduct of said business by said agent.

The testimony shows that the money for which the $500.00 note was given, was deposited in bank and was used by E. S. Farver in conducting the business of dealing in live stock.

If the money had been so deposited in bank by Jacob N. Shenk under the agreement of May 16th, 1904, he would have had the right to recover one-half of the amount so deposited from Christian Farver and no more.

When the money was advanced upon the note of May 26th, 1904, the obligation taken therefor was made payable to Jacob N. Shenk and Christian Farver jointly, thus clearly indicating that the payees at the time intended that each should receive only the one-half of the amount so advanced. Even assuming that Jacob N. Shenk at the time actually furnished the whole $500.00, the intention of the parties, as shown by the form of the written agreement, remains unchanged. As between Jacob N. Shenk and Christian Farver, Farver was bound to pay to Shenk one-half the amount advanced by him at the time the note was given in order that he, Farver, might have both a legal and equitable right to receive one-half the money due upon the note.

It is admitted that Christian Farver in his lifetime paid to Jacob N. Shenk one-half of the amount so advanced or loaned upon the note. Thus he discharged and satisfied the only legal obligation to Jacob N. Shenk resting upon him with respect to the money so advanced or loaned. The note of May 26th, 1904, thereafter remained the joint property of the payees named therein, and each was and is entitled to receive one-half of whatever may be paid or collected thereon. Neither payee is bound thereby to pay to the other the amount of the note or any part thereof, unless the makers have first made a payment thereof or thereon to one or other of the payees.

No such payment has ever been made. If Jacob N. Shenk is to recover one-half of this note from the estate of Christian Farver, the co-payee, he must by a preponderance of evidence show a contract on the part of Christian Farver to make such payment. The note is the debt of Mrs. E. S. Farver and Edwin S. Farver, and any merely verbal promise by Christian Farver to pay the whole or any part thereof in excess of $20.00 must be held as absolutely void under our statutes. What is the evidence as to a contract by Christian Farver to pay this $250.00 now claimed? It is not found in the note of May 26th, 1904. If there was any valid contract to pay, it must have been made at the time the note was signed, and the proof thereof must be clear, precise and indubitable. The testimony of several witnesses to establish such a contract was heard by the Auditor.

Fannie Sheetz, the subscribing witness, says (Testimony pp. 10-15) that Shenk furnished the money for which the note was given and that Farver said he would pay it back, and further states that the money was furnished before the note was given. Her testimony is vague and indefinite as to the time when Farver said he would pay the money back. If the statement was made before the note was given, it is insufficient to change the obligation as evidenced by the note itself. If made after the note was given, it could not change its legal effect. If Shenk actually advanced all the money loaned upon the note, the statement that Farver would pay back must be limited to the one-half of the amount which Farver was equitably bound to pay, because he was made a co-payee in the obligation. This portion was fully paid to Shenk by Farver in his lifetime, and thus, as we have already stated, he fully discharged the only obligation resting upon him. No demand appears to have been made by Shenk upon Farver in his lifetime for the payment of any additional sum.

The testimony of Samuel S. Farver (pp. 36-40) shows no promise made to Shenk directly nor any absolute promise to pay, nor the admission of any obligation to pay, but merely the expression of an intention either to pay the $250.00 or arrange that Shenk would get the money out of Edwin S. Farver's share of Christian Farver's estate, in case Shenk made a satisfactory settlement of the estate of Elizabeth Shenk, of which he was the administrator.

The same intention was expressed to Jacob S. Farver, as appears from his testimony (pp. 47-48).

The testimony of Mr. Geyer (pp. 42-43) to the effect that Christian Farver said to him "I owe Jacob Shenk $250.00," does not disclose any promise to pay, but merely a declaration that "he (Shenk) will get his money, or he (Shenk) is to have it."

This is insufficient to create any personal liability against Christian Farver or his estate for this money. It is at most only the expression of an opinion or perhaps an expression of the same intention expressed to Samuel S. Farver and Jacob S. Farver with respect to this sum. Jacob N. Shenk as administrator of Elizabeth Shenk did not make settlement of that estate with Christian Farver in his lifetime, and it may be that for this reason the expressed intention hereinbefore referred to was never carried out.

Even if the auditor had regarded Mrs. Edwin S. Farver and Edwin S. Farver as competent witnesses, there is nothing in their testimony showing an unconditional promise by Christian Farver to pay the money in question, nor the admission by him of any legal liability to pay the same.

The agreement of May 16th, 1904, shows that Jacob N. Shenk bound himself to contribute equally with Christian Farver the capital necessary to enable Edwin S. Farver to carry on the live stock business as their agent. It contains no stipulation that Christian Farver shall repay him any of the capital so contributed. The note of May 26th, 1904, given for money loaned or advanced to enable Edwin S. Farver to engage in the same business as agent for his wife, expressly declares that Shenk is to receive back only one-half of the money so advanced or loaned and no more.

Edwin S. Farver was the nephew of Jacob N. Shenk and the son of Christian Farver. This relationship doubtless induced both to enter into the arrangement evidenced by the agreement of May 16th, 1904, and the note of May 26th, 1904. Both were willing to aid Edwin S. Farver financially and neither stipulated that the other should reimburse him for any resulting loss. It is quite likely when Edwin S. Farver failed to make the business successful that Christian Farver felt disposed to protect Jacob N. Shenk, and that being so disposed he used the expression detailed in the testimony of the various witnesses, but nothing was said or done by Christian Farver to create any legal liability against himself or his estate.

We are satisfied that the learned auditor properly dis-

allowed the claim of Jacob N. Shenk, and we accordingly now overrule all exceptions to his report, confirm the same absolutely and direct that payment and distribution be made in accordance therewith.

COMMONWEALTH *vs.* A. P. WEHR.

Criminal law — Libel — Privileged communications—Re-submission of bill to grand jury.

A letter written by a minister of the gospel, on behalf of himself and the consistory of his church, in justification of the action of the church authorities in suspending the sister of the person addressed from church membership, and written in reply to a letter of the person addressed, complaining of the church's action, is a privileged communication.

In order to make the publication of privileged communication a criminal libel it is necessary to show act was malice.

Motion to re-submit bill of indictment. Q. S. Dauphin County, No. 118 September Sessions, 1908.

John Fox Weiss, John E. Fox and *Harvey E. Knupp* for Commonwealth.

M. E. Stroup, for defendant.

KUNKEL, P. J., December 22, 1908.

The bill of indictment in this case charged the defendant with the crime of libel. The alleged libel was contained in a letter written by the defendant, who was a minister of the gospel, to the brother of the prosecutrix, in which the defendant expressed his belief that the prosecutrix was guilty of fornication. The letter was a reply by the defendant, in his own behalf and in behalf of the consistory of his church, to a letter written to him by the brother, complaining of the action of the church authorities in suspending his sister from membership. It was written in justification of the action taken by the consistory against the prosecutrix and was called forth by the letter of the brother. There is nothing in the letter that indicates actual malice, that the defendant was actuated by motives of personal spite or ill will, or did not honestly believe what he said to be true, but, on the other hand, the language and spirit of the letter show only an

honest desire to vindicate the action which was taken by the church against the prosecutrix.

The letter was a privileged communication, which is defined to be "a communication fairly made by the person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters wherein his interest is concerned;" Russell on Crimes, pp. 244 and 245, and authorities there cited; and in the same work, on pages 245 and 246, it is said: "The occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill will—independent of the occasion on which the communication was made." And in Wharton on Criminal Law, section 1630, it is said: "The publication of a libel is not a misdemeanor, if the defamatory matter published is honestly believed to be true by the person publishing it, and if the relation between the parties by and to whom the publication is made is such that the person publishing is under any legal, moral, or social duty to publish such matter to the person to whom the publication is made, or has a legitimate personal interest in so publishing it, provided that the publication does not exceed either in extent or manner what is reasonably sufficient for the occasion." See, also, Bishop on Criminal Law, volume 2, section 905; Am. & Eng. Ency. of Law, volume 18, page 1029; Cyc., volume 25, page 385; Odgers on Libel and Slander, page 233. In all such privileged communications, the occasion which calls forth the defamatory statement refutes the malice, which would otherwise be implied from the charge of crime, and the burden is upon the party charging the libel to prove malice affirmatively, without which no offence is shown.

The principles thus laid down apply to the circumstances of the present case. As we understand, no evidence was given of the libel except the letter itself, which, as we have said, was a privilege communication. In order, therefore, to make its publication a criminal libel, it was necessary to show actual malice. This was not done. We are satisfied that the case presents no indictable offence and the disposition of it by the grand jury in finding the bill of indictment not true was entirely proper. The motion, therefore, to re-submit the bill to another grand jury is overruled.

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